Legal Symbolism

On Law, Time and European Identity

Jirí Pribán

ASHGATE e-BOOK

LEGAL SYMBOLISM

For Maddy, Kachenka and little Annie

Legal Symbolism
On Law, Time and European Identity

JI Í P IBÁ
Cardiff Law School, Cardiff University, UK

ASHGATE

© Ji í P ibá   2007

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Ji í P ibá   has asserted his right under the Copyright, Designs and Patents Act, 1988, to be identified as the author of this work.

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
P ibá , Ji í, 1967-
Legal symbolism : on law, time and European identity. -
(Applied legal philosophy)
1. Symbolism in law 2. Time (Law) 3. Constitutional law -
European Union countries
I. Title
340.1'1

Library of Congress Cataloging-in-Publication Data
P ibá , Ji í, 1967-
Legal symbolism : on law, time, and European identity / by Ji í P ibá .
p. cm. -- (Applied legal philosophy)
Includes index.
ISBN 978-0-7546-7073-5
1. Law--European Union countries--Philosophy. I. Title.

KJE960.P74 2007
340'.1--dc22

2006102316

ISBN-13: 978 0 7546 7073 5

Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall.

Contents

Series Editor's Preface *vii*
Introduction *ix*

PART I: THEORY OF SYMBOLIC COMMUNICATION IN LAW: A SOCIAL SYSTEMS PERSPECTIVE

1 Constitution-Making and the Symbolic Rationality of Law: A Systemic Differentiation of Law, Politics and Morality 3

2 The Symbolic Evolution of Political Identity from the Spirit of the Laws 25

3 Law and the Symbolization of Time: The Limits of Dealing with the Past and Future 47

PART II: IDENTITY AND LAW: EUROPEAN REFLECTIONS ON *DEMOS* AND *ETHNOS*

4 Civil and Ethnic Traditions and Identities: Post-Communist Constitution-Making in Central Europe 71

5 Identity, Constitution-Making and the Enlargement of the European Union 93

6 The Symbolic Power of European Law and Search of European Politics 115

PART III: THE TEMPORALITY OF JUSTICE: BETWEEN RETROSPECTIVE LAWS AND PROSPECTIVE POLITICS

7 The Retrospectivity of Laws and the Temporality of Justice in Post-Communist Central Europe 141

8 Moral Paradoxes of Legal Justice: An Analysis of Restitutive and Administrative Dealing with the Past 165

9 On Legal Symbolism and Social Theory: Concluding Remarks 195

Bibliography *201*
Index *221*

This page intentionally left blank

Series Preface

The principal objective of this series is to encourage the publication of books which adopt a theoretical approach to the study of particular areas or aspects of law, or deal with general theories of law in a way which is directed at issues of practical, moral and political concern in specific legal contexts. The general approach is both analytical and critical and relates to the socio-political background of law reform issues.

The series includes studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom D. Campbell
Centre for Applied Philosophy and Public Ethics,
Charles Sturt University, Australia

This page intentionally left blank

Introduction

In his *Critique of Pure Reason*, Immanuel Kant speaks about the architectonic nature of human reason which 'regards all cognitions as belonging to a possible system'.[1] The architectonic of reason is the art of system and a system is 'the unity of the manifold cognitions under an idea.'[2] The concept of system signifies unity, closure, coherence and distinctiveness. This study of legal symbolism does not pretend to organize all cognitions about law into a new systemic knowledge, yet it is profoundly influenced by the systemic approaches of legal and social sciences. Critically inspired by the theory of autopoietic social systems, I argue that modern society is a multitude of functionally differentiated social systems without a centre defining the supreme sources for the validity and enforcement of social norms. Social unity is imaginable only as a multiplicity of differences emerging between specific social systems, such as law, politics, economy, religion, morality, etc.

Different social systems are not hierarchically ordered into a pyramid of values and norms, as imagined by Hans Kelsen and others. No politically sovereign body, supreme legal act and moral commandments can fully represent the communicative and normative unity of modern society. Laws control excessive political power but, despite legalistic attempts to equate the state with the system of laws, law cannot entirely take the place of politics. Constitution-making and legislative processes are institutionalized by the politics of representative democracy and, at the same time, are expected to symbolically represent the whole of the nation. The democratic political system is constituted by law; the system of positive laws is one of many reflections of the democratic nation's search for moral fabric and collective unity; and the moral system uses law and politics to enhance its communication in modern society. However, law has no supremacy over politics and/or morality, morality over law and/or politics, nor politics over law and/or morality in modern society. The legal, political and moral systems operate autonomously despite creating numerous communicative tensions and noises. There is no overarching *Weltanschauung* to organize the hierarchy and levels of autonomy of different social systems.

This study focuses on the tension between legality and a specific form of symbolic communication facilitated by the system of positive law. The tension is particularly strong in the domain of constitutional law which commonly accommodates very different forms of legal, political and moral symbolic communication. Constitutions thus reflect a paradox of the legal system: the system operates autonomously but seeks to be founded on the external 'force of law', the transcendental 'basic norm', 'the rule of recognition', 'a command of the sovereign', and so on.

Apart from being a functionally differentiated system, law involves expressive and evaluative symbolism which aims at collective self-reflection combined with

1 I. Kant, *Critique of Pure Reason* (Cambridge, Ind., Hackett Publishing, 1996) 495.

2 id., 755.

attempts at self-perfection. The instrumental rationality of legality is accompanied by the symbolic rationality of collective identity and moral values. Although these values are not the 'foundations' of the legal system, they cannot be entirely discarded as external to it. The originally symbolic moral and declaratory character of a constitutional preamble and other acts of legislation or judicial decision-making can even profoundly influence law-making and judicial decisions: for instance, when the French Conseil constitutionnel decided that the preamble of the 1958 Constitution could be the basis for constitutional review.[3] Another persuasive example of these 'moral irritations' to the legal system is the *Lüth* judgment of the German Constitutional Court, reasoning on the basis of an objective order of values as supra-legal principles permeating the constitutional system of Germany.[4] In this book, I shall examine further examples of law pursuing or strengthening the moral and political arguments, mostly from recent Central European legal transformations, European integration and enlargement processes and the complicated constitution-making of the European Union.

The Concept of Legal Symbolism

Social symbols represent 'a fifth dimension'[5] of human existence which reshapes the four dimensions of space-time into a shared symbolic universe. Symbolic communication imagines modern differentiated society as a unity and thus enhances moral reflections of social cohesion. It maintains the identity of a collectivity, its social boundaries and its internal development.[6] Legal communication is not immune from this fundamental desire for social unity and collective identity pursued by moral communication. Apart from the instrumental rationality of formal legality, the legal system makes the symbolic rationality of communal bonds, collective identity and unity part of its communication.

The duality of the instrumental and symbolic rationality of law, therefore, is a central frame of reference. I argue that the concept of legal symbolism signifies the operations whereby the legal system internalizes the concept of identity and time as moral 'absolutes' and manipulates them within its internal temporal horizon. It thus constitutes the fictive experience of monumental time and history which

---

3 This judgment became known as 'the first constitutional revolution of 1971'. See J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Oxford, Oxford University Press, 1998), 152-4.

4 D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edition, Durham: Duke University Press, 1997) 361-9.

5 N. Elias, *The Symbol Theory* (London, Sage, 1991) 47.

6 For many examples of these sociological and anthropological interpretations of symbols see, for instance, M. Augé, *The Anthropological Circle: Symbol, Function, History* (Cambridge, Cambridge University Press, 1982); R. Firth, *Symbols: Public and Private* (London, Allen & Unwin, 1975); and V. Turner, *The Forest of Symbols* (Ithaca, NY, Cornell University Press, 1967).

informs political society about its moral fabric and identity.[7] Morality is defined as a loose system which does not have the institutional and operative capacity of law and politics and, therefore, uses the legal and political systems to stabilize itself in modern society. The legal system consequently facilitates a symbolic communication network semantically independent of instrumental legality and dominated by the value-based strategic rationality which stabilizes the system of morality. However, this network cannot reconcile the systemic divorce between the instrumental rationality and cultural symbolism of law. Instead of breaking the iron cage of modernity and achieving social and epistemological unity, it merely confirms the communicative and operative pluralism of functionally differentiated modern society in which 'some bits of information always may escape',[8] even within the domain of law.

Legislating the Collective Identity

The system of morality involves the symbolic communication of the collective identity and the unity of social values. Legislating the collective identity is, then, the necessary precondition of modern democratic politics which assumes that the people constitutes itself as a political nation by means of the constitution as the basic law of the democratic state. The legal system enhances the symbolic communication of the 'we, the people' feeling and its possible political uses and manipulations.

In modern representative democracy, the concept of political identity is historically determined by the distinction between the people as *demos* and *ethnos*. The history of modern nationalism illustrates the political risks accompanying the concept of pre-political ethnic identity and its various legal codifications. The conceptualization of popular identity appears inseparable from the clash of different cultural traditions and values. Despite all the potential risks arising from the concept of ethnicity, it is nevertheless impossible to exclude shades of pre-political identity from the constitutional and legal system. The first task of democratic constitution-making, therefore, is to codify liberal democratic traditions as part of a constitutional patriotism that can neutralize or, at least, contain pre-political ethnic communal bonds and their political consequences for modern democratic statehood. The 'us/them' distinction in the political identity of modern democratic society is thus reconstituted as the '*demos/ethnos*' distinction that informs the moral communication and self-reflection of the whole polity.

The democratic constitution of popular sovereignty opens further operative possibilities for the transformation of the political Subject of the people into the democratic political procedures of modern society. On the other hand, the various politics of pre-political identity result in the cultural embedding of politics and law, ignoring the constructed, relative and contingent character of culture and identity.[9]

7 P. Ricoeur, *Time and Narrative, Vol. 2* (Chicago, University of Chicago Press, 1985) 6, 106.

8 W. James, *Pragmatism and the Meaning of Truth* (Cambridge, Mass, Harvard University Press, 1978) 81.

9 R. Rorty, *Philosophy and Social Hope* (London, Penguin Books, 1999) 236.

Identity and the Temporality of Justice

The domain of culture is often mistaken for that of political community. The legal system provides an attractive referential framework for various attempts to define and stabilize political identity despite the fact that the concept of identity both exceeds and destabilizes legal communication. Political identity is a momentary outcome of collective self-reflections of the past and the future and is open to political manipulations, power struggles and 'us and them' distinctions. In the legal system, the discontinuities in identity-building and the 'us/them' distinctions frequently precipitate calls for historical and moral justice beyond the limits of legal validity and positive law. In these circumstances, law is expected both to deliver temporally selected moral justice and provide a normative framework for a new political identity.

Legal symbolism is particularly strong during the processes of constitution-making and complex legal and political transformations. The historical and future time of society becomes a moral absolute which needs to be addressed and conceptualized by the legal system. However, legality can ultimately neither codify collective identities and memories nor implement moral and political expectations in modern functionally differentiated societies. While often effectively manipulating moral and political temporality, the legal system refers these expectations back to the systems of morality and politics and their specific codifications of social time.

****

The book is divided into three parts: the opening part outlines a theory of symbolic communication; the second addresses the issue of legal reflections on political identity; and the third analyses temporal aspects of legal symbolism and historical justice.

In the opening chapter, I describe the systemic differentiation of law, politics and morality and the symbolic rationality of law. The functional differentiation of the legal, political and moral systems rules out the possibility that modern society could be founded on its moral self-reflection, establishing the truthful 'ethical State'. Lacking the systemic self-reference and closure of legal or political systems, morality effectively uses the legal system to enhance its communication of what is good, valuable and praiseworthy in society. The symbolic rationality of law is a specific reflection of cultural ideals and moral values. Constitution-making and legislated constitutions, therefore, need to be treated as an interplay of moral, political and legal communication. Acts of modern constitution-making, despite their moral symbolic language of common identity, 'ultimate' principles and 'good' social values, may result only in systemic pluralization and the impossibility of constituting systems of 'pure' law, morality and politics.

The second chapter considers the spirit of the laws, a symbol reflecting on the ontological status and transcendental ideals of the system of positive law. Genealogical analysis shows that there are historical links between Montesquieu's concept of the spirit of the laws, romantic philosophy's spirit of the nation and recent politics of cultural and ethnic identity. Avoiding the perspective of political philosophy and theory which highlight the superiority of the civil culture of *demos* to the regressive

vices of the identity politics of *ethnos*, I argue that the civil democratic identity finds its social expression in generalized democratic procedures and thus effectively dismantles the totalitarian claims of culture supported by the various projects of the politics of identity. Sociologically speaking, the identity of *demos* is an outcome of the differentiation of politics and culture.

The third chapter focuses on the notion of social time and the temporality of the systems of morality, politics and law. The concept of time is analysed in its social heterogeneity. Different theories and historical examples show that the use of tradition and history is always manipulative in modern society. The concept of effective history finds its specific meaning within the domain of law and constitution-making. I particularly analyse the complex relations between legal continuity and political and moral discontinuities manifested in revolutions, reconstructions and transitions. In these conditions, the legal system becomes a device for constituting and symbolizing collective memory as a mode of self-reflection of the political nation and its identity. Dealing legally and symbolically with the past is expected to secure both social stability and change by unveiling the authentic identity of a polity. Nevertheless, these ethical calls for law and politics to deal with the past are compromised and neutralized by the intrinsic logic and institutional limits of the legal and political systems.

The second part of the book analyses identity-building tensions between democratic and ethnic identity politics in the context of European integration, enlargement and constitution-making processes. In the opening fourth chapter, I pursue a socio-legal analysis of post-communist constitutional and political developments. For this purpose, I use different social theories of time and collective identity. I consider the moral evaluation and symbolism of civil society and ethnic nationalism as part of the more general social process of constituting and codifying new collective identities in the period of post-communist discontinuity. The moral and political conflict between *demos* and *ethnos* in post-communist Central Europe is not just a conflict between the liberal democratic imperatives of the present and the politically dangerous, ethnic concerns of the past. The distinction between civility and ethnicity signifies two distinct traditions in the modern political history of Central Europe manipulated by political agents and codified by means of constitutional law.

The fifth chapter covers the history of the post-war European integration process and its impact on ideas of both European and national identity. I analyse the historical role of the EU in neutralizing ethno-national divisions, tensions and conflicts. I pay particular attention to policies established by the EU to contain emerging ethno-political conflicts in Central Europe after the collapse of communism and subsequently compare two possible models of European constitution-making: the Hobbesian vertical versus the Lockean horizontal version of the social contract. I argue that the vertical constitutional model does not allow for the political ambitions of a European Federation or a Europolity to be fulfilled because of the notable absence of a European people as the Constitution's constituent power.

The sixth chapter focuses on the European Union's founding paradox of a politics of depoliticization, its legalistic context and its impact on the European integration and enlargement processes. The EU's idea of a cosmopolitan identity underlying recent constitution-making efforts paradoxically provokes growing

ethno-nationalist responses at Member-State level. I argue that the European project unfortunately lacks a political domain and therefore cannot follow the logic of nation state politics. At the same time, it can hardly be enhanced by further ethical, cultural and historical arguments in favour of a common European identity. The European identity is, rather, a hybrid mixture of persisting national loyalties and a civil ethos supported by the legal concept of European citizenship. At the European level, law, politics and moral symbolism get increasingly differentiated: consequently, ethical calls and common culture-based arguments can neither create nor take the place of non-existing European democratic politics which can emerge only as a sphere of genuine democratic deliberation and conflict-resolution.

In the final part, consisting of two chapters, I concentrate on the temporal dimension of legal symbolism and different forms of legal dealings with the past and its moral and political implications. Collective identities are shaped by collective memories and their legal codifications. The system whereby criminal justice prosecutes political crimes has its internal legal limits which are often perceived by the public as obstacles to historical justice. Retrospective legal measures are subsequently invoked to deal with the political past. Moreover, these measures have the symbolic power morally to condemn the past and its injustices and contribute to the creation of a new symbolic universe of political society in transformation. The seventh chapter describes different legal technical measures and dogmatic arguments employed by legislative and judicial bodies to deal with the political past. Analysing different approaches in individual countries in post-communist Central Europe, I emphasize both the internal limits and external environment of the legal systems and retrospective punitive justice.

In the final chapter, I refer to two different forms of symbolically important legislation – restitution and lustration laws. From the temporal perspective, restitutions are retrospective legal measures. Nevertheless, restitution laws can also be justified as the future-oriented governmental policy. This prospective argument was typical, for instance, of the Constitutional Court of Hungary in the 1990s. I therefore compare different temporal justifications for restitutive justice in the judgments of the Constitutional Court of Hungary and the Constitutional Court of the Czech Republic. In the second part of the chapter, I analyse another controversial transitional justice measure – a specific vetting policy introduced by the Czechoslovak 'lustration law' – and critically assess its symbolic and political role in the post-communist legal and political transformation. I describe the differences between the legal, political and moral impact of the law which represents a typical example of high moral symbolic expectations, conflicts and irreconcilable calls for justice during the post-communist legal transformation.

Acknowledgments

I wish to thank many friends and colleagues who have helped me, through their critical interest and ideas, to complete this book. I am very grateful to all those who have kindly commented on different parts of this project, most notably Roger Cotterrell, Adam Czarnota, Bruno De Witte, Peter Fitzpatrick, Pierre Guibentif, Stephan Kirste,

Martin Krygier, Stewart Motha, Andreas Philippopoulos-Mihalopoulos, Stephan Parmentier, Daniela Piana, István Pogany, Ralf Rogowski, Wojciech Sadurski, Anton Schütz, Grazyna Skapska and Jacques Ziller. I also want to thank my colleagues at Cardiff Law School who supported me in the last five years when I was working on the substance of this book, especially Gillian Douglas, Stewart Field, Jo Hunt, David Miers, Richard Moorhead, David Nelken, Pauline Roberts, Phil Thomas and James Young. I am grateful to Sian Edwards for her careful editing of the manuscript.

The following previously published essays of mine have been adapted for this book: 'Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making', 38 *Law & Society Review*, No. 3, September 2004, 407-32; 'The European Constitution-Making, Political Identity and Its Central European Reflections', 11 *European Law Journal*, No. 2, March 2005, 135-53; 'Time of Constitution-Making: on differentiation of the legal, political and moral systems and temporality of constitutional symbolism', 19 *Ratio Juri*s, No. 4, December 2006, 456-78; 'Constitutional Justice and Retroactivity of Laws in Postcommunist Central Europe', in J. P ibá , P. Roberts and J. Young (eds) *Systems of Justice in Transition: Central European Experiences* (Ashgate Publishing, Aldershot 2003) 29-49; 'European Hopes and National Fears: on Europe's legacy, nationalist identity politics and new tensions in the Czech constitutional system', in W. Sadurski, J. Ziller and K. Zurek (eds), *Aprés Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence, IUE Press 2006) 19-40; 'Is There the Spirit of the European Laws?', in V. Gessner and D. Nelken (eds), *European Ways of Law* (Oxford, Hart Publishing 2007).

This page intentionally left blank

PART I

THEORY OF SYMBOLIC COMMUNICATION IN LAW: A SOCIAL SYSTEMS PERSPECTIVE

This page intentionally left blank

Chapter 1

Constitution-Making and the Symbolic Rationality of Law: A Systemic Differentiation of Law, Politics and Morality

In his *Laws*, Plato perceived constitution-making as an act signifying a new beginning which imposes laws on a political community. The prescribed constitution determines the nature of laws and the lawgiver has to enjoy the respect of those subjected to the laws. The lawgiver's wisdom makes people recognize the rule of law legitimized by nature's order and not established by violence.[1]

This picture shows that constitution-making is inseparable from the problems of the temporality of political action and transcendental normativity. When does the constitution-maker choose to set up a new normative order? Does this order have specific symbolic meaning? Does it reflect existing culture and history, or does it deny them? These questions indicate that any attempt to analyse constitutionalism must address general issues of legal symbolism, cultural and moral elements in the system of positive law and, therefore, relations between law, politics and morality.

In functionally differentiated modern societies, the legal constitution and acts of constitution-making have an extraordinary ability to become part of the communication and operations of the very different social systems of law, politics and morality. The constitution is obviously an intrinsic part of legal communication because it formulates the legal principles and concepts necessary for specific legal arguments, reasoning and decision-making. However, it is also an instrument of political power because it regulates relations between government and opposition, respectively the state and its citizens. Finally, it is part of the moral system because it symbolically expresses social ideals and transforms them into general values. Apart from the functional rationality intrinsic to the legal system, the constitution accommodates the symbolic, normative, identity-building rationality of law. It is a unique expression of the Weberian tension between the instrumental, purpose-oriented rationalization and the coming wars of the gods driven by norms of cultural identity.

In this chapter, I therefore focus on mutual interplay, structural coupling and borders established between the social systems of law, politics and morality. I analyse the moral symbolic function of constitutions and other laws and their social

1 Plato, 'Laws' in *The Collected Dialogues of Plato* (eds. E. Hamilton and H. Cairns, New Jersey, Princeton University Press, 1961) 1225-516, at 1280-5.

dimension from the systems theory perspective. I argue that the system of morality often uses legal communication but does not provide any ultimate framework of 'the ethical State' and its system of positive laws. I critically conclude that acts of modern constitution-making, despite their moral symbolic language of common identity, ultimate principles and 'good' social values, may result only in systemic pluralization and differentiation of law, morality and politics.

The Constitution and the Problem of Origins: Morality, Ethics and Politics

The constitution is part of the legal, political and moral symbolic communication of modern societies. It brings modern politics and legal rationality very close to mythical language when it defines the ideal grounds of a political society and codifies its historical and moral self-understanding. It is a tool in the self-creation of a political society which has the power to 'legalize' political history, unique national glory and the moral foundations of political authority. Apart from being a founding text of the legal system, constitutions are an important reference point for morality which draws on the expressive symbolism of culture, collective identity, selected historical traditions and the ideals of a political society.[2] The process of 'constituting the constitution' must accommodate the language of morality which operates as one of the legitimating sources of the constitutional code and describes both politics and law in terms of their 'good' and 'bad' qualities.[3]

The three functionally differentiated social systems of politics, morality and law find themselves in a paradoxical communication loop: the constitution, which codifies the processes of political decision-making and specifies the moral symbols of a political society, needs the language of morality for its own legitimation and political power to guarantee its enforcement. The modern constitutional state based on the

2 For instance, Daniel Bell defines culture as a continual process of sustaining an identity through a moral conception of self and attributes political and moral meaning to symbolic expressions. See D. Bell, *The Cultural Contradictions of Capitalism* (London, Heinemann, 1979) 36, 248.

3 In this book, I define morality as a specific system which classifies political and legal phenomena in the communication code 'good/bad' but does not provide any general integrative framework for the political and legal systems. Reflections on good or bad politics and laws are only self-reflections, building society's moral symbolic universe.

Moral communication lacks the power to integrate other social systems and dominate their communication. For instance, the 'truth/falsity' binary code of science or the 'government/opposition' binary code of democratic politics cannot be subjected to the authority of moral judgements defining what is good and bad in science or politics. Any attempts to integrate other social systems into the moral system would paralyze their internal operations. The symbolism intrinsic to the moral system is just one dimension of the constitution and cannot achieve the status of an ultimate reference to the totality of society or the meaning of reality. For further details, see N. Luhmann, *Die Gesellschaft der Gesellschaft. Erster Teil* (Frankfurt, Suhrkamp, 1998) 396-405.

As regards the terminology, I prefer using the 'good/bad' conceptual distinction to the 'good/evil' alternative because the concept of 'evil' is more expressive, narrow and may evoke misleading theological connotations of modern morality.

rule of law is typical of the *circulus vitiosus* and *petitio principii* aporias[4] which both differentiate and intertwine the systems of politics and law: the sovereign political authority is restricted by the sovereignty of the law which may be implemented only by the (by definition, unrestricted) political sovereign body. The self-obligating will of the sovereign people is ceremoniously codified in constitutional preambles[5] and converted into the moral mythical foundations of political society.

This picture of the three different systems communicating through the pattern of a constitution may be inspired by recent social systems theories and postmodern philosophies, yet it is already present in Albert Dicey's much older distinction of the legal, historical and theoretical speculative views of English constitutional law. According to Dicey, the historical view is preoccupied with the question of the historical origins of the constitution and facts which hardly contribute to the present constitution and its functions. While the historical view suffers from antiquarianism, the speculative philosophical and political view of theorists such as Walter Bagehot primarily focuses on constitutional conventions, the political reality of government, power distribution and public opinion.[6] The political theoretical view lacks the analysis of enforcement mechanisms and one complete part of the constitutional law described by Dicey as:

> rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute 'constitutional law' in the proper sense of the term, and may for the sake of distinction be called collectively 'the law of the constitution'.[7]

The law of the constitution is different from the political character of conventions because it is enforceable by legal means. The legal perspective then focuses on this enforceable aspect of the constitution and, while eliminating the shortcomings of legal formalism typical of William Blackstone, analyses it as a system driven by its own normative structure, interpretive methods and logic.

As formulated by Dicey, the modern differentiation of law, politics and historical morality reflects the ontological problem of the origins of politics, morality and law and their constitution as independent social systems: it leads back to the question of foundations and meaning of the three systems. Can we describe the act of founding the legal system as a moment in history? Is it possible to reduce the systemic normativity of law and morality to historical facts of constitution-making and political decisions, or does the constitution-making itself involve the *a priori* normative power of meaning facilitated by transcendental morality? How does the founding act determine the legal system's constitution?

---

4 Discussed, for instance, in J.-F. Lyotard, *The Postmodern Explained to Children: correspondence 1982-1985* (London, Turnaround, 1992) 44.

5 N. Luhmann, 'Verfassung als evolutionäre Errungenschaft', (1990) 9 *Rechtshistorisches Journal* 176-220.

6 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan 1952) 7, 19-21.

7 id., 23-4.

The ideality of constitution-making facilitated by the code of transcendental morality would mean that the right to make the constitution is irreducible to a historical fact. In the constitutional context, morality comes very close to culture as a system of symbolically expressed and historically anchored ideals of society.[8] Morality draws on the cultural quest for perfection and the sense of duty by elaborating the 'good/bad' code[9] which can define any social phenomenon, even whole societies, as good and therefore worthy of being praised, esteemed, pursued or imitated. Using this code, it is possible to express good intentions, to act in good faith, to pursue good cooperation and better understanding, etc. For morality, history is only a reservoir of ideal patterns of human behaviour.

Nevertheless, this ideality present in culture and communicated by the moral code of 'good/bad' would be meaningless without legal and political history and its temporal dynamic. Moral speculation establishes the ideal 'pure' right to make a constitutional legal document but it is unthinkable outside history. In the moral domain, the code of 'good/bad', therefore, is differentiated to the transcendental level of moral ideals and the immanent level of social morals. What is good and bad must be anchored outside society. At the same time, this speculative transcendental difference would be meaningless without its normative social environment.

The difference between immanent normativity and the transcendental ideality of moral norms has been reformulated as a difference between morality and ethics which constitutes a reflexive theory of morality.[10] The social dimension of morals and politics means that they can be relativized by their temporal horizons and, therefore, can provide only limited reasons for the validity of specific normative structures. In modernity, ethics therefore has become a guardian of morality's ideality. Its main function is to extend the speculative reflection of ideal origins to different social systems and subject their specific communication to the moral code. Ethics represents morality's transcendental dimension and ideal origins which are nevertheless 'corrupted' by the fact that moral or, indeed, any other social norms can be validated only within their social context. They are thus exposed to the immanent effects of time and history.

It is only at the level of ethical reflection that moral communication can retain its *symbolic function* of expressing the transcendental ideals and origins of a polity and its laws and morals. However, political history will always be susceptible to forgetting the ideal origins of a polity. Politics forces society to forget its ideal origins and returns morality to the empirical sphere which, from the ethical perspective, should nevertheless be only a *sediment* of the original founding act.

The bond between the social sphere and the original founding act finds one of its most typical early modern expressions in Hegel's distinction between reason and religion and the attribution of synthesizing power to reason which ought to assume religion's role of facilitating social integration in modern society. According to

---

8 For culture as a domain of expressive symbolism, see E. Cassirer, *The Philosophy of Symbolic Forms, vol. 4* (New Haven, Yale University Press, 1996) 56-111.

9 See, for instance, N. Luhmann, 'The Code of the Moral' (1993) 14 *Cardozo Law Review* 995-1009; see, also, N. Luhmann, *Paradigm Lost* (Frankfurt, Suhrkamp, 1990).

10 id. (1990).

this view, religion could continue to provide practical efficacy to reason as a part of public life dominated by immanent social norms but it would be grounded on transcendental universal reason and its notion of humanity. Reason has the power to reconcile transcendental humanity with the immanent morality of religion because it can synthesize human intellect (gradually splitting away from the positive world of religious cults) with aesthetic religious perfection, thus energizing and securing the communal bonds of early human cultures.[11]

Every politics is susceptible to the moral crisis caused by forgetting the origins and very meaning of the existence of a political society. Moral and philosophical discourse therefore functions as a re-establishment of the ideal foundations of a political society which are irreducible to natural facts and the classifications of positivist science. It is the pursuit of an 'ideal image whose dimension is the infinite'.[12] Nevertheless, this effort cannot result in the consolidation of a solid normative framework for the totality of society. All attempts to establish 'moral politics' in complex democratic societies are doomed to failure.

A good example of such a failure to integrate politics into the moral system is the recent history of political dissidents in former communist countries, elected to national parliaments and other constitutional offices after the successful revolutions of 1989 with the aim of creating a just, fair and good political society.[13] Nevertheless, their moral message was not accompanied by a responsive political agenda and soon became marginalized in the emerging democratic political discourse. The incompatibility of the ethical dissident message with the semantics of democratic politics subsequently resulted in the loss of political power gained in the early stages of the post-communist political transformation. Many dissidents simply wanted to introduce too much ethics and too little politics into the new democratic political system. Those dissidents who had not adapted to the logic of democratic multi-party politics were consequently pushed out of politics and some of them adapted to the new critical role in the democratic political system which they originally helped to establish. Their story therefore represents a specific example of the functional differentiation of politics and morality in post-communist societies in the 1990s.[14]

Theory, the 'Ethical State' and Constitutionalism

Apart from the world of political agents and dissidents, efforts to integrate morality are easily detectable in some streams of social and legal science which seek to determine moral outcomes and their social effects. A number of social and legal

11 G.W.F. Hegel, *The Difference Between Fichte's and Schelling's System of Philosophy* (Reseda, Calif., Ridgeview, 1978) 92.

12 E. Husserl, 'Philosophy and the Crisis of European Man' in E. Husserl, *Phenomenology and the Crisis of Philosophy* (New York, Harper and Row, 1965) 149-92, at 159.

13 See B. Falk, *The Dilemmas of Dissidence in East-Central Europe* (Budapest, CEU Press, 2003) 354-64.

14 For further details, see J. P ibá , *Dissidents of Law: On the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract* (Aldershot, Ashgate, 2002) 170-3.

theories often contribute to the moral task of defining the ideological background of a particular society. As Thurman Arnold put it: '... [l]egal theories are methods of preaching rather than of practical advice.'[15] Theorists claim that it is necessary to study the implications of a society's system of moral beliefs and ideologies for its political and legal institutions, and some even argue that moral choices must be made first in order to establish the legal and political systems.[16]

These philosophers and theorists want to act as 'functionaries of humanity'.[17] Edmund Husserl, who used the expression when criticizing the decline of European critical thinking and political culture in the 1930s, believed that:

> By virtue of the demand to subject the whole of experience to ideal norms, i.e., those of unconditional truth, there results at the same time an all-embracing change in the practical order of human existence and thus of cultural life in its entirety

and concluded that this culture of the critical intellect will inspire 'a new intimate community of ideal interests' cultivated by philosophers.[18]

This kind of philosophical and sociological humanism often perceives political philosophy and social science as a tool for shaping a rational identity and ethics of modern societies which provides these societies with legitimate foundations. For instance, Jürgen Habermas believes that the public sphere of functionally differentiated societies should be guided by the pragmatics of communicative reason and scrutinized by the discourse ethics. This project of modernity searches for a rational identity for modern societies and takes communicative reason as a source of social integration and the ultimate ethical reference of modern political societies.[19] Similarly, different philosophies of 'new humanism' inspired by works of Emmanuel Lévinas draw on the ethics of otherness which takes moral argument as both a descriptive tool and a critique of the contradictions of modernity and their social consequences. For thinkers like Deleuze, Derrida and Lyotard, thinking is a position of resistance to the structures, procedures and rules of intellectual and social control.[20] Similarly, social theorists like Zygmunt Bauman call for a postmodern ethics of responsibility free of rule-based universalism and expert knowledge of

---

15 T. Arnold, *The Symbols of Government* (New York, Harcourt Brace & World, 1962) 21.

16 For many examples of this view in the field of public law and political theory, see P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, Clarendon Press, 1990) 5-9.

17 P. Feyerabend, *Farewell to Reason* (London, Verso, 1987) 274.

18 Husserl, op. cit., n. 12, at 174-5.

19 See, for instance, J. Habermas, *The Theory of Communicative Action,* 2 vols. (trans. T. McCarthy, Boston, Beacon Press, 1984/1987).

20 This applies to Deleuze's principle of nomadism, Derrida's deconstruction and problematic of *différance*, or Lyotard's *differend* and judgement without a priori rules. See, especially, G. Deleuze, *Difference and Repetition* (London, The Athlone Press, 1994) 36-7; J. Derrida, *Politics of Friendship* (London, Verso, 1997); J.-F. Lyotard, *Heidegger and "the jews"* (Minneapolis, University of Minnesota Press, 1990) 59-61.

modernity[21] and pragmatic philosophers like Richard Rorty suggest abandoning the seemingly unhelpful difference between morality and prudence.[22]

According to the moral enterprise of political philosophies and social theories, it is still possible to articulate society's knowledge of itself from an ethical, socially and intellectually specifiable point of view. Nevertheless, the belief that moral agnosticism would paralyse democratic political and legal institutions or liberal culture is another example of the normativism and moral aspirations of social sciences and the humanities which merely shows that modern science in search of the truth is often exposed to the code of the moral system and its search for the normative origins of a political society.

According to moral criticism, the factual domain of politics obscures the ideal normative origins of a society and turns them into the reality of habits and conventions. The legal constitution of a political society is therefore expected to mediate between these two seemingly irreconcilable worlds of normative eidetic origins and the real life of a political society. It is expected by moralists to convert ideals into norms[23] and thus contribute to the re-establishment of a code of morality in political decision-making, the public sphere and social life in general. It 'ought to' represent social origins both in the form of ideal, 'pure' normativity and the historical founding act of constitution-making transformed into the political tradition.

According to the popular notion of 'the ethical State',[24] the general ethical will has to supersede and finally integrate any particular individual will and social morality. As Hegel said when contrasting Rousseau's invocation of natural ethics:

> The right of individuals to be subjectively destined to freedom is fulfilled when they belong to an actual ethical order, because their conviction of their freedom finds its truth in such an objective order.[25]

The ultimate synthesis of essence and existence – the synthesis of transcendental ideals of morality formulated by ethics and the immanent facts of politics and different social morals – finds its expression in the *idea* of a state which is *actual* and thus reflects on the totality of reason in which '[w]hat is rational is actual and what is actual is rational.'[26]

---

21 Z. Bauman, *Postmodern Ethics* (Oxford, Blackwell Publishers, 1993) 47-53.

22 R. Rorty, *Contingency, Irony, and Solidarity* (Cambridge, Cambridge University Press, 1989) 56-7.

23 'Because here the expression of adult normality is not a given eidetic determination, but the index of an ideal normativity which is *on the horizon* of de facto normal adults. In proportion to our advancement in the spiritual world and then in history, the *eidos* ceases to be an essence in order to become a norm, and the concept of horizon is progressively substituted for that of structure and essence.' In J. Derrida, *Edmund Husserl's Origin of Geometry: An Introduction* (Lincoln, University of Nebraska Press, 1989) 80.

24 G.W.F. Hegel, *Hegel's Philosophy of Right* (Oxford, Oxford University Press, 1967) 155-60.

25 id., at 109.

26 id., at 10.

Ideality is constructed as 'supratemporal and omnitemporal' at the same time.[27] However, ideality therefore becomes inseparable from telos, normativity from facticity: the absolute becomes a never-ending historical movement. At the societal level, this critical movement effectively results in the impossibility of any hierarchical order with a centralized system of ultimate normativity. There is no Leviathan guaranteeing the ultimate normative authority. There is no justification of moral utopianism and its calls for the absolute moral formula of legitimate government. The rationalistic and hierarchical concept of the social system as a political society, which would be governed by universal natural morality detected by human reason in the factual life of human beings,[28] does not work: the universality of morality does not constitute the particularity of politics in functionally differentiated societies. The Enlightenment synthesis of natural morality and politics into 'natural politics' and the later Hegelian version of the absolute knowledge manifested in the universal and homogeneic 'ethical State' incorporating the whole of humankind,[29] are merely speculative moral ideals without normative force in the political and legal system.

The pure normativity of the 'de iure' right to make the constitution needs the 'de facto' neutralization of the temporal dimension of the political system. At the same time, politics cannot survive as a mere chain of arbitrary power decisions. Instead of being a legal reflection of 'the ethical State', the modern concepts of the rule of law and democratic constitutionalism are expected to provide the necessary synthesis of these two social antinomies without regressing to the older concept of politics as an ultimate social integration by sovereign state power. However, it means that the question of hierarchy and the supremacy of law over morality and morality over law is unanswered.

Social Differentiation, Heterarchy and Structural Coupling

In functionally differentiated complex societies it is impossible to conceptualize the totality of society in the language of ethics, the state, or revolution.[30] Instead of synthesizing the totality of society, each system reduces social complexity by constructing a social reality of its own. Instead of an identity defined by ultimate moral principles and values, it is the *difference* between the system and its environment that needs to be taken as the functional precondition of modern society.[31]

As Niklas Luhmann says about the relation between law and morality:

---

27 Husserl speaks about '*die urzeitliche, überzeitliche' Zeitlichkeit*'. In Derrida's interpretation: '... [p]ure sense, the ideality of ideality, which is *nothing other than* the appearing of being, is *at once* supratemporal ... and omnitemopral, or against that "*supratemporality implies omnitemporality*", the latter itself being only "*a mode of temporality*". ...'. Derrida, op. cit., n. 23, at 148.

28 P.H.D. Holbach, *System of Nature, or Laws of the Moral and Physical World* (New York, Burt Franklin, 1971).

29 See A. Kojeve, *Introduction a la lecture de Hegel* (Paris, Gallimard 1947) 301.

30 N. Luhmann, *Social Systems* (Stanford, Cal., Stanford University Press, 1995) 442.

31 id., 177.

> [t]he legal system must account for the fact that even though the moral *code* applies to the whole society as binary scheme, the moral *programmes*, that is, the criteria for a distinction between good and bad or good and evil, are no longer consensual. Although a moral critique of law is possible, it is highly unlikely that morals require obedience to the law in every case. … [I]t is this refinement on issues of moral sensitivity that requires that moral judgements do not lead to immediate legal consequences. Otherwise all moral controversies would have to be followed through in the legal system.[32]

Modern society as a whole cannot gain normative distance from itself. The functional reason of social systems does not recognize transcendental sources of validity: systems' rationality means self-referring and operating according to the internal criteria of validity. There is no social sphere which could be conceived as a higher-level intersubjectivity articulating a consciousness of the total society reconcilable in its plurality of views and interests by the power of transcendental reason or ethics. Fusions and combinations of social and substantive dimensions have always been 'the cardinal mistake of humanism'.[33]

According to the autopoiesis paradigm, social systems evolve both *in* society and *with* society and therefore are both part of and differentiated from society which constitutes their environment. In modern functionally differentiated societies, social systems are established by internal self-referential operations which determine the difference between the system and its environment. In the legal system, this operative closure is achieved by coding social reality in a binary code of 'legal/illegal' while the political system uses a code of 'government/opposition' and the moral system communicates in the above mentioned code of 'good/bad' which determines whether individuals and realities in our social world and culture are to be praised and esteemed, or not.

Modern societies have no centre or integrative structure of general symbols and achieve their stability by the different operations of different social systems. Truth cannot be functionalized in the sense of a political authority guaranteeing a generally binding interpretation of social reality and the world in general. Functionally differentiated societies consequently have no identity available to them by means of rational communication, political consensus or cultural tradition. Different systems may only 'irritate' each other via the environment but cannot provide social foundations for each other. Functional differentiation rules out any chance that society itself could be found in the society, its 'authentic' reflection and truth.[34] The moral system, which uses the concepts of identity, good and authentic 'truthful' being, is only one of many descriptions of modern society. It is not an ultimately valid description of this society.

---

32 N. Luhmann, *Law as a Social System* (Oxford, Oxford University Press, 2004) 107.

33 Luhmann, op. cit., n. 30, at 80.

34 For the philosophical context of this functional separation of truth and authority, see H. Blumenberg, *The Legitimacy of the Modern Age* (Cambridge, Mass., The MIT Press, 1983) 96.

Modern complex societies are not hierarchical: they are heterarchical, divergent and 'polycontextural'.[35] They are typical of communication loops between different social systems and their 'structural coupling' which indicates both systemic interaction at the cognitive level and functional differentiation at the normative level. The concept of structural coupling, introduced into social theory by the autopoietic systems theory,[36] assumes that social systems are operatively closed and cognitively opened. It means that the system's structure is determined by the system's own operations and no external operations can specify the system's internal development.[37] The coupling systems exchange information which has the effect of an 'irritant' increasing the self-determination and self-reference of the respective systems.[38] Self-observation of the system distinguishes between self-reference and external reference. The system depends on its environment only in the sense of gathering information (cognitive dependence).[39] The coupling can by no means affect the system's operations. It enhances the differentiation of society and specifies the difference between the system and its environment. Every communication between different social systems therefore supports their self-reference and operational closure and rules out any chance of hierarchy between functionally differentiated social systems such as economy, politics, law, morality, art and education.

Law thus cannot be an expression of ethics, moral principles, values or political practices as suggested by numerous sociological and political theories and philosophies of law. The unity of the legal system is not secured by the system's attachment to moral or political foundations, to the transcendental or immanent 'sources of law'. Jurisprudential and sociological beliefs that the system of positive law must be grounded in the mystical sources of the living law, moral fabric, natural law or folkways are replaced by the concept of legal validity which is intrinsic to the legal system and cannot be used anywhere else. Legal validity is an intrinsic value (*eigenvalue*) of the legal system.[40]

Instead of making moral (or religious) claims backed by legal validity, the constitutional law of modern society has achieved a *modus vivendi* for its arbitration of disputes between different moral and ideological claims. Any concept of the transcendental sources of law would necessarily invoke a hierarchical image of a constitutionally centred and integrated society. On the other hand, the concept

35 For the concept of polycontexturality, see, especially, G. Günther, 'Life as Poly-Contexturality' in *Beiträge zur Grundlegung einer operationsfähigen Dialektik* (Hamburg, 1976-80, 3 vols.) 283-306 (this volume published in 1979). For the context of legal autopoiesis, see G. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' 18(1) *Theory, Culture & Society* (2001) 29-47, at 38; see, also, G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Produces New Divergences' (1998) 61 *Modern Law Review* 11-32.

36 See Luhmann, op. cit., n. 32, at 381-422.

37 Luhmann, op. cit., n. 3, at 100.

38 id., 103.

39 See G. Teubner, 'Alienating Justice: On the Surplus Value of the Twelfth Camel', in J. P ibá and D. Nelken (eds.), *Law's New Boundaries: the consequences of legal autopoiesis* (Aldershot, Ashgate, 2001) 24-5.

40 Luhmann, op. cit., n. 32, at 125, 421.

of the legal validity guarantees the functional and semantic differentiation of law from its social environment and effectively dismantles popular perceptions of the legal system as a hierarchically structured order based on a set of moral or political principles and values. Although the legal system can directly accept normative premises from morality or politics, it can do so only by transforming them into the code of ‘legal/illegal’.

Morality as a ‘Loose’ Social System

The difference between law and morality and their relationship is a core issue of jurisprudence around which different theoretical schools formulate their positions and arguments. Concepts of ‘duty’, ‘obligation’, ‘right’, etc. are used both in legal and moral communication. Robert Nisbet speaks about ‘the sense of *oughtness*’[41] which is the most vital character of all social norms inspiring human conduct irrespective of the moral or legal context. Legal and moral norms need to be subsequently distinguished by either highlighting the authoritative nature of law as a system of politically enforced or commanded rules or emphasizing ethical approaches to law which ought to be legally enforced. This distinction corresponds to the never-ending natural law/legal positivism debates which are intrinsic to modern jurisprudence and moral philosophy.

Apart from semantic distinctions, law and morality are sometimes thought to be substantively different in their content which means that there are important differences in the criteria applied in the legal and moral systems.[42] In the Kantian manner, law is regarded as referring to external conduct and manifestations while morality refers to the internal state of mind and deals with subjective motives.[43] In the same mode of jurisprudential thinking, Kelsen’s pure theory of law emphasizes law’s enforcement and sanctions as its main distinction.[44] Positivistic perspectives of law claim that the legal system offers protection against moral pressures in modern societies in which there is a fundamental split between legal reason and the value framework of morality.

On the other hand, recent human rights legislation and different doctrines of judicial activism have stated that neither legislation nor judge-made law are morally indifferent: they appeal to moral considerations. Legislators and judges consider both legal arguments and moral evaluative judgments and make law dependent on a political community, its ideals of integrity and shared values.[45] The first job of

41 R. Nisbet, *The Social Bond: An Introduction to the Study of Society* (New York, Knopf, 1970).

42 See, for instance, H.L.A. Hart, *Punishment and Responsibility* (Oxford, Oxford University Press, 1968) 224-5; H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994) 167-80.

43 H. Kantorowicz, *The Definition of Law* (Cambridge, Cambridge University Press, 1958) 41.

44 H. Kelsen, *General Theory of Law and State* (New York, Russell & Russell, 1945).

45 R. Dworkin, *Law’s Empire* (London, Fontana, 1986) 225.

lawyers and legal theorists is to implement political morality in the legal system.[46] According to other moralistic views, the system of positive law cannot escape value judgements and contains the internal morality which may be described as the operative ideals (aspirations) of the legal system.[47] Furthermore, theories of human rights enhance the view that there always is one 'right' answer to legal, political and moral problems and thus suggest that the law has the power to integrate the socially differentiated domains of morality and politics in pluralistic and liberal modern societies. According to critics of the use of 'principled arguments' and different theories of human rights,[48] law nevertheless cannot substitute the function of ethics or retreat to a balancing of political values and ideologies. References to moral, supra-positive, natural or reasonable principles would substitute the codes of moral and political systems for the 'legal/illegal' code. However, legal operations can refer to different and often contradicting principles and use them contingently in decision-making. For instance, it is a matter for a judge to decide to give priority to a specific principle: in a hate-speech trial concerning the publication of potentially racially abusive materials, the judge must decide to give priority either to the principle of freedom of expression or the principle of racial non-discrimination and tolerance.[49]

The difference between law and morality represents a never-ending dispute driven by the internal structure and operations of the legal system which conceptualizes the internal and external constraints of legal arguments, decision-making and legislation. In modern society, morality is clearly unsuitable as a validation of legal norms and, although referred to in specific circumstances of legal interpretation and arguments, has to go through the process of *juridification* in order to be made part of legal communication.[50] In short, moral judgements and normative communication have first to be filtered by the legal system before being accommodated to legal communication. Moral arguments circulated in the legal system, irrespective of their accommodation with legal concepts and methods, indicate that problems of legitimation can never be entirely resolved within the legal code. Internal operations of the legal system distinguish between law and morality despite the fact that legitimation of the legal system can hardly be reduced to legal procedures. The legal system remains exposed to what is coming from its environment and its legitimation cannot be exclusively predetermined by the legal communication.[51]

At this point, it is important to ask if this relation between law and morality can be translated into an inter-systemic relation, that is, if it is possible to speak of the moral system as we speak of political or legal systems. Like other social systems,

---

46 R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford, Oxford University Press, 1996).

47 This is typical of Lon L. Fuller's jurisprudence. See L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969).

48 See, especially, R. Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002); R. Dworkin, *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985); and A. Marmor, *Positive Law and Objective Values* (Oxford, Clarendon Press, 2001).

49 See, for instance, Luhmann, op. cit., n. 32, at 312.

50 See J. Habermas, *Faktizität und Geltung* (Frankfurt, Suhrkamp, 1992) 250.

51 P ibá , op. cit., n. 14, at 125-40.

the moral system is internally differentiated: it differentiates between the concepts of immanent morals and transcendental morality evolved as a reflexive ethics which draws a circle of self-referential observation and communication. Furthermore, the moral system has its code of 'good/bad' which enables it to distinguish between belonging to the system and not belonging to the system and thus establishes the difference between the moral system and its environment. It is operatively closed because its programmes (norms), though missing the consensual character of modern societies,[52] can still distinguish between good and bad and thus define its objects by describing them as praiseworthy or not, as being esteemed and not disdained.

Unlike law, morality does not have a reflexivity that runs on proceedings and:

> can deal with the problems which arise from the application of the code to itself only in the form of rationale discourses, that is, only in the form of ethics, in the form of semantic abstractions – where any gain in orientation remains uncertain.[53]

Unlike morality, law has secondary rules which form legal communication and establish the systemic unity of validity, the absence of which makes it impossible for morality to evolve into an autopoietic system.[54]

Although morality as a social system can hardly be reduced to persons and conditions under which human beings esteem or disdain one another,[55] it is certainly true that morality lacks the procedural and communicative differentiation and structural complexity of law as a social system in modern society. Ethics reduces this structural looseness of the moral system with calls for obeying the moral law.

There is a paradox within the moral system, deriving from the reflexive search of ethics for transcendental 'ideal' grounds of morality, undertaken only within social horizons which constantly relativize moral judgements and make them subject to temporal limitations. One can always ask further why a particular moral judgement continues to be valid and what and where are its limits. In analysing the moral system and its relation to the systems of law and politics, it is necessary to highlight the close links between morality and culture as a domain of temporalized social ideals and expressive symbols. Morality draws on cultural symbolism, using its references to the unity of meaning and semantic integration of society and subsequently transforming it into normative judgements following the code of 'good/bad'. It is closely linked to the process of the sedimentation of cultural symbols and their transcendental reflection beyond the horizon of social time and space.

Similarly, morality draws on the semantics of law because it lacks codified textual frameworks for its communication. This is why it seems to be abundant and

---

52 Luhmann, op. cit., n. 32, at 107.

53 id., at 208.

54 id.

55 This view is typical of Niklas Luhmann's theory of morality as a social system who says that morality 'is a *symbolic generalization* that reduces the full reflexive *complexity* of doubly contingent ego/alter relations to expressions of esteem and by this generalization open up (1) room for the free play of *conditionings* and (2) the possibility of reconstructing complexity through the *binary schematism* esteem/disdain'. See Luhmann, op. cit., n. 30, at 236.

absent, everywhere and nowhere at the same time. The secular morality of modern societies is diffuse. It is therefore typical that ideals intrinsic to transcendental morality use legal communication (such as the process of constitution-making) in order to be transformed into immanent moral norms supported by legal validity. It is therefore appropriate to call morality *a loose system* which may have most of the features of autopoietic social systems, yet lacks their structural differentiation and self-referential validation procedures.

The code of ‘good/bad’ cannot affect the functional codes of the political system (‘government/opposition’) and the legal system (‘legal/illegal’) because they would not be able to guarantee their internal operations. These codes have to achieve a ‘higher-level a-morality’. Morality cannot be immediately or intrinsically valid in the legal or political systems. The paradigm of the totality of society conditioned by the moral code has been lost.[56] There is no possibility of harmonizing the concept of society and social solidarity with morality as suggested, for instance, by Durkheim’s elaboration of the ‘collective consciousness’.[57] In functionally differentiated societies, neither morality, nor any other social system can have a central position.

The Effects of Structural Coupling: Law and Politics

Like law and morality, law and politics are two distinct social systems. The rule of law makes it impossible to claim the supremacy of either politics or law. These systems are functionally differentiated and contribute to one another without any systemic hierarchy. Hans Kelsen reflected this systemic differentiation by extracting two different jurisprudential fictions: the ‘first lawgiver’ and the ‘basic norm’.[58] The lawgiver transforms the basic norm into a historically verifiable system of positive law while the system itself remains governed by the pure transcendental normativity of the basic norm. The historical founding act is a manifestation of the efficacy of the coercive political system while normativity is a manifestation of the validity of the legal system.[59]

The modern legal and sociological belief in legislation and its power to integrate political society and impose limits on political authority on behalf of citizens turns out to be too ambitious. The system of positive law does not constitute the ultimate boundaries of modern political society as suggested in early doctrines of the modern

56 Luhmann, op. cit., n. 9.

57 Durkheim considers social solidarity a moral phenomenon. See E. Durkheim, *The Rules of Sociological Method: and selected texts on sociology and its method* (London, Macmillan, 1982).

58 H. Kelsen, op. cit., n. 44, at 15.

59 id., at 116-7, 369-70. However, Kelsen famously claims that State and law are identical and the State is a legal order reducible to the pure norm. Kelsen also admits that normativity constitutes both law and morality, yet fiercely opposes any suggestion that moral normativity could be a foundation of legal normativity. Law and morality may have the same ontological status of ‘*Sollen*’ [ought to], but they constitute two very different social systems. For these and other views, see, especially, H. Kelsen, *The Pure Theory of Law* (Berkeley, University of California Press, 1970).

rule of law. Legal decisions and the normative framework do not stand above other spheres of our complex social life such as economics, education, religion and ethics. This process of the 'horizontalization of law'[60] shows the absence of law's supreme authority over the totality of political society. Law is not a command centre of modern functionally differentiated societies and there is no higher-level moral norm outside the legal system which could provide it with unconditional legitimacy.

Law deals with moral, economic or political demands and interests as cognitive facts at the level of structural coupling which means that they are external information in need of 'homogenization' by the legal code and operations. They are not normative conditions of the legal system with power to determine an outcome of the legal operation.

Structural coupling is particularly strong in the area of public and constitutional law in which a number of mutual irritations are experienced between the legal and political systems. In this area:

> Constitutions are real achievements (in contrast to mere texts) if there is success, on the one hand, in restricting the influences of law and politics on each other to the channels provided by the constitution of a state, and, on the other hand, in increasing possibilities in the framework of this coupling. … [R]ather, an *immense increase* in mutual irritability can be achieved through constitutions by limiting the corridors of contact – more possibilities are created for the legal system to register political decisions in a legal form, and also more possibilities for the political system to use the law for the implementation of politics.[61]

The paradox of the legal binding of the sovereign authority (which, by definition, is necessarily politically unbound) captures increasing structural coupling and irritability between the legal and political systems which, nevertheless, does not affect the internal codes of politics and law. What eventually carries the legal decision is not political will but legal reason. There are no ultimate ethical or political reasons in legal decision-making and all legal reasons are merely penultimate reasons.

In this context, constitutions in fact facilitate structural coupling between the systems of politics and law which extends into the system of morality because of the symbolic reflection of politics and law entrenched in constitutional texts. By dint of a constitution, law puts structural limits on political power. At the same time, it provides a powerful instrument for enforcing the political will. Law is thus both a constraint on and an enhancement of political power. It rules out some political practices by declaring them illegal (financial corruption, use of political violence, terror, etc.) while providing powerful legal tools for enforcing the specific political programme of political parties in charge of government.[62]

Modern democracies can de facto change the law anytime there is a majority political will supporting the legal change. Law would thus become a mere instrument of politics. Nevertheless, political power is limited by law and ultimately defined by the text of a constitution. On top of this, constitutions list a set of moral political

---

60 W.T. Murphy, *The Oldest Social Science?: Configurations of Law and Modernity* (Oxford, Clarendon Press, 1997) 172-3.

61 Luhmann, op. cit., n. 32, at 404.

62 Luhmann, op. cit., n. 5.

principles and values which might not be primarily enforceable by law, yet play an important role in the public discourse and operate as another reference to the systems of law and politics. The radical legal realist or critical legal view that all law is just politics therefore remains unsustainable.[63] Despite the obvious fact that there are many political (but also economic, moral, religious, etc.) elements present in the legal system, law is irreducible to the logic of political power. One can even ask a critical question: if law is politics, why do we still talk about law instead of talking purely about politics?

Structural coupling between law and politics extended to the domain of morality finds its immediate expression in the concept of justice which is semantically extremely rich and closely linked to the moral concepts of virtues, values and ideals. According to moral philosophy and jurisprudence, justice is a regulative idea of positive law and social order.[64] In this sense, the constitution of a political society is a codification of the moral concept of justice. This is why theories of natural law and various doctrines of universal human rights continue to claim the superiority of moral justice and legitimation over the system of positive law.[65] Nevertheless, the divide between natural and positive law and the failure to establish a universal doctrine of morally constituted law reveal a structural gap between law and morality. In fact, the structural opposition between moral justice, which seeks integration, and legal justice, as an outcome of the social differentiation of the legal system, represents a never-ending source of inspiration for jurisprudence, moral and political theory.

The concept of justice becomes socially fragmented and pluralistic. It is appropriated by the communication of different social systems. The legal system's concept of justice is different from that of the economic, moral and political systems. It is an operational concept which lacks a substantive meaning and is abstracted from the concepts of virtue, principle, idea or value.

Mutual relations between law, morality and politics are thus 'parasitical'[66] in the sense that each system benefits from the internal structures and operations of the others while keeping an external difference.[67] Moral demands for justice are internalized by the legal system and legal justice acquires moral meaning. In the system of politics, democratic representation, which is the core of political will-formation, involves a high risk of abuse of power by a governing political majority. The difference between political authority and legal control then makes it possible to safeguard the complex political system with the legal protection provided by the constitution. Law becomes an external guarantee for the internal paradoxes of democratic politics. However, it does not have the power to subject all political processes and decisions to existing legal regulation. For instance, negotiations regarding the formation of a

---

63 For this view, see for instance D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York, Pantheon, 1982).

64 J. Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971) 4-5.

65 Dworkin, op. cit., n. 48, at 97.

66 M. Serres, *The Parasite* (Baltimore, Johns Hopkins University Press, 1981).

67 Luhmann, op. cit., n. 32, at 371.

coalition government cannot be codified by the constitution in the same manner as the subsequent parliamentary vote of confidence in the government.

Another example of structural coupling is the concept of human rights. Regarding the coupling between law and politics, the function of human rights is pretty obvious: they are in opposition to political power.[68] In democratic political system, their function is to protect individual citizens and whole social domains against the interventionism of the general political will. However, human rights are clearly both a moral and legal concept. They are subjective rights and their validity therefore stretches both to the domains of natural justice in the moral sense and the system of positive law. Human rights represent a meeting point of law and ideology, the legal system and the system of morality. They therefore protect society from 'total legalisation' and politicization.[69] In this respect, morality operates as an external reference for the legal system which is subsequently accommodated by the legal system as a self-creating and self-limiting operation.

Structural coupling shows the impossibility of defining any clear systemic or normative hierarchy in contemporary political societies governed by the rule of law and democratic constitutionalism. The concept of domination and authority looks obsolete because social systems are governed by self-reference and further differentiation. The text of a constitution and the act of constitution-making have consequently to be analysed within this functionally differentiated social context despite a language full of concepts such as 'sovereignty', 'the sovereign people', 'democratic power' and 'ultimate legal force'. Despite its rhetoric of hierarchy and its reflection of the totality of a political society, the language of constitutions describes only a fragment of social reality and does not have the power to speak 'in the name' of any ultimate social body or society itself. Legality does not have power technically to neutralize the modern state and claim its formal perfection and logic to be the only political values and truth.[70] Nevertheless, the language and concepts of constitutional documents have an extraordinary ability to become part of the internal communication of very different social systems such as morality, law and politics and therefore have to be carefully analysed from these different perspectives.

Two Rationalities of Law Revisited: Morality and Culture

The concept of 'law' used to be a strong symbol and departure point of thinking about society itself. It reflected the phenomena of social order, hierarchy, regularity, institutionalization, etc. It was a way of thinking about power, government and state

68 N. Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin, Duncker & Humblot, 1965).

69 N. Luhmann, *Political Theory in the Welfare State* (Berlin, de Gruyter, 1990) 131.

70 This criticism of the rule-of-law-based constitutional liberal state as a technical neutral state which effectively dismantles the political sphere and makes it subject to the particular will and interests of political parties and mass movements is typical of Carl Schmitt's writings. See, especially, C. Schmitt, 'The Age of Neutralizations and Depoliticizations' (1993) 96 *Telos* 130-42; see, also, C. Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Greenwood Press, 1996) 45.

which symbolized political unity, social solidarity, moral harmony and rational organization.[71]

However, the absence of social hierarchy sheds a new light on acts of constitution-making and designing the legal textual unification of a political society. Constitutions are obviously of crucial importance for any legal communication: they formulate the principles of logic and concepts necessary for legal arguments, deliberation, decisions and law-making. Constitutions are also part of any public moral discourse because adherence to constitutionalism is regarded as one of the prime civil virtues in a liberal democratic society. Finally, constitutions are instruments of political power in that they regulate the relation between government and opposition, between the state and its citizens.

The systemic overlapping and structural coupling facilitated by constitutions brings to mind Max Weber's distinction between formal and substantive law.[72] Applying the distinction of instrumental, purpose-oriented rationality and substantive, value-oriented rationality to the domain of law,[73] Weber perceived formal law as the totality of rules based on strictly legal logic without any reference to the social environment. Formal law is an expression of instrumental rationality and the disenchanted world of modern bureaucratic order which ensures the calculability of choices. Formal justice has to follow black-letter law's prescriptions and exclude other criteria of decision-making, such as compassion, strength, status, etc. On the other hand, substantive law reflects extra-juridical elements and accommodates moral, economic or traditional and religious criteria in the domain of positive law. It is based on substantive rationality which involves provisioning according to some ultimate values, be they equality, status or any other form of social justice. Unlike formal justice, substantive justice takes account of the social circumstances of legal regulation. The old distinction between law and equity thus has wide consequences:

71 For instance, the difference between repressive and restitutive elements in law significantly affected Durkheim's theory of modern society and his typology of mechanic and organic solidarity. See E. Durkheim, *The Division of Labour in Society* (London, Macmillan, 1984) 24-5. Similarly, Herbert Spencer's evolutionary theory would be impossible without the classification of modern society as a contract-based collectivity which is different from pre-modern status-based societies. See H. Spencer, *The Study of Sociology* (Ann Arbor, University of Michigan Press, 1961). Modernity as a shift from status to contract appears in Henry Maine's seminal work on ancient law. See H. Maine, *Ancient Law* (London, John Murray, 1861).

72 M. Weber, *Economy and Society: an outline of interpretive sociology, vol. II* (New York, Bedminster Press, 1968) 655-8.

73 *Value*-rational action is a type of goal-oriented action different from the purposive (*zweckrational*) one. Unlike the instrumental rationality of purposive-rational action, people pursue values 'for their own sake' and irrespective of whether they mean any external success. For the role of a purposive-rational or instrumental orientation to utility satisfaction and an evaluative action-orientation in Weber's theory, see, for instance, L.A. Scaff, *Fleeing the Iron Cage: Culture, Politics, and Modernity in the Thought of Max Weber* (Berkeley, Cal., University of California Press, 1989) 32-3.

it creates the difference of legal expertise, the moral conflict between law and justice and the political commitment of socially responsive legal reforms.[74]

The modern legal system accommodates both formal and substantive justice and thus regulates constant tensions arising from differences between calculable purposive ends and substantive value/belief commitments. Formal rationality and justice refer to the calculability of means and procedures while substantive rationality and justice refer to values as an end of social action. At the same time, the need for effective legal regulation is gradually transformed into the belief that legality is a social value, irrespective of its effects. Formal justice is transformed from a means to an end of social regulation and becomes a social value itself. Legal legitimacy therefore emerges as cultural sedimentation of law's formal rationality.[75]

The modern legal system also incorporates and directly symbolizes other substantive values which are treated as legitimate because they are recognized as absolutely binding and valid. These values are primarily legitimized by their substantive rationality and not formal legality. The legal system only reinforces and symbolizes these substantive values and their social validity.[76] The symbolic rationality of the constitution and any legal document or decision therefore draws on substantive rational legitimacy and expresses the moral authority of a political collectivity over individuals.[77] However, this claim has validity only within the moral system and does not affect individual or collective aspirations facilitated by the legal system and its formal 'legal/illegal' code which is guarded by the same constitution. Whenever the symbolic rationality of a constitution determines the character of social communication, it is a sign that communication has shifted to the moral system of society. The moral system uses the legal system and makes a constitution part of its internal code which defines what is good and bad for a collectivity.

The morality of a constitution means that it preserves the integrity and solidarity of a polity and presents this preservation as itself a value.[78] In the moral sense, constitutions codify good and bad political and legal decisions. They are immediate *expressions* of a political society and therefore communicate and codify its *identity*. Constitutions are acts of expressive symbolization of collective needs, sacred or profane, the Old Testament or Lincoln's Gettysburg address.[79] In this expressive manner, Montesquieu compared the British constitution with the work of Homer and pointed to its lessons for other nations by calling it the mirror of political liberty.[80] The constitution is a point at which a rule or an institutional design can achieve symbolic status, such as the First Amendment of the Bill of Rights in the United States of

74 For the importance of the formal/substantive law distinction, see, for instance, J. Freund, *The Sociology of Max Weber* (Harmondsworth, Penguin, 1968) 254-6.

75 See Weber, op. cit., n. 72, at 215-23.

76 id., 815-6. Weber analysed the process in the context of the substantive rationalization of sacred law.

77 For these Durkheimian elements in substantive rational legitimacy see, for instance, E. Durkheim, *Sociology and Philosophy* (London, Cohen & West, 1953) 73.

78 T. Parsons, *The Social System* (London, Routledge, 1951) 97.

79 For the possibility of a text becoming an expressive symbol, see id., 411.

80 C. Montesquieu, *The Spirit of the Laws* (Cambridge, Cambridge University Press, 1989).

America or the Crown office in the United Kingdom. This status was echoed, for instance, when Edmund Burke compared the English constitution with the classical art of Virgil and the immortal Renaissance works of Raphael and Michelangelo.[81] The constitution was thus linked to the art of government and the conditions of a just political society. Similarly, Dicey considered the English constitution an ideal and 'a sacred mystery of statesmanship'.[82]

In order to operate as part of the moral system of society, constitutions – these immediate expressive symbols and sources of cultural identity – further have to evolve into a set of moral *dogmas* which establishes belief systems and value orientations. Primary expressive symbolism is adjusted to mundane social reality and routinized by members of a collectivity. The symbolic power of constitutions cannot be only expressive: it has to become evaluative.[83] Expressive cultural symbols have to be manipulated and synthesized by moral judgments and converted into value-orientation patterns. Constitutions subsequently become rigorously consistent value-systems.

This transformation of expressive symbolism into its evaluative form is part of the process of the differentiation of morality and culture and the formation of morality's code distinguishing between good and bad. Morality evolves from the domain of culture by manipulating the cultural symbols and using the effects of cultural sedimentation while still drawing on two distinct tendencies in modern culture: the tendency to become dogma and the concomitant tendency to consider any dogma as a problem in itself. The primary cultural need of society's self-expression through the medium of a legal text is contained in the codified system of values and constitutive moral principles. *The moral code of a constitution draws on the expressive symbolism of culture and transforms it into an evaluative symbolism and dogma of morality.*[84] This process of transformation has to be subsequently facilitated by legal norms and procedures because of the insufficient referential power and communicative looseness of morality in contemporary societies. At the level of constitution-making, the legal system helps morality to differentiate itself from the domain of culture and transform itself from a collection of transcendental ideals into a set of immanent normative structures.

A constitution, therefore, cannot be understood as a mere instrument for the circulation of political power or self-reference to the legal system: it also has to be analysed as an object of culture and tradition. It is both regulatory and symbolic, a useful tool of social control and a source of 'eternal truths' for a polity. Pragmatic legal tools and concepts, such as 'trust' or 'public work' are symbolized,[85] and symbols have the power to determine legal policies and suppress different ideologies and their symbolic universe. A constitutional pattern therefore differentiates between the sphere of effective legal rules regulating social action and the sphere of cultural

---

81 E. Burke, *Further Reflections on the Revolution in France* (Indianapolis, Liberty Fund, 1992) 199.

82 A.V. Dicey, op. cit., n. 6, at 2.

83 Parsons, op. cit., n. 78, at 401-3.

84 For the concept of 'evaluative symbolism', see Parsons, op. cit., n. 78, at 385.

85 See T. Arnold, op. cit., n. 15, at 110.

symbolism following the moral code of what is 'good' and 'bad' for a political society.

However, morality does not have a central position in modern society which would be guaranteed by its overarching integrative power. The moral code of 'good/bad' is not an ultimate source of validity unconditionally applicable to other domains of social life, such as art, economy, technology, politics, law, etc. Morality cannot integrate society through a 'supercode'[86] and functions only as one code among those of other social systems. Nevertheless, moral symbolic rationality semantically builds on the 'transcendental ideals', 'essentials' and 'moral foundations' of society. In this sense, morality is close to an ontological metaphysics which assumes a centrality of social meaning and ultimately transcendental validity – something ruled out by the very fact of the functional differentiation of modern society in which all meaning has to be treated as socially constructed and therefore, from the temporal perspective, provisional.

Moral communication therefore has to be treated as a specific expression of the image of the totality of society through coding the moral integrity and identity formulated by the symbolic language and evaluative statements which define the difference of identity/alterity, respectively 'us/them'. This operation, like any other social operation, requires time and the specification of what used to be considered an identity before its current definition. The moral codifications of collective identity can consequently be only temporary because the moral system, like other social systems, can use social meaning only temporarily before new distinctions communicated within the system constitute new identities.

The process of cultural sedimentation highlights the obvious fact that all symbols, including those accommodated and expressed by constitutions, are inseparable from social time and their temporal dimension profoundly affects the social transformation of cultural symbols into moral evaluations. Constitutional and legal symbolism and identity-building, therefore, are both subject to the effects of history and part of the present, future-oriented manipulation of history.

The Impossibility of 'Pure' Law, Morality and Politics

Constitution-making and its outcomes are an asymmetric interplay of moral, political and legal codes and communication. It is impossible to reduce constitutions to 'pure' goodness, governmental actions or legality. Constitutions, rather, connect the moral, political and legal systems by facilitating the social communication which keeps these systems functionally differentiated and supplementing each other at the same time.

The legal symbolism intrinsic to constitutions and other legal acts therefore has to be analysed as a specific reflection of moral communication facilitated by the system of positive law which can only specifically respond to the general issues of the collective identity and integrity of cultural symbols and moral values. Acts of

86 N. Luhmann, 'Identity-What or How?' in *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford, Cal., Stanford University Press, 2002) 113-27, at 124.

constitution-making, legislation or judicial decision-making provide a framework for the social differentiation of morality and its elaboration of culture and identity by internalizing the symbolic rationality of law.

In this sense, legal operations accommodate the process of morality-making and rich communication between morality and culture without any hierarchical points of reference. Constitutional documents contain elements of expressive symbolism because they refer to the ideality of a political society. At the same time, constitutions separate the sphere of politics and morality from the legal system: constitutions cannot operate as a point of ultimate social integration and *more geometrico* of modern society. They cannot provide the ethical notion of truth with political authority. They connect the systems of morality, politics and law only by keeping them functionally differentiated.

Different social systems 'objectify' their own interpretations of the constitution, corresponding to their internal communication. However, constitutional synthesis by selection also means that there is always an external supplement to each of the respective systems. Approaching the constitution from the legal perspective will reveal its political and moral meaning and vice versa. Every interpretation and contextualization initiates and reintroduces elements originally ignored.

Constitutions are semantically rich and powerful texts which are neither a mere symbol of government nor a factual expression of pure normativity as suggested by adherents of the pure theory of law and legal normativism. They are not a merely symbolic ceremony disguising the political power operations which condition social behaviour and convert ideological principles into the sacred fundamentals of polity. They are not just a story of government and ideological cover-up. Although it is a well-established social fact that *auctoritas, non veritas facit legem* and that moral truths cannot be the only source of legitimate political authority, it is also true that laws are an insufficient condition of political legitimacy and are supplemented by the moral symbolism of truth and justice. Constitutions therefore operate as a connection between the moral, political and legal systems which effectively rules out any hierarchy between them.

Chapter 2

The Symbolic Evolution of Political Identity from the Spirit of the Laws

The symbolic rationality of law specifies what is good and bad and makes legality an expression of the collective identity of a polity. The legal symbolic communication of morality involves transcendental ideals which, as analysed in the first chapter, are 'supra-temporal' because they constitute the image of ideal origins of society and its laws.[1] From a moral point of view, these ideals operate as the ultimate sources of the system of positive law which have the synthetic power to describe the general course of history and the future of society.

The concept of *the spirit of the laws* has precisely this power to symbolize the transcendental origins and unity of the systems of positive law and politics. Although the concept is more typical of moral philosophical speculation and the metaphysics of social theory, it is also common in recent jurisprudence and analytical theory. In the ontological analysis of positive law, which looks for common ground and general principles behind existing legal systems, the spirit of a particular system of positive law is what makes the system a coherent, logical and unified part of social reality.[2] Because of its status as the origin of the legal system, the spirit of the laws is perceived as a set of ultimate normative sources of positive laws. The spirit of the laws is taken as a symbol of the moral unity and collective identity of society which refers to the moral need for a reservoir of ideal patterns for positive law.[3] It operates as both an internal and external guardian of the laws' ideality and unity which makes it possible to morally evaluate the legal system in general.

The concept shows that the symbolic rationality of law reflects the first function of culture stretching to the domain of morality: the search for unity and general meaning in all human artefacts. The spirit of the laws is a specific speculative and synthesizing concept stretching beyond the temporal horizon of a particular society.

---

1 See E. Husserl, 'Philosophy and the Crisis of European Man' in *Phenomonology and the Crisis of Philosophy* (New York, Harper and Row, 1965) 149-92, at 160.

2 For a typical example of twentieth-century legal realism and sociological jurisprudence, see especially R. Pound, *The Spirit of the Common Law* (Boston, Beacon Press, 1963); for recent jurisprudential uses of the concept of the spirit of the laws and legal system, see, for instance, A.W. Fraser, *Spirit of the Laws: republicanism and the unfinished project of modernity* (Toronto, University of Toronto Press, 1990), B.G. Weiss, *The Spirit of Islamic Law* (Athens, University of Georgia Press, 1998), and G.S. Grossman (ed.), *The Spirit of American Law* (Boulder, Co., Westview Press, 2000).

3 One of the most complex examples of this blend of moral philosophical speculation and social theoretical approaches to law is O. von Gierke's *Natural Law and the Theory of Society: 1500 to 1800* (Cambridge, Cambridge University Press, 1958).

It shows that there is a genuinely symbolic mode of communication about the legal system which refers to the transcendental ethics and its striving for perfection in individual life and society.

In this chapter, I argue that the spirit of the laws is a symbol reflecting the ontological status and transcendental ideals of the system of positive law. I pursue a genealogical analysis to show historical links between the romantic philosophy of the spirit of the nation, which subsumed Montesquieu's general spirit of the laws under the concept of ethnic culture, and recent politics of cultural and ethnic identity. I continue by criticizing various attempts at legalizing ethnic collective identities and contrast these attempts with the constitutional proceduralization of democratic identity. I do not follow the logic of moral and political philosophy that simply highlights the virtues of *demos* and the superiority of civil culture against the vices of *ethnos* and the regressive nature of ethnic politics of identity. Instead, I argue that the civil democratic concept of political identity is part of the more general process of social differentiation: it can be converted to generalized democratic procedures and thus dismantle the ethical totalitarian claims of culture supported by some projects of politics of identity. Furthermore, this differentiation of politics and culture also makes it impossible to transform the civil identity of *demos* into the ultimately binding and enforceable politics of cultural identity. I therefore conclude by saying that no culture can become a codifying pattern for the political subject of the people either as *demos* or *ethnos* in functionally differentiated modern society. In this society, the spirit of the laws is a powerful symbol creating 'information noise' in legal, political and moral communication which, nevertheless, does not determine the ultimate 'true' origins of positive laws and the sources of their validity.

The Spirit of the Laws and Collective Identity

In principle, the concept of the spirit of the laws has two possible meanings: a) it signifies a general regime of legal interpretation which is intrinsic to the legal system; b) it has 'absolute meaning' in the sense that it claims to determine the ontological status of positive law. The first meaning indicates merely self-reference to the system of positive law and stabilizes legal decisions and interpretation by referring to the specific semantic limits of the positive laws. In this context, the concept of the spirit of the laws represents the systemic closure of the legal system. On the other hand, the second meaning implies external moral reflection on the legal system which standardizes the collective identity and moral unity of a polity and makes them open to political manipulation and power struggles. The spirit of the laws refers to the transcendental 'sources of law' and 'origins of law'. The central focus of jurisprudence then is to throw a 'little light on the absolute origin of the law'.[4]

The two meanings are structurally intertwined: moral ideals are internalized in legal arguments, and the intrinsic characteristics of law such as 'predictability', 'impartiality' and 'calculability' achieve the status of moral ideals. Rules and

4 H. Maine, *Early Law and Custom* (New York, Holt and Comp., 1883) 26.

principles facilitating the unity of the legal system and its operative closure are understood as the internal morality of law, applicable outside the legal domain and corresponding to human nature in general.[5] The specific morality of law, the primary function of which is to maintain the unity and operability of the system of positive law, may be generalized and applied to other social domains as the ethics of deference.[6] Obedience to laws, and the very fact that political societies are bound by the law's power, are considered a virtue which, for people today, has the same moral importance as the civil ability to contest the right of law – the right of the legislator to make laws.[7]

Legality can become a moral symbol. Similarly, the moral distinctions of good and bad often find their way into legislation and judicial decision-making. Unlike the self-referential interpretive use of the spirit of the laws, the external absolute reference to the spirit of the laws originally has moral meaning which is subsequently internalized by both the systems of law and politics. The spirit of the laws becomes a symbol of the timeless present of transcendental moral ideals. The collective identity of political society therefore can be constituted 'out of time' and against the temporal walls of the past and future. It can recall the spirit of the laws as its 'true' ideal origin and ultimate source of validity, incorporated into the system of positive laws.

Collective identity is closely tied with evaluations of what is good and bad, and often gets described as 'essential', 'fundamental' and 'central'. However, it should be emphasized that the validity of these seemingly absolute descriptions is restricted to moral communication. They are merely a *partial* reflection of the *totality* of society. Furthermore, the transcendental moral constitution of identity is internalized by the normative structure of temporal moral evaluations which necessarily constitute the 'us/them' difference. According to the anthropological truism borrowed from linguistics, identity is inseparable from alterity. The concept of 'us' is governed by our relationship with the others – 'them'. Social communication between 'us' and 'them' determines our identity. The formation and identity of social groups, such as ethnic and political nations, is based on collective imagination, an emotional quest for belonging,and the active pursuit of *we*-images and *we*-feelings.[8]

Nations are collectively imagined as social entities and their members have to feel passionate about belonging to them. National identities are not essences and do not have primordial origin. They are constructed, have to start somewhere and are subject to change by human action and manipulation. The formation of this collective identity is radicalized in modern democratic states built on the notion of one nation

5 See, especially, L.L. Fuller, *Morality of Law* (New Haven, Yale University Press, 2nd rev. edn., 1969).

6 P. Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge, Cambridge University Press, 2002).

7 M. Serres, *The Natural Contract* (Ann Arbor, University of Michigan Press, 1995) 60.

8 For the role of imagination in the nation formation, see B. Anderson, *Imagined Communities* (London, Verso, 1983); for emotional aspects of nationalist movements, see T. J. Scheff, *Bloody Revenge: Emotions, Nationalism, War* (Boulder, Co., Westview Press, 1994); for nation-building and we-images, see R. Bendix, *Nation-Building and Citizenship* (Garden City, NY, Doubleday, 1969).

and its general political will. Jean Jacques Rousseau's dilemma of how to make the people speak unanimously as a political nation and establish political procedures for the best possible representation of the people becomes a question of identity: who is the political Subject of the people imagined against the background of social heterogeneity, political plurality and reality of multitude? What are the consequences of the view that being part of a political minority means misunderstanding the meaning of the general will of the people?[9]

The 'us/them' difference is, indeed, used in democratic political conflicts and power struggles. The concept of identity is internalized by the political system. The legal system plays an important role in this politicization of identity when it makes the spirit of the laws subject to constitution-making, legislation and judicial decision-making. As regards the spirit of the laws, the system of positive law operates in two different ways and therefore has a double effect: *it makes the transcendental moral ideals of the spirit part of its internal normative structure; however, this 'legal codification of morality' happens only as a temporary and definite process of the immanent legal enactment.* The spirit of the laws incorporating the ideally constructed collective identity becomes the spirit of the positive laws, a definite political identity which is different from the identities of other political societies.

In functionally differentiated societies, moral ideals and collective identities are communicated both inside and outside the political and legal systems. The complex process of moral idealization, legalization and politicization of the spirit of the laws and its role in the timeless symbolization of collective identity therefore has to be examined as another communicative coupling between the systems of morality, law and politics. Furthermore, systemic analysis should be preceded by genealogical analysis of the spirit of the laws as a powerful and transformative concept of political and legal philosophy and social theory.

The Spiritualization of the Laws: A Historical Excursus

The duality of spirit and letter is an archetype of philosophical and theological knowledge. The image of the force of written language taking over oral traditions, making them durable and published in texts, plays an important role in modern culture's historical and transcendental self-reflection, as if the birth of thinking were marked by the degradation of orally transmitted and shared wisdom, the power of the letter consigning the origins of human knowledge to oblivion. According to this image, the role of spirituality is to oppose the overwhelming force of textuality and its formalistic reduction of thinking. The authentic spirit has to reassert itself against its textual form and thus be 'redeemed through the very gesture of overcoming/renouncing its particular historical shape'.[10] The authority of a text depends on its spirit. However, the spirit is permanently threatened to be obliterated by its textual expression. In this intellectual tradition, the spirit eventually has to prevail over

9 J.J. Rousseau, The Social Contract and other later political writings (Cambridge, Cambridge University Press, 1997) 124.

10 S. Žižek, *Did Somebody Say Totalitarianism? Five Interventions in the (Mis)use of a Notion* (London, Verso, 2001) 154.

the formalistic universe of the letter.[11] It reconciles contradictions and unifies all moments in one supra-temporal totality. The unifying power of the spirit determines the true source of the letter of the laws and thus guarantees their authority.

Natural Origins: Order and Reason

For the ancient Greeks, philosophy means a return to the origins of being and the struggle against their oblivion by the mundane.[12] Ancient calls for justice are calls for defining the nature of laws as their transcendental origins. The modern search for the spirit of the laws is echoed in Callicles's view that strong *physis* will eventually overcome weak *nomoi* including all conventional morality. Might is right, what is more powerful is ultimately better. In Plato's Gorgias, Callicles makes a distinction between natural and unnatural laws blaming the latter for enslaving the forces of nature and subjecting the strong few to the weak many of the city. The law of nature is the law of masters who must break the chains imposed on them by slaves. According to Callicles:

> nature herself makes it plain that it is right for the better to have the advantage over the worse, the more able over the less. … these men act in accordance with the true nature of right, yes and, by heaven, according to nature's own law, though not perhaps by the law we frame.[13]

The Sophist criterion of the success of the stronger and the rule of the strongest represents the first powerful concept of law originating in nature (natural law) which is unrelated to the theological notion of the justice and rightness of laws. Laws are not just conventions. Man as a supreme creator of laws has to follow the erupting law of nature in legislating the laws of a polity. According to Hippias, conventions should be replaced by nature as the origin of the laws and the civil life because '[B]y nature like is kin to like, but custom, the tyrant of mankind, does much violence to nature.'[14] The law of nature is closely tied to chance and its unlimited creative force.[15] According to Sophist wisdom, nature's force is to be the origin of human laws.

This wisdom is contested by Plato who denounces the functionalist idea that a good lawgiver drafts laws for the purpose of war and success in it. Radically departing from the Sophist functionalist model of force as the first and ultimate origin of laws, Plato elaborates a different concept of nature and claims that the natural order in politics is the rule of laws freely accepted by all and not enforced by violence. According to him, the 'unforced rule of law over willing subjects'

---

11 W. Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt, Suhrkamp, 1996) 60.

12 See E. Cassirer, *The Philosophy of Symbolic Forms, Vol. 1.* (New Haven, Yale University Press, 1953) 89-90.

13 Plato, 'Gorgias', in *The Collected Dialogues of Plato* (eds. E. Hamilton and H. Cairns, New Jersey, Princeton University Press, 1961) 229-307, at 266 (483d,e).

14 Plato, 'Protagoras', id., 308-52, at 331 (337d).

15 Plato, 'Laws', id., 1225-516, at 1444-5 (889).

should be called 'nature's own ordinance'.[16] The first job of philosophy is to define the conditions whereby citizens will freely accept and recognize laws. According to Plato, a perfect citizen in a naturally ordered politics is governed by the order of justice as the first political good. Justice is reasonable; it is not the will of the powerful forcibly imposed on a polity in the natural struggle of stronger against weaker citizens.

Like the Sophist teachings, Plato's philosophical approach is teleological and functionalist.[17] However, the *telos* of the laws is not political success and the enforced growth of political power. Plato replaces the telos based on the force of nature with a model of justice as *arête*, the goodness of laws. Good laws are laws establishing the balance and stability of a polity. In Plato's philosophy, power is self-control and discipline, rather than the expansion, by empowered individuals, of their political control of the world.

The legal rules must respect the call of justice as the harmony, balance and order of goodness and happiness. In his polemic against Callicles, Plato stated that the world of justice was that of order and that:

> the heavens and the earth, gods and men, are bound together by fellowship and friendship, and order and temperance and justice, and for this reason they call the sum of things the 'ordered' universe, my friend, not the world of disorder and riot.[18]

Instead of self-interest and unbound human behaviour, the human soul ought to be governed by geometry because the good is hidden in order rather than chaos. What is natural must originate in the goodness and order of human nature.[19] Because order is the good, the first political imperative is to subject the city to the power of laws and not men.[20] It is the philosophers' job to supply the wisdom of reason to the lawgiver so that, like our souls, our polity can be guided by justice and reason as the ultimate good. Lawgivers and philosophers are physicians[21] who impose good judgement on our souls and polity and thus unite the laws with their ideal origins.

The Spiritualization of Reason: Hegel's Concept of Law

The ancient distinction between the power of man and the power of reason as the good has become the first ontological condition of modern thinking about laws and

16 Compare id., at 1285 (690c).

17 For further analysis of Plato's functionalism, see G. Santas, *Goodness and Justice: Plato, Aristotle, and the Moderns* (Oxford, Blackwell Publishing, 2002). This ancient functionalism is also typical, for instance, of Aristotle's *Politics* which opens by the following definition of the state: '[E]very state is a community of some kind, and every community is established with a view to some good; for everyone always acts in order to obtain that which they think good. …'. See Aristotle, *Politics* (Cambridge, Cambridge University Press, 1989) 1.

18 Plato, 'Gorgias' in op. cit., n. 13, 229-307, at 290 (508a).

19 Plato, 'Protagoras', id., 308-52, at 349 (358d).

20 Plato, 'Letters', id., 1560-606, at 1583 (Letter VII, 334c).

21 Plato, 'Laws', id., 1225-516, at 1279 (684c).

the spirit as their true origin and, therefore, ultimate source. The distinction between the human and the rational origins of laws shows that legitimacy of law is facilitated by the law's environment – by god(s) and nature which may be defined either as the chaotic origin of laws, dominated by the most powerful, or the order of reason behind all human laws.

External references to the internal normativity of positive law are typical of the disputes between formal legality and an ethics of responsibility which is irreducible to the logic of rules. They are also echoed in the incommensurability of human and divine laws and conflicts between commands executed by a polity and duties imposed by our communal bonds and traditions of kinship. The irreconcilability of transcendental and immanent origins of laws and the incommensurability of different transcendental origins of laws find their early and most powerful expression in Sophocles's *Antigone*. Unlike the subject of many popular and clichéd interpretations, Creon is not an inhuman tyrant who would impose his arbitrary will by the force of law against the ethical imperatives of divine laws. Creon represents the political will of a community and the politically legitimate immanent rules of human laws backed by the transcendental reason of the State. Antigone represents the opposite, god-imposed duty to bury her brother's body. Here, the tragedy is that both sides find legitimacy for their action in the incommensurable origins of the laws.[22] While Creon's origins are those of the rational order of a polity, Antigone submits to the ultimate, divine order of family responsibilities, ungrounded in reason, which demands that she should bury Polyneices's body. She demonstrates unconditional obedience to the absolute order which disrupts the existing order of human laws and therefore effectively excludes herself from the polis and its symbolism.[23]

In one of the most persuasive modern interpretations of the Greek tragedy, Hegel highlights the complexity of the problem of the laws' origins as regards obedience to them and the moral legitimation they confer:

> If I inquire after their origin and confine them to the point whence they arose, then I have transcended them; for now it is I who am the universal, and *they* are the conditioned and limited. If they are supposed to be validated by *my* insight, then I have already denied their unshakeable, intrinsic being, and regard them as something which, for me, is perhaps true, but also is perhaps not true. Ethical disposition consists just in sticking steadfastly to what is right, and abstaining from all attempts to move or shake it, or derive it.[24]

From Hegel's perspective, obedience to divine laws has to be immanently questioned so that they may be constituted as the reason's commands. However, the immanent laws of a polity must be subjected to the same test; otherwise, their status is that of mere 'tyrannical insolence'.[25]

---

22 See, for instance, G. Steiner, *Antigones: The Antigone myth in Western literature, art and thought* (Oxford, Oxford University Press, 1984).

23 S. Žižek, *Did Somebody Say Totalitarianism? Five Intervenions in the (Mis)use of a Notion* (London, Verso, 2001) 163.

24 G.W.F. Hegel, *Phenomenology of Spirit* (Oxford, Clarendon Press, 1977) 261-2.

25 id., 260.

In modern moral, political and legal philosophy, the problem of origins of the laws consequently becomes inseparable from their temporality. Questioning the temporal nature of the laws means questioning their status as absolute commands. Hegel perceived the question of the law's origins and sources as part of the absolute spirit's dynamic which comes to its ultimate point in the reason's knowledge of the concrete world. The absolute spirit guarantees that the immanent laws of a specific polity will eventually be synthesized with its ethical commands.[26]

Hegel's call for temporalization of the laws has an ultimate goal of constituting the absolute spirit in thinking. Divine and human laws, which are originally undermined by the question of their origins, finally end up embraced and ultimately justified by the absolute spirit. Unlike the eternal natural laws, the spirit of the laws is reason itself in its concrete form and therefore inseparable from its temporality. According to this view, the spirit of the laws is *the totalizing force unifying and embracing the laws' reality.* The absolute spirit is an ultimate concept embracing the contradictions, differences, and conflicts of the concrete world. The spirit understands itself from itself ('*sich in sich*') and therefore eliminates all logical contradictions emerging at the conceptual level and in speculative abstract thinking.

The absolute spirit is a theological concept which introduces unity where there are, in fact, only structural and conceptual differences and differentiations.[27] It operates as a symbol of unity which stands above the factual world of differences.[28] It has the total power to absorb everything and thus negate the concept of the 'outside'. Contained by the spirit, reality is all inside and does not have an environment. The spirit as unity accumulates all temporal moments because it does not forget and its memory is absolute. It disposes of the ideal concept of time. In the absolute spirit, there is no difference between past, present and future. The question of the origins and sources of laws is eliminated because time is programmed as the *progress* of the spirit towards itself in the concrete form of the laws of a political community – or State. The State is the absolute form and its evolution and laws are merely realizations of the laws of historical progress.

The rationality of the absolute spirit is part of the factual world because the rational is identical with actual reality. The familiar statement that '[W]hat is rational is actual and what is actual is rational'[29] synthesizes normativity and facticity, essence and existence. The absolute spirit is not revealed in some metaphysical form of natural law; it is immanent in the system of positive law. Explorations of the spirit of the laws therefore must proceed as explorations of the positive laws.

Hegel synthesizes the immanent and transcendental perspectives in the concept of the ultimate law, manifested in the universal world spirit as the positive will.[30]

---

26 G.W.F. Hegel, *Lecture on the Philosophy of Religion, volume II: determinate religion* (Berkeley, University of California Press, 1987) 237.

27 N. Luhmann, *Die Gesellschaft der Gesellschaft, Erster Teilband* (Frankfurt, Suhrkamp, 1998) 364-5, at 423.

28 J. Hypollite, *Genesis and Structure of Hegel's Phenomenology of Spirit* (Evanson, Northwestern University Press, 1974).

29 G.W.F. Hegel, *Hegel's Philosophy of Right* (Oxford, Oxford University Press, 1967) 10; for the same reference, see also ch. I, fn. 26.

30 id., 36.

The laws are expressions of the political will and, as such, differ from each other but there is a general criterion of law, which is the origin of all duties in man's thinking, answering the question of what the laws 'ought to' be like.

The Spirit of the Laws and the Concept of Culture

According to Hegel, Charles Montesquieu was the first to recognize the true philosophical position when he demanded that legislation should be examined as a variable moment in the social totality.[31] By identifying reality with reason, the idea of law could be explored using positivistic methods and philosophical speculation at the same time. Hegel's notion of the spirit has three different levels: individual wisdom, the social structure and the world's transcendence.[32] The spirit therefore manifests itself in the collective life, social structures and history of a concrete nation. Different social groups may constitute different forms of the collective spirit which Hegel, drawing on Montesquieu's ideas regarding the spirit of political societies and their laws, described as *Volksgeist* (the spirit of the nation).[33] However, Montesquieu would never draw such speculative conclusions from his study of the spirit of the laws.

Montesquieu indeed assumes that there are natural laws of universally valid reason (having transcendental origins in God's will) which are intrinsic to human nature – 'antecedent to society' – and which therefore should be followed by the laws of all nations.[34] In the second chapter of *The Spirit of the Laws*, Montesquieu specifies natural laws which transcend social conditions, such as the right to preserve one's life and live in peace, which have their origins in the existence of individual human beings and not in the existence of society.[35] The validity of these laws derives from the idea of God as a transcendental legislator. Nevertheless, it does not mean that the laws of all nations ought to be the same. The laws of nature have to be distinguished from the diverse laws originating in social and political conditions which comprise political laws, civil laws and all major social institutions. The first purpose of an examination of the spirit of the laws is then to describe the differences in the lives of political nations and the unique and untranslatable character of the laws of different nations.

According to Montesquieu, the rule of human reason can manifest itself in the real world only as the rule of variety and differences. The main intellectual task is to disclose mutual relations and connection between all the external influences

---

31 id., 16.

32 G.W.F. Hegel, *Lectures on the Philosophy of World History: Introduction* (Cambridge, Cambridge University Press, 1977) 47-53.

33 C. Mährlein, *Volksgeist und Recht: Hegels Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft (Epistemata)* (Wuerzburg, Koenigshausen & Neumann, 2000).

34 R. Aron, *Main Currents in Sociological Thought 1: Montesquieu, Comte, Marx, Tocqueville, The Sociologists and the Revolution of 1848* (Harmondsworth, Penguin Books, 1965) 54.

35 C. Montesquieu, *The Spirit of the Laws* (Cambridge, Cambridge University Press, 1989) 6-7.

which determine the final form of the laws of each nation.[36] The spirit of the laws is the result of mutual social influences that may have only relative validity because it is related to the life of specific nations and external conditions such as climate, geography and space. As Raymond Aron remarks, the general spirit of the laws is a product of the 'totality of physical, social, and moral causes … which enables us to understand what constitutes the originality and unity of a given collectivity'.[37]

The concept of the spirit of the laws is analogical to the modern concept of *culture* because it signifies specific forms of the life of a nation, its moral bonds, natural environment and persistence through history. The spirit is concrete and this is why different nations will always have different spirits of the laws. Instead of Hegel's universal world spirit unifying the laws of different political communities and their specific *Volksgeist* in the totality of reason, one witnesses an attempt to classify descriptions of the real state of the law of different nations. Montesquieu uses the spirit of the laws as 'the unifying principle of the social entity'[38] which makes the entity of a specific nation different from other nations. This is what makes *The Spirit of the Laws* a proto-sociological treatise and its author one of the founding fathers of modern sociology.

The spirit of the laws synthesizes descriptions of social diversity and factual differences in the life of different societies. Instead of a speculative attempt to express the total unity of the world, one can see a prototype of sociological nominalism in Montesquieu's thinking.[39] The general spirit of the laws signifies both the transcendental unity of a particular society and its specific life forms and differences when compared with other societies. The legislator should have corrective power over political society but the power must be exercised in accordance with the general spirit. If the legislator were to legislate against the spirit, he would be acting as a tyrant.[40] The general spirit accounts for the content of the laws commanded by the legislator.

According to Montesquieu, society exists only where there is government enacting a system of political laws. It is therefore the nature of the government that determines the spirit of the laws. Differences between specific legal systems are explicable as differences between the forms of government. At the same time, Montesquieu says: '[T]here is this difference between the nature of the government and its principle: its nature is that which makes it what it is, and its principle, that which makes it act'.[41] The government may be examined as both a factual form of social life and as a normatively organized and regulated political institution. The spirit of the laws therefore is irreducible to the immanent reality of the socially constructed world which is determined by its environment, its geography, climate, etc. It also refers to

36 id., 9.

37 Aron, op. cit., n. 34, at 46.

38 id., 21.

39 See, for instance, E. Durkheim, *Montesquieu and Rousseau: forerunners of sociology* (Chicago, University of Michigan Press, 1960) 57.

40 Compare N. Hampson, *Will & Circumstance: Montesquieu, Rousseau, and the French Revolution* (London: Duckworth, 1983) 21.

41 Montesquieu, op. cit., n. 35, at 21.

the transcendental normative principle of political institutionalization which, albeit socially variable, is structurally common to all types of political societies. In other words, there are no laws without the spirit!

The republican government is then unique because, unlike monarchy or despotic regimes, it cannot rely only on political violence and the mere force of the laws. It demands additional virtue to guide citizens to obey the laws voluntarily. If this virtue is missing, '[E]ach citizen is like a slave who has escaped from his master's house. What was a *maxim* is now called *severity*; what was a *rule* is now called *constraint*; what was *vigilance* is now called *fear*.'[42]

It turns out that the spiritual uniqueness in fact depends on the structural preconditions of the political regime. According to Montesquieu's interpretation, the republican form of government is both more fragile and stronger than other forms of government, because of the bond of mutual trust between those who govern and those who are being governed and voluntarily subject to the political power. Respect for the laws and the polity is necessary for their continued existence which means that the spirit of the laws of republican government depends on the behaviour and normative judgements of its citizens. Respect for the laws is not a matter of rational judgement; it depends on a political sentiment which is common to all and, in democratic regimes, takes the form of respect and love of equality.[43]

Citizens, as social agents, must vigorously defend and respect equality as a structural condition of democratic government so that its laws can be enforceable.[44] Montesquieu can thus be regarded the first modern theorist of the rule of law as a system which, apart from the institutional separation of powers and the distinction between private and public spheres, depends on the virtues of public accountability and trust between the governed citizens and those who are to govern them by the power of the laws.[45]

Montesquieu conceptualizes the spirit of the laws as a matter of social reality and does not translate the normative conditions of the existence of different forms of political government into the universal claims of the spirit of rational law-making. Montesquieu's strict separation of social reality and speculative claims successfully avoids the proto-romantic perspective of the 'deification of the factual' which became so typical of Hegel's later philosophical legacy and romantic thinking.

The Romantic Philosophy of *Volksgeist* and Historical Jurisprudence

Romantic philosophy identified normative judgements with rules and regularities analysed and extracted from the factual nature of social reality. It was, indeed, inspired, by Montesquieu's historical methodology and sense of the importance

42 id., 23.

43 id., 42-8.

44 For this view, see especially J. Shklar, *Montesquieu* (Oxford, Oxford University Press, 1987).

45 M. Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press, 1992) 150.

of historical particulars.[46] It was F.C. von Moser who first used Montesquieu's concept of the general spirit of the laws in the context of historical nationalism and reformulated the concept as a unique genius of the German people.[47] The general spirit of the laws was gradually replaced by the national spirit. The concept of human nature antecedent to the social and historical condition of human existence was obliterated by this romantic historicism and its call for national patriotism and a feeling of unique togetherness. According to the romantic visions, the external reality of this world shapes man and imposes commitments and obligations on him as a rational being.

The romantic ideology of the spirit of the nation – *Volksgeist* – emerged as a synthesis of normative speculation and the factual exploration of the actual life and history of nations. As Ernest Gellner remarked in his analysis of romanticism and the basis of nationalism:

> The new nationalisms enter into violent competition with each other, and the new standard and rallying cry is, above all, folk culture. This is the deep paradox of nationalism: it is a phenomenon of *Gesellschaft*, but it is obliged to use and invoke the imagery of *Gemeinschaft*. The moral sovereignty of ethnic culture is nationalism's central principle. It was the nationalists who really rammed home, persistently and to great effect, the vision of the closed community, final and sovereign.[48]

The romantic spirit was first persuasively presented by Herder in his 'Yet Another Philosophy of History Concerning the Development of Mankind'.[49] The positive laws were considered just another expression of the life and history of different nations and their spirits. The historical nature of the spirit means that it is expressed in folk tales, language and the daily experiences of peoples. According to Herder, modernity threatens to destroy the specific spirits of different nations and it therefore is necessary to preserve these national distinctions and protect them against modern social pressures and the tendency towards uniformity in social life. The first job of philosophy is to focus on the people, because it 'is supposed to belong to the people'.[50]

---

46 F. Meinecke, *Historism: the rise of a new historical outlook* (London, Routledge and Kegan, 1972).

47 F.C. von Moser, *Von dem Deutschen national-Geist* (1766).

48 E. Gellner, *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (Cambridge, Cambridge University Press, 1998) 29; for a complex view of nationalism and culture, see E. Gellner, *Nations and Nationalism* (Oxford, Blackwell, 1983) ch. V.

49 J.G. von Herder, 'Yet Another Philosophy of History Concerning the Development of Mankind' in *J.G.Herder on Social and Political Culture* (ed. and trans. by F.M. Barnard, Cambridge, Cambridge University Press, 1969). Herder, who is generally considered a father of the *Volksgeist* romantic ideology, paradoxically did not introduce the term and used its various expressions like *Nationalgeist* (in reference to von Moser), *Genius des Volkes*, and *Geist des Volkes*.

50 J.G. Herder, 'How Philosophy Can Become More Universal and Useful for the Benefit of the People' in *Philosophical Writings* (ed. and trans. by M.N. Forster, Cambridge, Cambridge University Press, 2002) 3-29, at 29.

Despite the immense role of Herder's romantic philosophy, it was in fact Hegel who firmly established the concept of *Volksgeist* in moral and political philosophy and social sciences.[51] Using this concept, Hegel was inspired by both Montesquieu and Herder and referred to the mores, laws and constitutions of a nation. The spirit of the nation is one of the manifestations of the *Weltgeist* (World Spirit). According to Hegel, the spirit of the world manifests itself in the spirits of different nations which thus represent only a segment, albeit a meaningful one, of the total history of the world.

Leaving aside philosophical speculation, Hegel's concept of *Volksgeist* as the totality of the historical and cultural accomplishments of a nation fundamentally affected the history of social and legal sciences.[52] In his famous opposition to A.F.J. Thibaut's proposals to introduce a codified civil law for all German states during the Napoleonic wars in the beginning of the nineteenth century, F.K. von Savigny used the 'deeply mystical idea'[53] of *Volksgeist.* Savigny argued that all legal codifications first of all have to reflect and recognize the genuine spirit, convictions, beliefs and common consciousness of the nation (*Volksbewusstsein*).[54] The codified law should *express* the nation's distinctive ethos which could be traced back in its history, mythology, religion, customs or folk tales. In comparison with the Enlightenment's legal rationalism, this was an entirely new scholarly enterprise according to which customs and popular faiths are the real powers behind the positive laws. The lawgiver's will ought to follow the spirit of the nation, expressing itself through the national culture. Law derives from the nation's specific character in the same manner as its language, mores, and folk tales. Legislation has to respect legal customs and traditions (*Gewohnheitsrecht*).

According to this view, one would expect the legislator to truly represent and reflect on the spirit of the nation and appropriate legislative activities to this ultimate origin of the laws. However, this task has to confront a general historical tendency for modern, rationally organized legal systems to become increasingly detached from custom and their roots in community life. Legal knowledge is organized and exercised by jurists instead of reflecting the popular wisdom of the nation. The spirit of the nation is hard to recognize in modern society: this is typical of the complex and differentiated legal system which demands expert legal knowledge and is detached from the 'common consciousness' of the nation.

Law therefore should be more historically reflective of the spirit of the nation. The romantic ethos of historical jurisprudence represented by von Savigny, Puchta or, later, von Gierke and Maine, therefore, established historical methods as the most

---

51 In this context, Hegel speaks about the Spirit self-alienated in the actual realm of culture; see G.W.F. Hegel, op. cit., n. 24, at 296-321.

52 Apart from the historical jurisprudence, it profoundly influenced comparative and social psychology of the nineteenth century in the form of *Völkerpsychologie*. See especially W. Wundt, *Elements of Folk Psychology: outlines of a psychological history of the development of mankind* (London, Allen and Unwin, 1916).

53 R. Cotterrell, *The Sociology of Law: an introduction* (London, Butterworths, 2nd edition, 1992) 21.

54 F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Legal Science* (New York, Arno Press, 1975) 27-8.

important tool of legal science. Contrary to Hegel's legal philosophy, the historical school shifted the theoretical focus from the state to the spontaneous evolution of customs and traditions of historical people. The content of existing law was to respect the characteristics and traditions of a particular community of people. Law, like language and other cultural systems, was considered to have grown organically through the history of a particular people, perceived as an *ethnos* – a community of shared language, traditions, customs, religion, territory and race or ethnicity. Romantics like Savigny were convinced that 'law is the totality of life' seen from a specific viewpoint.[55] According to the romantic ethos, the spirit of the ethnic nation must be verbally expressed in positive laws. The particular spirit of the *ethnos* is the spontaneous and quiet power operating behind the positive law in the course of the nation's history.

The Politics of Identity and Culture: A Critique of Communitarian Ethno-Fantasies

The romantic spiritualization of the nation ends up in the modern politicization of cultural identities and culture in general. Culture represents the shared values and symbols of a people as a homogeneous entity distinct from all other peoples and their values and symbols. Modern nationalism politically sanctifies and identifies with a culture.[56] Unlike earlier generations' worship of gods and deities, modern man worships culture in its totality. Politics is perceived as a form of a particular but omnipotent culture. Modern *ethno-nationalism* was born out of the romantic passion for the spirit of the nation – *Volksgeist*. The romantic study of collective life forms concluded that human beings as individuals were but creations of their nations, national cultures, and histories. Subverting Montesquieu's demand of respect and love of a polity by its citizens, adherents of the *Volksgeist* philosophy eventually demanded that one should 'love thy nation as thyself'!

The ideology of the spirit of the nation expressing itself through a culture gradually made the regulative idea of justice and the origins of law subject to the factual life of a specific nation and its history. Culture was to dominate politics and the spirit of the nation descending to the state was to preserve its own existence as well as that of the state and thus secure 'a reservoir of moral and psychological wealth, a wellspring of creative power for later generations'.[57] The sovereignty of critical reason was replaced by the factual diversity of the life of modern nations and their different histories. The universality typical of rational Enlightenment philosophy gradually disappeared as the ultimate value and was replaced by romantic particularisms. The idea of universal reason and law was gradually challenged by singularity of culture

---

55 N.S. Timasheff, *An Introduction to the Sociology of Law* (Westport, Greenwood Press, 1939, 1974 edn.) 343.

56 E. Gellner, *Culture, Identity, and Politics* (Cambridge, Cambridge University Press, 1987) 10.

57 F. Meinecke, *The Age of German Liberation, 1795-1815* (Berkeley, Cal., University of California Press, 1977) 3.

and prejudice.[58] The national became identified with the universal, and the irrational collective spirit of the nation with the iron law of the spirit of history.

Jurisprudential use of the concept of *Volksgeist* is an example of the totalizing expressive symbolism of law which is expected to recognize the nation's customs, adjudicate on them and finally codify the national spirit in statute books and political constitutions. Law is supposed to mirror the spirit of the nation. The nation uses the legal system to codify its spirit. *The legalization of ethnic collective identity* has an important political role because it turns the primarily cultural concept of identity into codified rules and policies.

The legal constitution of the nation is thus to represent the total political codification of the nation's culture and ethnic identity. The law's power to express and codify the world of culture and its traditions result in the attempt to legislate one generally binding collective identity for a political community. The domain of culture colonizes the legal system with pre-political forms of expressive symbolism. The legal codification of the ethnic identity of the nation also legalizes ethnic and cultural divisions and produces 'unhelpful rigidities' in local, national and international politics.[59]

New forms of identity politics 'increase centuries-old tensions between the universalistic principles ushered in by the American and French Revolutions and the particularities of nationality, ethnicity …'.[60] The first principle of the democratic rule of law, that a *demos* constitutes itself by creating the constitutional powers of a democratic State, is being stripped of its universalistic ethos. Unlike the Enlightenment's political myth of the democratic political body, the romantic concept of the legal constitution is based on the recognition of the unique characteristics of a particular *ethnos* and its culture. Ethnic conflicts feeding on differences of language, race, history or religion are thus recognized and facilitated by the system of positive law and the political force behind it. As Michael Kenny admits in his defence of the politics of identity: '[R]omantic emphases upon the unique character of certain kinds of belonging … are clearly visible in the politics of identity.'[61]

A political society which constructs its identity by defending and proclaiming past traditions and collective beliefs faces the danger of an authoritarian takeover, controlling first the state and then the whole of society. Conservative and progressive communitarian ethno-politics both demand 'complete harmony, within a given territory, between a form of social organization, cultural practices and a political power' and seek 'to create a total society'.[62] The speculative question of cultural

58 A. Finkielkraut, *The Defeat of the Mind* (New York, Columbia University Press, 1995) 10.

59 R. Dahrendorf, 'A Precarious Balance: Economic Opportunity, Civil Society, and Political Liberty' in A. Etzioni (ed.) *The Essential Communitarian Reader* (Oxford, Rowman & Littlefield Publishers, 1998) 73-94, at 92.

60 S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ, Princeton University Press, 2002) vii.

61 M. Kenny, *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference* (Cambridge, Polity Press, 2004) 23.

62 A. Touraine, *Can We Live Together?: Equality and Difference* (Cambridge, Polity Press, 2000) 163.

purity becomes politicized either in conservative segregationist calls for 'separate but equal' or radical misinterpretations of our multicultural reality which call for 'equal but separate' politics of identity as difference. Normative conclusions supporting collective ethnic rights make constitutional democracy and human rights the tools of the ethical and political collective self-understanding. They effectively demand that the realm of law should codify the cohabitation of communities and become 'an aggregate of community-oriented privileges.'[63]

Ethnic communitarianism is an ideological reinterpretation of culture which primarily answers the call for collective recognition of different ethnicities pursuing political empowerment. Communitarian ethno-ideologies and policies promise a return to a politics of lived cultural experience and institutions based on shared traditions and beliefs. However, communitarian 'retrospective utopias'[64] assume authoritarian power which could guarantee the political exclusion of 'cultural foreigners'. Communitarianism exploits cultures for political mobilization and seeks to control a community through political manipulation of cultural symbols.

Similarly, Manuel Castells's vision of ethnic resistance identities, which oppose various forms of domination in the globalized network society and transform themselves to project identities, thus transforming the overall social structure and contributing to civil society, has a number of flaws. The new primacy of identity politics[65] draws on criticisms of the power shift in global society and the destructive effects of its economy and politics on the structures of civil society. According to Castells, the disintegration of civil society makes ethnicity the major source of communal resistance and an emancipating force for the discriminated against and the excluded. Ethnic and cultural identities are perceived as forces revitalizing civil society virtues in the global age. Drawing on the power logic and the struggle for social justice, Castells believes that, despite risks of political violence, such identity politics on the part of dispossessed and marginalized communities would ultimately become emancipatory and result in the necessary political change of global society.

Ethnicity is romanticized as a force of political resistance against the disintegrative forces of global economics and international order. A hyper-modern analysis of the information age paradoxically builds on the pre-modern ideal of a community uncorrupted by power and able to channel its potential for disintegrative political violence against the dark forces of modern economics, politics and powerful technologies. Castells's theory thus represents an eclectic mixture of conservative romanticism and a radical resistance agenda in which emancipation politics is exclusively based on the notion of communal identities without primarily civil self-reflection.

---

63 Z. Bauman, *In Search of Politics* (Cambridge, Polity Press, 1999) 199.

64 Touraine, op. cit., n. 62, at 34.

65 M. Castells, *The Information Age: Economy, Society and Culture, vol. II (The Power of Identity)* (Oxford, Blackwell, 2004) 12.

Democratic Politics, Identity and Cultural Heterogeneity

According to persisting philosophical and political romanticism, the nation's identity, constituted by its historically unique spirit, should stabilize the modern legal system. Identity is to operate as a totalizing normative pattern for the laws and the source of their stability. At the same time, communitarian ideologies which have appeared in various politics of identity use the legal system as a tool of social stabilization and political manipulation of specific identities. The legal system is then expected both to respect identity and codify it.

The communitarian claim that human existence is constituted by culture[66] has serious political implications because there is no anthropologically and politically pure cultural domain. Collective identities are, rather, complex power relations constructed by those who control the collectivity and further strengthen their position by codifying the binding version of the collectivity's identity.[67] Identity politics is recognition politics which makes culture and history part of political hegemony.[68]

The constitutional identity distinction of *demos-ethnos* is a modern example of this political manipulation of identity. The civic/ethnic distinction of collective identity has a profound formative effect on national self-reflection and the political integration and disintegration of specific nations. The modern history of nationalism reveals the political risks of the legal and constitutional codification of pre-political ethnically-grounded identities of emerging democratic societies. Nationalisms have totalitarian potential[69] and the constitutional ethnic codification of the sovereign people or *ius sanguinis* may easily result in the degradation of general legislation and various forms of ethnic and national discrimination. The view of the nation as a mythical body of people of the same racial and historical origin is typical of fascist ideologies.[70] Although fascist totalitarianism could not be established without the monopoly of violence and bureaucratic administration of the modern state,[71] it also needed the organic and socially conservative legitimation by ethnicity.

Despite the political risks, it is impossible to eliminate the pre-political context of collective identity entirely from legislation or constitution-making. It is therefore important to examine how pre-political ethnic identities are manipulated at the level of constitutional rights legislation, and in the process of constituting the sovereign nation by an act of legal constitution-making. As Jürgen Habermas remarks, the tension between pre-political cultural bonds and civil loyalty to the democratic state

---

66 C. Taylor, *Philosophical Papers* (Cambridge, Cambridge University Press, 1985) 230.

67 J.-F. Bayart, *L`illusion identitaire* (Paris, Fayard, 1996).

68 C. Taylor, *Multiculturalism and the Politics of Recognition* (Princeton, Princeton University Press, 1992); see, also, C. Levi-Strauss, *Race and History* (Paris, UNESCO, 1952).

69 C. Calhoun, 'Nationalism and Civil Society: Democracy, Diversity and Self-Determination' in C. Calhoun (ed.) *Social Theory and the Politics of Identity* (Oxford, Blackwell, 1994) 304-35, at 326.

70 W. Connor, 'A Nation is a Nation is a State, is an Ethnic Group, is a …' (1978) 1 *Ethnic and Racial Studies* 379-88.

71 H. Kohn, *The Idea of Nationalism* (New York, Macmillan Press, 1945) 20.

'can be resolved on the condition that the constitutional principles of human rights and democracy give priority to a cosmopolitan understanding of the nation as a nation of citizens over an ethnocentric interpretation of the nation as a prepolitical entity'.[72] According to this view, the civil bonds facilitated by the liberal democratic rule of law are necessary to sustain a democratic polity and therefore have to be nurtured as protection against various forms of ethnic and cultural exclusion and chauvinism.

The first purpose of constitution-making and legislation, namely, the establishment of the liberal democratic rule of law enforcing generally applicable civil rights and liberties, has a strong symbolic effect on political society. It inspires a special form of political identification which stretches beyond the internal communication of law and politics and constitutes a specific system of attachment and solidarity. Apart from obedience to the laws, citizens are expected to emerge as a '*we*-entity' – a polity sharing the common system of political virtues and bonds usually and imprecisely described as *civil/civic culture* or *political culture* which stretches beyond the framework of the legal and political systems.[73]

Instead of pre-political bonds and feeling of collective belonging, the concept of democratic political culture signifies the indirect impact of politics on the system of culture and self-identification of individuals as citizens. The concept of political *demos* transgresses the constitutional context, 'serves as the source of identity, morals, emotions, and collective behaviours,' and thus becomes 'a socially specific *habitus*'.[74] Political culture arises from the laws and politics which makes citizens share a common political identity, mutual responsibility and the duty of civil participation.[75] The general principle of constituting the civil political *demos* therefore takes precedence over all pre-political cultural and historical entitlements of the *ethnos* living in the constitutional democratic state, based on the rule of law. The general spirit of the laws is determined by the virtues of civility and democratic political culture. This culture depends on political trust and therefore invokes *constitutional patriotism* as a way for citizens to identify with their democratic polity.

Liberal thinkers, including a number of liberal communitarians, acknowledge that ethnocentrism has to be rejected and general human rights affirmed. According to them, the political integrity of democratic societies needs a coherent conception of institutional morality which belongs to the larger whole of liberal community[76]

---

72 J. Habermas, 'The European Nation State' (1996) 9(2) *Ratio Juris* 125-37, at 131.

73 See, for instance, G.A. Almond and S. Verba, *The Civic Culture* (Princeton, Princeton University Press, 1963).

74 D. Schnapper, *Community of Citizens: On the Modern Idea of Nationality* (New Brunswick, N.J., Transaction Publishers, 1998) 85.

75 J. Waldron, 'Cultural Identity and Civic Responsibility' in W. Kymlicka and W. Norman (eds) *Citizenship in Diverse Societies* (Oxford, Oxford University Press, 2000) 155-74, at 155.

76 P. Selznick, *The Moral Commonwealth* (Berkeley, Cal., University of California Press, 1992) 323.

and focuses on civil society.[77] According to these moderate communitarian voices, political community needs to be established on the basis of civil virtues in order to be inclusive and democratic.[78] The culture of liberty in a democratic community takes precedence over the ethnocentric cultures of various communities. The civil tradition of constitutional patriotism has priority over ethnic traditions. Constitutional patriotism contains and channels different ethnic and other collective pride, identities and histories.

In liberal democratic society, the constitutional self-identification of the people is transformed to general *democratic procedures*. Creating a constitutional identity of the sovereign people as *demos* and its proceduralization effectively dismantles the totalitarian claims of culture. Instead of enforcing the *demos-ethnos* distinctions and guarding its culture, the political system of modern complex democracies operates as a generalized and socially inclusive system of power circulation, expressed in the 'government/opposition' code. Any preliminary cultural definition of who can qualify as government and opposition is eliminated by the general character of the political code.

Political and legal systems cannot enforce and codify the ultimate meaning of collective identity and thus eliminate its heterogeneity and instability. In the context of political philosophy, Seyla Benhabib also commented that conservative and progressive ethno-communitarians both:

> share faulty epistemic premises: (1) that cultures are clearly delineable wholes; (2) that cultures are congruent with population groups and that a noncontroversial description of the culture of a human group is possible; and (3) that even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a human group and more than one group that may possess the same cultural traits, this poses no important problems for politics or policy.[79]

The right to culture advocated by ethno-communitarians assumes that cultures are clearly detectable and legally definable essences which would predetermine political identity and rule out the competition between different cultural self-reflections. The right to culture would therefore necessarily result in the institutionalization of cultural hegemony, marginalization of some cultures and even legal discrimination by one culture against another (for instance, territorially established traditional cultures against the immigrant ones).

The hegemonic concept of identity and identity politics would draw 'the state into culture wars'.[80] Ethnic identity politics feeds on epistemologically flawed cultural essentialism and normativism, suppressing those elements within a culture which confront its existing dominant codes, traditions and practices. Criticizing the formalistic rule of law tradition, the holistic concept of political identity draws on

77 J.B. Elshtain, 'In Common Together: Unity, Divesity, and Civic Virtue' in *Toward a Global Civil Society*, ed. M. Walzer (Oxford, Berghahn Books, 1995) 77-97, at 80.

78 H. Tam, *Communitarianism: a new agenda for politics and citizenship* (London, MacMillan Press, 1998) 246-60.

79 S. Benhabib, op. cit., n. 60, at 4.

80 id., p. 1.

the perception of political society as culturally united community.[81] Culture and its agents would consequently have to be purged of all foreign elements and unity enforced against diversity. Translated into human rights discourse, ethno-nationalist fantasies and claims of 'the right to cultural membership' deny one of the basic rights – 'to say no to culture and its identity offers' and to subvert the norms, patterns and ideals of one's culture.[82]

The 'Noisy' Spirits of the Laws

Culture is the permanent communication of the same with the other and identity is its momentary and temporary outcome. It is only possible to communicate with other cultures if self-identity and knowledge of one's own culture is being established against the diversity and differences of other cultures.[83] Nevertheless, as Vincent Descombes remarked: '[D]ifference is necessary in order for identity to preserve itself.'[84] Unlike ethno-communitarian holistic claims of cultural homogeneity, modern culture is heterogeneous and constantly transforms when face-to-face with new experiences and their intellectual reflections.

Diversity is a basic element of the world and the world's unity is constructed against the preliminary background of cultural and temporal horizons.[85] Diverse cultural and social processes form collective identities. Identity can hardly be presented as unique and primordial in its nature. The provisional character of modern cultural self-identification rules out the ultimate political enforcement and totalizing legal ordering typical of nationalism which 'pretends that culture is *given* to the individual, nay, that it possesses him, in a kind of ideological *coup de foudre*'.[86]

Identity is primarily a cultural concept referring to individual and collective self-reflection and self-understanding that cannot be totalized by the legal, political and even moral communication. It is irreducible to the semantics of specific social systems of law and politics. Identity is a much more general and unstable concept than constitutionalism and the constitutional democratic state. Symbolically expressed, identity gets evaluated by the moral system only after its differentiation to the transcendental ideals and immanent normative patterns. The moral system consequently cannot establish its ultimate meaning as a moral dogma of evaluative symbolism that could also be legally binding and politically enforceable.

Identity keeps its cultural meaning as a meaningful description of individual and collective lives. Although identity is permanently contested and its provisional

81 C. Taylor, 'Cross-Purposes: The Liberal Communitarian Debate' in *Liberalism and the Moral Life*, ed. N.L. Rosenblum (Cambridge, Mass., Harvard University Press) 159-68.

82 Benhabib, op. cit., n. 60, at 66.

83 P. Ricoeur, 'La civilisation universelle et les cultures nationales', *Esprit* (Paris, October 1961).

84 V. Descombes, *Modern French Philosophy* (Cambridge, Cambridge University Press, 1980) 38.

85 W. Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt, Suhrkamp, 1996) 768, 913.

86 E. Gellner, op. cit. n. 56, at 16.

character used in political communication,[87] the cultural symbolism of identity exceeds the logic of political conflicts and their ideological background. No pre-political culture can consequently become a codifying pattern of the sovereign people in the form of either *demos* or *ethnos*.[88]

The difference between the spirit and the letter of the laws subsequently does not have the epistemological value of explaining the origins of law by external reference to transcendental reason, morality or cultural identity. It, rather, explains the functional differentiation of law, politics and morality. In this process, the spirit of the laws is communicated by different social systems and thus can be accessed only as different moral, legal and political *spirits* of the laws. It is impossible to rely further on Gödel's proof and use the spirit of the laws as an external position from which one could satisfactorily prove or disprove legal propositions.[89] The concept refers to the law as a cultural artefact and uses different modes of social communication to promote its cultural value (morality), integrative force (politics) and specific virtues of normativity (law).

The concept of the spirit of the laws creates important 'information noise' in the systems of morality, politics and law and its symbolic meaning is dealt with by different communication channels. The spirit of the laws makes the legal communication 'noisy' by making a direct semantic link to the systems of morality and politics. It makes the political communication 'noisy' by its symbolism which separates culture from the legal and political systems. Finally, it makes the moral communication 'noisy' by oscillating between transcendental ideals of ethics and immanent moral norms.

The concept has been internalized by legal positivist hermeneutics and methodology in various forms of value-based interpretation, socio-legal methods, legal principles, and human rights arguments. Furthermore, it can be used in the Montesquieu-like tradition as a set of external determinants of the laws and the extra-legal origins of the legal system. It also can be perceived as a transcendental source of positive law, a view typical of philosophical speculation. However, neither the immanent critique of positive law nor its transcendental speculative analysis can establish the ontologically supreme spirit of the legal system that could inform the politics of identity and secure the ethnic and cultural bonds of political society.

---

87 Kenny, op. cit., n. 61, at 101.

88 It is important to keep distinguishing 'pre-political culture' from 'political culture' discussed above in this chapter. Political culture is only a fragment of common culture emerging as a consequence of democratization (and therefore proceduralization) of the political system of modern society and its adoption of the rule of law and constitutionalism.

89 N. Luhmann, 'The Self-Reproduction of Law and Its Limits' in *Essays on Self-Reference* (New York, Columbia University Press, 1990) 227-45, at 238.

This page intentionally left blank

Chapter 3

Law and the Symbolization of Time: The Limits of Dealing with the Past and Future

The concept of the spirit of the laws shows that the system of positive law achieves more stability by expressing and codifying the cultural and ethical ideals. However, this legal symbolism has its temporal dimension and ruptures which are revealed especially during complex social and legal transformations and constitution-making. Legal symbolism is both historical and prospective, 'transmitted' and 'shared' and, as such, informs members of a polity about certain actions required in the interest of preserving its identity and integrity. After analysing the ideality of the concept of the spirit of the laws and collective identity in the previous chapter, I focus on the moral, political and legal notion of time in this chapter. I start by linking the concept of time to social heterogeneity and continue by showing the power of prejudice and its role in modern, future-oriented and expectation-driven societies. I claim that, despite the profound role of the past in morality and law, the use of tradition and history is always manipulative in modern society. In the second part of this chapter, I show different modes of legal regulation of political and moral temporality and, in particular, analyse complex relations between legal continuity and political and moral discontinuities, especially revolutions and various forms of 'transformations'. I conclude by highlighting the fact that legality cannot exclusively codify collective identities and memories and take the place of moral expectations in modern functionally differentiated societies.

Social Time, Morality and the Legal System

The temporal differentiation of specific social systems – like the structural differentiation of the spheres of politics, economics, morality, law, education and art which resulted in the historical emergence of the concept of 'social'[1] – is part of the general process of the functional differentiation of modern society. However, before discussing *ephemeros* – the plural time of different social systems – we must distinguish it, like Homer, from empty time – *chronos*.[2] There are varieties of social time synthesized by an overarching general chronology which uses empty units

---

1 R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, Stanford University Press, 2002) 118.

2 See Z. Vaší ek, *P ijetí podmínek [The Acceptance of Conditions]* (Praha, Torst, 1996) 237.

(dates, hours, etc.) to constitute the abstract, codified, and standardized relational structure of time.[3] The empty time of *chronos* needs to be codified by conventions and formulated in units of dates, calendar months, hours, minutes, etc. Watches, clock towers, diaries and other tools keep us alert to this codified notion of abstract time.

This standardized cultural constitution of time is a precondition of the meaningful reality of modern society which is complex and contains many different layers of time: the time of the *longue durée* and tradition, the time of a sudden change and surprise, the time of communal cycles and patterns, or the time of revolution and social explosions, etc.[4] The abstracted notion of *chronos* is open to the cultural contextualization, elaboration and specification of *ephemeros*. The notion of an absolute time is exposed to the plurality of social times.[5] The general demand for codifying time necessary for the establishment of meaningful social reality is transformed into the different social contexts and communication patterns of different social systems. Different social systems elaborate their internal concepts of time which produce specific differentiations of the past, present and future. Systems operate in a time proper to themselves.[6]

Morality, politics and law constitute their internal temporal structures which nevertheless can systematically overlap like other social structures. This overlapping of the social time of morality, politics and law is further conditioned by some general qualities of modernity such as the profoundly prospective orientation of society, selective uses of the past and the domination of future expectations over past experiences which may be summarized as *effective history* – the meaningful and manipulated history of present society.[7] Different social systems then have to adjust their temporal structures to these synthesizing characteristics of modernity.

The system of positive law can operate only by constituting its internal 'ephemeral' temporality. Periods of limitations, time-related legal fictions, the time of law enforcement and enactment, and so on, are all intrinsic to the legal system and constitute its specific concept of time. The internal temporality of law is necessary in order to communicate what is legal and illegal and provide a framework of legal operations. The legal concept of time is different from political time or time dominating the moral system. For instance, historical changes in moral judgement as to whether the consumption of alcohol is good or bad are very different from changes in the legal regulation of the production, sale and consumption of alcohol such as prohibition laws, licensing regulations, etc.

Nevertheless, legal temporality and how it conditions the validity of legal acts is the subject of moral communication. Legal concepts of 'guilt', 'discrimination',

---

3 N. Luhmann, *The Differentiation of Society* (New York, Columbia University Press, 1982) 274-5.

4 G. Gurvitch, *The Spectrum of Social Time* (Dordrecht, D. Reidel, 1964) 20ff.

5 B. Adam, *Time and Social Theory* (Cambridge, Cambridge University Press, 1990).

6 Gurvitch, op. cit., n. 4.

7 Jürgen Habermas uses the concept of 'effective history' when referring to Walter Benjamin's radical thinking about history and a 'now-time' [*Jetztzeit*]. He also associates 'effective history' with Nietzsche's concept of 'critical history'. See J. Habermas, *The Philosophical Discourse of Modernity* (Cambridge, Polity Press, 1987) 13.

'injustice' or 'abuse' strongly resonate in the moral domain despite the fact that their legal meaning and temporal limitations differ profoundly from moral meaning and its temporal dimension. For instance, the moral concept of guilt may be applied in society long after the opportunity of proving someone guilty in a criminal law trial has elapsed due to the statute of limitations. The moral system often seeks to use these primarily legal concepts in order to enhance its communication and support the moral meaning of identity and evaluative self-reflection to a polity. The concept of legal guilt is therefore internalized by the moral system and turned into a classification of what is morally good and bad.

The moral system's requirements of time are different from those of the legal system. However, what morality requires of time is often supplemented by the use of legal communication. Moral temporality is supported by legality and its symbolic rational force. The constitution, individual laws and judicial decisions become part of the cultural (and therefore moral) enterprise of constituting a framework reflecting the identity and destiny of a polity. Morality makes the constitution of political society a specific tool for controlling social time – something typical of both the legitimizing mythical narratives and modern rationality. The legal system enhances moral communication by 'legal aid'.

Nevertheless, the moral use of the legal concept of time, such as criminal law's periods of limitations, quickly reveals the limits of legality when accommodated by the system of moral communication. The moral limits of legal validity subsequently require alternative quasi-legal, quasi-judicial or even exclusively moral solutions to constitute the collective identity and its expressive and evaluative symbols.

Cultural Prejudice, the *Longue Durée* and Constitutional Law

Gadamer's radical assertion that '[I]t is not so much our judgements as it is our prejudices that constitute our being'[8] opens new ways of formulating the hermeneutic problem of understanding and interpreting our culture and social reality, including morality, laws and constitutions. According to Gadamer, the concept of prejudice deserves rehabilitation after it was unjustly attributed a negative value by the Enlightenment. Prejudice is not always a misjudgement; it is actually 'a judgement that is rendered before all the elements that determine a situation have been finally examined'.[9] It can even be valued as a positive concept and bias 'of our openness to the world',[10] the ideality of which therefore cannot be reduced to the rationalistic mind. Prejudice should not be treated as a distortion of the truth because rational judgements, ideals and objective scientific and social texts and dogmas are intertwined with prejudices and shaped by them. Apart from prejudices that are obviously unjustifiable in the light of critical reason, there are legitimate prejudices

8 H.G. Gadamer, *Philosophical Hermeneutics* (Berkeley, University of California Press, 1976) 9; see also, H.G. Gadamer, *Truth and Method* (London, Continuum, 2003) 276-7.

9 Gadamer, id. (2003), 270.

10 Gadamer, op. cit. (1976), n. 8, at 19.

established by tradition and common practices of reasoning that can profoundly affect seemingly objective methods of critical reason.

Prejudices affect our concept of 'pure' ideals and constitute the historical reality of individual and collective being. However, the recognition of prejudice's role in our thinking and communal understanding does not mean that we are embedded in the irrational world of tradition and indisputable authority. Prejudice is, rather, a condition of understanding which shows that the past can effectively define the ground of our present condition.

The traditional power of political and moral prejudice is often reflected in the symbolic rationality of constitutional documents and thus represents an important link between the social past and present. It is an example of the process of cultural sedimentation as a precondition of moral communication channelled by constitutional law. For instance, the recent constitution-making efforts of the European Union offer a number of examples of a symbolic rationalization of political and moral prejudices. According to the preamble of the constitutional treaty's draft approved by the EU summit in 2004 and subsequently rejected by national referenda in some Member States, the European Union would emerge as a political organization bearing special responsibility for humankind and the whole planet. The draft's preamble reads:

> Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny. Convinced that, thus 'united in its diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities toward future generations and the Earth, the great venture which makes of it a special area of human hope.[11]

Although strange from the legal system's perspective, the preamble symbolically invokes the Enlightenment ideal of reasonable, responsible and therefore 'adult' human beings who, after experiencing the modern horrors of political divisions and wars, can inform the rest of the world about the nature of humanity, good life and politics. According to the document, 'Europeans' hope to grow out of all prejudices and politically transcend existing divisions and thus become 'united in diversity'. The prejudice of modern rationalism which believes in the power of deliberative reason to overarch and neutralize all the 'irrationalities' of common life is strongly present in the preamble drafted by the Convention's constitution-makers.

Understanding the present consequently assumes the reflection of our prejudices, shared and shaped within a community and its tradition and modes of reasoning and decision-making. It assumes the scrutiny of all aspects of the critical rational mind and identification of prejudicial structures of its 'objective' and 'generally valid' conclusions – work already undertaken by philosophers of science, such as Thomas Kuhn and Paul Feyerabend.[12]

---

11 'Treaty establishing a Constitution for Europe' No. 2004/C 310/01, (2004) 47 *Official Journal of the European Union* 1.

12 See, especially, T. Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press, 1962); P. Feyerabend, *Science in a Free Society* (London: NLB, 1978).

Understanding means participating in living history which is meaningful for present society. Gadamer's rehabilitation of prejudice has had a profound effect on our understanding of the constitution-making and codification processes of modern political societies. It emphasizes the role of irrationality and tradition in the seemingly rational legal and constitutional (re)construction of social reality. It points to the constant interplay of rationality and tradition and the irreducibility of social meaning to the strict literal exegesis of any acts of legislation and constitution-making.

Prejudice accommodates the *longue durée* of social institutions and develops in the long-term process of cultural sedimentation. Any act of legislation and constitution-making is consequently both an actual happening and a participation in the long-term, continuing reproduction of a specific social institution. The Bergsonian concept of *durée*, which was elaborated in the context of sociological phenomenology by Alfred Schutz[13] and that of historical methodology by Fernand Braudel, finds its societal expression in the persistence of social institutions. It is the opposite of the instant which represents 'the short history of events' and 'a matter of moment'.[14] The *longue durée* then appropriates a time far greater than a short period of social actions and events of daily life. As Braudel emphasizes, '[T]he *longue durée* is the endless, inexhaustible history of structures and groups of structures.'[15]

Following this historical phenomenological perspective, constitutional and legal ideals and principles are prejudices shaped by different modes of communicating this endless history in society and thus turning history into cultural symbols. The *longue durée* is detectable in the temporal dynamic of different social structures, historical cycles and traditions calling for the 'remembrance of things past'.

Effective History, Social Expectations and Law

The power of prejudice shows the power of culture and the cultural sedimentation of the present into the normative and interpretive past. The effects of the past reveal a familiar fact, namely, that people are historical and finite beings whose actions and choices are predetermined by the temporality of their existence. Social existence is not a matter of choice. However, the historical nature of society and cultural sedimentation also mean that every intentional act of constitution-making or legislation, though itself a product of culture and the social past, stretches out beyond historical limitations and remains constantly subject to new interpretations, manipulations and elaborations. Our historical identity is inseparable from variability and innovation of social action and interpretation. There is always tension between 'our *history*' and '*our* history' in interpretations of the past.[16]

In modern society, tradition itself operates as a rich source of possibilities of meaning. Prejudices determine the present condition and it is impossible – to transcend all prejudices in favour of a utopian act of universally valid constitution-

13 See, especially, A. Schutz, *The Phenomenology of the Social World* (London, Heinemann, 1980).

14 F. Braudel, *On History* (London, Weidenfeld and Nicolson, 1980) 27-8.

15 id., 75.

16 P. Kouba, *Smysl kone nosti [A Meaning of Finitude]* (Praha, Oikoymenh, 2001) 71.

making, reflecting a just and rationally organized political society. Constitution-making is profoundly affected by the persuasive force of prejudice and tradition. As Gadamer says:

> Only the support of familiar and common understanding makes possible the venture into the alien, the lifting up of something out of the alien, and thus the broadening and enrichment of our own experience of the world.[17]

Nevertheless, Gadamer's understanding of language and texts as the reconstitution of tradition and its prejudices has to be elaborated in the context of modernity's profoundly *prospective nature*. The semantics of modernity is constructed as 'a project of the future'[18] in which traditions are invented and subject to the prospective logic.[19]

As regards law, all acts of constitution-making therefore have to be perceived as actively manipulating prejudices. Constitutional and other legal documents have a dual nature: they are confronted and shaped by the power of prejudice, yet they accommodate and use it effectively in the process of the rational social codification of the constitutive political, moral and legal rules of a society. The history of modern societies therefore has to be perceived as effective history, full of legitimate prejudices that make present communication and understanding among members of a polity possible. In other words, effective history is aware of its own historicity and actively uses it for present and future purposes. Anachronistic interpretations are dismissed as obsolete. The conservative power of tradition is eliminated because the present is always an innovative present breaking away and reconstructing the seemingly homogeneous flow of history and tradition. Historical interpretation becomes a matter of both the past and the present which illuminates all past events.[20] The present uses tradition within the logic of the anticipation of future events.

Modernity means that retrospective meaning is always driven by prospective strategies. Interpretive efforts are closely connected with the process of 'active forgetting'[21] which destroys the concept of history as an irreversible flow of objective events and makes it subject to present experiences and interests, selecting the parts of history that can be actively lived and used by individuals and collectivities. The cultural system maintains social memory by selecting and re-presenting the social past[22] through the parallel processes of remembering and forgetting. In modern

---

17 Gadamer, op. cit. (1976), n. 8. at 15.

18 N. Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford, Ca., Stanford University Press, 2002) 192.

19 E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983).

20 Braudel, op. cit., n. 14, at 37-8.

21 F. Nietzsche, 'Genealogy of Morals II' in *Basic Writings of Nietzsche* (New York, Random House, 1966) 493.

22 The concept of culture refers to the social use of memory and mechanisms for presenting past experiences and traditions. See N. Luhmann, *Die Gesellschaft der Gesellschaft. Erster Teil.* (Frankfurt, Suhrkamp, 1998) 586-7.

societies, memory always implies the possibility of a different past and, furthermore, knowledge of a past forgotten spontaneously or forcibly obliterated.

One of the finest examples of active forgetting and instrumental use of the collective political memories is Winston Churchill's speech in Zurich in 1946:

> The guilty must be punished. Germany must be deprived of the power to rearm and make another aggressive war. But when all this has been done, as it will be done, as it is being done, there must be an end to retribution. There must be what Mr Gladstone many years ago called 'a blessed act of oblivion'. We must all turn our backs upon the horrors of the past. We must look to the future. We cannot afford to drag forward across the years that are to come the hatreds and revenges which have sprung from the injuries of the past. If Europe is to be saved from infinite misery, and indeed from final doom, there must an act of faith in the European family and an act of oblivion against all the crimes and follies of the past.[23]

Modern societies use historical events and mythology in order to stabilize their present and define their future course. History appears to predict the future. Effective history often indicates the progressive making of history, and the very idea of progress is 'rather the continuous self-justification of the present, by means of the future that it gives itself, before the past, with which it compares itself'.[24] In contemporary complex societies, the early modern idea of progress as a definitive achievement of the ideal social condition has been transformed into a never-ending process of social evolution and expansion of future possibilities.

This transformation and growing complexity only reveals how decisive the future has become in selecting the past and justifying the present. The possibility of social existence depends on the very ability to coordinate past and future. In this context, Reinhart Koselleck comments that '[O]ur anthropological premise can thus be verified semantically. Modern time is characterized by the fact that the difference between experience and expectation has increased.'[25] In modern societies, there is always a surplus of expectation and actual experience is also driven by future-oriented expectations. Excessive demands on experience by expectations can even create a social impression of shortage of time. The social space of experience and the horizons of expectation are increasingly differentiated in the sense that expectations become more separated from previous social experience.[26]

Modernity has the unique ability to make its own historicity subject to temporal analysis and historical examination. Prejudice and the *longue durée* tradition are reflected as possibilities of the present social condition. Modern societies are not trapped in the iron cage of tradition and the modern concept of history always means critical and effective history, instrumentalized by social actors. Tradition is not an

23 W. Churchill, 'Zurich Speech, 19 September 1946' available at The Churchill Society, London, <http://www.churchill-society-london.org.uk/astonish.html>.

24 H. Blumenberg, *The Legitimacy of the Modern Age* (Cambridge, Mass., The MIT Press, 1983) 32.

25 R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, Stanford University Press, 2002) 129.

26 R. Koselleck, *Futures Past: On the semantics of historical time* (New York, Columbia University Press, 2004) 255-75.

objective, necessary mode of collective life. Instead, it is conceptualized by modern society to facilitate collective images of temporal unity and connection between past experiences and future expectations. Historical time is not a simple conceptualization of social continuity. It comprises 'an indefinite multiplicity of continuities and discontinuities'[27] and different meanings and interpretations of the past. Historicism is a mirror of modern society's concept of the future and the dynamic of the past is defined by the logic of the present.[28] History is not the past because it is not an object in itself but rather supplies meaning to past events and objects for present and future societies.

In this sense, *social memory is a selective constitutional act in the most general sense.* A system selects its own history from various objects of the past and projects it onto its future development. The past and the future become horizons of selection for different social systems[29] so that the present condition may be temporarily stabilized and defined as meaningful. The present 'sinks' into the past the moment it ceases to have actual and direct meaning for present events, and we can neglect it without serious effect on our present condition. Every future will eventually become the present and then will be abandoned as the past.[30] Our present is defined by the differentiation of the past and the future.

In the domain of law, modern legislation and the codified system of law have been established in opposition to traditional sources of law. Law becomes valid when it is authorized by due process, itself authorized within the system of positive law, and not because it had been established in the past and projected as unchangeable and eternally binding. Modern law is typical in its flexibility and changeability. Legislation has become a major vehicle of social change in modern society. In addition, the concept of judge-made law as respecting the traditions and moral fabric of a political society has disappeared in modernity and the judiciary has started to regard itself as an institution and a force for social change.[31]

Legislative process, a special example of which is the constitution-making process, modifies the future quality of social life. Nevertheless, law is not primarily a matter of social experimentation. It acknowledges reasoned public opinion and common sense which expresses existing customs and public morals. The innovative function of legislation and adjudication is heavily influenced by existing political interests and power struggles.[32] The constitution-making process and legislation always reflect present and past experiences and lawyers are commonly perceived

27 J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* (New York, Atheneum, 1973) 256.

28 K. Löwith, 'Die Dynamik der Geschichte und der Historismus' (1953) 21 *Eranos-Jahrbuch* 217-54, at 218.

29 Luhmann, op. cit., n. 3, at 303.

30 A picture of the future is embedded in our present despite the fact that we cannot have it fully in our 'possession'. See, for instance, H. Bergson, 'The Possible and the Real' in *Key Writings* (London, Continuum, 2002) 223-32, at 229-30.

31 For more details, see, for example, J. Frank, *Law and the Modern Mind* (Cloucester, Mass.: Smith, 1970).

32 See, especially, W.G. Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores and Morals* (New York: Mentor Books 1960) 86.

as agents of continuity, presumably aware of existing commands, rather than social adventurers pursuing moral and political discontinuity. Normative changes, therefore, are closely tied to the existing social reality, its past developments and changes.

Fast-Forwarding the Future: Revolutionary Expectations and the Legal System

Modern societies have shifted their temporal orientation from the experience of endless history to future expectations; they always seek to unlock the future. Modernity is *futuristic*[33] and lives by expectation despite the fact that this 'unlocking' process is achieved in coordination with the past experiences of living memories and not by the sheer power of human reason establishing an utopian ideal of the enlightened society of the future.

The process of unlocking the future always involves tensions between future possibilities and the reality of the present. The future can become disruptive when expectations are too high and run contrary to present social experience. Ideal projections of the future cannot be unlocked by the present. Social contingency rapidly grows and time becomes 'explosive'.[34] Existing memories are being undermined and lose their validity. Calls for selecting a different past and different memories increase in the tension of the present.

Within the framework of the political system, this temporal logic and its social distribution is called *revolution*. It usually signifies an outbreak of political (potentially violent) unrest, institutional collapse and ideological distrust. The moment of revolution is the moment when injustice is widely felt to be built into the existing social structure. It is a clash between contradictory concepts of justice.[35] Revolution builds on the expectation that the future will be, or indeed must be, different and 'better' than the present condition. The experience of revolutionary transformation is based on the acceleration of processes distinguishing the coming 'good' time from the preceding 'bad' time. In the moment of revolution, the past is reconstructed in order to validate the future and the present is interpreted historically only to be stripped of its normative force and authority.[36]

The temporal dynamic of a revolutionary change is typically one of condemnation of the political present and past. The present condition is unsustainable and those who favour the status quo lose support for their political actions. The condemned past is the one controlled and determined by the present which is being replaced by revolution. The present only represents a political deadlock because it has lost the crucial power to shape and control the future. The political future 'must happen' but it cannot happen under present rules and procedures. In short, revolutions are complex social changes in which political expectations of the future cannot be facilitated and

---

33 K. Löwith, *Meaning in History: The Theological Implication of the Philosophy of History* (Chicago, Chicago University Press, 1949).

34 G. Gurvitch, *The Spectrum of Social Time* (Dordrecht, D. Reidel, 1964) 144.

35 J. Krej í, *Great Revolutions Compared: The Search for a Theory* (Brighton, Harvester Press, 1983) 13.

36 J.G.A. Pocock, op. cit., n. 27, at 261.

controlled by the political present. Revolutionaries are expected to answer these moral expectations and thus escape the abyss of corrupt history. Respecting the logic of revolution, they must act swiftly. Apart from Braudel's distinction of long and short time, it therefore is necessary to distinguish fast and slow time in modern societies. Revolutions are manifestations of *fast time* which commands social change but also looks for its stabilization.

Revolution is a moment of ultimate selection between the past and the future. In the process of revolutionary change, the present is already perceived as the abandoned past and the future emerges as part of the present. Modern social experience of the future as something designed, yet not existing in the present, is given radical expression in revolutions. During the French Revolution, the Convention thus famously scrapped the Christian calendar and announced a new era starting from the proclamation of the Republic. 'A blasting open of the continuum of history'[37] and signified by the Year One was occurring and spreading rapidly.

However, making the future in the present always involves the risk of failure, insecurity and violence[38] because the future may emerge differently from present designs. It can be replaced by a 'utopian future'[39] dominated by complete negations of the present and the 'final' images of projected hopes (utopia). Revolution therefore requires further mechanisms of stabilization because its repudiation of the present in the name of the future puts the very existence of social reality into question. Revolutionary condemnations of the present order must be balanced with the political need of stability, continuity and predictability. At a certain moment of revolution, stability must supersede revolutionary change. As Thomas Paine stated: '[O]ne of the great advantages of the American Revolution has been that it led to a discovery of the principles, and laid open the imposition of Governments.'[40]

A constitution consequently means the establishment of an entirely new system of power invoked by the revolution.[41] Legalizing the revolution by means of a constitution corresponds to the temporal logic according to which all revolutions end with the restoration of order – the logic haunting all revolutionaries dreaming about 'permanent revolution' and despots seeking to build 'eternal empires'. The symbolic function of legal rationality, therefore, becomes extraordinarily strong in the process of revolution which depicts itself as a constitutional and legal change and transformation. In a political society undergoing revolutionary discontinuity, law may become an important symbol of unity and provide an integrative framework for political fractures. The constituent power of the people is transformed to the power of the constitution which is the beginning of law.[42]

37 B. Anderson, *Imagined Communities* (London, Verso, 1991) 193.

38 Z. Bauman, *Postmodern Ethics* (Oxford, Blackwell Publishing, 1993) 230.

39 Luhmann, op. cit., n. 3, at 280-1.

40 T. Paine, *The Rights of Man* (Ware, Wordsworth Editions, 1996) 125.

41 See H. Arendt, *On Revolution* (Penguin, London, 1990) 147.

42 S. Kirste, 'Constitution and Time' in A. Soeteman (ed.), *Pluralism and Law: Proceedings of the 20th IVR World Congress, Amsterdam 2001, Volume 2: State, Nation, Community, Civil Society* (Franz Steiner Verlag, 2001) 79-87, at 86.

The revolutionary process of codification and constitution-making shows that time and the concept of temporality are identified both with social *stability* and *change*. Time is irreducible to the concept of change[43] or transition. Time – including the time of law, politics and morality – is a mechanism permanently selecting social presence and absence and thus 'presencing' itself.[44] It is not a solid framework defining the 'here and now' of objects, actions and institutions. In time of revolution, history then crashes into the wall of the present already governed by a completely different symbolic universe which is yet to come into existence. Social reality becomes elusive, political ideals and morality 'are not in place', and a polity is about to move away and shake off the burden of historical time. History as the meaningful past is tested against the temporal horizon of the future yet to come and present itself.

Revolution is fast and therefore typical of the scarcity of time because political society is attached to the future and denies the present. The future is overcrowded with different possibilities which are yet to be selected and presented. However, this selection cannot be restricted to an apocalyptic, self-revelatory future point of some form of 'the end of history' which would ultimately negate the very concept of social time. After all, the future is a temporal horizon of the revolutionary, profoundly destabilized present.

The codification of a coming political order by constitution-making can subsequently operate only as a way of making time less scarce and not as a final political act transforming society to the ideal order of transcendental morality already coming from the future to conquer the present. Legal codification only stabilizes a political society where time is out of control. The act of constitution-making is a process of presenting the political future which completes the final task of revolution - the negation of the present. The process of constitution-making therefore involves the codification of the time of the emerging polity, its law and public morality. Post-revolutionary constitution-making formulates the political future's present and re-inserts it into the political system by power of the legal code.

Law consequently operates both as *a mechanism of social change and stabilization*. It both restores the time dimension to revolution and normalizes it. During revolutions, everything is at stake and the old world is tossed around to attract new meaning and sources of validity. In such periods, law breaks away from the past and hammers out a new normative and symbolic universe. It has the double function of being a synthesizing symbol of social stability and a selective instrument of the coming changes. It helps to minimize the risk that the future of a revolution might get out of control. At the same time, it speeds up the abandonment of the condemned past because it legislates new political conditions and thus constitutes its own present which, from a temporal point of view, is still in the future and yet to be done.

43 See, for instance, A. Giddens, *A Contemporary Critique of Historical Materialism Vol. 1: Power, property and the state* (Berkeley, University of California Press, 1981) 17.

44 For a sociological analysis of the Heideggerian concept of 'presencing' and the time-space constitution of social systems, see Giddens, id., 30-4.

The Constitutionalization of Revolution: On Systemic Pluralization

The expressive symbolic function of law is crucial for any modern revolution. However, the constitution-making process is accompanied by communication noises and failures: the constitution and its legal concepts cannot translate and encompass the whole political reality and, especially, the ultimate justice-based claims of revolution. Law does not have the capacity to codify one politically and morally desirable future; politics overemphasizes the role of the rule of law in modern society and its central position regarding the normative structures of the political and moral systems.

Avoiding the subordination of law to the holistic concept of political and moral history, the constitution then transforms political ideals and goals into legal procedures. Temporalization of politics by law means its proceduralization. The only alternative to this historically reflexive movement[45] would be a revolutionary utopia in which the constitution-maker would be the only ultimate governor (no opposition permitted), lawyer (the only institution of the legal system) and moral authority with power to define who and what is good and bad. The persuasive concept of the revolutionary future, therefore, must be transformed into the legal process of goal attainment without defining and codifying the nature of such goal. The constitutionalization of revolution is a process of dismantling the totality of future political hopes facilitated by political revolution and reducing the abundant politicization of social reality which is so typical of all revolutionary processes. The legal code of a constitution re-enters the political system in order to reduce the proliferation of political communication in a revolutionized society. External references to the legal code of the constitution result in stabilization of the political system and, in a similar manner, moral references stabilize the system of law.

The system of positive law is exposed to the enormous political contingency in the revolutionary situation because the legislative and judicial processes are affected by governmental instability. In order to reduce the contingency of legislation and judicial decision-making, the moral idea of the equality of all people was accommodated by the legal system and constructed as the first principle of formal justice after the great civil revolutions of the eighteenth century. It was accompanied by the idea of inviolability of the republican constitution which was based on the notion of natural subjective rights.[46] The morality of natural law was transformed into the legality of a 'sacred' constitution. In the language of social systems theory, the legal system used moral concepts to increase its stability and regulatory capacity in revolutionary situations or other periods of social disruption.

Revolution is a social 'big bang' that needs to be codified by the constitution in order to contain the destructive power of revolutionary politics. Furthermore, the constitution makes the moral integration of society, which is part of the revolutionary utopia, both impossible and unnecessary. The life of political societies cannot be exclusively defined by the moral code of 'good/bad'. Any attempt to make

45 U. Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (Cambridge, Polity Press, 1997) 40-6.

46 Luhmann, *Law as a Social System* (Oxford, Oxford University Press, 2004) 481-6.

the political difference of 'government/opposition' part of the moral difference between good and bad would mean the end of democracy. Similarly, attempts to make the 'legal/illegal' difference subject to the 'good/bad' difference would result in the establishment of a moral tyranny, replacing the rule of law, and law would disappear as a moral conflict-resolution mechanism. Revolution must therefore be changed by the constitution into a present of heterogeneous legal, political and moral normativity.

At the same time, revolutionary moral symbols incorporated by the constitution re-enter the system of positive law and eliminate the possibility that law could describe the whole of society and social regulation through its mode of communication. There is always an alternative reading and interpretation of the text of a constitution. Apart from this communication-limiting function, moral references in the constitution also have a compensatory function inside the system of morality. In modern society, morality lacks a clearly codified institutional framework and therefore uses the codifying operations of the legal system to increase its own stability and social autonomy. Morality uses law for its self-assertion because, unlike the system of positive law, it does not have a purely moral text codifying standards of behaviour. The secular morality of modern societies is everywhere and nowhere. This is why one may witness a lack of morality and its proliferation and extension to all spheres of social reality at the same time.

The constitution therefore supplies a codified text which is externally used by the system of morality to enhance its communicative power in modern society. This text may be used by morality, yet remains intrinsic to the legal system. The constitution thus stabilizes the moral system by making it socially both more limited and clearer.

Collective Memory, Identity and Dealing with the Past

The legal system is a device for constituting and manipulating what the French sociologist Maurice Halbwachs calls, in the Durkheimian tradition, *collective memory.*[47] Collective memory is a mode of self-reflection of a social group, reconstruction of its history and identity. It is a mode of internal perspective which constitutes the group's *living* memory and remembers only those elements of the past which are still meaningful for the group, its unity, its identity and its continued existence. Collective memory constitutes the history of the group but must not result in paralyzing its future and prospective collective actions.

Collective memory as a temporal self-perception of political community is the first precondition of its identity. It needs a referential framework which would set limits for the interpretation of the community's history. Law, indeed, provides such a framework in modern society and gets used by the collective memory to reconstruct the meaningful past which is, nevertheless, determined by the present social life.[48] The legal system turns out to be a very effective form of codifying the collective

47 M. Halbwachs, *The Collective Memory* (New York, Harper-Colophon Books, 1950).

48 M. Halbwachs, *On Collective Memory* (Chicago, The University of Chicago Press, 1992) 40.

memory of a political society and the symbolic universe of its identity. For instance, prosecution or general amnesty for the political crimes of past political regimes may directly affect (either strengthening, or weakening) the political stability of new regimes.[49] The living generations engage in integrative manipulation of the past and use legal communication to constitute their political symbols and conventions, stabilizing the present. For instance, the preambles to acts of constitutional law then often may sound like a summary and synthesis of historical wisdom and the symbols of the collective, valued and treasured as the very foundation of the moral fabric and identity of a political society.

Collective memory and its codified version constituted by law establish a hermeneutic circle because the legally codified memory also operates as the interpretative framework of its legalized normative structure.[50] The legalized collective memory operates both as a mode of securing stability and fostering changes in those societies. This process is usually described as *dealing with the past* and involves a meta-synthesizing process of social integration in which a temporal synthesis is accompanied by a legal synthesis loaded with expressive and moral evaluative symbolism.

Legal symbolic dealing with the past is a sign of the force of political and moral communication in respect of time and history. In societies such as post-apartheid South Africa, post-communist Central and Eastern Europe or Latin American countries after the fall of military regimes, political and moral hopes and efforts were confronted with past injustices, political violence and oppression.[51] Political societies were locked between the unjust and possibly criminal past and the unfolding future of new political identity. In this condition, the law's job of constituting the collective memory of a political society stretches far beyond the level of constitutional transformation and has to address important issues of retrospective criminal justice, retributive justice, restitutions and amnesties which reflected both the pragmatic rationality of legal decisions and the moral symbolic rationality of political identity-building.

Dealing with the past constructs the future of the present. Legal dealing with the past makes the political and moral future happen and involves a complex moral reflection on political and legal institutions in terms of the injustices, illegalities, and abuses of power that they themselves produce. Dealing with the past means communicating what is morally repulsive and what was politically opposed in that past by means of the legal system which has to find legal solutions to moral and political problems. Legal issues of criminal responsibility, amnesty, political trials, constitutional transformation, rehabilitation and restitution play important role in the

49 See, for instance, S. Veitch, 'The Legal Politics of Amnesty' in E. Christodoulidis and S. Veitch (eds.), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford, Hart Publishing, 2001) 33-45.

50 The concept of the hermeneutic circle signifies a process in which a document becomes an object built up in the course of historical circular effort of being validated on the basis of what has been historically defined as a result of previous validating efforts. See U. Eco, *The Limits of Interpretation* (Bloomington, Indiana University Press, 1994) 59.

51 See, for instance, M. Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton, Princeton University Press, 2002).

processes of forgetting and remembering both inside the legal system and outside its limits in the domains of morality and politics.[52]

Dealing in legal terms with the past facilitates the constitution of new identities for political societies trapped between past and future by synthesizing 'new' collective memories. Dealing with past injustices is expected to give legal validity and persuasive force to these emerging memories. However, the moral code of good and bad, which is intrinsic to legal transformations, also reveals the structural limits of law in dealing with collective memories. The legal fast-forwarding and the encapsulation of the moral and political challenges of revolution can never be entirely morally and politically satisfactory. Apart from using legal communication, political morality therefore supports its stabilization by stretching beyond the legal calls for various forms of 'historical justice' and demanding other forms of socially institutionalizing the collective memory. The legal system cannot deal with the past injustices in moral terms and the means of legal rationality have to be supplemented by quasi-legal and quasi-judicial institutions to support moral and political notions of justice. Dealing with the past as a political and moral process therefore entails establishing different forms of social codification and constituting collective memories outside the legal system, using legality only as a supplementary point of reference.

One of the most typical institutions adapting elements of legal rationality, yet operating primarily within the domain of morality, was the South African *Truth and Reconciliation Commission* (TRC) set up after the dismantling of the apartheid regime in 1994. The road chosen by the TRC was to ease the passage of post-apartheid society from its apartheid past to becoming a liberal democratic and racially tolerant polity. The political impossibility of applying the principles of punitive justice to past political crimes committed by regime officials and the violent terrorist acts of the resistance movements resulted in the quasi-judicial principle of merely reporting past political crimes and the ethical principle of making these legally amnestied crimes part of the public archive as a moral reminder for future generations.

The collective memory would be institutionalized outside the legal system by a special body whose primary task was to forge the ethical domain of post-apartheid South African political society. The processes of active forgetting and remembering complemented one another during the existence of the TRC. Although the principle of impunity was questioned and the exclusion of criminal sanctions for political crimes criticized as weakening the emerging liberal democratic rule of law and the constitutional state,[53] the importance of the TRC's goals could not be exaggerated and the institution certainly helped to contain the risk of political violence and instability in South Africa in the 1990s. At the same time, it was clear that the TRC could not be the only agent of moral communication of dealing with the horrors of the past, and its moral condemnation of the political past represented only one of many modes of ethical reconciliation, close to the political institutions and legal procedures.

---

52 N. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, 3 vols* (Washington, The USA Institute of Peace Press, 1995).

53 See, for instance, F. du Bois, 'Nothing but the Truth' in Christodoulidis and Veitch. op. cit., n. 49, at 91-114.

Amnesty processes and the prosecution of past political crimes may be described as legally sanctioned memories and forgetting. For instance, the South African post-apartheid amnesty was a process of politically regulating amnesia and forgetting by the prohibition of criminal justice. It was accompanied by the public mobilization of the TRC which was politically calculated to result in constituting the ethically codified memory of crimes and victims of the past regime. The political goal of stability was fostered by both the proliferation of ethics and the exclusion of criminal law, supplemented by the implementation of limited measures of restitutive justice and political rehabilitations.[54]

The popular modern imperative of dealing with the past is driven by fear that the forgotten or repressed past could have its own sort of harmful present. Nevertheless, it is determined by which parts of the past are selected to be dealt with. Dealing with the past therefore always involves *undealing with the past* and every politics of memory simultaneously operates as a politics of imposed forgetting. One of the best examples of this political selection of the past and its manipulation by actively pursued forgetting is Cicero's speech in the Senate two days after the assassination of Caesar. At that time, Cicero called for *oblivione sempiterna delendam* – eternal oblivion of the assassination act.

The past is governed by the present which also governs different ways of dealing with the past. The political condition and complexity of relations between oppressors and victims play a decisive role in the institutionalization and the limits of legal and moral measures taken to 'do justice to the past.' The past therefore is always controlled by the specific strategies of political agents of the present.[55] There is a wide range of options regarding the treatment of the political past and its injustices, from the Spanish post-Franco politics of 'burying past political crimes in the past', various truth and reconciliation commissions set up in Latin America or South Africa, to post-communist attempts to prosecute communist officials for their political crimes.

Typically, none of these ways of dealing with the past can satisfy the public and victims and there is always a 'past to be dealt with' despite the need for 'active forgetting'.

Temporal Idealization of Memory and Authentic Identity

The constitution of collective memories is a future-oriented prospective process like any other modern appropriation of the past as 'effective history'. In political and moral philosophy there are then a number of examples of connecting memory and political ethics. Politics as remembering, based on the Greek conviction that 'where

---

54 For a publicly persuasive collection of journalistically interpreted testimonies and evidence of past political crimes before the TRC in South Africa, see A. Krog, *Country of My Skull* (London, Vintage, 1998).

55 N. Bigger (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington, Georgetown University Press, 2001).

arête is, oblivion cannot occur',[56] and depictions of political crises as acts of forgetting have been popular because they attempt the political and moral contextualization of the notion of truth as un-concealment (*a-lethe-ia*). Human beings as individuals are believed to confirm their uniqueness and 'possess an enduring quality of their own because they create their own remembrance'[57] through political action in the forms of representation, discourse and deliberation – as if the law and politics were to be committed to the moral obligation of absolute openness, honesty and remembering all past acts and events in the public realm.[58]

The search for the true spirit of the laws and collective identity is temporally structured as a recursive method of retrieving the forgotten origins of authentic thinking, truth and being. The search is driven by a moral duty to remember history and culture. Remembering is a human effort resulting in the constitution or, rather, permanent reconstitution, of collective identity. It therefore assumes the ideal notion of history and culture as unity which, nevertheless, needs a supplementary mechanism of obscuring and finally forgetting internal differences and heterogeneity existing within all cultures. The ideal unity is possible only by obfuscating real differences.

The method revitalizes collective memories and has the practical effects of reshaping and transforming the political identity of specific communities. A good example of the ideal construction of time and memory is the French *Declaration of the Rights of Man and of the Citizen* adopted by the National Assembly during the French Revolution in 1789 and reaffirmed by the French Constitution of 1958. Its preamble refers to the constitution of the Declaration as an act of memory which reveals the non-present elements of the present when it opens by stating that:

> The representatives of the French people, formed into a National Assembly, considering ignorance, forgetfulness, or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments, have resolved to set forth, in a solemn Declaration, the natural, inalienable and sacred rights of man, to the end that this Declaration, constantly present to all members of the body politic, may remind them unceasingly of their rights and their duties.[59]

The legal text enacts the first principles of universal humanity which had to be recovered by memory in order to legislate the just order of humankind. Memory does not deal with historical facts in this recursive process. The temporality of remembrance has only one function – to transcend the mundane world of politics and legislate the eternal source of universally binding rules of humanity.[60]

---

56 J.F. Lyotard, *The Inhuman: reflections on time* (Cambridge, Polity Press, 1991), 208, fn. 40.

57 H. Arendt, *The Human Condition* (Chicago, The University of Chicago Press, 1958) 208.

58 See, for instance, Christodoulidis and Veitch, op. cit., n. 49.

59 *Declaration of the Rights of Man and of the Citizen* adopted by the National Assembly on 26 August 1789.

60 For a critical view, see J. Bentham, 'Anarchical Fallacies' in *Selected Writings on Utilitarianism* (Ware, Wordsworth Editions, 2001) 381-459, at 395.

The ideal, memory-based notion of time is clearly different from any legal dealing with the actual past and future of society. It draws on the notion of the present state of society as more or less corrupted and in need of returning to its 'true' ideal origins. In this respect, David Hume critically noted that 'to declaim against present times, and magnify the virtue of remote ancestors, is a propensity almost inherent in human nature'.[61]

The contrast between the corrupt present and the virtuous past is part of modern thinking and critical reflections. Romantic nationalisms used to draw on the idea that nations had to be reawakened from their historical sleep and their latent ever-present spirit had to be asserted against present political chains.[62] The moral meaning and political consequences of the forgetfulness of being (*Seinsvergessenheit*) are not confined to Martin Heidegger's philosophy, which contrasts the authenticity of being with the inauthentic public domain of 'they' (*das Mann*). The idea is also detectable in the Marxist critique of a modern society of labour which corrupts humanity and results in the 'extinction of remembrance'.[63] Furthermore, it informs communitarian criticisms of modern society, which is seen as having lost the morality of the past and experiencing moral calamity in which the harmonious communities of the past are being destroyed by the instrumental reason of modernity.[64] It surprisingly penetrates even radical streams of current philosophy, inspired by the heavily romanticized concept of the originally free and noble savage conquered, colonized and corrupted by modern civilization.[65] According to these views, the archaic knowledge of tribes is being destroyed by 'the gangsters of colonialism and then by the humanitarians of developmental aid'.[66] The modern Western notion of reason is guilty of atrocities in the world and of the destruction of archaic harmonious relations between humans and Nature.[67] The idea of corrupt modernity as the loss of memory and authentic identity, typical of German romantics such as Schiller and others, permeates political philosophy, from Hannah Arendt's call for reviving the ancient politics of virtues and freedom[68] to Leo Strauss's critical remarks about modern man losing sight of his natural right.[69]

The spirit of authenticity buried in the past haunts the critique of modernity! However, the past has nothing to do with historical time and is constructed as a fictional ideal to which human beings and their cultures can return to reconstitute

61 D. Hume, 'On Refinement in the Arts' in *Essays Moral, Political, and Literary* (Indianapolis, Liberty Classics, 1985) 278.

62 E. Gellner, *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (Cambridge, Cambridge University Press, 1998) 29.

63 J. Habermas, *Autonomy and Solidarity: interviews with Jürgen Habermas* (London, Verso, 1992) 139.

64 A. MacIntyre, *After Virtue: a study in moral theory* (London, Duckworth, 1981) 22.

65 For a complex anthropological and functionalist view of the relation between freedom and civilization, see B. Malinowski, *Freedom and Civilisation* (London, Allen & Unwin, 1947).

66 P. Feyerabend, *Farewell to Reason* (London, Verso, 1987) 298.

67 id., 302.

68 H. Arendt, op. cit., n. 57, at 22-78, 248-325.

69 L. Strauss, *Natural Right and History* (Chicago, University of Chicago Press, 1953).

their 'true' authentic origins. The cultural symbolism of social time is transformed into intellectual speculation on lost and found authentic being, thinking and ethics.

Identity plays an important role in this process because it is perceived as the permanent recapitulation (*Wiederholung*) of history. It is constituted by the temporal horizon of the recurrence of its ideal origins. However, the concept of identity as memory is susceptible to one particularly dangerous form of abuse: it may be sacralised in the sense that all historical facts are idealized as principles, values and untouchable pillars of present identity, and any communication between past and present, therefore, becomes impossible.[70]

The sacralisation of memory is the most dangerous effect of the politicization of historical collective identity and the subjection of memory to the concept of truth. Establishing the direct relationship between identity, truth and memory is possible only in the politically extreme totalitarian condition in which the Party controls the production of truth, memory and ideological patterns of collective and individual identity. In the totalitarian condition, remembrance always means protecting identity against political violence and participating in the resistance against the political repression orchestrated in the name of 'historical Truth'. The politically enforced amnesia regarding parts of history disapproved of by the totalitarian power needs to be confronted with calls for social alternatives described as authentic identity and living in truth.[71] Those speaking and writing about the atrocities and violence of totalitarian regimes hope that they will not be ignored by future generations. They bear witness to the unbearable atrocities of the human race and struggle to say the unsayable.[72] They speak on behalf of memory and against oblivion.[73] On the other hand, memory is separated from political authority in the liberal democratic condition and the ontological memory-truth-identity triangle loses its political status. The simple alternatives of memory/truth versus the repression/falsity dominating the totalitarian experience is substituted by the ethical, temporal and political complexity of modern social life.

Ethical Calls, Collective Memories and Institutional Failures

Apart from the ideal notion of memory as a recurrence of authentic being and identity, the return of ethics is supported by the archive building, the logic of filing and sorting the past and the growing technological possibility of running what Jean-François Lyotard described as *machine memories*.[74] The multiplied search for information is directly linked to the growth in complexity of examined matters, available knowledge

70 See T. Todorov, 'Ni banalisation ni sacralisation: du bon et du mauvais usage de la memoire' *Le Monde diplomatique*, April 2001, 10-1.

71 See V. Havel et al., *Power of the Powerless: citizens against the state in central-eastern Europe* (London, Hutchinson, edited by J. Keane, 1985).

72 P. Levi, *The Drowned and the Saved* (London, Abacus, 1989).

73 See, for instance, interpretation of Levi's works in A. Rudolf, *At an Uncertain Hour: Primo Levi's war against oblivion* (London, Menard Press, 1990) 11, 13.

74 J.F. Lyotard, op. cit., n. 56, 36-46, at 45.

and technologies.[75] The main function of collective memories therefore becomes to select and process complex information provided by machine memories. Machine memories extend collective memories which are based on modern human ability to extend the process of remembering by extraction, manipulation and the pragmatic use of information. This specifically moral way of dealing with the past by archiving historical injustices and wrongs shows that the moral system and morality-building can directly use their internal temporality without necessarily relying on the legal system's temporality and rationality.

However, the pursuit of historical truth and justice does not necessarily bring more political stability and moral integrity to functionally differentiated societies. Gathering more information often produces more insecurity and instability. Calls for ethics as authenticity usually ignore one important aspect of Martin Heidegger's ontology: the sphere of *Öffentlichkeit* (the public sphere, or 'publicness') itself has the ontological status of averageness and concealment. It means the distancing of authentic being and its transformation into the public realm of an inauthentic and impersonal *das Mann* ('they').[76] The moral demands of the laws and politics that the past should be unconditionally dealt with and all information available about it disclosed cannot be accommodated by the legal and political systems. The public domain of politics and law cannot guarantee authenticity for citizens and provide authentic records of the past, and its impersonal structure will continue to be condemned as 'immoral'. Ethics formulated as authenticity and the disclosure of concealed truth cannot find shelter in the systems of law and politics.[77] Any institutionalization of dealing with the past necessarily ends up in the public (and therefore 'immoral', 'inauthentic') manipulation of the past.

Quasi-legal and quasi-judicial institutions, such as the TRC, the Gauck office dealing with the repression and political crimes of East Germany, and the Polish Institute of National Remembrance,[78] seek to approach the power of memory machines and store as much information as possible in the hope of profoundly influencing the constitution of new collective memories. They are designed as institutions securing future political stability, identity and integration by revealing facts of past crimes and injustices to the present generations. They are to act as both God-like 'absolute monads' with absolute memory, for which the future therefore 'is always already given',[79] and *institutions of memory* haunted by the paradox of an ethical demand for

75 id., 44.

76 M. Heidegger, *Being and Time* (Oxford, Blackwell Publishing, 1996) 165.

77 For instance, the South African TRC, aware of difficulties surrounding the concept of truth and its use, introduced different concepts of truth, each of them having a specific healing effect on the post-apartheid politically fractured society. The Commission's Report distinguishes between four different regimes of truth: forensic (the truth of discovered facts); narrative (the truth of individual stories of suffering, pain and violence); dialogue (the truth of social communication about the past); and restorative (the ethical truth resulting in reconciliation, forgiveness and unity). See *Truth and Reconciliation Commission of South Africa Report*, 5 volumes (Cape Town, Truth and Reconciliation Commission, 1998) 110.

78 These institutions will be further analysed in the third part of the book.

79 Lyotard, op. cit., n. 56, at 60.

the collection of all information, while reducing and containing it in order to make future political stability, identity and integration possible.

The notion of truth as non-concealment cannot be realized at the institutional level because no social system is able to communicate 'pure memory' and the authentic facts of being. The moral need to disclose all facts about past political crimes may clash with the criminal legal period of limitations for prosecuting the same crimes. Similarly, moral ideals used in shaping collective memories are used by political actors in their conflicts with opponents and power struggles. The legal pursuit of property restitution is also likely to cause moral controversies because of the risk of re-establishing past economic inequalities.

Dealing with the past therefore can never be morally, legally or politically 'authentic', 'pure' or 'correct'. Shifting legal communication to the systems of morality and politics necessarily results in a legally weaker concept of justice and leads to the frustration of many victims who had hoped for punitive measures and were awarded only financial compensation, restitution or rehabilitation instead. At the same time, legal rationality and its use in the establishment of 'ethical discourses' can only result in formalized procedures and reports distanced from authentic moral calls. It is impossible for members of a political society to fully recognize and internalize them morally.

Concluding Remarks

The moral symbolic rationality fostering the identity of a political society cannot be limited to legal communication which includes even potentially explosive principles such as *fiat iustitia, pereat mundus*. Alternative forms of moral reconciliation and dealing with the past contribute to political integrity and collective identity in modern, rule-of-law-based constitutional democracies. Collective identity calls for specific forms of memory-building and moral dealing with the past which should reveal what was excluded and repressed in the past.

However, all moral calls for authenticity and remembrance of the repressed (and repressive) past are immediately compromised by the neutralizing power of the information which is needed to cope with the growing complexity of descriptions of the past. Morality gets institutionalized and institutions control the future by turning the past into a codified collective and public memory. This is the process of the 'politicization of morality' in the temporal horizon of dealing with the past. After all, morality belongs to the public sphere and calls for justice as ethics therefore get transformed into the political principle of publication and power manipulation.

Nevertheless, from the moral perspective, the principle of publication is accompanied by the principles of individualization and particularization of the past which means that the moral system does not expect all atrocities to be translated into the codes of politics and law. Moral reconciliation remains uncertain and the need to shape new identity with the help of the process of dealing with the past escapes the limits of law and politics.

The systemic differentiation and pluralization typical of the constitutionalization of revolutions therefore applies to the originally moral process of dealing with the

past, too. The ethics of dealing with the past would otherwise end up in the tyranny of lawlessness. The morality of identity-building through reconciliation is unthinkable without the freedom which is dependent on a system of positive law.[80] Similarly, the undifferentiated order of legal rationality would become just a tool for the political codification of collective memory and identity. Political identity would be legislated in the language of transcendental ideals and embedded forever in the absolute norms of ethics legitimized either by the omnipotent past (conservative utopia) or future (revolutionary utopia). All these risks, therefore, make the moral symbolic rationality of law possible only at a higher level of functional differentiation of the legal system.

80 For this view, see E. Lévinas, *Totality and Infinity: an essay on exteriority* (Pittsburg, Duquesne University Press, 1969) 241-5.

PART II

IDENTITY AND LAW: EUROPEAN REFLECTIONS ON *DEMOS* AND *ETHNOS*

This page intentionally left blank

Chapter 4

Civil and Ethnic Traditions and Identities: Post-Communist Constitution-Making in Central Europe

In a period of complex social transformations and discontinuities, law must be analysed from *two different perspectives*: as an autonomous social system constructing its own legal concept of transformations and as part of moral and political discourse which can formulate the most persuasive version of revolutionary changes both morally and politically. The symbolic power of law coexists with its power to formulate an independent and socially autonomous 'legal' version of political and social transformations.[1]

The legal system, especially constitutional law, has been essential to the emerging public sphere and discourse of the 'political societies in transformation' that have pursued the establishment of a new collective identity based on the liberal democratic rule of law, such as political societies in Central Europe after the 1989 revolutionary changes. It has provided constitutive social values and principles shared by members of such societies as their collective conscience,[2] and has thus guaranteed social unity, coherence and solidarity at the symbolic level. Societies turn to the symbolic rationality of principles and values at moments of discontinuity. The constitutional and legal codification of substantive morality and political principles has the same importance like the purpose-oriented instrumental rationality of legal regulation.[3] The moment of discontinuity calls for a new 'social beginning'. It is a time of condemnation of the past and invocation of future hopes. Societies need a new foundation and coherence, and explore possible ways of achieving it, including the system of positive law.

Constitution-making and legal transformations in Central Europe in the 1990s were foundational in two different ways. First, they set up a system of separation of power, procedures of constitutional decision-making and the protection of civil rights and

---

1 The legal system continues to operate as a distinct and functionally differentiated system even in revolutionary societies. It would be therefore wrong and grossly simplifying to perceive legal transformations and constitution-making only as politics by legal means. The complexity of the legal system cannot fully accommodate and address the complexity of moral and political problems and vice versa.

2 E. Durkheim, *The Division of Labour in Society* (New York, Free Press, 1984).

3 J. P ibá , Dissidents of Law: on the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract (Aldershot, Ashgate Publishing, 2002) 110-14.

liberties. Second, the constitution-making processes also reflected the new political identity of the emerging democratic nations. In this sense, constitution-making was a process of self-reflection, clarification and codification of what constitutes a sovereign *people*. The process of constitution-making significantly contributes to the symbolic creation of the people as one nation. Modern constitutional symbolism therefore cannot avoid the democratic dilemma of whether the nation is based on either the notion of a political people – a *demos* (identified with the democratic state and its liberal constitutional foundations and rights) – or the belief in common origins of cultural and ethnic identity and traditions of a historical community of *ethnos*. The modern concept of the nation is a symbolic reflection of the idea of society which mobilized the notion of democratic political identity. Although nations certainly are not historical collective beings or real characters, the question of which people constitute a political nation has been central to modern legal symbolism. Following the historical dynamic of the nation, constitutions in their symbolic role have been transformed into 'the social order's meta-social guarantor'.[4]

The processes by which constitutions have been created in the post-communist countries of Central Europe have been subjected to extensive legal and political analysis. This analysis often associates the concept of civil society with democracy and liberal values and contrasts it with the authoritarian and populist nature of ethnic nationalism. This distinction between the civil and ethnic foundations of political societies is undoubtedly theoretically insufficient, yet it has been the main grounds for criticism of constitutional and political developments in Central Europe since 1989.

I pursue a different, socio-legal analysis of these constitutional developments using various social theories of time and collective identity and their codification. Instead of building on an ideological critique contrasting civil society and ethnic nationalism, I take these two phenomena as part of a more general social process of constituting and codifying new identities in the post-communist period of social discontinuity. An indispensable part of this process is the re-entry of ideologies, traditions and identities repressed by the Communist regime into the emerging public domain and new constitutional documents. In the course of analysing the different ways in which constitutions operate in post-communist political society, I argue that the conflict between *demos* and *ethnos* in post-communist Central Europe cannot be addressed as simply a conflict between the liberal democratic imperatives of the present and the politically dangerous, ethnic concerns of the past. The difference between civility and ethnicity has to be perceived as the difference between two distinct traditions in the modern political history of Central Europe that are manipulated by political agents and codified by means of constitutional law.

Furthermore, the 1989 revolutionary changes in Central Europe and subsequent constitutional and legal developments prove that the problem of collective identity involves a process of differentiating between *us* and *them*. The temporal dynamics of the complex constitution-making processes in different Central European countries were governed by the logic of the difference between the communist past, referring

4 A. Touraine, Can We Live Together? Equality and Difference (Cambridge, Polity Press, 2000) 202.

to *them*, and the democratic present, referring to *us*. While one past, the Communist one, was condemned and abandoned, the other past and its civil and ethnic traditions re-entered the public domain, were codified in law, and established new codes, structures and experiences of national identity. The example of post-communist constitution-making in Central Europe shows that democratic public discourse necessarily involves the manipulation of past traditions and goes far beyond the Kantian model of the public domain as an emancipatory rational discussion challenging tradition.

Constituting Political Time: The Synthesis and Selective Codification of Collective Identity

Each moral, legal and political dealing with the past, which is so important in post-communist societies, is determined by current political forces and agents. Michel Foucault (and George Orwell) put it thus: 'the control of people's memory is the control of their present.'[5] At the constitutional level, the politics of transformation proceeds by the selection of those past beliefs, events and related virtues which are thought useful for the present transformation and by the suppression of those discarded by a revolution. Current political forces control the process of dealing with the past and its possible moral therapeutic effect.[6] Post-revolutionary constitution-making is always a process of imposed forgetting, the reconstruction of the past and the codification of new, constitutive collective memories and identities.[7] The emerging constitutional system and its institutions are politically and ethically urged to condemn the abandoned past, codify future aims and principles and commit the nation and constitutional institutions to those aims and principles.

In analysing the temporal aspect of constitution-making and the role of civil and ethnic traditions in post-communist Central Europe, three different phenomena related to time, history and codification need to be distinguished: tradition, its code and its interpretation. *Tradition* means all the objects, patterns and practices of the past that have some meaning and impact on the social present.[8] Traditions are 'transferred' in time and must be enacted and re-enacted by living human beings. They spontaneously exert historical influence on current social patterns; their duration representing a link across a span of social time. In modernity, this influence is controlled and regulated by the present because modern societies so often use history and historical knowledge in order to construct their own identity. Practices of the past are reflected in, yet disentangled from, the social reality of the present.[9]

---

5 M. Foucault, 'Film and Popular Memory: An Interview with Michel Foucault' (1975) 11 *Radical Philosophy* 24-5.

6 I. Markovits, 'Selective Memory: How the Law Affects What We Remember and Forget about the Past – the Case of East Germany' (2001) 35 *Law & Society Review* 513-63.

7 M. Halbwachs, *On Collective Memory* (Chicago, Chicago University Press, 1992) 46-51.

8 E. Shils, *Tradition* (London, Faber and Faber, 1981).

9 A. Giddens, *Consequences of Modernity* (Cambridge, Polity Press, 1990) 42.

The modern use of history reduces traditions to an instrument for legitimizing the present.

Traditions must be distinguished from social codes and codifications. Unlike the spontaneous normativity of tradition, *codes and codifications* are the outcomes of a rational 'legislative' attempt by authorities to construct the future. Codes are not, therefore, only a matter for the legal system of a particular society. They emerge wherever social control and power are at stake. They are purposive acts intended to produce a collective dogma which will integrate a society. In this respect, constitutions are just one of many social codes produced by the power structures of modern societies.

The *interpretation* of a code or dogma is, however, an active process of applying a normative framework to everyday social reality and, as such, it establishes the code's meaning in the present social condition. It reacts to social changes and therefore has to be inventive. It is also affected by the spontaneous normativity of traditions. As Giddens remarks:

> The 'integrity' of tradition derives not from the simple fact of persistence over time but from the continuous 'work' of interpretation that is carried out to identify the strands which bind present to past.[10]

Consequently, different traditions are rediscovered and codified by current political agents. Codifications establish new traditions and change the social meaning of the old ones. From the perspective of temporality, tradition operates paradoxically because 'it prompts us to believe that the past *binds* our present; it augurs, however (and triggers), our present and future efforts to *construe* a "past" by which we need or wish to be bound'.[11] In this light, rebuilding the political identities of post-communist Central European societies emerges as a complex, reflexive interplay of the establishment of new political codes (constitutions), pre-communist and communist civil and ethnic traditions and their present interpretations in the public domain (ideologies and policies).

From this perspective, constitution-making is a mechanism for the establishment of a new political community through the constitutional codification of collective memory. Constitutional codification, which is just one of many different modes of social codification, always involves both the selection and synthesis of the past and present.[12] It is therefore very important to analyse how collective memory, this mode of internal perspective and self-perception of a group, is used for prospective political goals.

The collective memory has both 'structural' and 'experiential' dimensions.[13] The former refers to the sequence of moments and the change-continuum (in which

---

10 A. Giddens, 'Living in a Post-Traditional Society', in U. Beck, A. Giddens and S. Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Cambridge, Polity Press, 1994) 59-109, at 64.

11 Z. Bauman, *In Search of Politics* (Oxford, Polity Press, 1999) 132 (emphasis in original).

12 N. Elias, *Time: an essay* (Oxford, Blackwell Publishers, 1992) 96.

13 id. 80-1.

'earlier' and 'later' are synthesized into one continuum) and the latter refers to the social experience of this continuum. Codes become a community's framework of reference, establishing the authoritative interpretation of the community's history and thereby constituting collective memory and identity.[14] History is carried forward by its reproduction through the collective practices of the present.[15] The social need for the codification of collective memories grows with the gradual loss of the direct experience of commonly shared historical events. Codes substitute a structural dogma for historical experience. Collective memory consequently operates as the interpretation and hermeneutics of the codified history and thus synthesizes the structural and experiential dimension of time.

Constitution-making in post-communist Central Europe has its specific structural and experiential dimensions of time. The 1989 revolutions represented a clear structural element that differentiated 'earlier' and 'later' moments in the continuum of social time. Politics was divided into pre-revolutionary and post-revolutionary events and this division was accepted as common experience by all members of society, including those opposed to the revolutionary changes. Although the formal principle of legal continuity was accepted by all countries, post-1989 constitutional acts symbolically codified the moment of revolutionary discontinuity and the legal system thus became an important social reflection of time. The constitution-making processes in Central Europe have had to accommodate the selection of past traditions as fundamental for the codification of new collective identity.

Furthermore, these constitutions drew on both the civil and the ethnic traditions which were to legitimate the post-communist democracies. Different governmental policies in Central European countries then transformed this code into its experiential dimension. Different and often contradictory implementations of the constitutional codifications of time by governmental policies and doctrines facilitated the re-establishment of modern democratic politics with its ideological conflicts.

Constitutionalism and Political Identity: On Civil Society

What certain political thinkers had in mind when they warned against the future being shaped by the past in post-1989 Central Europe[16] were ethnic nationalist traditions. It was to combat these that they called for the reinvention of the political tradition of constitutionalism, republicanism and civil society.

Dealing with the past in constitution-making was part of the general problem of *rebuilding political identity.* Legality in Central Europe has reconstituted its symbolic function as the ultimate language of modern politics in the sense of marking continuity and legislating discontinuity. The rule of law has been re-established as the primary commitment of democratic and liberal politics. The formulation of the

---

14 J. Assmann, *Die kulturelle Gedächtnis, Schrift, Erinnerung und politische Identität in frühen Hochkulturen [The Cultural Memory, Writing, Recollection and Political Identity in Early Civilisations]* (München, C. H. Beck, 1997) 102-10.

15 P. Bourdieu, *The Logic of Practice* (Cambridge, Polity Press, 1990) 54.

16 J. Habermas, *The Past as Future* (Cambridge, Polity Press, 1994) 66.

new political identities of the Central European nations has been phrased in legal language, procedures and principles.

In this context, constitutionalism has played an important role in legislating the limits of government and the boundaries of civil society. Associations, civil organizations and pressure groups were not allowed under communism, yet the concept of civil society was very popular among dissidents living under communist regimes and constituted an important strategy of political opposition.[17] The dissident concept of civil society heavily romanticized the spontaneous order of liberal societies and contrasted it to totalitarian surveillance, planning and political control. The difference between civil society and totalitarianism was the focus of one of the most prominent criticisms of the communist system, based on the difference between moral and immoral politics.

After the collapse of immoral totalitarianism, this re-introduction of morality into political and legal systems was one of the first post-revolutionary goals.[18] The building of civil society was not perceived as merely a technical matter of providing the institutional framework for a new liberal democratic society, stabilizing the sphere of social interaction between the emerging market economy and state.[19] It was also perceived as the symbolic recurrence of the morally superior concept of politics based on civil society which had been destroyed by the communist regimes and defended by many dissidents in all Central European countries.[20] In post-communist Central Europe, civil society was irreducible to the prospective goal of constructing non-existing social structures by constitutional laws. Civil society was also perceived as a specific tradition which had strong symbolic value during the early phases of post-communist constitution-making. Civil society represented values and virtues such as individual freedom, cooperation, spontaneity, solidarity, public initiative,

17 See, for instance, C. Olivo, *Creating a Democratic Civil Society in Eastern Germany: the case of the citizen movements and Alliance 90* (New York, Palgrave, 2001); G. Skapska, 'Between "Civil Society" and "Europe": Post-Classical Constitutionalism after the Collapse of Communism in a Socio-Legal Perspective' in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot, Ashgate, 1999) 204-22, at 205-14.

18 J. Szacki, *Liberalizm po komunizme [Liberalism after Communism]* (Krakow, Znak, 1995).

19 A. Arato and J. Cohen, *Civil Society and Political Theory* (Cambridge, Mass., The MIT Press, 1992) ix.

20 Nevertheless, this temporal position of the civil society discourse is not limited only to the post-revolutionary societies. In established liberal democracies, various political strategies and critiques also resort to calls for 'civil renewal' as if the virtues of the spontaneous order of community had been lost in the course of everyday democratic politics. These virtues are to be retrieved and reincorporated into the democratic political system in order to combat its current corruption. See, for instance, M. Constable, 'The Rhetoric of Community: Civil Society and the Legal Order' in A. Sarat, B. Garth and R.A. Kagan (eds.), *Looking Back at Law's Century* (Ithaca, Cornell University Press, 2002) 213-31, at 213.

protest, intellectual critique, recognized political dissent and many other aspects of communal life destroyed by the communists.[21] In the Polish context:

> Ever since the early 1980s, a majority of scholars and observers agreed that a crucial agent of change in Poland would be the emerging 'civil society'. The civil society was a growing network of underground organizations outside of communist control. In fact, it was the civil society that Solidarity represented at the Round Table in Poland. A logical conclusion was that, with the end of communism, the civil society would evolve into pluralistic and democratic political structures.[22]

This use of 'civil society' had two temporal themes. The first was linked to the dissident concept of civil society brought from the oppressed past to the victorious present. The second contrasted the pre-communist modern era with the establishment of the communist regimes. Although the civil society and democratic traditions were different in each country, and both Hungary and Poland experienced illiberal authoritarian rule between the two World Wars in the last century, 'civil society' always retained the strong symbolic value of being a suppressed social structure in which human dignity and autonomy used to be guaranteed. The constitutional transformations in Central Europe then both promoted the institutional rebuilding of civil society and derived their legitimacy from the civil society tradition and virtues. The Hegelian distinction between civil society and state in which the latter had supremacy as an institution preceding, protecting, and overarching the former[23] was thus represented in one of its most dialectic forms in the post-communist transformations.

The prominent Hungarian dissident and writer György Konrad sought to transform the dissident experience of resistance into a more general argument for government limited and controlled by the activism of civil society. He called for an 'antipolitics' that would permanently challenge existing governmental actions, ideology and control:

> A society does not become politically conscious when it shares some political philosophy, but rather when it refuses to be fooled by any of them. The apolitical person is only the dupe of the professional politician, whose real adversary is the antipolitician. It is the antipolitician who wants to keep the scope of government policy (especially that of its military apparatus) under the control of civil society.[24]

---

21 M. Buchowski, 'The Shifting Meanings of Civil and Civil Society in Poland' in C. Hann and E. Dunn (eds.), *Civil Society: challenging Western models* (London, Routledge, 1996) 79-98; for links between the left-wing politics and political dissent in communist countries, see M. Hájek, 'The Left in the Process of Democratization in Central and Eastern European Countries' in M. Walzer (ed.), *Towards a Global Civil Society* (Oxford, Berghahn Books, 1995) 251-8.

22 W. Osiatynski, 'Revolutions in Eastern Europe' (1991) 58 *University of Chicago Law Review* 823-58, at 855.

23 G.W.F. Hegel, *Hegel's Philosophy of Right* (trans. by T.M. Knox, Oxford, Oxford University Press, 1967) 122-3, 266-7.

24 G. Konrad, *Antipolitics* (New York, Hartcourt, Brace, Jovanovich, 1984) 227.

Konrad's antipolitics had a broad appeal because it criticized both the communist regimes and the political engineering and ideological control carried out in Western liberal democratic states. In comparing the concept of antipolitics with the concept of non-political politics popular in the Czech dissident movement, it is possible to detect striking similarities of intellectual élitism, the romantic critique of bureaucratic power-making processes and a strong belief in the value of parallel activism driven by a sense of communal solidarity instead of by a struggle over power.[25] The dissident concept of community was often very close to a notion of the natural state based on complete harmony and the ultimate unity of different wills. As in Tönnies's social theory,[26] the dissident community contrasted civil virtues with a society dominated by communist power and ideology. Václav Havel and other former dissidents who became the new political leaders therefore considered the rejuvenation of the institutions and virtues of civil society to be the greatest problem confronting post-communist countries.[27] Their attention was directed to the past and their task was to revitalize what was suppressed by communists. *The lost paradise was to be rediscovered.*[28]

One important reason why the civil society argument was credible was the peaceful character of the revolutionary events, which did not lead to violence and civil war.[29] Civil disobedience and 'civilized negotiations' were the main revolutionary tools. As those principally responsible for instituting the liberal democratic rule of law were dissidents committed to civil society,[30] they were able to exercise great influence over post-communist constitution-making.

The constitutional transformations were supposed to promote and protect the political virtues of civil society by the force of law. Constitutional rules were to impose limits on government and facilitate the development of the institutions of civil society by ensuring the civil and political rights of citizens.[31] The human-rights-based jurisprudence of the constitutional courts was perceived to be an important tool in shaping this new, civil-society-based political identity.[32] Among the Central

---

25 V. Havel et al. in G. Keane (ed.), *The Power of the Powerless: Citizens against the State in Central-Eastern Europe* (London, Hutchinson Press, 1985) 27; see, also, Z. Kavan, 'Anti-Politics and Civil Society in Central Europe' in M. Shaw (ed.), *Politics and Globalisation* (London, Routledge, 1999).

26 F. Tönnies, *Community and Civil Society* (Cambridge, Cambridge University Press, 2001) 22.

27 E. Klingsberg, 'The State Rebuilding Civil Society: Constitutionalism and the Postcommunist Paradox' (1992) 13 *Michigan Journal of International Law* 865-907, at 866-7.

28 V. Havel, 'Paradise Lost' *New York Review of Books,* 9 April 1992, 6.

29 U. Preuss, *Revolution, Fortschritt und Verfassung [Revolution, Progress and Constitution]* (Berlin, Wagenbach Verlag, 1990); for a similar argument related to the political transition and democratization in Spain, see V. Pérez Díaz, *The Return of Civil Socity: the emergence of democratic Spain*. (Cambridge, Mass., Harvard University Press, 1993).

30 A. Arato, *Civil Society, Constitution, and Legitimacy* (London, Rowman & Littlefield Publishers, 2000) 70-80.

31 E. Gellner, *Conditions of Liberty* (London, Penguin, 1994).

32 Klingsberg, op. cit., n. 27, at 894.

European nations searching for their political identity after the 1989 revolutions, constitutional laws were perceived as a vehicle for rebuilding civil society and as the guardians of civil virtue. Because of this close symbolic link between the concept of civil society and constitutional legislation, constitutionalism achieved an almost heroic status because it secured a differentiated, spontaneous and well-ordered society. Constitutional symbolism designed by the state and the spontaneity of civil society supplemented each other.

The values of civil society influenced post-communist constitution-making, yet the need to institutionalize a market economy and a political society that would secure democratic control of the new power structures was even more crucial. The establishment of democratic procedures, political parties, ideologies and power techniques and loyalties was essential for the emerging political systems. Without the establishment of a market economy and democratic political society, the virtues of civil society would evaporate very soon after the fall of communism. Even the most convinced advocates of civil society admit that the maximum it can do is to function as:

> the key to the possibility of innovation in the East Central European transitions and ... [the concept of civil society] ... also points to the possible locus of reconciliation between economic liberalism and political democracy, both evidently necessary and yet in conflict in the difficult processes of transition.[33]

Because of its absence during the communist period, civil society could re-enter only as a specific tradition that had to be codified, promoted and protected by the post-1989 constitution-making processes.

Constituting a Nation: Ethnic and Civil Traditions

In post-communist constitution-making, the liberal model of democracy as a system of constitutionally protected political procedures and civil liberties prevailed over the progressive model of democracy as a system of decisions leading to substantive moral and economic improvement of humankind. Constitutions played an enormous role as *political stabilizers* protecting the *civil identity* of the new political community. However, a brief textual analysis of post-1989 constitutional documents shows that the liberal procedural model of democracy turned out to be an insufficient stabilizer and the political community looked for its substantive supplement. As had happened previously in many other European political societies, the Central European countries rebuilt their popular sovereignty and statehood on historically and culturally shared sentiments of national identity and ethnic unity.[34] Democracy rediscovered nations in the course of post-communist constitution-making. Constitution-making processes consequently had to deal with the problem of national identity based on the notion of a culturally and ethnically defined community.

33 Arato, op. cit., n. 30, at 36.

34 C. Offe, *Modernity and the State: East, West* (Cambridge, Polity Press, 1996) 256-7.

The prospective job of constitution-making was strongly determined by national traditions. Rebuilding *national* identity, in the sense of ethnic and cultural identity, was an important part of rebuilding *political* identity. The revolution involved not just dismantling the communist system and incorporating civil society values and principles into the new democratic constitutional system. It also re-established cultural and political traditions either suppressed or manipulated by communist power. Codifications of the new political identity had to refer to national history and tradition. While the tradition of pre-communist civil society was rather weak in some Central European countries, the ethnic national traditions, which had always played a central role in the modern political history of Central European nations, were 'strong' traditions.

Traditions are generally important because:

> The connection which binds a society to its past can never die out completely; it is inherent in the nature of society, it cannot be created by governmental fiat or by a 'movement' of citizens that aims at specific legislation. A society would not be a society if this bond were not there in some minimal degree. The strength or efficacy of the link can vary considerably, just as can the state of integration of a society at any point in time.[35]

It is necessary to acknowledge the significance of ethnic and cultural traditions and their ideological and integrative role in the constitutional and political transformations of the different post-communist national societies. The present can never fully abandon the past. Nevertheless, the role of the past in modern society is very different from its role in traditional societies. The past *is* the present in traditional societies. It is not questioned, contested or manipulated by present political actions. But in modern societies, tradition and the past are always subject to challenge by the present: they must be presented. Tradition is a starting point for and constituent of new beliefs and actions,[36] yet this point is determined by the present pragmatics.

The different histories, traditions, nationalities and political cultures existing within the seemingly monolithic bloc of East European communist countries gained new dynamism after 1989. The very concept of Eastern Europe became dubious and subsequently useless for constitutional, political and social analysis.[37] After the revolutionary changes of 1989, post-communist nations sought to revitalize their national heritage. Ernest Renan pointed to the mutual dependence of a nation's past and present in his *Qu'est-ce qu'une nation* when he said:

> A nation is a soul, a spiritual principle. Only two things, actually, constitute this soul, this spiritual principle. One is in the past, the other is in the present. One is the possession in common of a rich legacy of remembrances; the other is the actual consent, the desire to live together, the will to continue to value the heritage which all hold in common.[38]

35 E. Shils, op. cit., n. 8, at 328.

36 id., 44.

37 T. Garton Ash, *The Uses of Adversity: Essays on the Fate of Central Europe* (London, Random House, 1989).

38 E. Renan, *Qu'est-ce qu'une nation?* (Paris, Calmann-Levy Press, 1882) 26.

Memory establishes a nation's identity by reviving the common ground and mystery of historical unity. But the unity based on this common historical existence must be confirmed by the present will. According to Renan, a nation is a unity of the collective memory and the forgetting necessary for constituting the present identity. It is also a unity of the present codification of past tradition and its different interpretations. Collective identity-building is not a matter of historical truths. Nations are created by forgetting, historical errors and falsifications.

The substitution of 'nation' for 'state' as the basic administrative, territorial and legal unit is typical of modern political discourse of constitutionalism and nationalism. The doctrine of popular sovereignty, which dates back at least as far as Locke, identifies 'the people' as the political sovereign holding state power. The people were equated with the state and its sovereignty. During the nineteenth century, 'nation' and 'the people' or 'citizenry' became two distinct categories and nations were gradually referred to more often as ethnicities. The concept of popular sovereignty became burdened by the political and constitutional question of 'Who are the people?'.

The constitutional concept of a sovereign nation in modern European political theory has always been trapped between *demos* and *ethnos*. The concept of the nation may be subsumed under the concept of the state. In this way the nation is regarded as a collectivity living in the state's territory and administered by means of state's violence.[39] Nations are people under the control of modern state administration. This definition is always haunted by the ethnic concept of the nation, which reflects the tensions and differences among different collectivities, with their own customs and history, living in the same state territory. The ethnic definition of a nation emphasizes a sense of belonging and the homogeneity of a particular group which is not restricted to the artificial borders and institutions of modern politics. It is, rather, common history, language, customs, traditions and other shared social facts that constitute nations.[40]

This difference, which is demonstrated in the modern histories of more or less all European nations, was one of the major features of the new democratic liberal discourse of Central European political societies in the first half of the 1990s. The common understanding of this revival of national traditions and nationalism in post-communist countries contrasts the ethnic and civil concepts of 'the nation' and blames emerging liberal democracies for the revival of ethnic hatred and national tribalism in Central and Eastern Europe. This is, however, a gross simplification of post-communist developments and a misunderstanding of the historical role of nationalism, partly based on the widely accepted, yet misleading difference between the 'well-established' democratic West and the 'unstable' autocratic East.[41]

---

39 A. Giddens, *The Nation-State and Violence: Volume Two of a Contemporary Critique of Historical Materialism* (Berkeley, University of California Press, 1987) 103-21.

40 W. Connor, 'A Nation is a Nation, is a State, is an Ethnic Group, is a ...' (1978) 1 *Ethnic and Racial Studies*, 379-88.

41 L. Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, Mass., Harvard University Press, 1992); W. Pfaff, *The Wrath of Nations: Civilization and the Furies of Nationalism* (New York, Simon and Schuster, 1993).

Ethnically oriented politics have the communitarian promise of being a safe haven in the unsettled modern world of permanent change. During post-communist transformations, all Central European countries faced the possibility of a regression into the ethnocentric fantasies and racism of their nationalist past, which could be challenged only by the establishment of liberal democratic constitutionalism and a civil society tradition.[42] In the post-communist Central and Eastern Europe, the liberal democratic state-building's first imperative therefore was to be neutral among all the ethnic groups and nations living on its territory. This neutrality can be most effectively achieved through a common civil tradition and a politics that can contain and neutralize tensions and conflicts arising between different ethnic communities. Liberal principles achieve their most persuasive force when they are transformed into common political practices and traditions.[43]

However, civil liberal and ethnic communitarian traditions are not as opposed as they may seem and post-communist nationalism should not be treated simply as the *Ersatzideologie* of communism which would be entirely antagonistic to liberal democracy. In fact, modern nation states draw on ethnicity and particular national cultures and liberal principles are often implemented in the form of ethnically distinct policies. Civil and ethnic traditions are often inseparable in the process of modern nation-building.[44] The nation-building process is determined by a dialectic of civil institutional demands (centralizing state power, citizenship policy, language laws, education, civil service, etc.) and national ethnic claims.[45] Owing to its civil and ethnic origins,[46] nationalism is Janus-faced: it has integrative power which may involve images of democratic and civil polity, yet it also represents the most violent forms of cultural exclusion, discrimination and even extermination of 'ethnic strangers.' Resurgent nationalisms in post-communist Central and Eastern Europe only reinforce this image of modern nationhood.[47]

The spontaneous order of civil society can generate ethnic communitarian and nationalist ideologies, which may prove fatal to its existence, but it can also often draw strength from ethnic and national collective identity. The civil and ethnic traditions often supplement each other, the politics of liberty being supplemented

42 A. Lijphart, 'Political Theories and the Explanation of Ethnic Conflict in the Western World' in M. Esman (ed.), *Ethnic Conflict in the Western World* (Ithaca, NY, Cornell University Press, 1977) 46-64, at 55.

43 A. MacIntyre, *Whose Justice? Which Rationality?* (London, Duckworth, 1988) 346.

44 See, for instance, C. Calhoun, *Nationalism* (Minneapolis, University of Minnesota Press, 1997); E. Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983).

45 W. Kymlicka, 'Western Political Theory and Ethnic Relations in Eastern Europe' in W. Kymlicka and M. Opalski (eds.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford, Oxford University Press, 2001) 13-105, at 21-53.

46 See, especially, W. Connor, *Ethnonationalism: the Quest for Understanding* (Princeton, Princeton University Press, 1994) and A. Smith, *The Ethnic Origins of Nations* (Oxford, Blackwell, 1986).

47 For more details, see R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge, Cambridge University Press, 1996).

by the politics of identity.[48] These close links between civil and ethnic politics are extraordinarily strong in Central Europe. For instance, Solidarnosc, the civil society platform and opposition forum in communist Poland, always involved traditionalist and nationalist factions.[49] Hungarian nationalists emerged from the dissident groups and civil campaigns of the 1980s when they rediscovered a new nationalist populism and moved in the direction of Hungarian irredentism. They even successfully mastered the human rights discourse and voiced their traditionalist ethnic demands in the language of minority collective rights.[50] In Slovakia, the nationalist tradition emerged from the civic revolutionary structures of the Public Against Violence movement, and was institutionalized either in traditionalist ideological form, in the political platform of the Christian Democratic Movement, or in the populist form of the platform of Prime Minister Me iar’s Movement for Democratic Slovakia.[51]

Although ethnicity contributes to the identity of the most ‘explosive communities’,[52] it cannot be blamed for all modern political wrongs and catastrophes. Ethnicity is an intrinsic part of modern liberal democratic reality. It is necessary to emphasize the historical fact that the ethnic concepts of nationhood and popular sovereignty were not always necessarily anti-democratic and illiberal. As Will Kymlicka rightly comments: ‘All real-world nationalisms are a complex mixture of liberal and illiberal elements, although the forms and depth of illiberalism vary enormously.’[53] Nationalisms in Central Europe varied a lot, from the Polish aristocratic resistant nationalism and the Hungarian aristocratic loyalist nationalism to the Czech competitive nationalism of the small bourgeoisie.[54] Moreover, these nationalisms were often a revolutionary force challenging autocratic, illiberal regimes and aiming at the democratization of politics, constitutional rights and popular parliamentary sovereignty. A historically and ethnically shared national identity often supported the establishment of civil society and parliamentary democracy in modern Europe.[55] Liberalism and nationalism often complemented each other in the modern history of

---

48 C. Taylor, ‘The Politics of Recognition’ in A. Gutmann (ed.), *Multiculturalism. Examining the politics of recognition* (Princeton, N.J., Princeton University Press, 1994) 54-6.

49 W. Wesolowski, ‘The Nature of Social Ties and the Future of Postcommunist Society: Poland after Solidarity’ in J.A. Hall (ed.), *Civil Society: Theory, History, Comparison* (Cambridge, Polity Press, 1995) 113-4.

50 J. Kis, ‘Nation-Building and Beyond,’ in Kymlicka and Opalski, op. cit., n. 45, 220-42, at 234-6.

51 G. Mesežnikov and M. Ivantyšyn (eds.), *Súhrnná správa o Slovensku [Global Report on Slovakia]* (Bratislava, IVO, 1998).

52 Z. Bauman, *Liquid Modernity* (Oxford, Polity Press, 2000) 193.

53 Kymlicka, op. cit., n. 45, at 54.

54 P.F. Sugar and I.J. Lederer (eds.), *Nationalism in Eastern Europe* (Seattle, University of Washington Press, 1969); see, also, L. Holy, *The Little Czech Nation and the Great Czech Nation: National Identity and the Post-communist Social Transformation* (Cambridge, Cambridge University Press, 1996).

55 J. Keane, *Civil Society: Old Images, New Visions* (Cambridge, Polity Press, 1998) 86.

Central Europe.[56] This shows that ethnic nationalism could both serve the struggle for democracy and provide the legitimacy for state violence and ethnic repression.

This spirit of liberal nationalism therefore has to be separated from the threat of politically repressive and exclusive communitarian ethno-nationalisms.[57] The multicultural and liberal nationalist theories of Charles Taylor, Will Kymlicka, Michael Walzer and others are hard to dispute in respect to the historical development of the liberal nation state and its use of ethnicity. Nevertheless, their normative conclusions regarding the collective rights and legal protection of ethnic and national minority identities are questionable because they imagine national cultures and traditions as legally codifiable world-views. The identification of human rights discourse and constitutional democracy with the ethno-political process of collective self-understanding threatens cultural diversity and the emerging multi-cultural fabric of current societies and creates a world of mutually isolated and hostile communities.

The civil self-reflection of a nation would become impossible if liberal democratic constitutionalism gave way to the politics of ethnic and national collective recognition and empowerment. The civil tradition of constitutional patriotism therefore has to be given priority over ethnic and national traditions in the democratic rule of law and the political goal of recognition of collective ethnic demands should not be enforced by the legal system.[58] Constitutional patriotism's role is to contain and channel distinct national identities, pride and histories. Many advocates of the civil society tradition treat it as remedy for ethnic national animosities and tensions.

Constitutionalism, the Concept of a Nation and Popular Sovereignty in Central Europe

Post-communist politics have certainly experienced the anti-democratic and illiberal effects of conservative and aggressive ethno-nationalism.[59] It thus became a priority to make ethnic national identity constitutionally and ideologically subject to the principles of civil society based on the legal concept of citizenship and not on a mythical community of blood and race. The patriotism of citizens established on the ideologies of civil liberties and democratic political rights was then expected to

---

56 Sugar and Lederer, op. cit., n. 54, at 46-9.

57 A. Touraine, *Can We Live Together? Equality and Difference* (Cambridge, Polity Press, 2000) 210.

58 J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, Mass., The MIT Press, 1998) 216-9.

59 See, for instance, the anti-semitic nationalist pamphlets *Szentkorona* (Saint-Crown) and *Hunnia* in Hungary in early 1990s that, though marginal to Hungarian mainstream politics, called for a change of frontiers and made racist inflammatory demands. See, for instance, G. Schöpflin, *Nations, Identity, Power: The New Politics of Europe* (London, Hurst, 2000) 387.

Nationalist populism was also typical of some conservative streams within the Solidarnosc movement, and the extreme right-wing Republican Party in Czechoslovakia built its support on racist rhetoric at the beginning of 1990s. For further details on constitutionalism and nationalism, see A. Czarnota, 'Constitutional Nationalism, Citizenship and Hope for Civil Society in Eastern Europe' in A. Pavkovic et al. (eds.), *Nationalism and Postcommunism: a collection of essays* (Aldershot, Dartmouth, 1995) 83-100, at 83.

play an essential role in overcoming national hostilities and historical resentments, both inside nation states (between a majority nation and ethnic minorities) and in new, developing international relations (between sovereign nations). In the post-communist condition, civil society was loaded with a democratizing responsibility but the state was too weak to support and protect civil society's autonomy.[60] Civil society cannot exist without strong legal protection but, at the same time, the emerging constitutional democratic state was looking for legitimacy based on civil society. Where both civil society and the state are weak, democracy is difficult to sustain and ethnonationalist myths and ideologies can become more symbolically exclusive and politically violent.[61]

This struggle was very much complicated by the legacy of communist nationalism, though this is hardly recognized by many Western scholars. The late 1950s and 1960s are sometimes regarded as a period of 'nationalist communism'.[62] After the decline of the centralizing ideology of Stalinism, national communist parties in the Soviet bloc countries adopted nationalist rhetoric in order to win more popular support. National and ethnic intolerance were not, therefore, reinvented or reborn after the 1989 revolutions. They, rather, represented a continuation of communist policies mixed with pre-communist nationalist ideologies.

In the final part of this chapter, I shall therefore turn to the different constitutional strategies and governmental policies of individual countries in Central Europe, reflecting differing civil and ethnic aspects of post-communist nationhood. I examine different constitutional codifications of national identity as well as their interpretations and pragmatic use by different government policies and political forces.

The preamble to the Polish constitution is an interesting mixture of civil and national patriotism. Unlike Hungary, Slovakia or the Czech Republic, Poland is hardly challenged by the coexistence of a majority nation and ethnic minorities. The constitution, therefore, re-establishes Polish national heritage and history as a source of common political pride by stating:

> Having regards for the existence and future of our Homeland,
> Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,
> We, the Polish Nation – all citizens of the Republic,
> Both those who believe in God as the source of truth, justice, good and beauty,
> As well as those not sharing such faith but respecting those universal values as arising from other sources,
> Equal in rights and obligations towards the common good – Poland,
> Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in

---

60 See, especially, G. Schöpflin, 'Liberal Pluralism and Post-Communism' in Kymlicka and Opalski, op. cit., n. 45, 109-25, at 119.

61 L. Holmes, *Post-Communism: An Introduction* (Cambridge, Polity Press, 1997).

62 W. Osiatynski, op. cit., n. 22, at 847.

universal human values,
Recalling the best tradition of the First and the Second Republic,
Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage,
Bound in community with our compatriots dispersed throughout the world, …

This is a clear example of the mixture of the civil and ethnic concepts of the nation, full of references to history, traditions, religion, culture and national territory. The reference to universal human values and civility makes these intrinsic parts of national identity and history as formulated by the Polish constitution-makers. National patriotism is worthy of being preserved because it aspires to universal humanity and civil culture and is therefore protected by the Constitution.

Nevertheless, the post-1989 constitutional history of Poland is turbulent and was affected by political divisions between the post-communist socialist ideology of left- and right-wing politics split between traditionalist nationalism and economic liberalism. Poland's current constitution is the result of parliamentary disputes, power struggles, negotiations and compromises between 1989 and 1997. The interim constitution of 1992 significantly strengthened presidential powers and echoed both the French semi-presidential constitutional system and the pre-war Polish tradition of strong political authority and leadership. After Lech Walesa lost the presidential election of 1995, these powers were weakened and the constitutional system made efforts to incorporate more elements of a parliamentary system. The new Constitution of 1997, which was approved by national referendum, was constructed as a civil normative and republican project.[63]

In this political context, the preamble reads as a synthesizing political compromise, the core of which is constituted by the commonly shared national and cultural tradition, which covers over the political and ideological divisions between the left- and right-wing parties. Political developments in Poland in the last years, particularly the shake-up after the parliamentary elections in 2001 and the emergence of ideologically split right-wing winners after the parliamentary elections in 2005, indicate that exclusive ethnic nationalism remains a propaganda tool for new populist parties on the right, while the economically pro-market and socially liberal Civic Platform has built its electoral success mainly on an appeal to civil and democratic principles.[64] The divide between ethnic and civil interpretations of politics thus operates as the element of differentiation in the political system which,

---

63 J. Kurczewski, 'The Rule of Law in Poland' in P ibá and Young, op. cit., n. 17, 181-203, at 181.

64 The Civic Platform won 65 seats (13 per cent of votes) in Sejm, the lower chamber of Parliament, in the election in 2001. The right-wing populist League of Polish Families won 38 seats, the Law and Justice party 44 seats, and the Self-Defence 53 seats. In the parliamentary elections in 2005, the Law and Justice won 152 seats (27.6 per cent of votes) and the Civic Platform came second with 133 seats (24.2 per cent of votes) while the left-wing parties lost due to corruption allegations and poor governance. In the following presidential elections, Donald Tusk of the Civic Platform and Lech Kaczynski of the Law and Justice party succeeded in the first round of voting and Kaczynski subsequently beat Tusk in the second round and became President of Poland.

nevertheless, does not have any significant impact on the constitutional framework of the country. So far, political rhetoric of the Kaczynski brothers and their Law and Justice Party calling for the establishment of the 'fourth republic' purged of former communists, their secret police agents and corrupted new élites did not result in fundamental constitutional changes despite rising political tensions and fractures in Poland after the parliamentary and presidential elections in 2005.

Hungary provides a very different example of rebuilding national identity through constitutionalism. Unlike other Central European constitutions, the preamble of the Constitution of the Republic of Hungary is entirely prospective and surprisingly makes no references to history, culture, tradition or religion. It was also enacted under unique political circumstances, being negotiated during round-table talks between opposition and government and adopted by the communist Parliament in October 1989. The original democratic deficit was eliminated only indirectly by the acceptance of the constitutional framework by Parliament, democratically elected later in 1990.[65]

Regarding matters of national identity and ethnicity, the Constitution contains a highly controversial and disputed Article 6/3 which reads:

> The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.

This constitutional commitment to ethnic Hungarians living abroad reflects the fact that several million people of Hungarian ethnicity live outside the territory of the Hungarian state and constitute ethnic minorities in neighbouring states.[66] At the same time, Article 6/3 stretched constitutional sovereignty beyond state borders and understandably caused negative reactions from neighbouring states with large Hungarian minorities, such as Romania and Slovakia. Using the ethnic logic of Article 6/3, in 1993, the post-communist Parliament also adopted a new citizenship law legislating the principle of *ius sanguinis,* which meant that Hungarian descent became the main criterion for citizenship. This law was accompanied by the Act on the Rights of National and Ethnic Minorities which guaranteed the political and other rights of minorities living in Hungary.

Article 6/3 became a cornerstone of Hungarian nationalist politics when the first post-communist Prime Minister, the late József Antall, stated that he regarded himself as the Prime Minister of 15 million Hungarians, including the ethnic Hungarian minorities living abroad. After the victory of the post-communist left-wing opposition in subsequent parliamentary elections, the new Prime Minister, Guyla Horn, distanced himself from this right-wing nationalism by commenting that he was only the Prime Minister of the 10 million citizens of Hungary.[67] The ideological

---

65 For further details, see, for example, A. Örkény and K.L. Scheppele, 'Rules of Law: The Complexity of Legality in Hungary' in M. Krygier and A. Czarnota (eds.), *The Rule of Law After Communism (*Aldershot, Ashgate, 1999) 55-76.

66 F. Mediansky, 'National Minorities and Security in Central Europe: The Hungarian Experience' in Pavkovic, op. cit., n. 59, 101-20, at 108.

67 S.J. Roth, 'The Effect of Ethno-Nationalism on Citizens' Rights in the Former Communist Countries' in A. Sajo (ed.), *Western Rights?: Postcommunist Application* (The

and political struggles in Hungarian political life symbolized by Article 6/3 were further exacerbated by the ethno-nationalist policy of the Hungarian government of 1998-2002 under Prime Minister Viktor Orbán. This government enacted legislation granting special access to the social welfare provided by the state of Hungary to ethnic Hungarians living outside its territory. This legislation caused international tensions between Hungary and its neighbouring states once again and was criticized by the Council of Europe.[68]

Apart from other rights and entitlements, this legislation provided ethnic Hungarians from abroad with permission to work in Hungary for three months of each year. They also received the Hungarian state's welfare benefits for that period. This legislation also provided financial assistance for ethnic Hungarian students in higher-education institutions while they were in Hungary and extended this assistance to ethnic Hungarians in their home countries. Foreign citizens who wanted to apply for any of these entitlements were to obtain identity cards on the basis of a recommendation from foreign organizations of ethnic Hungarians recognized by the Hungarian government.

This legislation was originally drafted even more widely and was to create an 'out-of-state-citizenship' based entirely on the blood and race principle. It was supposed to be a legal and political symbol of the cohesion of ethnic Hungarians and their identification with the Hungarian state. It is then no surprise that the legislation was criticized even by moderate democratic leaders in Romania and Slovakia and the Romanian delegation to the Parliamentary Assembly of the Council of Europe submitted a resolution calling on Hungary to suspend implementation of the legislation. This resolution was supported by 26 other delegates and the legislation was described as discriminatory and violating the territorial integrity of other countries. The socialist government formed after the parliamentary elections in 2002 subsequently amended the law and abolished some of its most controversial provisions. Nevertheless, the legislation came into force on 1 January 2002 and highlighted how much the Hungarian constitutional and political transformation remained heavily determined by the divide between the civil and ethnic concepts of a nation.

The difference between the ethnic and civil tradition profoundly affected the ideologies of both the Hungarian political left and right and consequently had a significant impact on governmental policies during the 1990s. In general, the nationalist conservative governments of Prime Ministers Antall (1990-94) and Orbán (1998-2002) promoted the principle of ethnic identity, while the post-communist socialist governments of Prime Ministers Horn (1994-98), Medgyessy (2002-4) and Gyurcsany (2004-) do not give ethnic policies such priority. Although the ethnic politics of protecting both the Hungarian minorities living abroad and different minorities living in Hungary forms an important part of the policies of all post-communist Hungarian governments, its content is heavily influenced by the ideological differences between the liberal left and the conservative right.

Hague, Kluwer, 1996) 273-90, at 282.

68 (2001) 10(2-3) *East European Constitutional Review* 20 (country-by-country report on the 'status law' enacted by the Act of Parliament of the Republic of Hungary on 19 June 2001).

Interpretation of the ethnic tradition by different governments and political parties continues to play a formative role in the political system and, therefore, is the subject of controversial legal regulations that frequently change.

The Czech and Slovak process of rebuilding national identity by constitutionalism is as fascinating as that of Poland and Hungary. In the final part of this section, I therefore focus on the historical developments of ethnic relations between Czechs and Slovaks. The Czechoslovak constitution of 1920 purported to establish one Czechoslovak nation, but this was a constitutional, political and cultural fiction partly reflecting the common history of Czechs and Slovaks and partly expressing a hope for political integration held by Czech and Slovak politicians of that time. The constitutional fiction of a Czechoslovak nation symbolized political unity and enhanced the chances of political homogeneity in the ethnically fragmented territory of Czechoslovakia. The project of multi-ethnic liberal democracy in Czechoslovakia was, of course, brought to an end by the Munich agreement of 1938 and the subsequent dismantling of the state.

The problem of the coexistence of the different ethnic nations living in Czechoslovakia continued to preoccupy constitution-makers and politicians even during the communist era. After the removal of ethnic Germans from the territory of Czechoslovakia in 1945, the matter was reduced to the relationship between the Czech and Slovak nations and the constitutional protection of ethnic and national minorities.[69] The Constitution of 1960 limited the constitutional autonomy of the Slovak administration and shifted more power to central constitutional and political bodies. The Prague Spring democratization movement of 1968 resulted in the introduction of a federal system in Czechoslovakia. However, this system had no real impact on the lives of citizens because it lacked any capacity to express the truly democratic political will of Czechs and Slovaks and this continued to be the case over the next two decades.[70]

After the fall of communism, constitutional transformation quickly became predicated upon building an 'authentic federation' and securing the rights of self-determination of the Slovak and Czech nations and of the other national minorities within the framework of the common state.[71] The complicated process of redrafting the constitutional division of power and a system of checks and balances failed and both nations subsequently drafted constitutions for the new, independent states of the Czech Republic and Slovakia. Tensions between civil and ethnic traditions had led to the break-up of the country. This failure is an example of the deadlock between ethnically established political entities living in the territory of a common state, leading to peaceful partition.[72]

---

69 E. Stein, *Czecho/Slovakia: ethnic conflict, constitutional fissure, negotiated break-up* (Ann Arbor, University of Michigan Press, 1997) 23-32.

70 For further details about the federal system of 1968 and the constitutional history of Czechoslovakia, see L. Cutler and H. Schwartz, 'Constitutional Reform in Czechoslovakia: *E Duobus Unum?*' (1991) 58 *University of Chicago Law Review* 511-53, at 519.

71 V. Havel, *Summer Meditations: on politics, morality and civility in a time of transition* (London, Faber and Faber, 1992).

72 The former Yugoslavia would be an example of the violent dissolution of a common state, while Belgium may be used as an example of a crippled unity and continuing tensions

The constitutions of the Czech Republic and Slovakia manifest fundamentally different understandings of nationhood. The Slovak constitution was criticized for marginalizing ethnic and national minorities because its preamble refers primarily to the ethnically specified Slovak nation, its cultural heritage and political history.[73] This constitutional expression of ethnic domination was exploited by the 1994-8 government of Prime Minister Vladimír Me iar. The Prime Minister and his government used the historical resentment and recent fears of some of the ethnic Slovak population about Hungarian nationalism to isolate the Hungarian ethnic minority living in Slovakia from politics and public life. However, the Slovak constitution contains a special section on ethnic and minority rights, part IV, Arts. 33-4, which always enjoyed the protection of the Constitutional Court of Slovakia during its confrontations with Me iar's ethno-nationalist policy. After the fall of Me iar's government in 1998, this section was used as the basis of a more balanced policy and legislation protecting ethnic and national minorities. As in Hungary, the difference between ethnic and civil ideologies and policies has played a fundamental role in the Slovak political and legal system.[74] However, until the parliamentary election in 2002, the system was affected by the division between the populist nationalist Movement for Democratic Slovakia, led by former Prime Minister Me iar, and the wide coalition of the socialist, conservative, liberal and Hungarian minority parties that was first in opposition (1994-98) and then, in 1998, formed a government which sought to renew the institutional stability of the country. Ethnic policy was therefore part of a much larger political agenda and power struggles in Slovakia in the 1990s. It became a hot political issue once again after new Prime Minister Robert Fico decided to form the left-wing populist coalition and invited Vladimír Me iar and Slovak nationalists led by Ján Slota back to power after the parliamentary election in 2006.

In 1992, Czech constitution-makers merely reacted to political developments, and their lack of constitutional enthusiasm (unlike Slovakia) even led to the suggestion that the constitution-making process could wait until after the independent Czech Republic came into existence on 1 January 1993. This opinion did not prevail and the Constitution of the Czech Republic was eventually adopted in December 1992, just two weeks before it came into effect. The merely reactive attitude of the Czech constitution-makers is well illustrated by their definition of a nation. After the adoption of the Slovak constitution and subsequent criticism of its definition of nationhood in terms of ethnocentrism, the Czech constitution-makers enacted a document that begins:

---

between different nations under one federal rule.

73 D. Malová, 'Slovakia: From the Ambiguous Constitution to the Dominance of Informal Rules' in J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe Volume 1: Institutional Engineering* (Oxford, Oxford University Press, 2001) 347-77, at 355-6.

74 J.T. Ishiyama and M. Breuning, *Ethnopolitics in the New Europe* (Boulder, Co., Lynne Rienner Publishers, 1998) 51-78.

> We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia,
> At the time of the restoration of an independent Czech state,
> Faithful to all good traditions of the long-existing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood,
> Resolved to build, safeguard, and develop the Czech Republic in the spirit of the sanctity of human dignity and liberty,
> As the homeland of free citizens enjoying equal rights, conscious of their duties towards others and their responsibility towards the community,
> As a free and democratic state founded on respect for human rights and on the principles of civil society,
> As a part of the family of democracies in Europe and around the world,
> Resolved to guard and develop together the natural and cultural, material and spiritual wealth handed down to us,
> Resolved to abide by all proven principles of a state governed by the rule of law,
> Through our freely-elected representatives, do adopt this Constitution of the Czech Republic. (The Preamble to the Constitution of the Czech Republic of 1992.)

Nationhood was exclusively defined in terms of citizenship, territoriality, state (not national) history and the universal values of human dignity, liberty, democracy and human rights. Like the Polish and Slovak constitutions, the Czech Constitution retreats to a historical legitimating discourse but it entirely ignores the ethnic diversity of Czech society. Constitutional protection of ethnic and minority rights was secured by the *Charter of Fundamental Rights and Freedoms* which was incorporated into the newly established Czech constitutional order (Article 24 and 25 of the Charter). Unlike Hungary and Slovakia, the Czech Republic is not haunted by inter-national ethnic minority conflicts, and the problems of minority rights and discrimination toward the Roma community (some 2-3 per cent of the population) are not directly reflected in the collective memory of the nation. The civil liberal codification of that memory rather contributed to the neglect of policies and actions required in the field of the Roma minority rights in the first half of the 1990s.[75] Governmental policies recognizing the scale of the economic, social and cultural problems of the Roma community started to emerge only gradually and, as in Hungary and Slovakia in the second half of the 1990s, after a series of racist attacks and interventions from the European Union.

Constitutional Symbolism and National Policy-Making

The process of constitution-making in post-communist Central Europe went far beyond a mere technical building of liberal democratic institutions and procedures. It involved the codification of the new political identities that were being constructed by the re-emergence of the different civil and ethnic traditions of each nation. The temporal self-reflections and interplay between past and present that this involved

75 M.A. Vachudová, 'The Czech Republic: The Unexpected Force of Constitutional Constraints,' in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors* (Oxford, Oxford University Press, 2001) 325-62, at 353-60.

both synthesized the new collective memory of individual nations and selected the traditions that were to play a constitutive role in Central European political societies after 1989. The processes of both synthesis and selection were heavily influenced by the difference between the civil and ethnic traditions, their codification in legal systems and their interpretation regarding different governmental policies.

The choice between the civil and ethnic traditions has been ideologically perceived as mutually exclusive and subject to 'either-or' logic. However, a socio-legal analysis shows that the exclusive selection of either tradition is impossible and that nation-state democracy is often based on political compromise between ethnicity and civil principles. Modern nation states are 'cocktails' mixed from both civil and ethnic traditions[76] and post-communist reality is further evidence of this.

In analysing the constitutions put in place in Central Europe during the 1990s, it is possible to construct a spectrum of the constitutional codifications of a nation: entirely civil (Czechia); a patriotic mixture of civil and ethnic (Poland); internally civil combined with externally ethnic (Hungary); and entirely ethnic, defining popular sovereignty as participation and cooperation between an ethnic majority and minorities (Slovakia). A state established on the civil definition of popular sovereignty could thus have a discriminatory ethnic policy, such as Czech local authorities' policies towards the Roma/Gypsies in the mid 1990s. At the same time, the ethnic definition of a nation did not automatically rule out the adoption of a cooperative and inclusive ethnic policy by a state, as in Hungary in the 1990s.

The legal and political consequences of this constitutional symbolism are not simple cause-effect matters. These codifications of collective identity often involved the emergence of very different interpretations from the system of government and administration. The problems posed for popular sovereignty by the ethnic and civil concepts of a nation have gone beyond the level of constitutionalism, pervaded practical legal policies, and have not necessarily kept the same form and standards when translated from the constitutional level into ordinary legislation.

76 U. Beck, *The Reinvention of Politics: Rethinking Modernity in Global Social Order* (Cambridge, Polity Press, 1997) 73.

Chapter 5

Identity, Constitution-Making and the Enlargement of the European Union

After analysing different traditions of *demos* and *ethnos*, their symbolic power and political reflections in Central Europe in the 1990s, this chapter addresses the problem of political identity within the ambit of the post-war European integration process as well as the recent constitution-making efforts. I mainly focus on the symbolic rationality of law and political identity constructed by the European Union and its reflections in Central European countries. I outline the distinction between civil and ethnic political identity within the framework of the European Union in the context of the Central European accession states and the European Union's political symbolism and recent constitution-making premised on the possibility of a potential European *demos.*

The crux of the argument lies in comparing two models of constitution-making: the Hobbesian vertical versus the Lockean horizontal version of the social contract. The Hobbesian vertical constitutional model does not allow for the political ambitions of a European Federation or a Europolity to be met, due to the notable absence of a European people as the Constitution's constituent power. The vertical, authority-promoting model may have been beneficial to the accession countries during the accession process but could hardly be applied during the Convention's deliberation and, later, the Constitutional Treaty's ratification. Conversely the horizontal constitutional model introduced by the Convention has the potential for creating a Constitution which embraces a European multi-dimensional identity premised on the tension between civil democratic virtues and old national loyalties, and disentangled from the traditional concepts of solidarity and communal bonds.

Constitution-Making and Political Identity in Post-Communist Central Europe: Preliminary Remarks

Most of the countries which joined the European Union in 2004 experienced a unique movement related to their constitution-making. After the fall of communism in the late 1980s and the early 1990s, former communist countries such as the Baltic States, the Czech Republic, Hungary, Poland, Slovakia and Slovenia reinvented their national sovereignty by introducing and cementing the liberal democratic rule of law into their new constitutional systems. The constitution-making processes, typical of the political climate in the early 1990s, were part of the juridification of emerging democratic politics and human rights culture in post-communist countries.

The constitution-making process in Central and Eastern Europe in the 1990s was heavily influenced by the political motivation of accession to the European Union. Under the 'Return to Europe' slogan, former communist countries opened a complex process of negotiations with the EU which resulted in the enlargement of the Union from its existing 15 to 25 Member States. The enlargement process began at the EU Copenhagen summit in June 1993, continued at the EU Amsterdam summit in 1997 where the process of negotiations commenced, was formally recognized at the EU Nice summit in 2000 where the accession countries were invited to participate in the Convention's constitution-making, and was completed at the EU Copenhagen summit in December 2002 when the Central and East European countries concluded negotiations on EU accession.

National sovereignty achieved after the fall of communism was used as a political instrument to negotiate new forms of integration and limitations to sovereignty. The revival of the nation state in post-communist Europe was transitional in bringing those nations into the 'post-national constellation' of the European Union. The symbolic and somewhat vague claims of integration were gradually converted into pragmatic policies for the institutional and structural accommodation of democratic government, the civil-rights-based rule of law, and the market economy. The consolidation of these democratic regimes and their accession negotiations were taking place simultaneously. The integration process was part of the post-communist state-building and constitution-making exercise because of its symbolic power in uniting the region with liberal democratic and prosperous Europe (symbolic rationality), on the one hand, and its pragmatic effect on political, economic and constitutional transformations (instrumental rationality) on the other. The European Union was the main 'focal point'[1] which had a profound effect on the quality of the political process and the nature of the self-reflection of collective political identity in those countries. For many Czechs, Hungarians and Poles, this development was merely a restoration of the region's historical and cultural unity with the West.

European Constitution-Making: Three Arguments

By trading their national sovereignty in favour of European integration, the Central and Eastern European countries were partaking in the constitution-making process at the European level. Within this 15-year period, therefore, these countries experienced two fundamental constitution-making processes: from building national sovereignty to building supranational sovereignty.

Prior to analysing the role of the EU's institutional framework in these processes, it is worthwhile summarizing major arguments in favour of the European constitution-making efforts and further integration. We may divide these arguments into the following three categories: the functionalist argument, the democratic renewal argument and the identity argument. The functionalist argument primarily uses the language of globalization to demonstrate that the shape of the European

1 J. Elster, C. Offe, and U.K. Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge, Cambridge University Press 1998) 188.

political map must change since European nation states can no longer regulate global economic, environmental and political processes effectively. Global communication and economic exchange exceed the power of nation states.[2] The modern state can neither promote nor benefit from national economic development alone. The mobility of capital fundamentally affects the labour markets of wealthy post-industrial societies and their social welfare systems. According to the functionalist argument, state administration is too weak to cope with the disappearance of national economies. As a result, the progress of the European integration process into a tighter, constitutionally entrenched, political model appears to be a direct consequence of economic and political global trends.

Following the functionalist argument, the European Union has to be constructed as a supranational political agency, able to address the challenges of the existing monetary union and the denationalized European market. For instance, Jürgen Habermas demands the 'overcoming' of the nation state in post-Maastricht Europe when he states:

> For the present, a politics still operating within the framework of the nation-state limits itself to adapting its own society in the least costly way to the systemic imperatives and side-effects of a global economic dynamic that operates largely free from political constraints. But instead it should make the heroic effort to overcome its own limitations and construct political institutions capable of acting at the supranational level.[3]

According to Habermas, tighter political and administrative integration is considered to be the only antidote to the erosion of social solidarity, the welfare state and the public sphere. One does not have to be a great politician to see the political challenges of economic globalization, yet all attempts to reconstruct and strengthen the European political system in order to respond to developments in the European and global economic systems have received rather mixed and mostly lukewarm reactions.

The political building of the 'ever closer union' had been mentioned already in the 1957 Treaty of Rome and Jean Monnet, one of the European 'founding fathers', advocated the process of institutionalization which, although not an end in itself, might result in the tight-knit political entity of the United States of Europe.[4] The object of post-war European integration was the fostering of peace, prosperity and liberty whereas the building of a democratic community was left to the nation states.[5] Nevertheless, the permanent shift in power to the European level puts further pressure on overcoming the democratic deficit in the Union's institutions within the spheres of authority, representation and accountability. The European Union has to deal with its own democratic deficit and therefore needs to 'democratize'

---

2 K. Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York, Free Press, 1995).

3 J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, Polity Press 1999) 124.

4 J. Monnet, *Memoirs* (London, Collins, 1978) 520.

5 G.F. Mancini and D.T. Keeling, 'Democracy and the European Court of Justice' (1994) 57 *Modern Law Review* 175-90.

its administrative institutions. It cannot be a union merely based on functional integration[6] by harmonizing its political institutions with economic developments as a result of reactive strategies.[7]

This argument of democratic renewal has been the most common source of criticism of the European Union. It treats European politics as the politics of a 'confused empire' in which the proliferation of offices obfuscates political rule.[8] A critique of the pathological nature of current European politics is the starting point of this argument with the aim of strengthening the weak democratic legitimacy of EU institutions. The Union obtains its legitimacy through the previous – and therefore indirect – legitimacy of the Member States.[9] The people of Europe do not identify themselves with, and take very little interest in, European politics which is an issue that was to be tackled through the constitution-making process. An expansion of democratic legitimacy and its incorporation into formal constitutional rules for the EU was therefore being sought in order to promote the regulatory power of European institutions.

This idea of dealing with the democratic deficit by reducing the constitutional deficit of the Union is closely related to the outcome of the third identity-based argument. While the democratic renewal argument demands the democratization of the political bodies of the EU in order to legitimate them, the identity argument builds upon the successful historical achievements of the European integration process thus far. It is premised on the primary function of the European integration process, namely, neutralizing nationalist tensions. Taming *ethnos* in European nation states has always been considered to be the primary purpose of both economic and political integration. European popular identity is constructed as the reverse of modern nationalism and its political myths. This creation of a civil European *demos* is contrasted with different ethnic pre-political identities of peoples of Europe and its symbolic power is supposed to keep *ethnos* on the sidelines of European politics. *Ethnos* is treated as a mere structural excess of post-nationalist European politics. Within the process of European integration, a common European people is to be invented and given a voice which adheres to the principles of democratic government. The identity argument accommodates the notion of cosmopolitan citizenship and invents the *demos* as democracy's subject which is extended beyond the boundaries of the nation state to those of the supranational level.[10] Nevertheless, this effort is rendered more complex by the fact that European integration follows two different courses. On the one hand, an intensive process of transferring power

---

6 For the concept of 'functional integration', see, especially, H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr, 1972).

7 W. Wallace and J. Smith, 'Democracy or technocracy? European integration and the problem of popular consent' (1995) 18(3) *West European Politics* 137-57.

8 For the term, see P. Sloterdijk, *Im selben Boot. Versuch ueber die Hyperpolitik* (Frankfurt, Suhrkamp, 1993) ch. 3.

9 See, for instance, H. Wallace, 'Deepening and Widening: problems of legitimacy for the EC' in S. Garcia (ed.), *European Identity and the Search for Legitimacy* (London, Pinter, 1993) 95-105.

10 See, for example, D. Beetham, *Democracy and Human Rights* (Cambridge, Polity Press, 1999).

from national to European institutions is occurring and, on the other, an extensive process of incorporating the new Member States into the European Union is also taking place.

Taming *Ethnos* and its Symbolic Power for the New Member States

The first argument could only affect the post-communist accession countries indirectly since they were just opening their markets to the forces of globalization. The second argument could have no impact until the acceding states were informed that they were to become 'members of the EU family'. Unlike the first two, the identity argument played an essential role in national constitution-making in Central and Eastern Europe in the 1990s. It also formed an important part of the public discourse of the accession states.

The whole continent of Europe, not just its central and eastern parts, has suffered the terrible consequences of ethnically based popular sovereignty throughout its modern history. The idea of ethnic nationalism was naturally stronger in the 'younger' Central, Eastern and Southern European states such as Germany, Italy and Hungary than in the territorial states of northern and western Europe. However, racially and ethnically biased policies and discrimination were common even amongst states such as France and the United Kingdom. The shared historical truths between the old and new Member States resulting from the post-war integration process tell a story of the 'political trauma of nationalism and racism' as 'dark legacies' of Europe.

Modern European states were created as institutions of both liberal democratic hopes and exclusive political identity for an ethnically integrated community.[11] Romantic nationalism resulting in the creation of modern nations often initiated the transformation of the early modern states into democratic and republican regimes. The nationalist discourse therefore provided a very effective symbolic universe which facilitated a more abstract form of the social integration of populations in modern political societies.[12] The nation as an ethnic community with a common language, tradition and ancestry represents collective identity even for modern European states premised on principles of democracy and liberal republicanism. This duality of civic and ethnic collective identity and the institutional framework of modern politics 'leads to a double coding of citizenship, with the result that the legal status defined in terms of civil rights also implies membership in a culturally defined community'.[13] In this respect, Habermas summarizes that '[T]he tension between the universalism of an egalitarian legal community and the particularism of a community united by historical destiny is built into the very concept of the nation(al) state.'[14]

The European Union has been symbolically constructed as a civil alternative to the ethnically burdened nation states. Taken from the historical point of view,

---

11 For further details, see C. Tilly (ed.), *The Formation of Nation-States in Western Europe* (Princeton, NJ, The Princeton University Press, 1975).

12 H. Schulze, *Staat und Nation in der Europäischen Geschichte* (München, C.H. Beck, 1994).

13 J. Habermas, op. cit., n. 3, at 113.

14 id., at 115.

the European integration process is a post-1945 attempt to successfully answer the 'German question' and the ethnic extremism of *Volk* politics which continues to haunt modern European history. The question of whether the people constitute an ethnic or civil community has also been central in all Central European states. The Union's recent policy of promoting regionalism only strengthens its civil image because it devolves administration to the units beyond the institutional framework of a sovereign state. The modern administrative and redistributive roles of a nation state are weakened by the two opposite trends in the shifts in power. While the first trend devolves more power to the 'smaller' regions of the EU Member States, the second shifts more power to the 'bigger' European Union.

The Union has thus been perceived as an organization able to promote the values of cosmopolitan republicanism and civil virtues and curb the risks arising from ethno-nationalism. The modern state is an institution affected both by the ideals of a republican political society and the vices of ethnic communitarianism. The struggle between society and community, so central in the modern sociological paradigm, finds its reflection in the symbolic political language of European integration. The EU represents itself as a cosmopolitan civil society which is ready to recognize ethnic communities at the regional level, but which confronts the residual ethnic nature of its Member States.

The political dualism of community versus society may be far from the reality of EU politics yet it plays a significant role in its legitimation. This argument has also played an essential role in the mandates of pro-EU campaigners in the Central and East European countries. This strategy should come as no surprise when considering the recent history of Central and Eastern states and, in particular, the shocking example of Yugoslavia disintegrating into isolated islands of ethnic hatred and violence. The 'Europeanization' of the Central and East European countries was perceived as the best scenario for the region since the post-communist political reconstruction of democratic institutions and economic reforms could be backed by the 'grand design' of the European Union.[15] The strong involvement of 'patron power' guaranteeing the peaceful nature of post-communist transformations and the enforcment of democratization by internationally recognized standards had been favoured because of its ability to curb the growing threats of political authoritarianism, nationalist fractions and other disturbing consequences of the post-1989 political changes.[16]

The Copenhagen Criteria and Beyond: The Union's *Ethnos*-Oriented Strategies in Central Europe

Central European states formally started the process of EU integration after the Copenhagen summit of 1993 which set conditions for the accession states. In June 1993 in Copenhagen, the European Council specified the following criteria which individual states had to meet: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (the

15 A. Agh, *The Politics of Central Europe* (London, Sage, 1998) 43-4.

16 See, for instance, C. Offe, 'Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe' (1991) 58 *Social Research* 889.

political criterion); the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (the economic criterion); and the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (the criterion concerning adoption of the Community *acquis*). These accession conditions were very general and vague but their meaning could largely be extracted from the existing institutional frameworks and practices in the EU and its Member States. However, these frameworks and practices were changing as a result of the transformation of the EU itself during the 1990s.[17] For the accession states, the Union became a fluid goal which was yet to be achieved. While the Union was progressing in its political debates during the 1990s and proposing fundamental constitutional changes, the accession talks were driven by clear reference to the status quo of the 1993 Copenhagen criteria.

Furthermore, although EU regulations dominated the list of conditions, the conditionality policy was not necessarily limited to the Union's own standards. The Union could demand extra conditions only because European integration was such a high political priority for all accession states. This asymmetrical patron-client relation between the EU and the accession states, and the Union's superiority, was typical of the enlargement process, often described as the 'learning process'.[18] The conditions were even expanded after 1997 when the Commission introduced annual reports and elaborate monitoring of economic and political institutions and their transformation in the accession countries. The approximation of laws, which was not originally perceived as the most important condition for accession, eventually became a central activity for legislative bodies and governments in all accession countries. The harmonization of EU law and the national legal systems of the accession countries seriously affected the quality of democratic deliberation in those countries because national parliaments favoured a smooth integrative process and, without adequate political debate, mechanically enacted most of the proposals harmonizing national laws with the EU legal framework. This practice was possible because the Copenhagen principle of conditionality set standards for those aiming for EU membership, who then assumed that meeting these standards would automatically open the Union's gates. The accession states even raced each other to be the first to knock on those gates![19]

With regard to the identity argument, European integration has always acted as a neutralizing force in the ethnically and politically diverse regions of Europe and its positive effect should therefore not be underestimated. The Copenhagen special minority rights criteria were part of this. The *neutralization function* was emphasized, for instance, in the post-1989 tensions between Hungary and Slovakia regarding the

---

17 See, for instance, C. Jenkins (ed.), *The Unification of Europe: An Analysis of EU Enlargement.* (London, Centre for Reform, 2000).

18 See M. Maresceau, 'Pre-accession' in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003) 22.

19 This race was inspired by an enlargement strategy, *Agenda 2000*, published by the European Commission on 15 July 1997. The document was published together with individual reports on the applicant countries and outlined detailed assessments of each state.

policy of ethnic and national minority rights in both states. Hungary's attempts to veto Slovakia's accession to CSCE following the break-up of Czechoslovakia in 1992 and its abstention in the vote to admit Slovakia to the Council of Europe in 1993 worsened diplomatic relations between the two countries. In order to reduce the growing tension, the European Union launched its first Joint Action under the EU Common Foreign and Security Policy – 'the Balladur Plan' based on the idea of preventive diplomacy.[20] The Balladur Plan, drafted by the French government, pursued the idea of a stability pact cemented by bilateral agreements on ethnic and national minority problems arising between neighbouring countries and threatening their peaceful coexistence and political stability. Supported by Recommendation 1201 of the parliamentary Assembly of the Council of Europe on minority rights, this plan led to the successful 'Treaty of the Republic of Hungary and the Slovak Republic on Good Neighbourliness and Friendly Cooperation'.[21] Although one must not overestimate the role of the treaty in sensitive diplomatic relations between Hungary and Slovakia and its impact on the Me iar government in Slovakia (1994-8) or the Antall and Orbán governments (1990-4 and 1998-2002 respectively) in Hungary, this diplomatic effort certainly reduced the risk to both countries of an escalation of their nationalist policies, leading to international crisis and possibly violent conflict.

The Union's policy of active involvement is even more striking in its treatment of the Me iar government in Slovakia between 1994 and 1998. After the break-up of Czechoslovakia, Slovak foreign policy was focused on European integration and the government pledged to fulfil the requirements formulated at the 1993 Copenhagen and the 1994 Essen EU summits. However, the nationalist, populist and authoritarian Me iar government, which came to power in 1994, gradually steered the country toward international isolation which resulted in the elimination of Slovakia from the list of first-round candidates for NATO membership in Madrid in 1997 and the EU's refusal to continue the integration process with Slovakia. The government's foreign policy used the stereotypical self-perception of the Slovak nation as having a unique strategic position on the map of Europe and being constantly threatened by its neighbours and consequently, it strengthened its cooperation with Russia.[22] The collapse of Slovakia's European integration policy in 1997 and severe criticism of governmental policies by the Union's representatives were factors in the victory of the political opposition in the 1998 parliamentary elections and helped to restore liberal democratic politics in the country.[23] The combination of diplomatic pressure and local liberal democratic aspirations thus worked as a mechanism to curb the worst scenario of a violent outbreak of nationalist populism and the collapse of

20 For further details, see L. Valki, 'Hungary: Understanding Western Messages' in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors* (Oxford, Oxford University Press, 2001) 304-6.

21 Signed in Paris on 19 March 1995.

22 See I. Samson, 'Slovakia: Misreading the Western Message' in Zielonka and Pravda, op. cit., n. 20, at 376-80.

23 See, for example, EU Commission, 'Commission Opinion on Slovakia's Application for Membership of the European Union', *Bulletin of the European Union*, suppl. 9 (1997).

liberal democratic politics. The Union's executive power supported the principles of parliamentary democracy and constitutionalism in Slovakia by reporting and expressing concerns over government abuses of power and its attempts to undermine the role of parliament.[24] The EU thus played a fundamental role in the consolidation of democracy in Slovakia in the second half of the 1990s.

Another example of the Union's active policy of containment of ethnic divisions and nationalism was the role of the EU Enlargement Commissioner, Günther Verheugen, during the negotiations with the Czech Republic regarding the controversial issue of the Beneš Decrees that legalized the expulsion of Sudeten Germans from Czechoslovakia after World War II. In the final stage of negotiations, the Austrian government, the government of the German state of Bavaria, and the Hungarian Prime Minister Orbán repeatedly called for the repeal of the decrees. In the heated atmosphere of the 2002 parliamentary elections in the Czech Republic, Germany and Hungary, Verheugen managed to assure the Czech government that the decrees would not be a bar to accession while suggesting that a symbolic moral gesture recognizing the injustices of the expulsion would be helpful. The EU Commission was also reluctant to open the issue because it was closely linked with property restitution, family law issues (the decrees provided a basis for divorce) and compensation.[25] Furthermore, similar decrees had been issued in other countries, such as Poland and Denmark, and the specific character of the Czechoslovak decrees would therefore necessarily have broader international legal consequences.[26] The carefully crafted strategy of keeping the legal *status quo* and promoting the culture of moral 'collective repentance', which started with President Václav Havel's apology in 1990 and was incorporated into the 1997 Czech-German Joint Declaration of Parliaments, was the only possible option in the critical situation in which the Czech government and parliament made it clear that any EU demands for annulment would effectively put an end to accession talks.[27]

The last and probably most persuasive example of the Union's promotion of civil society oriented politics and the protection of minority rights is the protection

---

24 See G. Pridham, 'The European Union's Democratic Conditionality and Domestic Politics in Slovakia: the Me iar and Dzurinda Governments Compared' (2002) 54 *Europe-Asia Studies* 203-27.

25 For instance, a Christian Democratic Union member of the Bundestag (German Parliament) and President of the Association of Expelled Germans (*Bund der Vertriebenen*), Erika Steinbach, who is famous for radical ethno-nationalist views, said that British and American reluctance to support German restitution demands meant acceptance of the genocide of 15 million Germans after 1945 and accused the European Commission of ignoring laws depriving Germans of their rights in four future Member States of the EU (the Czech Republic, Poland, Slovakia and Slovenia). Quoted from an analysis by the Czech diplomat Ji í Šitler, 'Že by mi vrátili tu mou almaru?' (Would they return my cupboard?), published in *Lidové noviny*, Orientace, 3 January 2004.

26 For further details, see 'Constitution Watch' (2002) 11(1-2) *East European Constitutional Review*, 14-5; 'Constitutional Watch' (2002-03) 11/12(4-1) *East European Constitutional Review*, 19.

27 See, for instance, *The Declaration of the Assembly of Deputies of Parliament of the Czech Republic*, of 24 April 2002.

of minority rights of the Roma populations living in the region. Roma living in Central and Eastern Europe are one of the most vulnerable minority groups, subject to individual and institutional racism and discrimination. The EU set up national action plans for candidate states with sizeable Roma communities and provided funding for their implementation. These programmes were intended to address discrimination issues as well as to promote Roma cultural and ethnic identity.[28] It is also noteworthy that similar policies of promoting national and ethnic integration and diversity were encouraged by the European Commission in the Baltic States, with their large Russian-speaking minorities.[29]

Timing the Future in Process: 'Imagined Europe'

Focusing on the symbolic power of constitution-making and the role of European integration, the effect of 'imagined Europe' was essential in building the collective identity of Central European political societies. Europe's symbolic value was given by its temporal orientation. It was always a future-oriented political goal for the politicians and populations of post-communist countries which helped to contain political myths of the national past which might threaten to reinvent nationalist politics based on historical and ethnic claims of 'blood and soil'.

The politics of primordial attachments[30] is constituted by beliefs in the shared customs, blood-ties, language and tradition of a political community, which are normatively binding for its members. Ethno-nationalist sentiments are presented as 'natural' and historically 'inevitable'. This legitimation by 'natural history' gives normative force to these sentiments, makes people attached to their ethnically marked political community and delineates the limits of community membership.[31] Ethno-communitarians and nationalists believe that history and human traditions are the sources of the true collective nature of a nation and that its present identity has therefore to be derived from its past. According to this view, collective identity should be the 'gravitational field' of a constitution because it reflects communal values superior to liberal individualism.[32] However, this politics of a 'historical future'[33] turns out to be politically very dangerous because it draws on the system of historical

28 For many valuable details and analysis see *Monitoring the EU Accession Process: Minority Protection Volume I. An Assessment of Selected Policies in Candidate States. 2002* (Budapest, Open Society Institute, 2002).

29 See, for instance, European Commission, *2001 Regular Report on Estonia's Progress Toward Accession* (Brussels, 2001) 24.

30 See C. Geertz, 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States' in C. Geertz (ed.), *Old Societies and New States* (London, Free Press, 1963).

31 M. Nash, *The Cauldron of Ethnicity* (Chicago, University of Chicago Press, 1989).

32 G. Walker, 'The Idea of Nonliberal Constitutionalism' in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights (NOMOS XXXIX)* (New York, New York University Press, 1997) 169.

33 H. Joas, *The Creativity of Action* (Chicago, University of Chicago Press, 1997) 250.

pre-political identity and transforms particular traditions and national myths into political symbols and legally enforceable codes and norms. Communitarian critics of liberal society are legitimately concerned about the similarity between their position and fascist ideology.[34]

In comparison to this politics of a historical future, politics recalling a common post-1945 European identity has been driven by the opposite temporal logic which might be called the 'future in process'. Unlike the historical future, the future in process is not primarily legitimated by past experiences and therefore must be modelled in a more abstract way. The primary political goal of the future in process is to unify the heterogeneous groups and individuals who share a common political life. From the very beginning, the process of European integration was a project of building a supranational community which would need to emerge in order to minimize particular nationalisms and maximize the integrative power of a political culture of civil rights and parliamentary democracy. The supranational ideal of the Union's citizenry is to prevent nationalist abuses of state power in the future and defuse nationality as the principal reference of democratic politics. This ideal has always been present in European politics as an aspiration and a purpose of unification. It has a dual nature regarding its origin and *telos.*[35] It therefore permeates both the symbolic and purpose-oriented instrumental rationality of European politics. The concept of a European citizenry is a reference point for the 'ever closer union' and opens possibilities of future decision-making at the European level.

The primary effect of such a complex concept of European identity on the nations of post-communist countries was 'negative': it protected them from falling into the abyss of history-oriented nationalism and ethnically based political identity. Nationalisms, which falsely call for the awakening of nations to self-consciousness and 'invent nations where they do not exist',[36] certainly played a significant role in post-1989 Central and Eastern Europe but they never turned into the politics of state and tribal violence as happened in the Balkans in the 1990s. Thanks to the influence of this external 'European identity', re-awakened nationalisms influenced only a few political decisions and legislation but, with the exception of Slovakia between 1994-98, they never fully determined the course of national politics in the accession countries.

The European constitution-making process has been based on the 'future in process'. This future in process was typical, for instance, of the attempt at formulating an identity basis for the process of European unification in the *Declaration on the European Identity* signed by the then nine Member States of the European Community.[37] It states that the Member States shared 'the same attitudes to life,

34 Walker, op. cit., n. 32, at 169-70, 177-8.

35 Z. Bankowski and E. Christodoulidis, 'The European Union as an Essentially Contested Project', (1998) 4 *European Law Journal* 347.

36 E. Gellner, *Thought and Change* (Chicago, University of Chicago Press, 1964) 169. For a similar definition of 'the invention of the nation' see, also, B. Anderson, *Imagined Communities: Reflections on the origin and spread of nationalism* (London, Verso, 1983); E. Gellner, *Nations and Nationalisms* (Oxford, Blackwell, 1983).

37 Commission of the European Communities, *Declaration on the European Identity* (1973) Bull. EC 12, Cl. 2501, at 118-27.

based on a determination to build a society which measures up to the needs of the individual'. In the process of European integration, the 'historical future' has mainly been constructed as a negative element in the whole symbolic structure of the EU, representing the history of nationalism, ethnic hatred, racism and anti-semitism. The historical trauma and modern political disasters such as the Holocaust and the two World Wars in the last century can have an educative and unifying effect for Europeans, both 'old' and 'new' joining the Union in 2004 and eventually lead to self-identification as a new European citizenry.[38] The historical future accepted by European constitution-making was the republican history of cosmopolitan *demos* which was always confronted by the destructive power of nationalist political myths. The dream of a future 'everyone's Europe', announced by the President of the European Commission, Romano Prodi, was described as a gift 'we owe to future generations'.[39] In his address, the cosmopolitan political programme was almost fulfilling a utopian dream of the ultimate inclusion of all people, leaving nobody out. It is this language of the future in process and not the historical future which has had formative power in recent European constitution-making.

The 1992 transformation establishing a single market and the Single European Act was driven by the ideology of European ascendancy and people in the Member States were 'called to rally behind and identify with a bold new step toward a higher degree of integration'.[40] The European market's instrumental rationality was to be fortified by the symbolic rationality of political culture, ethos and ideology. Europe as unity was a slogan of the 1990s and the original EU integration goal of limiting state sovereignty[41] was progressing through ever closer economic integration, with the hope that full political union and a federal Europe would follow. Multicultural ethos of a common European state was to be 'composed of a plurality of nations and yet founded on a *demos*, deriving its legitimacy from consent rather than descent and its chances of survival from civil rather than primordial loyalties'.[42]

The European polity brought gradually into being by the 1957 Treaty of Rome and subsequent integrative efforts was believed to be in need of democratization and Euro-federalists started arguing strongly in favour of common statehood in the 1990s. However, the federalist model reveals an obvious problem: this *demos* may exist as a utopian fantasy and political symbolic project, yet it does not exist in the everyday reality of European politics. Advocates of cosmopolitan democracy and citizenship failed in their attempts to reduce the juridical and representative

38 See, for instance, J. Habermas, op. cit., n. 3, at 152.

39 R. Prodi, 'Shaping the New Europe', Prodi's speech in the European Parliament delivered on 15 February 2000. Quoted in I. Ward, 'A Decade of Europe? Some Reflections on an Aspiration' (2003) 30 *Journal of Law and Society* 236.

40 See J.H.H. Weiler, *The Constitution of Europe: 'Do the new Clothes have an Emperor?' and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999) 89.

41 The strategy of limiting the nation state had been present already in the 1950 Schuman Declaration and the 1951 European Coal and Steel Community Treaty. See Schuman Declaration of 9 May 1950 and the preamble to 1951 Treaty of Paris.

42 See G.F. Mancini, 'Europe: The Case for Statehood' (1998) 4 *European Law Journal* 35.

role of the nation state.[43] Democracy has not been successfully extended from the nation state framework to the Union and its population as a whole. The peoples of Europe and their democratically elected representatives at the national level regularly criticize the European Union for its lack of democratic legitimacy and accountability. The European sense of belonging, solidarity and identity is much weaker than the identification of people with their region, country and nation.[44] European federalism may be supported by different local and national élites, yet it still lacks solid democratic consent.[45]

Instead of representatives of the 'imagined' European nation, it is representatives of Member States, middle-range European officials and the agents of a variety of private advisory bodies who sit on different committees, exercising administrative and regulative functions. This 'comitology'[46] inevitably suffers from a deficit of legitimacy and strengthens the perception of the Union as driven by élites and their conceptions of the emerging polity. The committee-based form of European governance is neither constitutional nor unconstitutional. It is beyond the reach of constitutional discourse because it exceeds the concept of different branches of government, checks and balances, principles of delegation and separation of power, etc.[47] The expansion of government by committees contradicts the proclaimed ascendancy of a common European citizenry and its ethos of public control and political accountability. The democratization of the Union by constitution-making, which involves the attempt to establish a European *demos*, must therefore be primarily a process of changing its decision-making character, and moving closer to Kelsen's concept of constitutionalism based on the concept of *Grundnorm* (basic norm).[48] The hope is that a constitution will give normative legitimation to the Union's decision-making agencies.

The search for a European people was intensified by the fact that the Union has already been *de facto* building its constitutional order through the decisions and

---

43 See D. Held, *Democracy and the Global Order* (Cambridge, Polity Press, 1995); D. Archibugi, D. Held and M. Koehler (eds.), *Re-imagining Political Community* (Cambridge, Polity Press, 1998).

44 See, for instance, D. Beetham and C. Lord, *Legitimacy and the European Union* (London, Longman, 1998) 46.

45 See L.K. Hallstrom, 'Support for European Federalism: an élite view' (2003) 25 *Journal of European Integration* 51-72.

46 The term used in R.H. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy – The Role of Committees and Comitology in the Political Process* (Maastricht, European Centre for Public Affairs, European Institute of Public Administration, 1996). See, also, K. Bradley, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 *European Law Journal* 273; P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999).

47 See Weiler, op. cit., n. 40, at 98.

48 This 'symbolization' of the current constitutional dilemmas in the 'Kelsen v. Schmitt' jurisprudential divide has become quite popular in recent debates. See J.H.H. Weiler, 'In defence of the status quo: Europe's constitutional *Sonderweg*' in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003) 12.

practices of its administrative and judicial bodies. The doctrine of the European Court of Justice holds that European law constitutes a new legal order, neither a subordinate sub-system of the legal systems of Member States nor merely part of international law.[49] The national legal systems of Member States consequently contain two distinct 'basic norms', that of the national constitutional order and that of European law.[50] For instance, the response of the German Federal Constitutional Court to this doctrine denied that the European Court of Justice could have the so-called *Kompetenz-Kompetenz* to determine the final scope of European law in relation to national law and sovereign state.[51] One of the main reasons stated by the German Constitutional Court was precisely that the Union did not have a *demos* and its legislation could not therefore claim supremacy. This famous 'no demos thesis' and resistance to the ability of the European Court of Justice to limit national judicial and constitutional authority only revealed competing and conflicting visions of both the jurisdictional and political authority of the European institutions in relation to Member States. National constitutional courts therefore do not necessarily support the emerging transnational European legal order but often defend national democratic constitutionalism against 'illicit encroachment from Brussels'.[52]

Challenged or supported by the systems of justice of Member States, it is obvious that European constitutionalism had been practised long before the Convention started its constitution-making job. The existence of a 'constitution in practice'[53] reflects the fact that practical constitution-making and the formation of a political community have been proceeding for a long time, alongside the conceptual, theoretical and normative debates of the Convention and inter-governmental conferences, in the form of the daily practices and decisions of the EU institutions. Efforts to invent a European people thus had more than just the symbolic function of giving priority to *demos* over *ethnos* in the 'unification dream' decade of the 1990s. The invention of the European *demos* was also to affect all three spheres of the democratic legitimacy of the European institutions and the practical rationality of decision-making: authorization, accountability and representation.

49 See N. MacCormick, 'Sovereignty, Democracy and Subsidiarity' in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe* (London, Lothian Foundation Press, 1995) 100.

50 This structural division in national legal systems invokes the idea of constitutional and legal pluralism. See, for instance, N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

51 See, for instance, J.H.H. Weiler with U.R. Haltern and F.C. Mayer, 'European Democracy and Its Critique' in J. Hayward (ed.). *The Crisis of Representation in Europe* (London, Frank Cass, 1995) 4-39, at 9-23.

52 See Weiler, op. cit., n. 48, at 16.

53 See J. Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law and Society* 4-37, at 18. On the other hand, Dieter Grimm criticizes this thesis of 'constitution in practice' as self-contradictory when he says that '… [T]he call for a constitution would be void from the outset if European legal scholars' assumption that the missing constitution already exists were right. In that case one could certainly talk about improving it, but hardly about creating it. See D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282-302, at 284.

Space Varieties: Two Models of European Constitution-Making

The EU's quest for a 'European' people and its constitution-making are examples of a historically unique and paradoxical situation in which the 'constitutive power' is desperate to constitute its 'constituent power' (*pouvoir constituant*). The existing EU institutions decided to create a special agency – the Convention – which was expected to outline a new political structure and institutional framework inspiring the constitution of Europe's constituent power – the people. Concrete political actions and decisions were to be taken in two separate steps: the first was to create the Convention while the second was to create the Constitution. This gradual work of the EU agencies was then expected to transform the Union's political and legal structural framework and inspire the creation of a European democratic citizenry. While actions and decisions determined the structural transformation in the first part of the plan, the expected transformation was to inspire the creation of a new agency in the second part. This political structuring[54] would be an unremarkable social process were there not a paradoxical expectation involved: a new-born agency was to retrospectively legitimize the transformed political structure which had made its creation possible. The constitution-making process would thus have serious political and cultural implications for all the European nations involved and it is therefore not surprising that the whole nature of the process was questioned and redesigned by its agents.

The whole business of constitution-making and the search for a European collective political identity has undoubtedly been risky, like any sort of political constructivism. Apart from the institutional and procedural aspects of power and obedience, it involves problems of moral commitment and cultural identity. No wonder that endless debates regarding the Draft Constitutional Treaty regularly addressed the issues of cultural self-understanding among 'Europeans', and the Philadelphia Convention was used as a decisive inspiration for the imminent European democratic citizenry.[55] Despite such an overarching moral and cultural discourse, critics have often warned against the possible destructive effects of the current process on democratic politics at the national level. According to these views, the imposed idea of a non-existing European nation may result in the weakening of democratic legitimacy at the national level while having no real effect on the quality of European politics and its legitimacy. Other voices acknowledge the real achievements of European integration, but want to keep it at the level of purposive legitimacy through common interests instead of symbolic legitimacy through a common people.[56] The main message of these pro-European, yet anti-federal, warnings is that it would be dangerous to instigate political identity where a political community does not exist. Instead, these voices propose that liberal democracy

54 For a general sociological account, see A. Giddens, *The Constitution of Society* (Cambridge, Polity Press, 1984).

55 See, for instance, a speech delivered by the Convention's President, Valéry Giscard D'Estaing, 'The Preparation of the European Constitution', *Second Annual Henry Kissinger Lecture*, Library of Congress, Washington, 11 February 2003.

56 H. Lübbe, *Abschied vom Superstaat: Vereinigte Staaten von Europa wird es nicht geben* (Berlin, Siedler Verlag, 1994).

should rather be cultivated at the national level, with European constitution-making merely confirming the existing level of integration and thus reducing the potentially growing democratic deficit.[57]

Any sort of European constitution-making, based on post-Maastricht European sovereignty claims and the notion of the supremacy of European law,[58] fails the Hobbesian test of political order. According to Thomas Hobbes, it is the threat of anarchy and violence that makes the establishment of political order necessary. One can ask similarly: 'Why does Europe need a sovereign constitution when its political order is not threatened by anarchy and violence?' It may be distrusted by many European inhabitants, yet has been largely beneficial to most of them. Despite the politically disruptive effects of government by committees, there is no imminent threat to its stability and the main driving force behind current changes therefore has been political ambitions to enhance the existing levels of integration and build a federal Europe. The economic challenges and achievements of the common European market and currency were to be cemented by a federal European polity. Federalism has been taken as a rich political tradition and practice which should be exploited by EU policy-makers and constitution-makers in order to construct the Union as a federal polity.[59]

If enlargement policy was driven by the logic of *conditionality* set up at the Copenhagen summit, progressive political integration was typical of the logic of the constitutional *finality* of a European Federation.[60] For instance, the German foreign minister's finality principle included a stronger bicameral European Parliament representing both citizens and nation states, with basic human and civil rights enforceable at the European level. According to these federalist views, enlargement became one of the reasons why political integration should be accelerated. It was argued that European institutions should have more decision-making powers in order to avoid possible political chaos and instability. However, the enlargement processes have been following a very different logic incompatible with the finality argument of federal statehood.[61]

The Hobbesian finality argument could not be accommodated in a constitution-making process seeking to reconcile visions of both tightening and widening the European Union. Nevertheless, the argument that fear, as the most important cause of individual and collective violence, needs to be eliminated by a political sovereign, first made in Hobbes's *Leviathan*, informed the pro-European discourse of former

57 D. Grimm, op. cit., n. 53, at 282-302.

58 N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259-66.

59 R. Koslowski, 'A Constructivist approach to understanding the European Union as a federal polity' (1999) 6(4) *Journal of European Public Policy* (Special Issue) 561-78, especially at 568-70.

60 For this view, see, especially, the Germany Foreign Minister, J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', speech delivered on 12 May 2000 at the Humboldt Universitat, Berlin.

61 Compare A. Wiener, 'Finality vs. enlargement: constitutive practices and opposing rationales in the reconstruction of Europe' in Weiler and Wind, op. cit., n. 48, at 160-5.

communist countries exposed to threats of nationalism and 'new tribalism'.[62] Although the Union could hardly be perceived as a sovereign power, it was portrayed as a safe haven curbing all nationalist animosities and protecting the member countries from regressing to an earlier state of ethnically defined politics and traditionalism. Europe was expected to act as *quasi-Leviathan*, promoting the virtue of civil unity and protecting national politics from the risks of secessionist movements and nationalist separatism. Expectations of the Union's power of constraint in the field of ethnic politics, including minority rights and political self-determination, were indeed very high in the ethnically divided region of Central and Eastern Europe. The Copenhagen conditionality policy could therefore successfully use the Hobbesian model of political stabilization.

Although the Hobbesian model had a positive external effect on the accession states, its internal effect would have been much more negative and harmful. The Convention's constitution-making therefore eventually involved many elements that differed from Euro-federalist aspirations and their Hobbesian logic of state building as power, providing security for its subject citizens. It resembled much more the social contract in the sense of an alliance of involved parties that have mutual responsibilities and rights. The dominating logic was that of John Locke's 'horizontal' version of the social contract and not its 'vertical' version formulated by Hobbes.[63] After the struggle between federalists and anti-federalists, the Convention presented a draft of the social contract between the peoples of Europe politically organized in their democratic nation states. At the same time, it drafted some institutional and structural preconditions for a federalist model of the Union, but without the concept of a European people legislating the constitution for itself. The preamble to the draft 'treaty establishing a constitution for Europe' left a common identity yet to be shaped, and referred to national identities in both their positive and negative political impact on European history, emphasizing the potentially unifying role of negative historical experience.[64] At the same time, the Union selected its 'positive past' when it committed itself to respect cultural diversity and heritage in Article 1/3 of the draft Treaty.

The heavy weight of regulatory politics, comitology and the institutional framework of the European Union did not lead to the historical 'awakening' of political society in the participating states and their integration into a civil European nation. In the current situation, the search for the European *demos* resembled far too closely the undesired Hobbesian model, as it was a search for a sovereign political power which would legitimate the federal transformation of political power in Europe. The recognition of the sovereignty of Member States was reflected in the description of the draft as a 'treaty' which means that it, like any other international

62 The term used, for instance, by Michael Walzer. See M. Walzer, 'Notes on the New Tribalism' in C. Brown (ed.), *Political Restructuring In Europe: Ethical perspectives* (London, Routledge, 1994) 187-200.

63 For the distinction, see for instance H. Arendt, *Zur Zeit* (München, Deutscher Taschenbuch Verlag, 1989) 145-6.

64 See the European Convention document CONV 820/03, *Draft Treaty establishing a Constitution for Europe* 4-5.

treaty, would have to be ratified by national governments. The horizontal version of the contractual act forms a 'pact' between the parties which reflects the original agreement, consent and freedom of political will. The principle of negotiations and multilateral agreements between the Member States has remained decisive in the Union's future constitution-making.

'Europe's constitutional architecture'[65] is fundamentally different from models of national constitutions because its authority derives entirely from the Member States and not from the citizens of Europe. For this simple reason, the kind of constitutional authority and discipline in the Union will be different from any concept of statehood and a sovereign constitutional order. The constitutional language of statehood symbolism, which was typical of the Laeken Declaration of December 2001, has lost its momentum and 'the current situation of massive enlargement brings back elements derived from the logic of international law'.[66]

EU enlargement fundamentally affected the constitution-making process because the Convention realized that it would be very hard to go both much deeper and wider at the same time in shaping the future of Europe. The accession countries benefited enormously from this limitation of political ambitions because they were: a) treated as equal partners in the constitution-making debates; b) not forced to renounce too much of their recently re-established national sovereignty. These countries experienced solidarity with other European nations, the sense of belonging to a common political network and being 'one of us', when they were invited to participate in the Convention and the following Inter-governmental Conference.[67] They could build on the symbolic image of enlargement as a process of the reunification of Europe and 'the real end of World War II'[68] and incorporate it into the image of the Convention's constitution-making. It was also important that the preamble to the Convention's draft reflected this, speaking of a 'reunited Europe'.[69] New and fragile national democracies thus did not have to confront the public dilemma of 'selling out to Brussels' on an even larger scale than during the enlargement negotiations and the incorporation of EU law into their national legal systems.

The European enlargement process was thus typically a mixture of both the Hobbesian and the Lockean models. While the first was applied by the Union, for instance, in the Copenhagen criteria, the second was applied by the Convention in its constitution-making and extended to the accession countries. As mentioned above, the Copenhagen criteria were a fascinating example of the Union's 'double standards' policy, setting certain political and constitutional conditions for the accession states

---

65 See J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 567.

66 Wiener, op. cit., n. 61, at 159-60.

67 A concrete example of this participation was, for instance, an informal consultative Prague meeting of 15 states demanding further changes in the draft Treaty and a better balance of power in favour of the smaller Member States before the opening of the Inter-governmental Conference in October 2003. See the 'Prague Memorandum' of 1 September 2003.

68 N. Walker, 'Enlargement of the European Union: How New EU Members Will Change the Shape of Europe' in R.J. Guttman (ed.), *Europe in the New Century: Visions of an Emerging Superpower* (London, Lynne Rienner Publishers, 2001) 58.

69 European Convention, op. cit., n. 64, at 4.

which had been part of neither the Union's legal system nor the national legal systems of the Member States. This double-standards approach was striking in the field of minority rights protection which was expected from the accession states, yet ignored by some Member States. It was demanded of Central and East European countries joining the EU that they enter 'with a clean slate in respect of their minorities' because 'then there will be no need for the European Union itself to modify its "agnosticism" in respect of minority protection *inside* the Union'.[70] The Union's external demand that minority rights should be dealt with in the accession states before they joined the EU was to help keep the whole constitutional and legal agenda of minority rights protection outside the remit of EU law.

While the Copenhagen criteria were based on the Hobbesian model, the contractual model of the Union's 'Constitution in waiting' draws rather on the vision of a horizontal community of states which goes far beyond the conceptual framework of international law based on principles of state sovereignty, independence, neutrality, autonomy, national power and self-interest. The European Union has been designed as a community of states and peoples sharing a political ethos, principles of government, human values and aspirations. Although it builds on the principle of 'divided sovereignty' in a growing number of policies and economic and administrative interdependence, it is based on the principle of balance between the interests of a Member State and those of the community. It thus constitutes itself as a political and *legal hybrid* exceeding the territory of international law, yet without the coherence of a federal state.[71] This development leads to European political and legal practice 'beyond the sovereign state'[72] which does not comprise a federal Union. Debates on European constitution-making cannot proceed on the nation-state model of a constitution constituted by a central collective agent – the political nation.[73] The European polity is a decentralized body of different peoples and specific polities which cannot be contained by the federal nationhood pattern.

---

70 B. De Witte, 'The Impact of Enlargement on the Constitution of the European Union' in M. Cremona (ed.) *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003) 239.

71 Despite the proposed principle of the Union's legal personality in Article 6 of the draft Treaty, it cannot be considered a sovereign state in an international law sense, which would exercise greater power over the Member States. The proposed common foreign policy in Article 11/4 shows signs of external sovereignty and enhances mutual interdependence and closer cooperation between the Member States. However, it is an example of divided sovereignty because the sovereignty of the Member States has not been lost, but rather subjected to a number of decision-making processes combining the power of the European institutions and the Member States.

72 N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1-19.

73 For the debate on the European polity and constitution-making, see C. Joerges, Y. Mény and J.H.H. Weiler (eds,) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Firenze, Robert Schuman Centre, 2000).

The Multi-Dimensional European Identity and the Constitutional Marginalization of *Ethnos*

The contractual model had strong symbolic value especially for the new Member States. It strengthened their European identity precisely because of the draft's recognition of the diversity and heterogeneity of voices speaking through different national representations in a common Europe. The legitimating force of a Constitution drafted as a treaty can arguably be stronger because it shows reciprocal influence and agreement between equal political democratic nations.

Furthermore, the covenantal nature of the Convention's deliberation and the final draft inspired the civil virtues of equality, respect and agreement. They represented the Union's formative constitutional experience and the concept of constitutionalism which builds on procedural elements, conversation and dialogue, and the equal treatment of all parties. Nevertheless, it became obvious that the strong concept of political identity was not useful in the covenantal form of constitution-making. The identity of the European *demos* would be too difficult to formulate through the concepts of nationhood, sovereignty and democratic state. Weiler sees it as impossible when he comments on the process of European state and nation building:

> It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state. It would be equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism. The problem with the unity vision is that its very realization entails its negation.[74]

In his polemic with Grimm, Habermas, who has always been a strong proponent of the idea of a common European people, also recognizes problems with European identity and statehood and introduces a new project of a 'heterogenous' people which would have to replace the old 'homogenous' concept of a people in order to provide a legitimation framework for federal Europe:

> Of course, the argument that there is no such thing as a European people, and thus also no force capable of generating a European constitution, only becomes a fundamental objection through a particular use of the concept of 'a people'. The prognosis that there cannot be any such thing as a European people remains plausible only if 'the people', as a source of solidarity, actually depends on some corresponding community as a pre-political basis of trust, which fellow countrymen and women inherit as the shared fate of their socialization.[75]

The European identity lacks a common language, shared tradition and customs, yet it can draw on common culture and both negative and positive historical experiences. However, history cannot bind a political community. Habermas and other Euroenthusiasts therefore call for a political identity established by European law, politics, the public sphere and civil society institutions. According to this view,

---

74 See Weiler, op. cit., n. 40, at 94.

75 J. Habermas, *The Postnational Constellation: political essays* (Cambridge, Polity Press, 2001) 100.

European citizenship is incompatible with the exclusionary nature of nationalist sentiment.[76]

European constitution-making is accompanied by a multi-dimensional identity–building which is disentangled from the traditional concepts of solidarity, community and face-to-face relations.[77] Cultural rigidity is replaced by the flexibility of social networks and multiple personal choices. The proposed emergence of a minimum common identity through the network of European constitutional law depends on the concept of European citizenship. The original Maastricht citizenship provisions incorporated in Article 8 of the Maastricht Treaty have been elaborated in Article 10 of the draft Constitutional Treaty and declare that '(e)very national of a Member State shall be a citizen of the Union. Citizenship of the union shall be additional to national citizenship; it shall not replace it'. Although national citizenship is not affected, this provision clearly makes citizens of the EU Member States the subject of rights and entitlements provided at the European level. This trend of directly granting rights at the European level weakens old communal loyalties but it does not mean a full decoupling of national and European citizenship. It is still Member-State nationality which opens the way to the rights guaranteed for European citizens.[78]

The post-communist experiences of the accession countries show that identity dilemmas had an enormous impact on constitution-making and political processes which could be stabilized externally by the symbolic power of the EU as a supranational institution representing the political virtues of civility. Inside the Union, European civil identity has been a major tool for responding to the democratic deficit at EU level and connecting with the democratic politics of the ethnically consolidated Member States. In this context, European identity has not been a dilemma of sharply divided alternatives but, rather, a process of supplementing and expanding one form of political identity over the other.

Despite their persistence, the building of a European political identity can nevertheless proceed only by marginalizing ethnically established loyalties and traditional communal identities. This marginalization is part of the internal logic and constitution of the European Union as an answer to modern European history, its nationalism and ethnically incited political violence.

---

76 N.W. Barber, 'Citizenship, nationalism and the European Union', 27 *European Law Review* (2002) 256-7.

77 D. Beetham and C. Lord, op. cit., n. 44, at 44.

78 See, for instance, J.H.H. Weiler with U.R. Haltern and F.C. Mayer, op. cit., n. 51, at 21.

This page intentionally left blank

Chapter 6

The Symbolic Power of European Law and Search of European Politics

The process of European integration has its internal temporal logic according to which a common market and the political institutionalization of the European Union have emerged as ‘the future in process’. Economic and political integrative aspirations could be technically processed and deliberated only against the background of ‘imagined Europe’. The imagination of European and national political leaders and a generally shared feeling of belonging, common destiny and identity inspire their political deliberations and decisions leading to the ever closer union.

The idea of building a European polity has always been present in the integration process. At the same time, it has become increasingly challenged by a simple question of whether there are any limits of this process and contested by different criticisms and sceptical views. Despite many conflicting views, adherents and critics of political integration both agree that it depends on the non/existence of European identity and its political self-reflection in national societies and the Union itself. Although the early basis of the European Union was predominantly economic, the identity issue has always been present both as a project and a legitimation of European integration. Prosperity and peace in Europe have become inseparable from increasingly cultural and ‘civilizational’ reflections on greater European unification that involves the processes of both integration and enlargement.

The creation of democratic political institutions can proceed only if there is democratic constituent power. In the context of European integration, this democratic self-reflection and identification may take a radical essentialist form and demand the political Subject – one organically constituted European people as a nation necessary for pursuing egalitarian democratic politics. Some believe that only this strong concept of the European nation can counterbalance the enormous power of European institutions and guarantee social welfare and solidarity among European citizens. The absence of a European people as the political Subject is then used by both Euroenthusiasts and Eurosceptics for pursuing their political agenda. While Euroenthusiasts argue that further European integration will eventually result in the creation of this European nation, Eurosceptics warn that its absence makes any political integration illegitimate and undemocratic.

However, European democratic self-reflections and identity-building can also have different procedural forms demanding either the establishment of a European constitutional domain, which would define shared identity of the *demos* in the legal language of the rights of European citizens, or the establishment of a meta-constitutional European public sphere necessary for democratic deliberation. While the legal procedural approach is expected to create Euro-citizens by granting

This page intentionally left blank

identity derived from a sense of geographical, political and cultural belonging.[1] Cities historically shaped by the gothic, renaissance and baroque styles indicate a European territory. For Norman Davies, Europe and European post-1945 unification also contain an important historical dimension – 'Eurohistory' which involves both the sense of a shared past and a consensus on the positive historical meaning of the political horizons of the Union. Due to this historical dimension and solid reasons, Europe is not only 'a mosaic of cultures' but 'an organic whole'[2] with a sense of common identity justifying its political unification project.

There are many other examples of cultural and historical reflections on European identity. The symbolic communication of human sciences (*Geisteswissenschaften*), literature and the arts introduces new expressions and evaluations of Europe on a daily basis and makes us feel more or less European. These cultural reflections contribute to the self-identification of the inhabitants of the European continent as Europeans but this collective identity does not need to have any political meaning. It is ambivalent when it comes to the process of political integration and may even cause conflicts over which political process and vision is more 'European'. It is therefore important to examine which cultural reflections and symbolizations are adopted by the system of European politics and which political strategies facilitate the 'Europeanization' of democratic politics which, so far, has been the domain of nation states.

The symbolic ethical problem of European identity needs to be especially examined against the depoliticizing effects of economically and legally communicated integrative processes. The European Union's self-reflection historically lacks the political conception of democratic polemics, conflict and confrontation of different political agents and movements. The Union's generally neutralizing power permeates all levels and aspects of European politics. Its public law institutions are not established on the concepts of *polemos* or *hostis.*[3] They, rather, draw on universalistic values and identity. The EU institutions build on a *depoliticized* concept of Europe and thus are under the constant threat of 'official lyricism and an increasingly distrustful popular indifference.'[4] For a long time, European integration, despite its clearly political meaning, has been presented in terms of economic prosperity, international safety and legal regulation. The very project of political unification has both been presented and progressed as a *politics of depoliticization*. Politics communicated by the logic of economy and law is a founding paradox of the European Union.

Although Carl Schmitt's friend/enemy distinction should not be taken in its existential meaning and one has to be aware of its possible political consequences, it is analytically valuable and illuminates the structural preconditions, achievements and limits of the European Union's political and legal systems. As Schmitt argued,

---

1 C. Milosz, *The Witness of Poetry* (Cambridge, Mass., Harvard University Press, 1983).

2 N. Davies, *Europe: A History* (London, Pimlico, 1997) 43.

3 C. Schmitt, *The Concept of the Political* (Chicago, University of Chicago Press, 1996) 46-7.

4 A. Touraine, *Can We Live Together? Equality and Difference* (Cambridge, Polity Press, 2000) 204.

the moralistic politics and economic regulation of the liberal rule of law seek to marginalize the political concepts of battle and enemy. From this perspective, the EU's emerging public law system and constitutional framework are undoubtedly founded on demilitarized and depoliticized concepts and thus represent a coherent doctrine of liberal thought of this kind. Like other liberal doctrines and political institutions, EU law typically moves between ethics (moral and intellectual commitments in politics) and economics (free trade) and thus, using Schmitt's controversial concepts of political and legal theory, attempts 'to annihilate the political as a domain of conquering power and repression'.[5]

The EU's strategy of establishing a system of permanent negotiations and compromise and substituting legal procedures for political struggles is certainly driven by the Union's goal of making national and international politics *safe*, a possibility which is categorically rejected by Schmitt. The Union's politics of compromise may be only temporary, occasional and never decisive in the sense of decision-making by the ultimate political sovereign. However, the depoliticization of the EU's political domain and its transformation into neutral public law procedures clearly has some political significance and implications.[6] It may be argued, contrary to Schmitt's concept of the political, that the European Union historically emerged as a depoliticizing, yet profoundly political response to the unprecedented politics of local and universal genocides, extremely aggressive regionalisms, social-class discriminatory regimes and their politically violent totalitarian ideologies.

The Union's universalistic identity, based on the rule of law and constitutional democracy, was very useful for the post-communist EU accession countries in the 1990s. It was remarkably successful as a strategy for containing Central European ethno-nationalism. The EU membership aspirations of individual countries helped to neutralize tensions in the field of ethnic and national minority rights and the official nationalist propaganda of different Central and East European governments.[7]

Furthermore, the rule-of-law-driven universalistic identity also facilitated the adoption of the principles of liberal constitutionalism and the rule of law in the accession countries during their constitutional and legal transformation. The rule of law was contrasted with the battlefield of everyday politics, corruption, power struggles, confrontations and instability. The EU accession process incorporating the harmonization of the post-communist Central European and EU legal systems was commonly interpreted as an imposed check and external balance on post-communist internal law and politics. The limitation on the power of post-communist politicians at nation state level by the EU was popular because of the common public distrust of post-communist political élites and because of EU membership aspirations.

The EU processes of integration and enlargement have thus something general in common – they are designed and perceived as processes of *modernization*

---

5 Schmitt, op. cit., n. 3, at 71.

6 Schmitt himself is aware of this political function of liberalism and its tendency to neutralize and depoliticize, see id., 69.

7 See, for instance, A. Semjonov, 'Ethnic Limits of Civil Society: The Case of Estonia' in N. Götz and J. Hackmann (eds), *Civil Society in the Baltic Sea Region* (Aldershot, Ashgate, 2003) 145-57, at 153-4.

and justified less on geography[8] and more on grounds of the improvement of the member (and candidate) states' economy, politics, environment, welfare, etc. Europeanization as a modernization strategy has also been typical of asymmetrical relations between the Union and accession countries. Facing the 'Return to Europe' challenge, accession countries even implemented policies unfounded in the EU law, such as ethnic minority rights (Estonia, Slovakia, etc.), child care reforms (Romania) or nuclear power plant shutdowns (Bulgaria).[9] The Union's hegemonic use of annual accession reports and the mechanistic legislative adoptions of European law by accession countries could be justified only as principally contributing to the rule of law and democracy as universal values.

European Legality and its Identity-Building Limits

The Union's integration, based on the politics of depoliticization, has primarily been a *legalistic project*. The legal communication of civil rights and liberties enhances civil self-reflection among European citizens and marginalizes the political role of their ethnic bonds and loyalties. Despite its support for regionalization and power devolution,[10] the Union officially stands on the side of democratic political identity in the symbolic conflict of *demos* and *ethnos*.

Reflecting on the Union's civil universalistic mission and politics of depoliticization, two major political events closely connected with the collapse of communism occurred in Europe: the ethnically justified unification of Germany in 1990 and the civil democratic sense of togetherness inspired by the enlargement of the European Union in 2004. Although the Central European and Baltic 'return to Europe' had economic motives similar to those of German unification, they obviously could not be accompanied by the same 'one *Volk*' drive of identity politics, nationalist solidarity and its communitarian ethno-ideological background. The symbolic identification of 'new Europe' with the old one could proceed only against the background of common civil virtues and democratic principles.

The liberal democratic criteria of EU membership significantly affected the European enlargement process and strengthened the civil democratic collective identity of post-communist political societies. The prospects of EU membership stabilized and speeded up democratic transformations and marginalized illiberal domestic politics. Any enlargement process affects the existing collective identity

8 The issue of the European Union's borders has been recognized only recently as a relevant legal and political problem. See K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders* (The Hague, Kluwer International, 2003).

9 For general strategies, see *Agenda 2000: summary and conclusions of the opinions of Commission concerning the applications for membership to the European Union presented by the candidate countries; Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Czech Republic, Rumania, Slovenia, Slovakia* (Luxembourg, Office for Official Publications of the European Communities, 1997).

10 See, for instance, The Committee of the Regions' report, *A Europe of Cities and Regions: strategies and prospects for EU enlargement* (Luxembourg, Office for Official Publications of the European Communities, 2002).

of the Union and threatens to dilute its predominant values, norms and principles.[11] The strict conditionality policy defined by the Copenhagen criteria therefore were to minimize these identity risks and retain the universalistic, liberal mission of the Union that seeks to unite the peoples of Europe. Restrictive prerequisites for successful application thus had a significant influence and strengthened the civil and democratic collective identity of the EU Member States and the Union itself.[12]

European political developments since the collapse of communism and the EU enlargement process clearly illustrate the difference between the ethno-cultural identity politics still existing at nation state level and the more general and abstract European identity construed as both a supplement and antidote to ethno-nationalist identity politics. Nation states can be either unified (Germany), or dissolved (Czechoslovakia) on ethnic grounds. On the other hand, the European Union can function only as an extension of the civil and democratic traditions of these states. It is assumed that the Member States of the Union have a post-nationalist, liberal collective identity and that any accession countries:

> both match the EU members and distinguish themselves from other nonmembers with regard to their adherence to the liberal community values and norms. European states are excluded from [EU] membership only if they do not meet the liberal community standards.[13]

This pressure and a commitment to liberal democratic values is not limited to the candidate countries. Since the Amsterdam Treaty,[14] Member States have agreed to place the issues of naturalization, asylum, refugees and immigration policies in the third pillar of the Union's political architecture, that is, the domain of 'inter-governmental law'.[15] Under this pressure, Germany abandoned its exclusive principle of *ius sanguinis* and changed the citizenship law by supplementing it with the *ius soli* principle in the acquisition of German citizenship. The old 1913 citizenship law was changed in 1999 and made it easier for foreign residents and their children to acquire German citizenship.[16]

---

11 For general comments on European enlargement, see, especially, A. Michalski and H. Wallace, *The European Community and the Challenge of Enlargement* (London, Royal Institute of International Affairs, 1992); J. Redmond and G. Rosenthal (eds.), *The Expanding European Union: Past, Present, Future* (Boulder, Colo., Lynne Rienner Publishers, 1998).

12 G. Schöpflin, *Nations, Identity, Power: The New Politics of Europe* (London, Hurst, 2000).

13 F. Schimmelfennig, 'Liberal Identity and Postnationalist Inclusion: The Eastern Enlargement of the European Union' in L.-E. Cederman (ed.), *Constructing Europe's Identity: The External Dimension* (Boulder, Colo., Lynne Rienner Publishers, 2001) 165-86, at 175.

14 J. Monar and W. Wessels (eds.), *The European Union after the Treaty of Amsterdam* (London, Continuum, 2001).

15 See, for instance, C. Jong, 'Harmonization of Asylum and Immigration Policies: The Long and Winding Road from Amsterdam via Vienna to Tampere' in P.J. Van Krieken (ed.), *The Asylum Acquis Handbook* (The Hague, T.M.C. Asser Press, 2000) 21-37, at 25.

16 The residency-to-citizenship transition period was reduced from 15 to eight years and children born to foreign residents who have resided in Germany for eight years may now

The systemic logic of European constitutional law has been enforcing rights and protecting the civil liberties of individuals and various groups for decades.[17] Citizens of the Member States are legally identified as European citizens and therefore have certain civil rights and liberties guaranteed by the Union's institutions. There is an optimistic belief that the Union's legal system will gradually inspire a 'thin' European collective identity[18] based on the principle of universality of rights and its political benefits to European citizens.[19]

The constitutionalization of European identity expects that the Union's legality is going to be transformed into the symbolic communication used by European citizenry in the process of self-identification. Nevertheless, the legal civil identification of European citizens also reveals the limits of the legal symbolization of a European 'polity in the making'. The constitutionalization of the EU, including the recent constitution-making process, has not inspired the desired awakening of the European public sphere and civil solidarity between the different nations of the Union which are the necessary preconditions of any identity as a European *demos* – the constituent democratic power.

Instead, the process of constitutionalization highlighted the weaknesses of some of the leading principles of the Union's legal system, such as the divided sovereignty doctrine which has dominated EU public law discourse for the last two decades. Vagueness, contradictory conclusions, and the opaque structure of the current EU public law was illustrated by Roger Errera, an honorary member of the French Council of the State, who concluded that the very notion of divided sovereignty and competences and the principle of subsidiarity could not be 'a clear cut issue and had been painted in grey (and not black and white) as the main colour of the EU's public and constitutional law'.[20]

The Convention's constitution-making clearly indicates the absence of a constitutional rule and the continuation of the current practice of *ad hoc* judicial reasoning and decision-making which can neither provide a comprehensive constitutional and legal framework for the Union and its Member States, nor inspire the development of a European polity. The judicial and legal 'epistemological community' continues to push for European integration on a discretionary basis and without adequate political deliberation. Due to the lack of democratic mobilization

acquire citizenship without renouncing other passports and, when they reach the age of 23, have to choose their citizenship.

17 This systemic logic was supposed to be further enforced by the enactment of the Charter of Rights which was incorporated in the proposals of the EU's Constitutional Treaty.

18 See D. Beetham and C. Lord, 'Legitimacy and the European Union' in A. Weale and M. Nentwich (eds.), *Political Theory and the European Union: Legitimacy, constitutional choice and citizenship* (London, Routledge, 1998) 22.

19 See, for instance, K.O. Apel, 'Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik. Worin liegen die "kommunitaeren" Bedingungen der Moeglichkeit einer post-konventionellen Identitaet der Vernunftperson?' in M. Brumlik and H. Brunkhorst (eds), *Gemeinschaft und Gerechtigkeit* (Frankfurt, Fischer Vlg., 1993) 149-72.

20 House of Lords, European Union Committee, *The Future Role of the European Court of Justice: Report with Evidence*, 6th Report of Session 2003-04, 24-5, 45.

and support at Member States level, constitution-making and further integration have been pushed forward by a political class without adequate democratic representation and supported by juridical arguments. Democratic assessment of the proposed European constitution was thus 'reactionary' in the sense of responding to a project that could not be actively pursued and supported by the European constituent power. No wonder European nations with strong democratic traditions, such as the Dutch and the French, responded with political anger in the ratification referenda and rejected the Constitutional Treaty. It could be easily ratified only in countries with a weak democratic tradition that are beneficiaries of the Union's economic redistribution (Spain), and those where the ratification of the Constitutional Treaty was subject of parliamentary vote (Hungary) and/or where political élites were strongly pro-European (Luxembourg).

The European Convention drafting the EU's Constitutional Treaty was intended to sideline the politics of depoliticization and make further integration the subject of political deliberation. However, despite the correctly chosen Lockean model of treaty negotiations it ended up as the most recent and complex example of this politics, clearly showing the problems and limits of the depoliticized public law machine. Although the Convention's representatives originally claimed to be following in the footsteps of the two-hundred-year-old United States constitution-making process, the final proposal was anything but a democratic constitution for a united European people, willing to build and share political institutions, make them democratically accountable and representative, and basing this constitutional unity on an abstract political solidarity.

The constitution-making process did not lessen the paradoxes of European politics and the transformation of the Union into a polity-based, profoundly democratized political structure. This time, the depoliticized logic of legality could not overshadow the impossibility of a political act constituting a European democratic polity. During the constitution-making, the politics of depoliticization of the EU manifested its semantic shortcomings and subsequently was confronted by strong democratic choices directly expressed in national referenda on the draft Constitutional Treaty. While useful in the early stages of European unification and the different processes of European enlargement, this politics could not further evolve due to the lack of political communication and its inability to reflect on political problems disguised as technical legal issues in the agenda of European constitution-making.

Nationalism Revisited: Europe *Repoliticized*?

These and many other contradictions only signify both the absence of a European public sphere as an effective communicative network and basis of democratic will-formation. The persistence of nation state politics in debates on European issues is not weakened by a common civil ideology and political ethos. Instead of one public sphere inspired by constitution-making, the Union currently faces a number of different overlapping public issues which resonate differently in individual Member States.

The weakness of the EU as a political body was illustrated by the national referenda on the draft Constitutional Treaty: while the President of France, Jacques Chirac, called it during the referendum campaign in 2005 a document protecting French political values and defending the European welfare state against 'the ultra-liberal current, an Anglo-Saxon, Atlanticist kind of Europe',[21] the British Prime Minister, Tony Blair, defended the Treaty as a text guaranteeing national sovereignty and the flexibility of the successful British economy and 'protecting the UK's vetoes on economic policy, defence and foreign affairs'.[22] While France's rejection of the Constitutional Treaty was considered a failure by the French president and the whole political class, the same decision was welcomed with a sense of great relief by the British government and its Prime Minister called for a 'period of reflection' in the European Union.[23]

The commonly discussed democratic deficit of the Union is, in fact, part of a more general *political deficit* which is caused by allocating ever-greater powers to the Union's institutions without adequate political accountability and democratization. A number of European law experts and pro-European politicians are quite understandably concerned that the current constitutional vagueness may become future political chaos and warn against the 'There is no alternative' attitude.[24] At the same time, this genuine and often justified fear is exploited by various Eurosceptic nationalists who, under the guise of criticizing European progressive integration, and especially the Constitutional Treaty, criticize the very concept of the Union's existence. Eurosceptic nationalists constantly repeat that democracy cannot exist outside the nation state and that any attempts to extend democratic politics to supranational levels are doomed to fail and end up as the authoritarian regulatory politics of the powerful against the powerless. According to them, cultural differences have fundamental political consequences and the fact that individual European nations have profoundly different cultural traditions and social policies effectively rules out any chance of setting up a functioning political entity.[25]

The Union's depoliticization has a potentially far-reaching and damaging effect at nation state level: it rehabilitates nationalism and nationalist identity politics as part of the democratic political discourse. Similarly, as in the nineteenth century, nationalism becomes the guardian of democracy and nation state democratic institutions are made part of the modern nationalist illusion according to which democracy is a reflection of national culture and even the spirit of the nation (*Volksgeist*). It has become obvious that the populist right and left in many Member States have benefited

---

21 See 'Key Quotes: Chirac on EU Constitution', BBC News Online, 14 April 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4446711.stm>.

22 See 'Q&A The UK's EU Referendum', BBC News Online, 18 May 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/4208423.stm>.

23 See 'Blair Calls for EU 'reflection'', BBC News Online, 30 May 2005, <http://news.bbc.co.uk/1/hi/uk_politics/4591381.stm>.

24 See, for instance, G. Stuart, *The Making of Europe's Constitution* (London, Fabian Society, 2003) 57.

25 B. Benoit, *Social-Nationalism: an anatomy of French Euroscepticism* (Aldershot, Ashgate, 1997); A. Forster, *Euroscepticism in Contemporary British Politics: Opposition to Europe in the Conservative and Labour Parties Since 1945* (London, Routledge, 2002).

hugely from the never-ending and unrestrained process of EU integration which lacks adequate democratic accountability. Politicians like Jörg Haider and Jean-Marie Le Pen could not do so well without Euroenthusiasts such as Romano Prodi, Joschka Fischer and Jose-Luis Rodriguez Zapatero. Moreover, these populists count on the EU's democratic deficit and, like the nationalists of the nineteenth century, claim that democracy must be defended at the national level against the Union as a supranational entity. They often successfully use the Euroenthusiasts/Eurosceptics conflict in the otherwise depoliticized European domain and make 'Europe' subject to the political debates and conflicts arising at nation state level. The depoliticized EU is tragically *repoliticized* and made the subject of nationalist propaganda at the level of its Member States.

Emphasizing the Union's indisputable democratic deficit, contemporary nationalists point to the simple fact that the EU lacks abstract collective solidarity felt by citizens of nation states. A nationalist sense of collective belonging has been important for individuals to identify with one another, both as members of the same pre-political ethnicity and citizens of the democratic nation state. Two centuries ago, democracy and nationalism established a dangerous, yet often successfully functioning pact which still inspires nationalist critics of the European Union – a political entity without any solid collective identity.

Contemporary nationalists can pretend to be the only 'true democrats' because they still exploit the modern complex process of inventing the nation which could play 'the role of a catalyst in the transformation of the early modern state into a democratic republic'.[26] They have accommodated the democratic doctrine of the identification of state and people, yet define the people in pre-political categories of history, spontaneity, ethnic autonomy and organic development. In this respect, Craig Calhoun notes that '[I]t is rather surprising … that the idea that national identities are ancient and stable, even primordial, has survived with such force.'[27] Myths of ethno-nationalism keep thriving in Europe and even claim to be the continent's main democratic force.

Another 'Repoliticization'?: The Ethics and Spirit of European Law and Politics

Ethno-nationalist identities are usually contrasted with calls for Europe's global mission. Despite the problematic effects of European constitution-making, adherents of European political integration keep confronting ethnic nationalism by emphasizing Europe's cosmopolitan legacy. At the same time, these adherents also have to confront another structural defect of the European Union – a growing gap between the idea of Europe and its economic, legal and political manifestation. Apart

26 J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, (Cambridge, Polity Press, 1999) 111.

27 C. Calhoun, 'The Virtues of Inconsistency: Identity and Plurality in the Conceptualization of Europe' in L.-E. Cederman (ed.), *Constructing Europe's Identity: The External Dimension* (Boulder, Colo., Lynne Rienner Publishers, 2001) 35-56, at 41.

from old ethno-nationalist enemies, advocates of progressive political integration increasingly criticize the Union's machinery and bureaucratic technical decision-making. According to committed Euroenthusiasts, the depoliticized Union now paradoxically obfuscates the ideal of the cosmopolitan 'everyone's Europe.' It is considered an obstacle to political integration and therefore apparently needs to be eliminated by further ethical humanization.

A machine is a popular metaphor for the Union's political structure and legal system. A catalogue of legal rights is contrasted with human existence. The language of legality is treated as an example of dehumanizing rationalism which needs to be politically counterbalanced by emotional attachment and the sense of identification, sharing and belonging. Advocates of a cosmopolitan Europe, such as Zygmunt Bauman, are highly critical of the formal concept of legality. Europe's identity apparently cannot be conveyed by the incomprehensible language of legality which, due to its fixation with words and political institutions, could bring the whole European project to a fatal end. From an ethical standpoint, legality is criticized as a technical tool and part of the failing instrumental rationality which dominates modern societies. According to this critical view, the Union's political decisions cannot be constantly obscured by an epistemological community of EU legal and administrative experts. As Bauman puts it:

> If the Maastricht Treaty, or the Accession Treaty that followed it, is the contemporary equivalent of the Declaration of the Rights of Man and of the Citizen, the American Declaration of Independence or the Communist Manifesto, then there seems little hope left for the next instalment of the European adventure. More specifically, for Europe retaining its fate/vocation of being the global yeast of shared global history.[28]

Europe and the European Union in its institutionalized form have to address urgent problems, crises and tasks of global dimensions and therefore cannot be restricted to public law discourse. Instead, legality is to be used as a communicative mode to enhance the symbolic power of European cosmopolitan identity and become a point of cultural and moral reference.

In the same manner, Václav Havel, then President of the Czech Republic, proposed 'A Charter of European Identity' in his speech to the European Parliament on 8 March 1994. Europe was supposed to be identified as a community of values such as tolerance, humanity and fraternity which historically facilitated the establishment of democracy, freedom and political responsibility. The Charter:

> would clearly define the ideas on which it [The EU] is founded, its meaning and the values it intends to embody. Clearly, the basis of such a charter could be nothing other than a definitive moral code for European citizens. All those hundreds of pages of agreements on which the European Union is founded would thus be brought under the umbrella of a single, crystal-clear and universally understandable political document.[29]

---

28 Z. Bauman, *Europe: an unfinished adventure* (Cambridge, Polity Press, 2004) 24.

29 V. Havel, *Speech in the European Parliament*, Strasbourg, 8 March 1994, 3, at <http://www.vaclavhavel.cz/index.php?sec=3&id=1&kat=1&from=113>.

In the same address, Havel spoke about the need to reconcile reason (speaking the machine language of EU economic and legal regulation) and heart (speaking the emotional language of ethical bonds and attachments). In his comment on the Maastricht Treaty and other political and legal documents of the EU, he said:

> I felt I was looking into the inner workings of an absolutely perfect and immensely ingenious modern machine. To study such a machine must be a great joy to an admirer of technical inventions, but for me, whose interest in the world is not satisfied by admiration for well-oiled machines, something was seriously missing, something that could be called, in a rather simplified way, a spiritual or moral or emotional dimension. The treaty addressed my reason, but not my heart ... .
>
> Naturally, I am not claiming that an affirmation of the European Union can be found in a reading of its documents and norms alone. They are only a formal framework to define the living realities that are its primary concern. And the positive aspects of those realities far outweigh whatever dry official texts can offer. Still, I cannot help feeling that my sensation of being confronted with nothing more than a perfect machine is somehow significant; that this feeling indicates something or challenges us in some way.[30]

This view takes European integration as an ambivalent historical development which has to be repoliticized by further *ethicalization*. So far, the Union's progressive integration has been a formal process of legalization and regulatory politics of numerous documents and norms. The machine of European institutions and regulations is expected to operate in the most efficient mode but it can hardly inspire the awakening of the European *demos*. The structure is too cold for any emotions of belonging, abstract solidarity and togetherness. Something has to be urgently done so that people do not:

> perceive the European Union as a monstrous superstate in which the autonomy of all the various nations, states, ethnic groups, cultures, and regions of Europe would gradually be dissolved …

but appreciate it:

> … as the systematic creation of a space that allows the autonomous components of Europe to develop freely and in their own way in an environment of lasting security and mutually beneficial cooperation based on principles of democracy, respect for human rights, civil society, and an open market economy.[31]

Unlike modern nationalism based on organic solidarity and ethnic bonds, European identity-building must obviously use different fuel to warm the hearts of peoples. In the absence of a European political people, the political identity behind European constitution-making can be constructed only against the background of a general European *spirit*. European patriots are expected to be defenders of the European spirit of universal values, cosmopolitan ethics and politics.

30 id., 2-3.
31 id., 1.

The evolution of a spirit of the European Union signifies a return of ethics and ethical politics which, according to adherents of European integration, can revitalize a sense of Europe and the search for a common European identity. The Maastricht Treaty and all subsequent European treaties, including the Constitutional Treaty drafted by the Convention, are naturally expressions of the European spirit but they obscure it by 'systemic, technical, administrative, economic, monetary and other measures'.[32] A simple declaratory act or charter therefore should be an answer to this technical obscurity and move Europeans to identify with their spirit. Havel refers to this ramification of European ethos and values as the task of formulating the *charisma* of the European Union.[33] According to him, there is no identity without willingness to act responsibly and readiness to sacrifice, politically and individually. European identity therefore demands charismatic bonds even more than constitutional acts and political resolutions, because these are the bonds which will make us act responsibly and sacrifice our egotistic goals for the interest of Europe as a commonly shared polity.

According to this view, the charisma of European self-identification and the techniques of constitution-making and legal regulation can be reconciled in an official declaration of a shared European ethos. These calls for a general European spirit attempt to overcome the ambivalence of European integration by defining the European origins and moral foundations of the grand technical project of European integration. A declaration of European ethos and values would have the force of a charismatic document invoking the popular faith of Europeans and creating mutual bonds and solidarity. However, ethical calls for the reconciliation of 'cold' European law and a 'hot' European ethos can scarcely lead to the desired synthesis of European identity and usually initiate rather 'lukewarm' responses among peoples of Europe.[34] They incorporate new ambivalences permeating the process of European integration.

There can be only European answers to the question of Europeanization by constitution-making. However, the absence of a European people, political charisma and public sphere forces adherents of further integration to speak, rather, about the European spirit that could be used in a Montesquieu-like manner to justify the emerging architecture of European constitutional law. Law is criticized in the name of the spirit of civil democratic ethos but this creation of an ethical spirit of civility needs yet to be politically negotiated, declared by the general European will, and implemented by the European legal system. The structural irritations of law, politics, and morality have their specific forms at the level of European integration and institution-building.

---

32 id., 3.

33 id.

34 Ethical criticisms of the drawbacks and flaws of the Union's regulatory and integration politics and constitution-making highlight an important legal philosophical and social theoretical difference between the origins and function of the legal system. Like any other legal system, European law can easily operate self-referentially but it cannot constitute itself. Law cannot control its own constitution and therefore has to contain its constituent power that, by definition, exceeds the legal system and can be comprehended only in the context of politics and identity symbolism.

Attempts to invest European legal integration with a European spirit is therefore based on a typically moral view of Europe as a community of values and a place with the necessary minimum level of cultural integration. Lessons from European history inform us about 'good' and 'bad' European traditions and intellectual legacies.

Cosmopolitan Europe and the Kantian Legacy

Calls for a cosmopolitan ethos are deeply entrenched in modern European humanism that critically reflects on the crisis of European culture and/or humanity and pursues the goal of saving it through its very spirit of universal humanity and ethics. Every political and social crisis is considered a cultural crisis which can only be successfully resolved by the further 'Europeanization of Europe' and by injecting the universal spirit into the specific and technical problems of modern European societies.[35] The 'universal/particular' distinction, which is particular to modern society, is reformulated as the 'cosmopolitan/national' political and moral distinction at the European level.

A spiritual sense of the cultural superiority of the European cosmopolitan legacy envisions a gradual cultural and political Europeanization of national societies. The identity of Europe and the European Union is expected to transgress the instrumental rationality of legality and the common market economy. It is construed in a moralistic and cultural manner, following two distinct streams in modern European thought – the Kantian universalistic discourse of humanity and the traditional respect for tolerance and diversity recently formulated, for instance, in the moral theories and philosophies of Emmanuel Lévinas and Hans-Georg Gadamer.

Contemporary social and political scholars of both the political right and left often describe Europe as 'Kantian' and contrast it with the 'Hobbesian' United States. While Robert Kagan perceives Kantianism as evidence of Europe's decline,[36] left-wing European scholars such as Jürgen Habermas and Zygmunt Bauman perceive it as Europe's universal legacy and, setting aside current US foreign policy, contrast it with the dark 'Herderian' tradition of modern ethnic nationalism. Habermas considers Kant's idea of republican autonomy and self-legislation a triumphant tradition which lies behind the modern welfare-state democracies and needs to be developed beyond nation state limits.[37] It should become a formative trend in globalization leading to a 'post-national constellation'. Contradicting Kagan's defence of Hobbesian US foreign policy, Bauman also says that 'Europe is well prepared if not to *lead*, then

35 For one of the most typical and sophisticated views, see E. Husserl, 'Philosophy and the Crisis of European Humanity' in E. Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston, Ill., Northwestern University Press, 1970) 269-99, at 275.

36 R. Kagan, *Power and Paradise: America and Europe in the New World Order*, London, Atlantic Books, 2004).

37 J. Habermas, *The Postnational Constellation: Political Essays* (Cambridge, Polity Press, 2001) 60-1.

most certainly to *show* the way from the Hobbesian planet to the Kantian "universal unification of the human species"'.[38]

Bauman reflects on the fact that Europe has never had fixed borders and has successfully transgressed all attempts to anchor its identity to a particular space and time.[39] According to his view, Europe is 'an unfinished adventure'. European civilization has spread to the furthest parts of the planet making it a truly global and interconnected space. It has unbound the contradictory forces of globalization and made its social and political institutions planetary. These institutions have been responsible for some of Europe's worst 'civilizational' atrocities but they are still the only available framework for the contemporary globalized world of humankind. Globalization is a consequence of European expansion and the export of its universalistic culture. It implies the destructive global spread of industrial waste and political domination. However, it also advocates a peaceful and hospitable world of universal humanity and respect for difference and otherness.

Drawing on Europe's Kantian legacy, cosmopolitan thinkers believe that European civilization can internalize differences and is therefore both 'a transgressive civilization' and 'a civilization of transgression'.[40] This civilization apparently can politically construct its own collective identity which would guarantee that '[C]itizens who share a common political life also are others to one another, and each is entitled to *remain* an Other'.[41] Adherents of the Kantian Europe claim that normative universalism can be reconciled with specific social and political heterogeneities. European identity can be imagined as the culture of unity and difference, externalization and internalization. As Bauman paraphrases a comment made by Hans-Georg Gadamer: '[T]he European way of life is a continuous negotiation that goes on despite the otherness and the difference dividing those engaged in, and by, negotiation.'[42]

The distinction 'universal/particular' is particular to modern society[43] and its moral and cultural communication formulates 'universal' as 'good' and approves 'particular' only if it can be linked to 'universals'. Europe's identity may have the Other as its necessary component,[44] but this 'otherness' can exist only because of the legacy of Kant's *allgemeine Vereinigung der Menschheit* and the Enlightenment

---

38 Z. Bauman, op. cit., n. 28, at 40.

39 Similarly, Havel says: '[T]he history of Europe is, in fact, the history of a constant searching and reshaping of its internal structures and the relationship of its parts. Today, if we talk about a single European civilization or about common European values, history, traditions, and destiny, what we are referring to is more the fruit of this tendency toward integration than its cause.' See Havel, op. cit., n. 29, at 1.

40 This is Krzystof Pomian's concept used by Zygmunt Bauman. See K. Pomian, "Europe et ses frontiéres", in K. Pomian, *L' Europe retrouvée*, (Neuchatel, Editions de la Baconiere, 1992), quoted in Bauman, op. cit., n. 28, at 7.

41 Habermas, op. cit., n. 37, at 19.

42 Bauman, op. cit., n. 28, at 7. Bauman uses Gadamer's *Das Erbe Europas: Beiträge* (Frankfurt, Suhrkamp, 1989).

43 T. Parsons, *Sociological Theory and Modern Society* (New York, Free Press, 1967) 192-219.

44 Bauman, op, cit., n. 28, at 41.

notions of equality, rule of law, human reason and solidarity.[45] The Kantian notions of cosmopolitan identity and citizenship have been popular as a response to our contemporary, globalized social and political condition.[46] They also have often been used as a response to problems of European integration, globalization and international conflicts. The fantasy of the international community, which emerges as a constitutionalized world society, organizes sovereign collectivity and specifies the decision-making hierarchies of this cosmopolitan equivalent of the nation state, is intrinsic part of legal and political theory.[47]

However, philosophers and politicians tend to ignore Kant's deep irony present in the concept of 'perpetual peace' which was taken from the 'satirical inscription on a Dutch innkeeper's sign upon which a burial ground was painted'.[48] As Wolf Lepenies correctly remarks: '[P]erpetual peace was for the dead, not for the living. It was a regulative idea, not an idealist misconception of harsh reality.'[49] Furthermore, Kant used the notion of cosmopolitan identity and citizenship as an ethical category and not as a prerequisite of world political organization. For Kant, there is a difference between cosmopolitan politics and ethics, and citizens of a cosmopolitan federation of states still need their individual republics in order to be citizens at all.[50] While ethics should be universal, political communities keep their particular nature. The ethics of civility can be cosmopolitan but political citizenship may be exercised only within bounded particular political societies.

According to Kant, the states must finally enter into a cosmopolitan constitution due to the constant wars and 'form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under a commonly accepted *international right*'.[51] This federation guarantees 'perpetual peace' in the international state in which there is no chance for the nations to constitute a utopian '*world republic*'.[52] In this state, cosmopolitan ethics is restricted to the conditions of universal hospitality

45 id., 16.

46 See, for instance, J. Bohman and M. Lutz-Bachman (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, Mass., The MIT Press, 1997).

47 See, for instance, B. Fasbender 'The United Nations Charter as Constitution of the International Community' (1998) 37 *Columbia Journal of Transnational Law* 529-619; for a critique of these fantasies, see, especially, A. Schutz, 'The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society' in G. Teubner (ed.), *Global Law Without a State* (Aldershot, Dartmouth, 1997) 257-94.

48 W. Lepenies, *The Seduction of Culture in German History* (Princeton, NJ, Princeton University Press, 2006) 196.

49 Id.

50 S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ, Princeton University Press, 2002) 183.

51 I. Kant, 'On the Common Saying: "This May be True in Theory, but it does not Apply in Practice"' in *Kant's Political Writings* (edited with an introduction and notes by H. Reiss, translated by H.B. Nisbet, Cambridge, Cambridge University Press, 1971) 61-92, at 90.

52 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in id., pp. 93-130, at 105.

and legally specified by the cosmopolitan *right* 'of a stranger not to be treated with hostility when he arrives on someone else's territory'.[53]

In Search of European Politics

Despite Kant's distinction of ethics, national politics and international law, the ethics of cosmopolitan civility has been recently blended with cultural 'Eurocentrism' and Europe depicted as a cosmopolitan project that can morally mould and politically lead global society. This illusionary ethicalization and myth of Europe has even become an obstacle to recognizing and solving the real political problems of the continent.[54] Politics may depend on cultural symbols as expressions of collective unity but it also can easily be paralyzed by the semantic structural limitations of these symbols. Politics as a mere technique of power is a favourite target of moral criticisms. However, problem-recognition and conflict-resolution political mechanisms cannot be ultimately subjected to the system of symbolic cultural expressions and moral evaluations. The ethical ideal of 'Europe as humanity' cannot be fully grasped and implemented by European politics. The particularity of democratic politics can never accommodate the universality of cosmopolitan ethics.

As analysed in a nation state context in the fourth chapter, the constitutional legalist model as a procedural and formal expression of political identity is an insufficient stabilizer of the political community and further elements are introduced as its substantive supplement, such as the concept of one organic nation that can become the Subject of popular sovereignty and democratic statehood. At the European level, this mythical Subject does not exist and therefore cannot symbolically legitimize the process of constitution-making and political integration. The European 'community of rights' has a weak sense of being-in-common and solidarity. There is no 'European charisma' waiting to be brought to life in this community and transformed into its political Subject.

In this context, apart from pragmatic economic reasons, the European enlargement processes of the 1990s also used to be supported by a vague sense of common European identity.[55] Nevertheless, this feeling of belonging should not be mistaken for the notion of abstract European solidarity so crucially missing even in the EU constitution-making process and recent attempts at further political integration. The EU enlargement of 2004 was completely 'uncharismatic' for the vast majority of citizens of the old Member States and could not support the weak symbolism of the Union's constitution-making.

The absence of the European *demos* has actually been an argument in disputes between European and Member States' national institutions and legal systems. The German Constitutional Court's decisions regarding the division of sovereignty

53 id.; for comments, see T. McCarthy, 'On Reconciling Cosmopolitan Unity and National Diversity' in P. De Greiff and C. Cronin (eds.), *Global Justice and Transnational Politics* (Cambridge, Mass., The MIT Press, 2002) 235-74, at 249.

54 T. Judt, *A Grand Illusion? An Essay on Europe.* (New York, Hill and Wang, 1996) 140.

55 See, for instance, M. Cremona (ed.), *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003).

between the European and national legal systems provide a complex example of the technical legal consequences of the non-existence of a European people and any democratic legitimation of the European Union. The Court's Maastricht judgment and the 'no *demos*' thesis,[56] briefly mentioned in the previous chapter, can be interpreted in two different ways. According to a 'hard' nationalist version, there will never be a European *demos* which could guarantee as strong a feeling of collective identity – and therefore democratic legitimation – as modern ethnic European nations do at the nation-state level. European democracy is impossible because there is no European people transformable into a political nation. According to a 'soft' version actually applied by the Court, this absence mainly indicates that democracy and constitutional rights guaranteed at the nation state level cannot be compromised by supranational structures. The identification of people and state, which is fundamental in the Court's ruling, is then interpreted as a specific example of modern German history and its political *Sonderweg*.[57]

The concept of *demos*, which is used in European legal and political debates on sovereignty and normative superiority, is often presented as a *solid* political category and an essentialist concept even if it is not defined ethnically. It assumes a community integrating individual citizens into a whole composed of values and traditions. Ethnic nationalism and republican nationalism can paradoxically have similar exclusionary effects. The idea of the civil nation as a political unity free of ethnic meaning can, like ethno-nationalist notions of political society, speak the mythical language of historical roots, a genealogy of morals and values and cultural commitments. Like ethno-nationalist fantasies of the people's historical destiny and uniqueness, the democratic republican concept of the nation can have cultural fundamentalist and communitarian foundations.

This transformation of the democratic nation into an organic community is described by Etienne Balibar as a paradox of 'republican communitarianism' according to which:

> 'Republican communitarianism' has made the cultural, scholastic, and administrative *non-recognition* of 'particular identities' (be they linguistic, religious, national) within the nation into the mark of purity that allows one to recognize the character of one's own political universality. Thus, by a term-for-term reversal that does not fail to produce some strange mimetic phenomena, the struggle against communitarianisms of various degrees of reality, perceived as threats, is turned into the construction of an exclusive identity.[58]

56 J.H.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219-58.

57 K. von Beyme, 'Citizenship and the European Union', in K. Eder and B. Giesen (eds.), *European Citizenship between National Legacies and Postnational Projects* (Oxford, Oxford University Press, 2001) 61-85, at 62-4.

58 E. Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton, Princeton University Press, 2004) 64.

Balibar and others persuasively argue that universalist values can easily become expressions of exclusive and discriminatory particularisms typical of the modern age in which 'the nation has set itself as the universal idol in place of the Most High'.[59]

The European quest for its civil identity has been an effective tool in dismantling nation state politics which depends on the modern equation of citizenship and nationality. At the same time, Europe's common identity is entirely uncharismatic and lacks the solid identity politics of communitarian fantasies. Too much identity-building amounts to a social rigidity that is inconsistent with Europe's diversity, flexibility and cultural differences.

Europeanization by further integration and enlargement of the Union has never been a simple process. It had to face national institutions and local cultures and consequently transformed itself into a pluralistic pattern of numerous local Europeanizations.[60] From the Union's perspective, there certainly is one overarching pattern of integration manifested, for instance, in the accession conditions of EU enlargement and the further integration principles of the Union's constitution-making efforts. From the nation state perspective, however, there are many localized Europeanizations. Political power in the EU still depends on nation state politics and national constituencies, and the Union continues to look different from Berlin and Budapest, Lisbon and London or Paris and Prague.[61] Under the symbolic umbrella of the European Union, there are many different *spirits* of European laws corresponding to national legal and political systems and cultures. This interplay of symbolic unity and plurality makes it impossible to reduce European integration to one solid general spirit of the laws and its power to constitute collective identity of a constituent European *demos*. In Europe, the general spirit of the laws can be manifested only as a plurality of different spirits of the laws and peoples of Europe.[62]

The functional differentiation of the spirit of the laws into different moral, political and legal spirits of the laws, which was analysed in the second chapter, is thus supplemented by the differentiation of cultural, political and legal reflections on European integration in individual Member States. The most important European political questions, therefore, are: how much identity is a good thing in a large-scale economic, political and cultural unification of Europe, and how much unification can be pursued in the Union without the constituent democratic power? These questions reflect a more general problem of European politics, namely, that European collective political identity based on strong cultural identification may easily become a 'hobgoblin' of Euro-chauvinism and little minds,[63] hiding behind the symbolic formula of the European people as a political nation.

---

59 M. Horkheimer, *The Critique of Instrumental Reason* (New York, Continuum, 1994) 103.

60 For Europeanization, see F. Snyder (ed.), *The Europeanisation of Law: the legal effects of European integration* (Oxford, Hart, 2000).

61 P. Taylor, *The European Union in the 1990s* (Oxford, Oxford University Press, 1996) 148-9.

62 For constitutional law and pluralism, see N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317-59.

63 Calhoun, op. cit., n. 27, at 36.

However, the symbolization of European political identity is 'liquid'[64] and disentangled from the notion of a common fate and historical reason solidified in charismatic acts and documents. In a critical reflection on Ernest Renan's concept of the nation as a soul constituted simultaneously by the past and the present, Philippe C. Schmitter raises the following questions:

> why should individuals (and, for that matter, organizations) in the Euro-polity have to be 'nationals' in some sense in order to act like citizens? Why could they not be loyal to a common set of institutions and political/legal principles rather than to some mystical charismatic founder or set of mythologized ancestors? Why could Renan's *plébiscite de tous les jours* not be about rights and procedures in the present, rather than sacrifices and glories of the past?[65]

Renan's frequently cited idea that a nation is a daily plebiscite is to be politicized by uprooting historical traditions and reinventing the art of protecting political rights and the conflictual character of liberal democracy.

Political identity is a more general, unstable and fragile concept than constitutionalism and legality. The negotiation-and-compromise-based, *proceduralist model* uses the civil concept of political unity and identity as an outcome and not as a primordial condition of common life. At the same time, it shows that democratic political identities are volatile and political unity is inseparable from the experience of living with social and cultural differences.

Instead of extending a spiritual moral legitimation of Europe, the depoliticized Union needs to adopt democratic politics of conflicts, deliberations, negotiation, compromises and public mobilization of both support and opposition to its constitution-making and institutional transformation. The Union cannot operate politically on the basis of ceaselessly communicating its essential values and historical destiny and existence.[66] It is lacking its own democratic public and political class of active citizens, ready to define what European political society 'has in common'. EU institutions are too rich in terms of legalized decision-making and too poor in terms of conflict-driven democratic politics.

In other words, the Union has to produce less morality and law and more politics. If creating a spirit of Europe has political meaning, it is a return to liberal democratic politics that is in opposition to ethno-nationalist visions, and builds on unity:

> which is *achieved*, and achieved daily anew, by confrontation, debate, negotiation and compromise between values, preferences and chosen ways of life and self-identifications of many and different, but always self-determining, members of the *polis* ... [T]his … is

64 On the notion of liquidity, see Z. Bauman, *Liquid Modernity* (Cambridge, Polity Press, 2000).

65 P.C. Schmitter, 'The Scope of Citizenship in a Democratized European Union' in Eder and Giesen, op. cit., n. 57, at 86-121, at 91.

66 This identification of the political domain of a collectivity with its destiny is a mistake typical of modern European political thinking and philosophy, from Heidegger to Lukács. See A. Heller, 'The Concept of the Political Revisited' in D. Held (ed.), *Political Theory Today* (Oxford, Blackwell Publishers, 1991) 330-43, at 334.

> the sole variant of unity … which the conditions of liquid modernity render compatible, plausible and realistic.[67]

The European cultural and ethical heritage may be described as never-ending transgressive adventures and pursuits of otherness. However, these moral exercises in European cosmopolitanism and humanism obfuscate the fact that European politics is short of democratic accountability, conflicts, struggles and negotiated compromises. Instead of continuing with the moral symbolic communication of European values, historical missions and identity, advocates of a politically unified and internationally strong Europe therefore need to address their 'search for politics'[68] and 'the reinvention of politics'[69] within the context of European politics.

Extending Legal Integration to the Cultural Domain: Remarks on European Constitutional Patriotism and Hybrid Identity

The Union must expand civil liberties and democratic principles and its laws should have a liberal democratic surplus which is missing in the established legal systems of its Member States. European integration persuasively shows that the European legal system does not have the communicative ability to codify political identity. It is false to assume that the 'thin' legal, civil rights-based sense of European identity could eventually support the establishment of the 'thick' European *demos* as the constituent power, supporting the idea of European federal statehood. No charismatic act has the power to change this European reality. It is unlikely that European citizenry will transform themselves into a sovereign people with both symbolic and real power to support the establishment of a supreme political and legislating authority in federal Europe. Struggling with limited and weak internal commonality, the political identity of Europe is fortified mainly by constitutional patriotism in its 'lowest-common-denominator form'[70] that can inspire a 'we-Europeans' feeling but cannot replicate the solid collective identity and abstract solidarity typical of the modern nations of Europe.

European constitutional patriotism is a paradox: the European legal system is criticized as 'cold' and dehumanizing but 'hot' emotions of togetherness and self-identification are to be inspired by the legal communication of the rights, liberties and mutual responsibilities of Europeans. A particular European identity overarching collective identities of different European nations is fictionalized by supporting itself on the moral universalism of human rights and constitutional democracy.

European constitutional patriotism is a typical example of moral communication using the communicative framework of the legal system, more evidence of the impossibility of constituting an ultimate integrative social framework through culture,

---

67 Bauman, op. cit., n. 64, at 178.

68 Z. Bauman, *In Search of Politics* (Cambridge, Polity Press, 1999).

69 Furthermore, see U. Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (Cambridge, Polity Press, 1997) 136-42; see, also, Beck's concept of 'the political renaissance of Europe' at 111.

70 Calhoun, op. cit., n. 27, at 45.

morality, law, politics or any other social system. In the European constitutional patriotism discourse, human rights semantics is appropriated by the moral system and used by 'the logic of global responsibility and global aspiration'.[71] As a meta-constitutional structure, constitutional rights and liberties may be constituted as a set of discursive political strategies and moral values. The European legal system, especially its emerging constitutional domain, is then expected to define what is 'good' in the case of Europe and what is both morally and politically desirable for citizens of the Union, that can be symbolized by law as a common cultural pattern.

The global aspirations of Europe cannot be realized by simply building European identity as a new form of modern national identities and constitutional patriotisms.[72] The European Union cannot be built according to the political architecture and principles of modern nation states. European integration includes:

> a strange aporia: the typically European notion of sovereignty, a long-term product of European history in which the constitution of the people and the constitution of the state come together, turns out to be inapplicable to Europe itself.[73]

As regards European patriotism and identity, the legal symbolism is obviously centred on the concept of European citizenship. The legal conditions of European citizenship define the common ground and boundaries of those possessing the same European rights and duties. The multifaceted collective identity of Europe and the different collective identities of European nations eventually link the process of common identity-building to the legal formation of a European citizenry and the distribution of rights and duties guaranteed for citizens by European law.[74]

The problem of citizenship involves a number of issues, such as nationality, sovereignty, identity, statehood, civil rights and conflicts between them. Different national identities survive without the sovereignty of European nation states. Political rights are guaranteed supranationally but enforced by the coercive power of a nation state. A de facto constitution of European citizenship has been in place for decades even in the absence of a European public sphere and democratic deliberation. It is a 'citizenship without community'.[75] Consequently, the *European nation* cannot be political in the sense of the political Subject – the mythical body disposing of the constituent power. However, it apparently can be imagined and fictionalized as *a cosmopolitan culture of civil liberties and democratic values*.

The making of a European civility is possible by extending legal communication to the cultural domain but this expansion, at the same time, leaves the different national legacies of collective identities in Europe untouched as cultural traditions. One cultural layer defined by the legal symbolism of European citizenship is constituted next to other layers of different European cultures. A large-scale collective identity,

71 Bauman, op. cit., n. 28, at 135.

72 See, for instance, M. Horseman and A. Marshall, *After the Nation State: Citizens, Tribalism and the New World Disorder* (New York, Harper and Collins, 1994).

73 Balibar, op. cit., n. 58, at 135.

74 von Beyme, op. cit., n. 57, at 82-3.

75 Balibar, op. cit., n. 58, at 76.

such as the European one, is a field of 'multiple, overlapping, and sometimes even conflicting identities'.[76]

European symbolization of political space goes beyond the common understanding of democratic legitimacy based on the question of who constitutes the people, to which there is a mutually agreed and settled answer.[77] Unlike the image of one European people, European identity is constructed as a *hybrid mixture* of common civil ethos and persisting different national loyalties that is impossible to ultimately consolidate at either the legal or the political level.

European Culture as a Thorn in Society's Flesh

Cultural propaganda for virtues and moral values increases the risk that cultural unity and organic coherence will dominate the system of communication of political rights recognized by the political notion of citizenship. However, as analysed in the first chapter, cultural symbols, virtues and moral values cannot steer social integration because they are merely a part of one sub-system of modern complex society. Neither the symbolic meaning of citizenship nor its effective legal operation therefore can secure the ultimate unity of the European Union.

European identity-building is a far more complex process than the Union's constitution-making efforts. European culture is not a culture of unity that would provide solid normative foundations for society. Modern European culture is a 'thorn in society's flesh'[78] that destabilizes norms and conventions and makes change and protest its constitutive virtues. It even has power to balance morality and immorality. As Friedrich Nietzsche claimed a century and half ago:

> We Europeans of the day after tomorrow, we first-born of the twentieth century – with all our dangerous curiosity, our multiplicity and art of disguises, our mellow and, as it were, sweetened cruelty in spirit and senses – *if* we should have virtues we shall presumably have only virtues which have learned to get along best with our most secret and cordial inclinations, with our most ardent needs. Well then, let us look for them in our labyrinths – where, as is well known, all sorts of things lose themselves, all sorts of things are lost for good.[79]

This culture of contradictions, paradoxes and aporias cannot define solid moral foundations for Europe. Consequently, European citizenship and other legal categories cannot be subjected to a globalized cosmopolitan ethics of which the European Union would pretend to be an avant-garde supranational organization. European citizenship does not have cultural foundations in a normative sense because European culture is a 'labyrinth'.

---

76 Calhoun, op. cit., n. 27, at 52.

77 See, for instance, R. Dahl, *Democracy and its Critics* (New Haven: Yale University Press 1989).

78 Bauman, op. cit., n. 28, at 13.

79 F. Nietzsche, 'Beyond Good and Evil' in *Basic Writings of Nietzsche* (translated and edited by W. Kaufmann, introduction by P. Gay) (New York, The Modern Library Classics, 2000) 170-435, at 335.

The European Union and its identity are 'essentially contested projects'[80] and processes which are principally future-oriented and forced to respect the continent's pluralistic nature. European identity can emerge only as a symbolic space of heterogeneity, permanent contestation of existing practices, compromise-oriented negotiations, and the conversational model of politics. European politics is communicated without direct democratic representation and European identity 'was a utopia at all moments in its history'.[81] This utopia, like any symbolic vision and moral dream, is everywhere and nowhere. It cannot be located geographically and socially: it is communicated by the systems of law, politics and morality without ever being able to become a regulative idea and an ultimate integrative principle of society.

80 See Z. Bankowski and E. Christodoulidis, 'The European Union as an Essentially Contested Project' (1998) 4 *European Law Journal* 341.

81 Bauman, op. cit., n. 28, at 36.

PART III

THE TEMPORALITY OF JUSTICE: BETWEEN RETROSPECTIVE LAWS AND PROSPECTIVE POLITICS

This page intentionally left blank

Chapter 7

The Retrospectivity of Laws and the Temporality of Justice in Post-Communist Central Europe

In the third chapter, I analysed legal reflections and regulation of political and moral temporality. Ideal ethical and political notions of time are internalized and codified by the legal system but can never be fully accommodated by legality and are referred back to the systems of morality and politics. The legal system symbolically selects parts of society's past and future and synthesizes them as present identity. It codifies collective identity by symbolizing the transcendental ethical ideals of society and the specific meaning of the past, present and future.

The legal codification of moral and political time proceeds as an immanent reflection on ethical ideals and moral norms and political decisions. However, the legal system also uses moral and political temporality and makes them subject to legal regulation. For instance, political change needs to be legislated and legally enforced by legalizing the political discontinuity, be it revolutionary or transitional. Similarly, moral calls for historical justice are turned into various legal forms of dealing with the unjust past.

In order to respond to political interests and moral proclamations, the legal system conceptualizes its internal continuity and the limits of acceptable discontinuity in law-making, legal interpretation and the application of different legal principles. The strategy of returning to the past is a common legal measure when dealing with injustice, and may have a number of different forms, from restitutive to administratively punitive and criminal retributive justice. Drawing primarily on external notions of moral and political justice, this strategy classifies a certain historical period as 'unjust' and 'illegal' and seeks to either re-establish former legal justice or constitute entirely new principles of legal justice. The time of historical justice is selective and not comprehensive.

National collective identity can be constituted by memories that can be legally codified in a number of different ways. It is possible to use the principle of retributive justice seeking to prosecute the political crimes of a past regime. However, this principle has strict legal limits that may be perceived as obstacles to historical justice being done during revolutionary events. Calls for dealing with the past may subsequently even take the form of retrospective legal measures. When it proves impossible to deal with historical injustices legally, they are referred back to non-legal institutions, such as truth and reconciliation commissions, institutes of national memory, documentation offices, etc. After all, no complex social change, such as

revolution, can be entirely 'right' and claim to be ultimately just, legally, morally and politically.

Law has the symbolic power to condemn the past and its injustices and thus contribute to the creation of a new symbolic universe of a changing political society. In the final two chapters, I therefore analyse different ways in which law selects from and deals with the past and its moral evaluation and political uses. In this chapter, I focus on different technical measures and dogmatic arguments employed by legal institutions during the process of dealing with the past. Analysing the different strategies of individual countries in post-communist Central Europe, I show both the internal limits and the external environment of the legal systems and retrospective punitive justice in transition. In the final chapter, I then illustrate the problem of the symbolism of retrospective justice by analysing restitution laws and judicial decision-making and the controversial administrative law measure of *lustration* – the Czechoslovak law on vetting public officials which has been justified by its supporters on preventive and punitive but also legal symbolic grounds.

Between the Past and Future: The Round-Table Talks and the Temporal Dimension of Transformations

Political and constitutional transformations are typical of the *differentiation and discontinuity between the past, present and future of society*. From the temporal perspective, a complex social change is always stretched between the past and the future. At one end, there is the future full of expectations and hope. However, this future dimension is also unclear and uncertain and comprises too many political possibilities, breaks and unexpected turns. At the other end, there is the past that has to be either recreated and reconstituted as collective identity or repudiated and rejected as unjust, immoral and a 'dark experience' or 'dark legacy' for society.

Dealing with past injustices and crimes is part of the collective identity-building centred around the difference between the overpowered and condemned past representing *them* and the new present, building on future hopes and representing *us*. Dealing with the past, both legal and non-legal, entails manipulating different forms of the temporal dimension of society and its meaning for collective identity.

Because '[S]ocieties exist in time, and conserve images of themselves as continuously so existing …,'[1] legal communication has to deal with specific reflections on moral and political temporality and their meaning for the collective identity. Political regime changes always involve a complex change in the system of positive law, and the legislature, under these revolutionary circumstances, must address the most general questions of moral, political and legal continuity and discontinuity.

As regards the problem of legal continuity and discontinuity, post-communist legal systems were a typical example of the politics of legal continuity and the fast enactment of new laws which would gradually replace the communist legal system.

1 J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* (New York, Atheneum, 1973) 233.

This process was extremely dynamic and reflected the revolutionary changes in the post-communist societies. The law-making effort, the goal of which was to change the nature of the system of positive law and adjust it to the new political and social conditions, obviously involved the politics of dealing with the past and defining the future of political society.

Post-communist legal transformations were significantly influenced by specific forms of political negotiations and power transfers in the individual countries of the former Soviet bloc in the late 1980s and early 1990s. The mechanism of round-table talks became a dominant political process facilitating the transformation of the communist systems into liberal democracies. The different models and role of round-table talks in the former communist countries therefore have to be reflected in any analysis of political and legal changes in Central and Eastern Europe in the 1990s.[2]

In some countries, the round-table talks were carefully designed and took longer. The talks played a central role because they facilitated communication between communist governments and the political opposition which had been recognized as a legitimate partner. In other countries, this form of political negotiations was employed only after an outbreak of public protests and therefore within a much wider and faster revolutionary process. Here, the talks had a much more limited impact on the nature of post-communist constitutional and legal transformations because they were arranged only after communist governments had been challenged by revolutionary crowds.[3]

Poland and Hungary were more liberal and reform-oriented than other communist countries and undoubtedly represented the first group of countries in which round-table talks played a central role.[4] These two countries experienced a much more evolutionary and gradual rather than revolutionary and sudden political change. Their period of political transition was much more informed by the idea of negotiations and political bargaining. This gradual transfer of power facilitated by the round-table talks was commonly described as a process of the regulated and self-limiting revolution[5] or even 'refolution'[6] which had a deep impact on the character of constitutional and legal transformations and the perception of the rule of law in the process of political change. For instance, the Hungarian political

2 J. Elster (ed.), *The Round Table Talks in Eastern Europe* (Chicago, University of Chicago Press, 1996).

3 For a general overview, see for instance K. von Beyme, *Transition to Democracy in Eastern Europe* (Basingstoke, Palgrave Macmillan, 1996).

4 A. Bozoki (ed.), *The Round Table Talks of 1989: the genesis of Hungarian democracy* (Budapest, CEU Press, 2002).

5 For historical context and meaning before the 1989 revolutions, see J. Staniszkis, *Poland's Self-Limiting Revolution* (Princeton, Princeton University Press, 1984); for the 1989 context, see J. P ibá , *Dissidents of Law: On the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract* (Aldershot, Ashgate, 2002) 88-90; A. Arato, *Civil Society, Constitution, and Legitimacy* (Oxford, Rowman & Littlefield, 2000).

6 M. Brzezinski, H. Hausmaniger and K.L. Scheppele, 'Constitutional "Refolution" in the Ex-Communist World: The Rule of Law' (1997) 12 *American University Journal of International Law and Policy* 87.

rendszervaltozas (change of regime) was conducted entirely through constitutional acts and democratic procedures. The constitutional revolution in Hungary wished to avoid political divisions and establish new national unity. It was a transformation of communism into liberal democracy, entirely controlled and shaped by the existing constitutional and legal framework.

The round-table talks and the notion of the self-limiting or legalist revolution naturally raise the issues of the temporal emergence of the rule of law, legal continuity and retrospective legislation in post-communist political societies. The fiction of a revolution both limited and expanded by the existing constitutional and legal system helped to secure political stability and legal certainty and therefore was supported by all parties to the round-table talks in Poland and Hungary. It fundamentally contributed to the establishment of democratic institutions, the constitutional separation of power and the independent system of justice protecting constitutional rights and freedoms.[7] Constitutional transformations benefited from the fiction of the self-limiting legalist revolution because they could use the negotiated political consensus of the round-table talks and implement principles of democratic constitutionalism, human rights and the rule of law – political goals shared by all parties to the talks.[8]

This shared understanding of the political and legal transformation resulted in the persistence of the communist constitutional framework both in Hungary and Poland, the substantive and formal character of which gradually changed after a democratically elected government and independent judiciary had been constituted. Catalogues of human rights and their protection had been incorporated into the emerging constitutional system as a result of the round-table talks despite the fact that the use of the communist legal system to set out the system of democratic constitutionalism reminded one somewhat of 'squaring the circle'.[9]

The round-table negotiations in Hungary and Poland proceeded according to specific rules resembling (albeit remotely) some of the procedures and principles of the rule of law. The Hungarian transformation was depicted as a *constitutional amendment* based on the idea of the legislated regime change.[10] As Peter Paczolay states, '... the basic concern of Hungarians has long been peaceful change, the shaping of a constitutional state, and the avoidance of any possible conflict with the Soviet Union ...'[11] The constitution was a symbol of stability and continuity, not change and discontinuity. Control of the future by the constitutional present and past in Hungary was much stronger than in any other country in Central Europe.

Although politically much more dynamic and less consensual than the Hungarian post-1989 changes, the Polish transformation was close to the 'amendment' model.

---

7 R. Dahrendorf, *Reflections on the Revolution in Europe* (London, Chatto & Windus, 1990).

8 See G. Casper, 'European Convergence' (1991) 58 *University of Chicago Law Review* 441-6, at 442.

9 A. Arato, 'Dillemmas Arising From the Power to Create Constitutions in Eastern Europe' (1993) 14 *Cardozo Law Review* 661-90, at 674.

10 See P. Paczolay, 'The New Hungarian Constitutional State: Challenges and Perspectives' in A.E. Dick Howard (ed.), *Constitution Making in Eastern Europe* (Washington, Woodrow Wilson Center Press, 1993) 21-55, at 21.

11 id., 25.

Unlike in Hungary and Poland, the political and constitutional impact of round-table talks was much weaker in Czechoslovakia and the German Democratic Republic – two countries which underwent a more radical revolutionary transformation. In those countries, the round-table talks merely channelled the revolutionary situation and guaranteed the peaceful character of the revolutionary change. Until the last minute, the Czechoslovak and East German communist leadership remained rigid and without the slightest will to change the neo-Stalinist form of political rule, including the persecution of political opponents, repressive legislation and orchestrated political trials. Unlike Hungary and Poland, Czechoslovakia and East Germany experienced high political tension and revolutionary politics. The idea of a self-limiting revolution was weakened. This weakness opened much more space for a radical politics of decommunisation and different interpretation of basic and political rights.[12]

Different dynamics of political transformation in post-communist countries[13] therefore had a fundamental impact on the implementation, protection and, especially, the 'reading' of the rule of law. While the rule-bound, round-table-based transformation supported the unconditional implementation of the principle of equal treatment of all citizens before the law, revolutionary change opened much more space for retrospective legislation and both punitive and restorative historical justice. Present control of the political future was facilitated by the quasi-legal rationality of the round-table talks which were to design and approve a new constitutional and legal normative system. The meta-normative and provisional character of the round-table talks had strong symbolic value in the process of revolutionary change and deeply influenced the imminent constitutional and legal transformations. It supported the notion of legal continuity between the old communist and new democratic systems and significantly weakened all attempts to implement retrospective criminal justice to punish the political crimes of the past.[14]

Some lawyers, politicians and legal scholars supported the fiction that the very existence of negotiations and the round-table talks already indicated the existence of the democratic rule of law and no discriminatory or retrospective laws dealing with the communist political crimes and injustices would therefore be justifiable.[15] Any retrospective legislation or adjudication would amount to a breach of basic constitutional rights and due process of law. The fiction that the system already

---

12 Dahrendorf, op. cit., n. 7. See, also, J. P ibá , 'Constitutional Justice and Retrospectivity of Laws in Postcommunist Central Europe' in J. P ibá , P. Roberts and J. Young (eds.), *Systems of Justice in Transition: Postcommunist Experiences in Central Europe since 1989* (Aldershot, Ashgate Publishing, 2003) 38-40.

13 For further details, see, for instance, A.J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, University of Notre Dame Press, 1997).

14 C. Varga, *Transition to Rule of Law: On the Democratic Transformation in Hungary* (Budapest, The Hungarian Academy of Sciences, 1995) 124.

15 In Poland, one of the supporters of this idea of a 'democratic revolution', which rules out any chance of retrospective legislation as unjust and contradicting the existing rule of law, is Ewa Letowska, the first Ombudsperson of Poland, and currently a judge of the Constitutional Tribunal. For her general views, see E. Letowska and J. Letowski, *Poland: Towards the Rule of Law* (Warsaw, Scholar, 1996).

existed at the time when it was actually being negotiated and consensually agreed between the communists and the opposition made it eventually much harder to use any forms of punitive retrospective legislation or adjudication to deal with past abuses of human rights.

The round-table talks were a typical example of provisional control of the present situation by future political imperatives. Nevertheless, revolutionary changes had not been established only through the differentiation of the political present and future. In fact, the differentiation of present and past was as important as that of present and future. The prospective nature of legal change was accompanied by retrospective condemnation of the past. One of the first demands was to 'heal the wounds' and deal with political crimes committed in the name or under the veil of the past regime. The prospective task of the round-table talks and constitutional transformation had to be accompanied by the principle of historical justice and dealing (legally or non-legally) with the past. The future-oriented goal of reconstructing a human-rights-based democratic constitutionalism was accompanied by the issues of historical injustices and crimes committed by communist officials and often backed by the communist system of government and justice. The reverse side of the prospective programme of constituting a system of liberal democracy and human rights protection was dealing with the crimes and injustices of the past.

Dealing with the Past and Retributive Justice

Despite the prospective integrative goal of transformative mechanisms, the new political present always requires the following *archive imperative*: record past political injustices, reveal them to the re-emerging public and organize them as a reminder for future generations.

The archive imperative may be stronger or weaker depending on the character of political transformation. Using the criterion of retributive criminal justice, the imperative can have either a minimalist form, avoiding any legal solutions, or a maximum form, seeking to prosecute all crimes and injustices of the past and compensate their victims. The minimalist form, avoiding the common principles of retributive justice, was typical of various truth and reconciliation commissions which emerged after the collapse of authoritarian and illiberal regimes in Latin America or apartheid in South Africa.[16]

Central European post-communist reality was generally different and new governments did not principally abandon punitive justice in the hope of achieving political stability and national unity. Nevertheless, the archive imperative strategy, the purpose of which is to judge and condemn the past regime by other than criminal legal means, also accompanied legal and political transformations in Central Europe. One example is the decision of the German Parliament to hold a formal inquiry into the causes and consequences of the communist dictatorship in the former German Democratic Republic. Parliament set up a commission with the task of reviewing the

---

16 See, for instance, R. Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000).

40-year existence of the German Democratic Republic, similar to the task of truth commissions in Latin America or South Africa. Between May 1992 and May 1994, the commission, consisting of 16 parliamentary members, 11 academic advisers and a number of administrative staff, conducted a series of public hearings and closed sessions and debated various political topics in the history of the GDR. Its findings and files were received positively by the legislature and the commission's remit was renewed for another round of investigations in the spring of 1995.[17]

As regards the Czech Republic, a symbolic attempt to deal with the past, yet with strong practical and criminal justice consequences, was the establishment of a special Office for the Documentation and Investigation of the Crimes of Communism operating as part of the Ministry of Interior and, from 1 January 2002, as part of the Service of the Criminal Investigation Police.[18] The Office was to continue the job of collecting and archiving information regarding the communist regime. Its public moral task is to map all injustices, atrocities and crimes related to the communist regime and its officials. It will archive past political injustices and crimes as a reminder for future generations. Apart from this moral job, the Office also has a specific criminal justice task: filing cases and prosecuting individuals who are still criminally liable. Its activity is therefore both historical and supportive of the system of criminal justice – symbolic and pragmatic.[19]

The Office's moral symbolic task was subsequently backed up by the idea of publishing secret police registers and of giving public access to secret police files (inspired by the German legislation). In 1996, Parliament therefore enacted *The Act of Public Access to Files Connected to Activities of Former Secret Police*, No. 140/1996 of the Collection of Laws of the Czech Republic. The law originally granted access only to persons potentially affected by secret police activities. Nevertheless, the statute was amended in 2002[20] so that the main registers of secret police collaborators could be made available to the general public.[21] According to the current regulation, any adult citizen of the Czech Republic can file a request to access the secret police files and documents collected between 25 February 1948 and 15 February 1990.[22]

---

17 K.A. Adams, 'What Is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards' (1993) 29 *Stanford Journal of International Law* 271-314.

18 The Office was set up from two different administrative offices under the Ministry of Interior on 1 January 1995.

19 For further details, see P ibá , op. cit., n. 12, at 32-3.

20 See Act No. 107/2002 of the Collection of Laws of the Czech Republic amending Act No. 140/1996.

21 These registers are available on www.mvcr.iol.cz.

22 Access, which is provided by the Ministry of Interior, therefore is not limited to the person's data and files. Nevertheless, the Ministry protects the constitutional rights of personal integrity and privacy of other individuals who might be mentioned in the files demanded by the applicant. The Ministry therefore must make all information possibly affecting those constitutional rights inaccessible to the applicant unless it is related to the activities of the secret police and its collaborators. The applicant thus can access any details regarding the identity of secret police agents but would not be able to see information related, for instance,

Poland also came up with its own minimalist version of the archive imperative, when the Institute of National Remembrance was set up in July 1999. The Institute's job is to gather documentation on Nazi and Communist crimes, political repression and persecution. As with the Czech Office, the Polish Institute of National Remembrance is to investigate and file individual cases. It can access the communist secret police files and make them available to victims. However, the findings of the Polish Institute do not have direct criminal law consequences, an intrinsic part of the jurisdiction of the Czech agency.

From the perspective of temporality, the archive imperative may generally lead to a *confrontation* with the past or seek to achieve a new *consensus* and hope for the political future. The social and political consequences of the archive imperative often depend on its relation with the instruments of retributive justice. Some scholars and campaigners stated that for the archive imperative to involve any form of retributive justice against former communist officials would divide societies and cause social and political tensions and confrontation.[23] However, the prosecution of political crimes, administrative vetting of ex-officials of the communist regime, and other confrontational methods were not necessarily anti-consensual because the affected social groups constituted only a fragment of political society. Many citizens thought that it was in principle the correct approach to those directly or indirectly responsible for injustices and persecutions organized by the communist regime.

Retribution has been a constitutive part of the concept of justice from ancient times to modern social and political conditions. *Lex talionis*, the norm of retribution, represented early notions of justice and formed the principle of causality between human actions and rewards or punishments for them. Since ancient Greek times, retribution has been regarded 'as a kind of trade in which good is exchanged for good and bad for bad'.[24] Justice is established on the notion of compensation for human actions either in the form of reward or punishment. It is closely tied to the ancient concept of political order as harmony protected by laws. The main goal of law is to safeguard such harmony and establish a balance between harmful acts and punishment for them. The concept of justice as balance and equivalence is also typical of the philosophies of Immanuel Kant and Georg W.F. Hegel. According to this view, retribution means the re-establishment of balance by either negative or positive compensation for harmful acts committed. Justice without retribution lacks compensation and represents only a partial concept of justice. In spite of being politically controversial, retributive criminal justice was an integral part of the revolutionary transitional processes in post-communist societies, precisely because it sought to establish balance between past political crimes and their just punishment. Retributive criminal justice represented one of the most important bridges over

---

to their marital life or health problems. This shift of the state policy naturally resulted in a number of legal cases in which individuals demanded their names to be removed from the registers and moral reputation re-established.

23 H. Schwartz (1994), 'The Czech Constitutional Court Decision on the Illegitimacy of the Communist Regime', 1 *Parker School Journal of East European Law* 392-8, at 398.

24 H. Kelsen, *Society and Nature: a Sociological Inquiry* (London, Kegan, Trench, Trubner & Co., 1946) 193.

the abyss between political past and future. Denying justice based on equivalence weakens the rule of law in transforming post-communist societies.[25]

Analysing the concept and different uses of retributive criminal justice, it is important to distinguish the following: the prosecution of criminal acts not prosecuted by the communist system of justice but still prosecutable under the existing provisions of criminal law; retrospective legislation which would guarantee the prosecution of past crimes and acts of political terror in those circumstances where existing criminal law provisions do not apply; non-criminal law forms of legal sanction and punishment for the political activities of individuals under communist rule.

Unlike in Latin American countries and South Africa, there was no political agreement or public consensus on granting impunity to former communist officials and applying the politics of reconciliation in the post-communist countries of Central Europe. Those countries sought to prosecute communist political crimes but this turned out to be very difficult and technically impossible in many individual cases. One of the most famous examples is certainly the trial of Erich Honecker and other members of the German Democratic Republic communist leadership such as Erich Mielke, Willi Stoph and others. Germany was the most systematic of all post-communist countries in prosecuting past political crimes, yet the efforts and resources invested in the prosecution of communist political crimes did not correspond to the rather disappointing and politically frustrating outcomes.[26] The 'trial of the century' was the one in which Honecker and other members of the GDR's secretive Defence Council, Erich Mielke, Willi Stoph, Heinz Kessler, Fritz Streletz and Hans Albrecht, were accused of determining the GDR's border policy and therefore being criminally responsible for the political practice of border killings. The trial began in November 1992, the prosecution filed a nearly 800-page indictment, but the whole process was frustrating and unsuccessful because charges against Stoph were dropped due to his poor health in July 1993, Mielke was imprisoned on conviction in a different case, and charges against Honecker were also eventually dismissed on health grounds and he was permitted to leave Germany for Chile where he died on 29 May 1994.[27]

This institutional failure and reluctance of the old judiciary and prosecutors to deal with the criminal past was common in post-communist countries in the beginning of the 1990s. Criminal justice outcomes in Czechoslovakia, Poland and Hungary had been even poorer than those provided by the German system of justice. Public anticipation of the new regime's prosecution of the political crimes of the old was confronted with many institutional, normative and agent obstructions which subsequently undermined public trust and the legitimacy of the newly established

25 G.P. Fletcher, *Basic Concepts of Legal Thought* (Oxford, Oxford University Press, 1996) 24.

26 For materials related to the trial of Honecker et al., see P. Richter, *Kurzer Prozess* (Berlin, Elefanten Press, 1993) and W. Flimer and H. Schwan, *Opfer der Mauer: Die geheimen Protokolle des Todes* (Munich, Bertelsmann, 1991); for analysis of how criminal justice dealt with the communist past, see K.A. Adams, supra n. 17.

27 A.J. McAdams, 'The Honecker Trial: The East German Past and the German Future' (1996) 58 *Review of Politics* 53-80, also published in 'The Helen Kellogg Institute for International Studies: Working Paper Series, paper No. 216 (1996).

democratic rule of law. Retributive justice is a part of the rule of law and the fact that crimes that can be publicly identified remain legally unpunished weakens legal legitimacy. Criminal retributive justice applied in post-communist countries reveals one important aspect of the rule of law transitions: strict adherence to the rule of law and formal criminal procedures leads to conflict between public expectations (criminal punishment of communist political crimes) and legal results (only a fraction of alleged crimes actually prosecuted and perpetrators convicted).

The Jurisprudence of Retrospective Law

This politically and morally frustrating situation supported the idea that special legal measures such as *retrospective justice* had to be taken in order to deal with the past communist crimes. The prohibition of retrospective criminal justice and the principles of *nullum crimen sine lege* and *nulla poena sine lege* certainly constitute the democratic rule of law and constitutional states established after the fall of communism in Central European countries. However, the legal rationality of the constitutional and democratic rule of law also involves the principle that no individual is above the law and all criminal acts shall be prosecuted. New democratic authorities were then supposed to have both a moral and legal duty to bring to criminal justice those whose political position effectively protected them from prosecution for acts otherwise classified as criminal either by international human rights covenants, or even by the communist criminal law itself.

In fact, the problem of retribution, restitution and the retrospectivity of laws is one of the most common issues in any kind of transitional justice.[28] The problem of retrospective justice and the prosecution of political crimes is one of the most important constitutional issues in post-communist legal transformations. It has haunted legislative bodies, constitutional courts, politicians and the public. Its strong symbolic power made it a cornerstone of discussions of the democratic rule of law in all post-communist Central European countries which perceived the process of their constitutional and legal transformations as a *return* to constitutional democratic rule.[29] The problem of retrospective justice and the principle of *lex retro non agit* were often taken by politicians, lawyers and judges in post-communist countries to be untouchable pillars of the democratic rule of law and criminal justice.

Thomas Hobbes criticized retrospective laws and called for their prohibition because people's ability to plan their lives would be severely damaged by their enforcement. Social stability and security are primary goals of legal regulation and *ex post facto* laws involve a great deal of arbitrariness on the part of the power of a legislating sovereign. This direct relation between retrospectivity and the arbitrary use of power was later emphasized by Carl Schmitt in his interpretation of Hobbes's

28 J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, Cambridge University Press, 2004).

29 M.F. Brzezinski and L. Garlicki, 'Judicial Review in Postcommunist Poland: The Emergence of a *Rechtsstaat?*' (1995) 31 *Stanford Journal of International Law* 13-59.

political philosophy.[30] The prohibition of retrospective laws is also typical of Austin's jurisprudence because his 'command definition' of law relies heavily on the recognition and knowledge of present legal duties. Imposing different legal duties on past actions seems to be a logical paradox. In *The Federalist*, Madison similarly defended the constitutional prohibition on retrospective laws by pointing to the damaging social and political effects of fluctuating legal policies and sudden changes of legal rules.[31] Legal stability and constancy guarantee the security of individual actions. *Ex post facto* laws cause social uncertainty and therefore contradict one of the principal social goals of legislation. Nevertheless, a number of jurisprudential theories and legal philosophies of the democratic rule of law include politically more reflexive and socially more responsive attitudes towards retrospective justice. The strict prohibition on retrospective laws is limited to the field of criminal law while some direct or indirect forms of legal and judicial retrospectivity are generally accepted in other branches of a modern legal system such as contract or tax law. Hans Kelsen treats the retrospectivity of laws as a special example of the principle of *ignorantia iuris* and argues that retrospective laws are technically possible and their application is, rather, a matter of fairness.[32] Retrospective laws impose new duties on past actions but this is a problem of political and social acceptance and effectiveness and not a normative legal impossibility. The matter of fairness arises especially in the field of criminal law because the social consequences of retrospective legislation are usually much harsher for individuals than in other spheres of legal regulation.

While acknowledging the fact that retrospective laws are incompatible with the rule of law, Lon L. Fuller admits that there are special circumstances of political and historical discontinuities in which the retrospective application of law in fact supports the rule of law. Fuller uses the metaphorical example of Nazi Germany to show that the application of specific moral principles of law cannot ignore their political and social context. In general, retrospectivity is contradictory to the law's job of governing human conduct by rules and '[t]o ask how we should appraise an imaginary legal system consisting exclusively of laws that are retrospective, and retrospective only, is like asking how much air pressure there is in a perfect vacuum.'[33] At the same time, there are specific historical circumstances in which a law's function has been severely damaged and retrospective justice becomes tolerable and desirable because it retrieves the original social function of law. Political discontinuities call for legal imagination and more inventive application of legal principles. In the moment of discontinuity, the prospective orientation of legal regulation is impossible without backward-looking justice. Strict application and adherence to the principles of legal continuity and *lex retro non agit* are harmful because they legitimize the past legal

30 C. Schmitt, *The Leviathan in Thomas Hobbes's Theory of the State: Meaning and Failure of a Political Symbol* (Westpoert, C.T, Greenwood, 1996).

31 *The Federalist with Letters of "Brutus"* (edited by T. Ball, Cambridge, Cambridge University Press, 2003), paper No. 44 at 218.

32 H. Kelsen, *General Theory of Law and State* (New York, Russell and Russell Publishers, 1945) 43-4, 146-9.

33 L. Fuller, *Morality of Law* (New Haven, Yale University Press, 1969) 53.

system and may even lead to spontaneous acts of political revenge and counter-violence.[34]

Fuller sought to solve a problem which haunted all post-communist governments and may be summarized as: How can we punish obvious crimes committed by the tyrannical regime if, at the time they were committed, and according to the regime's laws, they were not considered criminal acts and were often in fact initiated by the regime's legislation? Fuller concluded that despite the fact that the prohibition against retrospective laws is a constitutive principle of the rule of law, such laws may be used in exceptional circumstances if they support another constitutive principle of the rule of law – the principle that all crimes shall be prosecuted even if they may be treated as legal acts by a tyrannical power.

Another example of retrospectivity in law is Gustav Radbruch's formula which favours the retrospective application of the supra-positive principle of equal justice in those circumstances when the law is in gross contradiction to the equal treatment of all. Radbruch was reacting to the National Socialist regime and its horror policies, executed by legal means, and summarized his position as follows:

> The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as an 'incorrect law' [*unrichtiges Recht*] to justice.[35]

The formula encouraged judges to resort to the justice argument in these extreme circumstances of conflicts between positive law and supra-positive normative arguments of equality before the law.

The difference between Fuller and Radbruch's examples is obvious: Fuller's example is based on democratic legitimacy because the retrospective law is enacted by the democratically elected legislature while Radbruch's formula facilitates judicial remedies of openly unjust laws in terms of natural justice. While democratic legislation's main advantage consists of clear sets of rules for the punishment of past political crimes and just compensation, the judicial solution is more flexible because it empowers courts to consider individual circumstances in each case and review it from the perspective of equal justice. Although both methods are distinctly retrospective, neither of them opens a way to the arbitrary use of power by judges or the legislature. They show that legal certainty is only one of many elements in the rule of law, which does not automatically rule out the possibility of retrospective

---

34 id., 253.

35 The translation used is from R. Alexy, 'A Defence of Radbruch's Formula' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999) 15-39, at 15-6. However, I have changed the translation of '*unrichtiges*' from 'false' to 'incorrect' as suggested by P. Minkkinen. I prefer Minkkinen's translation to the expression 'unjust law' used in older translations of Radbruch's legal philosophical texts. See P. Minkkinen, *Thinking Without Desire: A First Philosophy of Law* (Oxford, Hart, 1999) 41. Alexy himself uses the concept of correctness in the following parts of his chapter on Radbruch's formula.

and even discriminatory legislation and judge-made law in transitional periods of reconstructing the democratic rule of law.

In the domain of legal positivism and analytical jurisprudence, Kelsen and Hart argue that every revolution involves political and legal discontinuity. A new constitution and legal system subsequently define a new normative framework which may be more or less distant from the former framework.[36] This constitution represents a normative break with the legal and political past and may apply its new legal principles to those actions in the past which are prospectively defined as crimes and injustices. The character and extent of the legal discontinuity may significantly vary on a scale varying between the most radical departure from the old system comprising a complete revolutionary destruction of its normative framework and a peaceful transition which gradually incorporates new elements and principles into the existing legal system and thus eventually transforms it into an entirely different one.

The main jurisprudential problem regarding retrospective laws addresses the continuity and discontinuity of the constitution and legislation. Accepting the argument that there must be mutual political trust between government and citizens, which is also necessary for the recognition of existing legal rules, one can conclude that the application of the *lex retro non agit* principle in criminal law is essential only in those political societies which are established on such trust. The constitution is a legal expression of this trust and of mutual political obligations between government and citizens. This trust is typically missing in all tyrannies and totalitarian systems established on the arbitrary use of political violence and terror. Any strict prohibition on retrospectivity might then paradoxically extend the consequences and effects of political terror and violence to the new political and legal conditions. The most important issue which needs to be resolved by a new democratic government and constitution-maker/legislator is the extent of political discontinuity and the future effects of the enforcement of retrospective criminal laws and justice. The main purpose of any retrospective laws must consequently be to support the political trust, integrity and stability of a new legal and constitutional regime.

The legal fiction of constitutional continuity is impossible without referring to political trust. In the 'transitional' countries which experienced rather a longer period dominated by political negotiations and round-table talks, such as Hungary and Poland, political trust originally was a kind of 'élite' trust established between the communist government and the opposition. The democratic trust between people and government was supposed to emerge from the limited trust in the negotiating parties at the round-table talks. On the other hand, in 'revolutionary' countries experiencing fast political changes and substantive discontinuities such as the German Democratic Republic and Czechoslovakia, political trust was typically absent. The absence of trust and the need for its renewal was in fact a vehicle of revolutionary change. Political trust thus represents an external argument which determines the constitutional and legal dispute regarding the principle of legal continuity and the prohibition on retrospective laws. Retrospective justice was supposed to contribute

36 H.L.A. Hart, *The Concept of Law: second edition* (Oxford, Clarendon Press, 1994) 118-20; H. Kelsen, supra n. 32 at 117, 219.

to the reconstruction of democratic political trust. It significantly determined the internal logic and dynamic of transformations in the different post-communist countries of Central Europe.

Retrospectivity and Constitutional Justice

Addressing the problem of retrospective and retributive justice, it is important to reflect on possible similarities between the Communist and Nazi regimes and, subsequently, between the politics of decommunisation and denazification. What are possible links between the two totalitarian systems – Communism and Nazism? Both political regimes undoubtedly have common features: apart from the extreme form of socialist ideology and millions of victims, they share concentration camps, the principle of one-party rule based on the idea of leadership, the key role of secret police in the system of political power, the Party militia, etc. It therefore is not surprising that reactions to the political crimes of Nazism and Communism were often similar and that the systems of justice used similar reasoning to deal with political harms and injustices caused by those totalitarian systems. The supra-positive law and justice argument of Radbruch's formula, which opened the way to dealing with Nazi crimes and injustices in post-1945 Germany, was re-introduced after the re-unification of Germany in 1990 when the new system of justice was seeking to prosecute the political crimes of the East German communist regime.[37]

Nevertheless, some features of denazification and decommunisation politics should not result in oversimplifying comparisons, evaluations and conclusions. Despite all the common features, the politics of denazification and decommunisation are two different historical processes. The first reason is the profound difference in the way these two totalitarian systems collapsed. The second reason is the sheer variety of post-communist political transformations. The Nazi power system had to be overthrown from the outside and retained its extremely violent nature until the last minute of its existence. On the other hand, the communist regimes in Central and Eastern Europe, with the exception of Romania, were peacefully dismantled from the inside and in countries such as Poland and Hungary those in power often actively participated in the termination of the communist system of power. The politics of denazification could start only under the supervision of the Allies after Berlin had been conquered and Nazi Germany militarily defeated. On the other hand, the politics of decommunisation could be initiated only after the communist leaders had voluntarily yielded to political power and the negotiated transformation to liberal democracy and the rule of law. Unlike the politics of denazification, decommunisation did not rule out the participation of the communist parties, both reformed and unreformed, in the political life of the emerging liberal democracies.

These profound differences partly explain why decommunisation policies varied a lot in post-communist countries and punitive criminal or retrospective justice measures often failed, even in the countries most committed to them after the 1989

37 See, for instance, Alexy, op. cit., n. 35, at 15-39.

revolutions, such as Germany.[38] In the context of the revolutions of 1989, it is typical of those political scientists who argue that the processes were transitional rather than radically revolutionary that they favour the politics of impunity, legal continuity and strict prohibition of retrospective legislation.[39] Continuity and the self-limiting nature of political and legal transformations from communism to liberal democracy are perceived as a virtue and the very notion of discontinuity is dismissed as leading to disastrous radical revolutionary actions.[40] On the other hand, the events of 1989 involved substantive legal and constitutional discontinuity which characterizes the very logic of revolution which is prospective by being destructive in relation to the past. The level of political reluctance and resistance to applying retrospective legislation and justice is consequently one of the most important factors determining different developments in individual countries. This reluctance was generally higher in 'transitional countries' (Hungary, Poland) than in 'revolutionary countries' (Czechoslovakia, the German Democratic Republic) in Central Europe.

Retrospective justice is revolutionary justice. Following the difference between Fuller and Radbruch's jurisprudential dealing with retrospective justice, it is possible to distinguish two main legal methods incorporating retrospective justice: retrospective legislation enacted by representative bodies and retrospective decision-making applied by courts. The first method is used by new democratically elected parliaments in order to facilitate legal dealing with the past. It is often employed in order to avoid the 'ticking time-bomb' of periods of limitations for prosecuting criminal actions. Systems of criminal justice in post-communist countries generally set out time limits during which a crime must be prosecuted by the state. If this period elapses, a person who committed the crime cannot be brought to justice. Attempts to prosecute past crimes had therefore been racing against time. Legislative bodies in post-communist countries sought to stop this criminal justice clock. Nevertheless, this was not limited to post-communist legal systems. Post-Nazi Germany faced the same principle of time limits on prosecution and eventually, in 1965 and subsequently 1969, managed to extend the period of limitation only for murder.

Apart from the extension of limitation(s) for criminal actions, post-communist legal systems were confronted with the matter of those actions which, from a strictly legal perspective, could not be classified as criminal acts, yet represented the worst kind of political repressions, discrimination and abuse of power. In these circumstances, retrospective legislation would have to criminalize behaviour considered legal in the communist past.

---

38 For details, see A.J. McAdams, *Judging the Past in Unified Germany* (Cambridge, Cambridge University Press, 2001).

39 See, especially, Arato, op. cit., n. 5; J. Kis, 'Between Reform and Revolution: Three Hypotheses about the Nature of Regime Change' (1995) 3 *Constellations* 399-419; and C. Offe, *Varieties of Transition* (Cambridge, Mass., The MIT Press, 1996).

40 The concept of self-limiting revolution was introduced by a Polish dissident, Jacek Kuron (see Staniszkis, op. cit., n. 5). In the 1990s, it was adopted by Arato and other advocates of the post-Marxist ideology of civil society to argue against radical political condemnation of the communist past (Arato, id., 106-27).

Legal Continuity (Un)limited: Formalistic Perspectives of the Hungarian and Polish Constitutional Courts

Focusing on the transitional countries, the Hungarian Constitutional Court formulated its doctrine of legal continuity when dealing with the law proposing to make it possible to prosecute serious political crimes committed between 21 December 1944 and 2 May 1990.[41] In its decision No. 11/1992 (III. 5) AB, the Court ruled the Zetényi-Takács law, which was to affect the period of statutory limitation, unconstitutional on the basis that it lifted the penal code limitations that had been in effect at that time. The President of Hungary, Árpád Göncz, refused to sign the Bill and referred it to the Constitutional Court.[42] The Court unanimously declared the law unconstitutional precisely because it represented retrospective *ex post facto* legislation. In the decision, the Court summarized basic statements on the change of regime in Hungary and on legal continuity. It ruled that:

> there is no substantive distinction between legal rules enacted under the Communist regime and since the promulgation of the new Constitution. Consequently, there is no double standard in adjudicating the constitutionality of legal norms ... The Constitution and the basic laws that introduced revolutionary changes from a political point of view were enacted without formal defects according to the rules of lawmaking of the old regime and deriving their binding force from them.[43]

Furthermore, the Court refused to compromise its reading of the fundamental principles of the rule of law with historical justice and specific circumstances that might require a specific legal approach. According to the Court:

> Legal certainty based on objective and formal principles takes precedence over justice, which is generally partial and subjective.[44]

The Court used Kelsen's normativist definition of revolution as a framework for its reasoning. Understanding revolution as an illegitimate change to the existing legal system, that is, without constitutionally prescribed procedures and implying legal discontinuity, the Court interpreted legal and political changes in Hungary as a process regulated and founded on the existing legal framework. The description of the changes rather resembles Hart's understanding of transition which gradually establishes an entirely new legal system by using the existing legal framework. To

---

41 The Hungarian Constitutional Court had power to use a preliminary review procedure when considering the constitutionality of Parliament's legislation. In this case and other matters concerning the constitutionality of retrospective legislation, the Court exercised this power.

42 For details, see G. Halmai, 'The Hungarian Approach to Constitutional Review' in W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague, Kluwer International, 2002) 189-213, at 196-7.

43 Decision No. 11/1992. (III.5.) AB of the Constitutional Court, *Magyar Közlöny,* No. 23 (1992): 935; quoted in Paczolay, op. cit., n. 10, at 34.

44 id., 35.

declare retrospective legislation unconstitutional supports the notion of changes as transitional and manifests no understanding of the political discontinuity and rupture facilitated and regulated by the Hungarian constitutional framework. The arguments of legal continuity and the rule of law disguise political revolutionary changes and effectively curb all attempts at retrospective legislation and justice. Here, the Court even attempts to make its own contribution to the nature of political and legal transition in Hungary because it argues that the old system was not based on rule of law principles, yet that the emerging new democratic rule of law system must firmly defend these principles. By using the legal continuity argument, it certainly did not intend to provide the old communist regime with legal legitimacy and the communist system was dismissed as legally nihilistic. The Court itself was undertaking 'political revolution on the basis of legality' and used the law and constitution in a way which is described as a 'self-limiting revolution'.[45]

The Court condemned communist legal nihilism and marked a division between the political and legal past and present. The revolutionary change was, however, strictly limited because it was immediately submitted to the rule of law and not to supra-positive ideals of substantive justice. Calls for substantive historical and political justice were dismissed as demands to submit law to political prerogatives. This extremely formalistic position makes the Hungarian transition very different from the German and Czechoslovak political and constitutional changes in the beginning of the 1990s. The paradox of making changes in law by applying the existing legal rules and giving them fundamentally different meaning, the method employed by the Hungarian Constitutional Court, was criticized by both right-wing and liberal politicians and by legal experts. While conservative anti-communist politicians perceived the Court's activity as an obstacle to their attempt to confront political opponents,[46] liberals feared that the Court exercised too much normative power in a historical period regulated by a merely provisional constitutional and legal framework.[47] Even strong supporters of the Court's political role, such as Andrew Arato, admit that its activity suffered from paradoxical and politically controversial reasoning. Arato argues that the Court's adherence to the principle of legal continuity and its refusal to accept retrospective legislation was based on a wider political consensus established during the round-table talks and thus supported the rule of law and legitimacy of the new constitutional democratic system. The German example, nevertheless, supports the opposite argument, that the lack of retributive and retrospective criminal justice can, in fact, weaken the rule of law and the legitimacy of new democratic system.

The formalistic and legalistic understanding of the rule of law as represented by the Hungarian Constitutional Court has a strong symbolic role because it excludes

45 Arato, op. cit., n. 5, at 102.

46 One of the most outrageous political consequences of the proposed Zetényi-Takács Law was that, due to the period specification of December 1944, it would include criminal acts of 'treason' against the fascist Arrow Cross government, famous for its political terror. This retrospective application of law would legitimize Hungarian nationalist and authoritarian political history.

47 Arato, op. cit., n. 5, at 103-4.

history, with its demand for justice, from the present state of the rule of law. History is described as only a partial and subjective matter, while the present is constituted by legal rationality as objective and impartial. In comparison to the formalism of the Hungarian Constitutional Court, the Polish Constitutional Tribunal is more reflective of 'historical subjectivity' and its judgments do not contrast the rule of law so overtly with historical justice. Concerning the issue of retrospective criminal justice, in August 1990 the Polish Constitutional Tribunal ruled that the principle of non-retrospectivity of laws is an intrinsic part and one of the basic components of the *Rechtsstaat* clause legislated in the constitutional amendment in Article 1 of the Polish Constitution in 1989. According to the Tribunal's judgment in a case concerning the reduction of the state pensions of former communist officials, legislative enactments introducing retrospective justice are inconsistent with Article 1 and therefore may be declared unconstitutional and void.[48] It is noteworthy that this reasoning is surprisingly consistent with the early jurisprudence of the communist Constitutional Tribunal which ruled that the principle of non-retrospectivity of laws 'represents a fundamental principle of legal order. It finds its foundation in such values as legal security, certainty of legal transactions and protection of vested rights'.[49]

Like the Constitutional Court of Hungary, the Polish Constitutional Tribunal formulated a very strong doctrine of *legal continuity* between the old and new regime which was nevertheless weakened by its later judgment concerning the prosecution of Stalinist crimes committed between 1944 and 1956. In its ruling, the Tribunal imposes limits on the application of the principle of non-retrospectivity of law, but it warns that 'any departure from the principle of *lex retro non agit* in order to achieve justice demands a very precise definition of the specific crimes addressed'.[50] Although the Constitutional Tribunal of Poland did not rule out the possibility of a departure from the principle of non-retrospectivity, this departure was classified as an exceptional instrument which might be used only when the principles of justice clashed with the application of the principle of *lex retro non agit.*

Constitutional and Legal Discontinuity: On Substantive and Formal Legality

Following the rulings of other constitutional courts in the region of Central Europe,[51] such as the Constitutional Court of the Czech and Slovak Federal Republic and the Czech Constitutional Court, we discover even more flexible attitudes towards the issues of historical justice and legal certainty granted by formal principles such as

48 Judgment K 7/90 of 22 August 1990 Orzecznictwo Tryb. Konst. 42. In this judgment, the Constitutional Tribunal decided that the reduction of state pensions did not violate the Constitution.

49 See Judgment U 5/86 of 5 November 1986 Orzecznictwo Tryb. Konst. 7, 46; quoted in Brzezinski and Garlicki, op. cit., n. 29, at at 36.

50 See Judgment S 6/91 of 25 September 1991 Orzecznictwo Tryb. Konst. 290, 294; quoted in Brzezinski and Garlicki, id., 38.

51 For a comparative study, see W. Sadurski, *Rights Before Courts: a study of constitutional courts in postcommunist states of Central and Eastern Europe* (Dordrecht, Springer, 2005).

lex retro non agit. In the context of Czechoslovak constitutional justice, this matter arose in the case of the lustration law discussed in detail in the next chapter. The process of *lustration* in Czechoslovakia and, later, in the Czech Republic,[52] may be briefly described as an administrative procedure for screening individuals holding legally defined public offices of political or economic influence and prohibiting certain individuals from taking these offices due to their past political or persecuting activities.[53]

When the Czechoslovak Constitutional Court reviewed the lustration law after a complaint that it violated the principle of equality of all citizens before the law, it produced its own interpretation of the discrimination and persecutions perpetrated by the Communist regime. It also accepted a common argument that lustrations served the purpose of developing constitutional order. Instead of following the formalistic arguments, it built its reasoning for generally upholding the lustration law (with the exception of some sections of the statute)[54] on the argument that building the rule of law (*Rechtsstaat*) actually means abandoning the criterion of formal-legal and material-legal continuity with the totalitarian legal system, which is based on a differing value system. The Court recognized the formal normative continuity of the legal order of Czechoslovakia, yet it denied that legal norms may be interpreted with no reference to the value system of the liberal democratic rule of law. Discrimination imposed by lustrations was only formal and, according to the Court, the law ought not to be discarded as unconstitutional because it asserts and protects the principles and values upon which a democratic liberal state is founded.

In sharp contradiction to the formalistic approach of the Hungarian Constitutional Court, the Czechoslovak Constitutional Court and, later, the Czech Constitutional Court favoured the interpretation established on the assumption of *political and substantive legal discontinuity* between the communist and post-1989 democratic legal systems. Constitutional laws enacted after 1989, especially the Charter of Fundamental Rights and Freedoms which was adopted in 1991 and later incorporated into the constitutional system of the independent Czech Republic, fundamentally changed the value system and the nature of the constitutional and legal system. Distinctions between formal legality (which involves elements of legal continuity) and substantive legality (which, given the different values, foundations and principles of the democratic rule of law, involves discontinuity with the former totalitarian legal system) dominated parts of the judgments of the Czechoslovak Constitutional Court on the lustration statute and were often used by the Czech Constitutional Court in the mid 1990s. Political discontinuity affects the values and principles underlying

52 After the split of Czechoslovakia, the lustration law became an intrinsic part of the Czech legal system, while it was not applied in Slovakia.

53 The Act of the Federal Assembly of the Czech and Slovak Federal Republic No. 451/1991 Sb., on standards required for holding specific positions in state administration of the Czech and Slovak Federal Republic, Czech Republic and Slovak Republic, passed on 4 October 1991 and enacted from 1 January 1992 (for the English translation see M. Sklar and K. Kanev, *Decommunization: A New Threat to Scientific and Academic Freedoom in Central and Eastern Europe*, 1995) Appendix A).

54 For details, see M. Gillis, 'Lustration and Decommunisation' in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe* (Aldershot, Ashgate, 1999) 75-80.

the constitutional and legal system. Formal legal continuity must not, therefore, put limits on the developing democratic rule of law, a part of which is the interpretation and application of statutes and constitutional principles.

Legal Continuity Suspended by Supra-Positive Law: German Lectures on Jurisprudence

The German attitude towards the punishment of political crimes had been the most supportive of criminal prosecution from the very beginning of the process of political transformation and national unification. In November 1989, it was the GDR parliament, still controlled by the Communist Party (SED), that established a committee to investigate criminal activities such as abuses of power, corruption and election frauds. The outgoing Party élite sought to preserve its political existence by political denouncement and a willingness to prosecute its individual members. This policy led to the brief imprisonment of a number of the SED Politburo in December 1989. After the free elections in March 1990, all political parties represented in the democratically elected parliament of the GDR supported this policy of criminal justice and prosecutions, and it was consequently incorporated into the Unification Treaty which legislated for the legal continuity of criminal proceedings and was enacted in October 1990. The Unification Treaty determined which penal code should be applied to past criminal actions and ruled that the West German Criminal Code should apply to past acts committed by citizens of the former German Democratic Republic.[55] It was *outsiders' justice* (that of the former West Germany) that eventually prosecuted and punished communist political crimes such as border killings, election frauds, abuses of government office, etc.

Special attention was originally given to criminal activities involving economic corruption and election frauds orchestrated in local elections in May 1989.[56] Unified Germany merely adopted the policy of retributive criminal justice which had been initiated by the GDR's constitutional bodies. In 1994, a special criminal investigation office was set up for a period of five years to investigate the political crimes of GDR government officials.[57] The outcomes were, nevertheless, very disappointing and frustrating because, as of 31 March 1999, out of almost 22,765 investigations only 565 eventually led to criminal trials and only 20 cases resulted in prison sentences.[58]

55 The Unification Treaty, para. 315 of the Introductory Act to the Criminal Code, ruling that para. 2 of the Criminal Code of West Germany shall be applicable.

56 K. Marxen and G. Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht: eine Bilanz* (Berlin, De Gruyter, 1999) 235.

57 *Zentralepolizeiliche Ermittlungsstelle fuer Regierungs- und Vereiningungskriminalitaet* (The Central Police Investigation Office for Government and Unification Criminality).

58 For the figures, see C. Offe and U. Poppe, 'Transitional Justice after the Breakdown of the German Democratic Republic' in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism* (Budapest, CEU Press, 2005) 153-90, at 178; for general comments, see K. Marxen and G. Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht: eine Bilanz* (Berlin, De Gruyter, 1999).

Regarding the problem of legal retrospectivity, Germany accepted the most proactive policy which incorporated both the extension of the period of limitations and the recriminalization of previously legal actions. As in post-Nazi West Germany, the post-1989 unified German legislature eventually extended the period of limitation for all crimes committed between 1949 and 1990 for ten years, ending at the time of the tenth anniversary of German reunification in October 2000. The period of limitation for criminal homicide was extended until October 2030. The German legislature has thus established the legal fiction frequently discussed in the post-communist countries, that the communist system of justice, like that of the Nazis, suffered from arbitrary abuse of power and misconduct which made due process impossible.

Retrospective 'recriminalization' (of previously legal actions), although exceptional, can also be detected in post-communist legal transformations, especially in German courts dealing with communist political crimes and serious human rights violations such as killings at the German border. In post-1945 and post-1989 German criminal law, retrospective justice was facilitated by the notion of supra-positive justice which provides retribution for gross violations of human rights, and the principle of equal treatment of all before the law. The practice adopted by the German Federal Criminal Court and subsequently the German Federal Constitutional Court may be described as *the recurrence of Radbruch's formula*. The formula had originally been used in prosecuting the Nazis for political crimes and in cases of Nazi property confiscations. Although GDR law made shootings at the border technically legal and justifiable (the Border Act, para. 27.2), the criminal justice system of unified Germany resorted to the argument that this justification was invalid because it contradicted a supra-positive principle of justice incorporated in international human rights covenants and standards signed by the German Democratic Republic.

The Radbruch formula was explicitly cited in the first border-guard trial that began on 2 September 1991. The presiding judge of the regional court (*Landsgericht*), Theodor Seidel, used the formula and ruled that nobody can rely on laws that violate the rule of law, enacted by an illegitimate state.[59] Although Germany's High Court of Appeal (*Bundesgerichtshof*) was critical of the 'supra-positive' moral and political arguments Seidel used in his reasoning, it upheld the view that the fact that individuals obeyed superiors and law-based orders cannot be automatically used to excuse or justify actions that would be otherwise treated as criminal. It is also significant that the Court established its judgment upon pre-existing provisions in laws enacted in the German Democratic Republic and marginalized the use of the formula.[60] Later, the Constitutional Court upheld the use of the supra-positive law argument in border-killing cases by ruling that citizens of the GDR could not have had legitimate trust in the existing legal system due to its undemocratic nature and contradiction of basic principles of international human rights. According to this ruling, the constitutional prohibition on retrospective justice (Art. 103.2 of the Basic Law of the Federal Republic of Germany) was not affected because citizens of the

59 See the ruling of the Landsgericht Berlin ([523] 2 Js 48/90 [9/91] of 20 January 1992.

60 See the ruling of the *Bundesgerichtshof* (5 StR 418/92) of 25 March 1993.

GDR could not expect that actions classified as gross violations of international human rights, although considered legal in the communist past, would escape prosecution. Legitimate trust in law, according to the court, may exist only in respect of democratically created laws. Habitual obedience to existing legal rules does not guarantee protection from criminal prosecution.[61]

To summarize the legal and political developments in Germany in the 1990s: the importance of German public screening methods and the criminal trials for political crimes during the GDR era have something in common. They insist upon a strict distinction between those who were guilty and those who were not. The nature of totalitarian regimes such as the German Democratic Republic often leads to a simplistic conclusion that, because the regime forced all citizens more or less to participate in its system, everyone was to some extent guilty and all measures of punitive justice should consequently be abandoned. Criminal convictions established a clear line between perpetrators and victims of the communist regime and thus distributed the burden of social responsibility for the crimes and injustices of the past. The criminal trials dealing with the political crimes of the German Democratic Republic had ultimately a positive effect[62] because they applied precisely that principle of retributive justice and equal treatment before the law ('Nobody is above the law, not even political élites!') which showed the GDR's former citizens, now living in one unified Germany, the positive side of the rule of law (*Rechtsstaat*) extended from the former West Germany.

The Temporality of Politics and Different Uses of Justice

When Otto Kirchheimer, in his famous book *Political Justice*, written more than 40 years ago, warned against the use of the system of justice and legal procedures in general for the political purposes of successor regimes, he was certainly right, as the political abuse of courts is one of the most severe threats to the very idea of the rule of law.[63] However, an analysis of constitutional justice in different countries in Central Europe during their legal and political transformations in the 1990s shows a much more complex picture of the problems and issues confronting the new liberal democratic regimes of that region.

Retrospective justice was eventually concentrated in higher and constitutional courts in post-communist Central Europe. New bodies set up by the constitutional courts were confronted with the problem both of extending limitation periods for prosecution, and retrospective legislation introducing various forms of legal

---

61 However, it is noteworthy that the Constitutional Court of Germany ruled in another notorious case, that of the 'master-spy Markus Wolf', that former spies could not justifiably be prosecuted for activities undertaken on behalf of another government. See judgment of the Federal Constitutional Court of Germany of 23 May 1995.

62 For this view, see for instance the interview with the former Chief Justice of the Federal Constitutional Court of Germany, Ernst Benda in 'Interview mit Ernst Benda' (1992) 25 *Deutschland Archiv* 1341.

63 O. Kircheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, Princeton University Press, 1961).

punishment and discrimination for past political activities. For instance, post-communist Czechoslovak reality primarily reflected political discontinuity and the constitutional framework, according to the Court, has been built on this discontinuity which it symbolizes. This reflection was even stronger in the prosecutions of communist political crimes in unified Germany. On the other hand, the approach of the Hungarian Constitutional Court and, to a lesser extent, the Polish Constitutional Tribunal, were less reflective of discontinuities and backed their decisions with the principle of formal legal continuity. The Hungarian Court explicitly excluded historical justice as unconstitutional, because of its subjective and anti-universalistic nature.

If the Hungarian Constitutional Court argued that the rule of law depends crucially on the prohibition of legal retrospectivity, imposing the prospective logic of revolution by law on existing political processes, the attitudes of the German system of justice and the Czech Constitutional Court were diametrically opposed. Both justified retrospective legislation and judicial decision-making on the basis of public trust. According to this view, it is more harmful to leave the political crimes of the past unpunished than to turn to legal retrospectivity for redress. The revolutions of 1989 were driven by public condemnation of the communist regimes and expectations that justice should be done. Political discontinuity involved constitutional and legal discontinuity and the new democratic regimes therefore had a strong mandate to deal with the past by using criminal or other legal sanctions. Legal retrospectivity was therefore strongly backed by democratic legitimation. Any form of impunity would harm the rule of law and the principle that nobody stands above the law. Public trust in the rule of law depended on the state's ability to cope with past injustices within the framework of criminal justice or administrative discrimination.

Different attitudes towards legal retrospectivity in post-communist Central European countries clearly demonstrate that there is no simple answer to the problem of dealing with the past. Different strategies, arguments and reasoning chosen by governments and courts point to the intrinsic logic of political and constitutional transformations in the individual countries of Central Europe. However, the fundamental difference between the jurisprudence of the Hungarian Constitutional Court on the one side and the German Constitutional Court or the Czech Constitutional Court on the other shows that countries experiencing fast revolutionary transformations, backed by crowds of people on the streets, are less reluctant to 'do the prospective job by retrospective means'. On the other hand, countries negotiating the process of political transformation in 'élitist' round-table talks are less enthusiastic at the prospect of having to deal with the past in legal terms at all.

This page intentionally left blank

Chapter 8

Moral Paradoxes of Legal Justice: An Analysis of Restitutive and Administrative Dealing with the Past

In the emerging public domain of post-communist Central European countries, new political identity was confronted with unjust political history. Law became one of the most important discursive and integrative techniques. Prospective hopes and efforts to (re)construct liberal democratic conditions and the rule of law were haunted by past injustices, political oppression and violence. The emerging political and legal structures and decision-making processes were trapped between the past and future. They were challenged by the dilemma of 'dealing with the past in order to make the future happen'. They had to deal with the past either in political or legal terms and establish specific forms of retrospective justice.

Assessing the post-communist moral, political and legal manipulations of time and history, I focus on two different forms of the symbolically important legislation – restitution and lustration laws in this final chapter. Restitutions are principally retrospective and seek to compensate for past injustices. Despite this clear temporal logic, the restitution laws can be justified as prospective governmental policies, such as in the judicial reasoning of the Constitutional Court of Hungary in the beginning of the 1990s. In the first part, I therefore analyse different temporal justifications of restitutive justice and compare the reasoning of the constitutional courts of Hungary and the Czech Republic. In the second part, I analyse a specific vetting policy introduced by the Czechoslovak lustration law of 1991 and critically assess its symbolic and political role in the post-communist legal and political transformation. I conclude by showing profound differences between the legal, political and moral effects of the law that is historically one of the most typical examples of the highly symbolic and moral expectations and controversies of the post-communist legal transformations.

Post-Communist Restitutions – Main Principles and Dilemmas

Instead of public moral condemnation of the unjust political regime by an independent body, a characteristic of the post-communist transformations was that parliaments used their legislative authority to enact their moral condemnation of the communist regime in the form of law itself. In 1993, the Parliament of the Czech Republic thus enacted the Act of Lawlessness of the Communist Regime and the Resistance to

It,[1] which condemned the communist regime, made communist officials and their supporters responsible for its injustices, and praised those who had resisted the communist political system. The National Council (Parliament) of the Republic of Slovakia enacted the same kind of law in 1996.[2]

Apart from legislative acts and constitutional justice decisions supporting the construction of the democratic regime's political symbolism, laws of practical benefit to the individual victims of communist injustices had been enacted by the legislative bodies in the early 1990s. Despite their instrumental role, these laws also had strong symbolic power and signified the post-1989 political change. Restitution laws are a typical example of the mixture of the instrumental and symbolic rationality of law and its impact on economic transformation in post-communist Central European countries.

During the early stages of economic transformation, the main question was whether privatization and the establishment of a market economy should be left to spontaneous evolution or be designed and carefully regulated by law.[3] After the fall of the economic system based on nationalized industry and totalitarian state control, there was a tendency to disparage economic reforms which supported any

---

1 Act No. 198/1993 of the Collection of the Laws of the Czech Republic. Although primarily a symbolic legislative act, provisions incorporating the concept of 'responsibility' raised opposing hopes and fears in both camps in the emerging democratic system. Some right-wing politicians wanted prosecutions of political crimes to go ahead because they interpreted the law – especially section 5 extending the period of limitations for crimes unprosecuted for political reasons to last from 25 February 1948 to 29 December 1989 – as overturning the criminal law principle of limitation. Some left-wing politicians, even those outside the Communist Party leadership, feared that the law could lead to the politicization of criminal prosecution. Forty-one Members of Parliament therefore submitted a complaint to the Constitutional Court and demanded that the law be declared unconstitutional and therefore void.

The Constitutional Court of the Czech Republic rejected the complaint and upheld the Act's constitutionality. At the same time, the Court ruled that the Act, especially sections 1(2) and 5 incorporating the concept of responsibility and the criminal law period of limitation for prosecution, could not have any practical impact on the criminal law statutes, and that the meaning of the concept of 'responsibility' is moral, not criminal. The Act thus could not open the way to establishing criminal liability in the case of former communist officials outside the framework of the Criminal Code. The Court described the law's primary purpose as a moral one, mobilizing public opinion and instigating reflections on the communist period of modern Czech history. Instead of setting up some form of truth and reconciliation commission, Parliament established itself as a 'moral institution' dealing with the communist past and symbolically mobilizing public condemnation of it by means of the enacted law. For further details, see Judgment of the Constitutional Court of the Czech Republic, No. 14/1994 of the Collection of the Laws.

2 For details, see the Act of Immorality and Lawlessness of the Communist Regime, No. 125/1996 of the Collection of the Laws of Slovakia, enacted in March 1996. The Act uses language very similar to that of the Czech law and was not challenged before the Constitutional Court of Slovakia.

3 R. Frydman and A. Rapaczynski, 'Institutional Reform in Eastern Europe: Evolution or Design?' (1992) 1 Brigham Young University Law Review 1-22.

form of state activism. Market forces were considered a more reliable mechanism of economic transformation than legal rules administered by the state. The grand transformation of property rights was not accompanied by any legal enforcement and further protection of these rights. The imperative of that period of transformation was 'less legal regulation, more economic freedom'.

Economic transformation nevertheless revealed that the overwhelmingly purpose- and future-oriented process of establishing free market economies did not escape normative questions of historical justice and evaluations. The prospective nature of economic laws was significantly influenced by property restitutions which were legitimized retrospectively and demanded either the return of property or some form of compensation.[4] The economic future was significantly influenced by past injustices in respect of property rights in all Central European countries.

The main dilemmas surrounding the process of restitution may be formulated in the following questions: 1) Who is entitled to restitution?; 2) Over what historical period?; 3) What form will restitution take? The question of who is entitled to restitution includes the problem of possible restitutions to legal entities such as Churches and other institutions which had had property expropriated by the communist governments. If restitution is to compensate citizens for communist injustices, how can institutional restitutions be justified? Do they not subsequently re-establish pre-communist inequalities and even possible injustices? These problems are also entrenched in the second question regarding the problem of time limits. Furthermore, the definition of time limits assumes a clear temporal and legally formalistic distinction between 'just' and 'unjust' political conditions. The third question indicates that restitutions may take different forms – either financial compensation or physical restitution (*restitutio in integrum*) of property expropriated in the past.

The political and moral context of restitutions obviously made them a highly controversial issue. They were ferociously defended as the very least a new democratic government could do in order to deal with the communist crimes and injustices. However, they also were fundamentally criticized for being either ethnically discriminating, facilitating the establishment of nationalist governmental policies in post-communist countries or for having undesired distributional consequences and recreating old economic inequalities in new political conditions. Restitution was perceived as a policy historically legitimating pre-communist illiberal and nationalist programmes in different countries in post-communist Europe, disguised as moral regeneration and historical justice. According to these critics, selective schemes of restitution were ethnically biased and therefore would hardly satisfy standards of justice under the liberal rule of law.[5] Furthermore, critics of the economic and social consequences of restitution emphasized the harmful effect on standards of equal

4 For critical comments, see for instance U. Preuss, 'Restitution vs. Investment' (1992) 1(3) East European Constitutional Review 22-4; see, also, a general discussion in the same journal, 'Forum on Restitution' (1993) 2(3) East European Constitutional Review 30-9.

5 See, especially, I. Pogany, Righting Wrongs in Eastern Europe (Manchester: Manchester University Press, 1997) 213-16.

rights and citizenship. Instead of strengthening the principle of equality so vital for the liberal democratic rule of law, restitution:

> usually implies a redistribution at the expense of those members of the present generation who receive no compensation, and also at the expense of future generations who are deprived of either the privatisation proceeds or access to restored pieces of private property.[6]

According to those critics, retrospective justice entrenched in restitution is 'backward-looking justice'[7] and ignores the fact that all citizens were essentially victims and suffered under communism. Other criticisms advocate:

> moral rather than material restitution, except in cases of genuine need. Material restitution, along with schemes of monetary compensation, may all too easily reinforce traditional stereotypes in Central and Eastern Europe, i.e. that certain national or ethnic groups tend to accumulate unfair or grossly disproportionate wealth.[8]

While some feared the economically frustrating effects of restitution, others warned against its role in those political activities that threatened to revive the political ghosts of pre-communist anti-Semitism, nationalism and ethnic hatred.

Prospective and Retrospective Justifications of Restitution: A Comparison of the Hungarian and Czechoslovak Model of Restitution

Critics of restitution usually marginalize one important aspect of the liberal democratic rule of law – the principle of the availability of legal remedy for those who have suffered any form of injustice. Nobody can deny that communist expropriations, even when they had a legal form, contradicted the basic rule of law principle of equal treatment before the law. Critics of restitutions are right to point to various discriminatory and arbitrary provisions incorporated in restitution laws in different post-communist countries and to expose the partiality of restitution schemes that were not merely pragmatic but involved a particular conception of a desired type of society yet to be politically constructed. However, it is hardly contestable that restitutions, like the rehabilitation laws, were primarily formulated and justified as legal means of compensating the victims of communist injustices. The main

6 See C. Offe, *Varieties of Transition* (Cambridge, Polity Press, 1996) 126.

7 See J. Elster, 'On Doing What One Can' (1992) 1(3) *East European Constitutional Review* 15-7. The irony of the recent political developments in post-communist Central Europe is that one of the most passionate parliamentary speeches against restitution was delivered by a 'reconstructed' nationalist, advocate of property revisions in post-1945 Europe, and Prime Minister of Hungary between 1998 and 2002, Viktor Orbán, who said in the Hungarian Parliament on 4 February 1991: '... it would be ... unjust to implement compensation for former owners at the expense of the generations alive today who were completely blameless for the expropriations. It is clear, in any event, that the costs of compensation will be borne not by the state but by the increasingly badly-off taxpaying citizens ....' This passage quoted from Pogany, op. cit., n. 5, at 216.

8 Pogany, id., 213-17.

argument about dealing with the past and compensating the victims of communist injustices was elaborated in different ways specifying the possible political roles and legal obligations of new democratic governments. These specific arguments are heavily determined by the problem of the temporal nature of restitution laws and it is surprising how often arguments for historical justice are framed by a broader prospective jurisprudence and vice versa.

In the following part, I therefore focus on two different arguments. The first principal justification for making restitution is fundamentally prospective, future-oriented, and provided by the Constitutional Court of Hungary. The second justification is fundamentally backward-looking, retrospective, and based on the concept of substantive discontinuity between the past communist regime and the new, liberal democratic one. It is entrenched in the restitution laws enacted by the Czechoslovak legislative bodies in the early 1990s. The Hungarian Constitutional Court defines the restitution framework in a strongly prospective manner which imposes no constitutional duty on the new democratic government to deliver the restitution policy. It uses, somewhat puzzlingly, the concept of *novatio* in order to show that restitution is a new government's policy for compensating the victims of communist expropriations. According to the Court, there is therefore no obligation on the part of the new government to enact restitution based on the principle of legal continuity between the old communist regime and the new, liberal democratic one. It is, rather, a prospective recognition of special moral political needs stemming from the process of the country's constitutional and political transformation. The Court 'reasoned that property restitution was based on the government's gesture of renewing its old obligations on new grounds, as a new title in property'.[9] On the other hand, the Czechoslovak legislature and, later, after the break-up of the Czechoslovak federation, the Czech Constitutional Court, accepted the principle that restitutions are an *ex tunc* instrument for removing illegality from Czech property rights. In the first half of the 1990s, the jurisprudence of the Czech Constitutional Court was based on a strong concept of retrospective justice.

The Prospective Concept of Restitution in the Jurisprudence of the Constitutional Court of Hungary

As it did in the case of the retrospective criminal justice of the Zetényi-Takács law, the Hungarian Constitutional Court denounced retrospective legal and constitutional practice when it defined the limitations on its ability to undo past communist violations of citizens' property rights, thus strengthening its doctrine of legal continuity, although judgments in property rights cases show more flexible reasoning than judgments dealing with retrospective criminal justice.[10] The Court refused to

9 R. Uitz, 'Constitutional Courts and the Past in Democratic Transition' in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism* (Budapest, CEU Press, 2005) 235-62, at 249.

10 See E. Klinsberg, 'Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights' (1992) *Brigham Young University Law Review* at 94-5.

recognize the current validity of rights violated by acts legal under communism and thus remedy unconstitutional interferences with those rights. It refused to interfere with the state's ownership of nationalized assets but allowed retrospective judicial interference and remedy if there were important issues of legal security or those of the petitioner involved.[11]

Furthermore, it was significant that the Court distinguished between property restitution based on compensation and the reprivatization of property for political reasons: it perceived the first as a form of retribution and reparation of past harms and the second as primarily aimed at economic reconstruction.[12] Consequently, these two processes are taken as two distinct policies and possible discrimination resulting from the one cannot be compensated for by the other. Compensatory restitution of property was taken as the government's attempt to renew its old obligations on new grounds and provide a new title in property (*novatio*).[13] This concept is manifestly future-oriented and denies the retrospective legal obligation of the government to ensure restitution for its citizens.[14]

Analysing the history of restitution in Hungary, the Court's final opinion was established after a series of contradictory judgments passed between 1990 and 1991 and known as Compensation Cases I-III.[15] The judgments were contradictory because the Court originally ruled in Compensation Case I that the restitution of property to some former owners, while other former owners were denied restitution, would amount to unconstitutional discrimination contradicting Article 70/A of the Constitution. It is noteworthy that the Hungarian Democratic Forum, the bigger party in the governing coalition, was dissatisfied with the legislation pushed through Parliament by its smaller coalition partner, the Smallholders Party,[16] and asked the Constitutional Court for a preliminary review of the law's constitutionality.[17] In

11 For further details of *The Nationalisation Case* and *the Land Act Case I*, see id, at 81, 116.

12 See 21/1990 (X.4.) AB decision, ABH 1990, 77.

13 See id., pp. 76-7; The Constitutional Court introduced the concept of '*novatio*' in its decision 16/1991 (IV.20.). The terminology nevertheless is different from the Roman law concept of *novatio*. See 15/1993 (III.12.) AB decision, ABH 1993, 117-8.

14 See R. Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000) 130.

15 Judgment No. 21/1990 (X.4) AB is referred to as Compensation Case I. Compensation Case II was referred to the Constitutional Court by the opposition Free Democrat deputies of Parliament who challenged the constitutionality of the Act while it was still being discussed in Parliament. In this case, the Court declined its jurisdiction in judgment No. 16/1991 (IV. 20) AB on the basis that it did not know the final text of the Act. Judgment No. 28/1991 (VI. 3) is referred to as Compensation Case III.

16 The Smallholders Party represented peasants mainly and, after the 1989 political changes, it managed to reform itself politically and won 16 per cent of the seats in the 1990 free elections, while the Hungarian Democratic Forum (MDF) was a major opposition party, holding 42 per cent of the seats in Parliament. For further details regarding the political controversies between these two political parties in the case of legislation restoring land to former landowners see, for instance, H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago, University of Chicago Press, 2000) 104-6.

17 See P. Paczolay, 'Judicial Review of the Compensation Law in Hungary (A Symposium on Development in East European Law)' (1992) 13 *Michigan Journal of International Law*

Compensation Case III, the Court retreated from its original position and backed some controversial provisions in the Act of Partial Compensation for Unjust Injury Caused by the State to Property Owned by Citizens, in the Interests of Settling Ownership Relations (the Compensation Act I) that was passed by the Hungarian Parliament on 24 April 1991.[18]

The law granted partial financial compensation to physical (natural) persons whose property rights had been violated as a result of the application of laws adopted since 8 June 1949. However, the legislature followed the ruling of the Constitutional Court in Case III, which demanded compensation even for those violations that had taken place prior to this date, and stated that violations of property rights resulting from the legislation passed between 1 May 1939 and 8 June 1949 were to be regulated by a separate statute, which was to be enacted by 30 November 1991, and governed by the same principles. The Second Compensation Act was passed later in the spring of 1992 and covered those property rights violations that had occurred as a result of laws passed between 1 May 1939 and 8 June 1949.[19] In spite of its principal goal of compensating victims of pre-communist injustices, it was criticized for failing to address anti-Jewish discrimination arising from pre-May 1939 acts.[20] The range of persons entitled to restitution in the form of financial compensation was also relatively extensive. It included citizens of Hungary, persons who had been citizens at the time of violations, persons who had been deprived of citizenship in conjunction with violations (members of the ethnic German community had been particularly targeted) and non-citizens with permanent residence in Hungary.[21]

The Hungarian model was established on the principle of financial compensation with a maximum of 5 million forints per person and per item of property (equivalent to approximately 55,000 Euro at the 1991 exchange rate). This means that many people received only a small part of the value of their confiscated property. On the other hand, the process of restitution to the Churches, legislated for by Act XXXII of 1991 and enacted by Parliament on 10 July 1991, was governed by the principle of physical restitution (*restitutio in integrum*) and authorized the return of property that had been nationalized without compensation after 1 January 1948. The return of buildings to the Churches had to be approved by the government[22] and was justified on the basis that Churches needed that property for the realization of aims specified by the law.[23] In those circumstances, when the original property could not be returned, another appropriate state property was provided as an alternative and financial compensation was paid only in exceptional circumstances.[24] The Hungarian

806-31, at 813.

18 For further details of these contradictory rulings of the Court, see Pogany, op. cit., n. 5, at 157-64.

19 Act XXIV (1992) in the Hungarian Collection of Laws (*Magyar Kozlony*), 8 May 1992, No. 47, 1672.

20 See Pogany, op. cit., n. 5, at 171-8.

21 See section 2(1) of the Act.

22 See section 7(1) of the Act.

23 See section 2(2) of the Act.

24 See section 2(4a) and 2(4b) of the Act.

example shows a fundamental difference between the principles governing restitution to Churches, as legal entities, and individuals, as natural persons.

The extensive scheme of physical restitutions to Churches contrasts with the limited resources allocated for the financial compensation of individuals. This striking imbalance could nevertheless be justified on the basis of prospective governmental policy pursued by the restitution laws and specified in the Constitutional Court's ruling. The Court also ruled that the return of property could be justified by a cost-benefit analysis proving that making restitution would promote general welfare. The Court emphasized the extraordinary historical circumstances in which restitution was introduced as government policy. However, with the exception of restitution made to the Jewish victims of unjust expropriations, who were to be compensated under Hungary's international law obligation,[25] the Court made it clear that there was historically no legal obligation on the new democratic government to provide restitution for violated property rights. The policy of compensation was treated as a matter of government's 'grace' and political bargaining among different 'interest groups'.[26] The government was thus supposed to consider the possible effects and consequences of compensation before enacting any legislation in this field of legal and economic transformation. The Court demanded that the Hungarian government deal with the future rather than with the past. This opinion subsequently shaped Hungarian restitution policy in the beginning of the 1990s.

The Czechoslovak Restitutions and their Retrospective Justification

Like the Hungarian compensatory legislation, the Czechoslovak restitution laws represent a fundamental part of the country's constitutional and legal transformation. The restitution laws were one of the most important priorities of the new democratic legislature elected in the first free parliamentary election in 1990.[27] Restitution was perceived as the return of unjustly expropriated property and therefore as a part of the broader process of rehabilitation understood as the law mitigating injustices and harms done by the communist regime. This process of dealing with the unjust past was enacted by a series of specific laws during the first years of the legal and political transformation, formulated in the opening section of the Act No. 480/1991 of the Collection of Laws which established the legal assumption that the communist regime breached both the principle of human rights and its own laws.[28] Unlike in Hungary, the whole jurisprudence behind the rehabilitation and restitution laws was therefore based on a retrospective approach and the new democratic government's

25 Judgment of 12 March 1993 (Jewish Property Restitution Case), No. 16/1993 (III.12) AB.

26 Schwartz, op. cit., n. 16, at 105-6.

27 The Czechoslovak Federal Assembly legislated a number of laws to enact the process of rehabilitation and restitution. See, especially, the Act of Mitigation of the Consequences of Certain Property Losses No. 403/1990 of the Collection of Laws; The Act of the Regulation of Church Property No. 298/1990 of the Collection of the Laws; The Act of Judicial Rehabilitations No. 119/1990 of the Collection of Laws; The Act of Extrajudicial Rehabilitation No. 87/1991 of the Collection of Laws.

28 See Act No. 480/1991Sb., para. 1.

duty to deal with the unjust past and thus prove substantive discontinuity between the old communist regime and new liberal democracy based on the rule of law.

The Act of Legal Rehabilitations No. 119/90 of the Collection of Laws entitled former political prisoners to financial compensation for loss of earnings and time spent in labour camps and prisons. This entitlement was granted even to prisoners' relatives. This law also included a clause stating that compensation for other losses such as property, employment and educational discrimination would be drafted in specific laws under the new government's programme of political rehabilitation.[29]

The Act of Extrajudicial Rehabilitations, No. 87/1991 of the Collection of Laws, was enacted by the Czechoslovak Federal Assembly on 21 February 1991 and was considered a landmark bill both in the rehabilitation and privatization policy of the new government. It significantly extended the law passed on 2 October 1990 on property restitution which covered the return of small businesses and other property confiscated by the communist regime between 1955 and 1961. The Act set up time limits by stipulating that only property expropriated between 25 February 1948 and 1 January 1990 was subject to restitution. Despite the fact that these dates corresponded to the dates when Communists came to the political power (the communist coup was completed by 25 February 1948) and later effectively lost it (by 1 January 1990, Czechoslovakia had a government of national unity and Václav Havel as its President), political controversies characterized this 'period of injustice' legislation.[30]

Another legal condition for the return of confiscated property that caused a lot of criticism and significantly differed from the Hungarian compensation policy was that of Czechoslovak citizenship and permanent residence. It effectively made many Czech and Slovak refugees, who had escaped from the country during the communist era leaving behind their assets, ineligible for restitution. It was estimated that more than 3.5 per cent of the Czechoslovak population (550,000 people) were forced to emigrate. Many of them, especially in the wake of the communist coup in 1948, had been business people and enterpreneurs who would therefore qualify for large restitutions in all branches of Czechoslovak industry.[31] This restrictive measure was heavily criticized and later became subject of a review by the Constitutional Court of the Czech Republic. The Court declared the condition of permanent residence regulated in Art. 3/1 of the Act unconstitutional and it ceased to be a criterion of eligibility for property restitution in 1994. The Court passed a similar judgment in

29 For further details see the Act of Judicial Rehabilitations No. 119/1990 of the Collection of Laws. The law came into effect on 1 July 1990 and rehabilitated all individuals sentenced for political offences between 25 February 1948 and 31 December 1989.

30 This time limit also guaranteed that Sudeten Germans did not qualify for the Czechoslovak restitution process and therefore is the subject of frequent criticism, mainly from conservative politicians in Germany and Austria. However, in February 1992, the law was amended to allow for the restitution of property confiscated before 1948 in the case of Germans who had not been expelled from post-war Czechoslovakia and had had their citizenship restored but not their property.

31 For the data, see J. Pehe, 'Emigres in the Postcommunist Era: New Data, New Policies', *Report on Eastern Europe*, No. 17, 26 April 1991.

its review of the Act of the Revision of Ownership Relations to Land and Other Agricultural Property in 1995.[32]

The Act of Extrajudicial Rehabilitation was the core restitution law which covered most of the property confiscated by the communist regime and involved all industries and businesses. It was estimated that state-owned property valued at approximately 300 billion Czech crowns (10 billion Euro at the 1991 rate) would be returned to individuals in the form of physical restitution (*restitutio in integrum*) and only between 10 and 15 billion Czech crowns (0.5 billion Euro at the 1991 rate) would be paid in financial compensation which was used only as a supplementary method in cases in which physical restitution was impossible.[33] The law did not apply to churches and other legal entities such as political parties, charities, sport and cultural associations, etc. Existing land restitution laws were supplemented by the Act of the Revision of Ownership Relations to Land and Other Agricultural Property. It was enacted by the Federal Assembly on 21 May 1991 and entitled individuals to the restitution of up to 150 hectares of farmland and 250 hectares of all other types of land. Significantly, the time limits set for the process of restitution were incorporated into this land restitution law.[34]

Regarding the restitution made to Churches, the Czechoslovak practice was significantly different from that of Hungary and Poland. Despite the fact that real estate property used for religious purposes started to be returned in 1990, a decisive political consensus was missing in the case of Church restitutions.[35] The case was even more complicated because much property belonging to Churches and religious communities had been expropriated before 1948 and therefore did not qualify. It also contradicted the accepted government principle that property should be returned to individuals. Restitution to legal institutions was perceived as extending the original idea of restitution beyond desirable limits. The Czech practice as regards the restitution of Church property was consequently governed by policy of government decrees which enumerated property subject to restitution on a case-by-case basis.

However, after the break up of the Czechoslovak Federal Republic, the independent Slovak Parliament enacted a law on the restitution of Church property as early as in October 1993 which granted the return of all property, including real estate expropriated from Christian Churches between 8 May 1945 and 1 January 1990, and from Jewish associations between 2 November 1938 and 1 January 1990. In the Czech Republic, the government and the Federation of Jewish Communities came to an agreement whereby the process of Jewish restitution was separated from the general framework set up by the restitution legislation in order to satisfy the just demands of Czech Jews without having to adopt the unpopular policy of general

32 See the judgments of the Constitutional Court of the Czech Republic of 12 July 1994 and 13 December 1995.

33 For these estimations, see J. Pehe, 'Legal Difficulties Beset the Czech Restitution Process', *Radio Free Europe/Radio Liberty Research Report*, No. 28, 15 July 1994, 6.

34 This law was later, in December 1991, supplemented by the Act of the Revision of Ownership in Cooperatives dealing with the return of property in the possession of cooperatives to its former owners.

35 The legal regulation framework was provided by the Act of the Specification of Property of Church Organisations, No. 298/1990 of the Collection of Laws.

restitution of property to Churches. It became a moral imperative to enact a law providing for the restitution of property both to individuals and institutions and to extend the date of 25 February 1948 backwards to at least 1938 in order to cover all injustices arising from the Nazi period and its 'aryanisation of Jewish property'. The restitution laws were subsequently amended to permit the restitution of Jewish property expropriated after September 1938.[36]

Focusing on the profoundly retrospective logic of the process of restitutions in Czechoslovakia and, later, the Czech Republic, it is also important to mention the judgment of the Constitutional Court of the Czech Republic of 24 April 1994[37] in which the Court concluded that restitutions have a declaratory character and therefore take legal effect *ex tunc*. According to this ruling, restitution reconstitutes the property rights that existed in the past and were violated by the state's lawless actions.[38] This judgment strengthened the overall conviction in the government and judicial bodies that restitution was primarily a retrospective measure taken to heal the injustices of the communist past. The prospective goals of these measures could consequently be only of secondary importance.

The Czechoslovak Lustration Act: History, Criteria and Institutional Background

Apart from restitutive historical justice measures, moral and political controversies and paradoxes accompanied the exceptional administrative measures implemented during the post-communist political and legal transformations. These measures are usually based on specific forms of vetting civil service appointments and public officials of the new democratic regime. Although justified mostly as prospective legal measures to protect constitutional democracy and the rule of law, they commonly involve scrutinizing the past activities of individual officials, which may justify administrative or other kind of sanctions against them. The vetting procedures thus extend from the future (security of the new democratic regime) to the past (retribution or even revenge against officials of the communist regime) and show the complexity of social discontinuities after the 1989 revolutions.

One of the most typical examples of the vetting legislation is the Czechoslovak *lustration* law. The lustration law, as formulated in Act No. 451/1991 of the Collection of the Laws, 'determining some further conditions for holding specific offices in state bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic' (commonly referred to as the 'large lustration law'), and Act No. 279/1992 of the Collection of the Laws 'on certain other prerequisites for the exercise of certain offices filled by designation or appointment

---

36 For further details see, for instance, K. Sieradzka, 'Restitution of Jewish Property in the Czech Republic: New Developments', *Research Report of the Institute of Jewish Affairs*, No. 7 (1994) 9-10.

37 The Judgment of the Constitutional Court 16/93 Pl US.

38 See A. Procházka, 'K právním ú ink m rozhodnutí podle restitu ních zákon a zákona rehabilita ního' [On the legal effects of the Decisions under the Restitution Laws and the Law on Rehabilitations], (1995) 134 *Právník [Lawyer]*, No. 5.

of members of the Police of the Czech Republic and members of the Correction Corps of the Czech Republic' (commonly referred to as the 'small lustration law' because it only extended the lustration procedures to the police force and the prison guards service), was based on the idea that post-communist Czechoslovak society had to deal with its past and facilitate the process of decommunisation by legal and political means. It intended to specify a carefully selected list of top offices in the state administration which would be inaccessible to those individuals whose loyalty to the new regime could justifiably be questioned because of their political responsibilities and power exercised during the communist regime.

Furthermore, the law also responded to the practice of 'wild lustration' which had been going on since 1990. Before the first free parliamentary elections in 1990, all political parties except the Communist Party had their candidates 'lustrated' despite the fact that the parties were not legally obliged to withdraw those with a secret police record from the ballot list. This practice only illustrates how strong public pressure was to eliminate the risk of communist officials securing power and influence in the new democratic condition. The lustration policy was introduced in the democratically elected Federal Assembly (Parliament) and, in March 1991, the Parliament's internal 'November 17 Commission' which had been investigating the circumstances of the Velvet Revolution and secret police involvement in it, published the names of ten MPs who had a secret police record and refused to step down.[39] All these steps taken to clarify the status and past of new political figures, along with political instability and the coup attempt in the Soviet Union in August 1991, subsequently motivated the federal government's decision to draft a general lustration law.

The Federal Assembly enacted the law on 4 October 1991. Act No. 451/1991 of the Collection of the Laws was drafted under the guidance of deputy Prime Minister, Pavel Rychetský, who was politically affiliated with the Civic Movement, the centre-left post-dissident stream of the former revolutionary Civic Forum.[40] The proposal had to achieve support in the Federal Assembly (Parliament) which was already politically fragmented and witnessing growing ideological and national tensions. Supporters of the lustration law therefore had to negotiate the draft and accept some 100 amendments proposed in 14 committees and during the plenary sessions. The law was eventually enacted by the vote of 148 deputies (49.3 per cent of all members of the Federal Assembly) from 12 parliamentary factions stretching from the Christian Democratic parties and Moravian autonomists to the Hungarian nationalists and liberal MPs representing the Civic Movement and the Public Against Violence. The law passed only due to the abstention of 70 MPs which lowered the majority quorum.[41]

---

39 For details, see J. Oberman, 'Laying the Ghosts of Past' *Report on Eastern Europe*, No. 24, 14 June 1991.

40 It is noteworthy that Pavel Rychetský joined the Czech Social Democratic Party in the 1990s, served as a minister in a government led by social democrats and currently holds the position of Chair of the Constitutional Court of the Czech Republic.

41 See F. Cigánek, *Kronika demokratického parlamentu 1989-1992 (The Chronicle of Democratic Parliament 1989-1992)* (Prague: Cesty, 1992) 188. Quoted in K. Williams, A.

The law was based on the principle of person-by-person specific vetting and provided two lists, one of posts subject to a lustration procedure before individuals could take office, while the second enumerated positions of power held and activities undertaken during the communist regime which disqualified candidates from applying for the jobs listed in the first list. Individuals holding the jobs at the time were subject to the lustration procedure as well.

Despite a wide range of public offices subjected to the lustration procedure, positions contested in general democratic elections are not affected by the law. Offices protected by the lustration law included: all ranks of the judiciary and the prosecution office; the civil service (head of department rank and higher), and senior administrative positions in all constitutional bodies; the army and police rank of colonel and higher; all intelligence services specializing in political surveillance and persecutions (exceptions could be granted by the Minister of Interior on national security grounds); all management positions in the national bank, state media, press agencies and state corporations or corporations in which the state is a majority shareholder; university heads of academic departments and higher; and the board of directors of the Academy of Sciences.[42]

The disqualification on grounds of position and activities during the former regime were linked to the activities of: a) political bodies; b) repressive secret police, state security and intelligence forces; c) individuals collaborating with these forces. Positions which warranted disqualifications included: Communist Party secretaries from the rank of district secretaries upwards, members of the executive boards of district Communist Party committees upwards, members of the Communist Party Central Committee, political propaganda secretaries of those committees, members of the Party militia, members of the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968, graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. These jobs and memberships were assumed to constitute a risk for the post-1989 democratic regime. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between 1 January 1968 and 1 May 1969, that is, during the democratization period of the 'Prague Spring '68', terminated by invasion by Warsaw Pact armies in August 1968.[43]

Regarding security, secret police and intelligence service positions, the following were specified by law: senior officials of the security police from the rank of departmental chiefs upwards, members of the intelligence service, and police members involved in political persecutions. Nevertheless, the law originally allowed the Minister of Interior, the Head of the Intelligence Service and the Head of the

---

Szczerbiak, and B. Fowler, 'Explaining Lustration in Eastern Europe: "A Post-communist politics approach"', Sussex European Institute: Working Paper No. 62, 16.

42 See para. 1, ss. 1-5 of Act 451/1991 of the Collection of the Laws.

43 See id., para. 2, s. 1 (d)-(h).

Police Force to pardon those members of the former secret police whose dismissal would cause 'security concerns'.[44]

The most controversial part of the law was that which listed the activities of citizens related to the secret police. They involved collaborators of the following kind: agents, owners of conspiratorial flats or individuals renting them, informers, political collaborators with the secret police and other conscious collaborators such as candidates for collaboration.[45] This complicated structure corresponded to the system elaborated by the communist secret police. The main issue was whether a person consciously collaborated with the police, for instance by signing a confidential 'agent' cooperation document, or was just a target of secret police activity and a possibly non-intentional source of information gathered during police interviews.

It was often technically impossible to distinguish between the two sides of the repressive organization – the secret police collaborators and their victims. At the same time, the government had to address the problem because the public was most concerned about the possible damaging impact of secret police agents on the emerging democratic political process and institutions. In February 1992, the Independent (Appeal) Commission required by the law was created to review the issued positive lustration certificates[46] in light of the reliability of available facts and secret police records. The Commission consisted of the following members: the Chair, deputy Chair and one member were appointed by the Chair Committee of the Federal Assembly (Parliament) and could not be members of Parliament; two members were appointed by the federal Minister of the Interior from his staff; one member was appointed by the Head of the Intelligence Service; one member was appointed by the Minister of Defence; six members were appointed by the Chair Committees of the national parliaments (three by the Czech National Council and three by the Slovak National Council) and could not be members of the Czech and Slovak National Councils; one member was appointed by the Czech Minister of the Interior and one member by the Slovak Minister of the Interior from their staff. Members appointed by the Ministers and the Head of the Intelligence Service had to be university law graduates.

The appointment procedure was a strange mixture of democratic elements (involving the top bodies of the federal and national legislature), administrative hierarchical procedure (appointments from within the executive branch of constitutional power), and attempts to provide equal representation for both nations of the Czechoslovak federation at the time. The membership combined expert knowledge with lay elements. The appointment rules also show that the Czechoslovak (later, Czech) lustration process was handled primarily by the executive, especially the Ministry of Interior which set up a special bureau administering the process of

44 See id., para. 3, ss. 1 and 2. The sections were later declared unconstitutional by the Constitutional Court of the Czech and Slovak Federal Republic due to their inconsistency with the principle of equal treatment. See n. 16, above.

45 See para. 2, ss. 1(b) and 1(c) of Act 451/1991 of the Collection of the Laws.

46 The certificates were issued by Ministry of Interior to indicate collaboration with the communist secret police.

collecting the necessary data and issuing the lustration certificates within its Security Office.

The category of secret police collaborators was divided into three sub-categories: category A consisting of 'agents, informers and owners of conspiratorial flats'; category B, 'trustees' who, though not classified by any of the activities listed in the category A, were conscious collaborators; and category C, 'candidates for collaboration' who did not have to be necessarily conscious collaborators and often were just the subject of police surveillance and interrogation. The commission's principal goal was to decide whether those accused of collaborating with the secret police actually had been conscious collaborators or just innocent victims of political persecution recorded in the secret police files.

The Lustration Law in Action

The categorization of secret police collaborators led to a number of political protests, moral criticisms and legal cases. Category C, in particular, became the subject of controversy and resulted in a number of legal complaints. By October 1992, the Independent (Appeal) Commission had reviewed a mere 300 complaints, just 11 per cent of all the complaints submitted to the Commission and only in 13 cases concluded that they were conscious collaboration with the secret police.[47] No wonder that the Commission's Chairman Jaroslav Bašta proposed the removal of this category from the statute. The Constitutional Court of the Czech and Slovak Federal Republic, which reviewed the lustration law's constitutionality after some members of Parliament complained to the Court, eventually annulled this category.[48]

It is noteworthy that the Court upheld the law's constitutionality in general and stated that the lustration in principle did not violate the International Convention on Civil and Political Rights, the International Convention on Economic, Social, and Political Rights and the Discrimination Convention (Employment and Occupation) of 1958. Furthermore, the Court declared unconstitutional and therefore void those sections of the law (Sections 2(3) and 3(2)) which legislated specific powers to the Minister of Defence and the Minister of Interior to exempt individuals from the lustration procedure if it was in the interest of state security. According to the Court, these sections contradicted the principles of equality and due process of law guaranteeing that the same rules apply to those in the same position.[49]

The staff handling the lustration process consisted primarily of administrative staff in the Ministry of Interior responsible for the archive and the protection of the communist secret police files. The position of the Independent Commission was specific because it was to deal with citizens' complaints within the framework of

47 Quoted from the Judgment of the Constitutional Court of the Czech and Slovak Federal Republic, No. 1/92Pl US, 28.

48 For specific cases, see especially J. Šiklová, 'Lustration or the Czech Way of Screening' in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism* (Aldershot, Ashgate Publishing, 1999) 248-58, especially at 249-51.

49 See the Judgment of the Constitutional Court of the Czech and Slovak Federal Republic, No. 1/1992Pl US, 2, 26.

administrative procedure, before any judicial review, and on the basis of a rigorous and confidential fact-finding process. After the judgment of the Constitutional Court in 1992 which declared the incorporation of the category C into the law unconstitutional, the Commission's work became unnecessary and the body was dissolved. The lustration process subsequently became fully administered by the Security Office of the Ministry of Interior which issues the lustration certificate. The certificate therefore is an administrative act against which a citizen can file an administrative complaint and even a civil suit.

Regarding the procedure, an individual has to apply for a lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and the Ministry has a duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organization can apply for lustration of its employee only if her job is subject to the lustration law. In the case of a 'positive lustration' result, an applicant can submit an administrative complaint to the Ministry and, if the original finding remains unchanged, file a civil suit against the Ministry demanding the protection of 'personal integrity'.

It is obvious that the law did not affect Communist Party members in general and, among communists, targeted only party officials and party militia members. Individuals who ended up with the 'positive lustration' record stating that they had collaborated with the secret police could still be active in politics because the statute did not apply to any office and position contested in the general election. However, the overwhelming majority of political parties introduced a self-regulatory policy demanding that all candidates should submit a 'negative lustration' certificate before being listed for the parliamentary election. The only parliamentary political party which refused to apply lustration rules internally was the Communist Party. The law thus created a situation in which members of Parliament and local councils could have a secret police collaboration record while, for instance, heads of different university departments had been subjected to the lustration procedure. Lustration did not apply to the emerging private economy sector, either. Private companies did not have access to the secret police files of their employees and therefore could not apply 'private lustrations'.

Available figures show that around 5 per cent of all lustration submissions resulted in 'positive certificates' disqualifying the applicant from office in the mid 1990s.[50] The most recent figures indicate a decline in 'positive lustration' results of screening, to approximately 3 per cent of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. The Ministry currently

50 As Kieran Williams points out: '[F]rom 1991 to 1997, if one includes the lustrations also required by the law on police service, a total of 303,504 screenings took place, of which 15,166 (five per cent) resulted in positive certificates.' Figures had been provided by Jan Frolík, then director of the Czech Interior Ministry's Section for the Protection of Official Secrets, in Prague on 11 February 1998. See K. Williams, 'A Scorecard for Czech Lustration' 1 *Central Europe Review*, No. 19, 1 November 1999.

receives between 6,000 and 8,000 lustration requests per year and the total number of lustration certificates issued between 1991 and 2001 was 402,270.[51]

Furthermore, the law had been originally enacted for a limited period of five years but was subsequently extended by Parliament several times and still is being enforced in the Czech Republic.[52] In 1996, the Parliament of the Czech Republic extended the enforcement of the lustration law until 2000, overriding the veto of President Havel who criticized the prolongation of the act as contradicting its original design as an exceptional, temporary and revolutionary measure restricted to the early post-communist period and unsuitable for a stabilized democratic legal system. In November 2000, Parliament extended the law once again despite President Havel's veto. The extended law exempted persons born after 1 December 1971 from the lustration process.

The prolongation of the law by Parliament of the Czech Republic was widely criticized as contradicting its original purpose and spirit. One of main justifications for the law at the time of its drafting, that its discriminatory measures would only have a temporary effect, turned out to be a false one. Instead of coming to an end after the initial period of five years, the lustration rules have become an intrinsic part of the Czech legal system.

The prolongation of the law was also addressed by the Constitutional Court in its judgment No. 9/2001Pl. US of 5 December 2001 in which the Court admitted that 'the amendment of the lustration laws, which removed provisions about their restricted validity in time, was a considerable intervention in their meaning'.[53] Although the Court insisted that the lustration law should be perceived as a temporary legislative measure, it also said that the law still protected an 'existing public

---

51 In 2001, the Ministry of Interior received 6,770 lustration requests (7,280 requests in 2002), out of which 2.5 percent did not receive confirmation of a clear record. For details see U.S. Department of State Report on Human Rights Practices in the Czech Republic, 2001, issued by the Bureau of Democracy, Human Rights, and Labor on 4 March 2002, available on <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8243.htm>; for the last update, see U.S. Department of State Report on Human Rights Practices in the Czech Republic, 2002, issued by the Bureau of Democracy, Human Rights, and Labor on 31 March 2003, available on <http://www.state.gov/g/drl/rls/hrrpt/2002/18361pf.htm>. No data are available regarding the job description, gender, age or qualification of lustration applicants. There are also no general records related to the subsequent careers of the lustrated individuals, their employment, etc.

52 Slovakia is an example of the opposite approach because, after the break-up of the Czech and Slovak Federal Republic, Me iar's populist Movement for Democratic Slovakia and other parties of his coalition government ignored the lustration law. Although the law was favoured by the majority of the Slovak population (see Šiklová, op. cit., n. 48 p. 251) in the early 1990s, politicians opposed the law for many reasons, one of them being strong indications that Me iar himself was a secret police collaborator. The Slovak lustration history is full of rumours, disappeared secret police files and uncertainty. The political instability of Slovakia throughout the 1990s, especially during the Me iar government of 1994-8, is sometimes used as an example of a failed policy of decommunisation caused also by the fact that the Slovak government did not pursue lustrations. See, for instance, M. Gillis, 'Lustration and Decommunisation' in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe* (Aldershot, Ashgate Publishing, 1999) 56-81, at 71-2.

53 Judgment No. 9/2001Pl. US, referred to as 'Lustration Law Case II', 15.

interest' and had a 'legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and untrustworthy public services'.[54] In other words, the 'friend-enemy' political logic and its symbolic distinction of 'us' and 'them' still persisted more than 12 years after the Velvet Revolution and the collapse of the Czechoslovak communist regime, and justified extraordinary and temporary measures to protect the state administration. Nevertheless, the Court's ruling also emphasized the fact that political circumstances change and the relevance of the lustration law decreases with the passage of time. It is therefore possible to imagine that a future constitutional complaint challenging the law might lead to the revision of the current position of the Constitutional Court.

As regards public opinion regarding the lustration process, it may be surprising to discover that over 80 per cent of the results for 'lustration' on the major Czech websites in fact advertise screening and security facilities for new and used cars. Fourteen years after the enactment of the lustration law, dealing with the communist past seems to have been symbolically obliterated by the specific needs of consumer society. Cars have overtaken communist secret policemen!

This image provided by the virtual reality of our electronic media is underlined by public polls which indicate a steady decline in interest in dealing with the communist past and in prolonging the lustration law.[55] Nevertheless, this lack of public interest contrasts with intense activities in the Assembly of Deputies (lower chamber of Parliament of the Czech Republic) during the first half of 2003 when a group of communist deputies proposed the abolishment of the existing lustration law. Despite the fact that the Government refused to support the proposal, it went to the Assembly and, despite failing to garner a majority, the measure was supported by 48 of deputies, some of them prominent social democrats.[56] Although the Czech Social Democratic Party has always been rather lukewarm in its support of the lustration law, two smaller coalition parties backed the legislation and even threatened to leave

54 id., 20.

55 The problem of 'dealing with the communist past' is considered an inferior social problem when compared with other social issues such as 'crime and security', 'unemployment', 'health', etc. See the survey of the Centre for Public Opinion Polls (CVVM), 3 December 2003. When the lustration law was extended in 2000, Parliament's decision was favoured by 36 per cent of the population while 33 per cent were strongly opposed to the decision. Public opinion was divided and the left-right political split was illustrated by the fact that the prolongation of the law was supported by 59 per cent of the supporters of the neo-conservative Civic Democratic Party which was in opposition at that time. See the press release, 'Ve ejnost k lustra nímu zákonu (The Public Views of the Lustration Law)' of Institut pro výzkum ve ejného mín ní (The Institute for the Public Opinion Survey), 29 May 2000.

56 See, for instance, 'Další kolo boje o lustrace (Another round of the struggle over the lustration law)' *Lidové noviny*, 19 June 2003, and 'KS M se nepovedlo zrušit lustrace (The Communist Party did not succeed in the abolishment of the lustration law)' *Lidové noviny*, 26 June 2003. The Communist Party proposal drafted by a communist deputy Vojt ch Filip was supported by individual members of the Czech Social Democratic Party and top state officials, such as the deputy Chair of the Assembly of Deputies, Jitka Kup ová, the Minister of Cultural Affairs, Pavel Dostál, and former government ministers Jan Kavan, Petr Lachnit, and Jaromír Schling.

the government if the law was abolished. Once again, parliamentary discussion of the lustration issues raised the problem of collective guilt, communist political crimes, human rights standards, due process of law, discrimination at work, etc.

This contrast between an uninterested public and heated political disputes was typical of the Czech lustrations debate before the country's EU entry. Opponents of lustration wanted to use the final stage of the European integration process to abolish the law on the basis of its discriminatory character while Government, with a parliamentary majority of just two votes, realized that the whole issue was too risky for the fragile coalition and refused to abolish or substantially reduce the applicability of the existing lustration law.[57]

The Lustration Act and 'A Democracy Defending Itself'

In Czechoslovakia, as with the revolutionary changes in East Germany at the same time, the 1989 Velvet Revolution occurred as an event governed by the political demands of constitutional democracy, civil rights, and the rule of law. It may therefore seem that the rule of law principle should have been enacted immediately after the power transfer. If the minimum definition of the rule of law is taken seriously, namely that human conduct, and especially political power, is subject to general laws, not to individuals, one can see that the question of whether the new democratically elected bodies should unconditionally respect the principle of political equality (including the equal treatment of officials of the former totalitarian regime and its political organizations) would become a key issue for any post-communist political society.

Any democratic political community is constituted by the principle of equal treatment of all citizens before the law. However, the rule of law and liberal democracy cannot be reduced to the institutionalized world of legal principles, rules and standards of human conduct. Principles and standards are inseparable from the social actors who observe and enforce them. Apart from its normative structure, every political and legal institution therefore must be examined in terms of those who act within its framework: individuals and social groups. Persons with decision-making and executive power can fundamentally determine the quality of the political and legal process. Every major political and legal change thus necessarily affects both normative structures and actors in legal and political institutions.

Lustration therefore has to be understood as part of the broader politics of decommunisation which targets the *personal aspect* of the whole process of post-communist political and legal transformations. It is based on the idea that some individuals cannot be trusted in view of their past positions and activities, and therefore should be excluded from access to certain public offices in the new democratic regime. With its banning of specific groups of people from public office,

57 The Chair of the Union of Freedom party and deputy Prime Minister, Petr Mareš, made a public statement that his party would leave the coalition if the law were to be abolished by a combination of social democrats and communists. The law was also supported by the major opposition party, the right-wing Civic Democratic Party. See *Lidové noviny*, 19 June 2003, id.

lustration evidences the doubts and uncertainties accompanying the power transfer from communist rule to liberal democracy.

In order to understand the specific process of lustration, it is important to analyse the nature of political and legal changes in general. In Czechoslovakia, the revolutionary events of 1989 were typical of the logic of political conflict based on the concept of an 'enemy' that needed to be neutralized and removed from power. The absence of any round-table talks and power concessions before the outbreak of public protests in November 1989 resulted in the regime change being dominated by the revolutionary confrontation of 'us/friends/revolutionaries' and 'them/enemies/*nomenklatura*'. Communist officials, the secret police and collaborators therefore could be quite easily labelled as 'political enemies'.

This *urge to purge* state institutions of individuals linked to the previous communist regime was still present, for instance, in the judgment of the Constitutional Court of the Czech Republic No. 9/2001Pl US, 5 December 2001, regarding the lustration law. Ten years after the enactment of the law, the Court recalled the judgment of the European Court of Human Rights in the case *Vogt v. Germany* which states that:

> a democratic state is entitled to require of its bureaucrats that they be loyal to the constitutional principles on which it is based. In this regard it takes into account the experience in Germany during the Weimar Republic and during the bitter period which followed the collapse of this regime until the passage of the Basic Law in 1949. Germany wished to bar the possibility that these experiences would repeat themselves, and therefore established its new state on the idea of a democracy able to defend itself.[58]

The Court used the 'democracy able to defend itself' argument in its judgment upholding the lustration law as a constitutional instrument requesting the political loyalty of civil servants and protecting the democratic regime against political threats. In this respect, the post-1989 Czechoslovak and German decommunisation policies resemble each other because both strongly demanded that institutional guarantees of the reconstruction of the democratic rule of law should be supplemented with, necessarily restrictive, *personal guarantees*.[59]

---

58 Quoted in Judgment 9/2001Pl US, op. cit., n. 53, at 17.

59 The legal system of unified Germany has also incorporated a system of data collection and public access to the communist secret police files. Unlike the parliamentary commission discussed above in chapter VII, which facilitated political debate and critical public discourse about the nature of the old communist regime in the GDR, the so called Gauck Office represents an administrative body with power to issue information about the past of individuals in respect of their links to the structures and repressive forces of communist Germany. It is a cross between an administrative body and a public archive because, although it does not have the authority to issue 'lustration certificates' which debar people from office, the information provided by the Gauck Office still has serious implications for those under scrutiny. The Office cannot act on its findings but those who use its information service may then take further steps with serious legal consequences, for instance, between an employer and employee. The Gauck Office is thus an interesting and unique example of an institution, established by the legal acts of a state, whose activity does not have immediate legal consequences but whose legal and authoritative decisions can be acted on by third parties.

The idea of lustration is based on the belief that democracy is not only an impersonal mechanism for the reproduction of power in which law plays the role of a supreme regulative system but also a matter of civil trust and loyalty. People must trust the new regime and the regime must trust its people. This would scarcely be possible if old oppressors kept power in the new political condition. The danger of the persistence of old élites manifested its disastrous effects in ideological twists from international communism to ethnic nationalism and subsequent wars in the former Yugoslavia and in some former Soviet republics. It was therefore necessary to satisfy public expectations that the new power holders and civil servants would not threaten the authority of democratic political and constitutional institutions. The general principle of lustration was expected to strengthen public trust and the legitimacy of the new liberal democratic regime.

Despite its respect for democratic legitimacy as manifested in the general elections, the lustration law was nevertheless highly controversial because it compromised the first precondition of justice and the democratic rule of law – the equality of all before the law.[60] This equality was weakened because *the very purpose of the lustration law was to administratively discriminate* against specific groups of citizens by denying them access to public office because of their past political positions and activities. By legislating the lustration law, the post-revolutionary power ended up in serious conflict with its own revolutionary demand for the rule of law, which entails the equality of all citizens before the law.

The lustration law then constitutes a *pillar* of the Czech decommunisation policy based on the idea of practical measures necessary to protect the new democratic regime by temporarily barring potentially disloyal individuals from public administration. Nevertheless, the symbolic power of this practical purpose-oriented legislation has always been very strong and has become a cornerstone of all debates about decommunisation and dealing with past injustices.

The claim that the rule of law already existed at the time of the transfer of political power from the Communist Party to the opposition did not correspond to the reality of the 1989 revolutionary year in any of the former Soviet bloc countries. On the one hand, the whole period of the 1990s is depicted as a period of reconstruction, of the creation of the institutions of the democratic rule of law and the adoption of specific legal and political institutions mainly from West European democratic countries. The rule of law is not a real state of political society. It is its goal and regulative ideal. On the other hand, it is essential to adopt the principles of liberal democracy and the rule of law. It is therefore necessary to reconstruct the rule of law and confirm its existence in post-communist societies at the same time. It is yet to be brought into existence, but already must be the guiding principle of political and legal transformation.

The rule of law is not a structure which can be instantly brought into existence by a political decision and/or consent. It is a highly complex structure of institutions, rules and concepts which may take a number of different forms; reconstructing it takes years and decades rather than weeks and months. The problem of founding

---

60 See, for instance, R. Dworkin, *A Matter of Principle* (Oxford, Oxford University Press, 1985) 205-13.

the democratic rule of law and determining the moment from which it is absolutely necessary to enforce it represents one of the most difficult problems of 'transitional' legal and political theory. We are confronted by the question 'From when does the rule of law have to be generally and unconditionally imposed?' The judgments of the Constitutional Court of the Czech and Slovak Federal Republic (No. 1/1992Pl US) and the Constitutional Court of the Czech Republic (No. 9/2001Pl US) clearly show that the question has serious practical consequences and is not limited to the sphere of jurisprudence and political theory. It determines the extent and temporal limitation of the enforcement of extraordinary, 'transitional' legal measures such as the lustration law.

Apart from breaching the first principle of the rule of law – equal treatment of all before the law – the lustration law was also criticized for weakening the principle of legal certainty, encouraging the arbitrary use of law and having retrospective effect. The principle *lex retro non agit* certainly is a constitutive element of the rule of law, and retrospective laws may weaken legal certainty. However, jurisprudence commonly describes retrospective legislation as a possible remedy for past injustices and a form of punishment for crimes that could not be prosecuted for political reasons in the past.

From the temporal perspective, the lustration law has the dual character of both prospective and retrospective legislation. The statute is prospective because it regulates conditions for future job and/or office applications. The law is retrospective in the sense that a number of actions and positions securing privileges in the past have become grounds for administrative discrimination in the present and future. It is not retrospective in the sense of criminal liability and therefore does not breach the principles of *nullum crimen sine lege* and *nulla poena sine lege*. The retrospective aspects of the lustration law, which demand the screening of the political past of individual applicants, was a response to the calls for political discontinuity and condemnation of the previous regime and its repressive practices. Prospective aspects responded to the calls for strengthening the political stability and security of the emerging democratic regime. No wonder the European Court's formula of 'a democracy able to defend itself' became popular in post-communist judicial reasoning and was invoked to justify the extraordinary and temporarily discriminatory means of the lustration law.[61]

Lustration has to be treated as a controversial element of the emerging rule of law, not its negation due to the retrospective elements it incorporates. Nevertheless, the controversy about the statute goes beyond the equal justice and prohibition of retrospective law debates and there are many conflicting views regarding its political and moral impact. Some critics even suggest that the law made the whole politics of decommunisation much less effective.[62] Let us therefore turn our attention to some

61 See the European Court of Human Rights's judgment *Vogt v. Germany* as cited in judgment 9/2001Pl. US, op. cit., n. 53, at 17.

62 For early concerns about the law creating moral rifts and stigmatising innocent victims, see J. Pehe, 'Parliament Passes Controversial Law on Vetting Offices' *Report on Eastern Europe*, 25 October 1991, 4-9, at 9.

of these moral, political and legal problems surrounding the lustration law and their social impact.

Early Criticisms of the Law and their Weaknesses

One of the most worrying words in the political morality of liberal democracies is discrimination. Democratic political life is concentrated on the fight against any forms of discrimination and for the emancipation of all citizens. People living in the liberal democratic condition are politically integrated by the concepts of equality and civil activism against inequalities. In this respect, lustration goes against the flow, compromising the foundations of liberal democratic morality by its openly discriminatory character. Moral criticisms and arguments against the lustration law can be summarized in the following words: 'You make certain groups of individuals inferior, second-class citizens because you prohibit them from access to public office. This measure contradicts the liberal democratic principle of open access to public office. Democracy cannot be founded on discrimination.'[63]

This argument was used in early criticisms of the lustration law by human rights campaigners and organizations such as the U.S.-based group, Helsinki Watch. In 1992, the group reported on the lustration legislation and called on the Czechoslovak authorities to repeal the statute. In an article published in *The New York Review of Books*,[64] a former executive director of Helsinki Watch and senior adviser to Human Rights Watch depicted an atmosphere of suspicion and distrust in post-communist Czechoslovak society allegedly caused by lustration and implicitly blamed the law for invoking the horror practices and 'witch hunts' of the communist days.[65] Helsinki Watch even suggested alternative solutions as follows:

> (1) set up an independent, non-governmental commission to investigate and report on the abuses of the previous regime; (2) prosecute those responsible for actual crimes, on the basis of specific charges and with full due process protections; (3) assure that no prosecutions or other adverse actions against individuals – for example, in employment and education - take place solely on the basis of political association or party membership.[66]

Similar arguments basically treating the lustration law as part of the communist legacy and a totalitarian practice which creates an atmosphere of fear and police repression are also typical of Tina Rosenberg's famous book, *The Haunted Land* which won the 1996 Pulitzer prize for general non-fiction works.[67] Rosenberg admits that a transition from dictatorship to democracy must not be undermined and all necessary steps should be taken to create a new, democratic and political culture. She

63 For this guarantee, see J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972) 60-1.

64 See J. Laber 'Witch Hunt in Prague' *New York Review of Books*, 23 April 1992.

65 See, especially, Jeri Laber's reply to critical responses in the *New York Review of Books*, 11 June 1992.

66 See <www.hrw.org/reports/1993/WR93/Hsw-03.htm> 4-5.

67 T. Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (New York: Vintage 1995).

doubts that communist repression could be the subject of ordinary criminal justice and due process of law because of the sheer number of cases and the proportion of the population involved. Nevertheless, she sustains a fundamental moral position that lustration is morally repulsive and harmful due to its discriminatory and stigmatizing effect, and avoids basic questions about reasons, goals, and the recipients of discriminatory treatment.

Apart from this fundamental moral critique of the lustration law as discriminatory and therefore resembling communist past practices and undermining the democratic present, further criticisms pointed to the principle of collective responsibility which creates the false impression that it is easy to distinguish oppressors from their victims. For instance, Václav Havel opposed the idea of publishing the names of all those with some form of secret police connection and feared that it could lead to new fanaticism and injustices. Although he emphasized the need to deal with the communist past, he wanted to do so with generosity, repentance and a sense of forgiveness.[68] Yet, despite this call for a moralist solution, he eventually signed the lustration law and proposed several amendments to it.

Early criticisms often lacked sufficient knowledge of the language, political and historical context and even of the real content and effect of the legislation. They therefore unsurprisingly attracted critical responses.[69] Ignorance of basic facts and a general lack of knowledge is especially striking in the case of the Helsinki Watch report and the alternatives it suggests. In fact, Parliament had established an independent investigation commission ('November 17 Commission') as early as September 1990 and it was paradoxically this body which came up with the *concept* of lustration. The idea of prosecuting the 'actual crimes' completely ignored the fact that many laws enacted by the communist regime were actually of a criminal nature and therefore legalized what would otherwise be criminal behaviour. Taken as a general rule, the third suggestion that no adverse action should be taken solely on the basis of political party membership would be one of the strongest condemnations of the politics of denazification in post-war Germany: it would certainly have been appreciated by all high-ranking Nazi officials who could not be prosecuted for any 'actual crimes' but were still the subject of employment discrimination under the post-1945 democratic regime.

The Helsinki Watch's critical report stated further that:

> The law does not adequately guarantee a review of each case on an individual basis in a proceeding in which the accused is told the charges against him and is given sufficient opportunity to prepare a defence.[70]

---

68 See, for instance, Havel's speech at New York University published in the *New York Review of Books*, 9 April 1992.

69 Jacques Rupnik, an otherwise sceptical commentator on the Czech way of dealing with the past, comments that these 'comparisons say more about fears and fantasies concerning Central Europe as seen from New York than about the actual issues in post-communist Bohemia'. See J. Rupnik, 'The Politics of Coming to Terms with the Communist Past' (2002) 22 *Transit: Europäische Revue*.

70 Op. cit., n. 66, at 2.

It has to be emphasized that lustration is an administrative law measure. The 'lustration certificate' is an administrative decision which states facts pertinent to legal qualification for certain jobs in state administration and state-owned companies. The lustration procedure is administrative and not judicial, which means that any review of the certificate's statement is primarily the subject of administrative process. Nevertheless, an applicant can go to court and ask for a judicial review of the decision. This was also one of the reasons why the Independent (Appeal) Commission initiated the removal of category C from the law: the risks of legal actions against the Ministry of Interior were extremely high. Contrary to the criticism, judicial review of lustration decisions has been guaranteed by law. Those who receive a 'positive lustration' record can file a civil suit against the Ministry of Interior and demand that their personal integrity be restored in public.

The Helsinki Watch's report was argumentatively weak, inconsistent and failed to provide a thorough critique of the lustration law which would go beyond the usual out-of-context truisms. A similar example of this hasty critical approach was an early decision issued by the Governing Body of the International Labor Organization (ILO) on 5 March 1992, which speaks about 'more than one million people'[71] potentially affected and calls on the Czechoslovak authorities to 'scrap or change' the discriminatory law which allegedly contradicts the Discrimination Convention, 1958 (No. 111). After the subsequent exchange of reports between the ILO and the Ministry of Labour and Social Security of the Czech Republic, the criticism was toned down and primarily focused on proportionality between the lustration demand in general and the specific positions for which a job applicant is requested to have a 'negative lustration' record.[72]

In contrast to these approaches, the Parliamentary Assembly of the Council of Europe, for instance, admitted in principle the compatibility of the lustration law with the democratic rule of law, provided its aim was to protect the state and not to punish individuals.[73] This decision is based on the distinction between discrimination and punishment and emphasizes the importance of the protective function of democratically enacted laws. Similarly, although the European Commission expressed some concern regarding the continuing enforcement of the law, the lustration process did not become an obstacle of the accession of the Czech Republic to the European Union.[74]

---

71 Compare with the actual number of just over 400,000 people lustrated during the first decade of the law's existence, of which approximately 3 per cent received a 'positive lustration' certificate. See op. cit., n. 66, at 6; and compare especially with supra n. 51.

72 For the criticism, see the Report File No. GB.252/16/19. Quoted from the Judgment of the Constitutional Court No. 9/2001Pl US, op. cit., n. 53, at 2.

73 See Resolution No. 1096 (1996) [point 11] of the Parliamentary Assembly of the Council of Europe.

74 In one of its regular reports on progress towards accession, the European Commission only says that '[I]n September 2000 the "Lustration Law" that excludes from public service posts (but not from political offices) members of, and persons who cooperated with the former State Security Service was amended in order to extend its provisions until the new Civil Service Act is approved. It is important that this deadline for phasing out the lustration measures be

The paradox of establishing the democratic rule of law by breaching one of its constitutive principles cannot be fully understood if one simply considers the lustration law unjust because of its discriminatory character. This attitude draws on a broad picture in which the rule of law stands on the side of unconditional equality while the lustration law is compared to dark practices of the totalitarian past and condemned as contradicting the very concept of liberal democracy. In such criticisms, the new regime is the subject of general criticisms while all those subject to lustration are indiscriminately treated as victims. ‘Specific groups’ are not specified at all and top members of the Central Committee of the Communist Party could consequently be depicted as powerless victims of ‘witch hunts’ just three years after they orchestrated the last round of political trials.

Some critics of the law also claimed that the law incorporates the principle of collective guilt and responsibility, unacceptable in the rule of law.[75] It is true that the law defines specific groups of individuals prohibited from certain offices and jobs. In this sense, the law has a generic effect and nobody can deny that it seeks to discriminate against the specified groups, though by administrative and not criminal law means. However, the law also incorporates the principle of individual will expressed by those affected by lustration (acceptance of a position or job within the Party or secret police ranks, application to become a member of the Party militia, even, most controversially, consenting to become a secret police collaborator, etc.). The law presumes that a person who individually decided to become part of repressive communist institutions should be made to accept responsibility for this decision in the present condition. It is by no means a statute which indiscriminately hunts for all communists and members of the secret police, using the principle of collective guilt as suggested by early moral and legal criticisms. However, the law presumes that the very act of joining the higher ranks of the Communist Party organization or repressive institutions, such as the secret police and the Party militia, constitutes a solid ground for prohibiting access to a job subject to the lustration procedure. Individuals are held prima facie responsible for their past political engagements.

Oppressors and Victims

Apart from the ‘friend-enemy’ political logic dominating the early stage of the post-revolutionary legal and political transformation in Czechoslovakia, the post-revolutionary transformation also produced a much more complicated logic, given that totalitarian systems have the historically unique power of making all individuals more or less part of their machinery. In a moral sense, almost everyone was a perpetrator and victim at the same time and therefore ‘guilty’ of causing his or her own suffering. It means that everyone was *simultaneously a ‘friend’ and ‘enemy’* of the communist state. This deep moral instability was subsequently transferred to the post-revolutionary political system and the public atmosphere which heavily influenced the whole lustration controversy.

---

respected.’ See *The European Commission’s Regular Report on the Czech Republic, 2000*, (2000) 18.

75 See, for instance, Havel, op. cit., n. 68.

In any critique of the lustration law, it is therefore necessary to start by focusing on the personal aspect of the legislation and distinguishing two different groups of individuals: oppressors and their victims. One of the worst moral consequences of the statute is that it made both groups subject to the same lustration process and subsequent discrimination. It is the biggest failure of the law. Considering all those Party officials, members of the Party militia and secret policemen, it is quite hard to find any sympathy for their past activities. The moral argument against administrative discrimination provided by lustration is significantly weakened when we actually look at past records of undoubted validity relating to the lustrated persons. Discriminating against those who had been responsible for discriminatory policy and political repressions in the totalitarian past is morally justifiable even in the democratic condition.

However, the law is morally controversial and failing because it discriminates against many of those who had been subjected to the worst communist repression. A sadistic interrogator and her powerless victim, who had been forced to sign a statement of collaboration to protect her life, would both have been classified as persons posing a threat to the new regime's stability. A less emotional example would be a person who had been allowed to travel abroad as a student in the 1950s and, in return, agreed to provide information should she encounter any archive data relevant to the state security. Forty years later, this person could be classified as a secret police collaborator and banned from any senior position at her university. Furthermore, individuals famous for their civil courage and resistance to the communist persecutions could end up with 'positive lustration' because the secret police forged documents. The lustration law, which was intended to eliminate persons without political loyalty to the new democratic regime, utterly failed to reflect all these circumstances and, on top of that, exposed these victims of the old regime to public humiliation. They were *sacrificed* so that the vast majority of *society*, loyal to the previous regime for decades, could feel morally *purified* and label all those responsible for their own 'suffering'.

Those who defend the law usually emphasize that the process of 'wild lustrations' had already been going on before the statute was enacted. According to this view, public revelations would be made, sooner or later, about all persons with a record and it was better to give it a legal form rather than leave it to journalists with good contacts in the Ministry of Interior.[76] Furthermore, the law's defenders argued that, though personal tragedies were regrettable, Czech society was politically too fragile and had to bar potentially disloyal individuals and persons who could be blackmailed because of their past records from access to state offices. Nevertheless,

76 The 'wild lustration' practice was typical of an initiative called the Anticommunist Alliance which was established in 1992, led by Petr Cibulka, a former dissident and political prisoner, and published the lists of secret police collaborators illegally in the periodical *Rudé Krávo* (Red Cow – the title phonetically resembles 'Rudé právo', the communist daily published by the Communist Party of Czechoslovakia). Cibulka and his people acquired the secret police registers illegally from the new intelligence service. For the lists see *Rudé Krávo* (Red Cow) vol. 2, nos. 32, 33, 34, 38, 1992. These lists are now available in the form of a book.

this purely purposive argument can hardly eliminate the serious moral objections regarding the lustration law and the publication of all secret police files and registers of collaborators.

From the perspective of fact-finding procedures and the reliability of those facts, the lustration statute has always been dubious because the evidence against individuals comes from the archives of the secret police. These archives are incomplete because the secret police managed to destroy a lot of important documents and entire files. At the same time, the archives contain facts and information collected by the secret police themselves and their reliability may therefore be questioned. The secret police was one of the most important pillars of the communist totalitarian regime. It was described by the new democratic legislature as criminal and obviously could deliberately manipulate facts and create false evidence.[77] But the new regime, paradoxically, had to presume that all available police material was correct and reliable unless proved otherwise. Supporters of the law can hardly dispute this principal 'factual' objection against lustrations. Moreover, the problem of the unreliability of information collected by the secret police often benefits individuals who may have had a dubious past but have kept good contacts with communist secret policemen who now willingly testify in their favour before the courts.

Lustrations and the Paradoxical Concept of Transitional Justice

The lustration law could not clearly distinguish victims from their oppressors and its moral and symbolic effect was thus extremely controversial. The law therefore failed in its moral dealing with the political past as proposed by some of its supporters.

In the undifferentiated post-revolutionary condition, the Czechoslovak lustration law's purpose was to protect the emerging political system and its rule of law by the paradoxical strategy of discrimination. This paradox should not be exaggerated and condemned from the fundamental perspective of democratic political morality because it is easily detectable in a number of political transformations from totalitarianism to liberal democracy.

In the beginning of the 1990s, no post-communist country had an established rule of law system but the countries which experienced more evolutionary and gradual changes were much more affected by the fiction of the democratic/legalist revolution which defused an outright confrontation with the past regime at the level of criminal law and administrative discrimination.[78] On the other hand, Czech society and its

---

77 It is important to mention that politically motivated manipulations of the secret police and intelligence service files continued after 1989 and even affected the U.S. presidential campaign when the Czechoslovak counter-intelligence turned over material to the Bush presidential campaign on Bill Clinton's visit to Prague in 1970 with the intention of discrediting him. At that time, Clinton had visited a classmate whose parents had secret police records as agents. See *Czech Intelligence Tried to Blacken Clinton,* Teuter Library Report, 8 January 1994. Quoted in H. Schwartz, 'Lustration in Eastern Europe' (1994) 1 *Parker School Journal of East European Law* 141-71, at 145.

78 In this context, it is important to mention the failure of the lustration process in Poland in 1992. It was caused by an unusual decision of the Polish Parliament. Unlike the

new political élites had been much more reluctant to accept such a fiction. This political attitude facilitated the enactment of the extensive lustration statute with all its intrinsic controversies and contradictions.

The lustration law fulfiled its role as a filter separating former political enemies from new democratic institutions and, contrary to the claims that the statute had instigated an atmosphere of fear and suspicion, contributed to the stabilization of Czech post-communist society in the early stage of its transformation.[79] It contained the process of 'wild lustrations' and reduced social anxiety and uncertainty regarding new political élites. However, the law's impact on dealing with the communist past and *moral effects* were largely negative because the lustration process, handled by state bureaucrats, paradoxically inhibited public discussion of the totalitarian past, its political impact and responsibility. Dealing with the past by legislation contributed to the marginalization of moral issues regarding the political past during the 1990s.

At the same time, lustration's power to isolate the old political enemy helped to petrify the anti-regime ideology and unreformed leadership of the Communist Party which builds its popularity on political populism and anti-regime feelings. The law's *political effects* therefore are controversial in a way similar to the legal ones. The lustration statute and other laws attempting to legislate against the communist past have created strong political opposition and old enemies reproduced their mutual distrust and animosity. Lustrations are one of the reasons why old regime supporters keep their old ideological and political positions and operate as an anti-regime element in the new conditions of liberal democracy. In the regions of the former East Germany and the Czech Republic, communists continue using the ideology of political extremism. It is both an evidence of their rigidity and a consequence of the strict politics of decommunisation.

The lustration law paradoxically initiated the process of 'building civil equality by discrimination'. Future equality was to be achieved by temporary discrimination against those defined by the legislature as a present threat to the emerging regime. From the legal perspective, the lustration law represents an example of *transitional legislation*. Despite all objections and doubts accompanying its enactment, the lustration law, from the perspective of jurisprudence, is not so exceptional because no reconstruction of the democratic rule of law proceeds in a purely principled and dogmatic environment. Reconstruction is characterized by contradictions, compromises and logically inconsistent solutions. Examples from post-war Germany and its denazification politics, post-apartheid South Africa, and the decommunisation politics of other post-communist countries indicate that reconstructive legal and political efforts produce both principles and paradoxes.

Czechoslovak method of 'statutory lustrations', it chose the method of a mere resolution of Sejm (the lower chamber of Parliament) asking the Polish government to declare lustration within its administrative powers. This method lacked statutory legitimation and was criticized by many human rights organizations, other constitutional bodies, and the Constitutional Tribunal eventually declared it unconstitutional and void. Meanwhile, lustrations initiated a political crisis and Prime Minister Olszewski was forced to resign. For details, see, for instance, W. Osiatynski, 'Agent Walesa?', *East European Constitutional Review,* Summer 1992, 28-30.

79 See Gillis, op. cit., n. 52, at 81.

This page intentionally left blank

Chapter 9

On Legal Symbolism and Social Theory: Concluding Remarks

Legal contradictions, political conflicts and moral disillusionment accompany the processes of constitution-making, legislative acts and judicial decisions. Laws originally intended to support public morality create new moral controversies and political confrontations. Retrospective measures of legal restitution are justified as prospective governmental policies by courts, to avoid possible conflicts with privatization laws enacted during the process of post-communist economic transformations. Institutions of the democratic rule of law are supported by vetting laws effectively breaching the constitutional principle of equal treatment of all citizens and inflicting new harms on victims of the old communist regime.

Nation state constitutions and other legal acts are full of references to cultural inheritance and historical uniqueness, marked by moral values and traditions which supplement the democratic legitimacy of the political system. They codify a cultural code and thus select and symbolize modern democratic traditions of civility and ethnicity. Within the context of the European Union, the process of constitution-making and progressive integration also commonly use cultural and civilizational justifications to reduce their democratic legitimation deficit. However, the absence of the European Union's democratically operating and reflexive political system cannot be effectively disguised by European legality due to the current level of functional differentiation of European economy, law, politics and public morality. The paradox of the Union's politics of depoliticization has lost its operative power and the legal codification of a cultural code does not have capacity to create self-reflexive democratic politics at EU level.

These and many other examples analysed in this book show that the legal system provides only a limited and highly specific reflection of the semantics of political identity, democratic power and moral values or traditions of a polity. Nevertheless, they also show that the problems of the transcendental normativity and temporality of politics and morality are intrinsic parts of legal semantics. The system of positive law clearly has symbolic meaning determined by complex relations between law, politics and morality.

Semantics of Legal Symbolism

Legal symbolism is best understood as the legal system's specific reflection of social expectations of communal togetherness, goodness and justice. It is a mode of legal communication originating in the symbolic communication of cultural unity and the

moral values of a political community. Despite this external origin, legal symbolic communication is an internal part of the legal system that is also involved in the process of legal self-reproduction and self-reference. It constitutes a specific kind of legal semantics contributing to the external symbolic rationality of morality and politics. However, it also operates internally as a construct of the legal system.

The richness and persuasive force of legal symbolic semantics is particularly strong in the context of constitutionalism and constitution-making. Revolutions and other events of social discontinuity in particular, invoke the symbolic rationality of law to facilitate new modes of morally communicating the common good and to specify which values and principles need to be legally codified to secure the unity of an emerging polity. The legal system is morally expected to represent the totality of society and the foundation of its values. The law's role seems to be that of identifying and expressing the internal boundaries of political society and its essential cultural fabric. The legal system is thought of as representing cultural traditions, ideological expectations and essential forms of moral discourse.

The symbolic rationality of law obviously has its temporal dimension. It is historical and prospective, transmitted and shared by members of a polity. Law has the symbolic power to condemn the past and its injustices and thus creates the new symbolic universe of a changing political society. The system of positive law selects parts of society's past and future and thus contributes to the synthesis of the present identity of *us* opposed to the past or present identity of *them*. It codifies collective identity by symbolizing the transcendental ethical ideals of society and the specific meaning of the past, present and future. However, the legal system is unable to ultimately codify collective identity by effectively dealing with the morally unjust past and the just future. Despite the processes involved in the constitutionalization of political morality and cultural inheritance, law does not succeed in the moral job of constituting the ideal community and securing authentic being and humanity. Moral and political expectations can never be fully accommodated by legality and are referred back to the systems of morality and politics.

Legal Symbolism and Social Theory

This expectation of positive law actually constituting and representing the totality of social reality is common to modern political morality and ideologies as well as to social, political and philosophical theories. Legal concepts and theoretical constructs were commonly used as reflections of social reality by prominent sociologists such as Herbert Spencer, Max Weber or Émile Durkheim. Legal and social scientists interpreted law as a mode of expression of a collective *spirit* unifying and arranging manifold social elements into one pattern. The unifying concept of 'the spirit of the laws' analysed in the second chapter was considered to be both an analytical concept of general positivistic laws and a specific cultural totality governing the life of political society and making it clearly different from and incommensurable with other societies. The central role of law in expressing a historically and morally unique cultural system – the spirit of the laws – informed the idealistically romantic historical

jurisprudence of Savigny or Gierke as well as many different forms of Hegelian historicism in the social sciences in the nineteenth and twentieth centuries.

The legal system was depicted as a system of a limited number of principles rooted in the totality of culture. The problem of legal symbolism was treated as the symbolic precedence over the internal normative regulation in the system of modern positive law. Society was embodied in symbols communicated by legality. This social scientific and philosophical emphasis on the spirit of the laws following the spirit of a people always consisted of normative evaluations and expectations of social life and collective identity. The spirit of the laws thus became a leading metaphor for what the collective identity and values of society in its totality should be like.

The legal system has been commonly depicted as speaking the language of formal legality but faithfully mirroring the historical, cultural and political uniqueness of a people. It has been considered an aspect of cultural tradition and experience of the overwhelming and persisting domain of culture. At the same time, law has been expected to codify a cultural code for society and symbolize its unity. Formal legality has been used as a symbol of the problematic constructs of culture and society themselves and, within the context of social theory, legal science has been considered 'the oldest social science'.[1]

There is only a small step from this sociological and philosophical framework to the pursuit, on the part of the politics of identity, of the cultural and ethical embeddedness of law. Nevertheless, the moral ascendancy of law cannot materialize due to the functional differentiation of legal, moral and political communication. Law may symbolically represent society as God or any other sacred objects, but this symbolic expression does not give law moral authority over society. Society is not ultimately the moral reality that Durkheim and others assumed it to be and law, therefore, cannot be its effective promulgator and guardian. Legality does not have ultimate social capacity to codify collective identity and its normative framework for the moral system in modern functionally differentiated societies.

The symbolic processes of constitution-making and legislative acts are typical of communicative noises and failures. Recent history shows a number of examples of this inability of law to enforce moral and political expectations. The analysis of law's dealing with the moral and political past and future in the third chapter shows that the legal system cannot meet these expectations. Moral and political hopes of legislating the emerging just society and condemning the unjust past are followed by frustrations and disenchantment, so well captured for instance by a popular comment that people asked for justice and got only the rule of law after the 1989 democratic revolutions in Central and Eastern Europe. Similarly, legal and political limitations pushed post-apartheid South Africa to find alternative routes of symbolizing the new national unity and political morality. However, the quasi-judicial and quasi-legal proceedings of the Truth of Reconciliation Commission could not be an effective substitute for the system of criminal justice and its principle of retribution.

---

1 W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford, Clarendon Press 1997).

The Legal Symbolism of the Functionally Differentiated Society

As regards the context of complex democratic societies and their constitution-making, the semantics of human rights, freedom and equality actually irritates the revolutionary political demand of separating the past identity of *them* from the present and future identity of *us*. The universalism of human rights promises ultimate inclusion of all citizens of political society. However, this moral expectation clashes with the demand of dealing with past injustices and thus only leads to new paradoxes and conflicts between the systems of law, morality and politics.

The analyses of recent legislation and constitutional disputes in the field of restitutive and retrospective justice, given in the final two chapters, suggest that the rule of law and the human rights driven semantics of universal dignity and self-respect may be used in the service of the political interests of different groups and parties, thus effectively dismantling its universalism. Similarly, the current state of European politics analysed in the second part of this book is a persuasive example of the semantic structural limitations of cultural symbols as expressions of collective unity and identity. European citizens are paradoxically expected to feel distinctly European because they share 'all inclusive' cosmopolitan values.

The morality of human rights claims to transcend both the collective identity based differences and the functionally differentiated condition of modern society. In fact, it is the functionally differentiated modernity that establishes the transcendental, and value-based morality of human rights. The moral symbolic rationality of law is possible only at a higher level of functional differentiation of the legal system. Legal symbolism is an example of non-trivial interdependence between law and other social systems which needs to be studied from within a system's theoretical perspective, because the symbolic communication generated by the legal system involves both legal and non-legal expectations, limitations and paradoxes. It can hardly be formulated as a problem of social order bound by a Parsonsian shared symbolic system of culture, the normative structure of which could be expressed by the system of positive laws. As explained in the opening chapter of this book, the legal system does not have the capacity to codify an ultimate value consensus of modern political society. It would therefore be wrong to approach the problem of legal symbolism assuming that society hands down culture and that the *longue durée* of social institutions always uncovers culture, its sedimentation and inheritance as an ultimate code of social integration and evolution.

Modern society is a multitude of functionally differentiated social systems without a centre defining the supreme sources for the validity and enforcement of social norms. It is a multiplicity of differences, emerging between specific social systems and drawing on the processes of horizontalization and fragmentation. There is no simple causal relationship between the systems of morality, politics and law according to which changes in one system would necessarily result in changes in the other systems. The relationship rather is a complex of specific meanings internally communicated by these systems and externally related to one another.

Legal symbolism reflects an internal paradox of the legal system's operative autonomy and parallel search for external foundations. Although the expressive and evaluative symbolism of collective identity and moral values does not determine the

legal system's internal operations, concepts and regulation in general, it cannot be entirely discarded as external to it. Constitutions and other legislative acts or judicial decisions can effectively convert the originally symbolic moral and declaratory provisions to self-reflective normative sentences and legal operations. The concept of legal symbolism thus signifies those legal operations whereby the system of positive law internalizes and codifies collective identity, its temporal horizons and cultural expressions as moral 'absolutes'. At the same time, the legal system can always reconfigure these internal reflections of the ideality of a political society and make them an intrinsic part of formal legality and its circular self-referential operations. Instead of constructing social and epistemological unity, the symbolic rationality of law thus rather reflects the communicative and operative pluralism of the functionally differentiated modern society within the domain of law.

This page intentionally left blank

Bibliography

Adam, B. (1990), *Time and Social Theory* (Cambridge: Cambridge University Press).

Adams, K.A. (1993), 'What Is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards', *Stanford Journal of International Law* 29: 271-314.

Agh, A. (1998), *The Politics of Central Europe* (London: Sage).

Alexy, R. (1999), 'A Defence of Radbruch's Formula' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing) 15-39.

Alexy, R. (2002), *A Theory of Constitutional Rights* (Oxford: Oxford University Press).

Almond, G. and Verba, S. (1963), *The Civic Culture* (Princeton: Princeton University Press).

Anderson, B. (1983), *Imagined Communities: reflections on the origin and spread of nationalism* (London: Verso).

Apel, K.O. (1993), 'Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik. Worin liegen die "kommunitaeren" Bedingungen der Moeglichkeit einer post-konventionellen Identitaet der Vernunftperson?' in M. Brumlik and H. Brunkhorst (eds.), *Gemeinschaft und Gerechtigkeit* (Frankfurt: Fischer) 149-72.

Arato, A. (1993), 'Dillemmas Arising From the Power to Create Constitutions in Eastern Europe', *Cardozo Law Review* 14: 661-90.

Arato, A. (2000), *Civil Society, Constitution, and Legitimacy* (London: Rowman & Littlefield Publishers).

Arato, A. and Cohen, J. (1992) *Civil Society and Political Theory* (Cambridge, Mass.: The MIT Press).

Archibugi, D., Held, D. and Koehler, M. (eds.) (1998), *Re-imagining Political Community* (Cambridge: Polity Press).

Arendt, H. (1958), *The Human Condition* (Chicago: The University of Chicago Press).

Arendt, H. (1989), *Zur Zeit* (München: Deutscher Taschenbuch Verlag).

Arendt, H. (1990), *On Revolution* (London: Penguin).

Aristotle. (1989), *Politics* (Cambridge: Cambridge University Press).

Arnold, T. (1962), *The Symbols of Government* (New York: Harcourt Brace & World).

Aron, R. (1965), *Main Currents in Sociological Thought 1: Montesquieu, Comte, Marx, Tocqueville, The Sociologists and the Revolution of 1848* (Harmondsworth: Penguin Books).

Assmann, J. (1997), *Die kulturelle Gedächtnis, Schrift, Erinnerung und politische Identität in frühen Hochkulturen [The Cultural Memory, Writing, Recollection*

and Political Identity in Early Civilisations] (München: C. H. Beck).
Augé, M. (1982), *The Anthropological Circle: Symbol, Function, History* (Cambridge: Cambridge University Press).
Balibar, E. (2004), *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton: Princeton University Press).
Bankowski, Z. and Christodoulidis, E. (1998), 'The European Union as an Essentially Contested Project', *European Law Journal* 4: 341-54.
Barber, N.W. (2002), 'Citizenship, nationalism and the European Union', *European Law Review* 27: 241-59.
Bauman, Z. (1993), *Postmodern Ethics* (Oxford: Blackwell).
Bauman, Z. (1999), *In Search of Politics* (Cambridge: Polity Press).
Bauman, Z. (2000), *Liquid Modernity* (Cambridge: Polity).
Bauman, Z. (2004), *Europe: an unfinished adventure* (Cambrdige: Polity).
Bayart, J.F. (1996), *L`illusion identitaire* (Paris: Fayard).
Beck, Ul. (1997), *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (Cambridge: Polity Press).
Beetham, D. (1999), *Democracy and Human Rights* (Cambridge: Polity Press).
Beetham, D. and Lord, C. (1998), *Legitimacy and the European Union* (London: Longman).
Beetham, D. and Lord, C. (1998), 'Legitimacy and the European Union', in A. Weale and M. Nentwich (eds), *Political Theory and the European Union: Legitimacy, constitutional choice and citizenship* (London: Routledge) 15-33.
Bell, D. (1979), *The Cultural Contradictions of Capitalism* (London: Heinemann).
Bell, J., Boyron, S., Whittaker, S. (1998), *Principles of French Law* (Oxford: Oxford University Press).
Benda, E. (1992), 'Interview mit Ernst Benda', *Deutschland Archiv* 25: 1341.
Bendix, R. (1969), *Nation-Building and Citizenship* (Garden City, NY: Doubleday).
Benhabib, S. (2002), *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press).
Benoit, B. (1997), *Social-Nationalism: an anatomy of French Euroscepticism* (Aldershot: Ashgate).
Bentham, J. (2001), 'Anarchical Fallacies' in *Selected Writings on Utilitarianism* (Ware: Wordsworth Editions), 381-459.
Bergson, H. (2002), *Key Writings* (London: Continuum).
Beyme von, K. (1996), *Transition to Democracy in Eastern Europe* (Basingstoke: Palgrave Macmillan).
Beyme von, K. (2001), 'Citizenship and the European Union', in K. Eder and B. Giesen (eds.), *European Citizenship between National Legacies and Postnational Projects* (Oxford: Oxford University Press) 61-85.
Bigger, N. (ed.). (2001), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington: Georgetown University Press).
Blumenberg, H. (1983), *The Legitimacy of the Modern Age* (Cambridge, Mass.: The MIT Presss).
Bohman, J. and Lutz-Bachman, M. (eds.). (1997), *Perpetual Peace: Essays on*

Kant's Cosmopolitan Ideal (Cambridge, Mass.: The MIT Press).

Bourdieu, P. (1990), *The Logic of Practice* (Cambridge: Polity Press).

Bozoki, A. (ed.). (2002), *The Round Table Talks of 1989: the genesis of Hungarian democracy* (Budapest: CEU Press).

Bradley, K. (1997), 'The European Parliament and Comitology: On the Road to Nowhere?', *European Law Journal*, 3: 230-54.

Braudel, F. (1980), *On History* (London: Weidenfeld and Nicolson).

Brubaker, R. (1996), *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge: Cambridge University Press).

Brzezinski, M.F. and Garlicki, L. (1995), 'Judicial Review in Postcommunist Poland: The Emergence of a *Rechtsstaat?*', *Stanford Journal of International Law* 31: 13-59.

Buchowski, M. (1996), 'The Shifting Meanings of Civil and Civil Society in Poland', in C. Hann and E. Dunn (eds.), *Civil Society: challenging Western models* (London: Routledge) 79-98.

Burke, E. (1992), *Further Reflections on the Revolution in France* (Indianapolis: Liberty Fund Books).

Brzezinski, M., Hausmaniger, H. and Scheppele, K.L. (1997), 'Constitutional "Refolution" in the Ex-Communist World: The Rule of Law', *American University Journal of International Law and Policy* 12: 87.

Calhoun, C. (1994), 'Nationalism and Civil Society: Democracy, Diversity and Self-Determination', in C. Calhoun (ed.) *Social Theory and the Politics of Identity* (Oxford: Blackwell).

Calhoun, C. (1997), *Nationalism* (Minneapolis: University of Minnesota Press).

Calhoun, C. (2001), 'The Virtues of Inconsistency: Identity and Plurality in the Conceptualization of Europe' in L.-E. Cederman (ed.), *Constructing Europe's Identity: The External Dimension* (Boulder, Colo.: Lynne Rienner Publishers) 35-56.

Casper, G. (1991), 'European Convergence', *University of Chicago Law Review* 58: 441-6.

Cassirer, E. (1953), *The Philosophy of Symbolic Forms, Vol. 1.* (New Haven: Yale University Press).

Cassirer, E. (1996), *The Philosophy of Symbolic Forms, vol. 4* (New Haven: Yale University Press).

Castells, M. (2004), *The Information Age: Economy, Society and Culture vol. II (The Power of Identity)* (Oxford: Blackwell).

Christodoulidis, E. and Scott V. (eds.) (2001), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford: Hart Publishing).

Churchill, W. 'Zurich Speech, 19 September 1946' available at The Churchill Society, London, <http://www.churchill-society-london.org.uk/astonish.html>.

Cigánek, F. (1992), *Kronika demokratického parlamentu 1989-1992 [The Chronicle of Democratic Parliament 1989-1992]* (Prague: Cesty).

Connor, W. (1978), 'A Nation is a Nation, is a State, is an Ethnic Group, is a ...', *Ethnic and Racial Studies* 1(4): 379-88.

Connor, W. (1994), *Ethnonationalism: the Quest for Understanding* (Princeton:

Princeton University Press).
Constable, M. (2002), 'The Rhetoric of Community: Civil Society and the Legal Order', in A. Sarat, B. Garth and R.A. Kagan (eds.), *Looking Back at Law's Century* (Ithaca: Cornell University Press) 213-31.
Cotterrell, R. (1992), *The Sociology of Law: an introduction* (London: Butterworths).
Craig, P.P. (1990), *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press).
Craig, P. and de Búrca, G. (eds.). (1999), *The Evolution of EU Law* (Oxford: Oxford University Press).
Cremona, M. (ed.). (2003), *The Enlargement of the European Union* (Oxford: Oxford University Press).
Cutler, L. and Schwartz, H. (1991), 'Constitutional Reform in Czechoslovakia: *E Duobus Unum?*', *The University of Chicago Law Review* 58: 511-53.
Czarnota, A. (1995), 'Constitutional Nationalism, Citizenship and Hope for Civil Society in Eastern Europe', in A. Pavkovic et al. (eds.), *Nationalism and Postcommunism: a collection of essays* (Aldershot: Dartmouth), 83-100.
Dahl, R. (1989), *Democracy and its Critics* (New Haven: Yale University Press).
Dahrendorf, R. (1990), *Reflections on the Revolution in Europe* (London: Chatto & Windus).
Dahrendorf, R. (1998), 'A Precarious Balance: Economic Opportunity, Civil Society, and Political Liberty', in A. Etzioni (ed.), *The Essential Communitarian Reader* (Oxford: Rowman & Littlefield Publishers).
Davies, N. (1997), *Europe: A History* (London: Pimlico).
Deleuze, G. (1994), *Difference and Repetition* (London: Athlone Press).
Derrida, J. (1989), *Edmund Husserl's Origin of Geometry: An Introduction* (Lincoln: University of Nebraska Press).
Derrida, J. (1997), *Politics of Friendship* (London: Verso).
Descombes, V. (1980), *Modern French Philosophy* (Cambridge: Cambridge University Press).
De Witte, B. (2003), 'The Impact of Enlargement on the Constitution of the European Union', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press) 209-52.
Dicey, A.V. (1952), *Introduction to the Study of the Law of the Constitution* (London: Macmillan).
Du Bois, F. (2001), 'Nothing but the Truth', in E. Christodoulidis and S. Veitch (eds.), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford: Hart Publishing), 91-114.
Durkheim, E. (1953), *Sociology and Philosophy* (London: Cohen & West).
Durkheim, E. (1960), *Montesquieu and Rousseau: forerunners of sociology* (Chicago: University of Michigan Press).
Durkheim, E. (1982), *The Rules of Sociological Method: and selected texts on sociology and its method* (London: Macmillan).
Durkheim, E. (1984), *The Division of Labour in Society* (London: Macmillan).
Dworkin, R. (1985), *A Matter of Principle* (Cambridge, Mass.: Harvard University

Press).
Dworkin, R. (1986), *Law's Empire* (London: Fontana).
Dworkin, R. (1996), *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press).
Eco, U. (1994), *The Limits of Interpretation* (Bloomington: Indiana University Press).
Elias, N. (1991), *The Symbol Theory* (London: Sage).
Elias, Nt. (1992), *Time: an essay* (Oxford: Blackwell Publishers).
Elshtain, J.B. (1995), 'In Common Together: Unity, Divesity, and Civic Virtue', in M. Walzer (ed.), *Toward a Global Civil Society* (Oxford: Berghahn Books).
Elster, J. (1992), 'On Doing What One Can', *East European Constitutional Review* 1(3): 15-7.
Elster, J. (ed.). (1996), *The Round Table Talks in Eastern Europe* (Chicago: University of Chicago Press).
Elster, J. (2004), *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press).
Elster, J., Offe, C. and Preuss, U.K. (1998), *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press).
Falk, B. (2003), *The Dilemmas of Dissidence in East-Central Europe* (Budapest: CEU Press).
Fasbender, B. (1998), 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law* 37: 529-619.
The Federalist with Letters of "Brutus". (2003), (edited by T. Ball, Cambridge: Cambridge University Press).
Feyerabend, P. (1978), *Science in a Free Society* (London: NLB).
Feyerabend, P. (1987), *Farewell to Reason* (London: Verso).
Finkielkraut, A. (1995), *The Defeat of the Mind* (New York: Columbia University Press).
Firth, R. (1975), *Symbols: Public and Private* (London, Allen & Unwin).
Fletcher, G.P. (1996), *Basic Concepts of Legal Thought* (Oxford: Oxford University Press).
Flimer, W. and Schwan, H. (1991), *Opfer der Mauer: Die geheimen Protokolle des Todes* (Munich: Bertelsmann).
Forster, A. (2002), *Euroscepticism in Contemporary British Politics: Opposition to Europe in the Conservative and Labour Parties Since 1945* (London: Routledge).
Foucault, M. (1975), 'Film and Popular Memory: An Interview with Michel Foucault', *Radical Philosophy* 11: 24-5.
Frank, J. (1970), *Law and the Modern Mind* (Cloucester, Mass.: Smith).
Fraser, A.W. (1990), *Spirit of the Laws: republicanism and the unfinished project of modernity* (Toronto: University of Toronto Press).
Freund, J. (1968), *The Sociology of Max Weber* (Harmondsworth: Penguin).
Frydman, R. and Rapaczynski, A. (1992), 'Institutional Reform in Eastern Europe: Evolution or Design?', *Brigham Young University Law Review* 1: 1-22.
Fuller, L.L. (1969), *The Morality of Law* (New Haven: Yale University Press).
Gadamer, H.G. (1976), *Philosophical Hermeneutics* (Berkeley: University of

California Press).
Gadamer, H.G. (1989), *Das Erbe Europas: Beiträge* (Frankfurt: Suhrkamp).
Gadamer, H.G. (2003), *Truth and Method* (London: Continuum).
Garton Ash, T. (1989), *The Uses of Adversity: Essays on the Fate of Central Europe.* (London: Random House).
Geertz, C. (1963), 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States', in C. Geertz (ed.), *Old Societies and New States* (London: Free Press) 105-57.
Gellner, E. (1964), *Thought and Change* (Chicago: University of Chicago Press).
Gellner, E. (1983), *Nations and Nationalism* (Oxford: Blackwell).
Gellner, E. (1987), *Culture, Identity, and Politics* (Cambridge: Cambridge University Press).
Gellner, E. (1995), *Condition of Liberty* (London: Penguin).
Gellner, E. (1998), *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (Cambridge: Cambridge University Press).
Giddens, A. (1981), *A Contemporary Critique of Historical Materialism Vol. 1: Power, property and the state* (Berkeley: University of California Press).
Giddens, A. (1984), *The Constitution of Society* (Cambridge: Polity Press).
Giddens, A. (1987), *The Nation-State and Violence: Volume Two of a Contemporary Critique of Historical Materialism* (Berkeley: University of California Press).
Giddens, A. (1990), *Consequences of Modernity* (Cambridge: Polity Press).
Giddens, A. (1994), 'Living in a Post-Traditional Society', in U. Beck, A. Giddens and S. Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Cambridge: Polity Press) 59-109.
Gierke von, O. (1958), *Natural Law and the Theory of Society: 1500 to 1800* (Cambridge, Cambridge University Press).
Gillis, M. (1999), 'Lustration and Decommunisation' in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe* (Aldershot: Ashgate Publishing) 56-81.
Giscard D'Estaing, V. (2003), 'The Preparation of the European Constitution', *Second Annual Henry Kissinger Lecture*, Library of Congress, Washington, 11 February 2003.
Greenfeld, L. (1992), *Nationalism: Five Roads to Modernity* (Cambridge, Mass.: Harvard University Press).
Grimm, D. (1995), 'Does Europe Need a Constitution?', *European Law Journal* 1: 282-302.
Groenendijk, K., Guild, E. and Minderhoud, P. (eds.) (2003), *In Search of Europe's Borders* (The Hague: Kluwer International).
Grossman, G.S. (2000), *The Spirit of American Law* (Boulder, Co.: Westview Press).
Gurvitch, G. (1955), *Déterminismes sociaux et liberté humaine* (Paris: Presses Universitaires de France).
Gurvitch, G. (1964), *The Spectrum of Social Time* (Dordrecht: D. Reidel).
Günther, G. (1976/1980), *Beiträge zur Grundlegung einer operationsfähigen Dialektik* (Hamburg: F. Meiner Verlag).
Habermas, J. (1984/1987), *Theory of Communicative Action*, 2 vols. (Boston:

Beacon Press).
Habermas, J. (1987), *The Philosophical Discourse of Modernity* (Cambridge: Polity Press).
Habermas, J. (1992), *Faktizität und Geltung* (Frankfurt: Suhrkamp).
Habermas, J. (1992), *Autonomy and Solidarity: interviews with Jürgen Habermas* (London: Verso).
Habermas, J. (1994), *The Past as Future* (Cambridge: Polity Press).
Habermas, J. (1996), 'The European Nation State', *Ratio Juris* 9: 125-37.
Habermas, J. (1999), *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity).
Habermas, J. (2001), *The Postnational Constellation: Political Essays* (Cambridge: Polity).
Hájek, M. (1995), 'The Left in the Process of Democratization in Central and Eastern European Countries', in M. Walzer (ed.), *Towards a Global Civil Society* (Oxford: Berghahn Books) 251-8.
Halbwachs, M. (1950), *The Collective Memory* (New York: Harper-Colophon Books).
Halbwachs, M. (1992), *On Collective Memory* (Chicago: University of Chicago Press).
Hallstrom, L.K. (2003), 'Support for European Federalism: an elite view", *Journal of European Integration* 25: 51-72.
Halmai, G. (2002), 'The Hungarian Approach to Constitutional Review' in W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer International) 189-213.
Hampson, N. (1983), *Will & Circumstance: Montesquieu, Rousseau, and the French Revolution* (London: Duckworth).
Hart, H.L.A. (1968), *Punishment and Responsibility* (Oxford: Oxford University Press).
Hart, H.L.A. (1994), *The Concept of Law* (2nd edition, Oxford: Clarendon Press).
Havel, V. et al. (1985), *Power of the Powerless: citizens against the state in central-eastern Europe* (edited by J. Keane, London: Hutchinson).
Havel, V. (1992), *Summer Meditations: on politics, morality and civility in a time of transition* (London: Faber and Faber).
Havel, V. (1992), 'Paradise Lost', *New York Review of Books,* April 9.
Havel, V. (1994), *Speech in the European Parliament*, Strasbourg, 8 March 1994, at <http://www.vaclavhavel.cz/index.php?sec=3&id=1&kat=1&from=113>.
Hegel, G.W.F. (1967), *Hegel's Philosophy of Right* (Oxford: Oxford University Press).
Hegel, G.W.F. (1977), *Phenomenology of Spirit* (Oxford: Clarendon Press).
Hegel, G.W.F. (1977), *Lectures on the Philosophy of World History: Introduction* (Cambridge: Cambridge University Press).
Hegel, G.W.F. (1978), *The Difference Between Fichte's and Schelling's System of Philosophy* (Reseda, Cal.: Ridgeview).
Hegel, G.W.F. (1987), *Lecture on the Philosophy of Religion, volume II: determinate*

religion (Berkeley: University of California Press).

Heidegger, M. (1996), *Being and Time* (Oxford: Blackwell Publishing).

Held, D. (1995), *Democracy and the Global Order* (Cambridge: Polity Press).

Heller, A. (1991), 'The Concept of the Political Revisited' in D. Held (ed.), *Political Theory Today* (Oxford: Blackwell Publishers) 330-43.

Herder von, J.G. (1969), 'Yet Another Philosophy of History Concerning the Development of Mankind', in *J.G. Herder on Social and Political Culture* (trans. and ed. By F.M. Barnard, Cambridge: Cambridge University Press).

Herder von, J.G. (2002), 'How Philosophy Can Become More Universal and Useful for the Benefit of the People', in *Philosophical Writings* (trans. and edited by M.N. Forster, Cambridge: Cambridge University Press).

Hobsbawm, E. and Ranger, T. (eds.). (1983), *The Invention of Tradition* (Cambridge: Cambridge University Press).

Holbach, P.H.D. (1971), *System of Nature, or Laws of the Moral and Physical World* (New York: Burt Franklin).

Holmes, L. (1997), *Post-Communism: An Introduction* (Cambridge: Polity Press).

Holy, L. (1996), *The Little Czech Nation and the Great Czech Nation: National Identity and the Post-communist Social Transformation* (Cambridge: Cambridge University Press).

Horkheimer, M. (1994), *The Critique of Instrumental Reason* (New York: Continuum).

Horseman, M. and Marshall, A. (1994), *After the Nation State: Citizens, Tribalism and the New World Disorder* (New York: Harper and Collins).

Hume, D. (1985), *Essays Moral, Political and Litarary* (Indianapolis: Liberty Classics).

Husserl, E. (1965), *Phenomenology and the Crisis of Philosophy* (New York: Harper and Row).

Husserl, E. (1970), *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston, Ill.: Northwestern University Press).

Hypollite, J. (1974), *Genesis and Structure of Hegel's Phenomenology of Spirit* (Evanson: Northwestern University Press).

Ipsen, H.P. (1972), *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr).

Ishiyama, J.T. and Breuning, M. (1998), *Ethnopolitics in the New Europe* (Boulder, Co: Lynne Rienner Publishers).

James, W. (1978), *Pragmatism and the Meaning of Truth* (Cambridge, Mass.: Harvard University Press).

Jenkins, C. (ed.). (2000), *The Unification of Europe: An Analysis of EU Enlargement* (London: Centre for Reform).

Joas, H. (1997), *The Creativity of Action* (Chicago: University of Chicago Press).

Joerges, C., Mény, Y. and Weiler, J.H.H. (eds,). (2000), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Firenze, Robert Schuman Centre).

Jong, C. (2000), 'Harmonization of Asylum and Immigration Policies: The Long and Winding Road from Amsterdam via Vienna to Tampere', in P.J. Van Krieken

(ed.), *The Asylum Acquis Handbook* (The Hague: T.M.C. Asser Press) 21-37.

Judt, T. (1996), *A Grand Illusion? An Essay on Europe* (New York: Hill and Wang).

Kagan, R. (2004), *Power and Paradise: America and Europe in the New World Order* (London: Atlantic Books).

Kairys, D. (ed.). (1982), *The Politics of Law: A Progressive Critique* (New York: Pantheon).

Kant, I. (1971), *Kant's Political Writings* (edited with an introduction and notes by H. Reiss, translated by H.B. Nisbet, Cambridge: Cambridge University Press).

Kant, I. (1996), *Critique of Pure Reason* (Cambridge, Ind.: Hackett Publishing).

Kantorowicz, H. (1958), *The Definition of Law* (Cambridge: Cambridge University Press).

Kavan, Z. (1999), 'Anti-Politics and Civil Society in Central Europe', in M. Shaw (ed.), *Politics and Globalisation* (London: Routledge).

Keane, J. (1998), *Civil Society: Old Images, New Visions* (Cambridge: Polity Press).

Kelsen, H. (1945), *General Theory of Law and State* (New York: Russell & Russell).

Kelsen, H. (1946), *Society and Nature: a Sociological Inquiry* (London: Kegan, Trench, Trubner & Co.).

Kelsen, H. (1970), *The Pure Theory of Law* (Berkeley, Cal.: University of California Press).

Kenny, M. (2004), *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference* (Cambridge: Polity Press).

Kircheimer, O. (1961), *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press).

Kirste, S. (2001), 'Constitution and Time' in A. Soeteman (ed.), *Pluralism and Law: Proceedings of the 20th IVR World Congress, Amsterdam 2001, Volume 2: State, Nation, Community, Civil Society* (Franz Steiner Verlag), 79-87.

Kis, J. (1995), 'Between Reform and Revolution: Three Hypotheses about the Nature of Regime Change', *Constellations* 3: 399-419.

Kis, J. (2001), 'Nation-Building and Beyond', in W. Kymlicka and M. Opalski (eds.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press) 220-42.

Klingsberg, E. (1992), 'The State Rebuilding Civil Society: Constitutionalism and the Postcommunist Paradox', *Michigan Journal of International Law* 13: 865-907.

Klinsberg, E. (1992), 'Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights' *Brigham Young University Law Review* 1: 41-143.

Kohn, H. (1945), *The Idea of Nationalism* (New York: Macmillan Press).

Kojeve, A. (1947), *Introduction a la lecture de Hegel* (Paris: Gallimard).

Kommers, D.P. (1997), *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edition, Durham: Duke University Press).

Konrad, G. (1984), *Antipolitics* (New York: Hartcourt, Brace, Jovanovich).

Koselleck, R. (1985), *Futures Past: on the semantics of historical time* (Cambridge,

Mass.: The MIT Press).

Koselleck, R. (2002), *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press).

Koslowski, R. (1999), 'A Constructivist approach to understanding the European Union as a federal polity', *Journal of European Public Policy* 4: 561-78.

Kouba, P. (2001), *Smysl kone nosti [A Meaning of Finitude]* (Praha: Oikoymenh).

Krej í, J. (1983), *Great Revolutions Compared: The Search for a Theory* (Brighton: Harverster Press).

Kritz, N. (ed.). (1995), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, 3 vols* (Washington, The USA Institute of Peace Press).

Krog, A. (1998), *Country of My Skull* (London: Vintage).

Kuhn, T. (1962), *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press).

Kurczewski, J. (1999), 'The Rule of Law in Poland', in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot: Ashgate) 181-203.

Kymlicka, W. (2001), 'Western Political Theory and Ethnic Relations in Eastern Europe', in W. Kymlicka and M. Opalski (ed.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press) 13-105.

Laber, J. (1992), 'Witch Hunt in Prague' *New York Review of Books*, 23 April 1992.

Letowska, E. and Letowski, J. (1996), *Poland: Towards the Rule of Law* (Warsaw: Scholar).

Levi, P. (1989), *The Drowned and the Saved* (London: Abacus).

Lévinas, E. (1969), *Totality and Infinity: an essay on exteriority* (Pittsburg: Duquesne University Press).

Levi-Strauss, C. (1952), *Race and History* (Paris: UNESCO).

Lepenies, W. (2006), *The Seduction of Culture in German History* (Princeton, NJ: Princeton University Press).

Lijphart, A. (1977), 'Political Theories and the Explanation of Ethnic Conflict in the Western World' in M. Esman (ed.), *Ethnic Conflict in the Western World* (Ithaca, NY: Cornell University Press) 46-64.

Loughlin, M. (1992), *Public Law and Political Theory* (Oxford: Clarendon Press).

Löwith, K. (1949), *Meaning in History: The Theological Implication of the Philosophy of History* (Chicago: Chicago University Press).

Löwith, K. (1953), 'Die Dynamik der Geschichte und der Historismus', *Eranos-Jahrbuch* 21: 217-54.

Lübbe, H. (1994), *Abschied vom Superstaat: Vereinigte Staaten von Europa wird es nicht geben* (Berlin: Siedler Verlag).

Luhmann, N. (1965), *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot).

Luhmann, N. (1982), *The Differentiation of Society* (New York: Columbia University

Press).
Luhmann, N. (1990), *Paradigm Lost* (Frankfurt: Suhrkamp).
Luhmann, N. (1990), *Political Theory in the Welfare State* (Berlin: de Gruyter).
Luhmann, N. (1990), *Essays on Self-Reference* (New York: Columbia University Press).
Luhmann, N. (1990), 'Verfassung als evolutionäre Errungenschaft', *Rechtshistorisches Journal* 9: 176-220.
Luhmann, N. (1993), 'The Code of Moral', *Cardozo Law Review* 14, 995-1009.
Luhmann, N. (1995), *Social Systems* (Stanford, Cal.: Stanford University Press).
Luhmann, N. (1998), *Die Gesellschaft der Gesellschaft, Erster Teil* (Frankfurt: Suhrkamp).
Luhmann, N. (2002), *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford, Cal.: Stanford University Press).
Luhmann, N. (2004), *Law as a Social System* (Oxford: Oxford University Press).
Lyotard, J.F. (1990), *Heidegger and "the jews"* (Minneapolis: University of Minnesota Press).
Lyotard, J.F. (1991), *The Inhuman: reflections on time* (Cambridge: Polity Press).
Lyotard, J.F. (1992), *The Postmodern Explained to Children: correspondence 1982-1985* (London: Turnaround).
MacCormick, N. (1993), 'Beyond the Sovereign State', *Modern Law Review* 56: 1-19.
MacCormick, N. (1995), 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal* 1 259-66.
MacCormick, N. (1995), 'Sovereignty, Democracy and Subsidiarity', in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Foundation Press) 95-104.
MacIntyre, A. (1981), *After Virtue: a study in moral theory* (London: Duckworth).
MacIntyre, A. (1988), *Whose Justice? Which Rationality?* (London: Duckworth).
Mährlein, C. (2000), *Volksgeist und Recht: Hegels Philosopphie der Einheit und ihre Bedeutung in der Rechtswissenschaft (Epistemata)* (Würzburg: Koenigshausen & Neumann).
Maine, H. (1861), *Ancient Law* (London: John Murray).
Maine, H. (1883), *Early Law and Custom* (New York: Holt and Comp).
Malinowski, B. (1947), *Freedom and Civilisation* (London: Allen & Unwin).
Malová, D. (2001), 'Slovakia: From the Ambiguous Constitution to the Dominance of Informal Rules' in J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe Volume 1: Institutional Engineering* (Oxford: Oxford University Press) 347-77.
Mancini G.F. and Keeling, D.T. (1994), 'Democracy and the European Court of Justice', *Modern Law Review* 57: 175-90.
Mancini, G.F. (1998), 'Europe: The Case for Statehood', *European Law Journal* 1: 29-42.
Maresceau, M. (2003), 'Pre-accession', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press) 9-42.
Markovits, I. (2001), 'Selective Memory: How the Law Affects What We Remember and Forget about the Past – the Case of East Germany', *Law & Society Review*

35: 513-63.
Marmor, A. (2001), *Positive Law and Objective Values* (Oxford: Clarendon Press).
Marxen, K. and Werle, G. (1999), *Die strafrechtliche Aufarbeitung von DDR-Unrecht: eine Bilanz* (Berlin: De Gruyter).
McAdams, A.J. (1996), 'The Honecker Trial: The East German Past and the German Future', *Review of Politics* 58: 53-80.
McAdams, A.J. (ed.) (1997), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press).
McAdams, A.J. (2001), *Judging the Past in Unified Germany* (Cambridge: Cambridge University Press).
McCarthy, T. (2002), 'On Reconciling Cosmopolitan Unity and National Diversity' in P. De Greiff and C. Cronin (eds.), *Global Justice and Transnational Politics* (Cambridge, Mass.: The MIT Press) 235-74.
Mediansky, F. (1995), 'National Minorities and Security in Central Europe: The Hungarian Experience', in A. Pavkovic et al. (eds.), *Nationalism and Postcommunism: a collection of essays* (Aldershot: Dartmouth) 101-20.
Meinecke, F. (1972), *Historism: the rise of a new historical outlook* (London: Routledge and Kegan).
Mesežnikov, G. and Ivantyšyn, M. (eds.). (1998), *Súhrnná správa o Slovensku [Global Report on Slovakia]* (Bratislava: IVO).
Michalski, A. and Wallace, H. (1992), *The European Community and the Challenge of Enlargement* (London: Royal Institute of International Affairs).
Milosz, C. (1983), *The Witness of Poetry* (Cambridge, Mass.: Harvard University Press).
Minkkinen, P. (1999), *Thinking Without Desire: A First Philosophy of Law* (Oxford: Hart).
Minow, M. (ed.). (2002), *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton: Princeton University Press).
Monar, J. and Wessels, W. (eds.). (2001), *The European Union after the Treaty of Amsterdam* (London: Continuum).
Monnet, J. (1978), *Memoirs* (London: Collins).
Montesquieu, C. (1989), *The Spirit of the Laws* (Cambridge: Cambridge University Press).
Moser von, F.C. (1766), *Von dem Deutschen national-Geist*.
Murphy, T.W. (1997), *The Oldest Social Science?: Configurations of Law and Modernity* (Oxford: Clarendon Press).
Nash, M. (1989), *The Cauldron of Ethnicity* (Chicago: University of Chicago Press).
Nietzsche, F. (1966), *Basic Writings of Nietzsche* (New York: Free Press).
Nisbet, R. (1970), *The Social Bond: An Introduction to the Study of Society* (New York: Knopf).
Oberman, J. (1991), 'Laying the Ghosts of Past' *Report on Eastern Europe*, No. 24, 14 June 1991.
Offe, C. (1991), 'Capitalism by Democratic Design? Democratic Theory Facing the

Triple Transition in East Central Europe”, *Social Research* 58: 865-93.

Offe, C. (1996), *Varieties of Transition* (Cambridge: Polity).

Offe, C. (1996), *Modernity and the State: East, West* (Cambridge: Polity Press).

Offe, C. and Poppe, U. (2005), ‘Transitional Justice after the Breakdown of the German Democratic Republic’ in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism* (Budapest: CEU Press) 153-90.

Ohmae, K. (1995), *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press).

Olivo, C. (2001), *Creating a Democratic Civil Society in Eastern Germany: the case of the citizen movements and Alliance 90* (New York: Palgrave).

Örkény, A. and Scheppelle, K.L. (1999), ‘Rules of Law: the complexity of legality in Hungary’, in M. Krygier and A. Czarnota (eds.), *Rule of Law After Communism* (Aldershot: Ashgate).

Osiatynski, W. (1991), ‘Revolutions in Eastern Europe’, *The University of Chicago Law Review* 58: 823-58.

Osiatynski, W. (1992), ‘Agent Walesa?’, *East European Constitutional Review* 1(Summer): 28-30.

Paczolay, P. (1992), ‘Judicial Review of the Compensation Law in Hungary (A Symposium on Development in East European Law)’, *Michigan Journal of International Law* 13: 806-31.

Paczolay, P. (1993), ‘The New Hungarian Constitutional State: Challenges and Perspectives’ in A.E. Dick Howard (ed.), *Constitution Making in Eastern Europe* (Washington: Woodrow Wilson Center Press) 21-55.

Paine, T. (1996), *Rights of Man* (Ware, Wordsworth Editions).

Parsons, T. (1951), *The Social System* (London: Routledge).

Parsons, T. (1967), *Sociological Theory and Modern Society* (New York: Free Press).

Pedler, R.H. and Schaefer, G.F. (eds.). (1996), *Shaping European Law and Policy – The Role of Committees and Comitology in the Political Process* (Maastricht: European Centre for Public Affairs, European Institute of Public Administration).

Pehe, J. (1991), ‘Emigres in the Postcommunist Era: New Data, New Policies’, *Report on Eastern Europe*, No. 17, 26 April 1991.

Pehe, J. (1991), ‘Parliament Passes Controversial Law on Vetting Offices’ *Report on Eastern Europe*, 25 October 1991.

Pehe, J. (1994), ‘Legal Difficulties Beset the Czech Restitution Process’, *Radio Free Europe/Radio Liberty Research Report*, No. 28, 15 July 1994, 6.

Pérez Díaz, V. (1993), *The Return of Civil Socity: the emergence of democratic Spain* (Cambridge, Mass.: Harvard University Press).

Pfaff, W. (1993), *The Warth of Nations: Civilization and the Furies of Nationalism* (New York: Simon and Schuster).

Plato. (1961), *The Collected Dialogues of Plato* (edited by E. Hamilton and H. Cairns, New Jersey: Princeton University Press).

Pocock, J.G.A. (1973), *Politics, Language and Time: Essays on Political Thought and History* (New York: Atheneum).

Pogany, I. (1997), *Righting Wrongs in Eastern Europe* (Manchester: Manchester

University Press).

Pomian, K. (1992), *L'Europe retrouvée* (Neuchatel: Editions de la Baconiere).

Pound, R. (1963), *The Spirit of the Common Law* (Boston: Beacon Press).

Preuss, U. (1990), *Revolution, Fortschritt und Verfassung [Revolution, Progress and Constitution]* (Berlin: Wagenbach Verlag).

Preuss, U. (1992), 'Restitution vs. Investment', *East European Constitutional Review* 1(3): 22-4.

Pridham, G. (2002), 'The European Union's Democratic Conditionality and Domestic Politics in Slovakia: the Me iar and Dzurinda Governments Compared", *Europe-Asia Studies* 54: 203-27.

Procházka, A. (1995), 'K právním ú ink m rozhodnutí podle restitu ních zákon a zákona rehabilita ního' [On the legal effects of the Decisions under the Restitution Laws and the Law on Rehabilitations], *Právník [Lawyer]*, 134: 5.

P ibá , J. (2002), *Dissidents of Law*: *On the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract* (Aldershot: Ashgate).

P ibá , J. (2003), 'Constitutional Justice and Retrospectivity of Laws in Postcommunist Central Europe' in J. P ibá , P. Roberts and J. Young (eds.), *Systems of Justice in Transition: Postcommunist Experiences in Central Europe since 1989* (Aldershot: Ashgate Publishing) 38-40.

Rawls, J. (1971), *A Theory of Justice* (Oxford: Oxford University Press).

Redmond, J. and Rosenthal, G. (eds.). (1998), *The Expanding European Union: Past, Present and Future* (Boulder, Colo.: Lynne Rienner Publishers).

Renan, E. (1882), *Qu'est-ce qu'une nation?* (Paris: Calmann-Levy Press).

Richter, P. (1993), *Kurzer Prozess* (Berlin: Elefanten Press).

Ricoeur, P. (1961), 'La civilisation universelle et les cultures nationales', *Esprit*. October (Paris).

Ricouer, P. (1985), *Time and Narrative, Vol. 2* (Chicago: University of Chicago Press).

Rosenberg, T. (1995), *The Haunted Land: Facing Europe's Ghosts after Communism* (New York: Vintage).

Rorty, R. (1989), *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press).

Rorty, R. (1999), *Philosophy and Social Hope* (London: Penguin Books).

Roth, S.J. (1996), 'The Effect of Ethno-Nationalism on Citizens' Rights in the Former Communist Countries', in A. Sajo (ed.), *Western Rights?: Postcommunist Application* (The Hague: Kluwer) 273-90.

Rousseau, J.J. (1997), *The Social Contract and other later political writings* (Cambridge: Cambridge University Press).

Rudolf, A. (1990), *At an Uncertain Hour: Primo Levi's war against oblivion* (London: Menard Press).

Rupnik, J. (2002), 'The Politics of Coming to Terms with the Communist Past', *Transit: Europäische Revue* 22.

Sadurski, W. (2005), *Rights Before Courts: a study of constitutional courts in postcommunist states of Central and Eastern Europe* (Dordrecht: Springer).

Samson, I. (2001), 'Slovakia: Misreading the Western Message' in J. Zielonka

and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors* (Oxford: Oxford University Press) 363-82.

Santas, G. (2002), *Goodness and Justice: Plato, Aristotle, and the Moderns* (Oxford: Blackwell Publishing).

Savigny von, F.K. (1975), *Of the Vocation of Our Age for Legislation and Legal Science* (New York: Arno Press).

Scaff, L.A. (1989), *Fleeing the Iron Cage: Culture, Politics and Modernity in the Thought of Max Weber* (Berkeley, Cal.: University of California Press).

Scheff, T.J. (1994), *Bloody Revenge: Emotions, Nationalism, War* (Coulder, Co.: Westview Press).

Schimmelfennig, F. (2001), 'Liberal Identity and Postnationalist Inclusion: The Eastern Enlargement of the European Union' in L.-E. Cederman (ed.), *Constructing Europe's Identity: The External Dimension* (Boulder, Colo.: Lynne Rienner Publishers) 165-86.

Schmitt, C. (1993), 'The Age of Neutralizations and Depoliticizations', *Telos* 96, 130-42.

Schmitt, C. (1996), *The Concept of the Political* (Chicago: University of Chicago Press).

Schmitt, C. (1996), *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport: Greenwood Press).

Schmitter, P.C. (2001), 'The Scope of Citizenship in a Democratized European Union' in K. Eder and B. Giesen (eds.), *European Citizenship between National Legacies and Postnational Projects* (Oxford: Oxford University Press).

Schnapper, D. (1998), *Community of Citizens: On the Modern Idea of Nationality* (New Brunswick, N.J.: Transaction Publishers).

Schöpflin, G. (2000), *Nations, Identity, Power: The New Politics of Europe* (London: Hurst).

Schöpflin, G. (2001), 'Liberal Pluralism and Post-Communism' in W. Kymlicka and M. Opalski (ed.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press) 109-25.

Schulze, H. (1994), *Staat und Nation in der Europäischen Geschichte* (München: C.H. Beck).

Schutz, A. (1980), *The Phenomenology of the Social World* (London: Heinemann).

Schutz, A. (1997), 'The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society' in G. Teubner (ed.), *Global Law Without a State* (Aldershot: Dartmouth) 257-94.

Schwartz, H. (1994), 'Lustration in Eastern Europe', *Parker School Journal of East European Law* 1: 141-71.

Schwartz, H. (1994), 'The Czech Constitutional Court Decision on the Illegitimacy of the Communist Regime', *Parker School Journal of East European Law* 1: 392-8.

Schwartz, H. (2000), *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press).

Selznick, P. (1992), *The Moral Commonwealth: social theory and the promise of*

community (Berkeley, Ca.: University of California Press).

Semjonov, Ai. (2003), 'Ethnic Limits of Civil Society: The Case of Estonia', in N. Götz and J. Hackmann (eds.), *Civil Society in the Baltic Sea Region* (Aldershot: Ashgate) 145-57.

Serres, M. (1981), *The Parasite* (Baltimore: Johns Hopkins University Press).

Serres, M. (1995), *The Natural Contract* (Ann Arbor: University of Michigan Press).

Shaw, J. (2000), 'Process and Constitutional Discourse in the European Union", *Journal of Law and Society* 27: 4-37.

Shklar, J. (1987), *Montesquieu* (Oxford: Oxford University Press).

Shils, E. (1981), *Tradition* (London: Faber and Faber).

Sieradzka, K. (1994), 'Restitution of Jewish Property in the Czech Republic: New Developments', *Research Report of the Institute of Jewish Affairs,* No. 7: 9-10.

Šiklová, J. (1999), 'Lustration or the Czech Way of Screening' in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism* (Aldershot: Ashgate Publishing) 248-58.

Skapska, G. (1999), 'Between "Civil Society" and "Europe": Post-Classical Constitutionalism after the Collapse of Communism in a Socio-Legal Perspective', in J. P ibá and J. Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot: Ashgate) 204-22.

Sklar, M. and Kanev, K. (1995), *Decommunization: A New Threat to Scientific and Academic Freedoom in Central and Eastern Europe* (Washington, DC).

Sloterdijk, P. (1993), *Im selben Boot. Versuch über die Hyperpolitik* (Frankfurt: Suhrkamp).

Smith, A. (1986), *The Ethnic Origins of Nations* (Oxford: Blackwell).

Snyder, F. (ed.). (2000), *The Europeanisation of Law: the legal effects of European integration* (Oxford: Hart Publishing).

Soper, P. (2002), *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press).

Spencer, H. (1961), *The Study of Sociology* (Ann Arbor: University of Michigan Press).

Staniszkis, J. (1984), *Poland's Self-Limiting Revolution* (Princeton: Princeton University Press).

Stein, E. (1997), *Czecho/Slovakia: ethnic conflict, constitutional fissure, negotiated break-up* (Ann Arbor: University of Michigan Press).

Steiner, G. (1984), *Antigones: The Antigone myth in Western literature, art and thought* (Oxford: Oxford University Press).

Strauss, L. (1953), *Natural Right and History* (Chicago: University of Chicago Press).

Stuart, G. (2003), *The Making of Europe's Constitution* (London: Fabian Society).

Sugar, P.F. and Lederer, I.J. (eds.). (1969), *Nationalism in Eastern Europe* (Seattle: University of Washington Press).

Sumner, W.G. (1960), *Folkways: A Study of the Sociological Importance of usages, Manners, Customs, Mores and Morals* (New York: Mentor Books).

Szacki, J. (1995), *Liberalizm po komunizme (Liberalism after Communism)* (Krakow:

Znak).
Tam, H. (1998), *Communitarianism: a new agenda for politics and citizenship* (London: MacMillan Press).
Taylor, C. (1985), *Philosophical Papers* (Cambridge: Cambridge University Press).
Taylor, C. (1989), 'Cross-Purposes: The Liberal Communitarian Debate', in N.L. Rosenblum (ed.), *Liberalism and the Moral Life* (Cambridge, Mass.: Harvard University Press).
Taylor, C. (1992), *Multiculturalism and the Politics of Recognition* (edited by Amy Guttman, Princeton: Princeton University Press).
Taylor, P. (1996), *The European Union in the 1990s* (Oxford: Oxford University Press).
Teitel, R. (2000), *Transitional Justice* (Oxford: Oxford University Press).
Teubner, G. (1998),'Legal Irritants: Good Faith in British Law or How Unifying Law Produces New Divergences', *Modern Law Review* 61, 11-32.
Teubner, G. (2001), 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann', *Theory, Culture & Society* 18 1.: 29-47.
Teubner, G. (2001), 'Alienating Justice: On the Surplus Value of the Twelfth Camel', in J. P ibá and D. Nelken (eds.) *Law's New Boundaries: the consequences of legal autopoiesis* (Aldershot: Ashgate), 21-44.
Todorov, T. (2001), 'Ni banalisation ni sacralisation: du bon et du mauvais usage de la memoire' ; *Le Monde diplomatique*, April, 10-1.
Tönnies, F. (2001), *Community and Civil Society* (edited by J. Harris, transl. J. Harris and M. Hollis, Cambridge: Cambridge University Press).
Tilly, C. (ed.). (1975), *The Formation of Nation-States in Western Europe* (Princeton, NJ: The Princeton University Press).
Timasheff, N.S. (1974), *An Introduction to the Sociology of Law* (Westport: Greenwood Press).
Touraine, A. (2000), *Can We Live Together?: Equality and Difference* (Cambridge: Polity Press).
Turner, V. (1967), *The Forest of Symbols* (Ithaca, NY: Cornell University Press).
Uitz, R. (2005), 'Constitutional Courts and the Past in Democratic Transition' in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law After Communism* (Budapest: CEU Press) 235-62.
Vachudová, M.A. (2001), 'The Czech Republic: The Unexpected Force of Constitutional Constraints', in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors*. (Oxford: Oxford University Press) 325-62.
Valki, L. (2001), 'Hungary: Understanding Western Messages', in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors* (Oxford: Oxford University Press) 281-310.
Varga, C. (1995), *Transition to Rule of Law: On the Democratic Transformation in Hungary* (Budapest: The Hungarian Academy of Sciences).
Vaší ek, Z. (1996), *P ijetí podmínek [The Acceptance of Conditions]* (Praha:

Torst).

Veitch, S. (2001), 'The Legal Politics of Amnesty', in E. Christodoulidis and S. Veitch (eds.), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford: Hart Publishing) 33-45.

Waldron, J. (2000), 'Cultural Identity and Civic Responsibility', in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies* (Oxford: Oxford University Press).

Walker, G. (1997), 'The Idea of Nonliberal Constitutionalism', in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights (NOMOS XXXIX)* (New York: New York University Press) 154-86.

Walker, N. (2001), 'Enlargement of the European Union: How New EU Members Will Change the Shape of Europe', in R.J. Guttman (ed.), *Europe in the New Century: Visions of an Emerging Superpower* (London: Lynne Rienner Publishers) 57-66.

Walker, N. (2002), 'The Idea of Constitutional Pluralism', *Modern Law Review* 65 317-59.

Wallace, H. (1993), 'Deepening and Widening: problems of legitimacy for the EC', in S. Garcia (ed.), *European Identity and the Search for Legitimacy* (London: Pinter) 95-105.

Wallace, W. and Smith, J. (1995), 'Democracy or technocracy? European integration and the problem of popular consent', *West European Politics* 18: 137-57.

Walzer, M. (1994), 'Notes on the New Tribalism', in C. Brown (ed.), *Political Restructuring In Europe: Ethical perspectives* (London: Routledge) 187-200.

Ward, I. (2003), 'A Decade of Europe? Some Reflections on an Aspiration', *Journal of Law and Society* 30: 236-57.

Weber, M. (1968), *Economy and Society: an outline of interpretive sociology, vol. II.* (New York: Bedminster Press).

Weiler, J.H.H. (1995), 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', *European Law Journal* 1: 219-58.

Weiler, J.H.H. (1999), *The Constitution of Europe: 'Do the new Clothes have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press).

Weiler, J.H.H. (2002), 'A Constitution for Europe? Some Hard Choices', *Journal of Common Market Studies* 40: 563-80.

Weiler, J.H.H. (2003), 'In defence of the status quo: Europe's constitutional *Sonderweg*', in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003) 7-23.

Weiler, J.H.H. with Haltern, U.R. and Mayer, F.C. (1995), 'European Democracy and Its Critique', in J. Hayward (ed.), *The Crisis of Representation in Europe* (London: Frank Cass) 4-39.

Weiss, B.G. (1998), *The Spirit of Islamic Law* (Athens: University of Georgia Press).

Welsch, W. (1996), *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt: Suhrkamp).

Werle, G. (1999), *Die strafrechtliche Aufarbeitung von DDR-Unrecht: eine Bilanz*

(Berlin: De Gruyter).

Wesolowski, W. (1995), 'The Nature of Social Ties and the Future of Postcommunist Society: Poland after Solidarity' in John A. Hall (ed.), *Civil Society: Theory, History, Comparison* (Cambridge: Polity Press) 110-35.

Wiener, A. (2003), 'Finality vs. enlargement: constitutive practices and opposing rationales in the reconstruction of Europe', in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press) 157-201.

Williams, K. (1999), 'A Scorecard for Czech Lustration', *Central Europe Review* 1: No. 19, 1 November 1999.

Williams, K., Szczerbiak, A. and Fowler, B. 'Explaining Lustration in Eastern Europe: "A Post-communist politics approach"', Sussex European Institute: Working Paper No. 62.

Wundt, W. (1916), *Elements of Folk Psychology: outlines of a psychological history of the development of mankind* (London: Allen and Unwin).

Žižek, S. (2001), *Did Somebody Say Totalitarianism? Five Interventions in the (Mis)use of a Notion* (London: Verso).

This page intentionally left blank

Index

Act of Extrajudicial Rehabilitations, 1990 (Czech Republic), 173
Act of Legal Rehabilitations, 1990 (Czech Republic), 173
Albrecht, H., 149
Amsterdam Treaty (1993), 120
Antall, J., 87, 88
Antigone (Sophocles), 31
Arato, A., 157
Arnold, T., 8

Bagehot, W., 5
Balibar, E., 132-3, 136
Balladur Plan (EU, 1993), 100
Bauman, Z., 8-9, 125, 128-9, 134-5
Benhabib, S., 43
Blair, T., 123
Braudel, F., 51

Callicles, 29
Castells, M., 40
change, revolutionary
  constitutionalization of, 58-9
  temporal dynamics of, 55-7
Charter of Fundamental Rights and Freedoms (Czech Republic), 91
Chirac, J., 123
chronos, 47-8
Churchill, W., 53
'civil society'
  reinvention of in Central Europe, 75-9
codes, social
  impact on collective identity, 74-5
communism
  comparison with nazism, 154-5
communitarianism, republican, 132-3
Compensation Cases I-III (Hungary), 170-71
Constitutional Court of Hungary, 156-8, 169-72
Constitutional Court of the Czech Republic, 173, 184
Constitutional Court of the Czech and Slovak Federal Republic, 158-60
constitutions (concept)
  characteristics, 4-7
constitutions, European
  political limitations, 121-2
constitutions, making of
  developments in Central Europe post-communism, 75-9, 84-97
  European models, 107-11
  future vision of in Europe, 102-6
  impact of identity on, 41-4, 75-9
  impact of revolutionary processes, 55-7
  see also influences eg culture; ethniity; identity, collective; morality; prejudice; traditions
continuity, legal
  role within Hungarian and Polish courts, 156-8
Copenhagen Summit (1993), 98-100
Copenhagen Summit (2002), 120
cosmopolitanism
  role and perception in Europe, 128-31
Council of Europe, 189
countries, post-communist *see name eg* Czech Republic; Hungary; Poland
coupling, social
  role in defining society, 12-13
coupling, structural
  role in defining legal and political systems, 16-19
culture
  impact on European identity, 137-8
  involvement in evolution of ethno-nationalism, 38-40
  role in constitution-making, 19-24
Czech Republic
constitutional and political developments post-communism, 78, 89-91, 93-7
  ethnos oriented strategies within, 101
  experience of restitution, 172-87

interpretation and use of constitutional-legal discontinuity, 158-60
legal system transformation post-communism, 145
retributive justice measures post-communism, 147, 149-50

Davies, N., 117
Declaration of the Rights of Man and of the Citizen (France, 1789), 63
Declaration on the European Identity (1973), 103-4
decommunisation
comparison with denazification, 154-5
demos
EU attitude towards, 96-102, 112-13
relevance in central Europe post-communism, 81-92
role in European politics, 131-2
denazification
comparison with decommunisation, 154-5
depoliticization
of European political identity and structures, 116-19
Descombes, V., 44
Dicey, A., 5
differentiation, social
role in defining society, 10-13
discontinuity, constitutional-legal
interpretation by Czech and Slovak republics, 158-60
interpretation by German Democratic Republic, 160-62
Durkheim, E., 196-7

East Germany *see* German Democratic Republic
*ephemero*s, 47-8
Errera, R., 121
'ethical state'
role of theories in definition of, 8-10
Essen Summit (1994), 100
ethnicity
impact on EU constitution-making, 122-4
significance of ethnic unity in nation building, 79-84
ethnos
EU attitude towards, 96-102
marginalization within EU identities, 112-13
relevance in central Europe post-communism, 81-92
Europe (concept)
as obstacle to future development, 124-8
Europe, Central and Eastern
constitutional and political developments post-communism, 75-9, 84-97
EU *ethnos* oriented strategies within, 98-102
legal system transformation post-communism, 142-5
retributive justice measures post-communism, 146-50
significance of traditions in nation building, 79-84
see also country eg Czech Republic; Hungary; Poland
European Court of Human Rights, 184
European Union (EU)
attitude towards *ethnos*, 96-102, 112-13
depoliticization of, 116-19
future vision and pathways, 102-6, 124-8, 131-5
see also countries eg Czech Republic; France; Hungary; Poland
'Europeanisation of Europe', 128-35
events, historical
susceptibility to temporal manipulation, 51-5

Feyerabend, P., 50
Fico, R., 90
Fischer, M., 124
Foucault, M., 73
France
Declaration of the Rights of Man and of the Citizen, 63
Fuller, L., 151-3, 155
'functionaries of humanity (Husserl), 8

Gadamer, H.G., 49, 51, 52, 128, 129
Gellner, E., 36
German Democratic Republic
interpretation and use of constitutional-legal discontinuity, 160-62

- legal system transformation post-communism, 145
- retributive justice measures post-communism, 146-7, 149

Gierke, O. von, 196-7
gypsies
- EU protection of, 101-2

Gyurcsany, F., 88

Habermas, J., 8, 41-2, 95, 97, 112-13, 128
Haider, J., 124
Halbwachs, M., 59
Hart, H.L.A., 153
Havel, V., 78, 125-6
Haunted Land, The (Rosenberg), 188-9
Hegel, G.W.F., 6-7, 30-33, 34, 36-7, 148
Heidegger, M., 64
Helsinki Watch, 187, 188
heterarchy
- role in defining society, 10-13

Herder, J.G., 36
Hippias, 29
history (historical events)
- susceptibility to temporal manipulation, 51-5

Hobbes, T., 108-10, 128-31, 150-51
Honecker, E., 149
Horn, G., 87, 88
Human Rights Watch, 187
Hume, D., 64
Hungarian Democratic Forum, 170
Hungary
- constitutional developments post-communism, 87-9, 93-7
- EU *ethnos* oriented strategies within, 99-100
- experience of restitution, 169-72
- legal system transformation post-communism, 143-5
- reinvention of constitution and political identity within, 77-8
- retributive justice measures post-communism, 149-50

Husserl, E., 8

identity (concept)
- characteristics and symbolism, 44-5

identity, collective
- considerations when legislating for, *xi*, 26-8
- impact on legal systems, 41-4
- involvement in evolution of ethno-nationalism, 38-40
- role in constitution-making, 73-5
- role of legal systems in codification of, 59-62
- temporal idealization of authentic collective identity, 62-5

identity, European
- depoliticization of, 116-19
- future vision and pathways, 102-6, 124-8
- impact of European culture, 137-8
- marginalization of *ethnos* within, 112-13
- political interpretations and limitations, 119-22, 131-5
- *see also* cosmopolitanism; patriotism, European constitutional; traditions

identity, moral *see* morality
identity, national
- significance in nation building, 79-84

identity, political
- developments in central Europe post-communism, 75-9, 84-97

ideologies, moral *see* morality
integration, European
- depoliticization of, 117-19
- future pathways, 124-8

International Labor Organization, 189

jurisprudence, historical (concept)
- evolution of, 37-8

justice (concept)
- role of structural coupling within definition of, 18-19

justice, retributive
- characteristics, 148-9
- *see also* justice, retrospective

justice, retrospective
- changing attitudes towards, 162-3
- jurisprudence of, 150-54, 160-62
- measures involving, 146-50
- *see also* continuity, legal; discontinuity, constitutional-legal; *Lustration Act, 1991*

justice, transitional
- impact of lustration law upon, 192-3

Kagan, R., 128
Kant, I., *ix*, 128-31, 148
Kelsen, H., 13, 105, 151, 153, 156
Kenny, M., 39
Kessler, H., 149
Konrad, G., 77-8
Koselleck, R., 53
Kuhn, T., 50
Kymlicka, W., 83

Laeken Declaration (EU, 2001), 110
law, natural
  role within defining of legislation, 29-30
law and laws
  as mechanisms of social change and stabilization, 55-7
  as symbolic elements of constitutions, 4-7
  impact of collective identity on formulation of, 41-4
  relationship with morality, 13-16
  relationship with politics, 16-19
  'spirit of' *see* spirit of the laws
  symbolic role of prejudice in making of, 50-51
  temporal codification of, 48-9
  see also continuity, legal; discontinuity, constitutional-legal; justice
  law and laws, European
  identity-building limitations, 119-22
  see also countries eg Czech Republic; Hungary; Poland
law and laws, restitution
  experiences within Czechoslovakia and Czech Republic, 172-85
  experiences within Hungary, 169-72
  principles and dilemmas post-communism, 165-8
  see also Lustration Act, 1991
Laws (Plato), 3
legislation *see* law and laws

Le Pen, J-M., 124
Lévinas, E., 8, 128
Luhmann, N., 10-11
lustration (concept)
  role in Czechoslovak legal system, 158-60
Lustration Act, 1991 (Czech Republic)
  characteristics and history, 175-9
  experience of implementation, 179-83
  role and symbolism in post-communist era, 183-7
  weaknesses and criticisms, 187-93
Lyotard, J-F., 65-6

'machine memories' (Lyotard), 65-6
Me iar, V., 90
Medgyessy, P., 88
memory and memories, collective
  role of legal systems in codification of, 59-62
  temporal idealization of, 62-5
  weaknesses, 65-8
  see also identity, collective
memory and memories, social
  in relation to historical development, 54
Mielke, E., 149
Milosz, C., 116-17
Ministry of Labour and Social Security (Czech Republic), 189
Monnet, J., 95
Montesquieu, C., 33-5
morality
  as symbolic elements of politics and law, *xi*, 4-7
  relationship with law, 13-16
  role in constitution-making, 19-24
  role of theories in defining, 7-10
  temporal codification of, 48-9

National Council of the Republic of Slovakia, 166
nationalism, ethnic
  impact on EU constitution-making, 122-4
  role of culture in evolution and collective identities, 38-40
  see also communism; nazism; relations, ethnic
nationhood
  characteristics, 81
  developments in central Europe post-communism, 84-91
  significance of national identities, 79-84
  see also constitutions, making of; identity, European
nazism

comparison with communism, 154-5
negotiations
role in legal transformation post-communism, 142-6
Nietzsche, F., 137
Nisbet, R., 13

oppressors
as elements of lustration law, 190-92
Orbán, V., 88
order
Hobbesian model of political order, 108-10
role within defining of legislation, 29-30
Orwell, G., 73

Parsons, T., 198
patriotism, European constitutional, 135-7
Plato, 3, 29-30
Poland
constitution-making and political identity within, 77-8, 85-7, 93-7
legal system transformation post-communism, 143-5
retributive justice measures post-communism, 148, 149-50
Polish Constitutional Tribunal, 158
politics
as symbolic elements of constitutions, 4-7
relationship with law, 16-19
temporal codification of, 48-9
see also elements eg constitutions, European; nationalism, ethnic
politics, European
depoliticization of, 116-19
role of *demos* within, 131-2
see also elements eg constitutions, European; nationalism, ethnic
power, European
political limitations of, 119-22
power, transfer of
role in post-communist legal transformation, 142-6
prejudice, cultural
characteristics, 49-50
role in constitution-making, 50-51
Prodi, R., 104, 124
Public Access to Files Connected to Activities of Former Secret Police, Act of (Czech Republic), 147
punishment
characteristics, 148-9
see also justice, retrospective

Radbruch, G., 152-3, 154, 155, 161
reason
Hegelian interpretations and views, 6-7, 30-33
role within defining of legislation, 29-30
regionalisation, European
political limitations, 119-22
relations, ethnic
between Czechs and Slovaks, 89-91
religion
Hegel's views, 6-7
Renan, E., 80-81, 134
'republican communitarianism', 132-3
restitution (concept)
changing attitudes towards, 162-3
prospective and retrospective availability, 168-75
see also justice, retrospective; law and laws, restitution
retribution
characteristics, 148-9
see also justice, retrospective
retrospectivity, legal *see* restitution
revolution (concept)
as expression of future expectations, 55-7
constitutionalization of, 58-9
rights, human
role of structural coupling within definition of, 19
Rodriguez Zapatero, J-L., 124
Roma
EU protection of, 101-2
Rorty, R., 9
Rosenberg, T., 188-9
Rychetsk , P., 176

Schmitt, C., 117-18, 150-51
Schmitter, P., 134
Schutz, A., 51
Seidel, T., 161
Slota, J., 90

Slovakia
constitutional and political developments post-communism, 89-91, 93-7
EU *ethnos* oriented strategies within, 99-101
interpretation and use of constitutional-legal discontinuity, 158-60
National Council of the Republic of Slovakia, 166
Smallholders Party (Hungary), 170-71
society (concept)
ability of modern society to dictate own temporal pathway, 53-5
definition and characteristics, 7-13
impact of revolutionary processes on modern society, 55-7
Sophist wisdom, 29
Sophocles, 31
South Africa
Truth and Reconciliation Commission, 61-2
sovereignty
characteristics, 81
developments in central Europe post-communism, 84-91, 93-7
Spencer, H., 196
spirit of the laws (concept)
and collective identity, 26-8
and concept of culture, 33-5, 196-7
definition and history, 25-6, 28-33
evolution into concepts of volksgeist and historical jurisprudence, 35-8
Spirit of the Laws (Montesquieu), 33-5
Stoph, W., 149
Streletz, F., 149
symbolism, constitutional
and Central Europe national policy making, 91-2
symbolism, legal
definition and characteristics, *x-xi*
see also law and laws; law and laws, restitution
systems, legal
as symbolic elements of constitutions, 4-7
impact of revolutionary expectations, 55-7
role in codification of collective memories, 59-62
transformation, post-communism, 142-5
systems, social
role in defining society, 10-13

Taylor, C., 84
time (social time)
definition and characteristics, 47-9
traditions
role in collective identity, 73-4
significance in constitution-making, 79-84
susceptibility to temporal manipulation, 51-5
Treaty Establishing a Constitution for Europe (2004), 122, 123-4
Treaty Establishing the European Economic Community (1957), 104
Treaty of Amsterdam (1993), 120
Treaty of the Republic of Hungary and the Slovak Republic on Good Neighbourliness (1995), 100
Treaty on the Establishment of German Unity, 160
Truth and Reconciliation Commission (TRC) (South Africa), 61-2

universalism
depoliticization within EU, 118-19

Verheugen, G., 101
victims
as elements of lustration law, 190-92
Vogt v. Germany legal case, 184
'volksgeist' (Hegel), 36-7, 39
von Moser, F.C., 36
von Savigny, F.C., 37-8, 196-7

Walesa, L., 86
Walzer, M., 84
Weber, M., 20, 196

Zetényi-Takács Law, 169