

relatively little success. A large majority of French Jews, about three-quarters, survived the war.

The decisive matter, here as everywhere, was sovereignty. For French authorities, the Jewish question was subordinate to that of the well-being, as they saw matters, of their state. They certainly wished to remove Jews from France—foreign Jews to be sure and, no doubt, most or all Jews. But they could see the inherent problem of allowing German preferences to determine their own citizenship policy. The moment a state no longer determines internal membership, it loses external sovereignty. By the same token, French authorities had recourse to foreign policy and could react to the course of the war. Unlike the Dutch and the Greeks, who had lost these elements of sovereignty, the French could respond to Allied pressure about the Jews and anticipate a British and American occupation, which was indeed coming.

The Holocaust in France was mainly a crime against Jews who, from a French perspective, were foreign. As François Darlan, head of government in 1941 and 1942, put it: “The stateless Jews who have thronged to our country for the last fifteen years do not interest me.” Jews without French citizenship were about ten times more likely to be deported to Auschwitz than were Jews with French citizenship. At Drancy, Jews were selected for deportation according to the vitality of their state. Jews in France understood this perfectly. In 1939, when Poland was destroyed by the joint German-Soviet invasion, Polish Jews living in France flocked to the Soviet embassy in Paris. This was not out of any love for the Soviet Union or communism. They simply knew that they needed state protection. Between September 1939 and June 1941, documents from Hitler’s Soviet ally were of great value. But when Hitler betrayed Stalin, and Germany invaded the Soviet Union, these Jews’ new papers were suddenly useless.

Considerably more Polish Jews resident in France were killed than French Jews resident in France. Statelessness followed these thirty thousand murdered Polish Jews to Paris, to Drancy, to Auschwitz, to the gas chambers, to the crematoria, and to oblivion.

The likelihood that Jews would be sent to their deaths depended upon the durability of institutions of state sovereignty and the continuity of prewar citizenship. These structures created the matrix within which individual choices were made, the constraints upon those who did evil, and the possibilities for those who wished to do good. <

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Budapest and Brussels: A Troubled Relationship

BY JÁNOS MÁTYÁS KOVÁCS AND BALÁZS TRENCSENYI

In the 1990s, Hungary was celebrated as a post-communist success story. Today, it serves as an example of “inverse transition”. The second government of Viktor Orbán (2010–2014) replaced the republican regime with a so-called “System of National Cooperation” (SNC). The SNC is increasingly considered as prototypical of the potential “new right” regimes in Europe. How has it become possible that an EU member state shows conspicuous similarities to Putin’s Russia?

In June 2015, the Institute for Human Sciences (IWM) and the Central European University organized a conference on Hungary today. The participants—scholars in- and outside Hungary from various disciplines in the social sciences and humanities—analyzed the main features of the SNC, ranging from re-nationalization and social exclusion

to the dismantling of the democratic constitution. One aim of the conference was to find an appropriate description for the SNC, be it “authoritarian”, “populist”, “illiberal”, “nationalist”, similar to a mafia regime, or otherwise. Beyond the question of labels, the idea was to offer interpretations of the historical prerequisites for the SNC and its specifics

in comparison with other post-communist systems in Eastern Europe.

The first session focused on how the EU has responded to the Hungarian government’s repeated attempts to radically remodel the country’s legal and political arrangements. Below, we publish shortened versions of the three introductory statements to the session, by **Kinga Göncz**,

Ulrike Lunacek and **Jan-Werner Mueller**. In the light of these contributions, one is prompted to re-think both the ominous success and triumphant failure of the Orbán regime in dealing with the refugees in a European context. <

The Games the EU and Hungary Play

BY KINGA GÖNCZ



PHOTO: IWM

Hungary, a forerunner of democratization in 1989 and erstwhile champion of EU accession, has introduced systemic change over the past five years. The European Union has observed this with growing anxiety, however seems to be paralyzed and unable or unwilling to intervene.

Hungary is deeply divided in terms of its value structure. A substantial majority of the population are paternalist and anti-liberal, willing to accept a strong leader, are xenophobic, intolerant and closed-minded. This value orientation meant that people did not question democracy for about fifteen years, because they were hoping for a higher living standard after 1989. The gradual loss of hope in a better life went hand in hand with a growing disappointment in a corrupt political class and in democracy in general. Since those who are more open-minded and competitive can leave the country, their share among the citizenry is decreasing. As a current joke has it, “if you’re bored with democracy, come back home to Hungary”.

Viktor Orbán was a strong candidate for the role of charismatic leader. In well-established democracies, charismatic leaders don’t make a substantial difference; in times of transition, however, they do—for better or for worse. If they strengthen the self-esteem and identity of society, without excluding and stigmatizing certain groups, their influence is for the better; if they scapegoat certain groups in order to create group cohesion, it is for the worse. The majority of Hungarians are willing to follow Orbán down the latter route. Orbán believes in a black-and-white world and in win-lose outcomes, understands only the language of power, and is unable to cooperate. In his family, all the men are called Viktor (his father’s and brother’s name is Győző, the Hungarian version of Viktor).

Hungarian society has not reckoned with its past. Historical traumas (Trianon, the Holocaust, communism) have led to a competitive sense of victimhood, in which guilt is projected onto others. Orbán reinforces this paranoid tendency. He

encourages a view of the EU as one of Hungary’s main enemies. For the Hungarian government, the Union is not a shared value system but a cash cow for Orbán’s clients. European transfer payments are for Hungary what oil incomes are for certain resource-rich illiberal democracies.

The assumption in Brussels was that once the accession countries had met the Copenhagen criteria, democracy would be a one-way street. In the meantime it has become clear that an anti-democratic backlash is possible, however an effective response has yet to be developed. The EU is able to reprimand candidate countries, but interdependency and the need for consensus requires it to be generous towards member states. The growing number and diversity of member states are another factor making problem-solving difficult. Moreover, as Brussels learned from Austria in 2000, exclusion can provoke anti-EU sentiment among citizens.

The EU’s credibility as a community of values and an embodiment of economic success was shattered by the financial crisis. This was exploited by politicians like Orbán. Although the Lisbon Treaty included sanctions in the case of a serious breach of values (article 2), the implementation of these sanctions requires a large majority (article 7). The European People’s Party still backs the Hungarian government, partly because FIDESZ MEPs are badly needed for its majority in the European Parliament, and partly because it thinks that it can influence Orbán more when FIDESZ remains in the conservative camp.

The EU sees its task in connection with Hungary as being to “return the lost sheep to the fold”. Orbán, on the other hand, asks: “Who can outsmart the other?” Any attempt by the EU to initiate dialogue and cooperation with the Hungarian prime minister is interpreted by the latter as a sign of weakness and an encouragement for further violations of EU rules. A vicious circle emerges: the more the EU seeks dialogue and provides funds, the greater Orbán’s chance to demonstrate that he can “bash” Brussels.

If EU criticism aims at systemic problems, Orbán asks for concrete examples. If the EU provides evidence, Orbán produces unknown data (usually false) and accuses the EU of ignorance of the Hungarian situation. If no other argument works, he speaks of “double standards” and the “unique spirit of the Hungarian people”. Brussels is bound by the rule of law; Orbán is not—with his two-thirds majority, he makes that law. If new legislation is unconstitutional, he changes the constitution. If resistance is too strong, he takes a step back without giving up the essence of the policy in question. While the EU distinguishes between Hungary and its government, Orbán repeatedly equates the two, claiming that “the Hungarian nation is under attack” and that he has to “fight for the dignity of the nation”. He speaks a pro-European language in Brussels and an anti-European, politically incorrupt, even extremist language in Budapest. Jean Claude Juncker’s greeting of Orbán with “Hello, Dictator” was an attempt to find an adequate reaction to this game. <

Creating a New EU Mechanism to Protect Fundamental Rights

BY ULRIKE LUNACEK

The last vote we had on Hungary in the European Parliament was at the beginning of June. We thought that before taking a resolution we ought to give him a chance to respond to our criticisms. As always, Orbán's speech turned into a show directed towards his domestic audience. This is one of the problems we face: he is very good at using national media. At the same time, he has done a lot to constrain media freedom in Hungary. In the end, we succeeded in not having a vote by open ballot on the resolution. This allowed some MEP's in the European People's Party to vote in favor, or at least to abstain. The resolution was passed.

The title of this conference is *Mapping the "System of National Cooperation"*. It is important to analyze this system at a time when many of the member states, not just Hungary, increasingly favor nationalist decision-making. During the debt crisis, many states saw the strengthening of the EU not as the solution, but as the problem. The same goes for the refugee crisis today.

Ever since the first media law was passed in Hungary in 2010, the European Parliament has attempted to move in the opposite direction. It was in 2011, the year of Hungarian presidency, that the "strange non-communication" between the European Parliament and Viktor Orbán began. The Parliament already has

article 7 of the Lisbon Treaty at its disposal. I remember the sanctions against Austria fifteen years ago, when I was member of the Austrian parliament. Chancellor Wolfgang Schüssel had formed a government with Haider's Freedom Party. In the opposition, we were very much in favor of the sanctions, although there was no exit strategy. In the end, the sanctions proved counter-productive; many citizens saw them as being directed against the country as a whole. Euroskepticism in Austria still has a lot to do with that conflict.

The Lisbon Treaty of 2008 introduced the means for punishing the violation of the treaty in article 7, in particular paragraphs 7.1 and 7.2. Ultimately, the Council has to take a decision; at the most, a member state forfeits the right to vote in the Council. The problem is that the decision must be unanimous, with the exception of the state concerned. When the first media law was passed in Hungary, we Greens put pressure on the Commission to identify it as an infringement of European law. This makes it easier to start a procedure against a member state; acting against infringement of European values in general is more difficult. We have learned our lesson from the hesitancy of the Barroso Commission.

We call this the "Copenhagen dilemma". The candidate countries are required not only to fulfill the Co-

penhagen criteria in legal terms but also to implement them, and the implementation is monitored in great detail. Once a candidate member enters the European Union, monitoring stops. With Romania and Bulgaria, some checks remained in operation. With the others, there is no comprehensive mechanism of control. Therefore, the Greens proposed that the European Parliament establishes a body similar to the Copenhagen Commission.

In July 2013, the Committee on Civil Liberties, Justice and Home Affairs wrote a report on Hungary. It was my colleague Rui Tavares who prepared the document. Because Hungarian conservatives regard him as an enemy, he developed a clever strategy. He divided the report in five parts, for each inviting a co-rapporteur from one of the parliamentary groups, including the European People's Party. The report proposed setting up a commission similar to the Venice Commission in the Council of Europe. This body would deal not only with Hungary but also, for example, with the political measures of the Romanian prime minister, Viktor Ponta, or Lithuania's propaganda law prohibiting talk about homosexuality, a copy of Russian law on the same. The report was passed in the parliament with a majority.

Orbán's recent support for the reintroduction of death penalty in Hungary again raised the potential of



Photo: IWM

a Hungarian violation of the European Treaty. On several occasions, Orbán made one step forward and one step back. First, he said that he wanted to reintroduce the death penalty in the Hungarian penal code. Then, talking to Jean-Claude Juncker, he promised to drop the idea. The next day, he repeated his wish to reinstate the death penalty. Later, when visiting the European Parliament, he changed his mind again. Even the idea of introducing the death penalty infringes of the Charter of Fundamental Rights. No country with death penalty in its penal code may enter the European Union. The last words in Orbán's speech to the European Parliament were: "Well, that was the first step."

Then he came up with the immigration questionnaire. It insinuated that all migrants were criminals and blamed the European Union for the

rise in immigration. It stressed that migrants are unwelcome in Hungary, and that if they come to Hungary nonetheless, they were not to take the jobs of Hungarians. The European People's Party was very annoyed by that questionnaire. Parliament demanded that the Commission present a proposal for the establishment of a new mechanism on democracy, rule of law and fundamental rights that would serve "as a tool for compliance with and enforcement of the charter and treaties signed by all Member States". This mechanism would operate something like a peer review process, whereby member states and the European Union would monitor each other on a regular basis. A similar procedure exists in the OECD in cooperation on development. It would help counter the notion that "it's them up in Brussels to decide what we can and can't do". <

Challenges to Democracy and the Rule of Law: What Should the Union Do?

BY JAN-WERNER MUELLER



Photo: IWM

I shan't recap the entire proposal for a Copenhagen Commission, because we have just heard from Ulrike Lunacek about the basic idea. It is an EU-specific democracy and rule of law watchdog, if you like. If I may extend the canine analogy, it would be a watchdog that not only barks, but also bites. Ideally, it would also be able to sniff around wherever it likes. In other words, this new institution would have the right to investigate possible problems with democracy and the rule of law, as well as the power to penalize member states and, in particular, impose financial sanctions.

Having said that, it's worth adding a word of caution. This is essentially a proposal for institutional design or, if you like, institutional redesign. There is always something dangerous about designing or redesigning institutions on the basis of one particular case. I don't think we want to end up in a situation where, in thirty years from now, people say "oh, that would have worked wonderfully for Hungary in 2011—but the new institution had all kinds of unexpected side effects that nobody foresaw". It's very important to understand the case of Hungary today, but it is also important to take some distance.

Let me now say something about the proposals usually discussed to address that case, and why I think they fall short.

First, the so-called "nuclear option", that is to say article 7 of the Treaty of the EU. What we have at the moment doesn't work. The majority needed for article 7 is simply too large. Even apart from that, there is something to be said about what article 7 actually is, and what it does structurally. The important thing is that it is not really about intervening in a country. It's a form of political, even moral, isolationism. In applying article 7, the EU would essentially be saying: "we want to have nothing to do with this government. We don't want to be subject to decisions which have been taken by a government that we do not consider to be democratic, or a government we think is violating fundamental values." Now, stripping people of rights is not such an outrageous proposal as one might think. Article 18 of the German Basic Law allows citizens to be stripped off their political rights. This has never happened, but it has been tried four times without success. Still, the question is wheth-

er one can do this to an entire people—though, of course, the people of an EU member state would retain representation in the European Parliament, so this is not a case of a complete disenfranchisement.

There is another problem. An application of article 7 could in theory last forever. The government of the country concerned might say: "Ok, we no longer vote in the European Council, but, hey, we are a small country anyway, we don't care, we only care about domestic power." Then the Union could not ostracize the country altogether—there is no legal way of ejecting a member state. Ultimately, there is something incoherent about a quasi-federation that neither can kick a part out, nor intervene properly in one of those parts. There is no functioning federation which has similar features: either it allows a central authority to expel certain actors out, or it allows the central actor to intervene in a part of the country. So I think it is important both to push ahead with something like the Copenhagen Commission and also to create something like a mechanism for ejecting a country altogether

(even if, hopefully, this would never happen).

The following remarks will focus on refuting four common objections to the idea of a Copenhagen Commission.

First, it's often said that there are no real shared standards for evaluating national political systems. There might be a common market, but there is no common European political model; in fact, Europe prides itself on its diversity, and pluralism is often taken to be a value in itself. The most we might have is Viktor Orbán's approach to constitutional law. Recently, the Hungarian prime minister said that he couldn't explain what an illiberal state was, and cited the famous remark of the United States Supreme Court Justice Potter Stewart on pornography: "you know it when you see it".

However, the claim about a complete absence of criteria for judgment is clearly false. The Venice Commission, for instance, regularly makes such judgments of whole constitutional systems. If you look, for instance, at the Venice Commission's opinion on the fourth amendment of the basic law of Hungary, it is very

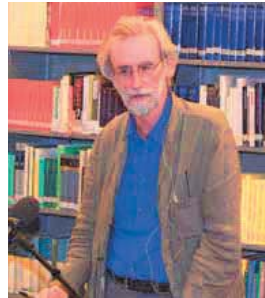
clear that they construct an argument that cannot be dismissed as arbitrary. Rather than disaggregating a constitution and then claiming that many democratic countries exhibit these elements (the approach taken by the Hungarian government in its strategy of legal and normative self-defense), the Venice Commission insisted on seeing the whole picture, and on examining whether the whole does or does not function in a liberal-democratic fashion. Moreover, it's not the case that the EU itself never makes this kind of judgment. It makes it every single time that a country becomes a member state. That doesn't mean that the EU has a very convincing methodology. I am sure many of you have a good story about mistaken judgments in the process of accession. But the point is that the idea of an actor (usually the European Commission) making the call on whether the Copenhagen criteria have been fulfilled is not generally seen as illegitimate.

The second concern is this: you might come back to me and say "look, you keep lauding the Venice Commission, so why don't we just stick to that?" In fact, many critics claim that it is typical of the EU that, when it can't solve a problem, it invents new institutions that cannot really solve the problem either. So why don't we use what we have more effectively? Here are a couple of reasons. One is that the Venice Commission itself cannot actually sanction. It is a purely advisory body. Furthermore, it is not EU-specific, and I think the EU has reached a level of density and depth of integration that finds no equivalent in the Council of Europe. Above all, the Council of Europe simply doesn't have the resources, the actual power, including the normative power, that is remotely comparable to anything in the EU. I don't want to make a cheap point, but an organization that allows Azerbaijan to be in charge cannot be a credible defender of democracy and the rule of law.

Third objection: a Copenhagen Commission, critics often say, is going to cause a great nationalist backlash, pushing all kinds of countries in the direction of euroskepticism. Well, so far, this has not been true in Hungary: the "war of independence" launched by Orbán is not really a very popular measure. But what about Austria in 2000, you might ask? This is a sordid story that everybody remembers, an absolute trauma for the EU. The very fact that we talk about "sanctions against Austria" shows that Wolfgang Schäuble won out—because these were sanctions against a particular government, not the country and its people. Moreover, it was actually the EU 14 member states, and not the EU itself, that decided on the sanctions. We already had a mechanism in place at that time, but the governments did not want to use it. So instead they introduced rather dubious bilateral sanctions, while also making use of the Portuguese presidency of the EU for the purpose. Thus, the member states really didn't conform to any basic standards of the rule of law: the sanctions weren't predictable and didn't ac-

cord with what had been envisaged in existing procedures. In the end, there were many good reasons to have a problem with the sanctions, even if one had absolutely no sympathy for Haider.

Let me make one other point: any government that wants to do what Viktor Orbán has done during the last couple of years knows that it will enter on a collision course with Brussels. Therefore, it will preemptively stir euroskeptic sentiments. Governments intent on violating European values are not going to wait for Brussels to come along and sanction; in all likelihood, they will go on the attack. Moreover, if the EU does nothing, it lets down all those



Keynote Speech by Stephen Holmes

people who, in 2004, said "thank God we are in the EU. We basically locked ourselves in supranational liberal democratic structures, there will never be any backsliding, any return to authoritarianism, we are safe." They would now say today: "We have much better reasons to become euroskeptic now than other people, because the EU really let us down."

The fourth and last objection: I occasionally hear something along the lines of people saying, "look, a Copenhagen Commission policing countries will reinforce the image of the EU as an entirely punitive organization." This is what some call "authoritarian liberalism". In economic matters it's true that Brussels tells you that can't have a certain kind of budget. But that is not comparable to something like a potential Copenhagen Commission, which would leave the existing pluralism and diversity of the European model untouched. It is about saying that there is a limit to pluralism in any club.

Still, you might ask with Erich Kästner: "Wo bleibt das Positive?" Is there anything positive here, or is it all about punishments and disciplining? Here is a very modest proposal: the new body could also build up knowledge of European constitutional traditions. I have in mind something like the *Verfassungsgerichtsverbund* advocated by Andreas Voßkuhle, president of the Federal Constitutional Court of Germany. This would be a kind of clearing house that helps to share information and examines best practices. I don't want to make too much of this—"best practices", "benchmarking", etc., is often bureaucratized that over-promises. Still, the Copenhagen Commission could play a positive role in this regard, even if its main function remains that of a watchdog. The hope is that countries would conduct themselves in light of the fact that a watchdog is indeed watching them. ◀



Photo: IWM

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