

REINVENTING CRITICAL THEORY

critical theories of crisis in europe

FROM WEIMAR TO THE EURO

EDITED BY

Poul F. Kjaer

Niklas Olsen

Critical Theories of Crisis in Europe

Reinventing Critical Theory

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Critical Theories of Crisis in Europe

From Weimar to the Euro

Edited by
Poul F. Kjaer and Niklas Olsen

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Poul F. Kjaer and Niklas Olsen
Copenhagen, January 2016

List of Abbreviations

AfD *Alternative für Deutschland*/Alternative for Germany
AGIL Adaptation-Goal Attainment-Integration-Latency
DG Directorate General
ECB European Central Bank
ECJ European Court of Justice
ECSC European Coal and Steel Community
EEC European Economic Community
EFSF European Financial Stability Facility
EMU European Monetary Union
ESM European Stability Mechanism
EU European Union
FPÖ *Freiheitliche Partei Österreichs*/Freedom Party of Austria
G20 Group of Twenty: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, United States, and the European Union
G8 Group of Eight: currently the Group of Seven (G7), following the suspension of Russia: Canada, France, Germany, Italy, Japan, Russia (suspended *sine die*), the United Kingdom, the United States, and the European Union
GATT General Agreement on Tariffs and Trade
GOP Grand Old Party (US Republican Party)
LGBT lesbian gay bisexual transgender
NATO North Atlantic Treaty Organization
NPM new public management
NSDAP *Nationalsozialistische Deutsche Arbeiterpartei*/National Socialist German Workers' Party
OECD Organisation for Economic Co-operation and Development
OEEC Organisation for European Economic Co-operation
OSCE Organisation for Security and Co-operation in Europe
PiS Prawo i Sprawiedliwość (Polish Law and Justice Party)
SER standard employment relationship
SPD Sozialdemokratische Partei Deutschlands/The Social Democratic Party of Germany
TFEU Treaty on the Functioning of the European Union
TSCG Treaty on Stability, Coordination and Governance
UK United Kingdom
UN United Nations
US United States of America
WWI World War I/First World War
WWII World War II/Second World War

Introduction

European Crises of Public Power from Weimar until Today

Poul F. Kjaer and Niklas Olsen

Once again, Europe finds itself in the middle of a crisis. In public discourse, the ongoing crisis has foremost been considered as an economic crisis, or a crisis of a largely technical nature due to failed governance within the Eurozone. However, the still unfolding refugee crisis and the widespread challenges to the state of law and parliamentary democracy, which have emerged in many European settings in recent years, indicates that the crisis trajectory cannot be understood in purely economic or technocratic terms. Accordingly, this volume takes a different approach to the understanding of the current crisis. First, it reconstructs the commonalities and differences between this and earlier major European crises from the interwar period onward. Second, it reconceptualizes these European crises as primarily crises of public power and authority. Third, it offers an interdisciplinary framework for analysing and understanding the phenomenon of crisis more generally.

The guiding point of this volume is that modernity and crises are co-original. As initially pointed by Georg W. F. Hegel and reinforced by scholars as different as Jürgen Habermas, Herbert Marcuse and Reinhart Koselleck, the breakthrough of modernity in the latter half of the eighteenth century also marked the emergence of the crisis phenomenon.¹ Societal crises, as well as narratives and analysis of crises, are, in other words, inherent to the history of modern Europe. This insight has, however, been blended out in mainstream understandings of the current crisis trajectories.² This volume therefore counters the profoundly ahistorical perspectives that dominate contemporary crisis discourses by systematically contextualizing and explaining the dynamics and characteristics of the ongoing crisis within the framework of, and with reference to, previous European crisis experiences. The volume presents a particular take on the crisis phenomenon in Europe, by providing a long-term historical, sociological, as well as a 'conceptual history'-informed take on crises in twentieth-century Europe from the Weimar Republic and the interwar period through the 1970s crisis to the ongoing crisis of the Euro,

the European integration project and European society as such. It provides a historical and conceptual link between the interwar crisis and the crisis of today, while highlighting that the 1970s crisis was, in many ways, a prelude to the ongoing crisis.³ Thus, the volume asks how the crisis experience of the interwar period informs our thinking about crisis today, and, to what extent, the catastrophic consequences which emerged from the breakdown of the Weimar Republic might be repeated. As such, the volume advances a warning from history by highlighting that the chaos of Weimar is not as far away as one might have thought only a few years ago.⁴

At a more concrete level, the central thesis of the volume is that the crises focused upon are interconnected, in so far as many of the issues and conflicts characterizing the previous crises are reemerging in the current crisis. Economic and social turmoil was surely inherent to all the major crises of twentieth and twenty-first century Europe. However, purely economic takes on the crisis phenomenon need to be complemented by a stronger focus on the political and legal preconditions that paved the way for these crises, as well as on the more fundamental erosion or, in some cases, outright collapse of social order which marked large segments of interwar Europe and characterizes crisis-ridden countries such as Greece and Spain today. Against this background, a second thesis of the volume is that the root cause of both the interwar and the current crises was political rather than economic, and that these crises must be understood as crises of public power, order and authority. The essence of public power, as distinct from private power, is that it provides a generalized and legally-constituted framework of collectivity based upon both a formal constitutional setup and a social *praxis* which, through the rule of law, ensures the realization of a fairly unitary set of norms throughout a given society.⁵ A recurrent theme of the volume is that both prior to and during the crisis under scrutiny, such unitary norm-based frameworks were substantially challenged and undermined by political movements opposing the existing normative grid of society. In line with this, the volume illuminates how such ideological contestations tended to gain strength and intensity in times characterized by profound structural transformations of society, causing a discrepancy between the unfolding of social processes and the institutional frameworks that have been established to stabilize such processes normatively.

Focusing on how notions of public order and authority have been severely challenged and, in many instances, undermined, the volume reconstructs how the crises unfolded, how they were experienced, and what kind of responses the specific crises in question provoked. In doing so, the volume draws on the rich 'crises literature' developed mainly within the critical theory tradition to outline a conceptual and sociological framework for understanding what societal crises are. By concrete use of and reference to central scholars associated with critical theory, such as

Franz L. Neumann and Hugo Sinzheimer, the volume seeks to bridge the gap between humanistic, legal and social science approaches to the subject matter. Moreover, at a theoretical and methodological level, the volume combines structural and sociological explanations and approaches with insights from conceptual and intellectual history, drawing also on analytical devices from scholars such as Reinhart Koselleck and Niklas Luhmann. It is well known that both scholars developed their work within different traditions than—and at times in opposition to—critical theory.⁶ Notwithstanding this, there are, arguably, many commonalities in the respective approaches, and they can be fruitfully combined in the analysis of the European crisis. In particular, Koselleck's conceptually-oriented analysis of the emergence of modern political language and its key concepts (such as that of 'crisis') and Luhmann's idea that issues of crisis and societal integration in the modern world must be understood in the light of the functional differentiation of society, seem to be not only compatible with, but also to enrich the analytical ambitions of critical theory, by opening other paths to the study of language, society and politics, as well as the relation between them.

On a more general level, combining insights from critical theory, functionalist sociology and conceptual history, this volume aims to provide a dialectical perspective on the relationship between ideological articulations and the structural transformations unfolding in society. These ideological articulations are considered normative in their core and are observed in both their progressive (e.g., in relation to democracy, human rights and emancipation) as well as reactionary (e.g., antidemocratic and antimodernist) variants. In addition, they are viewed as both reflections and factors of societal change. Against this background, the book provides frameworks for analysing how, in different societal contexts—characterized by specific structural problems and contradictions—ideological articulations influence structural transformations over time and *vice versa*. As will become apparent, these frameworks allow for a combination of descriptive and normative approaches to the subject matter. Also in this sense, the ambition of critical theory becomes visible in so far as critical theory since Immanuel Kant has been based upon the idea that productive articulations of normative endeavours must be done with reference to the structural setup of society, while, at the same time, such articulations possess the potential to alter the structural setup of society over time.⁷

The present volume adds crucial perspectives to the vast amount of books on crises that have appeared in recent years. Most of these books are monodisciplinary and monothematic (e.g., they look exclusively at the financial crisis, the crisis of the public sphere or the crisis of democracy).⁸ In contrast, this volume cuts across different problem constellations and presents a broad range of analyses of how societal crises emerged and evolved in the European context from the interwar period until to-

day from an interdisciplinary perspective. The volume opens with two chapters that develop a conceptual and temporal framework for thinking about societal crisis, identifying what societal crisis are, how they unfold over time and what implications they have for democracy in the present and the future.

David Runciman's central concern is the ability to pin down the time frame of crises: When do they begin and when do they end? Discussing the concept of crisis in relation to that of democracy, he defines a crisis as a situation characterized by fundamental threat and fundamental choice, which implies the need to take fundamental decisions. At the same time, he highlights the difficulty in pinning down crises, asking the question as to whether crises emerge when a fundamental danger occurs or at the moment that fundamental choices have to be made. In a similar vein, he discusses the particular experiential and perspectival dimensions of crises, as well as the issue of ubiquity, arguing that crisis semantics tend to suffer from inflation, in so far as it is invoked time and again, thereby diluting the concept of crisis. This was particularly the case from the 1960s onward, in so far as semantics of 'events' and 'catastrophe' have increasingly lost out and been replaced with crisis semantics. Runciman further discusses this development in relation to an increased acceleration of societal time and a compression of temporal frames of crises, which implies a higher level of contingency and unpredictability of societal developments.

Observing a profound lack of scholarly inquiry into the significance and practice of the concept, Janet Roitman examines the particular stakes of crisis. She does so by reflecting on the status of the concept as a ubiquitous qualifier of contemporary historical conditions. Instead of providing a fixed theory or definition of crisis, she examines the role and function of the term in the construction of narrative forms. How does the term *crisis* serve as a place from which narrative accounting can begin? How does *crisis* serve as a narrative device, which establishes certain events as moments of truth? How is crisis mobilized to engender conditions of action, serving to constitute a particular form of ethics or mode of critique? Probing these questions, Roitman unveils how crisis has come to serve as a non-*locus* which enables claims concerning access to history and knowledge of history. Against this background, she compels us to put less faith in crisis by asking more critically how we produce meaning and history through the concept.

Following the section devoted to conceptual and temporal frameworks for thinking about societal crisis, a section of three chapters focuses on the crisis experience of the interwar period, and on how these experiences were negotiated in intellectual thinking in this period. Focus is, in particular, on how ideologies of antimodernism and liberalism were negotiated and came to challenge democratic forms of public power in

the Weimar Republic, in Eastern and Central Europe, as well as within transnational networks spanning Western Europe and the United States.

John P. McCormick provides a re-evaluation of the Weimar writings of Carl Schmitt and Leo Strauss, specifically, their intellectual efforts to replace, as the ground of political authority, Enlightenment rationality with, respectively, 'political theology' and 'Biblical atheism'. Schmitt and Strauss each insisted that Enlightenment rationality was unravelling into a way of thinking that violently rejected 'form' of any kind, as fixated myopically on human things and lacking any conception of the external constraints that condition the possibilities of philosophy, morality and politics. Consequently, so McCormick argues, they considered Enlightenment reason a threat to 'genuine' expressions of rationality and a dangerous obfuscation of the necessity of political order—of the brute fact that human beings stand in need of being ruled. Finally, McCormick points to—and warns against—the ways in which contemporary enemies of liberal democracy share Schmitt's and Strauss's anxieties over Enlightenment values and likewise seek to develop genuinely authoritarian alternatives to liberal state theory.

In a similar vein, Balázs Trencsényi explores the radicalization of political style in Europe in the interwar period. His focus is on how intellectuals in Eastern and Central Europe launched a new image of modernity and crisis, which emphasized the rupture of development and a liminal period which threatened the community with dissolution, but also carried with it the promise of renovation. While Trencsényi links these discursive features to the broader ideological framework of 'antimodernism' which had a powerful appeal all over Continental Europe throughout this period, he shows how intellectual élites in Eastern and Central Europe constructed a distinct local discourse about the crisis of the Western civilization as a possibility for non-Westerners to redeem a supposedly youthful East from the declining West and alter the perceived hierarchy between the two regions. Finally, Trencsényi reflects on the complex afterlife of the crisis discourses that were launched in interwar Eastern Europe, pointing, among other things, to the recent promise by Viktor Orbán to build an 'illiberal' Hungarian state.

Drawing on perspectives from the interwar period to the current financial crisis, Niklas Olsen illuminates the making of the contemporary consumer figure in twentieth-century Western European political thought. His argues that the meaning, role and status ascribed to the consumer today is, to a great extent, a product of semantic reconstructions of the figure, which was performed by liberal academics and politicians with the aim of reconstructing liberalism in times of crises. His contribution focuses specifically on how, in the 1930s, the British economist William H. Hutt coined the notion of 'consumers' sovereignty' in an attempt to remedy certain malfunctions that he identified in classic liberalism. The result was an updated version of liberalism, based upon con-

sumers' sovereignty and a scheme of government intervention, which aimed to ensure a more equal, just and productive society, and to solve the 'crisis of liberalism'. Moreover, Olsen traces how liberal thinkers since 1945 have advanced a concept of the consumer which disconnected ideals of economic efficiency, utility and growth from those of democracy, equality and moral behaviour. This disconnection, he argues, should be seen as a contributing factor to the still ongoing economic crisis that became visible from 2007 onward.

In the following section, historical sociological and sociology of law approaches are invoked in order to provide structural explanations for the emergences of societal crises. The three contributions in this section focus on the relationship between the political and economic dimensions of society with particular attention being paid to how the failure of stabilising this relationship with the help of legal instruments was a central cause of both the Weimar and the ongoing crisis trajectory.

Chris Thornhill develops the thesis that the central dimension in the construction of nations was the integrative function of political, economic and social rights. Social rights were mainly introduced through corporatist measures based in labour law, which thereby became part of the fundamental inclusionary structure of society. From Thornhill's perspective, the Weimar Republic was a paradigm case of the attempt to establish a unified nation through reliance on rights including social rights. Both the political constitution of the Weimar state and the corporatist economic and social rights based constitution of the economy, however, remained half-evolved and were factually not capable of handling the normative intentions associated with them. The consequence was a move toward 'hyperpoliticization', in which public power and public interests were dismantled and substituted with the advancement of private interests by powerful economic groups. Thornhill characterizes this development as a move from inclusionary to exclusionary corporatism, which he sees as a quite typical example of the problems associated with national inclusion. In contrast to prevailing theories, he does not see Weimar Germany as representing a highly distinctive *Sonderweg* (special path), but rather as a paradigmatic case of the failure of national inclusion strategies.

Departing from Hugo Sinzheimer's seminal Weimar text *The Crisis of Labour Law* (*Die Krisis des Arbeitsrechts*) of 1933, Ruth Dukes picks up the baton from Thornhill by exploring how the notion of conflict has evolved within labour law. In the Weimar context, a highly conflictual relation could be observed between labour law and the private law (*bürgerliches Recht*) framework guiding the wider economy. This conflict was exacerbated by the Great Depression and the policies of the late Weimar Republic, effectively leading to a breakdown in the capacity of labour law to serve as a framework for protective and emancipative measures. This conflict constellation, Dukes argues, has reemerged in recent decades through policies aimed at breaking down the ability of labour organiza-

tions to serve as frameworks for stability and for the protection of employees. Since the heydays of Thatcherism and the subsequent New Labour and Third Way era, the conflictual relationship between capital and labour has been underemphasized. Instead, a 'divide and rule strategy' has been imposed in order to prevent the (re)emergence of a unified representation of labour interests. According to Dukes, this development has greatly increased the vulnerability and sense of insecurity of large segments of the citizenry in the Western world.

Poul F. Kjaer examines the close link between the emergence of societal crises and the evolution of intermediary institutions in their corporatist, neocorporatist and governance variants in the European context. Intermediary institutions, he argues, assume a strategic location in society, in so far as they are central sites of social integration as well as disintegration. The 'turn to corporatism' which unfolded throughout interwar Europe implied a move toward a short-circuiting and dismantling of the legal infrastructure through which the relationship between public power and the rest of society was structured. The result was a process of mutual decay and disintegration of the normative and institutional underpinnings of both the economy and the political system. The neocorporatist reconstitution of society which unfolded at both the national and the transnational level of Western society in the immediate post-WWII era was aimed at rectifying this development. The 'turn to governance' which, as a response to the crises of the 1970s, started to unfold from the late 1970s onward has, however, implied a return to many of the issues known from the interwar period. Also in today's society, Kjaer argues, a (re)privatization of public power contributing to an increased erosion of its integrity can be observed.

The gradual shift from a focus on the crisis of the interwar years to the contemporary crisis in the previous section is reinforced in the next section, which takes issue with the crisis of the rule of law within the EU, its member states and beyond.

Christian Joerges reconstructs the intellectual lineages of the ordoliberalist tradition from Weimar Germany to the Euro crisis. Ordoliberalism became *come il faut* in the post-WWII period where it was regarded as a legal theoretical response to the disaster of Weimar. Today, ordoliberalism is, however, mainly associated with the austerity policy advanced by the German government within the framework of the Euro crises. Joerges, nevertheless, argues that ongoing policies in relation to the euro-crises have little to do with ordoliberalism. The policy response to the Euro crises is, instead, characterized by discretionary and delegatized managerialism. The transnational executive machinery which has been established as a reaction to the Euro crises largely operates outside the realm of the rule of law. It is, according to Joerges, a framework which is devoid of any inherent normative foundation, and, as such, it threatens to

undermine the integrity of the EU legal order and thereby the integration project.

Jan-Werner Müller also illuminates Europe's 'rule of law crisis' within the EU and its member states. Using Hungary as the most striking example, he focuses in particular on the determined destruction of the rule of law advanced by the present and previous governments of member states such as Hungary, Poland and Romania in the past half decade. Müller analyses the reasons and consequences of the particular political choice made by the EU to frame the developments within these countries as a 'rule of law crisis'. He argues that the term *rule of law crisis* seemed to be a pragmatic option for the EU policymakers, but that it has made it difficult for European actors not only to understand the crisis as a serious political conflict, but also to intervene in what is going on. According to Müller, the rule of law approach fails to capture the political essence of the populist movements and governments which aim to undermine core EU values by offering a conflictual story of good versus evil engaged in a final battle. The consequences of the situation might be that the supposed 'rule of law crisis' becomes permanent, so that the EU comes to house a group of countries in which fundamental values are continually violated.

Hauke Brunkhorst follows suit by advancing the thesis that the financial crisis and the interconnected Euro crisis have mutated into a crisis of parliamentary democracy. This is the case within—as well as beyond—the borders of Europe. At the heart of the crises, Brunkhorst observes a conflict between the notion of legal formalism, as advanced by Hans Kelsen and others in the interwar period, and Schmittian legal dynamism which transformed law into a mere façade of power politics. Over the past decades, he argues, legal formalism has lost out both in Europe and throughout the globe, and it has increasingly been replaced by informal practices of decision-making which bypass democratic institutions. In this process, the public sphere has increasingly lost its link to institutionalized democratic processes, and, in the words of Nancy Frazer, it has become a weak public sphere. According to Brunkhorst, a re-animation of democratic politics is what is needed.

In the final section, left- and right-wing political reactions to the ongoing crisis are examined, thereby highlighting the potential consequences and responses which might emerge from it.

William Scheuerman illuminates conceptual features in recent debates about the place of extralegal political action in the context of societal crises. He departs from a distinction between the 'top-down' extralegality of European executive actions during the Euro crisis and the 'bottom-up' call for extralegal action by left-wing political movements in the face of supposedly dire crises. Scheuerman demonstrates how left-wing political movements justify action outside the law and how these justifications often reflect specific theoretical arguments in defence of illegal popular disobedience to government. More specifically, he shows that both the

'top-down' and the 'bottom-up' calls for extralegal action are based upon similar claims about the limits of legality in the face of crisis situations, as well as strikingly parallel models for how political actors should be expected to conduct themselves. However, he also points to key normative differences between executive-level extralegality 'from above' and popular forms of 'extralegal' protest from 'below', suggesting that defenders of executive level extralegality should be expected to face a higher burden of proof than those engaged in civil disobedience from 'below'.

Mikkel Thorup examines crisis perceptions on the contemporary anti-Muslim right. He uncovers the premise of right-wing violent imaginaries by dissecting how themes of crisis, treason, internal enemies, European decline and its culmination in a civil war appear in the writings of contemporary right-wing anti-Muslim writers. He further reflects upon what it means for thinking about crisis, societal decline, culmination, and solution when these themes are framed within a civil war narrative. A central argument of his chapter is that the contemporary anti-Muslim right frames the crisis as a crisis of modernity, which is related to a politicized experience of loss and defeat from the French Revolution onward. They are furthermore informed by the specifically modern idea that it is choice and not destiny that determines the future. Finally, Thorup argues that the crisis discourse on the far right is linked to the broader governmental crisis in contemporary Europe, and that it has the potential to undermine the hitherto dominant ideas of modern Europe as advanced within enlightenment and critical theoretical thinking.

The volume ends with a brief conclusion which sums up the findings and outlines possible pathways for further research and political engagement. Contemporary Europe, it is argued, is at a crossroad, and a fundamental reconstitution of its institutions and normative underpinnings is needed.

NOTES

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1. For a reconstruction of Hegel's take on modernity and crisis, see Jürgen Habermas, *The Philosophical Discourse of Modernity* (Cambridge: Polity Press, [1982] 1990), 23 *et seq.*, and Herbert Marcuse, *Reason and Revolution: Hegel and the Origin of the Theory of Society* (Abingdon: Routledge, [1941] 1986). For more general reflections on the crisis of modernity, see Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: Polity Press [1962] 1989); *idem*, *Legitimation Crisis* (Cambridge: Polity Press, [1973] 1988); and Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA: MIT Press, [1959] 1988).

2. As also pointed out in Hauke Brunkhorst, 'The Return of Crisis', in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, 2011), 133–71.

3. Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso Books, 2014).

4. See, also, the contributions in Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart Publishing, 2003).

5. For different, but related, takes on the constitution of public power, see Hannah Arendt, *On Violence* (New York: Harvest Books, 1970); Jürgen Habermas, 'Hannah Arendt's Communications Concept of Power', *Social Research* 44 (1977): 3–24; Niklas Luhmann, 'Power', in: idem, *Trust and Power* (New York: Wiley, [1975] 1979); idem, *Die Politik der Gesellschaft* (Frankfurt aM: Suhrkamp Verlag, 2008); Franz L. Neumann, 'The Concept of Political Freedom', in: William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley: University of California Press, [1953] 1996), 195–240.

6. See, for example, Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (Oxford: Berghahn Books, 2012); Poul F. Kjaer, 'Systems in Context: On the Outcome of the Habermas/Luhmann-Debate', *Ancilla Iuris* (2006): 66–77.

7. Immanuel Kant, *Critique of the Power of Judgement* (Cambridge: Cambridge University Press, [1790] 2000), Introduction Part II. See, also, Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury Academia, 2014).

8. See, for example, Andrew Gamble, *Crisis without End? The Unravelling of Western Prosperity* (London: Palgrave Macmillan, 2014); Streeck, *Buying Time*; Janet Roitman, *Anti-Crisis* (Durham, NC: Duke University Press, 2013); David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (Princeton, NJ: Princeton University Press, 2013); Phillip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (London: Verso Books, 2013); Costas Lapavistas et al., *Crisis in the Eurozone* (London: Verso Books, 2012); Gerard Dumenil and Dominique Levy, *The Crisis of Neoliberalism* (Cambridge, MA: Harvard University Press, 2011). For a recent volume analysing the current crisis of capitalism from a critical theory perspective, see Heiko Feldner and Fabio Vighi, *Critical Theory and the Crisis of Contemporary Capitalism* (London: Bloomsbury Publishing, 2015).

Part I

Semantics, Notions and Narratives of
Societal Crisis

ONE

What Time Frame Makes Sense for Thinking about Crises?

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There are a number of fundamental difficulties involved in defining the scope of crises. These difficulties derive both from the ambiguity inherent in the term, and also from its current overuse to describe a wide variety of different political, social and cultural phenomena. These factors are related: crisis is a difficult concept to pin down not just in spite of its growing ubiquity as a label for all sorts of different kinds of events, but, in part, *because* of its growing ubiquity. In particular, there is a problem of deciding what marks the start of a crisis and what marks the end of one: in other words, the question of time frames. This can be seen in relation to the recent financial crisis (the one that ostensibly started in 2008, though there are good reasons to dispute that, in many senses, it started long before). We are now—eight years on—living in an environment that is routinely described as *postcrisis*, yet also as containing the ongoing legacy of the crisis, including the possibility of further iterations of the crisis. If nothing else, this is evidence of how hard it is to get time frames fixed when discussing crises: Is it really over or not? However, this is not just a recent problem. It derives from the historical experience of crisis in both Europe and the wider world across the twentieth century.

This analysis has something in common with Reinhart Koselleck's classic account of the concept of crisis, its historical development and its resulting ambiguities. 'The concept remains as multi-layered and ambiguous as the emotions attached to it,' Koselleck wrote.¹ He argues that the fundamental ambiguity lies between the idea of crisis as an acute moment of choice or bifurcation of possible futures (as in 'the crisis of the

disease'), and crisis as an ongoing state of uncertainty or potential peril (as in 'the crisis of Western civilization'). In one case, crisis has a focal point in time; in the other, it is expansive across time and can even be annexed to the notion of the end of times. Koselleck identifies three primary sources for the modern conception of crisis: it comes from medicine, where the emphasis is on crisis as a turning point; from economics, where crisis can mean both an acute breakdown and also an ongoing malfunction of the system; and theology, where crisis tends to be deployed in eschatological terms and contains within it the notion of immanent or even permanent transfiguration. Together, these different sources feed into contemporary political uses of the term, which often alternate between or combine various ideas of crises as both short- and long-term phenomena, raising immediate, as well as enduring, challenges. Crisis, Koselleck writes, 'can be conceptualized as both structurally recurring and utterly unique'.²

My account here shares this focus on the fundamental temporal tension in the idea of crisis. But I develop my argument beyond Koselleck in a number of ways. First, he was interested in how the concept evolved over the modern period up to the early- to mid-twentieth century. I am interested in how it has evolved into the twenty-first century. This means that where the primary political reference point of crisis for Koselleck is revolution, I am interested in crisis in democratic settings where revolution is a remote possibility: the recent crises of the established Western democracies have not carried with them a serious prospect of revolutionary upheaval in the traditional sense. So, I will be writing about crisis against a backdrop of democratic stability, which poses a particular set of challenges. Second, Koselleck's primary interest is in the contrast between the 'subjective' and 'objective' aspects of the idea of crisis, and between its cosmic and more narrowly secular connotations. I am interested more specifically in how crises pattern themselves in our discourse and our imaginations: their beginnings, their endings and their repetitions. Koselleck does not much discuss the problem of framing in these terms. Third, I am interested in how different temporal conceptions of crisis react on each other: that is, in how long-term perspectives shape our conception of the short term, and *vice versa*. My argument is that a distinctive feature of the contemporary understanding of crisis is the interplay and mismatch between different time frames, which creates particular problems for thinking about our long-term future.

I want to begin with three background difficulties that I take to lie behind any attempt to fix the time frame of a crisis. The first is *definitional*. It is possible to come up with a broad, catchall definition of what we mean by the word *crisis* in a way that accommodates its inherent ambiguity. A crisis might be defined as a situation characterized both by fundamental threat and fundamental choice. Each needs to be present for it to count as a crisis. So threat without choice—for instance, in the case of an

asteroid on a fatal collision course with earth—does not qualify as a crisis, since the scale of the threat precludes meaningful choice (though a choice about how to respond in such fateful circumstances—preparation, resignation, liberation?—could still constitute a crisis situation). Choice without threat is also insufficient—a decision about what to do with an unexpected financial windfall is not in itself a crisis, unless the difficulty of making that decision produces a sense of threat (option paralysis leading to lost opportunities, for instance). Choice plus threat are necessary, and both have to be serious. What is meant by serious? It is hard to be precise, but a serious choice does not have to rule out the possibility of inaction. Some crises may force a choice between doing something and doing nothing—as Thomas Paine wrote of the revolutionary crisis of the early 1790s, ‘there remained no choice but to act with determined vigor or not to act at all’.³ But inaction needs to be a decision: in situations of crisis, mindless drift no longer remains an option.

A definition like this accomplishes something, but it does not take us very far. It leaves unresolved the question of whether crisis is to be identified with the acute moment of threat/danger/choice or with a more entrenched or intractable situation. It could be either and it could be both. Equally, this definition does not help with the knowing of when to mark the beginning or the end of crises. Does the crisis start with the danger or with the choice? Does it end when the danger has passed or when the choice has been made? Choice and threat are unlikely to coincide: threat is likely to predate choice, and also sometimes to outlast it. But it does not follow that choice represents the acute moment of crisis and threat, merely the ongoing condition: it could be the other way round. Take the financial crisis of 2008 and its aftermath: it is arguable that the moments of threat have been the most acute—particularly the week following the collapse of Lehman Brothers when the entire world economy was at risk—whereas the choices have been more enduring (in the sense that they keep needing to be made, particularly by policymakers maintaining a regime of cheap money to prop up deflating economies). Crises are also different from wars in this respect, though wars produce crises and are often identified with them. Wars have distinct beginnings and endings. Crises do not. For instance, WWI was undoubtedly an epic crisis, made up of a whole series of interlocking and overlapping crises. But it would be a mistake to identify the crisis of the war with the duration of the war itself. The crisis—depending on how it was experienced and from what perspective—was either longer or shorter than that; or both.

This leads to the second background difficulty of fixing the time frame of a crisis. I will call this problem *experiential*: the time frame of any crisis may look very different, depending on who is experiencing it. The crisis that led to WWI—the *July crisis* as it is often called—started earlier, as experienced in Belgrade or Berlin than in London or Washington. Some people are closer to the crisis than others, which means it strikes them

quicker. In relation to the recent financial crisis, it could be argued that policymakers experienced it sooner than the public, but also got past it sooner. For those close to power, the focal point of the crisis might well have been late 2008, when the threat, as they perceived it, was most acute; or, in the case of the Euro crisis, late 2011/early 2012, as government bond prices most dramatically diverged. But, for the publics of Western democracies, the crisis may have been experienced very differently. Most were unaware of it in 2008 and only discovered it at one remove, since its most serious effects were unfelt away from centres of power (when the British Chancellor Alistair Darling, in a newspaper interview in the summer of 2008, described the economic situation as 'the worst economic crisis Britain has faced for 60 years', this came as news to many people, who had not recognised it; over time, however, they saw that Darling was right).⁴ In many ways, this situation has now been reversed. A large number of ordinary citizens are still conscious of an ongoing economic crisis (the squeeze on wages that the British Labour Party has tried to name 'the cost-of-living crisis'), while their politicians are telling them that the crisis is passed.

The third background problem here I will call *perspectival*, which is related to the problem of divergent experiences of crisis, but is distinct because it includes the perspectives of people who have not experienced the crisis at all. The time frame for thinking about crises may be very different for those who are experiencing the crisis firsthand compared to those who are looking at the crisis from the outside. In blunt terms, the further one is from a crisis the shorter it is likely to appear, because the absence of immediate experience makes it tempting to mark the beginning and end of the crisis by using arbitrary or fixed moments in time, whereas experience teaches that crises cannot be measured in this way. So, as seen from the outside, crises are often identified with wars or other time-limited events, and demarcated by declarations of war and by peace treaties. Those closer to these events know that the crisis does not necessarily end when the treaty is signed. Distance here can be understood in simple geographical terms: the further away, the shorter the crisis looks. So, for instance, the recent crisis in Ukraine, however it ostensibly ends, is likely to be perceived as longer-lasting for those in or near Ukraine than for those much farther removed. However, there is no equivalent correlation between magnitude and distance when perspective is viewed in temporal terms. We stand at varying distances from past crises. But how near they appear to us is not simply a function of how long ago they happened. In some ways, the economic crises of the 1930s appeared more distant as seen from the 1960s than they do today, because in the 1960s it was possible to believe that the conditions that gave rise to them were past, whereas today we are more aware of how those conditions can persist or recur. Of course, in experiential terms, the 1960s were closer to the 1930s than we are today because there were many people alive then

with personal memories of the Great Depression, whereas there are relatively few such people alive now. This is why the experiential and the perspectival need to be distinguished.

These difficulties—definitional, experiential and perspectival—lie behind any attempt to pin down the time frame for thinking about crises. But I want to identify three further problems that seem particularly pertinent when considering the idea of crisis in a contemporary context. They specifically concern the question of how we experience crises at their onset, and how hard it is to know whether to take them seriously—indeed, how hard it is to know whether the onset of the crisis is real or not. I will identify these difficulties as the problems of ubiquity, unpredictability and (democratic) durability.

Ubiquity: one fundamental difficulty with pinning down the concept of crisis in contemporary discourse is its increasing overuse to describe a very wide range of events and circumstances, many of which turn out in retrospect not to look much like crises at all. There is a tendency to call any political or economic disturbance or upheaval a crisis, ranging from elections to scandals to fleeting economic dislocations.⁵ When a politician resigns, it is a crisis; when the stock market falls sharply, it is a crisis; when international tensions rise, it is a crisis. There is, in other words, an inflationary effect in the ubiquity of the term: by being applied to so much, it ends up being worth relatively little. In some respects, this is nothing new. Alexis de Tocqueville described, and mocked, the tendency to treat every election as a crisis in a chapter of *Democracy in America*, which he titled, with deliberate irony, 'The Crisis of the Election'. Tocqueville noted the ferment that accompanied all American elections—the sense that everything was at stake and the wrong choice would plunge the country into ruin—and he also noted how quickly the ferment passed.⁶ The choice, once made, soon came to appear a superficial one after the election was over, only for the charade to be repeated next time around. Tocqueville knew what was primarily responsible for this inflation of language: newspapers. No newspaper ever willingly forgoes the opportunity to turn a drama into a crisis. Koselleck describes similar effects at work in Germany in the later nineteenth century, when crisis became what he calls a 'catchword' for any political disturbance and 'the frequent changes of chancellors after Bismarck's fall rapidly led to an inflationary use of the term "Chancellor crisis"'. (Koselleck also remarks that contemporaries noticed this inflationary effect and diagnosed a longer-standing institutional crisis behind it: a crisis of political superficiality.)⁷

These inflationary effects have been greatly accelerated during the past century, when uses of the term *crisis* have become ever more frequent and more widespread, particularly since the 1960s. From that point on, alternative vocabularies for talking about political change start to go into abeyance. One example is the terminology of *events* (*événements*) to

describe dramatic or unexpected political happenings. This terminology coexisted with the language of crisis for much of the nineteenth and a large part of the twentieth century (as, indeed, it had been the predominant term during the eighteenth century). It constituted a rival Franco-phone discourse to compete with an Anglophone or Germanic one, and it carried specific Enlightenment connotations of disruption to established patterns without any commitment to inflated or eschatological significance. Its decline coincides with the decline of French as a universal language of politics and political science. Its last 'hurrah' was probably the worldwide use of the term *les événements* to describe the student uprisings of 1968. No one (outside of France) much uses the language of 'events' to describe current uprisings or conflicts. It is not 'the Ukrainian events'. It is 'the Ukraine crisis'.

A similar story can be told at the other end of the scale about the relative decline of the term *catastrophe* to describe what we now tend to call *crises*. During the eighteenth and nineteenth centuries, *catastrophe* retained a meaning close to *crisis* to denote a break-point in historical evolution accompanied by the serious threat of disaster. Revolutions, for instance, were routinely described as *catastrophes* as well as *crises*. During the twentieth century, its use evolved to offer a contrast with the temporal dimension of crisis, as in this line from Herbert Marcuse: 'The actual situation of capitalism is characterized not only by an economic or political crisis, but by a catastrophe of the human essence'.⁸ Now *catastrophe* tends to be limited to the description either of personal disaster or of epochal or environmental calamity.

The result of the inflationary use of the term *crisis* is to add an extra element of uncertainty to the events that it has come to describe. At almost any given moment in twentieth and early twenty-first century democratic discourse, it is possible to find talk of crisis, including talk of a 'crisis of democracy'. This is true of periods that we now associate with relative stability (at least as compared to what was to come after them): the 1920s, the 1950s and the 1980s. In other words, if you time-slice a functioning democracy at a particular point, there will be people running around saying the sky is falling. Democratic freedoms, as Tocqueville noticed, include the freedom to panic needlessly. Most of these crises, in retrospect, no longer look like crises to us; they look like examples of 'crying wolf'.

However, this cannot be the whole story, since not all crisis talk turns out to be inflated. Significant numbers of crises prove to be genuine, not only as seen at the time but in retrospect: that is, both the threat and the choice turn out to be real. This is true of the crises of the 1930s, the 1970s and the 2000s. There truly are some wolves out there. It is usually not difficult to know that a crisis is serious once it is properly underway—the financial crisis of 2008 was unambiguously a real crisis within days of the Lehman bankruptcy—just as it is not difficult to recognise a genuine

Broadway hit once it is up and running. The real difficulty is knowing in advance where the significant crises are likely to come from. This is the problem of *unpredictability*. It is very hard to filter from within the surfeit of crisis talk the specific crisis talk that deserves our attention. The 2008 crisis illustrates this. There was—as there always is—quite a lot of crisis talk in the run up to 2008, focusing on the perceived shortcomings of democracy, its failures in the aftermath of the Iraq war, the challenge of falling voter turnout and growing disengagement with politics: all of which might be summed up as ‘crisis of legitimacy’ talk. But the crisis that broke in 2008 turned out to be of a different kind altogether—it was a crisis not of legitimacy but of liquidity. This crisis has subsequently exacerbated many of the problems that were identified before 2008—the perceived crisis of legitimacy has not gone away, and, if anything, it has worsened as the economic consequences of the 2008 crisis have started to bite politically. However, the financial crisis of 2008 was one that almost no one saw coming. In this respect, the surfeit of crisis talk is often a distraction when it comes to identifying which crises are real. This is why, despite always being on the lookout for crises, we are still so often surprised by them.

There is another difficulty: once a crisis is underway, what most often becomes clear is the nature of the threat; what can remain unpredictable is the nature of the choice. In particular, what remains hard to fathom even as a crisis is unfolding is when the choice is being made. During major crises, forks in the road are sometimes only apparent long after they have been passed, which does not make them illusory but does make them hard to judge in real time. Take the example of the very real political and economic crises that marked the 1970s and are often amalgamated into a single, ongoing, global crisis covering almost the entire decade. The peak of the crisis, as seen at the time, lasted from 1973 to 1975, a period that covers the Oil Shock, Watergate, the onset of the Indian emergency, stagflation, industrial unrest and widespread political scandals. The decisive shift looked like it only occurred at the end of the decade, with the election first of Margaret Thatcher, then of Ronald Reagan, along with the Iranian Revolution, the elevation of Pope John Paul II and other conspicuous turning points.⁹ But, in retrospect, the fork in the road was from 1976 to 1978, when centre-left governments in Britain and the United States moved toward new forms of fiscal discipline and distanced themselves from labour movements.¹⁰ It is a historically-complex question to determine how apparent this was at the time to politicians and policy-makers who were, for the most part, improvising and muddling through. But it is apparent with the benefit of historical perspective.

Finally, there is the fact of democratic *durability*. The knowledge now exists at this stage in the historical development of modern democracy that established democracies (as opposed to new or fragile ones) can survive even the worst of crises. There *are* wolves out there; yet notwith-

standing our democratic habit of ‘crying wolf’, the real wolves get seen off, too. Western democracy survived the 1930s and the 1970s and the 2000s. It has, thus far, survived everything that has been thrown at it. Inevitably, this serves to diminish over time the sense of existential threat posed by crises that get dressed up as existential threats. What can also get diminished over time is the sense of fundamental choice. One reason that established democracies have survived the past hundred years is that they have proved their adaptability, which includes an ability to adapt toward arbitrary forms of rule in a crisis, and then to adapt back afterward. This is especially notable during wartime. One of the crucial lessons of the First World War was that democracies can experiment with autocracy in ways that autocracies cannot experiment with democracy.¹¹ This lesson has been repeated over the past century: in a crisis, democracies are simply more flexible than rival systems of governments (in large part, because their leaders are better able to face up to their mistakes, albeit not always in public). Democratic adaptability blurs the idea of fundamental choice because it is never clear how fundamental the choice has been: Was it simply temporary improvisation or was it evidence of a structural shift? This is further complicated by the fact that (as illustrated by the example of the 1970s) structural shifts often come in the form of temporary improvisations.

All these features of democratic life—the ubiquity of crisis talk, the unpredictability of crisis situations, the confusing quality of democratic improvisation—were on display before, during and after the crisis of 2008. We did not move from an absence-of-crisis talk before 2008 to a surfeit of crisis talk once it was underway: there was plenty of crisis talk before 2008, but we were invariably worrying about the wrong sort of crisis. Democratic adaptability kicked in almost immediately, with improvised and frequently autocratic solutions (subsequently rubber-stamped by *ad hoc* democratic procedures), which succeeded in rescuing the sinking ship of the financial sector. The notion of fundamental choice was hard to grasp, because, although the entire crisis was dressed up as an existential one (Nicolas Sarkozy warned at the height of the Eurozone crisis in 2012 that the continent was on the brink of returning to the dark days of the 1930s), the existential moments of choice never quite came into view.¹² As a result, the crisis has both been resolved in a piecemeal fashion and yet remains *unresolved* because of the piecemeal nature of the solution. It is for now unclear whether a structural shift in the organization of democratic capitalism is being masked by political improvisation or being avoided by means of it.

It is possible to posit upon the basis of this analysis three types of questions that arise in crisis situations. First, how serious is it? Second, how are we going to get out of it? Third, is it part of a pattern? They correspond to the short-, the medium- and the long-term perspectives on crisis. At any given moment, we want to know whether we should take

crisis talk seriously. Once enough time has passed to establish that the crisis is serious, we want to know what to do about it. Once we have enough distance to compare the crisis to past crises, we want to know whether this one is likely to be any different. Another way to put this is to say that the three time frames treat past crises in three different ways: from a time-slice perspective, past crises are an irrelevance since all we can hear is the noise of now; from a comparative perspective, past crises are a useful resource because they can provide pointers toward potential solutions; from a cyclical perspective, past crises are a reassurance and an invitation to complacency because they suggest nothing is as bad as it seems. Day to day, the experience of the 1930s had little impact on the panicky immediate responses to 2008; month to month, the evidence of what happened in the 1930s helped policymakers avoid some of the worst mistakes of their predecessors; decade to decade, the fact that democracy survived the 1930s makes it easier to believe that democracy can survive anything, which renders structural change more difficult because the incentives are muted.

This analysis is deliberately schematic—the reality is clearly more complex and nuanced than this—but it does allow for one important conclusion to be drawn about democratic crises. These different ways of viewing crisis do not merely coexist in a given crisis situation; they go together. Indeed, they feed off each other. In other words, they are not rival perspectives, but mutually-reinforcing perspectives. Most straightforwardly, ubiquity is related to unpredictability: the noise of crisis talk makes it harder to spot a real crisis and to register its shape as its unfolding (the recognition that the crisis is real does not stop the crisis talk; if anything, it accelerates it). But, perhaps more significantly, both the ubiquity and the unpredictability of democratic crises connect to the fact of democratic durability. There are two aspects to this. First, the surfeit of crisis noise in democracies is one way of avoiding the buildup of pressure points in the system: it is a way of letting off steam. For instance, there was a striking contrast in the response to the overlapping crises of the 1970s between the democratic and nondemocratic parts of Europe. On the democratic side, crises were talked up, often exaggerated and occasionally treated as terminal; on the nondemocratic side, talk of crisis was suppressed. Yet it was in the places where the crisis was overplayed that the system survived; where it was underplayed, the system eventually collapsed.¹³ Second, the distracted quality of the democratic response to crisis goes along with the adaptability of democratic systems in general, since the lack of a focal point for democratic crises is consistent with the experimental quality of democratic life and its ongoing restlessness. The historical evidence of democracy in crisis suggests that the most acute moments of danger are diluted by the open-endedness of democratic politics: there is always something else to worry about. Democratic publics are often jittery and impatient; democratic institutions are subject to

multiple, overlapping sources of authority; taken together, these dispersals of concentrated political attention mean that crises have difficulty taking hold of the entire system. Democracies do not simply make mountains out of molehills; they also make molehills out of mountains.

This was one of Tocqueville's fundamental insights into the character of a successful democracy: the short-termism of democratic politics creates long-term advantages because it means that no crisis is ever allowed to reach its moment of truth (and, therefore, its moment of ultimate danger). Attention to the immediate problem at hand helps disaggregate an existential crisis into a series of more manageable problems. The worst-case scenarios are forestalled by never being encountered in full. However, this aspect of democracy also has its own serious disadvantages. The first is that short-term time horizons and improvised responses mean that the resolutions of democratic crises are themselves fragile and liable to fall apart. The same forces that serve to break up the crisis—distraction, restlessness, improvisation—also serve to break up the solutions. Second, once the long-term advantage of short-termism becomes apparent—that is, once the durability of democracy reveals itself over time—it can also become self-defeating. As I said earlier, the reassurance of the long-term story of modern democracy can generate its own form of complacency: the lesson that nothing is as bad as it seems, or that no crisis is as big as it looks, will eventually get in the way of the short-term jitteriness on which it depends. Modern democracies are capable of panic and smugness at the same time. The short-termism of democratic politics produces, over time, a sense of its own invulnerability. That was the essence of Tocqueville's diagnosis of American democracy and its inherent flaw.

The crisis of 2008 and beyond conforms to this pattern as well. The adaptability and flexibility that got us through the worst of the crisis also got in the way of longer-lasting solutions. Part of the reason that the crisis is still with us is that democratic experience prevented it from getting bad enough to trigger structural change. The lingering sense of complacency emanating from the crisis is the product of a pattern in which the worst is predicted but never arrives. Yet it is possible that the repetition of this pattern will eventually prove its own undoing, since there is always a risk that the worst has merely been delayed, rather than prevented. It is certainly possible that the worst of the crisis that began in 2008 is yet to come; or perhaps that some new, entirely unexpected crisis will arrive that was unanticipated precisely because the temporising solutions to the crisis of 2008 got in the way of any longer-term perspective. The way to sum up these difficulties is to say that a short-term perspective is not inevitably connected to the longer-term advantages of democracy. It may be that a longer-term perspective is required to rescue us from an over-dependence on short-term adaptability. However, in twenty-first century democracies that longer-term perspective is increasingly hard to achieve.

By way of conclusion, I want to look at ways in which the short- and long-term perspectives on crisis in democratic societies might be at odds, rather than in alliance. If this is true, then there are reasons for thinking that the pattern of crisis—threat, adaptation, recovery, forgetfulness—that we have seen over the past hundred years is not going to last much longer.

One kind of divergence between time frames has become clear in the aftermath of the 2008 crisis: the speed of the response relative to the slowness of the resolution. It is striking how fast politicians and policy-makers had to react in the heat of the crisis. Often, it was a question of hours, rather than days or weeks, for the key decisions to be made.¹⁴ This stands in marked contrast to the length of time it has taken for the effects of these decisions to play themselves through. Many Western economies are still stuck in conditions of austerity—encompassing a squeeze both on wages and on welfare—that was, in part, a consequence of the rapid-fire response to the immediate threat, with governments taking on large obligations that then require extended periods of retrenchment to unwind. There is, of course, considerable political and economic disagreement about the extent of the constraint under which Western politicians are operating. Nonetheless, there remains a striking mismatch between the acuteness of the threat that the crisis posed and the drawn out nature of the choices that have been imposed as a result. This goes back to the point that I made earlier about differing experiences and perspectives of crisis: quick choices and extended commitments are an uneasy mix of time frames.

This mismatch has some potentially deleterious consequences for democracy. One is the squeezing out of electoral time frames. Crises have always posed a challenge for electoral democracy, in that they do not operate to the rhythms of the electoral cycle. Sometimes, elections come too soon, making executive action difficult; sometimes, they come too late, making popular endorsement of emergency measures elusive. The 2008 crisis in the US displayed aspects of both sides of the problem—the general election barely weeks into the crisis constrained the freedom of manoeuvre of elected representatives (though not of the incumbent president, George W. Bush, who had the advantage of not being up for re-election); four years was then a long time to wait for the popular endorsement of Barack Obama's decisions in the early days of his presidency. (In contrast, the electoral cycle in the US worked against the crisis that followed the crash of 1929 in a different way, because it was four years until the public's rejection of Herbert Hoover's response could be given full expression.) However, there is a wider sense in which the crisis of the past few years has significantly exacerbated this problem: politicians who announce that they have only hours to save the banking sector/the Euro/the economy, yet require decades to restore them to health, leave public opinion and electoral democracy looking squeezed.

The interconnectedness of global politics in the twenty-first century puts a premium on the speed of response to any crisis and also on the complexity of any possible solution. This creates a further mismatch between the freedom of manoeuvre demanded by elected politicians and the restraint that they require of their voting publics. The ever-greater imperative for delegation of authority in an emergency—much of which then passes out of the hands of elected representatives and into the hands of unelected central bankers and other officials—fuels popular mistrust of democratic politics and the rise of rejectionist or obstructive populist alternatives. We see this at work in Europe today. It is a chicken-and-egg situation: crisis produces a disconnect with the time frames of electoral politics; this disconnect generates new electoral alternatives that feed off the discontent; their presence makes it harder for politicians to secure the authority to act, which places a yet greater premium on emergency executive action, so fuelling further mistrust. It is a very difficult cycle to break. Wishing for the crisis to get worse—that is, bad enough to realign the mismatched expectations of politicians and the voting public—in order to get better is playing with fire.

A separate problem of mismatched time frames relates to the time-lag effects of certain kinds of threats that we face in the twenty-first century. The pattern of the past century that shows the timeliness of democratic adaptation to crisis situations—timely in the sense that adaptation tends to take place just in time, when other alternatives have been exhausted—depends on the capacity of certain crises to cut through the noise of crisis talk, producing a sense of perspective. Once it becomes clear that a crisis is sufficiently serious—as is the case in wartime or under conditions of widespread economic failure—democracies are good at making the necessary adjustments. But this depends on the experience of crisis being both accessible and communicable. It is not clear that this pattern maps onto the threat posed by climate change and other environmental challenges. There, it seems likely that some action will have to preempt any widespread experience of the situation as a crisis. If we wait until the situation is bad enough to be seen as a crisis, it may be too late. The twentieth-century pattern of short-term adjustments producing long-term durability will not work if we need to make our short-term adjustments in the light of an anticipated long-term threat. Faith in democratic adaptability to meet the challenge of climate change—particularly the assumption that democratic societies always adapt when they need to, but not before—may, therefore, be a big mistake. This faith is part of the narrative of growing complacency that I identified as one possible consequence of the knowledge that we now have of democratic durability. The knowledge that Western democracies have come to possess that they can survive whatever the world throws at them could yet prove their fatal flaw.

Finally, there is the challenge of the new information technology. One striking feature of the past thirty years has been that the transformative effects of new forms of communication on society and the economy have not been matched by similarly dramatic changes in how we do politics. There is a mismatch between the pace of technological change relative to the pace of political change, set against a backdrop of democratic stability. Recent crises of politics, such as the Eurozone crisis, have had a technological dimension but have not had an explicit connection with the most dramatic ways in which our lives have been altered over the same period (social networks, for instance, have played relatively little role in crisis politics). In other words, we have had a revolution but it has not been a political one. The continuing impact of the new information technology therefore stands at one remove from the cyclical upheavals of intermittent crises.

So far, the information technology revolution has produced either political scandals—often caused by the failure of politicians to understand the new forms of scrutiny to which they are subject—or structural shifts that have taken place beneath the radar of crisis politics. The revelations of Edward Snowden are symptomatic of this: the event itself was a scandal but what it revealed was a barely noticed move to forms of surveillance that pose a fundamental threat to some of the basic categories of democratic politics, including privacy and personal identity. What we have not had so far are crises of the new technology. Indeed, it is hard to imagine what such crises might entail. Technological failure—the threat of systemic collapse—would be potentially catastrophic, but also beyond the adaptive capacity of democratic systems of government. The sheer speed of the new technology—high-frequency trading being a conspicuous current example—tends to defy democratic understanding. Yet, in the absence of a crisis of the new technology, it is hard to see how political change will be brought into alignment with its transformative effects. The time frames of technological change and political response are fundamentally out of kilter. The crises that are yet to come will not necessarily address this problem; they may make it worse.

One final remark: all time frames are relative. In this chapter, I have talked about long-term perspectives to denote insights drawn from the past two centuries of democratic politics. But, in broader historical terms—never mind in cosmological terms—two hundred years is the short run. The historical experience of democracy may be far too brief to draw meaningful long-term lessons. It may also be about to come to an end.¹⁵ The language of crisis does not seem sufficient to capture this kind of long-term thinking. For that, only the language of catastrophe seems appropriate.

NOTES

1. Reinhart Koselleck and Michaela W. Richter, 'Crisis', *Journal of the History of Ideas* 67 (2006): 358.
2. *Ibid.*, 374.
3. Quoted in *ibid.*, 375.
4. See <http://www.theguardian.com/politics/2008/aug/30/alistairdarling.economy>.
5. See David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (Princeton, NJ: Princeton University Press, 2013), 179–80.
6. See Alexis de Tocqueville, *Democracy in America*, eds. Harvey C. Mansfield and Debra Winthrop (Chicago: University of Chicago Press, 2000), 127–28.
7. Koselleck and Richter, 'Crisis', 383–84.
8. Herbert Marcuse, *Studies in Critical Philosophy* (London: New Left Books, 1972), 29.
9. See Christian Caryl, *Strange Rebels: 1979 and the Birth of the 21st Century* (New York: Basic Books, 2013).
10. See Jacob Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (New York: Simon & Schuster, 2011).
11. See Runciman, *The Confidence Trap*, 55–57.
12. See David Runciman, 'Will We Be Alright in the End?' *London Review of Books* 34 (2012): 3–5.
13. See Stephen Kotkin, 'The Kiss of Debt: The East Bloc Goes Borrowing', in Niall Ferguson, Charles S. Maier, Erez Manela and Daniel J. Sargent, *The Shock of the Global: The 1970s in Perspective* (Cambridge MA: Harvard University Press, 2011), 80–93.
14. See, for instance, Alistair Darling, *Back from the Brink: 1000 Days in No. 11* (London: Atlantic Books, 2012), and Henry M. Paulson, *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System* (London: Business Plus, 2010).
15. See Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (London: Harvill Secker, 2014).

TWO

The Stakes of Crisis

Janet Roitman

WHAT IS AT STAKE?

On 20 January 2009, upon having been sworn in as the forty-fourth President of the United States, Barack Obama stood on the Washington Mall and proclaimed, 'We are in the midst of crisis'. Obama's claim to crisis characterized a moment in history, so as to mark off a new age, or a 'journey'. This journey is historical in so far as it pertains to an economic and political conjuncture. And yet, after giving an inventory of the historical facts of crisis—homes lost, jobs shed, businesses shuttered—Obama added a qualifier: 'These are the indicators of crisis,'¹ he said, 'subject to data and statistics. Less measurable but no less profound is a sapping of confidence across our land—a nagging fear that America's decline is inevitable, and that the next generation must lower its sights.' He then concluded: 'This is the source of our confidence—the knowledge that God calls upon us to shape an uncertain destiny'.

Such knowledge in the face of uncertainty implies that the historical crisis entails, or perhaps constitutes, a transhistorical journey, being, as he insisted in his closing words, a matter of hope and grace:

With hope and virtue, let us brave once more the icy currents and endure what storms may come. Let it be said by our children's children that, when we were tested, we refused to let this journey end, that we did not turn our back, nor did we falter; and with eyes fixed on the horizon and God's grace upon us, we carried forth that great gift of freedom and delivered it safely to future generations.

Crisis is a historical event as much as it is an enduring condition of life and even the grounds for a transcendent human condition.

Obama sought to convey to the American public that the crisis could not be reduced to an ensemble of socioeconomic indicators because these conditions of life entail an *experience* of crisis. His secular narrative of human history is conjugated with a Christian narrative of witnessing. And yet it echoes secular accounts in the social sciences that attempt to relate the ways in which history can be characterised as crisis and the ways that social life can be said to be 'in crisis'. But the question arises: *If crisis designates something more than a historical conjuncture, what is the status of this term?* How did crisis, once a signifier for a critical, decisive moment, come to be construed as a protracted historical and experiential condition? The very idea of crisis as a condition suggests an ongoing state of affairs. But can one speak of a state of 'enduring crisis'? Is this not an oxymoron?

This chapter is a reflection on the status of the term *crisis* as the most common and most pervasive qualifier of contemporary historical conditions, and even of 'history' itself.² However, in what follows, I am not concerned to theorise the term *crisis* or to produce a working definition of it. Rather than essentialize it so as to make better use of it, I seek to understand the kinds of work that the term *crisis* is or is not doing in the construction of narrative forms. Therefore, I am not concerned to show how contemporary uses of the term are wrong and hence argue for a true, or more correct meaning and usage. As will be made clear below, crisis serves as the noun formation of contemporary historical narrative; it is a non-*locus* from which to claim access to history and knowledge of history.

For clarification, I turn to the late German historian Reinhardt Koselleck, author of perhaps the only conceptual history of crisis, which thus serves as the authoritative historiography.³ Koselleck provides one illustration of the emergence of 'history' as a temporal category. He maintains that, by the end of the eighteenth century, crisis is the basis for the claim that one can judge history by means of a diagnosis of time. This claim and this judgement entail a specific historical consciousness, which posits history as a temporality upon which one can act. As I will clarify below, and following from what Koselleck deems the modern practice of temporalized concepts, in the social sciences, crisis is conceived as a historical concept: it is taken to be both a particular entry point into history (a means to know what phenomena are truly 'historical') and as a means to reveal historical truth (as a turning point or epistemological *impasse*). In other words, in the social sciences, *when history is taken to be immanent to social relations, crisis serves as the term that enables the very elaboration of what we call history.*

It is important to note that I take Koselleck's conceptual history of crisis to be indicative of *the practice of the concept of crisis*. His account of

how crisis achieves status as a historico-philosophical concept illustrates the practice of the premise of crisis, or how it serves a set of interlocking determinations: what counts as an event, the status of an event, the qualification of history itself, and the basis of narration. I therefore refer to Koselleck's conceptual history on two registers: as the orthodox historiography of the term, and as an account that itself partakes of a conventional practice of historiography. This conventional practice of historiography presupposes criteria for what counts as an event and premises as to what can be narrated—or the means to distinguish between 'a properly historical account of reality and a nonhistorical or ahistorical or antihistorical account'.⁴ My point is not that crisis is false or merely a constructed basis for narration; my aim is to raise questions about the status of the concept of crisis as a founding term for the elaboration of 'history' per se—what is posited as the ultimate *locus* of significance.

In its practice, as we learn from Koselleck, crisis is figured as judgement: judging time in terms of analogous intervals, and judging history in terms of its significance. One can then ask, inspired by Koselleck and yet putting the question to him as well: What is the burden of proof for such judgements? By way of response, I consider how crisis evokes a moral demand for a difference between the past and the future, such that the very apprehension of history is defined by the negative occupation of an immanent world: What went wrong? Crisis is at the basis of social and critical theory in so far as it signifies the dissonance between morality and progress, knowledge and human interests, or the limits of intelligibility: *critique* and *crisis* are cognate terms. Crisis thus serves the practice of unveiling latencies; it is a distinction that transcends oppositions and dichotomies. In this sense, there is not 'crisis' and 'noncrisis', which can be observed empirically; rather, crisis is a logical observation that generates meaning in a self-referential system, or a non-*locus* from which to signify contingency and paradox.

Ultimately, I invite the reader to put less faith in crisis, which means asking what is at stake with crisis in and of itself. *Crisis* is a term that is bound up in the predicament of signifying human history, typically serving as a transcendental placeholder in ostensible solutions to that problem. It is a primary enabling blind spot for the production of knowledge. Making this blind spot visible means asking questions about how we produce significance for ourselves. At the least, it means asking how we produce 'history'. At most, it means asking how we might construct accounts without discerning historical significance in terms of ethical failure. An answer to this question requires, as an inaugural step, consideration of the ways in which crisis, as an enabling blind spot for the production of knowledge, entails unremitting and often implicit judgement about latencies, or errors and failings that must be eradicated and, hopefully, overcome.

JUDGEMENT DAY

The very etymology of the term *crisis* speaks to the requirement of judgement. Its etymology originates with the Ancient Greek term *krinô* (to separate, to choose, to cut, to decide, to judge), which suggested a definitive decision. With significance in the domains of law, medicine and theology, by the fifth and fourth centuries BCE, the medical signification prevailed. Associated with the Hippocratic school (*Corpus Hippocratum*) as part of a medical grammar, crisis denoted the turning point of a disease, or a critical phase in which life or death was at stake and called for an irrevocable decision. Significantly, crisis was not the disease or illness per se; it was the condition that *called for* decisive judgement between alternatives.

Reinhart Koselleck's conceptual history describes a decisive shift in the semantics of crisis, transpiring between Hippocratic medical grammar and Christian exegesis. Not surprisingly, one did not replace the other: in the elaboration of Christian theology, with reference to the New Testament and alongside Aristotelian legal language, *crisis* was paired with *judicium* and came to signify judgement before God, which Koselleck characterises as possibly the unsurpassable signification of crisis in the course of its conceptual history, thus indicating how the secular term partakes of a Christian theological grammar.⁵ Through the history of its conceptual displacements—involving the elaboration of semantic webs as opposed to a linear development of substitutions⁶—the term *crisis* comes to entail prognosis, which increasingly implies a prognosis of time.

Koselleck's account of this semantic shift is part of his *œuvre* on the emergence of the European concept of history and the ways in which its associated historico-political concepts (e.g., progress) thematize time.⁷ With the temporalisation of history—or the process by which, since the late eighteenth century, time is no longer figured as a medium in which histories take place, but, rather, is itself conceived as having a historical quality—history no longer occurs in time; rather, time itself becomes an active, transformative (historical) principle.⁸ This is more than just a novel manner of defining and representing history per se. The historical perspective, which allows for the identification and judgement of a temporal situation, is itself taken to have a temporal quality, making the truth of history contingent, not given once and for all. This now familiar point is based upon the assumption that time is constantly being produced and that it is always new: the future is fundamentally open.⁹

But this constant production of the new, or of new time, is not without the production of new pasts. In order to incorporate new experiences into one's own history—inspired by awareness of an elsewhere and by the very idea that one constructs history—one must be able to conceive of the past in terms of its radical or fundamental difference. *Crisis comes to signify the marking out of 'new time' in so far as it denotes a unique, immanent*

transition phase, or a specific historical epoch. The somewhat odd practice of the retrospective recognition of the past as new—an epoch can only be recognized as such (i.e., in its ‘true significance’ for history) *ex post facto*—distinguishes this ‘epochal consciousness’ and the philosophy of history of the late eighteenth century.

Crisis, as a historical concept, refers to the retrospective effects of events and to their constitutive presuppositions.¹⁰ For this epochal consciousness, crisis is a criterion for what *counts* as ‘history’.¹¹ While typical to an eighteenth-century philosophy of history and a corresponding conceptualisation of history in terms of progress, this epochal consciousness is nevertheless very familiar to us; it is in keeping with common contemporary usage of the term as a turning point, or as an iterative, periodizing concept. In this instance, crisis is defined as both entirely specific—because it defines a historical epoch—and as structural recurrence—because it establishes and fulfils the notion that historical change takes place in analogous forms.

This illustration of the temporalization of history, or the emergence of ‘history’ as a temporal category, demonstrates how the term *crisis*, through semantic displacement, becomes the basis for the claim that one can judge history by means of a diagnosis of time. Koselleck likewise maintains that both this claim and this judgement entail a specific historical consciousness—*a consciousness that posits history as a temporality upon which one can act*. For this historical consciousness, crisis is a criterion for what counts as ‘history’; crisis signifies change, such that crisis ‘is’ history; and crisis designates ‘history’ as such. In this way, crisis achieves the status of a historico-philosophical concept; it is the means by which history is located, recognized, comprehended, and even posited. And because the concept of history, in and for itself, requires a referent from which movement, transformation, and change—historical change itself—can be posited, crisis, as a freestanding historico-philosophical concept, takes the role of a transcendental referent.

What we forget when invoking this scholastic sense of the term is its theological genealogy, reinstated by Koselleck,¹² and which entails expectations for world-immanent history.¹³ But what is expected of history? History, in its immanence, becomes a problem of meaning. In other words, the emergence of crisis as an historical concept occluded practices of prophecy in favour of practices of prognosis, thus raising the issue of the burden of proof for meaning in history, and for the meaning, or significance, of history itself. Through the invocation of the term *crisis* as a historically unique transition phase which marks an epoch, historical experience is likewise generalised as a logical recurrence. Judging time (sorting change from stasis, perceiving intervals) and judging history (diagnosing demise or improvement, defining winners and losers) is a matter of prognosis. And such prognosis depends upon the stabilisation of ‘a single concept limited to the present with which to capture a new era that

may have various temporal beginnings and whose unknown future seems to give free scope to all sorts of wishes and anxieties, fears and hope'.¹⁴

THE MORAL DEMAND

The very notion that one could judge historical time—that it presents itself to us as an entity to be judged—and that history is defined by a teleology of justice—that there are winners and losers, errors and victories—conjures an extraordinarily self-conscious mode of being. The emergence of this particular form of historical self-consciousness is the subject of Koselleck's first book, *Critique and Crisis*, in which he presents a conceptual history of the mutual constitution of those two cognate concepts: critique and crisis.¹⁵ His aim is to illustrate that this historical self-consciousness is related to what he defines as a specifically modern attitude toward politics.¹⁶

Koselleck puts forth the counterintuitive argument that, over the course of the eighteenth century, a novel distinction was formulated between morality and politics, which allowed for what he terms the 'exclusion of morality from politics'¹⁷ or the emergence of a distinct realm that constitutes 'society' and which, being invested with Natural Law, marks off a self-proclaimed 'moral society' from politics. This disassociation between political and moral authority is generally—and uncritically¹⁸—assumed to be an actually occurring 'great separation', which is qualified as 'the crisis' that marked off new time, or secular history. This notional separation between morality (conscience) and politics (the state) has consequences for manners of positing social change, which comes to be understood as transpiring via rational persuasion and the *telos* of reason, and thus from *outside* the institutions of the state. Thus, Koselleck illustrates the conversion of the Masonic Lodges and the Republic of Letters from 'enclaves of internal exile' in the realm of the absolutist state to 'centres of moral authority' in eighteenth-century France. In the political transformation of these moral societies, claims to 'political legitimacy [grow] out of moral innocence'¹⁹—a statement about politics that rings as a truism to our twenty-first-century ears, perhaps most recently in Barack Obama's inauguration speech.

Of course, one can put many questions to Koselleck's portrayal of these debates: Does he not assume both the efficacy and historical adequacy of 'the Enlightenment' as a political project? Does he not assume a premodern *versus* modern distinction? Does he not portray the distinction between morality and politics in absolute terms, which is a fallacy? Doesn't his conceptual history partake of a teleological understanding of historical development? And does he not affirm a misleading—and even Orientalist—divide between modern historical consciousness, on the one

hand, and a theological Middle Ages incapable of history, on the other?²⁰ These questions are well-founded. Nonetheless, if not taken as truth correspondence theory of history, Koselleck's illustration sheds light on the various fault lines that gave rise to a form of political utopianism based upon the juxtaposition between immortality and innocence, or between what is thought to be a corruption and what is taken as natural. And, as I noted earlier, his account is *indicative of the practice of the concept of crisis*, or how the premise of crisis serves a set of interlocking determinations: what counts as an event, the status of an event, the qualification of history itself and the basis of narration.

The triumph of reason through the pure authority of private verdicts over both politics and the state entails a notion of historical progress that is necessarily a form of moral progress, posing the ultimate challenge of emancipation. Self-rule, as an ethical principle, is generalized as a public, political demand, based upon the assumption that 'inner freedom' is realised in the external world. This principle amounts to the plainly incongruous demand for 'a complete and total liberation of human beings from human rule'.²¹ What would be the burden of proof for such a demand? Koselleck notes that this burden of proof, as produced through reason, would have to be free of logical self-contradiction. By the end of the eighteenth century, *the grounds for such proof had shifted from natural law to the historical future*:

The transformation from personal rule into rational custodianship may be empirically demonstrated: such an expected, contested, and anticipated liberation of human beings from human subordination, in other words, their *redemption within history* or the negation of alienation.²²

This European challenge, he argues, became a world historical challenge.²³

Koselleck's general point is that political utopianism entails a philosophy of history: the morally just and rational planning of history coincides in a hoped for future, and the achievement of that future requires an interpretation of the relationship of the present to the past. He asks, as noted in the previous section of this chapter, what history itself might be, if it is established from the distance of time. And his reply is that it is a matter of a moral demand for a difference between the past and the future.²⁴ And, for Koselleck, this demand—or the positing of a transcendent that accommodates the idea that humanity can devise its own destiny—produces 'crisis', and it does so in two ways.²⁵ First, it is a philosophy of history that allows one to posit the very possibility of a 'break' with the past. His central thesis is that, with the French Revolution, the conviction that conclusions about the past are necessary to an understanding of the future is challenged by the idea that the future is indiscernible. The Revolution thus represents a new mode of consciousness of *history as crisis*.²⁶ Second, and equally novel, is the practical mode of

social action that this historical consciousness entails: one can act 'on' history to transform it, which, for Koselleck, denotes a distinctly modern way of postulating the relationship between theory and practice.²⁷

The concept of critique, as understood by the end of the eighteenth century—that is, not as criticism of the state or of political policy, but as a judgement of the *validity* of institutions and concepts themselves—defines this manner of understanding the relationship between theory and practice. As an alleged universal standard of judgement, through the exercise of reason to resolve historical contingency, critique engendered what Koselleck sees as a form of 'hypocrisy' because the depiction of political crisis as the *logical outcome* of historical progress obscures the *contingent political* significance of such critique.²⁸ In this sense, perpetual critique—of oneself via moral conscience and of the world against a standard of reason—is coterminous with a perpetual state of crisis. Critique makes the future 'a maelstrom', says Koselleck.²⁹ In other words, the constant quest to authenticate the supreme authority of reason transpires through the perpetual process of critique, which is based upon the idea of duty toward the future and motivated by faith in the yet-to-be-discovered truth. Crisis invokes a moral demand for a difference between the past and the future. And this critical historical consciousness—or the specific, historical way of knowing the world as 'history'—discerns significance in terms of ethical failures: 'What went wrong?'³⁰

THE BLIND SPOT

With reason as our judge, we are consumed with the problem of establishing the validity of claims to critique, which makes faith in deliverance the uncertain terms of our historical self-consciousness. Of course, the grounds for human progress have been subject to suspicion for several centuries. Historical narratives produced by 'Enlightenment rationalists' themselves displayed the form of irony associated with a self-critical awareness and an ethics of scepticism.³¹ And by the end of the nineteenth century, despite faith in technological progress, the search for general causes in history, or a philosophy of history, was deemed by many a forsaken enterprise. But what is obscured in denunciations of the notion of historical progress and the disavowal of noncontingent grounds for judgement is the way in which the temporal understanding of theory and practice remains contingent upon the concept of crisis. The concept of crisis is bound to its cognate 'critique' and is established, as a concept, through the very widespread, but strange, idea that history could be alienated in terms of its philosophy—that is, that one could perceive a dissonance between historical events and representations of those events.

Of course, contemporary modes of immanent critique take into account this problem of presuming a dissonance between history and a

philosophy of history, or simply between history and representation.³² The very critique of reason, which notes that there are no epistemological or philosophical foundations for securing rationality beyond its contingent or partial manifestation—or no Archimedean point of observation and validation, no position from which to transcend history³³—is itself a rational critique, or ‘performative contradiction’ arising from self-referentiality. With the generalisation of this reflexive disposition, the problem of self-grounding, or the legitimation of theories in terms of the very distinctions (e.g., rational *versus* irrational) that permit their elaboration, leads to infinite regress. This dilemma of self-grounding and legitimation is taken to be the ‘crisis of modernity’³⁴ defined by the problem of meaning (‘lost meaning’) and alienation—the grounds for critical reason remain the fundamental source of crises for modern society.

And when the grounds for critical reason migrate to the even more unstable lands of partial and local truths, crisis is not solved. To the contrary, the concept of crisis is a prime mover in, for example, poststructuralist thought: while truth cannot be secured, it is nonetheless performed in moments of crisis, when the grounds for truth claims are supposedly made bare and the limits of intelligibility are potentially transgressed. Thus, epistemological crisis is defined as a ‘crisis over what constitutes the limits of intelligibility’,³⁵ inspiring scholars, including me,³⁶ to take crisis as the starting point for narration. Following the work of Michel Foucault, we assume that if we start with the disciplinary concepts or techniques that allow us to think ourselves as subjects—that enable us to tell the truth about ourselves—then limits to ways of knowing necessarily entail epistemological crises.³⁷ From this point of view, subject formation transpires through crisis: that is, crisis, or the disclosure of epistemological limits, occasions critique, and potentially gives rise to counter-normativities.³⁸ Crisis signifies a discursive impasse and the potential for a new form of historical subject. Crisis is a means to transgress and is necessary for change or transformation. In keeping with this, because reason has no end other than itself, the decisive duty of critique is essentially to produce crisis—to engage in the permanent critique of one’s self, or to be in critical relation to normative life—which is a form of ethics and a virtue.³⁹

Meaning, significance, and truth are, of course, problems—it seems that they constitute our condition of crisis and are addressed by reflection on the possibility for critique. But this category of crisis, so integral to the production of new forms and the very intelligibility of the subject, is never problematized, despite its cognate and historical-semantic relationship to critique. Apparently, for scholars past and present, attention to the problem of the grounds for critique has eclipsed the seemingly less imperative question of the grounds for positing crisis. This is curious: Why should crisis, as a category, be so self-evident? How is it that the

grounds for critique became the defining problem of epistemology while the grounds for thinking the human condition *in terms of crisis* did not?

Unable to establish the noncontingent grounds from which to claim critique, truth is necessarily immanent, and critique is consigned to the constant unveiling of latencies.⁴⁰ The latter have been characterized in terms of invisible relations, false consciousness, ideologies, naturalised categories, or normalization. Even when the criterion for truth is no longer defined in terms of the logic of noncontradiction, or internal consistency, critique is thought to occur through paradox: through the purging of contradiction and paradox; through the commitment obstinately to demonstrate the paradox of power, or the necessary exclusions (the *Other*, nonsovereigns) that expose the foundations of power to be contingent suppositions.

But if current scholarship claims to no longer place faith in reason as the basis for validity, a critical perspective is nevertheless achieved through second-order observation—that is, observing observations from a standpoint that is observable. As Niklas Luhmann has demonstrated consistently, this is not a matter of empirical observations, but rather a matter of logical observations, which are distinctions and which are meaning-constituting. Crisis is just one distinction. Significantly, this practice of observation, or distinction, does not proceed from binaries or oppositions. For example, my own claim is that it cannot be the case that there is crisis/noncrisis, both of which can be observed. Rather, ‘crisis’ is a distinction that transcends oppositions between knowledge and experience, or subject and object; it is a distinction that generates meaning precisely because it contains its own self-reference.⁴¹ As Luhmann notes: ‘What can be distinguished by means of these distinctions will become “information”’.⁴²

That is to say, from my point of view, the term *crisis* establishes second-order observation; it is not an object of first-order observation.⁴³ This external reference for judgement in a necessarily self-referential system—or a distinction that generates and refers to an ‘inviolable level’ of order (not crisis)—is seen to be contingent (historical crises) and yet is likewise posited as beyond the play of contingency, being a logical necessity that is affirmed in paradox (the formal possibility of crisis).⁴⁴

Without doing justice to the depths of Luhmann’s work, suffice it to underscore the point that, in a world that is posited as an immanent field of observations, one is necessarily in a self-referential system which is unavoidably paradoxical.⁴⁵ That is, if we take ourselves to be without a position from which to observe society in its totality, there can be no universal principles, but only self-referential principles, which are unavoidably paradoxical. Habitually posited as a logical contradiction, paradox is a foundational sign for an order without an origin. In other words,

all knowledge and all action have to be founded on paradoxes and not on principles; on the self-referential unity of the positive and the negative—that is, on an ontologically unqualifiable world.⁴⁶

Without recognition of these conditions of paradox, standards for evaluating social conditions produce descriptions and judgements in terms of pathology—*as deficient but not as merely paradoxical*.⁴⁷

Crisis is an enabling blind spot for the production of knowledge.⁴⁸ It is a distinction that, as least since the late eighteenth century, and like all latencies, is not seen as an enabling paradox, but, rather, as an error or deformation—a discrepancy between the world and knowledge of the world. But if we take crisis to be a blind spot, or a distinction that makes certain things visible and others invisible, it is merely *a priori*. Crisis is claimed, but it remains a latency; it is never *itself* explained because it requires the further reduction to other elements, such as capitalism, the economy, politics, culture, subjectivity. In this sense, crisis is not a condition to be observed (loss of meaning, alienation, faulty knowledge), it is an observation that produces meaning. More precisely, it is a distinction that secures ‘a world’ for observation or, in Obama’s terms, the grounds for testing.⁴⁹

WHAT WENT WRONG?

William Rasch sums up our dilemma concisely:

We have become distinctly suspicious of transcendental attempts to construct inviolate and panoramic levels of vision labeled God, Reason, or Truth. Yet, because of political or moral commitments, we are equally disinclined to relinquish ‘critical’ perspectives from which we presume not only to see the world as it is but also to utter judgments about its inadequacy.⁵⁰

Even if a critical perspective is relegated to provisional ends, and thus applies itself to ‘bearing witness’ to difference and partial interests, these exclusions (the *Other*, the nonsovereign) are apprehended in terms of negative integration.⁵¹ The reflexive stance, which recognises the contingency of its observations and accounts for the ways in which the observer itself constructs its object of investigation, has similar implications. This means that the various disciplines of the social sciences are no longer defined by their object of inquiry: sociology is, for the most part, no longer the positivistic study of ‘society’. In the place of disciplinary objects, we have constitutive questions.⁵² The obvious constitutive question is framed in terms of the *conditions of possibility* for a given situation, practice, institution, *et cetera*. The less obvious but equally pervasive constitutive question is ‘What went wrong?’

The claim to crisis is structuring: by positing crisis, certain questions can be asked, while others are foreclosed. To return to Obama's declaration on the Washington Mall, the referenced 'historical crisis' was the subprime mortgage market for which, answers to the question 'What went wrong?', have been located either in the systemic nature of capitalism (the business cycle, the falling rate of profit) or in the moral failings of speculative finance capital (producing 'bubbles' of false value). These interpretations do not consider the ways in which the crisis itself is not intrinsic to a system or the result of a teleology, but is, instead, a distinction that produces meaning. Thus, for example, the massive devaluation of real estate values (and not their 'natural' tendency to diminish) resulted in a tide of home foreclosures, which was seen as the natural result of an insufficiently collateralised debt market. However, the decision by the banking industry and the American government to define economic conditions in terms of crisis *at a particular moment* was motivated by questions regarding interbank loans and guarantees for bank debt. Naming this situation 'crisis' implies that what was once perfectly intelligible and construed as productive (debt is a credit) is now taken to be without basis and construed as a negative value form (debt is a toxic asset).

Answers to the question 'What went wrong?' are devised according to the 'is-versus-ought' distinction inherent to paradox. This means that *post hoc* analyses in terms of crisis necessarily entail an assumed teleology based upon alleged 'moments of truth'. Crisis is mobilised in narrative constructions to mark out such 'moments of truth', which are defined as turning points in history, when decisions are made or events are decided, thus establishing a particular teleology. They are frequently also defined as instances when 'the real' is made bare, such as when a so-called financial bubble has seemingly burst, thus divulging alleged 'false value' based upon speculation and revealing 'true value', or the so-called fundamentals of the economy. As a category denoting a moment of truth in these ways, and despite presumptions that crisis does not imply, in itself, a definite direction of change, the term *crisis* implies a certain *telos*—that is, it is inevitably, though most often implicitly, directed toward a norm. Evoking crisis entails reference to a norm because it requires a comparative state for judgement: Crisis compared to what?

In the case of subprime mortgages, such analyses entail assumptions about how 'the market' *should* function and conjecture about how deviations from 'true' market value were produced. These analyses do not account for the ways in which value produced by specific financial products results from an assemblage of markets, or coordinated modes of evaluation and calculation.⁵³ Such coordination is not merely the product of the law of capitalism or the efficient market; it arises from specific technical practices, such as underwriting, accounting, and risk management, allowing debt to be figured as a fungible asset in the first place. To say that capitalism or the market is 'in crisis' presumes a prior state of

affairs in which prices reflected true value (when would this be for the US housing market?), and that capital and labour were allocated properly (when would this have been obtained in the United States?). Reference to a 'financial crisis' with respect to the subprime mortgage market only serves to unify the disparate modes of evaluation that are essential to the coordination of specific chains of valuation and calculation, which merit systematic study.

This is a point of reflection for claims to a 'sovereign debt crisis' in various European states—and most obviously in Greece today. Asking 'What went wrong?'—and thus acceding to the crisis narrative—leads, in a nutshell, to condemnation of fiscal irresponsibility and the imposition of austerity measures. Other questions related to the production of value in the Eurozone are not articulated. For instance, the ways in which the Eurozone functions much like a gold standard system and is thus structured to preclude inflationary measures or devaluation as adjustment mechanisms, leaving default or deflation/austerity as the only options, has not been much debated. Moreover, 'Greek debt' is the product of the global banking system, enabled by the effective adoption of the strong German credit rating (with the adoption of the Euro) and the consequential massive appeal of Greek sovereign bonds for European banks, which led to extremely effective wealth production. Mark Blyth explains this process and notes that, even when sovereign bond yields converged,

if you swapped out your low-yield German and Dutch debt and replaced it with as much PIIGS [Portugal, Ireland, Italy, Greece and Spain] debt as you could find, and then turbocharged that by running operating leverage ratios as high as 40 to 1—higher than your US counterparts—you would have one heck of an institutionally guaranteed money machine. . . . As such, the more risk you took onto your books, especially in the form of periphery sovereign debt, the more likely it was that your risk would be covered by the ECB, your national government, or both.⁵⁴

Indeed, the subprime mortgage market and related secondary markets were structured such that leveraging and hedging practices embraced risk. Instead of systemic and ethical failure, we had pragmatic practices of wealth creation and a specific decision to claim crisis so as to recapitalise the private banking system by means of public funds.⁵⁵

In eliding the study of these pragmatic practices, reference to 'crisis' can only identify the historical significance of the contemporary situation in terms of systemic and ethical failures.⁵⁶ But this does not mean that crisis claims and crisis narratives are mere representations, to be compared to more accurate terrain. They are distinctions that locate contradiction and paradox so as to establish the grounds for the 'is-versus-ought' of critique. In lieu of devotion to reconciling such paradox, one might prefer to consider what it would take to 'reconcile *ourselves* to the

inevitability of antinomies'.⁵⁷ It would follow that the aim is not to invalidate *crisis* or to critique the term as inaccurate or merely symbolic. There is no reason to claim that there are no 'real' crises. Rather, the point is to observe crisis as a blind spot, and hence to consider the ways in which it regulates narrative constructions, the ways in which it allows certain questions to be asked, while others are foreclosed.

NOTES

1. 'Transcript: Barack Obama's Inaugural Address', delivered on 20 January 2009, Washington, D.C., available at: <http://www.npr.org/templates/story>php?storyId=99590481&ps=cprs>, last accessed 20 January 2009. A lengthier version of this text, published online ('The Anti-Crisis', *Political Concepts* 1 (2009), <http://www.politicalconcepts.org>), owes a great deal to the comments of Ann Stoler, Martha Poon, Jay Bernstein, Richard Bernstein and Gil Anidjar.

2. This text summarises the exposé set forth in Janet Roitman, *Anti-Crisis* (Durham, NC: Duke University Press, 2014).

3. Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, CA: Stanford University Press, 2002); *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA: Berg Publishers, [1959] 1988); *Futures Past: On the Semantics of Historical Time* (New York: Columbia University Press, [1979] 2004); and 'Crisis', *Journal of the History of Ideas* 67 (2006): 357–400.

4. Hayden White, 'Foreword', in Koselleck, *The Practice of Conceptual History*, xii.

5. Koselleck, *The Practice of Conceptual History*, 237; Koselleck, 'Crisis', 358–59.

6. The various 'semantic options' are set forth as distinct but not mutually exclusive in Koselleck, *The Practice of Conceptual History*, 240–44; Koselleck, 'Crisis', 371–72. It is important to note that, for Koselleck's brand of conceptual history, and contrary to a history of ideas, concepts cannot be defined; they have no inner core meaning that undergoes permutations. Instead, concepts consist of semantic webs of meaning, which bring definitions into a wider relational nexus, thus producing relatively stable units of sense. See Koselleck, *Futures Past*, 75–92.

7. By a European concept of history, I refer to the project of *Begriffsgeschichte*, devoted to the study of the fundamental concepts that partake of, and give rise to, both a specific concept of 'history' and a distinctly historical consciousness. Koselleck's extensive writing on this subject and on the ultimate question of the emergence of *Neuzeit* (the modern age, modernity) as a historical concept has been commented at length. For brief reviews, see Keith Tribe, 'The *Geschichtliche Grundbegriffe* Project: From History of Ideas to Conceptual History. A Review Article', *Comparative Studies in Society and History* 31 (1989): 180–84; and Melvin Richter, 'Reconstructing the History of Political Languages: Pocock, Skinner, and the *Geschichtliche Grundbegriffe*', *History and Theory* 29 (1990): 38–70. The main body of Koselleck's work in English includes Reinhart Koselleck, *Critique and Crisis*, 1988; *The Practice of Conceptual History*; and *Futures Past*.

8. Koselleck, *Futures Past*, 236; *The Practice of Conceptual History*, 165–67.

9. One of the main features of the historical concept of *Neuzeit* is the assumption that 'time is always new,' in so far as 'every present differentiates itself from every past and every future; it is unique and therefore new' (Koselleck, *The Practice of Conceptual History*, 148). *Neuzeit* entails an open future. On the emergence of the notion and experience of an 'open future', see Alexandre Koyré, *From the Closed World to the Infinite Universe* (Baltimore: Johns Hopkins University Press, 1957), Barbara Adam, *Timewatch: The Social Analysis of Time* (Cambridge: Polity Press, 1995), and Barbara Adam and Chris Groves, *Future Matters: Action, Knowledge, Ethics* (Boston: Brill, 2007).

10. See Randolph Starn, 'Historians and "Crisis"', *Past and Present* 52 (1971): 3–22, for a skilful review of crisis in historiography; and see Gerhard Masur, 'Crisis in History', in Philip P. Weiner, ed., *Dictionary of the History of Ideas* (New York: Scribners, 1973), 589–96, for a useful encyclopedic-style presentation.

11. This is an extremely condensed presentation of Koselleck's analysis, the main points of which can be found in *The Practice of Conceptual History*, chapters 10 and 13; *Futures Past*; and 'Crisis', 370–71.

12. Koselleck, *The Practice of Conceptual History*, 24; *Futures Past*, 40–41, 240; and 'Crisis', 371–97.

13. Koselleck, *The Practice of Conceptual History*, 243–44; 'Crisis', 370–97.

14. Koselleck, 'Crisis', 372.

15. Originally Koselleck's PhD dissertation, *Kritik und Krise: Eine Studie zur Pathogenese der bürgerlichen Welt* was published in 1959.

16. An insight associated with Kant, Baudelaire, Benjamin and Foucault. See Jason Edwards, 'Critique and Crisis Today: Koselleck, Enlightenment and the Concept of Politics', *Contemporary Political Theory* 5 (2006): 428–46 for commentary on *Critique and Crisis* that illustrates the affinities between Koselleck and Foucault with regard to this modern (Enlightenment) attitude. Edwards highlights the problem of assuming the unity of 'the Enlightenment', which obscures the heterogeneous dispositions that prevailed in seventeenth-century European intellectual and literary circles—a problem noted by Koselleck, *Critique and Crisis*, 3, in his preface to the English Edition. And see Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008), who takes issue with Koselleck's mobilization of 'modernity' as a category of explanation and as a 'sovereign period'.

17. Koselleck relates the now familiar story of the emergence of a *bourgeois* public in terms of its 'self-understanding' as a distinct social realm—an account most often attributed to Habermas, who published his *habilitation* thesis after Koselleck (1962), the English translation appearing in 1989. On Koselleck's and Habermas's respective theses, see Anthony J. La Volpa, 'Conceiving a Public: Ideas and Society in Eighteenth-Century Europe', *Journal of Modern History* 64 (1992): 79–116.

18. Read Kathleen Davis, *Periodization and Sovereignty*, who, alongside Gil Anidjar, 'Secularism', *Critical Inquiry* 33 (2006): 52–77, takes issue with the 'triumphalist history of the secular' and of universalism, which she questions through the operations of medieval/modern periodization to demonstrate how the notions of both feudalism and secularization themselves are constituted. Her concern to suspend periodization is important given the longstanding effects of the thesis of a 'great separation', which is reiterated in contemporary scholarship and denoted as 'the crisis' (see Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* [New York: Alfred Knopf, 2007]). I thank Gil Anidjar for turning my attention to Davis's book.

19. Koselleck, *Critique and Crisis*, 95.

20. Bedrich Loewenstein, 'Book Review: "Kritik und Krise. Eine Studie zur Pathogenese der bürgerlichen Welt" by Reinhart Koselleck', *Journal of Modern History* 48 (1976): 122–24; David Carr, 'Book Review: "Koselleck; Futures Past"', *History and Theory* 26 (1987): 197–204; Edwards, 'Critique and Crisis Today', and Davis, *Periodization and Sovereignty*, among others, raise these questions. For a recent review of Koselleck's work, see Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (Oxford: Berghahn Books, 2012).

21. Koselleck, *The Practice of Conceptual History*, 250.

22. *Ibid.*, my emphasis.

23. While agreeing that this challenge was generalized extensively from an epistemological point of view, one nevertheless wonders whether this positing of a transcendent and the consequential challenge of redemption, or negation of alienation, are truly general to world populations.

24. Koselleck, *Critique and Crisis*, 98–137, and *The Practice of Conceptual History*, 110–44.

25. It is important to note that Koselleck interrogates the concept of crisis as historically produced and hence contingent, but nevertheless argues for the necessity of the concept of crisis.

26. See, also, François Furet, *Penser la Révolution française* (Paris: Gallimard, 1978) [English edition, 1981]. Note that Koselleck does not infer that revolutionary practice subverts what he defines as the structure of modernity.

27. Koselleck's point, reiterated by Albrecht Wellmer, *The Persistence of Modernity: Essays on Aesthetics, Ethics, and Postmodernism* (Cambridge, MA: MIT Press, 1993), and William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford, CA: Stanford University Press, 2000) is that revolutionary practice, being enabled by what he sees as the structure of modernity, only serves to confirm or extend modernity, not negate or surpass it. The question is whether modernity is ever obtained: see Bruno Latour, *We Have Never Been Modern* (Cambridge, MA: Harvard University Press, 1993); Anidjar, 'Secularism'; and Davis, *Periodization and Sovereignty*.

28. See Koselleck, *Critique and Crisis*, 117–23; Victor Gourevitch's 'Preface' to *Critique and Crisis*, viii–ix; and Edwards, 'Critique and Crisis Today', 438.

29. Koselleck, *Critique and Crisis*, 109.

30. For commentary on this interrogation, see White's 'Foreword' to Koselleck, *The Practice of Conceptual History*, viii–xiv.

31. Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969); Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (Baltimore: Johns Hopkins University Press, 1973).

32. This is evident in the work of scholars associated with the Institute for Social Research, who sought to secure the grounds for immanent critique, as it is the case for contemporary scholars who seek nonfoundationalist grounds for political action.

33. Crisis often serves to signify such a vantage point, especially in accounts that seek to determine the 'mediations' that might exist between structural crisis and experiential crisis, or between crisis as a descriptive category and crisis as an evaluative category (see Jürgen Habermas, *Legitimation Crisis* [New York: Beacon Press, 1975]; Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* [New York: Columbia University Press, 1986]).

34. Jürgen Habermas, *The Theory of Communicative Action*, 2 volumes (Boston: Beacon Press, 1984–1987), and *The Philosophical Discourse of Modernity* (Cambridge, MA: MIT Press, 1987).

35. Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993), 138.

36. Janet Roitman, *Fiscal Disobedience: An Anthropology of Economic Regulation in Central Africa* (Princeton, NJ: Princeton University Press, 2005).

37. A non-Foucauldian approach that similarly inquires into the limits of intelligibility as a prime mover in history is the sociology of critique. See Luc Boltanski and Laurent Thévenot, *De la justification. Les économies de la grandeur* (Paris: Gallimard, 1991).

38. Judith Butler, *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* (New York: Columbia University Press, 1999), and Sarah Salih and Judith Butler, eds., *The Judith Butler Reader* (Malden, MA: Blackwell Publishing, 2004), 307–8; and see Tom Boland, 'Critique as a Technique of Self: A Butlerian Analysis of Judith Butler's Prefaces' *History of the Human Sciences* 20 (2007): 105–22.

39. Michel Foucault, 'What Is Enlightenment?', in Paul Rabinow, ed., *Ethics, Subjectivity and Truth: Essential Works of Michel Foucault, 1954–1984* (New York: New Press, 1997), 303–19, and *The Use of Pleasure. The History of Sexuality*, vol. 2 (New York: Pantheon Books, 1985); and see Simon Critchley and William R. Schroeder, eds., *A Companion to Continental Philosophy* (Oxford: Blackwell Publishing, 1998), 12.

40. This is not a novel or necessarily remarkable point. It is reviewed with clarity by Rasch, *Niklas Luhmann's Modernity and idem, 'Introduction'*, to Niklas Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford CA: Stanford University Press, 2002), and see Eva M. Knodt, 'Toward a Non-Foundationalist Episte-

mology: The Habermas-Luhmann Controversy Revisited' (1994) 61 *New German Critique*, pp. 77-100, on paradox and self-reference in Habermas and Luhmann.

41. This brief allusion to observing systems can be explored in Luhmann's immense body of work, in part inspired by George Spencer-Brown. For clarification, see Rasch, *Niklas Luhmann's Modernity*; Hans-Georg Moeller, *Luhmann Explained: From Souls to Systems* (Chicago: Open Court Publishing, 2006); and the special issue of *Theory, Culture and Society* 18 (2001), guest edited by Jakob Arndt.

42. Niklas Luhmann, *The Differentiation of Society* (New York: Columbia University Press), 131.

43. Although Luhmann does not assess the term *crisis* in this manner, his appraisal of Edmund Husserl's *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston, IL: Northwestern University Press, [1954] 1970), can be read through such a lens, as I have done. See Niklas Luhmann, *Theories of Distinction* (Stanford, CA: Stanford University Press, 2002), chapter 1.

44. 'Inviolable level of order' is Luhmann's expression (*ibid*), taken from Douglas Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (New York: Basic Books, 1979).

45. Niklas Luhmann, *Social Systems* (Stanford, CA: Stanford University Press, [1982] 1995), 56-57; *Essays on Self-Reference* (New York: Columbia University Press, 1990), 123-43; *Observations on Modernity* (Stanford, CA: Stanford University Press, 1998); *Theories of Distinction* (Stanford, CA: Stanford University Press, 2002), 130-33.

46. Luhmann, *Theories of Distinction*, 101, and see also pages 86-87 and 142-43.

47. Luhmann, *Essays on Self-Reference*, 136-37.

48. This is my performative paradox. I follow Luhmann's definition: 'The distinction that is operatively used in observation but not observable is the observer's blind spot', *Theories of Distinction*, 190. See Rasch's introductory remarks on this notion of blind spot (pp. 104-5).

49. 'The blind spot of each observation, the distinction it employs at the moment, is at the same time its guarantee of a world.' (Luhmann, *Theories of Distinction*, 136).

50. Rasch, *Niklas Luhmann's Modernity*, 127.

51. The commitment to 'bearing witness to the differend' is Jean François Lyotard's, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988), xiii. The injunction to 'witness' partakes of a Christian genealogy that seeks to redeem what has been lost (or silenced, in Lyotard's language), though according to an ethics of remembrance as opposed to emancipation.

52. A point made by scholars associated with constructivist theories, but see, also, Georges Canguilhem, *Ideology and Rationality in the History of the Life Sciences* (Cambridge, MA: MIT Press, 1988); Luhmann, *Social Systems*, xli-xlii and 115-66; Bruno Latour, *Pandora's Hope* (Cambridge, MA: Harvard University Press, 1999), and 'The Promises of Constructivism', in Don Ihde and Evan Selinger, eds., *Chasing Technoscience* (Bloomington: Indiana University Press, 2003); Ian Hacking, *The Social Construction of What?* (Cambridge, MA: Harvard University Press, 1999), and *Historical Ontology* (Cambridge, MA: Harvard University Press, 2004); and Paul Rabinow, *Anthropos Today* (Princeton, NJ: Princeton University Press, 2003).

53. These include the real estate market through which property is valued and exchanged; the market for loans through which credit is established; exchanges of pooled loans between mortgage brokers and wholesalers; and the secondary market for those loans, which are sold by securitizing financial institutions as products to international investors. See Martha Poon, 'From New Deal Institutions to Capital Markets', *Accounting, Organizations and Society* 34 (2009): 654-74; Michel Callon, *The Laws of the Markets* (London: Blackwell, 1998); Donald MacKenzie, Fabian Muniesa and Lucia Sui, eds., *Do Economists Make Markets?: On the Performativity of Economics* (Princeton, NJ: Princeton University Press, 2007).

54. Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013), 81-82.

55. Blyth, *Austerity*; and Roitman, *Anti-Crisis*.

56. For lack of space, I cannot elaborate on the claim to crisis with respect to the sub-prime real estate market, nor can I multiply the examples; see Roitman, *Anti-Crisis*.
57. Rasch, *Niklas Luhmann's Modernity*, emphasis in original.

Part II

Weimar and the Interwar Period
Ideologies of Antimodernism and
Liberalism

THREE

The Crisis of Modernity — Modernity as Crisis

*Toward a Typology of Crisis Discourses in Interwar East
Central Europe and Beyond*

Balázs Trencsényi

THE FACES OF CRISIS: SPATIAL, TEMPORAL, SOCIOCULTURAL

The interwar period witnessed a general radicalization of political discourse all over Europe. Among others, this was linked to a shift in the image of history, as an evolutionist vision gave way to a range of models that stressed discontinuity, cyclicity, and re-enacted the past. A key *topos* in this new image of history was crisis, emphasizing the rupture of linear development, and denoting a liminal period which not only threatened the community with dissolution, but also carried the promise of regeneration. In a way similar to the metapolitical function of the crisis discourse in the Enlightenment, memorably analysed by Reinhart Koselleck,¹ this discourse served the delegitimization of political order—albeit now with a contrary political function: *grosso modo*, the liberal democratic political order was undermined by conservative revolutionaries as the reference to crisis eventually became a weapon of a symbolic—and, in some cases, real—civil war. Given the traumatic experiences of the region both during and after WWI, it is not surprising that, in the interwar period, the genre of ‘crisis literature’ became one of the most characteristic venues of self-expression for Central and Southeastern European intellectuals. But it is important to point out the inherent ambiguities of this

discourse: crisis brought the threat of dissolution, but it *also* offered a possibility of regeneration. The loss of self-confidence present in the Western European core, which these intellectual élites had been so eager to follow throughout the 'long nineteenth century', catalysed a specific local discourse about the agony of Western civilization as a 'chance' for non-Westerners to subvert their subordinate position.

In East Central Europe, this 'crisis discourse' had a number of analytically separable, although, in many ways, interrelated, functions. First, it was often connected to symbolic geographical models, contrasting the 'overrefined', 'artificial', 'declining', and the like, Western civilization to the 'virile', 'youthful', 'expansive' East. Second, crisis could be perceived as a liminal phase between two different world orders, most often implying a transformation from the era of individualism to a new period of collectivism. Third, the crisis discourse could also be used to describe the situation of certain social groups, institutions and social relations, such as the crisis of the *bourgeoisie*, of the intelligentsia, of democracy, of the village, of the family, and so on.

The sources for these East Central European discourses of crisis were multifarious. In the early 1920s, the impact of Oswald Spengler was visible in all cultures of the region. The local readings of *Der Untergang des Abendlandes (The Decline of the West)*² were usually marked by a certain ambiguity. Eastern European authors considered their high culture to be linked to the West and thus to be hit by the crisis, but, at the same time, they often argued that their society was definitely not as overrefined as the West, and thus the temporal lag between them opened up a possibility of turning 'the Decline of the West' to the advantage of the Eastern Europeans. Significantly, this was also in line with Spengler's own prediction about the rise of the Russian East at the expense of the ailing West. Other key sources to this discussion were the writings on the rise of mass society and the crisis of the élites (José Ortega y Gasset, Miguel de Unamuno, Robert Michels), the crisis of rationalism (Henri Bergson, Edmund Husserl, Nikolai Berdyaev), and, in particular, the crisis of the intelligentsia (Julien Benda).

Along these lines, the most obvious Eastern European application of the crisis discourse was the counterposing of the aged and declining West to the youthful East. However, the definition of the two poles of this counterposition could be varied. The projects for the revitalization of Europe were context-bound, as representatives of Slavic cultures commonly defined the rising East as Slav, while others put the emphasis on other categories, such as contrasting urban/industrial and rural/peasant nations. Even within the same culture, this discourse could be framed very differently. For instance, the Bulgarian literary historian and Slavist, Boris Jotzov could argue that the Slavs were the race of the future,³ while another Bulgarian, the neo-Hegelian philosopher Janko Janev, appropriated the German *Völkisch* discourse and linked Germans and South-Slavs

as the two most authentic European cultures.⁴ An interesting third option within the Bulgarian discourse, directly related to the debate on Spengler, was formulated by the philosopher Spiridon Kazandzhiev, who argued that Bulgarians were not yet developed enough to have a crisis of the Western type, and therefore they could still proceed with an organicist/evolutionary modernization.⁵

Another modality of the crisis discourse, which had particularly strong repercussions in the region, was linked to the politicization of religion. Catholic or Orthodox traditionalists, such as the Hungarian Piarist priest and cultural philosopher, Gyula Kornis, or the Serbian clergyman, Justin Popović, converged in criticizing Western civilization where the loss of faith in God and the expansion of materialism undermined all solid points of reference and cast modern man into permanent despair.

Representing a powerful political tradition all over the region, agrarian populism also articulated itself through a crisis discourse contrasting East and West. In contrast to the protagonists of a Conservative Revolution, however, the agrarian populists put more emphasis on the socio-economic relations, contrasting the industrialized Western European core and the rural peripheries. They argued that the crisis was, to a large extent, due to the misunderstanding of this relationship on the part of the local liberal nationalist élites (and also their socialist opponents), who argued for the need to catch up with the West by imposing industrialization and 'pseudo-Western' urban modernity to the detriment of the rural classes, who were kept in *quasi*-feudal dependence. What they suggested, instead, was focusing on the specific social interests and mentality of the smallholder peasants, who combined private property with the lack of exploitation (since they worked on their own land).⁶ All this could be put into a regionalist argument, stressing the common need of Eastern European rural nations to reject the West, although many of the agrarian populists can still be considered to be selective Westernisers in the sense that they looked at the democratic Northern and Northwestern European small states characterized by a highly productive farming agriculture and cooperativism (such as Denmark and the Netherlands) for inspiration.

As mentioned previously, the second broad framework of the crisis discourse involved projecting the crisis on a historical *continuum*. Thus, crisis could be described as a transitional historical phase pregnant with a new spiritual world order. The Romanian cultural philosopher Lucian Blaga, drawing on Expressionist aesthetics and theories of cultural morphology, announced the coming of a new 'dogmatic age', akin to Berdyaev's 'New Middle Ages', which would restore belief and metaphysical order.⁷ In a similar vein, the Hungarian cultural philosopher, Béla Hamvas, formulated a neotraditionalist doctrine, inspired by Julius Evola and René Guénon, turning back to the 'axial age' of world religions for inspiration, and seeking to restore a prehistoric metaphysical 'Tradition' as a way out of the crisis of orientation.⁸ It is important to stress,

however, that these metaphysical traditionalisms did not necessarily have radical political implications. In fact, both Blaga and Hamvas were adherents of a relatively moderate nationalist agenda and considered totalitarianism to be a false solution for the metaphysical dilemma faced by modern man.

The discourse of crisis was often turned to question the entire modern nation-building project. On the whole, the *topos* of a mistaken path, a negative *Sonderweg*, had been omnipresent in the ideological debates of interwar Eastern Europe. We encounter it, for example, in the conservative historian Gyula Szekfű's extremely influential *Three Generations*, describing the 'distortion' of the Hungarian liberal nationalist project due to its imitation of Western patterns, which had resulted in the collapse of 'historical Hungary' in 1919–1920.⁹ The Bulgarian literary historian Boyan Penev's analysis of post-1878 social and cultural developments had similar overtones, as he stressed the incoherence of the cultural élite caused by competing cultural fashions coming from different European directions.

Finally, the crisis discourse could also refer to the dissolution of social coherence and the identity crisis of certain social groups. The most common version of this was linked to the question of élites. While going back to local debates on the role of the intelligentsia in transmitting Western modernity, the interwar discussion was, to a large extent, formatted by the Western European authors of 'élite theories', ranging from the more essayistic José Ortega y Gasset and Miguel de Unamuno to the more systematic Vilfred Pareto and Robert Michels.

The most obvious common denominator of these debates in East Central Europe was the crisis of 'national mediation': the double failure of the intelligentsia to digest external influences before transmitting them to the common people and their incapacity to format the essence of the popular culture as a basis of high culture. To this, many analysts added a crisis of social roles and values, with the intelligentsia being unable to sustain the cultural and social mediation. This criticism was formulated by thinkers such as the Bulgarian psychologist and social philosopher Athanas Iliev, the Romanian political theorist Constantin Rădulescu-Motru, and the Hungarian follower of *Völkerpsychologie*, Sándor Karácsony. For instance, Karácsony talked about the dysfunctional social existence of the 'sophocracy' (i.e., the intelligentsia), disconnected from the lower classes, but also unable to function as a spiritual élite.

As the understanding of crisis was extremely multifarious, the proposed ways out were also quite divergent, depending on the local social and political context and the ideological commitments of the author. The main common *motif* of all these suggestions in the period was the craving for a new spiritual élite which would be able to reinvigorate the social and cultural 'blood circulation'—linking past and future, East and West, low and high culture, peasantry and urban élite, individualism and col-

lectivism. One possible version of this was linked to the discourse of ethno-pedagogy, involving the creation of a cultural matrix based upon popular culture which could be institutionalized as a new high culture. Here, the definition of the new *élite* was specifically linked to that group which was able to discern the 'hidden essence' of the popular tradition and to turn it into a new and more authentic version of high culture than the 'imitative' Westernism of the previous generations.

A dramatized and radicalized version of this discourse contrasted the insensitive masses (often framed in the key of Ortega's 'revolt of the masses') with the tragic genius who saw the way of regeneration but could not realize it in the face of mass indifference. This is the message of the essays written by the Hungarian populist writer László Németh in the late 1930s and early 1940s.¹⁰ While, in his earlier essays, he opted for a more optimistic vision where the visionary individual was able to transform his environment into utopian experiments, harmonizing Western high culture with folk authenticity as well as socialism with individual creativity. Gradually, with the dominance of totalitarian political ideologies in the region, his perspective became darker. In the early 1940s, the contrast of the idealist individual and mass insensitivity prompted him to recreate a national master narrative based upon the eternal tragic conflict of the ethnically Hungarian prophets of authenticity and a false (and, ethnically, usually foreign) *élite* serving the taste of the masses.¹¹

Summing up, the 'crisis discourse' in East Central Europe had multifarious political implications. Although it could be formulated from a liberal or a leftist perspective as well, as was the case with the reception of Julien Benda's *La trahison des clercs*, used for asserting the need to reinforce one's commitment to the endangered 'European value system', its most common application was in the broadly conceived conservative/antimodernist ideological camp where it was closely linked to the collapse of the evolutionary vision of social development. A particularly influential subgenre of the debate centred around the emergence of the modern national project, when some of the most important intellectuals of the period turned to re-assess, in an extremely critical way, the genesis of their respective national canon and its problematical relationship to the formative influence of the West. At the same time, since the *topos* of crisis was not bound to any particular ideological offer, the crisis discourse also played a different role in different ideological contexts. In general, adherents to the notion of a radical transformation (both in a conservative and in a socialist direction) tended to use it as a critical weapon; but, as soon as they achieved the coveted transfer of power, they abandoned it and became apologists of the new authoritarian or totalitarian regime. In contrast, other intellectuals held fast to it, and described the rise of totalitarianism also as a symptom of the crisis of modernity.

THE GENERATIONAL CRISIS DISCOURSE

A central element of the interwar discourse of crisis, cutting across actual political divergences, focused on the 'clash of generations', pitting the newly emerging dynamic potential élite against the corrupted 'gerontocracy'. For sure, this generational rhetoric could draw on a long history: a key *topos* of romantic nationalism was youth (Young Europe, etc.), and the subsequent paradigm shift of national liberalism was often framed in these terms (Young Czechs); finally, at the turn of the century, there was a proliferation of antipolitical youth movements as well as radical nationalist groups (*Mlada Bosna*, etc.), which all devised their mobilizing ideology in terms of the clash of old and young. In the interwar period, all this became even more influential, as it was coupled with the experience of a global crisis of temporality: a fundamental rupture in time created by WWI. Hence, in the early 1920s, the theme of generational conflict prevailed in practically all of Eastern Europe. It became a central discursive component of the conservative revolutionaries, when they proclaimed the need to break with the corrupted recent past in order to restore a deeper continuity with an earlier heroic past that had been marked by high social coherence and cultural authenticity.

Beyond the common experience of WWI, a set of stylistic and ideological elements contributed to the formation of political platforms in terms of a generational agenda. One such component was the proliferation of Expressionism as a cultural movement, which was also very sensitive to the conflict of 'fathers and sons'. Another factor was the lasting impact of social Darwinist and biopolitical discourses that had emerged at the turn of the century, which often stressed the need for biological 'rejuvenation' and the rights of uncorrupted youth over the decrepit and unproductive older generation. A typical example is the discourse of the Yugoslav 'young nationalists' who established the organization *Orjuna* in the early 1920s, which continued the vitalist radicalism of the 1910s, turning it into the direction of unitary Yugoslav nation building and serving as its shock troops.

In the early 1920s, in various countries, a huge variety of political projects framed themselves in terms of generational ideology. While it is possible to discern both radical leftist and radical rightist tendencies, the projection of a binary logic on these developments obliterates the considerable discursive similarity between statements stemming from diametrically opposed ideological camps. For the leftist option, a case in point is the Bulgarian 'September generation' (symbolically linked to the Communist uprising of September 1924). Its most prominent member was the poet and essayist Geo Milev, who fused stylistic Expressionism and philosophical vitalism with social radicalism. On the right, we can point to the generational discourse of the Romanian anti-Semitic student movement of the early 1920s, from which eventually the 'Iron Guard' emerged.

It is important to note, however, that, in many cases, this ideological polarization followed a relatively long period of coexistence when the common antipolitical and anti-institutional rhetoric still kept people—who later chose radically divergent paths—together.

The late 1920s and early 1930s brought a new wave of politicization of the generational ideology. In most of the countries of the region, it was roughly 1927–1928 that marked the taking-off point of the first postwar cohort which distinguished itself from the ‘war generation’ shaped by the *Fronterlebnis* (front experience). In contrast, members of the postwar generation had usually experienced the war only as children, and hence they had an ambiguous relationship to it, remembering it, but not being able to draw their symbolic legitimacy on it. Also, they came to maturity in the mid-1920s in the context of a relative normalization and usually turned to culture, instead of party politics and state building. In the long run, however, this metapolitical position was also prone to assume direct political connotations, often linked to political movements which challenged the institutionally established political forces.

Perhaps the most paradigmatic case of such a generational discourse in the region can be found in Romania, where the ‘Young generation’ or the ‘generation of 1927’ brought together a plethora of highly original young intellectuals who later had a formative impact on their national culture.¹² The first articulation of this generation is usually linked to Mircea Eliade’s *Spiritual Itinerary*,¹³ with its theme of the search for spiritual experience as the agenda of the new postwar generation. The ensuing discussion on the nature of the new generation occasioned a huge number of discussions. Although there was a general antipolitical thrust in most of the earlier statements, the party politics of the years following WWI being rejected and blame being laid on the old élite for ‘missing the chance’ of radical political and spiritual transformation of the country, step by step various political forces also tried to use the generational discourse to their advantage.

The transformation of an individualist metaphysical revolt into a violent political programme can be best observed in the writings of Emil Cioran, who was at the periphery of the ‘young generation’ at the time of its launching, being somewhat younger than its leaders, but who became one of the most characteristic figures of his cohort in the 1930s. In his essays written in the mid-1930s, and especially in his pamphlet on the ‘Transfiguration of Romania’, with its blending of existentialism and totalitarianism, we see him adapting a hypertrophic version of the generational discourse.¹⁴ He extended the ideology of generational conflict to the entire nation-building project and launched the idea of ‘Romanian Adamism’, involving the start of a real, ‘historical’ existence initiated by the rejection of the ‘ahistoric-larval’ way of life of the previous generations.

Other contexts also produced very lively generational debates in the early 1930s. Similar to the Romanian in dynamism, albeit less differentiated, the Bulgarian discourse of the young generation was also linked to an antipolitical agenda, rejecting party politics (revived between 1931 and 1934) and arguing for the need of a fundamental spiritual change. A case in point is the former social democratic politician Dimo Kazasov, who combined technocratic élitism with the discourse of an idealistic young generation seeking to put an end to the corruption of the traditional party élite.¹⁵ Kazasov's rhetoric had a strong authoritarian tendency, but also retained some residual elements from the leftist tradition and combined it with a 'Balkanist' discourse of regional cooperation. This discourse had strong links to the group of conspirators calling itself *Zveno*, which, in 1934, successfully instigated a coup d'état, although King Boris III eventually used the opportunity to impose a personal dictatorship.

In many ways comparable, members of the Albanian 'young generation' (*Te rinjtë*), emerged in the early 1930s with a modernist agenda in which the national romanticism of the 'old' élite was rejected in the name of a more dynamic understanding of nation and society. One of the key figures of this group, Ismet Toto, compressed the programme of his generation into the lapidary alternative: 'Switzerland or Afghanistan?' Different members of the group had different visions of how to turn Albania into a proper European state; but the ideological influences which they appropriated were rooted in the same antimodernist turn prevailing throughout Europe. Thus, mixing such components as Nietzscheanism, Spenglerianism, vitalism, and geomorphology, they came up with an intricate ideological mixture in their effort to mobilize their society. This mixture is, perhaps, most striking in Toto's writings. His nation-building project had a strong eugenic aspect, and sought to mix the different regional types of Albanians, even going so far as to advocate administrative means to encourage marriages between them. While he was in favour of Western modernity, he cited Nazi Germany and fascist Italy as paradigmatic examples of dynamism, though he defended such classic liberal values as the freedom of the press.¹⁶

In the case of the group around the Polish journal *Bunt Młodych* (*Revolt of the Youth*), the vocabulary of generational mutiny was taken up by young intellectuals who sought to rejuvenate the Polish right by taking away from the nationalist *Endecja* the central place it occupied on the right side of the political scene. They coveted great power status and imperial ideology; from this perspective, the multi-ethnic composition of Poland—provided that the leading position of the ethnic Poles was assured—was seen as an asset, rather than a handicap, and a reason of state, rather than ethnic nationalism, was seen as the greatest good. In contrast, from the mid-1930s, one can observe the appearance of yet another sort of generational discourse, with pro-totalitarian leanings. In some ways, these authors followed in the path of the 'new generation' of

the late 1920s. However, they entered the field when the aesthetic anti-politics of the previous cohort had already been dissolved, and thus the members of this group were marked by a much more emphatically political self-identification. In fact, the generational discourse of the late 1930s and early 1940s was often linked to a fascination with totalitarianism. This is exemplified by such groupings as the Polish review *Prosto z Mostu* or the Bulgarian *Mlada Balgariya*, which became adepts of radical nationalism.

NATIONAL ONTOLOGY AS A RESPONSE TO THE CRISIS

The interwar period saw the emergence of a new type of national discourse that rejected the previous positivist framework for defining the nation. In some contexts, this discursive shift led to the formation of a 'national ontology', based upon the notion that nations have a specific physiognomy which can only be grasped by metaphysical inquiry. These constructions were intimately linked to the atmosphere of crisis: the experience of modernity leading to social and cultural disintegration, and a feeling of the 'fluidity' of existence triggered a search for a framework which could restore the identity of the nation, as it were, at an ontological level. As a result, the classical historical and geographical references for defining and describing the nation were replaced by a new set of categories seeking to grasp the 'national Being'.

While this development was unprecedented, the chief components of this 'metaphysical turn' were rooted in previous ideological configurations. The various local versions of *Völkerpsychologie*, or psychology of peoples, contributed to the linking of cognitive categories and the national taxonomy. Wilhelm Wundt was a common inspiration for many of the ideologists, and his Leipzig chair served as an important hub for Eastern European scholars at the turn of the century. While the original paradigm of *Völkerpsychologie* and the French *psychologie des peuples* of Alfred Fouillée were generally critical of ethnic nationalism and stressed the importance of cultural and linguistic assimilation, many of their Eastern European followers used this framework to define the nation in ethnocultural terms, localizing national specificity in the most 'authentic' social layer: the peasantry.

'National psychology' had already reached its peak in many of these cultures in the 1910s, but, in its more syncretic versions, it continued to have an impact on political discourse in the interwar period as well. The main characteristic of this approach, which also limited its usefulness, was the inductive method which it inherited from the empiricist psychological tradition. Representatives of this trend sought to gather various manifestations of the national soul, and the outcome of this was often the documenting of a mind-boggling plurality of stereotypes, often leading

to incompatible codes of representation and transmitting the message of an incoherent national character. Another implication was the subnational regional diversification of psychic types, which was rather problematic from the perspective of the homogenizing nationalism that became prominent after 1918. A case in point can be found in the work of the Bulgarian writer and political journalist Anton Strashimirov, who, in the late 1910s, produced a number of character sketches of Bulgarians, with emphasis on their regional differences, which sought to assert the 'unity in diversity' of the nation, but also called attention to the mind-boggling cultural, mental, and social diversity of the country.¹⁷

The pressing need to legitimize national projects at the end of WWI and in its immediate aftermath saw a veritable boom in the production of various approaches seeking to establish the 'science of the nation', ranging from physical anthropology to geopolitics. An important source of radical discourses of identity in the interwar period throughout East Central Europe was provided by British, German and French geopolitical literature, this discourse being intimately linked to the debates around the post-WWI reshuffling of borders. The most common points of orientation were Friedrich Ratzel, Rudolf Kjellén, Paul Vidal de la Blache and Karl Haushofer. Arguably, the most important East Central European representative of this trend was the Serbian Jovan Cvijić. Linking geological and ethnographical categories, Cvijić focused on the 'Dinaric type', characterized by a patriarchal and heroic mountaineer mentality, untouched by Western decadence, as the central anthropological pattern of the Balkan peninsula. This obviously squared well with the prewar 'Serbian Piedmont' ideology that perceived the Serbs as the core of a future South-Slavic state, and, in the 1920s, it could also be actualized in a Yugoslavist template, arguing for a common South-Slavic geographical space and popular mentality.

It was the spatial referential framework (of geopolitics and 'geophilosophy') that the most radical versions of identity discourse in the interwar period sought to connect to a new normative theory of the national community. While this aspiration to a 'national philosophy' was not new, as it went back to Romantic antecedents which sought to find the philosophical system most fitting to the national character, the projects of the interwar period were radically different. An important factor was the turning of the notion of *style*, a key concept of the *Geistesgeschichte* approach, into a central category defining national individuality, linking aesthetic, historical and cognitive elements.

A good example can be found in the work of Lucian Blaga, who drew mostly on German sources, such as Expressionism, *Geistesgeschichte*, the philosophy of Ludwig Klages and the geomorphology of Leo Frobenius, while, at the same time, searching to develop a specifically Romanian philosophy. Blaga sought to define the national style, but, in his search, he wanted to go beyond ornamentalism, and to identify the inherent

metaphysical matrix of the nation. He constructed 'Romanian-ness' in terms of village existence, which he depicted as a space of magic spirituality characterizing the worldview of a child. He contrasted this to the disorientation of Western urban civilization, which had lost this concentric framework of sacrality, and therefore existed in permanent crisis. In this way, he was able to subvert the usual hierarchy, describing the seemingly peripheral Balkan village as being closer to a metaphysical centre than the Western European 'core'.

This model had a considerable impact on the 'national ontologies' of the 'young generation', who all venerated Blaga as one of the pioneers of 'national philosophy'. In his essays of the 1930s and early 1940s, Mircea Eliade linked national folklore and archaeology to his more general vision of traditional cultures which were characterized by a metaphysical *Weltanschauung*. His key ideas in this context anticipated the analytical categories of his future comparative history of religions: traditional culture built around a symbolic *axis mundi*, the importance of rituality, and repetitive gestures of collective regeneration. Rather than entering historical time with the traditional means of sociocultural modernization, Eliade invited the Romanians to preserve their relationship to suprahistorical transcendence, thus fulfilling a universal mission as heralds of a new collectivism based upon sacrality. Although for a considerable time he adhered to an antipolitical position and rejected the violent factionalism of Romanian public discourse, Eliade eventually opted for the localization of this metaphysical regeneration in the 'Iron Guard'.

In Hungarian culture, the drive to create a national philosophy was equally powerful, but the available cultural resources were rather different. The most elaborate national characterology was created by the philosopher Lajos Prohászka.¹⁸ His interpretation of the Hungarian national character was based upon the figure of the 'outlaw', which he contrasted to the *topos* of the 'wanderer', which he described as the matrix of the German character. Prohászka believed that, in contrast to the depleted Western European cultures, the dynamic German and Italian characters would create a new European cultural revival. While the author was attacked for indirectly legitimizing pro-Nazi tendencies in Hungary, the study was, in fact, written before 1933, and Prohászka was politically a moderate conservative. It is, however, indicative of the blurred ideological implications of his discourse that he referred to Germans and Italians as the representatives of the two most important traditions animating European culture, to wit, humanism and romanticism. Subsequently, when the two totalitarian regimes manifestly turned against European culture, Prohászka became radically antifascist, apparently without feeling the need to revoke his previous philosophical arguments.

One of the discursive functions of national metaphysics was to confer symbolic unity on a polity which had only recently come into being. A case in point is the Yugoslav characterology of Vladimir Dvorniković. His

intention was to create an integrative framework of identity for Yugoslavia, in which the differences between Serbs, Croats, Slovenians, and Bosnians could be described in terms of regional varieties.¹⁹ To achieve this goal, he fused references to Western theories of cultural morphology with a symbolic geographical construction based mostly upon Cvijić's writings and a liberal nationalist historical narrative. Consequently, in ideological terms, his discourse was ambiguous. On the one hand, he was a proponent of modernization and compared the *Sonderweg* of the South-Slavs caused by the experience of the Ottoman occupation to the more organic development of the Western European nation-states; but, on the other hand, he contrasted the declining Western civilization to the dynamic vitality of Southeastern Europeans.

Developing one of the most idiosyncratic discourses of national essentialism, the Bulgarian Nayden Sheytanov coined a specific conceptual language drawn on Romantic models. His principal work, *The Great-Bulgarian Worldview*, sought to formulate a new framework of national identification in line with the profound ideological transformation in Europe in the late 1930s. In his opinion, a new worldview was needed 'in order to determine the laws of the past and to proceed in tune with the contemporary spirit'.²⁰ Thus, Sheytanov's aim was not only to devise a new political ideology or historical interpretation, but to achieve something much more fundamental—to recreate the national canon, from which a 'Great-Bulgarian ideology' could stem. This 'Bulgarian Titanism' was to function as a religious system, in which the Bulgarians were defined as an 'elect nation' and the Balkans as the 'holy land of Europe'.

On the whole, the proliferation of autochthonist discourses and national ontologies signalled the 'alienation' of the cultural and political élites of these countries from the Western model and the questioning of the previous cultural hierarchy based upon the desire of local élites to 'catch up' with the West. At the same time, these discourses could not develop without a connection to Western intellectual sources. Thus, paradoxically, they were the result of the intensification of cultural connections between Eastern and Western Europe, and bore witness to familiarity with the latest Western trends which were focused precisely on the issue of the decline of Western civilization. The various formulations of 'national metaphysics' can thus be considered characteristic of the intellectual responses to the political and ideological crises ravaging interwar East Central Europe. Stemming from a deep feeling of marginality and frustration, they were also based upon an intensive dialogue with the very Western cultural centres that they sought to subvert. While often slipping into rather idiosyncratic formulations, they had a lasting impact on the collective imagination of these societies, serving as a pool of stereotypes and cultural references in moments of intensive debate on the (geo)political orientation of these countries.

THE LONG SHADOWS OF THE INTERWAR PERIOD

The crisis discourses analysed in this study fit into the broader framework of antimodernism. Born out of the perceived crisis of modernity, antimodernism is a neopalingenetic, revolutionary, transfigurative, future-oriented alternative spirituality that pervades every realm of the human experience.²¹ Its main markers are authoritarianism, the cult of violence and (self-)victimization, cultural pessimism, organicism, and biopolitical exclusion. Importantly, it has a complex entanglement with modernism: it rejects political modernity, but also draws on it.

The antimodernist ideological tropes are usually associated with the extreme right, but some elements (such as the rejection of the evolutionary vision of development or the stress on creative élites) were also present in the radical leftist ideological subcultures. One could argue that the Stalinist political project was as much rooted in an antimodernist ideology as in a modernist one. This partly explains the survival of antimodernist references after 1945 as well. Antimodernism was an important element of the legitimization of the postwar Communist regimes in East Central Europe, asserting that *bourgeois* democracy was in a permanent crisis and needed to be superseded by a new, more organic and collectivistic ideology.

The interwar antimodernist tropes had a complex afterlife, present both in the anti-Communist alternative (underground and *émigré*) subcultures and also in the Communist ideological frameworks. A particularly important context was 'national Communism', offering a selective appropriation of some of these ideological tropes and discourses. In some cases, national Communism also offered a possibility for former extreme rightists to cooperate. Later on, the reintegration of antimodernist themes was often facilitated by fellow traveller intellectuals searching for an alternative legitimization of the regime in the 1970s and 1980s, as Marxism-Leninism proved increasingly unable to rally any kind of popular support around the leadership. This is important to bear in mind also when one looks at the post-1989 revival of antimodernist discourses in East Central Europe, which were often depicted by Western observers as an unexpected return of ideological zombies, or 'skeletons in the closet', believed to be long dead.

This ideological continuity also contributed to what, on the surface, seemed to be a radical change after 1989, namely, the return of the interwar tropes and discursive patterns to the centre of the public sphere. Interwar cultural references had an aura of being an uncontaminated cultural heritage, which led to the fervent reproduction, reedition, and recanonization of many key authors of this period after the regime change. The intensity of this revival, however, was different in different contexts. Romania, where the discussion of the interwar canon, and eminently of the work of the 'young generation' around Mircea Eliade, Emil

Cioran and Constantin Noica, became central to the cultural life of the 1990s, is perhaps an extreme case, but, in all countries of the region, there were important efforts to engage with the intellectual heritage of interwar conservatism, national metaphysics, and the crisis literature.

While, on the surface, the 1990s were dominated by a pro-European consensus, fed also by the expectation of the institutional and economic merger with 'the West', in the depth of these societies, the anti-Western and antimodernist ideological traditions resonated well with the cultural and political resentment caused by the process of unification. Ironically, but not illogically, the pro-European consensus politics that seemed to pervade the region evaporated after the accession process of these countries was successfully finalized. The first symptoms of this shift were linked to the rise of antinomian politics, defining the political-ideological opponent as a fundamental threat to the very existence of the national community. Importantly, as the case of Hungary and Poland shows, the ensuing 'culture wars' started well before the economic crisis hit these societies in 2008-2009. However, while, in the mid-2000s version, the struggle was usually internal and was often fashioned as a fight against post-Communism, after 2008, new ideological modalities emerged, which began to reassert national *autarchy* as a legitimate political and also cultural strategy to fend off the negative consequences of the global crisis.

It is in this context that one needs to place the ideological contention around the 2015 'migrant crisis'. Analysts have often pointed out the ideological cleavage between the former Communist 'Eastern' members of the EU, who tended to reject any sort of solidarity with the refugees in the name of preserving their ethnocultural and religious purity, and the other Member States. It is important to note, however, that, in the interwar period as well as currently, the East Central European crisis discourses, no matter how much they stress their autochthonism and anti-Western credentials, are actually themselves products of the Western political culture. As we can see, in the interwar period, it was precisely the self-destructive modality of the Western political discourse that East Central European radical intellectuals—such as Mircea Eliade, Emil Cioran, László Németh and Vladimir Dvorniković—turned against the West, constructing the global crisis as a liminal experience of their nation, carrying the promise of reshuffling the global symbolic hierarchy in favour of the materially backward but spiritually uncontaminated 'peasant nations'. Similarly, one needs to contextualize the calls for 'illiberal democracy' on the part of Viktor Orbán and his advisors in view of the loss of self-confidence and orientation of the European Union in the last couple of years.

As in the interwar period, as well as during the last decade, the shaking of a future-oriented vision of Europe triggered populist reactions which translated the socioeconomic and cultural questions into the language of exclusion. Therefore, studying the antimodernist ideological

mobilization and crisis discourses in East Central Europe is relevant not from the perspective of some sort of ‘exotic’ regional interest, but because, due the precariousness of political and social modernity in this part of Europe, one can get a more direct and elementary grasp of the challenges that the *whole* of Europe is facing, even if this is much less obvious when one looks at Aarhus, Delft, Bergamo or Stuttgart, than at Ózd, Craiova, Białystok or Lovech.

NOTES

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1. Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA: MIT Press, 1988). Originally published in 1959.

2. First published in Germany in 1918, and in English translation in 1926–1928.

3. Boris Jotzov, *Славянство и Европа* (Sofia: Унив. изд. Св.Климент Охридски, 1992).

4. Janko Janeff, *Der Mythos auf dem Balkan* (Berlin: Verlag für Kulturpolitik, 1936).

5. See Spiridon Kazandzhiev, ‘История и народ’ (1928), in *Пред извора на живота* (Sofia: Хемус, 1943), 46–62.

6. A good example of this discourse can be found in the Romanian economic theoretician of the Peasant Party, Virgil Madgearu. See the collection of his studies: *Agrarianism, Capitalism, Imperialism: Contribuții la studiul evoluției sociale românești* (Cluj: Dacia, 1999).

7. Lucian Blaga, *Spațiul mioritic* (Trilogia culturii, II.) (Bucharest: Humanitas, 1994).

8. Béla Hamvas, *Világválság* (Budapest: Neumann, 2003), originally published in 1937.

9. Gyula Szekfű, *Három nemzedék* (Budapest: Élet, 1920), revised ed., 1934.

10. László Németh, *A minőség forradalma* (Budapest: Magyar Élet, 1940–1943).

11. See, especially, László Németh, *Kisebbségben* (Budapest: Magyar Élet, 1942).

12. Matei Călinescu, ‘The 1927 Generation in Romania: Friendships and Ideological Choices (Mihail Sebastian, Mircea Eliade, Nae Ionescu, Eugène Ionesco, E. M. Cioran)’, *East European Politics and Societies* 15 (2001): 649–77.

13. Mircea Eliade, *Itinerariu spiritual. Scrieri de tinerete* [1927], ed. by Mircea Handoca (Bucharest: Humanitas, 2003).

14. See Emil M. Cioran, *Singurătate și destin* (Bucharest: Humanitas, 1991); *Schimbarrea la față a României* (Bucharest: Vremea, 1941).

15. See Dimo Kazasov, *Две поколения. Два различни света* (Sofia: Изд. на българския национален студентски съюз, 1931). For a recollection of this *milieu*, see Stefan Popov, *Безсъници* (Sofia: n.p., 1992).

16. Ismet Toto, *Bota e një djali kryengritës* (Tirana: Toena, 1997).

17. Anton Strashimirov, *Книга за българите* (Sofia: n.p., 1918).

18. Lajos Prohászka, *A vándor és a bujdosó* (Budapest: Danubia, 1941).

19. See Vladimir Dvorniković, *Borba ideja* (Belgrade: Geca Kon, 1937); *Karakterologija Jugoslovena*, 2 vols. (Belgrade: Kosmos, 1939).

20. Nayden Sheytanov, *Великобългарски светоглед* (Sofia: Библиотека ‘Родна мисъл’, 1939), i.

21. On the concept of antimodernism in the context of East Central European intellectual history, see Sorin Antohi and Balázs Trencsényi, ‘Introduction: Approaching Anti-Modernism’, in Diana Mishkova, Marius Turda and Balázs Trencsényi, eds., *Dis-*

courses of Collective Identity in Central and Southeast Europe (1775–1945): Texts and Commentaries, Vol. 4: Anti-Modernism: Radical Revisions of Collective Identity (Budapest: CEU Press, 2014).

FOUR

European Legitimacy Crises — Weimar and Today

Rational and Theocratic Authority in the Schmitt- Strauss Exchange

John P. McCormick

This chapter revisits scholarly investigations, conducted over twenty years ago, of the interwar writings of Carl Schmitt and Leo Strauss; writings in which ‘theology’ played a major role in Schmitt’s and Strauss’s criticisms of Weimar’s liberal democracy, and their respective critiques of Enlightenment politics, more generally.¹ Two decades ago, many progressive scholars, myself included, feared that, in the wake of the Soviet Union’s collapse in 1989, a resurgent radical right in Europe might enlist religion as a crucial component in their authoritarian causes. But we never imagined that these authoritarian threats would themselves become — as they have to a remarkable extent — genuinely and thoroughly *theocratic*. I mention as just three examples: right-wing Christian movements in the US, politically active Orthodox Judaism in Israel, and radical forms of Islam in Europe and the Middle East. After more than twenty years’ reflection on the Schmitt-Strauss exchange, I believe that I now somewhat better understand the stakes that ‘political theology’ raises for the theocratic challenge to liberal democracy today. In this spirit, this chapter reflects a personal-political enlightenment that I hope is worth sharing with others.

* * * * *

The conservative, and eventual National Socialist, jurist, Carl Schmitt, famously asserts, in the *Concept of the Political*,² that all genuine political philosophies are pessimistic concerning human nature. By relying extensively on Thomas Hobbes, a political thinker who strikingly illustrated the violent behaviour of man to man in the absence of authority, Schmitt clearly assumes that he has grounded his state theory on a sufficiently pessimistic conception of human beings. Indeed, what could be more pessimistic than a theory like Schmitt's 'friend/enemy thesis', which insists on the centrality of enmity to political life?

Yet, in his widely celebrated contemporary commentary on Schmitt's 1932 book, the young Leo Strauss³ insists that Hobbes's notion of man as dangerous but educable—a notion that Schmitt never fully rejects—is not sufficiently pessimistic to justify the kind of political philosophy that both Schmitt and Strauss seek as an alternative to liberalism. I will argue that Strauss, in the 1920s and early 1930s, sought a functional equivalent to traditional theocracy—a Biblical atheism, as it were—that might serve as a foundation of political authority in a simultaneously post-theistic and post-Enlightenment age.⁴ Schmitt, as we know, sought an appropriately fascist (if not yet Nazi) solution to what he deemed to be liberal theory's hopelessly contradictory principles, and liberal practice's painfully obvious inability to resolve the near civil war circumstances of the late Weimar Republic.⁵

According to both Schmitt and Strauss, even though Hobbes deems man 'dangerous' in circumstances where authority is absent, the Malmesbury philosopher affords the subjects of his Leviathan state significant freedom of thought and action on the assumption that individuals, when governed by a sufficiently strong state, can be prudent, educable, and capable of rational, cost-benefit calculations that may prove conducive to public peace and stability. Schmitt thinks he can correct these flaws in the Hobbesian state by refounding it on collective—rather than individual—grounds.

Strauss retorts that Schmitt's reformulation still permits too much freedom of conscience and behaviour for state subjects. In relying on Hobbes, Schmitt may affirm the importance of 'sovereignty', but he eschews the necessity of, in Strauss's word, 'dominion'. If Schmitt were to understand human evil in terms of 'moral baseness' or 'sinfulness', then, Strauss suggests, Schmitt would elaborate a more comprehensive notion of 'ruling' than Hobbes countenanced or Schmitt himself articulates. Rather than correcting addressable flaws in Hobbes' system, Schmitt, by not clarifying his own view of human nature, still allows essentially liberal freedoms to persist as dire threats to both the stability of his neo-Leviathan state, and to any substantive notion of the good life.

Given the sinful, morally base character of human evil, Strauss insists that public order requires an authority more intrusive than the sovereign

state—an authority that imposes a substantive vision of the good life that cannot be derived from modern sources, whether they be early-modern notions of natural right, or what he calls elsewhere ‘the execrable principles of 1789’. Strauss suspects that Schmitt, a renowned Roman Catholic critic of liberalism, fundamentally agrees with him; despite what he appears to say to the contrary, Schmitt must believe that human beings are inherently sinful.

A perspective that understands sinfulness as moral baseness asserts that humans are driven to do wrong not by material deprivation or by the desire to satisfy bodily appetites, as liberals would have us believe. Rather, human beings take fiendish pleasure in doing precisely what they know to be wrong; they take supreme gratification by committing evil, as such. Statutory law associated with the modern *Rechtsstaat* cannot tame humanity’s inherent sinfulness; nor can it cultivate the natural human intuition of goodness that necessarily accompanies the base human desire to violate it.

This chapter explores the place of educable *versus* sinful evil in the respective efforts of Schmitt and Strauss to develop genuinely ‘authoritarian’ alternatives to liberal state theory in interwar Germany. Specifically, it addresses several of Strauss’s readings of Schmitt on the moral *cum* theological status of the political: his assumptions concerning the extent to which Schmitt actually endorses a notion of human evil as sinfulness or moral baseness; his assertion that Schmitt deliberately hides the moral dimensions of the political; and his mischaracterization of what Schmitt deems to be the ultimate danger confronting the political in their age—that is, whether Schmitt fears that the political will disappear altogether or merely that it will be practiced ‘dishonestly’.

Much more than his disciples claim, Strauss shared deep affinities with Schmitt’s agenda in *The Concept of the Political*. By affirming ‘the political’, Schmitt celebrated the return of enmity as a harbinger of the reassertion of *authority*, the prospect that, in the present moment, a new postliberal world order might arise afresh.⁶ Only a few years before, in 1929, Strauss had expressed similar exhilaration at the return of sharp distinctions among different groups of neighbours: the demise of the commitment to ‘love thy neighbour’ at the heart of Enlightenment philosophy, spelled, for Strauss, the return of moral affirmation and a revival of quasi-Biblical authority. However, rather than a self-critical, quasi-universal, Biblical tradition affiliated with the Hebrew prophets, Strauss exclaims, somewhat alarmingly, ‘we must ask ourselves seriously whether perhaps *the kings* were right’.⁷ Strauss turns to the Biblical legacy to reaffirm the harsh necessities of warfare and rule, rather than the universal morality philosophically developed by the assimilating liberals of the German-Jewish Enlightenment.

Schmitt’s endorsement of National Socialism in 1933 makes clear the kind of authoritarianism he sought as a replacement of liberalism—again,

a suitable, if not first choice, alternative for the conservative jurist. Strauss' position, as conveyed by his writings of this era, is more elusive. I will therefore try to sketch out the kind of authoritarian alternative to liberalism, the kind of revived premodern, 'regime as regimen', that Strauss was formulating in his writings before his emigration to the United States.

* * * * *

Schmitt intends *The Concept of the Political* to serve as a neo-Hobbesian attempt to rescue the state in the midst of its twentieth-century crisis. To Schmitt's mind, liberal theory and practice has undermined the unity, the integrity, of the state, and put European nations, particularly Germany, back in circumstances similar to those that confronted Hobbes during the English Civil War. Schmitt seeks to return to the sovereign state, the monopoly over 'the political' that liberalism had wrested from it during intervening centuries. Schmitt famously insists that the political corresponds to the fact of human enmity—the factuality, the facticity, of the eternal human propensity to make distinctions between friends and enemies. The political pertains to the existential reality that humans resort to mortal violence, lethal force, to make or sustain our friend/enemy dissociations, our 'us-versus-them' groupings.

According to Schmitt, the political sphere and the friend/enemy distinction stand independent of all other concepts and distinctions. The political is distinct from the aesthetic, the economic, the moral, and the theological spheres. Human enmity is simply beyond good and evil in the moral realm; it exists independent of categories such as beautiful and ugly in the aesthetic realm. The enemy is simply the embodiment of an alternative, 'different and alien', way of being, one that, by virtue of its inherent otherness, potentially threatens one's own.⁸

For Schmitt, even though the concepts that constitute the various spheres of human life stand independent of each other, they all may, at some point, become political. If people were to raise the possibility, the threat, of deadly force in pursuit of any of these other distinctions, these other spheres would, in fact, convert into political spheres. If religious distinctions, economic distinctions, even, theoretically, aesthetic distinctions, develop into potentially mortal distinctions among groups, then they are no longer strictly religious, economic or aesthetic, but now primarily political.⁹ Thus, the political derives its content, its substance, from the potential for life-threatening violence posed by various human groupings, *not* from the specific issue over which that violence might be deployed.

* * * * *

Schmitt lauds the Hobbesian state for stabilizing human expressions of the political in a historically unprecedented way: the sovereign state defused civil wars, domestically, and the Westphalian state system managed interstate conflict, internationally. Nevertheless, Schmitt concedes that both the sovereign state model and Hobbes's philosophical formulation of it were flawed. They allowed the state to be undermined from within. As individuals surrender their subjective judgement over the use of lethal violence to the state, Hobbes granted them an ostensibly less volatile subjective freedom: individuals are free to think whatever they like, so long as they do not act, and especially do not resort to violence, upon the basis of what they think.

Freedom of conscience is soon followed by economic rights: in pursuit of commodious living, subjects have the right to engage in commercial exchange with, rather than armed conflict against, their fellow subjects. According to Schmitt, freedom of conscience and economic activity eventually threaten the state and upset the state-secured equilibrium of the political: corrosive political dissent and disruptive class conflict are the inevitable results of such freedoms.

Schmitt thinks that he solves these problems by replacing Hobbes's individualism with a revived and radicalized version of Aristotelian social solidarity: Schmitt revives, albeit in a morally neutral way, the notion that human beings naturally gravitate towards some sort of community—a notion that Hobbes, in many ways, sought to dissolve. The predisposition of some groups of humans to live together according to specific ways of life allows Schmitt to postulate an unassailable *collective* existence of humans congregated around these specific forms of life.

These spontaneously formed, fighting collectivities transpose to state authority something more existentially vital and socially-binding than the self-interested individuals who contract their way out of Hobbes's natural condition could.

But Schmitt wilfully resists any moral assessment of the particular substance that brings a specific collectivity together; or, conversely, of the particular grounds on which they fight other collectivities bound by some other organizing substance. Schmitt will not even supply an account of the mechanisms, moral or not, that bring such people together to begin with and that keep them together; that is, he ignores what we conventionally understand as 'politics'.

* * * * *

Leo Strauss detects something odd in Schmitt's claim that the political stands independent of other conceptual spheres, especially the moral sphere. He cites Schmitt's *Political Theology*, published a decade earlier, in which Schmitt asserted that 'the core of the political idea is the *morally* demanding decision'.¹⁰ Indeed, in that earlier text, Schmitt emphatically

affiliates the moral and the theological, with the political.¹¹ Strauss attributes the 'disharmony' between the two texts, separated by a decade, to a polemical intention on Schmitt's part; a desire to keep hidden below an amoral exterior a deeply moral motivation.

Strauss identifies a peculiar anxiety pervading the work: namely, Schmitt's fear that the political might disappear altogether, and his worry that this disappearance would have catastrophic moral consequences for humanity. If liberalism were successful in establishing a perpetually peaceful world of commercial exchange, or Russia, a universal worker's paradise, then something morally valuable about humanity would be lost. Strauss asserts that, for Schmitt, a world without anything sufficiently important to kill and die for is a world in which nothing is important or serious.

However formidable his critique, I submit that Strauss overstates certain aspects of Schmitt's text: specifically, whether Schmitt really fears that the political will disappear; and whether Schmitt's separation of the political from the moral is merely polemical—in other words, whether Schmitt feels obliged to hide his moral intentions in the text. On the first point, Schmitt provides ample evidence in both the main text of the *Concept of the Political* and in the appended 'Neutralisations' lecture, which Strauss himself cites, that liberal and Communist states, their universalist ideologies notwithstanding, will continue to behave 'politically'; that is, they will continue acting in ways that both identify and mortally threaten enemies. For instance, the way in which Schmitt describes French *revanchist* behaviour in a crucial footnote of *Concept of the Political*, and Russian geopolitical motivations throughout the 'Neutralisations' essay, suggest that he believes that there is virtually no danger that the political will disappear from the face of the earth.

On the second point, that Schmitt is consciously hiding the moral status of the political, Strauss may be at a disadvantage for which he cannot be criticized. Strauss could not know that there is a substantive reason for the fact that Schmitt's works from the early 1920s, like *Political Theology*, are not 'in harmony' with the argument of the *Concept of the Political*: he likely did not know that Schmitt had been excommunicated by the Roman Catholic Church when he remarried without an annulment in 1926.¹² Upon the basis of this fact, it is quite plausible that Schmitt may have been deliberately and sincerely trying to reorient his ideas accordingly.

To be sure, moral presuppositions pervade Schmitt's arguments in favour of the political. But they may be unconscious and unintentional, and they certainly do not concern the prospect of the political's disappearance. The moral question of the *Concept of the Political* is not that the political will disappear: rather, Schmitt exhibits alarm that the allies and the Russians are practicing the political from an overtly antipolitical ideological standpoint, which has serious consequences for how war is and

will be conducted in the present and the near future. Since their adversaries, especially Germany, are cast in an increasingly moralized light as monsters, and not mere enemies, Schmitt argues, wars will be even more vicious and inhumane than 1914's WWI was.

In this light, Strauss may be correct in suggesting that Schmitt has not completely abandoned morality. But I would cast the moral character of the work differently than Strauss does, to wit: the state itself seems to carry much greater moral weight for Schmitt in *Concept of the Political* than does the possibility of killing that Strauss consistently emphasizes in his comments. Therefore, one ought to press Schmitt on the question of morality differently than Strauss did. One should ask, for instance: By what standard, what criterion, other than a moral one, can Schmitt claim that the political is better managed, domestically and internationally, by the Hobbesian state and the Westphalian state system?

Again, Schmitt overtly claims that the political should not be evaluated or governed by moral notions of good or bad, better or worse—the political should just *be*. In an ostensibly, morally neutral way, Schmitt leaves these matters entirely to the judgement of the respective combatants engaged in existential struggle. Then, why should he care whether the political is operationalized efficiently or inefficiently, that is, in ways that shed less, rather than more, blood? If his claim is that the early-modern state system better institutionalizes the political than do nomadic, feudal, or imperial arrangements—that 'the state' best quells civil war at home and forestalls total war abroad—doesn't this assume that less killing is a good thing, that less killing is morally right? For that matter, on what grounds does Schmitt imply that a victorious combatant should permit their defeated opponent to 'retreat back into their borders'?¹³ Why shouldn't the victor, on existential grounds, pursue the vanquished until the latter are eliminated, indeed, exterminated?

If this is an accurate depiction of the latent moral underpinning of Schmitt's book, then the 'order' provided by the state clearly takes normative precedence over the facticity of the political in Schmitt's estimation. On these grounds, Schmitt ought to affirm—morally—the Hobbesian *state*, which secures morally good outcomes, over the *political*, which may manifest itself in the most atrocious ways, most notably, through genocide. In the text, Schmitt expressly prefers less, not more, blood, contained rather than total war; but his definition of the political *qua* political sets no limit on lives expended or blood spilled when collectivities act on the friend/enemy distinction.

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To return to the issue of human nature in Strauss's critique of Schmitt with which I began these remarks: the ultimate question is not whether Schmitt's political stands upon a moral basis, the question is *what kind of*

moral basis? Strauss's still penetrating critique prompts us to ask: Does Schmitt, whether Schmitt the Catholic moralist of *Political Theology*, or the surreptitious/unconscious moralist of the *Concept of the Political*, have a sufficiently pessimistic view of human nature to overcome liberalism? Strauss appears uncertain whether, even in the earlier, explicitly Catholic work, Schmitt agrees with counterrevolutionary Juan Donoso Cortés, that humanity is morally base, inherently sinful, and hence in need of, to employ Strauss's words, dominion, of *rule*, as such.

In *Political Theology*, Schmitt does not—indeed, he intimates *cannot*—fully endorse the Spaniard's argument for the moral baseness of humanity because he identifies such a position as heresy—and, perhaps, he remarks, insanity. Even if Schmitt concedes that human beings are sinful—flawed, corrupted—in these early Weimar works, the incarnation of Christ, for him, explicitly attests to the fact that human beings are part divine. Because they are part divine in nature, they are capable, under the right circumstances, and with appropriate guidance, of choosing to do what is good, what is right.

In *Concept of the Political*, it is no longer Catholic orthodoxy that prevents Schmitt from adopting the standard of moral baseness, but rather the fact that, following Hobbes, he has now formally divorced the categories of moral virtue/moral baseness from politics altogether. As Strauss asserts, since Hobbes has no notion of human evil as arising from 'sin', from an inherent human desire to transgress the boundaries of what is known to be morally right, Hobbes—perhaps much like Christianity itself—grants too much freedom of conscience to the subjects of his Leviathan state.

Ultimately, Strauss and Schmitt diverge quite drastically on this question of conscience and its relationship to the human need for 'being ruled'. Conscience, as I will explain further in the following section, is a target for Strauss; unlike The Law, in a theocratic sense, conscience is an irredeemable source of philosophical degradation and political anarchy. It possesses no inherently good moral content and it encourages promiscuous nonobservance of the law.¹⁴ For Schmitt, on the other hand, conscience can—and should—maintain a place of prominence in moral philosophy, so long as it, in his early Catholic writings, remains subservient to the authority of transcendental divinity (made flesh in political form).¹⁵ This freedom of conscience remains in Schmitt's secular endorsement of Hobbes's state, which prescribes and proscribes little belief or behaviour that does not directly affect 'public peace'.

From Strauss's interwar perspective, either to be a Christian, or to be a Hobbesian is ultimately to be a liberal. For instance, in Strauss's early engagement with Paul de Lagarde—an arch-German-Christian nationalist, authoritarian and anti-Semite—Strauss locates a fundamental spiritual individualism at the core of his thought; an individualism at odds with Lagarde's counter-Enlightenment aspirations. To drive the point that, in

Strauss's estimation, Christianity and the Enlightenment were inextricably bound, in a now notorious letter to Karl Löwith penned a year after his critique of Schmitt, Strauss speaks of 'the *cross of liberalism*', and his preference for 'the ghetto', over any effort to crawl to such a cross.

In this context, Strauss elucidates, in a manner that no doubt shocked Schmitt, just how 'liberal' Schmitt's compartmentalising of the theological, moral, and political in the *Concept of the Political* is. Moreover, if Schmitt refused to attribute abject moral baseness to mankind in *Political Theology* from a decade before, then his overtly Catholic position was already protoliberal, despite the fact that Schmitt affiliated the moral, the theological and the political in that work. Strauss presses Schmitt to affirm that human beings are morally base because they will inevitably find reasons to commit wrong even when their immediate physical needs are met and when their security is guaranteed—especially when they suffer only the limited control of a night watchman, Leviathan state. In his commentary on *Concept of the Political*, Strauss challenges Schmitt to concede that human beings are in need of 'being ruled' more fundamentally than Schmitt articulates in that work.

In a letter following up his commentary on Schmitt's thesis, the young Strauss continued to pursue Schmitt on the issue of human evil, moral baseness and the necessity of dominion, of 'rule' as such. Clearly sensing Schmitt's hesitation, Strauss asks Schmitt point blank whether 'the ultimate foundation of the Right' does not, in fact, require a foundational belief in 'the natural evil of man'.¹⁶ In the letter to Löwith, mentioned previously, composed only months after this correspondence with Schmitt, Strauss elaborated his own sense of what constituted the fundamental 'principles of the Right', principles that even a now triumphant Nazism should not discredit: Strauss identifies these as 'authoritarian, fascist, imperial principles'.¹⁷

Strauss' subsequent works from the 1930s illuminate the full thrust of his critique of Schmitt, and help us better understand what Strauss means by the 'principles of the Right' and the human need to be 'ruled'.

* * * * *

In Strauss' books on Maimonides of 1935 and Hobbes of 1936, Strauss attempts to retrieve, philosophically and historically, something like Islamic, Jewish or Platonic theocracy for a post-Enlightenment age. Only theocracy, or a substantive equivalent thereof, these works suggest, effectively governs the vulgar, subdues the proud, and facilitates human perfection in the manner aspired after by premodern classical philosophy and monotheisms of The Law. Christian theology, and its Enlightenment heirs, Strauss continues to insist, are not sufficiently authoritarian, in a specific sense, to accomplish any of these goals.

In *Philosophy and Law*, Strauss, quite astonishingly, suggests that the contemporary starting point for refounding theocratic political authority would be a form of atheism. Strauss attributes a specifically 'Biblical' quality to the forthright, conscientious, and courageous atheisms espoused by Nietzsche and Heidegger. Here, as late as 1935, long after Heidegger's *Rektoratsrede*, Strauss praises 'the probity' of Heideggerian existential philosophy. Especially, in affirming the precariousness of human existence, the 'primordial' experience of human finitude, Strauss locates in this atheism affinities with the Hebrew Bible.

Genuinely, Biblical religion embraces the fearfulness and precariousness of human life when it affirms God; it does not, as does Christianity, turn to God with the hope of escaping such experiences; that is, with the anticipation that such primordial fear might be alleviated. Therefore, according to Strauss, when Nietzsche and Heidegger reject God, they do so in a singularly Biblical way. Nietzsche and Heidegger valiantly reject the Epicurean impulse toward safety and security exhibited by unreflective, conventional Enlightenment atheism. Strauss insists that the Epicurean impulse toward security undergirding both Christianity and the Enlightenment is inherently corrosive of both the philosophical pursuit of truth, and of any political order capable of both taming human evil and cultivating human perfection.¹⁸ In this spirit, *Philosophy and Law* sharpens Strauss's criticism of the Christian authoritarians, Lagarde and Schmitt, whose work he had engaged over the previous decade.

While Strauss notably refrains from criticising Heidegger in the work, Strauss dismisses Lagarde as a mere Christian Averroist and derides Schmitt as a simple political theologian: the first uses religion artificially, instrumentally in the service of a nationalist state; while the latter seeks to elevate a sovereign state above society, thereby maintaining its separation from society, and, hence, leaving free, rather than regulated, the realm of 'culture'. In other words, these German-Christian authoritarians conceive only of state and nation, they cannot imagine a political *regime* that imposes a thoroughgoing *regimen* of social life. In this light, Strauss contrasts the ideas of Lagarde and Schmitt with the thoughts of Farabi and Maimonides:

Islamic and Jewish philosophers of the Middle Ages are 'more primitive' than modern philosophers because they are guided not, like them, by the derived idea of natural right, but by the primary, ancient idea of law as a unified, total regimen of human life; in other words, because they are pupils of Plato and not pupils of Christians.¹⁹

Strauss again invokes Plato and 'the total regimen of human life' in his Hobbes book of the following year. Strauss elevates Plato over Aristotle for treating 'the most important subjects'—namely, 'the just, the beautiful, and, above all, the good'—not abstractly, 'but with the greatest accuracy'.²⁰ Here, he cites *The Republic* and *The Laws*. Only a modern approxi-

mation of such regimes that regulate the ‘most important subjects [with] the greatest accuracy’, with the greatest specificity about what is good, can fully and appropriately replace liberalism.

I direct the interested observer to pages 125–26 of the Hobbes book, where Strauss quite eloquently and poignantly describes how ill-equipped, emotionally and psychologically, he believes the average human being to be for the kind of freedom bestowed upon him by Hobbes and subsequent modern ‘enlighteners’.²¹

* * * * *

To return, then, to Strauss’ criticism of Schmitt in his commentary on the *Concept of the Political*: a state, like Schmitt’s neo-Hobbesian state, that is agnostic with respect to the moral, theological, aesthetic, and the like—that is, a state that leaves judgement and action over these spheres to its subjects—does not exert sufficient political authority over what he dismissively calls ‘culture’ to forestall the civil war conditions that beset Weimar Germany, and to prevent the twentieth century crisis of the state in general. The standards of classical political philosophy and monotheistic religions based upon Law, Strauss suggests, unlike their Christian-Enlightenment successors (including Hobbes), taught that human beings required a ‘regime’, in the sense of a regimen, that regulated each and every aspect of their lives.

A true *regime*, unlike the Hobbesian state, does not merely identify internal and external enemies, and satisfy the human desire for self-preservation; it instils habits of behaviour with respect to art, religion, economics, and the like, conditioning the internal and external dimensions of human life, such that human evil is suppressed and human perfection made possible. In Strauss’s estimation, only such a regime in the sense of *regimen* can rule a morally base humanity and make it possible for human beings to live the good life. In this sense, Lycurgus’s Sparta, Plato’s Kalipolis, theocratic Islam and Judaism stand on one side; Christianity and liberalism stand on the other.

The Hobbesian state, even as reconstructed by Schmitt, allows ‘dangerous but educable’ humanity to educate itself in so many supposedly nonpolitical spheres that it remains fundamentally unruly, and hence inherently dangerous. Echoing a phrase that Schmitt adopted from Donoso Cortés, when the latter derided liberalism for shifting all politics ‘onto the plane of conversation’,²² Strauss declares that Schmitt’s critique of liberalism occurs within ‘the horizon of liberalism’.²³

In his Hobbes book of 1936, perhaps as a gesture to Schmitt, Strauss backpedals slightly on the issue of whether Hobbes had a conception of human evil as ‘sin’: the moral attitude against vanity, which Strauss came to believe motivates Hobbes’s philosophical enterprise, he concedes, bears residues of Christian critiques of the sin of pride. But, Strauss main-

tains his earlier line of criticism by affiliating Hobbes with 'Kant [and] with the Christian tradition', particularly on the centrality of 'individual conscience' to his project.²⁴ However, whether Hobbes, or Schmitt for that matter, maintained a conception of sin is less important than the fact that their notion of sinfulness is insufficiently *radical* to engender a political solution concomitant with human nature; human nature in dire need of being ruled, not by a state, but by a regime.

* * * * *

In his 1938 book *The Leviathan in the State Theory of Thomas Hobbes*,²⁵ Schmitt, now a discredited Nazi, returns to a theological, rather than purely a secular, purely 'political', reading of Hobbes's *Leviathan*. When explaining the collapse of the Hobbesian sovereign state, which he still considers to be the pinnacle of political theory and practice, Schmitt assigns to the 'Jewish philosopher', Spinoza, the central role in an esoteric passion play.²⁶ Schmitt posits Hobbes's absolutist state as a 'mortal god' that was betrayed by Spinoza on behalf of 'his own Jewish people' with dramatically detrimental consequences for Christian Europe.²⁷

As Strauss dared him to do, but in ways that he could have scarcely imagined, Schmitt now reaffiliates the moral, the theological and the political in his defence of Hobbes—with a vengeance. According to Schmitt, the God-become-Man Leviathan state, came to earth in order to bring peace and security to humanity. This mortal god asked its subjects, not only to exchange obedience for protection, but also to believe, genuinely, that 'Jesus is the Christ'. Because he did so, Hobbes cannot be blamed for turning the Leviathan into a morally neutral, and hence potentially oppressive, totalitarian state.

Perhaps in response to Strauss's Hobbes book of two years before, Schmitt takes great pains to demonstrate that the Leviathan created by vulnerable human beings in the natural condition is more than simply the sum of the wills and the fears of these newly submissive political subjects. There is, Schmitt insists, a thoroughly theological, transcendental substance to the mortal god that cannot, as Strauss claimed in his book, be neutralized merely by the fact that it was created by individual conscience and individual consent.

Unfairly—in fact, quite cruelly—misusing aspects of the exiled Strauss's Spinoza book of 1930, Schmitt here blames that 'liberal Jew', Spinoza, for initiating the fateful demise of God on Earth, the sovereign state. Spinoza, who could not accept the doctrine of the incarnation, used the qualified subjective freedom of conscience permitted by Hobbes to turn particularist societal forces against the unity of what was fundamentally a Christian state, all in the subversive interests of assimilating Jews.²⁸

According to this narrative, Spinoza and the Jews effectively recrucify divinity incarnate, the Leviathan state, on the cross of private conscience, unleashing chaos and disorder on the Christian world in the form of the Enlightenment, the age of revolutions, world wars, and even, at the deepest levels of the text, the mechanically oppressive and abusive Nazi state itself.²⁹ The Jews—not Hobbes, and certainly not Schmitt himself—the Plettenberg jurist so reprehensibly intimates, are ultimately responsible for the eventual emergence of the Third Reich.

After the war, even when the horrors of the Holocaust had been exposed to the entire world, Carl Schmitt, who so enthusiastically supported the Third Reich, still, quite chillingly declared: ‘Really, the assimilated Jew is the true enemy’.³⁰ History, experience and prudence *may* have compelled the mature Leo Strauss, in his postwar writings, to change fundamentally his youthful criticisms of liberalism.³¹ Schmitt, for his part, clearly proved impervious to learning of any kind.³²

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Contemporary theocratic enemies of liberal democracy share Schmitt’s and Strauss’s anxieties over the simultaneous weakness and strength of Enlightenment principles and practice. Many right-wing Christians, politically motivated Orthodox Jews and fundamentalist Muslims abhor the vision of ‘mere life’ seductively offered by Western capitalism and often, arguably, imposed by Western imperialism. The rejection of sin constituent of the Enlightenment’s *telos* of human life—for example, personal security, sexual liberation and consumer consumption—represents nothing short of the rejection of God himself. It betrays monotheism’s understanding that the perfectibility of man is realizable only through obedience to divinely sanctioned law, which regulates every facet of human life so as to turn believers away from iniquity and toward God’s will.

It is perhaps no accident that the most radical adherents of these various fundamentalisms often engage in suicide missions that violently target institutions and persons associated with the free market, sexual permissiveness, and tolerance of difference (e.g., global trade centres, abortion clinics, LGBT organizations and enclaves of immigrants or racial minorities). In killing others, they express utter desperation over the seemingly ineluctable progress of Enlightenment principles; in killing themselves, they blatantly defy the primacy of self-preservation at the core of Enlightenment legitimacy.

In Europe today, these motivations take a peculiar and dangerously toxic form. Far-right movements often mix appeals to traditional Christian values with a cynical embrace of certain Enlightenment principles such as liberty, equality and even women’s rights in efforts to target non-Christian immigrants as enemies of ‘the nation’ or ‘our way of life’. Simultaneously, centre-right governments, increasingly neoliberal in orien-

tation, pursue policies that disproportionately immiserate members of these non-Christian communities throughout Europe—effectively denying them the fruits of Enlightenment progress that life in ‘the West’ so chauvinistically promises. The interaction of these forces perpetuates a vicious cycle in which intolerance and neglect encourage more radical responses on the part of the oppressed, which then supposedly legitimate more virulently exclusionary political programmes and policies from ever more rightward-moving parties and governments. Just how far this dynamic will go, we do not know.

The temptation to contemporary Europe posed by the young Schmitt and the even younger Strauss is this: since authority cannot be legitimated upon the basis of Enlightenment rationality, ‘our own’ theologically legitimated authority must prevail over foreign, non-European ones that seek to infiltrate ‘our’ societies and overthrow ‘our’ ways of life. Europe must resist both the premise and the conclusion of the Schmittian-Straussian temptation: it must reject the proposition that the Enlightenment is dead; and it must resist the attempt to formulate and impose new, but nostalgic, forms of authority based upon a substantive ‘European’ vision of the good life. The solution to the most recent crisis of Enlightenment rationality in Europe is *more*—not *less*—enlightenment.

NOTES

1. See John P. McCormick, ‘Fear, Technology and the State: Carl Schmitt, Leo Strauss and the Revival of Hobbes in Weimar and National Socialist Germany’, *Political Theory* 22 (November 1994): 619–52; *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997); and ‘Political Theory and Political Theology: The Second Wave of Carl Schmitt in English’, *Political Theory* 26 (December 1998): 830–55.

2. Carl Schmitt, *The Concept of the Political*, Expanded Edition [(1932)], trans. G. Schwab (Chicago: University of Chicago Press, 2007), hereinafter CP.

3. Leo Strauss, ‘Notes on Carl Schmitt’s *The Concept of the Political*’, [(1932)], trans. J.H. Lomax, in Schmitt, *The Concept of the Political*, expanded edition, 97–122, hereinafter NCP.

4. William H. F. Altman, *The German Stranger: Leo Strauss and National Socialism* (Lanham, MD: Lexington Books, 2010); John P. McCormick, ‘Post-Enlightenment Sources of Political Authority: Biblical Atheism, Political Theology and the Schmitt-Strauss Exchange’, *History of European Ideas* 37 (June 2011): 175–80; and Miguel Vatter, *Leo Strauss’ Political Theology* (Cambridge University Press, forthcoming).

5. Reinhard Mehring, *Carl Schmitt, Aufstieg und Fall: Eine Biografie* (Munich: Verlag C.H. Beck, 2009).

6. Carl Schmitt, ‘The Age of Neutralizations and Depoliticizations’ (1929), trans. M. Konzett and J. P. McCormick, appended to *The Concept of the Political*, 80–96, at 96; hereinafter ND.

7. Leo Strauss, ‘Religiöse Lage der Gegenwart’ (1930), in Leo Strauss, *Gesammelte Schriften, Band 2: Philosophie und Gesetz, Frühe Schriften*, ed. H. Meier (Stuttgart: Metzler Verlag, 2001), 377–91, at 389.

8. CP, 27.

9. *Ibid.*, 36.

10. NCP, 116, emphasis in original.

11. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, [(1922)], trans. G. Schwab (Chicago: University of Chicago Press, 2006), 65, hereinafter PT.
12. Mehring, *Carl Schmitt, Aufstieg und Fall*.
13. CP, 36 and 27.
14. See Leo Strauss, *Philosophy and Law: Contributions to the Understanding of Maimonides and His Predecessors* [(1935)], trans. E. Adler (Albany: SUNY Press, 2002), 37; hereinafter P&L.
15. PT, 57–58.
16. Leo Strauss, 'Three Letters to Carl Schmitt', in Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. J. H. Lomax (Chicago: University of Chicago Press, 1995), 121–29, at 125.
17. Leo Strauss to Karl Löwith, 19 May 1933, in Leo Strauss, *Gesammelte Schriften, Band 3: Hobbes' politische Wissenschaft und zugehörige Schriften, Briefe*, ed., H. Meier (Stuttgart: Metzler Verlag, 2001), 624–25.
18. See Leo Strauss, 'The Testament of Spinoza', in *The Early Writings (1921–1932)*, trans. Michael Zank (Albany: SUNY Press, 2002), 216–24, and P&L, 37.
19. P&L, 73.
20. Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis* (1936), trans. Elsa M. Sinclair (Chicago: University of Chicago Press, 1996), 139.
21. *Ibid.*, 125–26.
22. PT, 59.
23. CP, 122.
24. Strauss, *The Political Philosophy of Hobbes*, 23.
25. Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Symbol* (1938), trans. G. Schwab (Chicago: University of Chicago Press, 2008), hereinafter LSTH.
26. *Ibid.*, 55.
27. *Ibid.*, 60.
28. LSTH, 57. See Miguel Vatter, 'Strauss and Schmitt as Readers of Hobbes and Spinoza: On the Relation between Political Theology and Liberalism', *The New Centennial Review* 4 (2004): 161–214, at 190–92.
29. *Ibid.*, 62.
30. See Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51* (Munich: Duncker & Humblot, 1991), 255.
31. See Leo Strauss, 'Why We Remain Jews' (1962), in *Jewish Philosophy and the Crisis of Modernity: Essays and Lectures in Modern Jewish Thought*, ed. K. H. Green (Albany: SUNY Press, 1997), 311–58, and 'Preface to the English Edition' (the so-called Autobiographical Preface), in *Spinoza's Critique of Religion* (1930), trans. E. M. Sinclair (New York: Schocken Books, 1965), 1–31.
32. Emblematic of Schmitt's many unsatisfying attempts at apologia are the essays contained in his *Ex Captivitate Salus: Erfahrungen der Zeit [1945–1947]* (Cologne: Greven Verlag, 1950).

FIVE

Crisis and the Consumer

*Reconstructions of Liberalism in Twentieth-Century
Political Thought*

Niklas Olsen

The weakening of consumer credit laws has been identified as a central factor which has contributed to the ongoing financial crisis. Policymakers in the EU and the US have thus turned their attention to financial consumer protection, adopting a range of policy measures to counter crisis-related failures. The US financial reform overhaul established a new federal agency that was to be solely responsible for consumer protection, the Consumer Financial Protection Bureau. At the same time, the European Commission brought forward a policy package, including new supervisory authorities, which changed the institutional design of financial consumer protection in the EU.¹

The weakening of consumer credit was allegedly caused by the idea of the 'sovereign consumer'. That is, the idea that all economic processes are ultimately directed towards satisfying the wants of a critical and independent consumer, who exerts sovereignty over the marketplace and demands little government regulation. Since the sovereign consumer was viewed as an agent, whose dynamic ruling of the market ensured not only efficiency, wealth and entrepreneurship, but also freedom, democracy and individuality, banks were allowed, if not obliged, to meet his or her borrowing needs.²

But what are the origins of the idea of the sovereign consumer? How, in which contexts, and by whom, was the idea created? What has been

said about the sovereign consumer in the past, and how did the figure come to play a key role in the present?

Exploring the history of the sovereign consumer, this chapter presents three arguments: (1) The sovereign consumer is a phenomenon marked by crisis, as the figure has not only contributed to the ongoing crisis, but was also born of one, namely, the crisis of the interwar period; (2) The history of the sovereign consumer is closely related to the history of neoliberalism: the figure was invented by liberal free-market thinkers in attempts to defend, to legitimize and to renew liberalism in the 1920s and 1930s, and it was widely disseminated by a new generation of liberals, who sought to reconstruct liberal ideology after 1945; and (3) The sovereign consumer that was disseminated after 1945 is identical to the figure which contributed to the financial crisis in the 2000s, but was different from the one that was born of the crisis of the 1930s. In fact, a radical change of the liberal sovereign consumer took place between the two crises. This change concerned the degree of sovereignty and rationality that liberals ascribed to the consumer, and the ways in which they related the figure of the consumer to the ideals of economic efficiency and political democracy.

THE EMERGENCE OF THE SOVEREIGN CONSUMER

The idea of the sovereign consumer was born in the interwar period. However, the idea of the consumer as the pivotal point of the capitalist economy can be traced back to Adam Smith, who, in *The Wealth of Nations*, wrote:

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.³

Smith's assessment, however, did not dominate classical economic theory, in which the producer was commonly viewed as the nexus of the economy. Portraying the producer as a figure possessing special capabilities and propensities when it came to creating economic growth, much nineteenth-century economic theory thus focused on the instituting conditions in which the entrepreneur-producer could boost the economy in the best possible way.

The marginal revolution in the late nineteenth century contributed to a shift of focus from supply to demand, unfolding as a scientific quest to settle the laws of value and prices, to determine how, when, and why consumers choose to use their money. In this quest, the marginalists pursued mathematical utility in an endeavour to establish an idealized figure of an economic agent, who acted with full information, complete rationality and without obstacles in a market of perfect competition. In other

words, they constructed a one-dimensional and mechanical consumer, which came to inform mainstream neoclassical economics. This consumer was increasingly confined as an object of study in the laboratory of economists and thus detached from real-life observations.⁴

When American and European free-market thinkers in the early twentieth century began to portray the consumer as a key agent in the economy, they both relied on and departed from the neoclassical agent shaped by the marginal revolution. Most notably, they did not ascribe the same perfect rationality and predictability to consumers as the neoclassicists had. In the view of the free-market thinkers, even if consumers acted rationally upon the basis of the available information, few individuals knew exactly what they wanted in the future or how to get it. Instead, consumers expressed many and changing desires or needs and pursued these in different ways. Notwithstanding this, or, rather, *because* of this, free-market thinkers viewed an economy which forced producers to invent new and better things to keep up with consumer favour, as an effective, prosperous, and, as such, rational system. Moreover, the free-market thinkers took the consumer out of the laboratory and into the real world, as they began to portray the figure as the key driver of capitalism and liberal democracy. In this process, using the consumer to describe and legitimize a particular economic-political order, they deeply moralized the figure.

The Austrian-inspired American economist Frank Fetter was the first free-market thinker in the twentieth century to connect consumers, capitalism and liberal democracy directly. In his 1905 book *The Principles of Economics*, Fetter stated that the 'consumers of products are the true purchasers of labor, materials, and uses of agents'. Moreover, he made an analogy between the market and the democratic form of government, arguing that the market 'is a democracy where every penny gives a right to vote'.⁵ Fetter did not further elaborate on this comparison of democracy and markets. However, his staging of consumers as key agents in the capitalist economy, and his arguments concerning the effective, democratic and just nature of the market economy, was picked up by other free-market thinkers, who reacted to the bad reputation that liberalism had acquired in public political discourse in the early twentieth century.

Liberalism's flawed reputation had its roots in the late nineteenth century, when the ideology had gradually been associated with negative developments and values, such as the exploitation of the working classes, monopolism and egoism, and, after WWI, also with economic crisis. The criticism intensified in the interwar years, when intellectuals and politicians often described liberalism as a fragile project, one which was unable to sustain a legitimate political order and effectively respond to the many challenges posed by the modern world. In reaction, liberal ideology was, in many contexts, modified and entirely abandoned in self-declared liberal *milieus*.⁶

One crucial break with 'classic liberalism' was voiced as ideas of a 'new' and more 'social' liberalism, which became widespread from the end of the nineteenth century, and later came to provide the foundation for practical politics. Through a reconciliation with the new socialistic and democratic forces, and based upon the conviction that the state should provide its citizens with equal opportunities by offering social services in areas of health, education, welfare and unemployment, social liberalism aimed to create a community in which the individual could unfold and contribute to the community.⁷

Free-market thinkers responded differently to the crisis of liberalism: they sought to redraw 'rather than to reformulate radically' the principles informing classic liberalism. Mobilizing in the wake of the Russian Revolution, they especially aimed to explicate the virtues of liberalism and the market *vis-à-vis* socialism and the planned economy, and they assigned a key role to the consumer in this endeavour.

Crucial, in this respect, was the Austrian economist Ludwig von Mises' article titled '*Die Wirtschaftsrechnung im Sozialistischen Gemeinwesen*' ('Economic Calculation in the Socialist Commonwealth') of 1920, which was followed up by the book *Die Gemeinwirtschaft (Socialism)* in 1922.⁸ In both texts, Mises argued that socialist systems had a calculation problem due to their incapability to determine prices, resulting from the fact that production is directed from a central authority and not by consumer demand. In *Socialism*, referring to Fetter's *The Principles of Economics*, Mises claimed that 'the lord of production is the consumer' in liberal capitalism and that 'all production must bend to the will of the consumer' in this system. He added:

From this point of view the capitalist society is a democracy in which every penny represents a ballot paper. It is a democracy with an imperative and immediately revocable mandate to its deputies. It is a consumers' democracy.⁹

In short, Mises defended and legitimized liberal capitalism by (re)describing it as an economically well-ordered, rational and democratic system, as it rested on the demands of ordinary people and not on the narrow interests of those in power of the centralized, planned economies.

In *The Case for Capitalism* from 1920, chief editor of the *Economist*, Hartley Withers, had launched a criticism of socialism and a defence of capitalism that was identical to that of Mises. 'Capitalism', Withers states, 'puts the real power in the hands of the average consumer, and so suffers from and rejoices in all the weakness and force, all the hopefulness and despair, that are associated with democracy'.¹⁰ Against this background, he concluded:

With regard to the consumer's freedom, it [capitalism] beats State Socialism and Guild Socialism so hollow that they are hardly to be seen on the course.¹¹

It is thus fitting that, in second edition of *Die Gemeinwirtschaft*, which appeared in 1932 at the height of the calculation debate, Mises had inserted a sentence which referred the reader to the 'striking remarks in Wither's, *The Case for Capitalism*', alongside his reference to Fetter's *The Principles of Economics*.¹²

More generally, in the socialist calculation debate, free-market thinkers increasingly portrayed the free consumer as the key agent of capitalism and liberal democracy in attempts to defend liberalism and attack socialism.¹³ Against this background, they judged economic-political systems according to their capacity to fulfil consumer desires or needs.

This was also the case in the 1935 volume entitled *Collectivist Economic Planning*, edited by the Austrian economist Friedrich A. von Hayek. Among other things, in his afterword to the book, Hayek labelled a section which discussed the problems of socialist calculation, the 'Abrogation of the Sovereignty of the Consumer'. Without elaborating on the concept, Hayek asserted that it was an ideal 'which few who realized what it meant would readily abandon'.¹⁴ In the same year, German economist Wilhelm Röpke, who became a key actor in the fight for liberalism against socialism, referred in passing to a 'democracy of consumers' in an article titled 'Fascist Economics'.¹⁵

Evidently, a language portraying the consumer as a key agent of capitalism and liberal democracy had been underway since the early twentieth century and became widespread in the 1930s. However, this was not the only notion of the consumer that was disseminated at the time, and it was far from the most dominant one.

Having emerged as a figure in social-political discourse in the nineteenth century, the consumer was pushed to the centre of public and political discourse in Europe and the US in the interwar years. In this process, previously separate discourses of the consumer, for example, within social politics and economic thought, were combined. This created a universal category of the consumer, a figure now imbued with a plurality of societal practices and virtues. Elevating the figure into a key figure of modern society, many politicians, scholars and intellectuals described the consumer as an agent capable of ensuring and enhancing economic growth and political democracy. More specifically, and most pronounced in the US, consumer choice and the act of consumption were portrayed as features that were necessary to boost the national economy and strengthen the democracies of Western countries against the threats of fascism and Communism.¹⁶

However, the issue of how consumers could best contribute to economic growth and democratic development within society was strongly contested. The contestation to a great extent concerned the question of whether consumers tended to thrive within free markets, or benefit from a regulatory framework aimed at protecting the consumer from market forces. The consumer debates not only divided free-market thinkers and

socialists, but also exposed a split among liberals concerning how to deal with the crisis of liberalism. This split was evident, for example, in relation to the New Deal. On the one hand, free-market thinkers embraced a sovereign consumer steeped in the ideals of classical liberalism and in line with the one launched in the realm of marketing where the figure was often portrayed as 'Voter', 'Judge' and 'Jury', dictating what is produced on the market by his or her choices.¹⁷ On the other hand, the so-called citizen consumer was launched by social liberal reformers as an ideal that safeguarded the rights of individual consumers and acted on a commitment to the common good. This ideal involved a conception of the new American democracy as based upon consumers, who were gathered in protection agencies and represented on all major advisory boards and agencies. Linked to a social definition of citizenship, which incorporated consumer choice, the idea of the citizen consumer was connected to frameworks of state regulation and social policy that aimed to remedy market flaws, protect consumers from manipulative advertising, and provide them with equal economic and social opportunities.¹⁸

In the 1930s, the consumer debates were joined by a number of liberals, who believed that *laissez-faire* had to be abandoned if liberalism was to be saved from its contemporary crisis. In a European context, this crisis was deepened by the upsurge of Communist and fascism, which drew on very different ideas of how the 'masses' ought to be incorporated into a legitimate and durable political system, and what role the state and the individual should play in modern society.

In 1938, twenty-three liberal thinkers from several countries met at the so-called *Colloque Walter Lippmann* in Paris to discuss the challenges to liberalism. Besides the American journalist and intellectual Walter Lippmann, the participants included, among others, Ludwig von Mises and Friedrich A. von Hayek, economists Wilhelm Röpke and Alexander Rüstow from Germany, and philosophers Raymond Aron and Louis Rougier from France. At the meeting, they outlined an agenda, which they labelled 'neoliberal', and which concerned ideological principles and organizational activities aimed at creating liberal societal orders based upon the rule of law, the price mechanism, and the role of the state as an actor within a market economy. While the agenda came to a halt at the outbreak of the WWII, some of the (neo)liberals, who had met in Paris in 1938, resumed their ideological labour in the *Mont Pelerin Society*; the transnational association of economists, intellectuals and businessmen founded by Friedrich von Hayek in Switzerland in 1947, which is today known as the cradle of neoliberalism.¹⁹

In the period from the 1930s to the 1950s, neoliberalism was 'anything but a succinct, clearly defined political philosophy'.²⁰ Even if the members of the neoliberal network agreed on the overall aim of developing a liberal ideology based upon a free-market economy and notions of individual freedom, they embraced different variants of liberalism. At the

one end of the spectrum, Ludwig von Mises argued that a classical liberalism based upon individual property rights, free markets and minimal government intervention would lead to a peaceful, prosperous and just society. At the other end, figures such as the philosopher Karl Popper embraced a more social liberal discourse, viewing state regulation and distribution of the economy as essential to a liberal society.

In fact, in the 1930s and 1940s, several members of the neoliberal network were deeply suspicious of nineteenth-century capitalism, associating unregulated markets with two problems.²¹ First, recent developments had shown that capitalism not only brought about prosperity and freedom, but also inequality and widespread poverty. In this respect, these liberals endorsed various degrees of governmental economic regulation and wealth redistribution. However, they had no intention of embarking on a system of socialist planning, as they held a free-market system to be vital for a just society.

Second, the liberals in question had come to believe that markets were not naturally made, but had to be created and maintained, since history had shown that unregulated markets invariably led to the rise of monopolies and the misuse of human and environmental resources. In other words, they were convinced that strong systemic frames were needed to secure the workings of the price mechanism and the ability of the market to bring about growth, freedom and justice (for the ordoliberal trajectory of the neoliberal attempts to institute legal systems aimed at creating market economies, see the contribution by Christian Jöerges, chapter 9 in this volume). They therefore called upon the state to create and maintain the free market. The key question was how to define the state's positive functions: How extensive should they be, and should they mainly focus on creating an effective market or on mitigating its negative consequences?

WILLIAM H. HUTT'S CONCEPT OF CONSUMERS' SOVEREIGNTY

For the British economist William H. Hutt, who was a founding member of the *Mont Pelerin Society*, the state's functions were also the key issue to be pondered in the 1930s. It was in this context that, in his 1936 book *Economists and the Public: A Study of Competition and Opinion*, he elaborated on and, for the first time, explicitly named the sovereign consumer figure by launching the concept of the 'consumers' sovereignty'.²²

Economists and the Public contained many—at times conflicting—messages. In many chapters, Hutt reiterated arguments known from free-market thinkers such as Frank Fetter, Hartley Withers and Ludwig von Mises, giving the impression that his aim was exclusively to rehabilitate *laissez-faire* liberalism and its proponents.

In the first part of the book, he argued for the necessity to restore the authority that liberal economists had allegedly once enjoyed in the public debate.²³ According to Hutt, economists had contributed to their own downfall, as they had abandoned economic truth (i.e., the doctrines of *laissez-faire*) in the pursuit of their personal interests and political ambitions, thus causing what he understood to be a 'crisis of public power and authority' (see the introduction to this volume) of liberal economics. His solution to the ineffectiveness of the economic discipline was to form an 'Association of Pure Economists', whose members should focus only on making objective statements and forsake all connections to politics and business. Their task was to explicate and defend the market system, so that the public would understand its rationality and virtues.²⁴

In the second part of the book, Hutt argued for the necessity to restore and maintain a free-market economy. It was in this context that, in a chapter with the same title, he introduced the notion of 'consumers' sovereignty'. 'The consumer,' Hutt wrote, 'is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding)'.²⁵ To this, he added that the power assigned to the consumer is to be viewed as an expression of democratic values in achieving 'the social control which maximizes liberty and justice'.²⁶ As such, Hutt made it clear that, next to making an argument about market efficiency, his vision of 'consumers' sovereignty' comprised a set of social norms and political ideas that were central to liberal society.

More precisely, according to Hutt, if liberal economics and free-market thought were to regain public power and authority, it was necessary to outline a new liberal political order that drew its legitimacy from notions of democracy, freedom, and liberty. What, in his perspective, made the principle of 'consumers' sovereignty' a suitable basis for such an order was its 'superior ethical significance in liberty and freedom of choice', meaning that it gave consumers the choice between accepting and rejecting a market offering, and thereby constituted an open system that reflected people's preferences.²⁷

By giving consumers such great power in determining the allocation of resources and the course of production, Hutt not only answered those who criticized liberalism for its lack of a clear source and symbol of societal order, he also launched a defence against the Marxist conception of capitalism as a system merely enriching the owners of the means of production. At the same time, he argued that the case for competition also relied on the consent of producers, and that they ought to view a societal order based upon 'consumers' sovereignty' as far more attractive than the available alternatives in the 1930s, as, in a market society, producers are dependent on the many and divergent choices of the consu-

mer and not on a web of constraints posed by the state or by the often unidentifiable networks of power in a totalitarian system.

Hutt justified the supremacy of the consumer over the producer on the grounds 'that every individual is, after all, not only a producer but a consumer—that every individual is not only subject but sovereign'.²⁸ In this context, echoing the parallel between consumer choice and the ballot box first outlined by Frank Fetter, he extended the mechanisms of liberal democracy to the market, ascribing the same measure of social validity and a similar rationality 'on the part of voters in an election and consumers in a market place'.²⁹ However, it was not ideals of economic efficiency or wealth maximization that were at the core of Hutt's notion of consumer's democracy, but the view that only minimal restrictions should be placed on personal freedom. His ambition was to create a system that leaves the individual free to adjust 'his conduct in the way he thinks will bring him the maximum of satisfaction of all kinds he can take from society'.³⁰ As this freedom not only concerned the actions of buying and selling, but also, more broadly, how individuals choose to organize and live their lives, it necessitated a willingness to tolerate the choices of other individuals, so as to defuse the potential for conflict. 'The case for competition rests on this tolerance', he emphasized, thus calling upon a classical liberal virtue that was under growing pressure in the 1930s.³¹

Indeed, by merging notions of liberty, individualism and tolerance with conceptions of legitimacy, sovereignty and power, Hutt was updating liberalism to the age of ideologies, and he evidently assigned greater value and trust to the mechanisms of capitalism and liberal democracy than communist and fascist ideologies did. Both of these ideologies sought to deal with the 'the rise of the masses' through creating a supposedly democratic unity of the people both by means of *and* within a total state.³² Launching consumer sovereignty as part of the contemporary battle about the meaning of democracy and the role of the market in this context, Hutt sought to portray the market—'and liberalism more generally'—as much more democratic than the so-called people's democracies proposed by communists and fascists. This involved an attempt to turn the masses into sovereign consumers who dictated a well-ordered, efficient and legitimate liberal-capitalist system. In this process, Hutt tapped deeply into the consumer language that free-market thinkers had outlined in the first decades of the twentieth century.³³ However, he not only outlined a 'thicker' description of the consumer, but also unfolded a view of the nature and dynamics of consumers and markets that was more pessimistic than the one expressed by Fetter, Withers and Mises.

Most importantly, Hutt identified crucial limitations in the democratic and liberating potential encompassed in the notion of consumers' sovereignty. To begin with, discussing the formation of preferences among consumers, he expressed doubts about the ability of consumers to know what was in their own best interest. According to Hutt, instead of reflect-

ing the individual's unique being, '[o]ur tastes and desires have after all been almost wholly imposed upon us by the teachings, the tastes and the standards of those among whom we live'.³⁴ In fact, Hutt added, due to social traditions, and influenced by techniques of modern advertising, consumers often bought utterly useless things.

Rejecting the idea that individuals are perfectly rational on the marketplace, Hutt placed himself in line with those free-market thinkers, who drew attention to the limitations of free markets, and found it impossible to return to *laissez-faire*. One of the most influential American representatives of these thinkers was the Chicago economist Frank Knight, whose 1923 essay 'The Ethics of Competition' was often referred to by Hutt and discussed in his *Economists and the Public*. Among the many limitations that Knight identified in unregulated capitalism was precisely that it was the surrounding cultural environments that for the most part form human needs. 'In fact', he wrote, 'human activity is largely impulsive, a relatively unthinking and undetermined response to stimulus and suggestion.'³⁵

Sharing Knight's concern about the lack of individual rationality, Hutt nevertheless argued that the supreme norm of freedom outweighed this deficiency of consumers' sovereignty. In his view, individuals should be free to choose, regardless of the quality of their choices, and he thus portrayed consumer irrationality as an inevitable feature of what Knight, in his essay, had labelled the 'great' and 'competitive game' of capitalism.

In addition, Hutt was hoping that time and experience would remedy the irrationality of consumers. In this respect, he picked up on an idea that was widespread among free-market thinkers, and which can be traced back to the work of Carl Menger, the founder of Austrian Economics.³⁶ Diverging from the marginalist calculus, Menger included the possibility of error in individualistic decision making, but also believed that societal progress would, in various ways, enable individuals to understand what their own needs actually were. Liberal thinkers, such as Hutt, agreed with this belief. They, moreover, expected that errors and mistakes on the marketplace would result in increased consumer intelligence, thus ascribing certain rationality to the capitalist system.

However, Hutt's optimism was limited. He went on to argue for 'educative restraints of freedom of choice', which was to be undertaken via government action in order to 'protect the individual from the unforeseeable results of his voluntary acts'.³⁷ This was far from the only area of state activity that he introduced in *Economists and the Public*. Most importantly, he identified two further (and more crucial) limitations to the democratic potential comprised by the notion of consumers' sovereignty, namely, (1) that votes in the marketplace are not evenly distributed among the population, due to the huge inequalities of income and wealth in modern society; and (2) that unregulated competition creates condi-

tions in which the price mechanism is undercut and resources are exploited in undesirable ways by business and other kinds of vested interests.

According to Hutt, free-market economists had, in fact, always been aware of the various limitations of the market and had also outlined a variety of measures to remedy them, but they had eventually failed to use this knowledge in the pursuit of personal interests and political ambitions, leading to this knowledge being discarded. However, the concern for market deficiencies and the flaws that Hutt ascribed to the tradition of free-market thought were more in line with contemporary social liberals than with figures such as Fetter, Mises and Withers. So were the measures that he endorsed to address the flaws.

In order to level out the democratic playing field and remedy the malfunctions of unregulated competition, Hutt thus presented a rather comprehensive governmental programme. Besides public education, the programme involved a minimization of the inequalities of wealth through the drastic restriction of private inheritance, steeply progressive taxation, and the removal of the sources of special privilege, including labour unions and monopolies. As such, reinterpreting liberalism into a doctrine that views substantial state intervention in the economy as necessary to ensure functioning markets as well as justice and equality in a modern society, *Economists and the Public* formed part of mainstream neo-liberal discourse in the 1930s.

Like other neoliberals in the 1930s, Hutt reflected on the violation of individual liberty that his societal visions involved and offered a validation for it. This validation was based upon the belief that complete freedom in modern society is both undesirable and utopian, and that restraints are legitimate if they are 'inevitable', 'impartial', and 'impersonal' in nature.³⁸ But it also rested on the conviction that the possibility of restoring the public power and authority of liberalism was inextricably bound up with its ability to enhance justice, equality and security more broadly in modern society. 'It rests on a common-sense view of history,' Hutt concluded about his concept of consumers' sovereignty, 'which suggests that people will consent to be ruled only in a regime which can be seen to give them equal rights and equality of opportunity'.³⁹

Overall, Hutt aimed to establish a market economy based upon free prices and competition, which was directed toward satisfying consumer choice. However, he argued that markets and consumers were imperfect and susceptible beings that had to be regulated and protected, respectively. He assigned the state a substantial role in this context. By breaking up monopolies, restricting advertisement activity, enforcing taxation and ensuring social welfare activities, free and fair competition as well as basic economic, political and social consumer rights would be secured. Even if it was marked by tensions, Hutt saw consumers' sovereignty as the best solution to the contemporary challenges. In his eyes, it's favouring of

political democracy and social freedom simply constituted a better societal model than competing societal visions in the 1930s did.

THE SOVEREIGN CONSUMER RELAUNCHED AND RESHAPED

Among the many neoliberal thinkers in 1930s and 1940s who shared the main positions outlined in *Economists and the Public* were key representatives of the Chicago School, such as Henry C. Simons and Jacob Viner, and their younger associates Milton Friedman and George Stigler.

However, in the period from the 1950s to the 1970s, Friedman and Stigler were instrumental in taking the Chicago School and the project of neoliberalism in a new direction. In this process, they turned key arguments outlined in the work of neoliberal thinkers such as William H. Hutt upside down, including his idea that markets and consumers must be created and protected by the state. Friedman and Stigler thus vented a high degree of trust in the efficiency and self-protective mechanisms of markets and consumers, who they understood as sovereign, largely rational, and utility-maximizing agents. Moreover, they expressed a deep scepticism toward governmental regulation and claimed that business monopoly was no real problem for a competitive economy.

A passage in the opening chapter of Friedman's *Capitalism and Freedom* published in 1962 illustrates the new view on the sovereign consumer that he launched with Stigler:

The consumer is protected from coercion by the seller because of the presence of other sellers with whom he can deal. The seller is protected from coercion by the consumer because of other consumers to whom he can sell. The employee is protected from coercion by the employer because of other employers for whom he can work, and so on. And the market does this impersonally and without centralized authority. Indeed, a major source of objection to a free economy is precisely that it does this task so well. It gives people what they want instead of what a particular group thinks they ought to want. Underlying most arguments against the free market is a lack of belief in freedom itself.⁴⁰

Friedman and Stigler's reinterpretation of the sovereign consumer is to be understood against the background of changed societal contexts after 1945. Most importantly, the reinterpretation unfolded as a reaction to the ways in which regulation was theorized and practised in postwar America; it took place against the background of the profound transformation of the economics discipline that took place in the 1950s and 1960s; and it was shaped by new political contexts, such as the Cold War.

The postwar American political economy was characterized by a reinforcement of the socially-embedded managed capitalism and the regulatory framework that had been created in the 1930s. More specifically, in the 1950s and 1960s, this regulatory framework developed into a compre-

hensive system of independent federal commissions and agencies, which oversaw the nation's crucial infrastructure industries and were in charge of setting prices, quality, and quantity standards, thus determining which firms could enter or leave a market, what goods and services could be offered, and how the goods and services were to be sold. All these and other industry-specific and economy-wide agencies amounted to a far-reaching regulatory system, which imposed conditions on market transactions between either producers and consumers or firms and workers.⁴¹

The scope of the American regulatory system peaked in the 1960s and early 1970s, aided by consumer advocates such as Ralph Nader, who became famous for demanding aggressive state intervention to protect Americans from dangerous consumer products.⁴²

Similar to the New Deal reformers, consumer advocates such as Ralph Nader and the supporters of the regulatory framework conceptualized a highly vulnerable and susceptible consumer trapped within a malfunctioning, manipulative and repressive capitalist system. A similar consumer ideal was found in the flood of literature appearing in the postwar period that heavily criticized the contemporary purchaser consumerist culture for being individualistic, socially divisive and wasteful, and which, moreover, claimed that consumer choice was deeply manipulated by the power of advertising. Some of the most well-known contributions came from social liberal critics, such as journalist Vance Packard and economist John Kenneth Galbraith, both of whom sounded the alarm bell warning against postwar consumption culture and politics with their respective books *The Hidden Persuaders* (1957) and *The Affluent Society* (1958). Both argued that certain actors on the market (consumer research and advertising) tried to manipulate consumer desires and needs, and Galbraith also contended that the new demands created by advertising led to exuberance in private production and consumption that pushed out public spending and investment.⁴³ According to Galbraith, the result would be private affluence and public poverty, and, next to government protection of the consumer, he therefore called for comprehensive economic regulation and redistribution.

While Galbraith represented typical views of markets and consumers in the political realm, he found himself increasingly at odds with the views on these issues among his colleagues in the American economics discipline, which underwent a profound transformation in the 1950s and 1960s. Here, the discipline came to be characterized by neoclassicism as a dominant framework, replacing the plurality of approaches characterizing the interwar years. This included a growing faith in the workings of free competition and the ideal of a utility-maximizing economic agent, acting with full information and complete rationality to maximize individual utility in a market of perfect competition.⁴⁴

Scholars from the Chicago School such as Friedman and Stigler were key figures in the transformation of the US economics discipline from

interwar pluralism to postwar neoclassicism. They also played vital roles in changing the *Mont Pelerin Society* in the 1950s and 1960s. From gathering a heterogeneous group of intellectuals, philosophers and economists studying the relations between market and state from many different angles and embracing various visions of liberal society, under their leadership, the *Mont Pelerin Society* was turned into an association of mainly free-market oriented, neoclassical economists.⁴⁵

It was against this background, and in reaction to the views on regulation and consumers associated with figures such as Galbraith and Nader, that Friedman and Stigler began to express a firm belief in the efficiency and self-protective mechanisms of markets and consumers, and deep scepticism toward government regulation. The context of the Cold War was arguably important for the hardening of their beliefs, as the discourse of choice was linked to the struggle for democratic over totalitarian values.⁴⁶

Yet there were crucial differences in the ideals of the consumer and the ways of relating capitalism to democracy in the work of Friedman and Stigler. These differences speak to the further development of neoliberalism and the Chicago School in the 1960s and 1970s. On the one hand, similar to early neoliberal thinkers such as Hutt, Friedman had referred to the enhancement of equality, innovation and meritocracy that supposedly result from freeing individuals as consumers on the market place. Stigler, on the other hand, contributed to shaping a sovereign consumer, which disconnected ideals of economic efficiency, utility and growth from those of democracy, equality and moral behaviour. This consumer was positioned at the centre of the Chicago School that later to manifest itself in the 1970s.⁴⁷

Stigler's sovereign consumer was rooted in a strong belief in the utility of the maximising nature of individuals and in a definition of economics as dealing with the relationship between ends and scarce means. This involved a strict analytical focus on how individual preferences play out in their choices between scarce means and ends, and on outlining the principles that most effectively governs the allocation of scarce means among competing ends. It also involved a view of distributional issues as not falling within the category of economic analysis, as it was deemed impossible to arrive at interpersonal comparisons of individual preferences and utility, which could form the basis of overall social welfare distribution.

Against this background, aiming to outline the principles that most effectively govern the allocation of scarce means among competing ends, Stigler argued that individuals generate more efficiency and wealth as consumers on the market than as agents entering and capturing government bodies for individual utility. Moreover, he claimed that monopoly was not a problem for a competitive economy, thus allowing markets to be dominated by a few and very powerful firms. And while agency and

initiative was handed over to the big players, consumer action was limited to that of reacting to price signals on the market in order to maximize the value of the goods produced and secure efficiency and growth. Reduced to tools for economic efficiency, the sovereignty of consumers was thus bounded. In addition, they were understood as a homogenous, mechanical and predictable mass, rather than as a heterogeneous group of individuals with divergent qualities and preferences or basic social and political rights.⁴⁸

In the context of the crisis and breakdown of Keynesianism, the features characterising the work of George Stigler and like-minded scholars such as Chicago School scholar Gary Becker and public choice theorist James Buchanan (both of whom served as presidents of the *Mont Pelerin Society*) became increasingly prominent in the way in which economics and politics were conceptualized and redesigned in the US and in Western Europe. In the 1970s and 1980s, governments thus began to experiment with economic liberalization policies such as privatization, deregulation and reductions in government spending in order to enhance the role of the private sector in the economy.

Two developments are especially relevant to the topic at issue. The first is the formulation and application in the US of a particular model of antitrust law, which pursued the new neoliberal ideals of economic efficiency and aggregate wealth. While allowing a market dominated by few and powerful firms, this model disregarded distributional issues and ethical concerns relating to the societal position and rights of consumers.⁴⁹ The second is the emergence of so-called 'privatized Keynesianism', which transferred the debt burden to individuals—'often low-income or medium-income people, paying high interest-rates for their loans'—whose spending became linked to unregulated derivatives markets.⁵⁰ In this process, government sought to foster and elicit a particular consumer mentality, which aimed at persuading consumers to exercise sovereignty by borrowing and spending, as well as trying to ensure that market institutions responded to and served this mentality. This political-economic setup played a key role in the process that led to the financial crisis, as consumers were incentivised to buy into a housing market that turned out to be a pyramid scheme.⁵¹

In spite of new regulatory measures to protect consumers, this political economic has not been seriously challenged or replaced. In many countries, austerity is doggedly pursued to reduce government budget deficits; banks which contributed to the market crisis were bailed out and are back in the game; and consumers continue to be portrayed and addressed as sovereigns, although their sovereignty remains bound and many have little money at their disposal. These elements are intrinsic to the dynamics of capital at the beginning of the twenty-first century, where economic growth is accompanied by extreme inequalities that threaten to stir discontent and undermine democratic values.⁵²

NOTES

1. Lisa Kastner, 'Forging Legitimizing Coalitions: Comparing EU/U.S. Financial Consumer Protection Reform', available at: <http://www.aicgs.org/publication/forging-legitimizing-coalitions-comparing-euu-s-financial-consumer-protection-reforms-2>, published 14 March 2014.

2. Christopher Payne, *The Consumer, Credit and Neoliberalism: Governing the Modern Economy* (Oxford: Routledge, 2012).

3. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Chicago: University of Chicago Press, 1977), 877.

4. Payne, *The Consumer, Credit and Neoliberalism*, 20–32; and Mary S. Morgan: 'Economic Man as Model Man: Ideal Types, Idealization and Caricatures', *Journal of the History of Economic Thought* 28 (2006): 1–27.

5. Frank A. Fetter, *The Principles of Economics: With Application to Practical Problems* (New York: The Century Co., 1905), 154 and 212. Austrian economics is a school of thought that is based upon the concept of methodological individualism and rejects economic empiricism in the form of modelling. It originated in the late nineteenth and early twentieth century Vienna with the work of Carl Menger, Eugen Böhm von Bawerk and Friedrich von Wieser.

6. Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, CT: Yale University Press, 2011), 7–48; Michael Freeden, *Liberalism Divided: A Study in British Political Thought 1914–1939* (Oxford: Oxford University Press, 1986); Anthony Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984), 284–308.

7. Most famous is the making of a 'new' liberalism in a British context. See Michael Freeden, *The New Liberalism: An Ideology of Social Reform* (Oxford: Clarendon Press, 1978).

8. Ludwig von Mises, 'Die Wirtschaftsrechnung im Sozialistischen Gemeinwesen', *Archiv für Sozialwissenschaft und Sozialpolitik* 47 (1920): 86–121; *Die Gemeinwirtschaft. Untersuchungen über den Sozialismus* (Jena: Gustav Fischer, 1922).

9. von Mises, *Die Gemeinwirtschaft. Untersuchungen über den Sozialismus*, 435 and 436.

10. Hartley Withers, *The Case for Capitalism* (New York: E. P. Dutton & Co., 1920), 40–41 and 42.

11. *Ibid.*, 244.

12. Ludwig von Mises, *Die Gemeinwirtschaft. Untersuchungen über den Sozialismus* (Jena: Gustav Fischer, 1932), 412, note 1.

13. Lawrence H. White, *The Clash of Economic Ideas: The Great Policy Debates and Experiments of the Last Hundred Years* (Cambridge: Cambridge University Press, 2012), 32–67; and Joseph Persky, 'Consumer Sovereignty and the Discipline of the Market', *Revue européenne des sciences sociales* 96 (1993): 13–28.

14. Friedrich A. von Hayek, ed., 'The Present State of the Debate', in *Collectivist Economic Planning* (London: Routledge, 1935), 214 and 219.

15. Wilhelm Röpke, 'Fascist Economics', *Economica* 2 (1935): 93.

16. Frank Trentmann, 'The Modern Genealogy of the Consumer: Meanings, Identities and Political Synapses', in Frank Trentmann and John Brewer, eds., *Consuming Cultures, Global Perspectives: Historical Trajectories, Transnational Exchanges* (Oxford: Berg, 2006), 19–69.

17. Stefan Schwarzkopf, 'The Consumer as "Voter", "Judge" and "Jury": Historical Origins and Political Consequences of a Marketing Myth', *Journal of Macromarketing* 31 (2011): 8–18.

18. Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Post-war America* (New York: Vintage Books, 2003), 17–61.

19. Philip Mirowski and Dieter Plehwe, eds., *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2009).

20. Dieter Plehwe, 'Introduction', in Mirowski and Plehwe, *The Road from Mont Pelerin*, 1.

21. Ben Jackson, 'At the Origins of Neo-Liberalism: The Free Economy and the Strong State, 1930–1947', *The Historical Journal* 53 (2010): 129–51.

22. William Harold Hutt, *Economists and the Public: A Study of Competition and Opinion* (London: J. Cape, 1936). In the historical research on the idea of the sovereign consumer, Hutt's contribution has often been omitted or simplified. Most importantly, Hutt's notion of consumers' sovereignty is absent in Christopher Payne's recent account of how the ideas of the sovereign consumer emerged in economic thought in the first half of the twentieth century and manifested in British economic-political discourse in the 1960s and 1970s. Moreover, the notion is somewhat distorted in Stefan Schwarzkopf's articles on the origins of the idea of consumer choice and on consumer theology, respectively, as they place Hutt too squarely in a camp of Austrian free-market idealists and anti-statists around Ludwig von Mises and Friedrich von Hayek and thus overlook the nuances and complexities of Hutt's project. Payne, *The Consumer, Credit and Neoliberalism*; Schwarzkopf, 'The Consumer as "Voter"', "Judge" and "Jury"', and idem, 'The Political Theology: Towards an Ontology of Consumer Society', *Theory, Culture and Society* 28 (2011): 106–29. For a brief but insightful discussion of Hutt's notion of 'consumer's sovereignty', see Joseph Persky, 'Retrospectives: Consumer Sovereignty', *Journal of Economic Perspectives* 7 (1993): 183–91. See, also, the comments in Trentmann, 'The Modern Genealogy of the Consumer', 17–61, at 44–45.

23. This was a theme that von Hayek also pondered in his contributions to the calculation debate. See Friedrich von Hayek, 'The Nature and History of the Problem', in von Hayek, 'The Present State of the Debate', 8–11.

24. As phrased by Warren J. Samuels: 'Introduction', in William Harold Hutt, *Economists and the Public: A Study of Competition and Opinion, With a New Introduction by William J. Samuels* (New Brunswick, NJ: Transaction Books, 1990), 2.

25. Hutt, *Economists and the Public*, 257.

26. *Ibid.*, 257.

27. *Ibid.*, 270.

28. *Ibid.*, 262.

29. *Ibid.*, 262.

30. *Ibid.*, 265.

31. *Ibid.*, 293.

32. Müller, *Contesting Democracy*, 91–124.

33. Careful not to claim credit for the notion of consumers' sovereignty, in a later article, Hutt pointed to earlier uses of the notion among other liberal economists and in marketing literature. William H. Hutt, 'The Concept of Consumers' Sovereignty', *The Economic Journal* 50 (1940): 66, note 2.

34. Hutt, *Economists and the Public*, 282–83.

35. Frank H. Knight, 'The Ethics of Competition', *Quarterly Journal of Economics* 37 (1923): 590. See, also, Angus Burgin, 'The Radical Conservatism of Frank Knight', *Modern Intellectual History* 6 (2009): 513–38.

36. Bruce Caldwell, *Hayek's Challenge: An Intellectual Biography of F. A. Hayek* (Chicago: University of Chicago Press, 2004), 32–35.

37. Hutt, *Economists and the Public*, 273 and 275.

38. Hutt, *Economists and the Public*, 252–53.

39. *Ibid.*, 298.

40. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 14–15.

41. Eduardo Canedo, 'The Rise of the Deregulation Movement in Modern America, 1957–1980', PhD diss., Columbia University, 1–2.

42. *Ibid.*, 134–56.

43. Daniel Horowitz, *Vance Packard and American Social Criticism* (Chapel Hill: University of North Carolina Press, 1994), and *The Anxieties of Affluence: Critiques of*

American Consumer Culture, 1939–1979 (Amherst: University of Massachusetts Press, 2004).

44. Mary S. Morgan and Malcolm Rutherford, 'The Character of the Transformation', in Mary S. Morgan and Malcolm Rutherford, eds., *From Interwar Pluralism to Postwar Neoclassicism* (Durham, NC: Duke University Press, 1998), 1–28.

45. See the relevant chapters in Robert Van Horn, Phillip Mirowski and Thomas A. Stapleford, eds., *Building Chicago Economics: New Perspectives on the History of America's Most Powerful Economics Program* (Cambridge: Cambridge University Press, 2011), and Mirowski and Plehwe, *The Road from Mont Pelerin*.

46. For perspectives on the contemporary connections made between liberal democracy, the discourse of choice and the Cold War, see Hunter Heyk, 'Producing Reason', in Mark Solovey and Hamilton Cravens, eds., *Cold War Social Science: Knowledge Production, Liberal Democracy, and Human Nature* (New York: Palgrave Macmillan, 2012), 99–116; and Sonia Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (Chicago: University of Chicago Press, 2003).

47. For a detailed account of Stigler's economic-political visions, see Canedo, note 'The Rise of the Deregulation Movement', 98–133.

48. See, also, the comments on the implications of the consumer ideals of the later Chicago School in Colin Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Cambridge University Press, 2011), 55–57.

49. *Ibid.*, 49–71.

50. Colin Crouch, 'Privatized Keynesianism: An Unacknowledged Policy Regime', *The British Journal of Politics and International Relations* 11 (2009): 382–99; Paul Langley, *The Everyday Life of Global Finance: Saving and Borrowing in Anglo-America* (Oxford: Oxford University Press, 2008), 162–83.

51. Payne, *The Consumer, Credit and Neoliberalism*, 20–32.

52. Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2013).

Part III

The Causes of Crises from
Corporatism to Governance

SIX

The Constitutionalization of Labour Law and the Crisis of National Democracy

Chris Thornhill

Many sociologists have observed that the formation of modern societies as *nations* was deeply linked to the integrative functions of rights.¹ In key respects, in fact, this common sociological intuition is correct. It is clearly observable that the extension of societies into their modern national form was substantially determined by the fact that these societies cemented increasingly generalized *layers of rights* to integrate their populations.

To illustrate this, for example, the ideologues of national revolution in the later Enlightenment originally saw the equal exercise of rights as a path to a unified national society, and they promoted general rights in order to supplant the patchwork of particular entitlements which had underpinned pre-national social structure.² The revolutionaries of 1789–1795 France began to construct nations by using universal rights to eradicate rights founded in local distinctions of status or in corporate distinctions of sectoral or professional affiliation, thus placing single citizens, via rights, in a direct relation to the central organs of the political system. Famously, just before the French Revolution, Abbé Sieyès defined the nation as a people *equal in rights*.³ Jean Le Chapelier then concluded, in his (in-)famous law against corporations (1791), that general personal rights eliminated all corporate structures from society.⁴ Similarly, in the American Revolution, the rights enunciated in the Federal Constitution were immediately translated into justiciable rights. These were then used, across the diffuse territories of the new American Republic, as

institutions that drew persons in different states and different social spheres into an immediate relation to national law.⁵

The constitutional revolutions of the eighteenth century thus enunciated a formal diction of national-legal inclusion through rights. This diction was subsequently translated into objective socio-legal reality through two distinct processes of legal evolution, which were centred both on a thickening of the rights *and* on an extension of national inclusionary structures across society.

In the course of the nineteenth century, on the one hand, the national construction of society relied on the growing circulation of private rights and of some civil rights. For example, the growing generalization of *proprietary or monetary rights* accompanied and refracted an expansion of the economy, which progressively reduced the social prominence of persistent local patterns of transaction, remuneration and distribution. Likewise, the rising importance of the rights of *freedom of movement, labour and contract* meant that singular persons in society were able to detach themselves from localized corporations and trade associations, and society as a whole was able to expand beyond its embedded localized limits. Societies were thus flattened into nations, forming relatively uniform environments for their legal and political systems, as they began to include and regulate the private exchanges of society through the medium of rights.

In the course of the nineteenth century, on the other hand, some states began to apply *political rights* as integrative institutions, and this also acted to widen societies beyond their original pre-national form. Marx was manifestly wrong in suggesting that, by the middle of the century, states in Europe were well on their way to guaranteeing substantial bodies of political rights to the persons that were subject to their authority.⁶ Very few states began seriously to make good on the inclusionary political implications of the constitutional revolutions of the 1780s until around 1870. Gradually, however, as national societies expanded their internal inclusivity through private and civil rights, national political systems were confronted with societal environments which could no longer be held together through local centres of authority. Most importantly, they were exposed to social constituencies, which, increasingly released from local motivational horizons, presupposed that acts of legal direction should have generalized foundations and command some token of generalized support. As a result, in societies where rights-based expansion in the private or economic domain was most advanced, political rights also began to play a vital role in national inclusion and national formation. The existence of a rudimentary political franchise, securing a substratum of general support for the national political system, was established in most major European states by about 1860.

Overall, therefore, the increasing promotion of rights and the increasing construction of societies as nations were two sides of the same pro-

cess of social inclusion. Societies evolved as comprehensive systems of inclusion through the incremental solidification of different strata of rights, and through the transformation of single actors in society into holders, first, of generalized private and monetary rights and, second, of generalized *political rights*.

If we observe the allocation of rights in this inclusionary perspective, however, we can identify a dialectical problem at the core of modern societies and modern states. Manifestly, the allocation of rights by emergent modern states was a precondition for the inclusionary penetration of the state into society. Simultaneously, however, the allocation of rights also exposed national political systems to acute inclusionary pressures. Rights always acted as instruments of nation building and national inclusion. But they also acted, potentially, as destabilizing sources of crisis, which, in some ways, obstructed the formation of national societies and national political institutions.

This dialectical quality of rights was determined, first, by the fact that, in the initial wake of the eighteenth-century revolutions, most societies concentrated the process of national inclusion primarily into the medium of private/economic rights, and, for many decades, they did not establish hard political rights which reached deep into society. This disproportionate emphasis on economic inclusion had a number of results. One consequence of this was that, after 1789, many European societies began to experience controversies in the *system of economic rights*, which they lacked the political resources to moderate or resolve: many societies were unable to react to the problems generated within the economy, in so far as these problems could not be reduced to questions posed and resolved in private law. By the middle of the nineteenth century, therefore, the élites of most European societies were confronted with intensifying social problems caused by their one-sided promotion of economic inclusion, which threatened to spill disruptively into the political domain.⁷ One further consequence was that the spheres of society organized through private economic rights began, in the course of the nineteenth century, to develop quite autonomous modes of political organization or political *self-organization*. Notably, through the middle part of the nineteenth century, many societies witnessed the rise of combinations and early trade unions, which gradually translated economic imperatives into demands for political rights. Other societies saw the emergence of cartels, which absorbed certain functions originally performed by guilds and corporations, and which also conferred a relatively autonomous political structure on economic interactions. In many cases, these processes led to a *recorporation* of society, and the emergence of powerful economic organizations on both sides of the industrial production process formed a counterweight to the nationally expansive political systems of society promoted by the eighteenth-century revolutions. The main consequence of disproportionate economic inclusion, however, was experienced when

states began to activate political rights as more general media of effective inclusion. Generally, as already mentioned, it was only in the latter part of the nineteenth century that states began to allocate extensive political rights, and effectively to construct a *political nation*, as the basis for the political system. By this time, however, states were required quite fundamentally to redefine the nations to which they owed their legitimacy. Owing to their initial asymmetrical reliance on private-legal rights as instruments of inclusion, states ultimately encountered political nations, not as communities of equal rights holders, but as societies marked by quite entrenched economic conflicts, advanced sectoral partitions, and strict patterns of organizational autonomy. The imbalance in the original distribution of private and political rights, in short, created longer-term inclusionary pressures for national states, and it meant that, when they finally began to integrate their national societies through political rights, they were required to internalize societies marked by deep fissures, deep conflicts, and radically divergent material demands, partly caused by the processes of inclusion triggered by the national revolutions in France and America. This dialectic of rights first appeared in the earlier dynamics of state formation and national inclusion in the nineteenth century; however, it has reappeared in the construction of many contemporary legal-political entities, where its potential for generating systemic crisis is evidently undiminished.⁸

Well into the nineteenth century, of course, many societies avoided this dialectic of rights by perpetuating an essentially local/privatistic structure, and, as far as possible, by deliberately curtailing the social penetration of political rights. However, societies which began to allocate extensive political rights to different social groups were soon obliged to promote national-societal inclusion through a *third stratum* of rights: through rights allotted via the medium of *labour law*. In much of late nineteenth-century Europe, labour law typically became the domain of law which refracted the widening reach of political rights. The expansion of the inclusionary system of political rights inevitably meant that a system of labour rights had to be established, through which national states absorbed the inclusionary pressures created by political rights. Labour law thus assumed a vital role in conducting processes of national inclusion which were only precariously performed by private rights and political rights.

The process of national inclusion through labour law had already gained momentum in the nineteenth century. Initially, this process occurred through progressive recognition and, in some cases, limited political assimilation, of trade unions. In the later decades of the nineteenth century, most European societies accepted the legality of trade unions. By the year 1900, many societies had, in some tentative way, integrated trade unions into the margins of the political system. In addition, this process occurred through the establishment of conflict resolution mechanisms in

factories and productive units. By the late nineteenth century, many European societies had begun to formalize procedures for arbitration between rival parties in the industrial process.⁹ In some settings, tentative steps toward the institution of collective bargaining were also being taken.¹⁰ On each count, labour relations became objects for state regulation, and labour regulation became part of the fundamental *inclusionary structure* of more integrated national political systems. However, this dynamic of socio-material inclusion underwent dramatic acceleration in the course of WWI. At a general sociological level, WWI marked a great leap forward in the process of European nation building. Arguably, it was only in the years 1914–1918 that the concepts of national unity, equal inclusion under law, equality in rights, and cross-sectoral immediacy to state authority, which had been first proclaimed in and around 1789, became common objective realities. The revolutionary nation-building impact of WWI was caused by the fact that belligerent societies promoted the mobilization of all social groups for the war effort, so that differences of social class, gender, age group, confession and regional affiliation were diminished in importance in the context of shared national military adversity. The revolutionary nation-building impact of WWI was also caused by the fact that states were forced to galvanize the entire industrial workforce for military production, and governmental ministries were required to co-opt or secure the compliance of trade unions for the war effort. This meant that previously privileged élites, such as members of the aristocracy, lost their elevated standing in the peripheries of government, and were often replaced by actors who were able effectively to regiment labour for the manufacture of armaments.

However, the revolutionary impact of WWI was caused, most particularly, by the fact that, in order to mobilize labour, governments were forced to recognize labour organizations as holders of collective rights and as partners in collective bargaining. In order to solidify national support for the wartime economy, states were obliged to refine their existing systems of industrial arbitration, to establish labour tribunals for the resolution of industrial conflicts, and, ultimately, to give public standing to interassociational agreements regarding conditions of employment and production.¹¹ In most belligerent societies, notably, the war gave impetus to the elaboration of a body of labour law in which provisions for worker representation, industrial codetermination, collective bargaining, and equitable arbitration in industrial disputes acquired standing close to public law, or were even integrated into democratic constitutions. Organized labour thus became a constituent actor in the national political system, and labour law was used to impose a cohesive structure of political-economic inclusion on national societies.

WWI, in short, was the period in which the nation state became a reality, and the construction of societies as systems of general inclusion approached conclusion. Tellingly, this process was registered in the *me-*

dium of rights: labour law became a most vital instrument of national formation, and labour law was applied to construct a deepened body of *socio-material rights* throughout society. The increasing penetration of the political system into society was supported by a definition of society as a material community, a nation of *socio-material rights holders*.

THE WEIMAR REPUBLIC AND LABOUR LAW

The process of rights-mediated national inclusion and nation building expressed during the WWI found distinct expression in the Constitution of Weimar Republic. This constitution expressly reflected the belief, declared by Friedrich Naumann in the National Assembly in early 1919, that Imperial Germany had not been formed as an integrated nation. Like the 1849 Constitution before it, the Constitution of 1919 was intended, not only to allocate powers in the German national state, but also *to found* the German nation. In this conception, in particular, the basic rights contained in the constitution were construed as instruments of national inclusion, completing the unfinished process of nation and state making through rights initiated in 1848.¹²

The nation-building objectives of the Weimar Constitution were visible in a number of its dimensions. Most obviously, the basic democratic content of the Weimar Constitution was designed to promote rights-based national integration. Indicatively, the functions of the elected members of government were defined in the Constitution in clear relation to the nation as a whole, and emphasis was placed on the fact that politicians had responsibilities, not to professional groups, classes or regions, but to the German people in its entirety. This was evident in Article 21, which accounted for representative duties of parliamentary delegates in expressly national-integrative terms, and in Article 41, which defined the presidential office in unmistakably national categories. Equally significantly, the Constitution was expected to create a nation by incorporating the different German states evenly within a territorially cohesive system of public law. This was expressed in a number of clauses: in Article 13(1), giving national law primacy over the different constituent states of the Empire; in Article 15, allowing the Empire to supervise legislation in the states; in Article 19, giving the *Staatsgerichtshof* oversight of legal disputes within and between the states; and in Article 48(a), which authorized the president to overrule the states in cases of exceptional legal conflict with the Empire. In these instances, the Weimar Constitution was clearly designed to establish the Empire as a national entity. Importantly, the Constitution reflected the demand of prominent political actors that Prussia should be fully incorporated as an equal part of *Reich*, and that a remedy should be found for the traditional gravitational pull of Prussia, reflected during the *Kaiserreich* in the disproportionate representation of Prussia in

the *Bundesrath* (Union Council), against the construction of a fully balanced national state.¹³ In fact, anti-Prussianism was a pronounced attitude among the architects of the Weimar Constitution; Hugo Preuß, most notably, had deliberated, and continued to deliberate through the early 1920s, as to whether Prussia should be divided into smaller states. In addition, the Weimar Constitution was accorded nation-building functions in that it reflected some residues of the doctrine of *industrial Caesarism* endorsed in the Wilhelmine era by Max Weber and Friedrich Naumann. The basic premise of industrial Caesarism was that a strong state executive was required to integrate diverse sectors of the population into the political system, and that such integration would reinforce the position of the German nation in the international political economy. Traces of this outlook underpinned the symbolic design of the executive in the Weimar Constitution.¹⁴ In this respect, in fact, the Weimar Constitution was clearly an early example of a *national-developmental* constitution, and it construed executive authority as a symbolic point of popular identification, unifying otherwise antagonistic societal groups in order to increase industrial productivity. Quite generally, the provisions for presidential rule under Article 48 were shaped by a strategy for cohesive nation building and mobilization. Furthermore, the Weimar Constitution was expected to give effect to religious conceptions of the national community. Notably, Weber's model of a presidential or élite democracy was shaped by the belief that modern complex nations, defined by deep class fissures, cannot be unified under law alone.¹⁵ Instead, he implied, it was only as the people were addressed directly by a charismatic leader that lateral affiliations (between classes, regions, professions) could become subordinate to the spirit of national unity. The charismatic politician assuming presidential office under Article 48 was thus intended to instil a class-transcendent, or even cultic sense of unity in the German nation. This outlook in some ways evoked the concept of the inspired community proposed by the Lutheran theologian Rudolf Sohm.¹⁶

Most importantly, the Weimar Constitution was accorded a central role in a process of nation building because it was intended to create the basic public-legal structure for a national welfare state and a corporatist national economy organized by interorganizational political-economic consensus.¹⁷ Accordingly, the Constitution provided in Articles 159 and 165 for a system of industrial negotiation, in which legislation could be based upon cross-class agreements. These provisions recalled Hugo Sinzheimer's wartime reflections on collective bargaining as a source of popular will formation.¹⁸ In Articles 7 and 157, moreover, the Constitution placed national labour in an immediate relation to the Empire, implying that the labour force was a core part of the material substructure of the nation-state. In Article 157, it envisioned the introduction of a unified system of labour law, to include, equally, all members and sectors of society. In each of these respects, the Weimar Constitution was assigned

distinctive status as a nation-building document. It was envisaged as an instrument for mediating class differences, and it was intended to tie together all diverse groups within the nation, promoting the creation of a nation of equal rights holders.¹⁹ As such, the Weimar Constitution was enforced, finally, to eradicate the primacy of private groups and organizations, which many influential theorists of early Weimar Germany saw, and, earlier, many leading intellectuals had seen, as responsible for the history of weak statehood in Germany.²⁰ At the heart of the Weimar Constitution was the idea of an inclusionary nation, based upon collective material rights, guaranteed through a systematic body of labour law, in which organized labour played an integrated role both in legislation and in ongoing processes of national inclusion.

THE END OF THE MATERIAL NATION

As is well documented, the attempt at rights-determined nation-building in the Weimar Republic had disastrous consequences. Paradoxically, in fact, many aspects of the Constitution which were deployed to promote consolidated nationhood ultimately had exactly the opposite outcomes.

First, the assumption among the *Verfassungsväter* of 1919 that Prussian hegemony was detrimental to national democracy proved spectacularly misguided, and measures taken to eliminate Prussia as an independent political force played a significant role in the unravelling of national democracy. By 1928, it had become apparent that Prussia was actually the major bastion of German democracy. By 1930, the Prussian parliament was the most powerful democratic institution that was still more or less intact. However, provisions in the Constitution for the annexation of states to the *Reich* meant that Prussia could be legally removed from the institutional landscape of the *Reich*, which famously occurred in the *Preussenschlag* of 1932. The abolition of the Prussian parliament as a distinct political actor was the most important prelude to the eventual process of *Gleichschaltung*, or comprehensive institutional colonization by the NSDAP.

Second, the use of emergency legislation as a means to ensure the primacy of national law over state law had a deeply corrosive impact on national society. Within a short period, the use of emergency legislation, rather than solidifying a direct link between the Imperial President and the national people, had stripped the core executive away from society, and it had rendered offices around the presidency porous to individual actors and groups seeking access to directive power for their own personal motives. Presidentialism, thus, clearly undermined the national foundation of the political system. By 1930, use of executive prerogative had created a system in which powers of government could be allocated upon

a personalized basis, and the link between the executive and the people could be snapped.

Third, the attempt to construct a unified nation through a quasi-corporatist system of labour law also fell catastrophically short of its goals. In the first instance, the attempt to use labour law for nation-building purposes in interwar Germany never came to fruition. Indeed, even the modest idea that a comprehensive codification of labour law could be undertaken was not realized. For this reason, the Weimar Republic acquired a half-evolved or semi-corporatist system of political economy and a half-evolved or semi-corporatist system of public law. At one level, the body of labour law in the Weimar Republic created a legal framework in which collective bargaining was formalized, in which the state interacted directly with organizations of aggregated interests, and, crucially, in which, after the emergency laws on tariffs passed in 1923, the government was forced directly to internalize conflicts in the production process through mandatory arbitration and obligatory dispute resolution. However, the state's ability to control industrial negotiations always existed more on paper than in reality. In fact, governmental capacities for industrial control were increasingly unsettled, after the hyperinflation of 1923, by the fact that the relative parity between big business and big labour (large trade unions), formally presupposed in the corporatist ideals of 1919, was tilted in favour of business organizations. As a result, it slowly became clear that the corporatist opening of the state in 1919 had established a system in which large-scale enterprises could exploit their position in the state periphery in order to oppose those groups (i.e., trade unions), with which they had originally sworn to cooperate in the name of cross-class national unity, and in which powerful industrial bodies were able to direct public policy to suit defined elite prerogatives. Progressively, it became clear that the democratic state institutions created under the Weimar Constitution lacked the robustness required to direct government policy through the consensual mediation of class interests, and many institutions were rapidly placed in thrall to powerful extrasystemic societal interests. The establishment of a quasi-corporatist system of industrial organization thus ultimately meant that private organizations could use the corporatist arrangements to pursue distinct interests through the state, often bypassing established (national) procedures for representation and legislation. Notable in this, in particular, was the fact that, in the Weimar Constitution, the state projected its legitimacy, in part, as derived from group rights, which it was bound to allocate to different social organizations, as a prerequisite for class equilibration. Eventually, however, the guarantees of group rights announced by the Weimar Constitution promoted a collectivization of society around private group interests, and it meant that organizations pursuing group rights were able to monopolize bargaining positions in the state, to mobilize social groups around single policy objectives, and, ultimately, even to

dictate legislation, spending and fiscal policy. Finally, the sanctioning of group rights imprinted a deep structural privatism on society as a whole, and it meant that the state was required to negotiate points of policy, not with a uniformly ordered nation, but with massed ranks of sectorally organized private associations.

Through the 1920s, consequently, the Weimar political system was exposed to a process which we might now define as *hyperpoliticization*: that is, it entered a condition in which public offices and resources were transformed into spoils to protect the extrasystemic interests of powerful social groups. Accordingly, the *inclusionary corporatism* promoted under the democratic constitution of 1919 was replaced by a system of *exclusionary corporatism*. In this system, some structures of collective-interest aggregation and articulation were retained, but these were organized in a highly coercive fashion, and negotiations between different factions were clearly aligned to the prerogatives of powerful economic groups. The transition from inclusionary to exclusionary corporatism passed through three distinct steps. The first step saw the weakening of protective provisions for trade unions and the limiting of union powers of collective bargaining.²¹ This began in 1925 with the establishment of the *Bürgerblock* government,²² but it gained momentum after the end of the Grand Coalition (1929–1930). The second step saw an active retrenchment against the welfare provisions obtained by the unions. This was reflected in Heinrich Brüning's coercive *Sparpolitik* (austerity policies) of 1930–1932, widely supported by big business.²³ It culminated, in particular, in the economic decrees introduced under Article 48 by Franz von Papen. Finally, the third step was the institution of a fully evolved system of quasi-corporatist economic coercion, instituted by Adolf Hitler through the *Arbeitsordnungs-gesetz* in 1934 and the introduction of *Zwangskartelle* in 1933, which carried over some principles of corporatist public law into a legal order designed to consolidate a system of authoritarian capitalism.

Overall, the constitutional order of the Weimar Republic was a legal system designed, under the flag of national integrity, to internalize, to pacify and to mediate starkly opposed economic interests. However, it lacked the institutional stability—or the basic *publicness*—required to solidify the political system against the antagonistic, essentially private factions which it had internalized. The crisis of the Weimar Republic can thus be seen, simultaneously, both as a failure of labour integration *and* as a failure of nation building. In particular, the failure of national construction in the Weimar Republic can be linked to the inclusionary functions of rights. The national inclusion of society promoted through three stratified layers of rights degenerated into a condition of extreme social fragmentation, in which the national political system forfeited its essential national/inclusionary characteristics.

FROM INCLUSIONARY TO EXCLUSIONARY CORPORATISM

The Weimar Republic is often observed as a *sui generis* political experiment, or even as a particularly unusual part of Germany's already highly distinctive *Sonderweg* toward modern nationhood.²⁴ In fact, however, it can be observed as a quite typical exemplification of the pressures resulting from rights-mediated national-societal formation. The long transition in the Weimar Republic and after 1933 from *inclusionary* to *exclusionary* corporatism, and the correlation of this transition with the fragmentation of national-social structure, describes a trajectory subsequently followed by a number of societies, and it throws quite general light on problems of national inclusion.

After the Weimar Republic, notably, many societies began to utilize corporatist constitutionalism, and many societies pursued inclusion through socio-material rights to serve a strategy of national inclusion and even national developmentalism. Many societies identified the programmatic allocation of socio-material rights, on top of private and political rights, as a technique for linking together obdurately conflictual and loosely solidified social groups into one integrated national whole. An immediate example of this can be found in the Spanish Second Republic, whose 1931 Constitution copied many quasi-corporatist elements contained in the Weimar Constitution. Countries in Latin America soon followed this example. First, in the late 1930s and 1940s, Brazil and Argentina devised corporatist constitutions, which, within a semi-authoritarian executive system, elaborated material rights as part of a national inclusionary structure: that is, as the media of inclusion, used to bind together different groups and different regions in societies otherwise only weakly consolidated as nations. Subsequently, other Latin American states, notably Colombia and Bolivia, promoted corporatistic political organization, semi-democratic in the case of Bolivia and semi-fascist in the case of Colombia, as a technique for enforcing national inclusion.²⁵ These political orders applied socio-material rights in order to attach different sectors in economically divided societies directly to the departments of the central state, thus imposing a material-political structure of inclusion across the whole of society.²⁶ Subsequently, in postindependence states in Sub-Saharan Africa, corporatist constitutionalism was widely utilized as a nation-building technique in which material rights were applied as institutions with *ex nihilo* powers of national formation and social integration. Even states such as Kenya, which remained formally capitalist during decolonization, devised semi-corporatistic techniques to ensure national control of the economy, and to reduce the extent to which lateral or centrifugal obligations in society could pull against the power of national political institutions.²⁷

Most societies that copied the Weimar Republic in their use of socio-material rights, however, also copied the Weimar Republic in their resul-

tant experience of crisis. Almost uniformly, across different societies at varying stages of institutional construction, the attempt to forge a system of national inclusion through labour law failed as a strategy of national construction. In fact, in most cases, the corporatist enforcement of socio-material rights acted, of itself, as an impediment to the establishment of reliable modes of generalized inclusion in society. On the one hand, corporatistic nation building usually had the result that single groups were able to use corporatist bargaining arrangements to infiltrate the state. Consequently, corporatism fostered very high levels of patrimonialism, in which private groups seized institutionalized opportunities to colonize offices of the state, either for material gain or for sectoral influence.²⁸ In most cases, also states promoting corporatist nation building were soon exposed to high, and ultimately unmanageable, levels of politicization, in which private groups translated distinct, often implacably hostile, social prerogatives directly through the institutions of the state administration. In most cases, such *hyperpoliticization* of the political system led to acute state debilitation, in which state institutions forfeited autonomy and independent capacity, and often ceded authority to groups located outside the political domain, not strictly bound by political rules or oriented around political directives.²⁹ In most cases, furthermore, states committed to nation building through corporatist rights circulation usually also echoed the Weimar experience because they underwent a transition from *inclusionary* corporatism to *exclusionary* corporatism. Firstly, these states rapidly abandoned the democratic/inclusionary dimension of corporatism. Simultaneously, however, they preserved some of the mechanisms for the aggregation of economic interests, for the coercive regimentation of labour and labour markets, and for the collective economic steering which had characterized democratic corporatism. Unlike the systems that they supplanted, they deployed these mechanisms to reinforce the consolidated interests of élite groups (usually large-scale enterprises) in industrial conflicts, openly enforcing public authority to allocate privilege to select parties, and to stabilize a small number of private elite prerogatives.³⁰ The Weimar experience of counterintentional denationalization through the distribution of social/material rights, in short, was paradigmatic for many later cases of corporate state building and national construction. Most subsequent attempts at corporatist nation building led both to a parcellation of national state institutions and, at least *de facto*, to a parcellation of the nation as a system of social inclusion.

FROM MATERIAL RIGHTS TO INTERNATIONAL HUMAN RIGHTS

Striking, in this analysis, is the fact that the collapse of the Weimar Republic does not only provide a paradigm of national fragmentation and state collapse: it also illuminates alternative patterns of national inclu-

sion, and alternative patterns of inclusionary-systemic construction through rights. For example, the most notable feature of the constitutional order that developed after 1945, at least in Western Germany, is that it introduced a new series of rights in the domestic legal order. Notably, through its commitment to *Völkerverrechtlichung* declared in Articles 24, 25, 26 and 100(2), the *Grundgesetz* (1949) gave semi-constitutional standing to rights enshrined in international instruments and promoted by international organizations, and it tied the jurisprudence of national courts to international human rights law. The resultant activist role of the high domestic judiciary may not have been entirely a matter of conscious design. But within a short period of time, the newly established West German *Bundesverfassungsgericht* had defined itself as a *transformer* of international law,³¹ and it began to extract rights norms from the interstate domain to check domestic legislation, to oversee legislative procedure, and to scrutinize judicial verdicts. By 1958, the court had made decisive rulings on the use of proportionality and the third-party effect of human rights in West Germany, such that these rights came to overlie the strata of private, political and socio-material rights already articulated through national constitutional law. In so doing, in fact, the court began to promote international rights norms as the basic diction for all legal relations, all interpersonal interaction, and all acts of social inclusion, and it elaborated a corpus of rights as the basic inclusionary fibre of society.³² If, before 1945, national societies had been mainly formed through processes of inclusion mediated through private, political and material rights, international human rights norms now assumed a very salient position in the system of social inclusion.

Very important in this respect was that the penetration of international human rights law into domestic law had a decisive impact on economic law and labour law. One outcome of the rising prominence of international human rights law was that the *Grundgesetz*, shaped by international norms, gave primacy to individual personal rights over collective, programmatic or group rights, and it defined singular, personal rights as irreducible sources of legitimacy for law. As a result, it curtailed the dependency of the state on the allocation of group rights, and it reduced the extent to which the political system was obliged to produce legitimacy through the concrete mediation of social groups or the concrete pacification of social conflicts.³³ Generally, in fact, the fact that it derived part of its legitimacy from an external normative order meant that the political system assumed heightened autonomy *vis-à-vis* social conflicts, and the organizations expressing such conflicts, with which it was confronted, and it could separate some of its functions from everyday processes of contestation and conflict settlement. In consequence, the state was able to establish an inclusionary structure for a society as a whole which was, to some degree, set a priori above specific social antagonisms, and the political system was able to apply the law as a relatively neutral inclusionary

medium, partly insulated against day-to-day crises, and capable of social integration at a high level of abstraction and immunization. Ultimately, in fact, the shift from socio-material rights to international human rights as sources of legitimacy created a social environment in which the political system was able to reconceive policies of socio-material integration, and to resume selective material distribution as a means of societal inclusion. Progressively, through the 1950s, West Germany redeveloped a semi-corporatist system of economic conflict management. But, in this system, rival organizations were not directly internalized in the state, and negotiations between rival groups were not subject to mandatory state arbitration. As a result, the legitimacy of the state was not made fully contingent on its internal ability to mediate and defuse factual conflicts between fractious organizations.³⁴ A relatively depoliticized, societalized version of corporatism thus began to emerge. Central to this neocorporatist system was the fact that the state authorized its inclusionary functions through international rights norms, and it could perform functions of cross-class mediation and conflict management without projecting these functions as the ultimate basis for its legitimacy. This led to a depoliticization of corporatism, and, ultimately, through the de-emphasis of socio-material rights as objects of socio-political conflict, to the more effective distribution of material rights across society.³⁵

The example of state construction in Germany following the collapse of the Weimar Republic exemplifies the role of international human rights in the formation of national societies. If we accept the sociological intuition, discussed previously, that modern societies are constructed through a gradual thickening of rights, the German example suggests that the layers of rights generated by national societies are often unable to promote enduring structures of national inclusion. This example, in fact, suggests that it is only where a fourth set of rights, international human rights, is applied to avert the extreme politicization caused by other rights (especially social/material rights) that societies are able to consolidate themselves as reasonably stable systems of inclusion. Notably, this shift from material rights to international rights as the primary media of legitimation and inclusion also underlies other recent transitions to democratic statehood, in Argentina, in Brazil, in Ghana, in Kenya, and even in Russia and Poland. The study of Weimar thus allows us to observe the paradoxical fact that sustainable national statehood and sustainable nationhood typically have transnational foundations. Moreover, it allows us to recognize international human rights as the fourth inclusionary dimension of national society, without which most national societies struggle to exist as such. To this extent, the long German transition from a political system based upon corporatist rights to a political system based upon international rights can be taken as an exemplary sociological learning process, which ultimately generated insights for other patterns of institutional and social formation. Outside Germany, most national states

and national societies were only solidified through the integration of international human rights as basic principles of legitimation and inclusion. The question of whether international rights can be applied to assuage inclusionary crises in transnational polities remains, of course, open.

NOTES

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1. See Émile Durkheim, *Leçons de sociologie* (Paris: PUF, 1950); Talcott Parsons, 'Full Citizenship for the American Negro? A Sociological Problem', *Daedalus* 94 (1965): 1009–54; and T. H. Marshall, *Citizenship and Social Class* (London: Pluto, [1950] 1992).

2. See Elisabeth Fehrenbach, 'Nation', in Rolf Reichardt and Eberhard Schmitt, eds., *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820*, vol. 7 (Munich: Oldenbourg, 1986), 75–107, at 85–89.

3. Emmanuel Joseph (Abbé) Sieyès, *Préliminaire de la constitution: Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen* (Versailles: Ph.-D. Pierres, 1789), 19.

4. Philippe Joseph Benjamin Buchez and Pierre Celestin Roux-Lavergne, *Histoire parlementaire de la Révolution française*, vol. 22 (Paris: Paulin, 1834), 194–95.

5. On this general principle, see Christian Starck, *Verfassungen. Entstehung, Auslegung, Wirkungen und Sicherung* (Tübingen: Mohr, 2009), 124.

6. Karl Marx, *Zur Judenfrage*, in Karl Marx and Friedrich Engels, *Werke*, vol. 1 (of 43) (Berlin: Dietz, [1844] 1958–68), 347–77.

7. See the rather quaint account of the 'social movement' in Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich*, vol. 2 (Darmstadt: Wissenschaftliche Buchgesellschaft, [1850] (1959), 110, as a key example of such anxieties.

8. Asymmetrical inclusion through monetary rights is of course a central characteristic of the EU, and the inclusionary dialectic described here in nation-state contexts could also be applied, with some adjustments, to crisis potentials at a transnational level. On the dialectical standing of rights in the foundation of the EU, see Jason Coppel and Aidan O'Neil, 'The European Court of Justice: Taking Rights Seriously?' *Legal Studies* 12 (1992): 245; Hans-Wolfgang Micklitz, 'The ECJ between the Individual Citizen and the Member States—A Plea for a Judge-Made European Law in Remedies', in Hans-Wolfgang Micklitz and Bruno de Witte, eds., *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia, 2012), 349–99.

9. For example, Prussia had communal labour courts from 1845 (see Günter Graf, *Das Arbeitstarifgesetz von 1926. Weimarer Verfassungsvollzug auf justizpolitischen Irrwegen des Kaiserreichs?* [Goldbach: Kneip, 1996], 10). In the UK, an Arbitration Act was passed in 1824, Councils of Conciliation were established by parliamentary statute in 1867, and arbitrational powers in labour disputes were augmented in the Conciliation Act of 1896 (see Lord Amulree, *Industrial Arbitration in Great Britain* [Oxford: Oxford University Press, 1929], 101). By 1840, a basic system for industrial arbitration was in place in the UK (see James Jaffe, 'Industrial Arbitration, Equity and Authority in England, 1800–1850', *Law and History Review* 18 [2000]: 557). Napoleon introduced petty labour courts in France in 1806 because a substitute jurisdiction was required for cases that had been heard by corporations before 1791 (François Étienne Mollot, *De la justice industrielle des Prud'hommes* [Paris: Napoléon Chaoix, 1846], 21).

10. See the classic analysis in Léon Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (Paris: Alcan, 1912), 134–35; Philipp Lotmar, *Der Arbeitsvertrag*, ed., Manfred Rehbinder (Berlin: Duncker & Humblot, [1902–1908] 2001), 818.

11. See, for example, Jürgen Kocka, *Klassengesellschaft im Krieg. Deutsche Sozialgeschichte 1914–1918* (Göttingen: Vandenhoeck und Ruprecht, 1973), 115; Barthélemy

Raynaud, *Le contrat collectif en France* (Paris: Rousseau, 1921); G. R. Rubin, 'The Origins of Industrial Tribunals: Munitions Tribunals during the First World War', *Industrial Law Journal* 6 (1977): 149–64, at 152–53.

12. *Verhandlungen der verfassunggebenden Deutschen Nationalversammlung* (1920: 2190).

13. Gerhard Schultz, *Zwischen Demokratie und Diktatur: Verfassungspolitik und Reichsreform in der Weimarer Republik*, vol. 1: *Die Periode der Konsolidierung und der Revision des Bismarckschen Reichsaufbaus 1919–1930* (Berlin: Walter de Gruyter, 1963), 173.

14. Friedrich Naumann, *Demokratie und Kaisertum. Ein Handbuch für innere Politik* (Berlin-Schöneberg: Burchverlag der Hilfe, 1900), 350; Elisabeth Fehrenbach, *Wandlungen des deutschen Kaisergedankens 1871–1918* (Munich-Vienna: Oldenbourg, 1969, 85–89; Stefan-Georg Schnorr, *Liberalismus zwischen 19. und 20. Jahrhundert. Reformulierung liberaler politischer Theorie in Deutschland und England am Beispiel von Friedrich Naumann und Leonard J. Hobhouse* (Baden-Baden: Nomos Verlag, 1990), 148.

15. Max Weber, *Gesammelte Politische Schriften* (Tübingen: Mohr, 1921), 425.

16. Weber borrowed from Rudolf Sohm, *Kirchenrecht*, in 2 vols. *Die geschichtlichen Grundlagen*, vol. 1 (Leipzig: Duncker & Humblot, 1892), 22, 28 and 699, the idea that rule-bound or purely legal order is not sufficiently compelling to integrate modern societies.

17. One observer (Ulrich Nocken, 'Corporatism and Pluralism in Modern German History', in Dirk Stegmann, Bernd-Jürgen Wendt and Peter-Christian Witt, eds., *Industrielle Gesellschaft und politisches System: Beiträge zur politischen Sozialgeschichte* (Bonn: Verlag Neue Gesellschaft GmbH, 1978), 37–56, at 55, calls Weimar Germany the first major experiment in societal corporatism. See also, Werner Abelshausen, 'The First Post-Liberal Nation: Stages in the Development of Modern Corporatism in Germany', *European History Quarterly* 14 (1984): 285–318.

18. Hugo Sinzheimer, *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht* (Munich: Duncker & Humblot, 1916), 202.

19. Hugo Preuß argued that a legitimate legal state must be founded in 'organic social law', in which the rights of citizens can be negotiated to incorporate material entitlements and rights of distribution; Preuß, *Gemeinde, Staat, Reich als Gebietskörperschaften. Versuch einer deutschen Staatskonstruktion auf Grundlage der Genossenschaftstheorie* (Berlin: Julius Springer, 1889), vii.

20. For earlier liberal reflections on this problem, see Friedrich Christoph Dahlmann, *Die Politik, auf den Grund und das Maß der gegebenen Zustände zurückgeführt*, introduced by O. Westphal (Berlin: Hobbing, [1835] 1924), 124–32.

21. See Otto Kahn-Freund, 'Der Funktionswandel des Arbeitsrechts', *Archiv für Sozialwissenschaft und Sozialpolitik* 67 (1932): 146–74, at 169; Thilo Ramm, 'Die Arbeitsverfassung der Weimarer Republik', in Franz Gamillscheg, Jean de Givry, Bob Hepple and Jean-Maurice Verdier, ed., *In Memoriam Sir Otto Kahn-Freund* (Munich: Beck, 1980), 225–46, at 243.

22. Fritz Blauch, *Staat und Verbände in Deutschland zwischen 1871 und 1945* (Wiesbaden: Franz Steiner, 1979), 64.

23. See Rainer Meister, *Die große Depression. Zwangslagen und Handlungsspielräume der Wirtschaft und Finanzpolitik in Deutschland 1929–1932* (Regensburg: Transfer Verlag, 1991), 248; Michael Grübler, *Die Spitzenverbände der Wirtschaft und das erste Kabinett Brüning: Vom Ende der Großen Koalition 1929/30 bis zum Vorabend der Bankenkrise 1931* (Düsseldorf: Droste, 1982), 168–69; Claus-Dieter Krohn, 'Autoritärer Kapitalismus. Wirtschaftskonzeptionen im Übergang von der Weimarer Republik zum Nationalsozialismus', in Dirk Stegmann, Bernd-Jürgen Wendt and Peter-Christian Witt, eds., *Industrielle Gesellschaft und politisches System: Beiträge zur politischen Sozialgeschichte* (Bonn: Verlag Neue Gesellschaft GmbH, 1978), 113–29, at 119.

24. See the thumbnail summary in Jürgen Kocka, 'German History before Hitler: The Debate about the German Sonderweg', *Journal of Contemporary History* 23 (1988): 16.

25. See Håvard Haarstad and Vibeke Andersson, 'Backlash Reconsidered: Neoliberalism and Popular Mobilization in Bolivia', *Latin American Politics and Society* 51 (2009): 1–28, at 10; Helwar Figueroa Salamanca and Carlos Tuta Alarcón, 'El estado corporativo colombiano: Una propuesta de derechas 1930-1953' (2005) 32 *Anuario Colombiano de Historia Social y de la Cultura*, 99–148.

26. Álvaro García Linera, *La condición obrera en Bolivia. Signo XX* (La Paz: Plural, 2014), 204.

27. See, for discussion, Donald Rothchild, *Racial Bargaining in Independent Kenya: A Study of Minorities and Decolonization* (London: Oxford University Press, 1973), 262–63 and 420–21; Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism 1964–1971* (London: Heinemann, 1975), 222; Nicola Swainson, *The Development of Corporate Capitalism in Kenya 1918–77* (London: Heinemann, 1980), 180; John W. Harbeson, *Nation-Building in Kenya: The Role of Land Reform* (Evanston, IL: Northwestern University Press, 1973), 18.

28. For separate studies on different polities, see Barbara Geddes, 'Building "State" Autonomy in Brazil', *Comparative Politics* 22 (1990): 225; Harvey F. Kline, *State Building and Conflict Resolution in Colombia, 1986–1994* (Tuscaloosa: University of Alabama Press, 1999), 4–5; Thomas M. Callaghy, 'The State as Lame Leviathan: The Patrimonial Administrative State in Africa', in Zaki Ergas, ed., *The African State in Transition* (Basingstoke, UK: Macmillan, 1987), 87–116, at 108.

29. See the theory of the politicised state set out in Douglas A. Chalmers, 'The Politicized State in Latin America', in James M. Malloy, ed., *Authoritarianism and Corporatism in Latin America* (Pittsburgh, PA: University of Pittsburgh Press, 1977), 23–46, at 30–31 and 38. On overpoliticization in Argentina, see Gerardo L. Munck, *Authoritarianism and Democratization: Soldiers and Workers in Argentina, 1976–1983* (University Park: Pennsylvania State University Press, 1998), 51.

30. For examples of exclusionary corporatism outside Europe, see Guillermo O'Donnell, *Modernization and Bureaucratic-Authoritarianism: Studies in South American Politics* (Berkeley: Institute of International Studies, University of California, 1973), 53–55; and 'Corporatism and the Question of the State', in Malloy, ed., *Authoritarianism and Corporatism*, 47–87, at 48; Kenneth Paul Erickson, *The Brazilian Corporative State and Working-Class Politics* (Berkeley: University of California Press, 1977), 42; Salvador A. M. Sandoval, *Social Change and Labor Unrest in Brazil since 1945* (Boulder, CO: Westview Press, 1993), 42; Margaret Keck, *The Workers' Party and Democratization in Brazil* (New Haven, CT: Yale University Press, 1992), 63.

31. See Karl Josef Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht. Überprüfung der Transformationslehre* (Karlsruhe: Müller 1964), 53, 80 and 115.

32. See the Constitutional Court ruling in *Lüth* 1 BvR 400/51 (1958). This ruling instilled a rights-based order in West German society as a whole. In this case, rights were not expressly extracted from international law, but the openness of the *Grundgesetz* to international norms was a very important influence on the ruling.

33. See the seminal ruling on trade union autonomy in West German Constitutional Court, 1 BvR 629/52 (1954).

34. See Jürgen Nautz, *Die Durchsetzung der Tarifautonomie in Westdeutschland: Das Tarifvertragsgesetz vom 9 April 1949* (Frankfurt aM: Lang, 1985), 45.

35. Manfred Spieker, *Legitimitätsprobleme des Sozialstaats. Konkurrierende Sozialstaatskonzeptionen in der Bundesrepublik Deutschland* (Stuttgart: Paul Haupt, 1986), 33–34.

SEVEN

Conflict and the Crisis in Labour Law

From Weimar to Austerity

Ruth Dukes

This chapter aims to investigate the ways in which the notion of *conflict* has figured within academic depictions of a crisis in the discipline of labour law, and, further, how it has been understood and deployed in policy debates regarding labour laws and labour markets. The starting point for the investigation is the observation that, in both scholarly and policy discourse, the existence of conflict between the social classes has tended to be underemphasized in recent years, even by those on the left or centre-left. Conflicts of interest are located, instead, as arising between workers, or groups of workers—designated often as ‘insiders’ and ‘outsiders’—and policy prescriptions drafted accordingly.¹

The title of the chapter refers to an article published in 1933 by the German Jewish scholar Hugo Sinzheimer, titled *Die Krisis des Arbeit-srechts*.² Sinzheimer was a legal academic and practitioner who is widely regarded today as one of the founding fathers of the discipline of labour law, in Germany and beyond.³ In his 1933 article, his primary concern was to illustrate how and why the economic crisis of the time meant a crisis for labour law. The notion of conflict figured prominently in the discussion. The crisis in the economy, Sinzheimer explained, exposed the conflicts that existed between the quite different rationalities which underpinned labour law, on the one hand, and private law (*bürgerliches Recht*), on the other: conflicts, in other words, between the principles of labour law, and the wider economic order, since the latter was regulated primarily by private law.⁴ Before the economic crisis, labour rights and

collective institutions had been introduced in the belief that these could achieve the resolution of such conflicts, allowing for the regulation of production and work in the interests of all. Bringing with it steeply declining wages and catastrophic levels of unemployment, the economic crisis of the 1930s cast doubt on the capacity of labour law to function as intended within a capitalist—'private law'—economy. A renewal of labour law no longer appeared possible without the renewal of the entire economic order.

In the very different context of the 1980s and 1990s, scholars in North America and the UK began anew to talk of a crisis in labour law. Broadly speaking, the crisis was understood to result from a growing mismatch between the assumptions that had underpinned the development of labour laws and labour law scholarship in the beginning and middle of the twentieth century, and the realities of production and working relationships at its end.⁵ The shrinking prevalence of what had been defined as the *standard employment relationship*—full time, stable, secure—and its replacement with a panoply of contract forms designed to shift risk from the employer to the worker; the increasing feminization of the workforce; the 'globalization' of product markets and production chains; the muting of the trade unions in both industrial and political contexts—each of these was understood to call into question 'old' ways of thinking about the subject. At the most fundamental level, new economic orthodoxies and their prescription of flexible, unregulated labour markets appeared to threaten the very viability of *protective* or *emancipatory* labour laws: laws aimed at ensuring decent terms and conditions for workers, and at guaranteeing workers' rights to act in association with others.

So understood, the end of the century 'crisis in labour law' was further exacerbated by the financial crisis of 2008 and the ensuing crisis in the Eurozone. If a case could still be made in the 1990s and early 2000s for the singularity of the European 'Social Model', and the success of 'flexicurity' in charting a third way between free markets and overly generous welfare states, by 2012, it was quite clear that the Social Model was gone.⁶ Labour laws and institutions were now routinely characterized by EU institutions and national governments alike as tools to be wielded for the achievement of economic goals, and especially greater labour market flexibility and economic growth. In several Member States, sometimes as a condition of 'bailout' loans, existing employment protection legislation was amended so as to afford workers fewer or weaker rights, and steps were taken to encourage the dismantling or decentralization of industry-wide collective bargaining.

Juxtaposing Sinzheimer's analysis of the crisis in the Weimar Republic with contemporary approaches to the study of labour law and the analysis of labour markets, this chapter seeks to highlight the excessive emphasis given today by policymakers and commentators to the conflicting interests of different workers or groups of workers. It illustrates how the

identification of conflicts of interest between workers is closely linked, often, to the claim or belief that flexible—‘free’—markets benefit all, raising employment levels and encouraging economic growth. Labour market segmentation should be addressed, so the argument goes, so as to maximize flexibility and ease market access for all. In a final section, and with reference to the work of Sinzheimer, it is suggested that scholars and policymakers ought to consider the motivations and actions of employing organizations as well as workers. The extent to which the interests of certain workers conflict with those of others, or with those of employers or consumers, is a matter which falls to be scrutinized with reference to the specific context, and not simply to be assumed or deduced by reason of a characterization of some as insiders and others as outsiders.

SINZHEIMER'S KRISIS DES ARBEITSRECHTS

Labour law lay right at the heart of Weimar social democracy.⁷ Famously, the Constitution proclaimed the will of the German people to ‘advance social progress’. In its second part, it defined the basic rights and obligations of citizens so as to include social as well as civil and politic rights. Chief among these were labour rights: the right to freedom of association (Article 159) and the right to participate with capital in the ‘whole economic development of the productive forces’ (Article 165). If, in the decades that followed the adoption of the Constitution, several of its social rights provisions could be criticized fairly as ‘sententious platitudes’—legally binding no one, and certainly not the legislator—the same could not be said of the labour rights, which were implemented by way of legislation in the very first weeks and months of the Republic.⁸ In the estimation of Ernst Fraenkel, it was the labour provisions of the ‘Constitution’ (understood in the broader sense to include the terms of the relevant legislation) which secured the trust of the working classes in the new democratic order.⁹ An attack on the fundamental principles of labour law amounted, for this reason, to nothing less than an attack on the continued existence of the Republic.¹⁰

As a parliamentary representative of the *SPD* and a Party spokesman on labour and social policy, Sinzheimer had the opportunity to shape, quite directly, the relevant terms of the Weimar Constitution and labour legislation.¹¹ Politically, he was positioned to the non-Marxist right of the Party. In common with others at the time—notably Hermann Heller—he theorized social democracy as involving the extension of democratic modes of decision making from the political to the economic sphere, and, thereby, the emancipation of the working class.¹² A democratized economy was a capitalist economy with guaranteed property and contract rights, but it was an economy governed by capital *and labour* acting to-

gether in furtherance of the public good. This was the principle which Sinzheimer understood to be embodied in Article 165 of the Constitution, and in the legislation that regulated the rights of trade unions and works councils. In Sinzheimer's terms, the law formed an 'economic' or 'labour constitution'; it called labour into a community with 'property' (i.e., capital), guaranteeing the right of labour to participate, upon a parity basis, in the administration of production. Through such participation, labour was freed from its subordination to capital; workers were freed from the efforts of employers to dictate the social and economic conditions of their existence, and, at the same time, became free to participate in the formation of those conditions.¹³

Sinzheimer's labour law scholarship, which predated WWI, was closely informed by the writings of Marx and of Otto Gierke.¹⁴ In developing a particular conception of the sociology of law—and a particular socio-legal methodology appropriate to the study of labour law—he was also strongly influenced by the Austrian scholars, Eugen Ehrlich and Karl Renner.¹⁵ Given the strong similarities between the labour legislation of the Weimar Republic and the postwar Federal Republic, Sinzheimer's contribution to the development of labour law was patently a lasting one. Among scholars today, almost a century after its publication, there is continued, and even renewed, interest in his work on labour law and the sociology of law.¹⁶ Indirectly, moreover, his influence has extended over the years through the work of his students: the political scientists Ernst Fraenkel and Franz Neumann, and the labour lawyer Otto Kahn-Freund. Having settled in the UK in the 1930s, Kahn-Freund was eventually to be regarded as the founding father of the discipline of labour law in that country. His work, too, continues to figure as a primary point of reference for scholars in the field.¹⁷

Crisis

As narrated by Kahn-Freund in the early 1930s, the story of the labour law of the Weimar Republic was the story of the frustration of efforts to create a 'collectivist' system for the administration of production, and the regulation of the terms and conditions of employment of workers as a fundamental component of the new social democratic state.¹⁸ Adopted in the early years of the Republic, the collectivist legislation provided for a system of industry level collective bargaining between trade unions and employers' associations, workplace bargaining between works councils and employers, and the compulsory arbitration of industrial disputes. In the hands of a 'fascist' judiciary and increasingly interventionist government, however, its terms were interpreted, and eventually amended, to allow for the ever-greater involvement of the state in deciding wage levels and maintaining industrial peace.¹⁹ In the early 1930s, the Brüning and von Pappen governments even made use of Emergency Decrees to

impose lower wages by way of 'collective' agreements drafted by the state, and to empower employers to cut wages unilaterally.²⁰

This was the context within which *Die Krisis des Arbeitsrechts* was written, in late 1932. As a Jew, Sinzheimer was stripped of his chair at the University of Frankfurt in 1933 and fled thereafter to the Netherlands. Employed by the University of Amsterdam, he continued to lecture and write, but with a focus now on legal theory rather than labour law: the sociology of law, jurisprudence, a theory of legislation. *Die Krisis des Arbeitsrechts* was then his last publication on labour law and his last publication in Germany. Appearing in the twentieth-anniversary edition of *Arbeitsrecht*, a journal he had himself helped to establish, it amounted to nothing less than the recognition of the ultimate failure of the project to which he had devoted so many years of his life. As Kahn-Freund later recalled, it read, 'like a farewell. It was his swan song'.²¹

The principal theme of *Die Krisis des Arbeitsrechts* was the fundamental importance of the economy to labour law. The primary subject of labour law was dependent labour, Sinzheimer explained, and dependent labour was nothing less than an element of the economy. The situation of the worker was defined by economic relations, the assumptions upon which they were based, and the ways in which they were ordered. In a time of crisis, this became clearer. The economy no longer produced a yield sufficient to meet the needs of the people. Large sections of the economy, of production, were inactive, and this was so despite a level of technical development never seen before. While people starved to death, goods and foodstuffs lay unused in warehouses because buyers could not be found. Workers did not work, as unemployment soared to catastrophic levels.

The crisis in labour law could be understood, then, in the first instance, as a direct consequence of the crisis in the economy. Labour law, which had previously functioned to raise the price of labour, no longer achieved that aim: the output of the economy no longer corresponded to the collectively agreed rates of pay, and employers refused to bear the 'social burden' that honouring those rates would have entailed. In the face of devastating levels of unemployment, the workers' capacity for collective action was greatly diminished, such that they were unable to force the employers' hand. The government, meanwhile, acted to amend the law so as to free the supposedly 'natural' laws of the economy from the 'artificial' constraints of labour law; to 'recontractualize' labour law to the benefit of the employers, with the value of work thereby radically reduced.²² While billions of Marks of public money were spent in propping up the private sector (in something approaching a 'grotesque paradox'), no means could be found, apparently, of public job creation.²³

As Sinzheimer went on to describe, the crisis in labour law ran, in fact, far deeper than the mere frustration of its aims in a time of economic recession. The crisis in the economy revealed the situation of tension in

which labour law *always* existed (in the Weimar Republic as in any other capitalist economy): tension between the 'social' rationality of labour law itself, on the one hand, and the 'individualistic' rationality of the economic order. Labour law was social law, according to Sinzheimer, because it was the (primary) body of law which recognized the social existence of the worker, elevating him from the status of legal person (which he enjoyed in private law) to human being. By recognizing and guaranteeing the role of labour in the regulation, or ordering, of the economy, labour law sought at once to emancipate the worker from his relation of subordination to the employer, and to ensure that the economy would function in furtherance of the common interest, as identified by the representatives of labour and capital. It sought, in other words, to *socialize* the economy. Plainly, it had failed in this objective. What had been made clear by the economic crisis, if it had not been obvious already, was that the economy continued to be ordered around the pursuit *by individuals* of their own *private* interests. Within such an economy, labour law did not and *could not* have the intended effect, since all efforts to raise the value of labour, and to emancipate workers were resisted by the self-interested owners of capital.²⁴

Conflict and Crisis

Throughout his life, Sinzheimer adhered to an essentially Marxist conception of capitalism as a system in which the interests of the social classes—dependent labour and the owners of capital—were diametrically opposed.²⁵ In an essay of 1928, he charted the evolution of the institution of labour in different types of society—feudal, *bourgeois*, social democratic—emphasizing, in each case, the significance of the relationship of labour to 'property'.²⁶ Social democracy was understood by him, as we have seen, to entail democratic control of the economic, as well as the political, sphere. His advocacy of the creation of an economic, or labour, constitution was informed by a belief that all (collective) economic actors ought to be involved in the ordering of the economy, and not only the most economically powerful.²⁷ Through the creation of a labour institution and the bipartite identification and furtherance of the common interest, conflicts of interest between the social classes would be resolved or transcended.²⁸ At the end of the Republic, and in the context of economic crisis, he noted that they had instead been thrown into starker relief than ever before.²⁹

As for conflicts of interest arising *between* workers, Sinzheimer seems to have regarded these as largely illusory. The existence of the individual worker, he insisted, was determined by collective living conditions, so that any improvement in the former depended upon an improvement in the conditions of the worker's whole class.³⁰ It was true, however, that workers might experience feelings of competitiveness with one another:

for example, groups of workers employed in one workplace might regard themselves as in competition with workers employed elsewhere.³¹ To guard against such *Betriebsegoismus* (workplace egotism), Sinzheimer argued, national 'umbrella' organizations of workers and employers ought to be accorded primacy over workplace and district organizations, so that they might coordinate all bipartite labour/capital negotiations (particularly wage negotiations) in furtherance of the interests of all.

In *Krisis des Arbeitsrechts*, the instance of conflict discussed at greatest length was that which existed between the rationalities of private law, on the one hand, and labour law, on the other.³² Appraising the state of labour law scholarship within the Republic at the time of writing, Sinzheimer noted that labour law continued to be understood, for the most part, as an 'appendage of private law'.³³ Scholars overlooked the fact that the two fields of law differed in their very fundamentals. Private law was based upon the idea of individual free will, and upon the rather abstract notion that all legal persons enjoyed such freedom of will equally. Labour law, in contrast, was based upon the relationship of dependency (upon capital) in which the worker, and the working class, concretely existed. Private law sought to protect the individual's free will, labour law to subject that free will to a rational social order. Based as it was primarily upon the principles of private law, the current economic order pulled in the opposite direction to labour law. As a result, labour law was at risk of 'an inner destruction of its new, unique, fundamental substance'.³⁴ And this posed a danger not only for labour law, but also 'for the totality in which we all live'.³⁵ The crisis of labour law was a crisis of the entire economic order. Labour law had to be renewed, and such renewal would require the deep restructuring of the entire economic order. Economic law would have to be rethought as a matter of social law as well, the economy reorganized according to socialist (social law)—and not private law—principles.³⁶

CONFLICT AND THE NEW CENTURY CRISIS IN LABOUR LAW

Diagnosing Crisis

Though it has become commonplace in the course of the past thirty years or so to speak of a crisis in labour law, the notion of crisis has not always been understood or deployed in precisely the same way.³⁷ Some commentators have sought to explain why, in conditions of late capitalism, labour law is suffering from a crisis of *concepts*. Focusing, for example, on the 'cornerstone' concept of the 'employee', it has been emphasized that it can no longer be assumed, as it was in the past, that most workers are employees, hired under a contract of employment with a view to a long-term engagement.³⁸ Motivated by a desire to 'maximize flexibility', to be

in a position to shrink and grow the workforce as circumstances demand, employers have made ever-greater use of a variety of working relationships that do not fall within the category 'employment'. Throughout the developed world, there has been a massive rise in the number of workers hired through agencies, or as part-time, or casual, or zero-hours workers.³⁹ From the point of view of workers, this has been experienced, first and foremost, as a loss of security in employment; as the substitution of *precariousness* for security. Instead of enjoying a 'job for life', workers have had to adjust to the new reality of short-term or fixed-term hires, weak or no legal protections against redundancy or dismissal, and the prospect of participating several or many times throughout their lives in external labour markets. From the point of view of scholars, the problem to be addressed is the unsuitability of 'employment' as either the peg upon which to hang protective labour rights and standards, or as the foundation upon which to construct a defining paradigm of the subject of study.

Elsewhere, and especially since the financial crisis of 2008, the focus has lain with the even more fundamental challenge posed to labour law by the by now mainstream characterization of 'protective' labour legislation and labour market institutions as creating rigidities in markets and therefore barriers to economic growth. In substance, the idea is the expression, in the field of employment relations, of a particular strand of economic rationality or logic derived from a version of neoclassical economics.⁴⁰ Since the 1980s, it has become accepted across the globe to a remarkable extent, such that it has come to enjoy the status, almost, of a new 'common sense': something that is routinely claimed and assumed without being proven.⁴¹ For scholars of labour law, and especially those on the left, this has resulted in a crisis of *identity*. From the time of the birth of the subject, scholars have conducted their studies, often, with the aim of influencing policymakers and decision making within courts and legislatures.⁴² (For, Sinzheimer questions of legal policy were even intrinsic to the study of labour law.⁴³) Today, however, those who wish to construct arguments in favour of unionization and collective voice, or against deregulation and the persistent ratcheting down of workers' terms and conditions, risk having their contribution overlooked or ignored in favour of apparently more compelling claims regarding the deregulatory steps necessary to ensure job creation and growth. Unless they can identify a means of countering the new economic 'common sense', they risk the charge of irrelevance or futility. If their aim is, more modestly, to describe and analyse the law as it is, they face the rather different challenge of how to avoid appearing to endorse policies and legislative programmes based upon the 'flexibilization', deregulatory logic; how to avoid inching toward the conclusion that the very field of law which they seek to study is disintegrating or disappearing even as they write.⁴⁴

A Third Way in Labour Law?

Towards the end of his life, Kahn-Freund remembered the Weimar era as one in which conflict between the social classes had been grossly accentuated.

It was a society in which the conflictual element was more palpable, more visible to the eye. . . . The concluding words of the *Communist Manifesto*—‘Nichts zu verlieren als eure Ketten . . . und eine Welt zu gewinnen’—really made sense in Germany in 1930.⁴⁵

From the standpoint of 2015, Britain in the 1980s might similarly be remembered as a time and a place in which class conflict was overt: picture a line of striking miners eye to eye with an opposing line of police; a mounted policeman, truncheon raised; a roomful of young, male traders popping champagne corks as computer screens flash green around them.

In stark contrast to these images, the Third Way discourse developed in the UK in the 1990s represented an attempt by the centre-left to transcend the ‘old’ divides between left and right, and to offer, instead, a vision of a ‘win-win’ society in which rich and poor alike would be better off. In the UK, ‘New’ Labour devised a set of policies and legislative initiatives in the field of employment and employment relations which were introduced as offering ‘fairness at work’.⁴⁶ The premise upon which the claim of fairness lay, quite explicitly, was that certain kinds of labour laws and legally enforceable standards could benefit employees and employers alike, improving the situation of the former while helping at the same time to make British businesses and the British economy more competitive. ‘[F]airness at work and competitiveness go hand in hand . . . one must reinforce the other. That is the cardinal principle’.⁴⁷ Describing the social policy of the EU at the time, and with reference to Karl Polanyi, Colin Crouch spoke of ‘embedded neo-liberalism’.⁴⁸ Neoliberal strategies were pursued, but it was recognized that such strategies should be nested or embedded in certain forms of social protection, to gain legitimacy and to ease disruptive transitions. ‘Flexicurity’ programmes aimed, then, to increase the flexibility of action open to employers, especially their ability to dismiss workers, while offering those workers ‘security’ in the form of improved opportunities for alternative employment and adequate income support during periods of ‘transition’.⁴⁹

During the 1990s and early 2000s, many scholars of labour law in the UK were critical of Third Way policies and legislative initiatives, illustrating how measures which purported to benefit both sides of industry in truth served the interests of employers rather better than those of the workforce.⁵⁰ Others, however, glimpsed therein the possibility of a way out of the *crisis in labour law*.⁵¹ Without, of course, simply endorsing government policy and legislation in the field uncritically, these scholars felt themselves able to identify, within its terms, a set of objectives that

went some way toward offering an alternative to the ‘deregulation’ orthodoxy of the 1980s, and which they could approve as setting an appropriate agenda for scholarly investigations. In their authoritative history of labour legislation and public policy in the years up until 2007, for example, Paul Davies and Mark Freedland adopted a framework which assessed laws and policies primarily with reference to New Labour’s stated objectives of maximizing social inclusion and improving the competitiveness of the economy.⁵² These were ‘profoundly important social objectives’, Davies and Freedland suggested, with which scholars would do well to engage.⁵³ Writing alone and together with Frank Wilkinson, Simon Deakin sought to employ economic arguments and methodologies to challenge head-on the notion that protective and emancipatory labour laws were economically damaging.⁵⁴ Building on the work of Amartya Sen, for example, Deakin and Wilkinson recharacterized social rights not as constraints upon market activity (as T. H. Marshall had done) but, rather, as constitutive of well-functioning markets—well-functioning markets being those in which all economic agents are able to participate to the benefit of themselves and others.⁵⁵ On this logic, they were able to argue that certain social rights and labour standards (including, for example, minimum wage laws) were beneficial not only to workers and rights holders, but to all.

Crisis, Austerity, Insiders, Outsiders

Where is the fairness, we ask, for the shift-worker, leaving home in the dark hours of the early morning, who looks up at the closed blinds of their next-door neighbour sleeping off a life on benefits?
—George Osborne, UK Conservative Party Conference, October 2012

For a brief moment in 2008, the financial crisis appeared to reveal the deep-seated nature of the conflict of interests between those who (had) benefited from deregulated or ‘lightly’ regulated financial markets, and those who had not. As a matter of more or less unanimous agreement, it seemed, the ostensibly ‘win-win’ strategies of the Third Way would be rethought: more stringent financial regulation would be introduced, bankers’ salaries and bonuses reigned in. Before such steps could be taken, however, the crisis was quickly recast as one of swollen public sectors, overgenerous welfare systems and rigid labour markets.⁵⁶ The kind of ‘grotesque paradox’ observed by Sinzheimer in the 1930s played out again: as billions in public money were spent on propping up the banks, unemployment rates rose, welfare payments were reduced, and legal and institutional supports for better-than-minimum terms and conditions of employment were removed.⁵⁷

In what has since become the mainstream analysis of ‘failing’ labour markets, labour market segmentation has routinely been attributed to the existence of market *insiders* and *outsiders*. *Insiders* are those who enjoy

'unnaturally' and, therefore, 'unfairly' high wages and good working conditions including, importantly, job security; *outsiders* are those without work or in precarious, low-paid work. Often *insiders* are defined simply as those in a SER, enjoying all the legal protections that are accorded to (standard) 'employees', while *outsiders* are correspondingly those in non-SERs.⁵⁸ The characterization of labour markets as dually segmented in this way encourages the conclusion that conflicts of interest arise—primarily and problematically—not between workers and their employers, but between different groups of workers. The logic implied by the diagnosis is that, in order to improve the position of the outsiders, the insiders' rights should be weakened or forfeited: it is *because* the insiders' terms and conditions are unfairly high that those of the outsiders remain low.⁵⁹

In the context of the financial crisis of 2008 and the ongoing crisis in the Eurozone, the EU Commission and its *Troika* associates have consistently identified dual segmentation as a primary cause of failing labour markets, high unemployment levels, and stunted economic growth. Accordingly, they have recommended or required national governments to reform employment protection legislation so as 'to reduce over-protection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market'.⁶⁰ With the stated aim of better 'balancing' the legal protection afforded to so-called insiders and outsiders, national governments have amended legislation so as to weaken the rights and lower the standards enjoyed by the former, without, in fact, strengthening the protections afforded to the latter.⁶¹ Elsewhere, conflicts of interest have been deemed to arise between 'hard-working families' and 'welfare-scroungers', 'strivers' and 'shirkers', and used to legitimize cuts to welfare.⁶² In an attempt to explain the imposition of draconian restrictions upon the right to strike, the interests of striking workers have been said to conflict with those of other worker-consumers, whose access to services is purportedly unfairly hindered by reason of the industrial action.⁶³

In scholarly writing, the language of labour market insiders and outsiders is familiar, first and foremost, from the US and a line of 'law and economics' analysis which seeks to illustrate the allegedly damaging effects of trade union representation; particularly, the barriers put in the way of employers who would otherwise 'increase efficiency' by hiring cheaper, nonunion labour.⁶⁴ In recent years, it has appeared, too, in the work of some left-wing, or centre-left, commentators. Perhaps the best-known example is Guy Standing and his identification of an emerging global class of low-paid workers with little or no job security: the 'precariat'.⁶⁵ As the dynamics of globalization and government policies aimed at 'flexibilization' have fragmented older class divisions, so Standing argues, several new social classes have emerged, which may be defined with reference, essentially, to the degree of vulnerability suffered by their

members. Above the 'precariat', sit then, among other classes, the 'salarimat' (comprising those employed in large corporations and government administration upon a full-time basis, enjoying job security, pensions and paid holidays) and the rump of the old working class (also employed under full-time, long-term contracts, enjoying both legal protections and representation by trade unions). Below it, sit the unemployed and the *Lumpen*. Implicit, and, at times, even explicit, in Standing's analysis is the suggestion that the interests of these different classes of worker conflict. From a social policy/basic income group perspective, for example, he describes the current systems of welfare and labour law as 'labourist', effective only in supporting the shrinking and privileged population who are in stable and secure jobs. The centre-left must abandon the interests of 'labour', he argues, and turn its attentions instead to representation of the precariat.

'The Sharpest Weapon . . . in the Hands of the Bourgeoisie'

In common with other commentators of the time, Sinzheimer tended, in the course of his analysis, to treat labour as a unitary social class.⁶⁶ He did admit, as we have seen, of the existence of competition between workers—for example, between groups of workers employed at different workplaces—and he spoke at times of the role of the state in protecting the interests of individuals (as against the collective).⁶⁷ For the most part, however, he was more immediately concerned to emphasize the ways in which all workers stood to gain from their collectivization and from the efforts of the collective to further collective interests. Through collectivization, competition between workers was minimized, and a defence created against the levelling down of wages that would otherwise result therefrom.

It is as true today as it was then that the interests of individual workers and groups of workers can conflict. Competition between workers for jobs is as much a characteristic of market economies as conflict between workers and their employers over terms and conditions,⁶⁸ and the greater the inequality of rewards attached to particular jobs—both within and among different countries—the more accentuated such competition is likely to be. It is also manifestly the case that law can serve to intensify or to weaken such conflicts of interest, or to resolve them in favour of particular parties.⁶⁹ Which workers or groups of workers stand to benefit, and which to be disadvantaged, by particular labour laws is—or should be—a matter of concern to all scholars and policymakers working in the field.⁷⁰

It is nonetheless the case that approaches to the description or analysis of labour laws and labour markets which begin from an identification of conflicts of interests between workers—including, especially, those which employ the notion of insiders and outsiders as a heuristic device—can suffer from a number of weaknesses. The picture that they present of

segmented labour markets can be rather simplistic, failing to take account of the extent to which workers may also *share interests*—because ‘insider’ and ‘outsider’ identities are fluid and not fixed; because ‘outsiders’ may be financially dependent on ‘insiders’; because depreciation in the wages of one group may create downward pressure on those of another. It can tend, too, to obscure the importance of employer interests and strategies in causing or exacerbating market segmentation. As was emphasized long ago by Friedrich Engels, employers have much to gain by orchestrating and intensifying competition between workers. It was, of course, precisely for that reason that workers sought to organize themselves into trade unions and to demand the standardization of terms and conditions across whole sectors and countries, or regions, refusing to compete with one another upon the basis of the price at which they were willing to sell their labour power.

When scholars or policymakers seek to identify conflicts of interest within workplaces and labour markets, and to draw conclusions accordingly, they ought to bear these points in mind. Instead of characterizing trade unions as protective only of the interests of a limited group of ‘insiders’, they ought to recognize the extraordinary achievement of the unions, historically, in improving wages and working conditions for union members and nonmembers alike, through sectoral collective bargaining as supported by particular legislative mechanisms. Instead of disregarding employing organizations as disinterested bystanders in situations of competition between workers, they ought to direct their attention squarely on those organizations as additional ‘interested’ parties. The interests of certain workers may conflict with those of others, or with those of employing organizations, or with those of consumers. But this is a matter which fails to be determined with reference to the specific context, and to the interests and practices of all the economic actors concerned.

CONCLUSION

In the aftermath of the financial crisis of 2008, failing labour markets were identified as a primary cause of stagnating economies and, accordingly, as a primary target for reform. As national governments and supranational institutions moved to prescribe programmes of reform, *flexibility* figured as the key to well-functioning markets. In this respect, there was a significant degree of continuity with ‘Third Way’ and ‘flexicurity’ policy prescriptions. Now, however, there was far less emphasis by government on the capacity of innovations to benefit *all*, and a much greater tendency, instead, to assert and emphasize the existence of conflicts of interest between different groups of workers: labour market insiders and outsiders, strivers and shirkers, striking railway workers and hardwork-

ing commuters. Such conflicts of interest were then used to justify reforms aimed at lowering labour standards, cutting welfare payments, or restricting workers' freedom of association.

In policy debates and academic discussions alike, the identification of conflicts of interest between different workers or groups of workers has been based quite routinely upon a depiction of labour markets as dually segmented; upon the characterization of some workers as labour market insiders, and others as labour market outsiders. This is oversimplistic, tending to overlook and obscure the extent to which workers also share an interest in the improvement of wages and other terms and conditions, and the ways in which workers' interests can conflict with those of employing organizations. It was suggested in this chapter that the analysis of labour markets and labour law ought to take account also of the interests of employing organizations and the strategies employed by them to further those interests. In seeking to identify the interests of various market actors, moreover, scholars and policymakers ought to seek to understand markets and market behaviour not in the abstract, but with reference, instead, to the specific configuration of particular economies and economic institutions. These, perhaps, are the enduring lesson of old approaches to the study of labour law, exemplified *par excellence* in the work of Hugo Sinzheimer.

NOTES

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1. Michel Coutou relates Sinzheimer's paper to the current 'crisis' in Michel Coutou, 'With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law', *Comparative Labor Law and Policy Journal* 34 (2013): 605–26.

2. Hugo Sinzheimer, 'Die Krisis des Arbeitsrechts', *Arbeitsrecht* 20 (1933), Columns 1–10, reproduced in Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt aM-Cologne: Europäische Verlagsanstalt, 1976).

3. See, further, Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014).

4. Private law regulates relationships between private individuals and comprises principally property law, contract law and tort law (see public law which regulates relationships between individuals and the state).

5. For further explanation and references, see, for example, Guy Davidov and Brian Langille, 'Introduction', in Guy Davidov and Brian Langille, eds., *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 1.

6. As famously declared by Mario Draghi, *Wall Street Journal*, 24 February 2012.

7. Roy Lewis and Jon Clark, 'Introduction', in Roy Lewis and Jon Clark, eds., *Labour Law and Politics in the Weimar Republic* (Oxford: Oxford University Press, 1981), 36, citing Ernst Fraenkel, 'Die politische Bedeutung des Arbeitsrechts', in Thilo Ramm, ed., *Arbeitsrecht und Politik: Quellentexte 1918–1933* (Neuwied am Rhein: Luchterhand, 1966), 254.

8. Otto Kahn-Freund, 'The Weimar Constitution', *Political Quarterly* 15 (1944): 230. See, also, Dukes, *The Labour Constitution*, chapter 3.

9. Fraenkel, 'Die politische Bedeutung des Arbeitsrechts', 247.

10. *Ibid.*, 247.
11. See, for example, Gerhard A. Ritter, 'Die Entstehung des Räteartikels 165 der Weimarer Reichsverfassung', *Historische Zeitschrift* 258 (1994): 73–111.
12. Dagmar Schiek, 'Europe's Socio-Economic Constitution ("Verfasstheit") after the Treaty of Lisbon', in Thomas Dieterich, Lartine Le Friant, Luca Nogler, Katsutoshi Kezuka and Heidi Pfarr, eds., *Individuelle und kollektive Freiheit im Arbeitsrecht—Gedächtnisschrift für Ulrich Zachert* (Baden-Baden: Nomos Verlag, 2010), 172–73.
13. Hugo Sinzheimer, *Grundzüge des Arbeits Rechts*, 2nd ed. (Jena: Verlag von Gustav Fischer, 1927), 208–9.
14. Otto Kahn-Freund, 'Hugo Sinzheimer', in Lewis and Clark, *Labour Law and Politics in the Weimar Republic*.
15. Otto Kahn-Freund, Hugo Sinzheimer and Achim Seifert, 'Die Rechtssoziologie von Hugo Sinzheimer: eine Annäherung', in Wolfhard Kohte and Nadine Absenger, eds., *Menschenrechte und Solidarität im internationalen Diskurs: Festschrift für Armin Höland* (Baden-Baden: Nomos Verlag, 2015).
16. See references herein to work written by the current author, by Achim Seifert and by Michel Coutu.
17. See, further, Dukes, *Labour Constitution*, chapter 4.
18. Otto Kahn-Freund, *Das soziale Ideal des Reichsarbeitsgerichts* (Mannheim-Berlin-Leipzig: Bensheimer, 1931), and 'Der Funktionswandel des Arbeitsrechts', *Archiv für Sozialwissenschaft* 67 (1932), in Lewis and Clark, *Labour Law and Politics in the Weimar Republic*.
19. Kahn-Freund uses the term *fascist* to liken the 'social ideal' of the Weimar judges to that of Mussolini.
20. Michael Kittner, *Arbeitskampf: Geschichte, Recht, Gegenwart* (Munich: C. H. Beck, 2005).
21. Kahn-Freund, 'Hugo Sinzheimer', in Lewis and Clark, *Labour Law and Politics in the Weimar Republic*, 95.
22. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, 135–36.
23. *Ibid.*, 140.
24. *Ibid.*, 139.
25. See, for example, Sinzheimer, *Grundzüge des Arbeits Rechts*.
26. Hugo Sinzheimer, 'Demokratisierung des Arbeitsverhältnisses', in idem, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt aM-Cologne: Europäische Verlagsanstalt, 1976).
27. See, further, Dukes, *The Labour Constitution*, chapter 2.
28. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, 140.
29. *Ibid.*, 138.
30. *Ibid.*, 121.
31. See, for example, Hugo Sinzheimer, 'Das Räte-system', and idem, 'Die Rätebewegung und Gesellschaftsverfassung', both in *Arbeitsrecht und Rechtssoziologie*.
32. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, 138–39.
33. *Ibid.*, 138.
34. *Ibid.*, 138.
35. *Ibid.*, 138.
36. *Ibid.*, 140.
37. See, for example, Davidov and Langille, *The Idea of Labour Law*.
38. Kahn-Freund famously described the contract of employment as the cornerstone of labour law: Otto Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment', *Law Quarterly Review* 39 (1977): 508–28.
39. 'Zero hours workers' are those who are not guaranteed any minimum hours of work—the employer undertakes only to call upon them *if* and when they are needed.
40. Joseph Stiglitz, *Globalization and its Discontents* (Harmondsworth, UK: Penguin, 2002).
41. Kerry Rittich, 'Making Natural Markets: "Flexibility" as Labour Market Truth', *Northern Ireland Legal Quarterly* 65 (2014): 323–43.

42. Ruth Dukes, 'Wedderburn and the Theory of Labour Law: Building on Kahn-Freund', *Industrial Law Journal* 44 (2015): 357–84.

43. Hugo Sinzheimer, 'The Background of Labour Law' (1936) cited in Kahn-Freund, 'Hugo Sinzheimer', 79.

44. Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable', in Davidov and Langille, *The Idea of Labour Law*, 88.

45. 'Nothing to Lose but Your Chains, and a World to Win': Kahn-Freund, 'Post-script', in Lewis and Clark, *Labour Law and Politics in the Weimar Republic*, 195. See, also, Chris Thornhill, chapter 6 in this volume.

46. UK Government (1998), White Paper, *Fairness at Work*, Cm 3968.

47. *Ibid.*

48. Colin Crouch, 'Entrenching Neo-Liberalism: The Current Agenda of European Social Policy', in Nicola Countouris and Mark Freedland, *Resocialising Europe in a Time of Crisis* (Cambridge: Cambridge University Press, 2013), 40.

49. 'Flexicurity' and 'Third Way' approaches were also adopted in several of the Member States, for example the Nordic countries, the Netherlands and Germany.

50. See, for example, Tonia Novitz and Phil Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Oxford: Hart Publishing, 2001).

51. Dukes, *The Labour Constitution*, chapter 5.

52. Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1900s* (Oxford: Oxford University Press, 2007).

53. *Ibid.*, 249.

54. See, for example, Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2004), chapter 5; Simon Deakin, 'Concepts of the Market in Labour Law', in Annett Numhauser-Henning and Mia Rönnmar, eds., *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart Publishing, 2014), 141.

55. Deakin and Wilkinson, *The Law of the Labour Market*, esp. 344–45, citing T. H. Marshall, 'Citizenship and Social Class', in T. H. Marshall and Tom Bottomore, eds., *Citizenship and Social Class* (London: Pluto Press, 1992).

56. Alain Supiot, 'Towards a European Policy on Work', in Countouris and Freedland, *Resocialising Europe in a Time of Crisis*, 19.

57. For country-by-country analysis, see Stefan Clauwaert and Isobel Schömann, 'The Crisis and National Labour Law Reforms: A Mapping Exercise', *Annex to ETUI Working Paper 2014/4* (Brussels 2014).

58. Valerio de Stefano, 'A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries', *Industrial Law Journal* 43 (2014): 253–85.

59. See, for example, the Kok Report, *Jobs, Jobs, Jobs: Creating More Employment in Europe* (Report of the Employment Taskforce, November 2003), cited in de Stefano, 'A Tale of Oversimplification and Deregulation', 258.

60. EU Commission, 'Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions, Annual Growth Survey', COM (2011) aa final.

61. V. de Stefano, 'A Tale of Oversimplification and Deregulation', 264–74.

62. See, for example, the Conservative Party of the UK, *Manifesto 2015*, and its bracketing together of welfare cuts and income tax cuts.

63. UK Government, Department of Business Innovation and Skills, *Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services* (July 2015).

64. V. de Stefano, 'A Tale of Oversimplification and Deregulation', 262–64.

65. Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury Academic, 2011). For criticism, see Jan Breman, 'A Bogus Concept?', *New Left Review* 84 (2013): 130–38.

66. The quotation in the subtitle is from Friedrich Engels, *The Condition of the Working Class in England* (Leipzig: Otto Wigand, 1845): '[C]ompetition of the workers

among themselves is . . . the sharpest weapon against the proletariat in the hands of the *bourgeoisie*.'

67. Hugo Sinzheimer, 'Eine Theorie des sozialen Rechts' (1936), in *Arbeitsrecht und Rechtssoziologie*, 181.

68. Characterized by Weber as 'Konkurrenzkampf' and 'Preiskampf': Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 72, 82 and 93.

69. A. C. L. Davies, 'Identifying 'Exploitative Compromises': The Role of Labour Law in Resolving Disputes between Workers', *Current Legal Problems* 65 (2012): 269–94; Guy Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers', in Davidov and Langille, *The Idea of Labour Law*, 315.

70. See Mundlak, 'The Third Function of Labour Law', and Davies, 'Identifying 'Exploitative Compromises'. See, also, Cathryn Costello and Mark Freedland, eds., *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014).

EIGHT

From the Crisis of Corporatism to the Crisis of Governance

Poul F. Kjaer

In the first half of the twentieth century, and, in particular, in the interwar period, corporatism, in its populist, progressive, reactionary and totalitarian variants, became a central feature of European societies. Many observers have regarded this development as a central driving force of the profound societal crises which characterized this period.¹ In contrast, other observers have mainly interpreted the corporatist surge as both a reaction and a possible solution to societal crises caused by the nature of capitalist reproduction.² In a similar vein, the emergence and expansion of new types of governance institutions since the 1970s has been understood as both the cause *and* as a reaction to the protracted series of crises which have characterized Western Europe and the rest of the Western world from the 1970s to the recent financial crisis.³

In more general terms, societal crises can be said to be intrinsic to a modern society that is characterized by constant transformations of its basic structure. This is also reflected in the constitutive distinction of modern society, the distinction between the factual unfolding of social processes and contrafactual normative articulations concerning how these processes ought to unfold. Against this background, this chapter examines the close link between societal crises and the evolution of intermediary institutions in their corporatist, neocorporatist and governance variants in the European context. Intermediary institutions fulfil a dual role in so far as they are simultaneously oriented toward the internal stabilization of social processes and the establishment of compatibility between the social process in question and the rest of society. This gives

them a strategic location in society in so far as they can be understood as central sites of societal integration as also reflected in the particular way in which they seek to combine factuality and normative articulations.⁴ But this location also implies that they are sites where tendencies of societal disintegration tend to emerge and become most visible. This was particularly clear in relation to interwar corporatism, but it has also re-emerged as a central issue within contemporary governance. A central reason for the crisis proneness of both interwar corporatism and contemporary governance can be found in their advancement of a fundamental antilegalist stance which, both in the interwar period and in the present time, paved the way for an erosion of the legal infrastructure of society.

THE MODERN CONDITION AND CRISES

Societal crises have two dimensions: a social dimension and a time dimension. In relation to the latter dimension, a crisis is a transition which involves an adjustment of expectations. An expectation is not being fulfilled and an adjustment of expectations has to take place. Thus, from this perspective, crises are essentially about the future. This also explains why, since Georg W. F. Hegel, modernity and crisis are to be understood as co-original.⁵ Modernity implies, as also highlighted by Reinhart Koselleck,⁶ a reconfiguration of the time structures of society from a circular to a linear conception of time, where the reality of the present is constituted on the distinction between the past and the future. It is through the continued projection of problems, demands and expectations out in the future that the social world maintains its vigour. In practice, the continued displacement of problems, demands and expectations into the future serves as a way to de-paradoxicalize the constitution of modern society. The economy is expected to grow in order to maintain itself, and its ability to do so is linked to the continued ability to inject new capital which enables it to take yet another step forward. In a similar manner, the political system continuously needs to make credible promises of a better future in order to maintain its legitimacy. But, if fulfilled, such promises are immediately replaced with new expectations, thereby creating a need for new promises of future fulfilment.⁷

But modernity not only implies a reconfiguration of the time structures of society, it also implies their acceleration.⁸ From economy and politics to science and sports, modern social processes are based upon an expansionary logic which implies that the pace of change is continuously increased.⁹ *Citius, Altius, Fortius* is the slogan of not only modern sports, but also of modernity as such. Acceleration implies that the pace of change is increasing, and, with it, the horizon of expectations is shortened. Career planning for a lifetime has, for example, become increasingly impossible.¹⁰ Instead, the continued readjustment of expectations, and,

with it, the sense of crisis, tends to become a permanent feature. Under the condition of accelerated modernity, a conflation is taking place, in which transition, adjustment and uncertainty become an integrated and permanent feature of everyday life. It is therefore hardly surprising that Søren Kierkegaard's problematization of existential anxiety and angst emerged at the dawn of modernity.¹¹

The second dimension, the social and integrative dimension of society, is also intimately linked to the structural composition of modern society. A central feature of modern society is the differentiation of a number of functionally delineated societal spheres or, in systems-theoretical parlance, function systems, which increasingly operate autonomously based upon their own logic. Here, Karl Marx's and, later on, Karl Polanyi's, reconstruction of the differentiation of the economic system into a self-propelling and expansionist system guided by the objective of profit is only one particular, albeit very clear, case of this development. The turn to modernity implied a reconfiguration of society through the emergence of a whole string of increasingly autonomous social processes related to functional areas as diverse as the arts, education, health, law, the mass media, politics, science and sports.¹² These systemic processes are all based upon expansionist logics, as expressed in terms such as juridification, medicalization, politicization and scientification, in that they tend to produce negative externalities which cannot be handled in a purely system-internal manner.¹³ The reification of social relations, as diagnosed in different ways by Karl Marx and Friedrich Engels, as well as Theodor Adorno and Max Horkheimer, are therefore not a phenomenon which is specific to the economy, but rather a feature of modern society as such. The same might be said for the related issues of alienation, anomie, the colonialization of lifeworlds, disciplinarian, rationalization and technification.¹⁴

STRUCTURAL TRANSFORMATIONS AND SOCIETAL CRISES

Within the Marxist tradition, contradictions between social classes, capital owners and labour providers, have traditionally been regarded as the central driving force of history, just as the inequality produced within capitalist society is seen as a root cause of societal upheaval and crisis. Whereas the handling of social class differences certainly has been a central issue throughout modern times, an adequate structural perspective, however, highlights that such differences are more of a side effect of increased functional differentiation.¹⁵ This does not imply that social differences related to inequality are irrelevant for social crises, but it does imply that, behind the issue of social inequality, more profound structural transformations in relation to the intensity and structural centrality of functional differentiation can be detected. The crisis trajectory leading to

the French Revolution of 1789 was, for example, closely linked to the increased differentiation and empowerment of the political-bureaucratic system.¹⁶ The revolution essentially amounted to a coup d'état in which an increasingly professionalized bureaucratic machinery sought to eradicate competing claims to political power.¹⁷ This again implied that novel and very profound *effects* were produced *vis-à-vis* the rest of society in so far as the traditional nobility, the *petite bourgeoisie* and the peasantry were all faced with fundamental changes in the way in which their lives were organized as well as their formal status in society.

As also argued by Franz Neumann and Hugo Sinzheimer among others, the crisis of the Weimar Republic can, furthermore, be traced back to a fundamental 'construction failure' of the institutional setup of the newly founded republic. The institutional framework of Weimar Germany rested, to a considerable degree, upon the idea of the collective inclusion of social classes into the state, and thus upon the idea that social classes provided the fundamental building blocks of society. As also pointed out by Chris Thornhill in this volume, the comparatively late, and, in many ways, incomplete unification of Germany implied that the early years of the Weimar Republic were driven by a state-building effort guided by the desire to establish a more unitary and coherent German society capable of replacing the conglomerate institutional structure of the German *Reich* of 1871.¹⁸ Thus, the introduction of a collectivistic and class-based corporatist institutional framework, mainly enshrined through labour law, as developed in the early Weimar years, was intended to act as a counterweight to the local and particularistic forces which continued to be a central trademark of German society.¹⁹ In practice, the collective inclusion of social classes into the state, however, led to an undermining of the fragile public law framework of the state and the *de facto* privatization of public power, since it opened the gates for a circumvention of democratic procedures by organized interest groups, most notably business groups. This again led to a factual curtailing of the state's capacity to pursue coherent and long-term policy objectives in relation to issues of economic policy, among others.²⁰ The catastrophic end of Weimar can, therefore, in this light, be seen as a result of the *de facto* short-circuiting of the functional delineations of society, since the boundaries between the political-bureaucratic system and the economy were effectively fractured, which led to a profound crisis of legitimacy.²¹ In sociological terms, one might, therefore, argue that the Weimar crisis, in contrast to the crisis leading to the French Revolution, was a 'retroactive crisis', in so far as it was a reflection of an attempt to normatively institutionalize a framework of collective decision making which factually rested partly on the stratificatory differentiation between social classes and partly on the segmentary forms of differentiation, as expressed in the continued vibrancy of strong localistic and particularistic centres of authority throughout German society. The root cause of the crisis was therefore profoundly linked to the

absence of a condensed and institutionally stabilized functionally delineated sphere of public power due to the continued resistance of societal countermovements. To the extent that modernity is defined as the primacy of functional differentiation *vis-à-vis* segmentary, territorial and stratificatory differentiation,²² Germany, at the time, might therefore be considered to be a country which had only partially arrived in modernity. From a structural perspective, the successive series of catastrophic events from 1914 to the division of Germany in 1949 might be seen as the 'side effects' of a protracted reconfiguration process which led to the emergence of a more outright supremacy of functional differentiation in (Western) Germany in the post-WWII era.

The protracted series of crises which evolved in Western Europe and the rest of the Western world from the 1970s onward, and which found its (preliminary) culmination in the financial crisis that became visible from 2007 onward, might also be regarded as a reflection of more profound structural transformations. From the 1970s onward, the system of economic production increasingly broke loose from its confinement within the national and transnational institutional setups which were established throughout the Western world in the wake of WWII. At nation-state level, fundamental neocorporatist constitutional and welfare reforms were unfolded, partly based upon developments such as the New Deal in the 1930s and the military planning efforts undertaken during WWII. At transnational level, a new architecture was established through frameworks such as Bretton Woods, the GATT, the International Monetary Fund, the OEEC/OECD, and the World Bank. It was this institutional framework which became 'exhausted'²³ due to a radicalization of social processes in the latter half of the twentieth century, a radicalization which implied a massive spatial expansion as well as an immense acceleration of time in relation not only to economic, but also to other systemic processes in relation to the mass media and education, just as two examples. An expansion and acceleration, typically described with the term *globalization*, which implied that the institutional frameworks aimed at stabilising systemic reproduction processes, such as economic processes, no longer corresponded to the nature and reach of the processes that they were oriented against. From the 1960s onward, technological transformations implied a gradual shift to a service and knowledge society which made the institutional framework of the preceding industrial society increasingly outdated, just as the modernization processes in East Asia and elsewhere have made the existing transnational architecture, from the composition of the UN Security Council, to the power relations within the International Monetary Fund and the World Bank, out of touch with the reality that they are directed against.²⁴ It is this development which has found its expression in the emergence of a new semantic universe through the 'turn to governance'.

It follows that the history of societal crises in the twentieth and early twenty-first century is intimately linked to the consecutive expansion and deepening of modernity. The gradual succumbing of ever larger segments of global society to the logic of modernity, as expressed in a relative dominance of functional differentiation as the organizing principle of society, has unfolded in a 'two steps forward and one step back' manner, in which catastrophic and violent excesses have been a central trademark. Rather than social inequality, the structural cause for the outbreak of crisis tends to be related to the emergence of discrepancies between the unfolding of societal processes and the institutional architecture aimed at stabilising these processes. Social processes are constituted upon the basis of a 'doubling of reality'²⁵ between facticity and normativity, between the factual existing social reality and the equally real idea of what the factual reality *ought* to look like. This doubling is expressed in a functional need to stabilize social processes normatively through institutional frameworks such as those associated with rights-based rule of law, constitutional democracy, and labour market regimes. Forms of institutional stabilization, however, tend to change at a slower pace than the social processes that they are oriented against. In a world characterized by constant change, they again and again end up being 'out of touch' with the structural composition of the very processes that they aim to stabilize. Sociological theory, conceptual history and social and political theory converge on this point, in so far as the tension between facticity and normativity is where they, albeit from different angles, meet up. As we will turn to now, both the crisis of the interwar period, and the post-WWII response and the subsequent turn to governance which emerged from the consecutively unfolding experience of crisis from the 1970s onward, were intimately linked with the articulation and the unfolding of new ideological frameworks aimed at addressing the continuously unfolding discrepancy between facticity and normativity.

CORPORATISM AS ANTIMODERNISM

From the late nineteenth century onward, the emerging sociological discipline was characterized by increasingly critical voices concerning the consequences of modernity. Not just Marx, but also scholars such as Émile Durkheim, Ferdinand Tönnies and Georg Simmel voiced their concerns in relation to the side effects of a rapidly changing world characterized by an implosion of holistic sources of meaning through increased temporalization and functional differentiation. Throughout Europe, this discomfort with the everyday life of modernity also became mirrored in a broad host of social movements of socialist, syndicalist and religious variants, which emerged from the mid-nineteenth century onward. Common to these otherwise very diverse groups was their call for the curbing of

the volatility of market-based interactions. They shared the view that a competition-based economy produced anomie and other side effects, just as they called for the reinstatement of guild or guild-like corporations in order to reduce the contingency of market interactions. These movements, in most instances, saw themselves as opposed to liberal as well as Marxist ideas. Instead, they emphasized the protection of artisans, shopkeepers and other groups related to the *petite bourgeoisie*.²⁶

This line of thinking was taken up in the interwar period, in Weimar Germany as well as throughout the rest of Europe, through the development of forceful corporatist ideologies. Even though corporatist discourse took substantially different forms and unfolded with different degrees of force and resonance in different European and non-European settings, the common feature was the advancement of an idea of society as an organic body. In practice, this holistic view implied calls for limitations to be imposed upon the competition-based economy and the view that modern liberal statehood was an insufficient basis for societal order. The rejection of the modern liberal state was expressed in a rejection of its core component, namely, the rule of law, which was seen as an alienating tool which inhibited efficient and goal-orientated planning.²⁷ The corporatist rejection of the rule of law, which was taken to an extreme in the ideological underpinnings of Italian fascism and German National Socialism, implied that the state/society distinction was to be dissolved. Thus, the core trait of corporatist thinking was the desire to return to a holistic world in which the functional differentiation of society had been undone. This desire was, however, not only a prevalent idea, it also gained factual reality. Although Mussolini's Italy and post-Weimar National Socialist Germany massively radicalized both the ideational foundation and its practice, corporatism was not confined to these totalitarian regimes. Both at the level of ideas and at the level of practical politics, corporatism became a central trademark of interwar Europe. This was the case from de Rivera's authoritarian conservative regime and later under the Falangist regime in Spain, the *Ditadura Nacional* and the *Estado Novo* in Portugal, Engelbert Dolfuss' Austrofascism, the Josef Pilsudski regime in Poland as well as throughout the rest of Eastern, Southeastern and Central Europe which all succumbed to various degrees of corporatist authoritarianism at different stages of the interwar period.²⁸ The corporatist desire for a new type of ordering also heavily influenced political discourse and practice in those few European states where democracy did not experience an outright breakdown, such as Belgium, France, the Netherlands, the Nordic countries and the UK.

The dual corporatist rejection of liberal market economy and the liberal state can be seen as a reflection of a demand for order and certainty which gained traction due to the earthquake caused by WWI. In sociological terms, corporatism can be understood as being characterized by a general rejection of the spontaneous dimension of social processes and

their substitution with planned and organized processes. Most functionally differentiated areas of society are characterized by a duality between hierarchically organized and spontaneously coordinated areas, as, for example, is expressed in the distinction between firms and the market, the political system and public opinion, and between institutionalized religious congregations and their believers.²⁹ It is this duality which corporatist ideologies sought to break down through the substitution of spontaneous processes, including market-based processes and pluralist politics, with hierarchical structures relying on organization and planning.³⁰ The corporatist urge was therefore based upon a fundamental paradox. Strong states and strong leadership was promoted at the same time as the most central infrastructure of state-based authority, its legal underpinning, was to be removed. Not surprisingly, the freeing of political decision making from the constraints of law in almost all settings ended up being a very short-lived strategy. In almost all cases, the suspension of the legally imposed self-restraint of state power implied an initial explosion of political energies and a strengthened capability to act under exceptional circumstances. In the longer run, however, the dismissal of legal self-restraint implied that the functionally confined integrity of state-based power was eroded, thereby paving the way for societal breakdowns and disaster.

NEOCORPORATIST RESTABILIZATION

The interwar experience and the subsequent totalitarian disaster became the focal point around which intellectual thought circulated from the end of WWII onward. Friedrich von Hayek and Karl Polanyi, for example, simultaneously developed theories concerned with why totalitarianism had emerged.³¹ But they arrived at diametrically opposed conclusions, in so far as the former argued that the problem was 'too little' and the latter 'too much' market and competition. From the perspective of sociology, their respective positions can also be seen as focused upon whether the existence or the absence of a functionally differentiated society was the underlying reason for the emergence of totalitarianism. The resurgence of the ordoliberal school in post-WWII Western Germany implied strong advocacy for the former perspective, that the short-circuiting of functional differentiation was a central reason for the totalitarian surge. Accordingly, the ordoliberal school reinforced its focus on law and legal instruments as the central tools through which the dual separation and reconnection of the economic and political dimensions of society should be achieved.³² Thus, at the heart of the ordoliberal perspective was an understanding of *Rechtstaatlichkeit* as the central framework through which the functional differentiation of society was to be established and maintained. This issue lay, furthermore, at the heart of the dispute be-

tween Wolfgang Abendroth and Ernst Forsthoff concerning the compatibility between *Rechtsstaatlichkeit* and progressive welfare-state arrangements.³³

Ordoliberalism only gained central traction in Germany, but the broader emphasis on *Rechtsstaatlichkeit* was a general thing and heavily influenced practical politics throughout Western Europe. In the part of Europe which did not succumb to Soviet control, a substantial wave of both constitutional and welfare reforms all reinforcing the legal structuring of relations between the state and the rest of society were enacted in the immediate post-WWII years. Almost all European states outside Soviet control granted themselves new constitutions or substantially revised the ones they had between 1945 and 1953.³⁴ The West European political economy regimes furthermore underwent fundamental transformations. Already during the allied occupation regime, a disentanglement of the conglomerate structure of German industry, characterized by a horizontal integration of industries such as coal, machinery and steel, was initiated. This paved the way for the strong focus on competition (antitrust) policy as a cornerstone of industrial policy at both national and European levels in the post-WWII area. In addition, the International Ruhr Authority, through which the Western Allied powers imposed their control over the German economy, initiated a reform of the German codetermination (*Mitbestimmung*) framework³⁵ which guaranteed employees places on company boards. Codetermination has a long history in Germany but was fundamentally reformed with the *Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie* of 1951. This law, reforming codetermination in the coal and steel sector, eventually came to serve as the template for codetermination in the entire German industry. The same was the case with the reform of the framework for collective bargaining autonomy (*Tarifautonomie*) which was developed in a similar manner and which was finalized in April 1949 one month before the establishment of the Federal Republic. In the UK, the *Social Insurance and Allied Services Report*, the so-called Beveridge Report, of 1942 provided the cornerstone for the reformation of the British welfare and labour market system in the early postwar period, and, as such, provided the basic framework for the British political economy until the late 1970s. In France, where only timid moves toward a generalized welfare and labour market system had emerged from the late nineteenth century onward, the immediate post-WWII period saw the emergence of an 'across-the-board' welfare system. A system which emerged through the merger of the existing plethora of mainly 'private law'-based social-security systems into a single 'public law'-based generalized framework, covering, among other things, pensions, occupational injury, health and housing.³⁶ The Constitution of the Fourth Republic of 1946 furthermore introduced a 'right to social security' and reinforced the right to form

occupational associations, business associations and trade unions, and the right to strike.

This cluster of arrangements has traditionally been denoted as 'neocorporatist', although, in fact, they have essentially nothing in common with the earlier forms of corporatism.³⁷ Although considerable variation can be observed,³⁸ the welfare state conglomerates which emerged in Western Europe in the postwar period shared the feature that they had formal organization and formalized positivist law as their key organizational components, and, as such, they were directly opposed to the core organizational ideal which had driven interwar corporatism. The post-WWII neocorporatist institutional formations were characterized by hierarchically organized 'peak associations', which served as negotiation systems (*Verhandlungssysteme*)³⁹ aimed at mediating between the different spheres of society, most notably – but not exclusively – between the economy and the political system in the state form. As such, the core objective of the emerging neocorporatist set-ups was to establish a mutual stabilization of exchanges between different societal spheres.⁴⁰ While acknowledging the centrality of the state, the fundamental starting point was an acceptance of functional differentiation and the legally mediated stabilization of relations between the different functionally delineated segments of society.

THE 'TURN TO GOVERNANCE': DEEPENING MODERNIZATION OR REFEUDALIZATION?

In spite of the strong developments in the immediate post-WWII years, the structuration of society through legally mediated neocorporatist institutions did not reach a mature level in most Western European settings before in the 1960s. First, at this time, one might plausibly argue that at least *some* European states had gained the capability of establishing a coherent framework for society as a whole.⁴¹ This evolutionary achievement was, however, 'tragic' in nature in so far as this unitary society started to unravel at the very moment of its completion,⁴² thereby creating a basis for contemporary golden age nation-state nostalgia.⁴³

The massive expansion in the size of the public sector and the general 'demand overload' which Western, including Western European, states were confronted with from the 1970s onward led to a problematization of the state's steering capacity as both left and right leaning scholars identified a planning and steering crises.⁴⁴ The 'turn to governance', typically associated with decentring, and increased hybridization between public and private spheres, as well as the increasing deregulation and privatization from the 1980s onward, is typically seen as a response to this development.⁴⁵ However, this shift did not imply a substantial shrinking of the state, but rather a reconfiguration, through a shift in policy priorities, a

restructuring of the tax base upon which states relied as well as an internal reorganization of states through the introduction of NPM techniques. In ongoing critiques of this new, often denoted as neoliberal, policy regime, the central focus has been on the expansion of commodification and thus marketization. While this is certainly an important trend, this development did not imply a reduction in the reach of state power. On the contrary, a double-movement which implied a dual expansion of the economy and statehood was the central feature. The reorganization of the state through NPM implied, in most European settings, the introduction of competition as a central steering instrument within public institutions. From the public service mass media,⁴⁶ to public research funding and health care,⁴⁷ the establishment of internal modes of competition, where tasks and funds are allocated through competitive bidding have become commonplace. This sort of framework mimics the logic of the market but remain essentially nonmarket in so far as they typically are organizational or regime internal institutions where the parameters, as well as the final decision, tends to rest with management and as such are hierarchically and not spontaneously defined. This again creates a need for constant evaluations to be conducted as efficiency increases and resource allocation cannot be linked to the price mechanism. Thus, whereas this development indeed implies an increased marketization, it also, and probably more substantively, implies an expansion of a state-based bureaucratic logic, *de facto* serving as a tool for undermining a central characteristic of the neocorporatist welfare regimes, namely, the profession-based autonomy of areas such as health, science and the mass media.⁴⁸ The competitive bidding for resources is, in other words, an instrument which allows for an expansion of political rationality—which, to a large extent might be considered bureaucratic rationality in disguise—into spheres which, to date, had been capable of upholding a certain degree of autonomy *vis-à-vis* political influence.

The most fundamental transformation following on from the reconfiguration of the state is, however, observable at the legal level through the dual expansion of contract and administrative law. This development has been considered a one-way absorption of contract law by administrative law.⁴⁹ A contradictory double movement can, however, be observed, in so far as the contract tool has been introduced into the organization of public policies at the same time as increased hybridization between the public and the private implies that administrative law provisions are increasingly applied to private structures as well, leading *de facto* to the emergence of considerable grey zones that are not clearly demarcated to one or the other sphere, a development which indicates that the differentiation between state and nonstate social processes is becoming increasingly strained, potentially allowing for the increasingly unregulated introduction of privatistic logics into public processes and vice versa.

This development is being further enhanced by the ethos dominating NPM and the wider neoliberal discourse, in so far as its call for increased efficiency and adaptability are closely linked to an anti-legalistic discourse in which the ‘removal of red tape’ hampering social interaction is seen as a central objective. Whereas the corporatist discourse of the early twentieth century was closely linked to an anti-legalist discourse because formal law was seen as inhibiting the possibility of planning and political action, the neoliberal discourse develops the same argument upon the basis of the idea that legal formalism inhibits spontaneous market processes. In both discourses, ‘society’, and not the state, is considered to be the true constitutive object and source of social progress at the same time as both discourses, paradoxically, provide the basis for an expansion of state power in the short and middle term. As is clearly visible in relation to the 2007–2008 financial crises, the legal infrastructure, with its strategic function of *simultaneously* separating and reconnecting numerous social spheres in order to enable a stabilization of expectations and a structuring of exchanges between these spheres, came under sustained pressure in most developed countries from the 1990s onward. Over time, this led to an incremental undermining of the integrity and sustainability of political, economic, as well as other social processes. Much like in corporatism, the turn to governance and its accompanied expansion of competition might, therefore, in the short and middle term, have established the basis for a dual expansion of political and economic rationality as the same as the suspension of reflexive self-limitation through law indicates the long-term dangers associated with this development for the state as well as the economy.

NOTES

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1. See, for example, Franz L. Neumann, ‘The Change in the Function of Law in Modern Society’, *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, edited by William E. Scheuerman (Berkeley: University of California Press [1933] 1996), 101–41; Franz L. Neumann ([1933] 1996): ‘The Decay of German Democracy’, in: *The Rule of Law Under Siege. Selected Essays of Franz L. Neumann and*

Otto Kirchheimer, edited by William E. Scheuerman (Berkeley: University of California Press, [1933] 1996), 29–43; see, also, Chris Thornhill, chapter 6 in this volume.

2. Bob Jessop, 'Corporatism and Beyond? On Governance and Its Limits', in Hartmann and Kjaer, *The Evolution of Intermediary Institutions in Europe*, 29–46, and Ruth Dukes, chapter 7 in this volume.

3. Gerry Stoker, 'Governance as Theory. Five Propositions', *International Social Science Journal* 50 (1998): 17–28; R. A. W. Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain', *The Political Quarterly* 65 (1994): 138–51; *Understanding Governance* (Buckingham: Open University Press, 1996); 'The New Governance: Governing without Government', *Political Studies* 44 (1996): 652–67.

4. As already stipulated by Émile Durkheim. See Poul F. Kjaer, 'Context Construction through Competition', 146–66, at 155 et seq.

5. Jürgen Habermas, *Der philosophische Diskurs der Moderne. Zwölf Vorlesungen* (Frankfurt aM: Suhrkamp Verlag, 1988), 34 et seq; Hauke Brunkhorst, 'The Return of Crisis', in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo, eds., *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, 2011), 133–71. See, also, Reinhart Koselleck, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt aM: Suhrkamp Verlag, [1986] 2006), 203–17.

6. Reinhart Koselleck, *Vergangene Zukunft: Zur Semantikgeschichtlicher Zeiten* (Frankfurt aM: Suhrkamp Verlag, 1988).

7. Wolfgang Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Berlin: Suhrkamp Verlag, 2013), 60 et seq.

8. On the acceleration of time structures in modern society, see Hartmut Rosa, *Beschleunigung: Die Veränderung der Zeitstrukturen in der Moderne* (Frankfurt aM: Suhrkamp Verlag, 2005); Paul Virilio, *Vitesse et Politique: Essai de Dromologie* (Paris: Galilée, 1977); William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University Press, 2004); Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt aM: Suhrkamp Verlag, 1997), p. 997 et seq.

9. Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

10. See Ruth Dukes, chapter 7 in this volume.

11. Søren Kirkegaard, *The Concept of Anxiety: A Simple Psychologically Orienting Deliberation on the Dogmatic Issue of Hereditary Sin* (Princeton, NJ: Princeton University Press, [1844] 1981).

12. For a historical overview of the evolution of the differentiation of function systems, see Rudolf Stichweh, 'Strukturbildung in der Weltgesellschaft—Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt', in Thomas Schwinn, ed., *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen* (Wiesbaden: Verlag für Sozialwissenschaften, 2006), 239–57; 'Das Konzept der Weltgesellschaft: "Genese und Strukturbildung eines globalen Gesellschaftssystems"', in *Rechtstheorie* (Sonderheft, Heft 2–3, 2008), 329–55.

13. Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury, 2014), 56.

14. For further reading on this, see Poul F. Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (London: Routledge, 2014), 90 et seq.

15. For a detailed discussion of the relation between societal differentiation and inequality, see Thomas Schwinn, *Soziale Ungleichheit* (Bielefeld: Transcript Verlag, 2007), and the contributions in: Thomas Schwinn (ed), *Differenzierung und Soziale Ungleichheit. Die zwei Soziologien und ihre Verknüpfung* (Frankfurt aM: Humanities Online, 2004).

16. Brunkhorst, *Critical Theory of Legal Revolutions*, 230 et seq.

17. Norbert Elias, *Über den Prozeß der Zivilisation, Band 2* (Frankfurt aM: Suhrkamp Verlag, [1938] 1976), 132 et seq.

18. See Chris Thornhill, chapter 6 in this volume.

19. Neumann, 'The Change in the Function of Law in Modern Society', 101–41, at 101.

20. Harold James, *The German Slump: Politics and Economics 1924–1936* (Oxford: Clarendon Press, 1986).

21. A crisis which was, of course, reinforced by the difficult starting position of the democratic experiment of Weimar as provided for by the defeat of Germany in WWI and the Treaty of Versailles.

22. Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt aM: Suhrkamp Verlag, 1997), 743 et seq.

23. Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford: Oxford University Press, 2010), 8.

24. Poul F. Kjaer, 'Law and Order within and Beyond National Configurations', in Kjaer, Teubner and Febraro, *The Financial Crisis in Constitutional Perspective*, 395–430, at 415 et seq.

25. Robert M. Cover, 'Nomos and Narrative', *Harvard Law Review* 97 (1983): 4–68; Niklas Luhmann, 'Quod Omnes Tangit: Remarks on Jürgen Habermas' Legal Theory', *Cardozo Law Review* 17 (1996): 883–99, at 889.

26. Howard J. Wiarda, *Corporatism and Comparative Politics: The Other Great 'Ism'* (Armonk, NY: M.E. Sharpe, 1997), 34 et seq.

27. J. T. Winkler, 'Corporatism', *European Journal of Sociology* 17 (1976): 100–136, at 108.

28. With Czechoslovakia as an important exception.

29. Teubner, *Constitutional Fragments*, 88 et seq.

30. Winkler, 'Corporatism', 100–136, at 107 et seq.

31. Friedrich A. von Hayek, *The Road to Serfdom* (London: Routledge, [1944] 2001); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, [1944] 2002).

32. See Christian Joerges, chapter 9 in this volume.

33. Christian Joerges, 'Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process', *Comparative Sociology* 9 (2010): 65–85.

34. Brunkhorst, *Critical Theory of Legal Revolutions*, 428 et seq., and John Erik Fossum and Agustín José Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Lanham, MD: Rowman & Littlefield, 2011).

35. John Gillingham, *Coal and Steel and the Rebirth of Europe 1945–55: The Germans and French form Ruhr Conflict to Economic Community* (Cambridge: Cambridge University Press, 1991), 190 and 199 et seq.

36. Titled: 'Un plan complet de sécurité sociale, visant à assurer à tous les citoyens des moyens d'existence, dans tous les cas où ils sont incapables de se le procurer par le travail, avec gestion appartenant aux représentants des intéressés et de l'État.' See Yves Carsalade, *Les grandes étapes de l'histoire économique: revisiter le passé pour comprendre le présent et anticiper l'avenir* (Paris: Ecole Polytechnique, 2002), 347 et seq.

37. Philippe C. Schmitter, 'Still the Century of Corporatism?', 85–13 in Frederick Pike and Thomas Stritch, eds., *The New Corporatism* (Notre Dame, IN: University of Notre Dame Press, 1974), 85–131.

38. Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990).

39. Helmut Wilke, *Ironie des Staates: Grundlinien einer Staatstheorie polyzentrischer Gesellschaft* (Frankfurt aM: Suhrkamp Verlag, 1992).

40. David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge: Cambridge University Press, 1992), 73 et seq.

41. Kjaer, 'Context Construction through Competition'.

42. Chris Thornhill, 'The Future of the State', in: Kjaer, Teubner and Febraro, *The Financial Crisis in Constitutional Perspective*, 357–93.

43. Achim Hurrelmann, Stephan Leibfried, Kerstin Martens and Peter Mayer, *Transforming the Golden-Age Nation State* (Basingstoke, UK: Palgrave-Macmillan, 2007).

44. From the left side: Jürgen Habermas, *Legitimationsproblemeim Spätkapitalismus* (Frankfurt aM: Suhrkamp Verlag, 1973); *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt aM: Suhrkamp Verlag, 1976); Renate Mayntz, 'Legitimacy and the Directive Capacity of the Political System', in Leon N. Lindberg, Robert Alford, Colin Crouch and Claus Offe, eds., *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State* (Lexington, MA: Heath, 1975), 261–74; Claus Offe, 'Structural Problems of the Capitalist State', in Klaus von Beyme, ed., *German Political Studies*, vol. 1 (London: Sage, 1974), 31–57; 'The Theory of the Capitalist State and the Problem of Policy Formation', in Lindberg et al., *Stress and Contradiction in Modern Capitalism*, 125–44. From the right side: Michel Crozier, Samuel P. Huntington and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York: New York University Press, 1975).

45. Stoker, 'Governance as Theory: Five Propositions'; Rhodes, 'The Hollowing out of the State'; *Understanding Governance*; 'The New Governance: Governing without Government'.

46. Simon Deakin, "'The Return of the Guild?" Network Relations in Historical Perspective', in Marc Amstutz and Gunther Teubner, eds., *Networks: Legal Issues of Multilateral Co-operation* (Oxford: Hart Publishing, 2009), 53–73.

47. Julian Le Grand, Nicholas Mays and Jo-Ann Mulligan, eds., *Learning from the NHS Internal Market* (London: King's Fund, 1998).

48. Sciulli, *Theory of Societal Constitutionalism*.

49. Grahame Thompson, 'The Constitutionalisation of Everyday Life?', in Hartmann and Kjaer, *The Evolution of Intermediary Institutions in Europe, 177–97*.

Part IV

The Euro and the Crisis of Law and
Democracy

NINE

What Is Left of the European Economic Constitution II?

From Pyrrhic Victory to Cannae Defeat

Christian Joerges

Ordoliberalism is *en vogue*. If you search for this term on the homepage of the *Observer* newspaper, you will be led within 0.15 seconds to thirty-five pertinent entries.¹ The resonance in academic writing is even more impressive, not only in the UK, but also in France and Italy. The recent interest was obviously provoked by the financial crisis and Germany's orchestration of the European responses. And the tone of the comments is quite uniform. It has been set by a much-cited paper by Ulrike Guérot and Sebastian Dullien, which seeks to discern the ideational basis of 'Germany's approach to the Euro crisis'.² 'The long shadow of Ordoliberalism' is its title. Thomas Biebricher's objections against 'The Return of Ordoliberalism in Europe'³ sound similar. But his argument is embedded in a much more comprehensive long-term research agenda on the varieties of political and economic liberalism.⁴ There are more learned accounts available,⁵ some apparently written in some haste.⁶ No further lamentation. The quality of academic work is not uniform; indignation about Germany is comprehensible. Three queries which deserve to be taken seriously remain.

1. How come the broad stream of critical evaluations fails to mention, let alone discuss, the interdisciplinary or transdisciplinary foundations of the ordoliberal tradition? This school of thought is, or was,

essentially a socio-legal philosophy which sought to synthesize two disciplines under overarching normative visions.

2. Not only is there hardly only mention of law and of lawyers, it is also equally difficult to discern who in the academic profession represents ordoliberalism today and defends Germany's responses to the crisis on such conceptual grounds.⁷ Scholars indebted to the legacy of the Freiburg School tend to focus on its conceptual history and philosophical or methodological underpinnings. In the debates over the financial crisis, this kind of work is not particularly useful. One wonders, however, why there is so little engagement with contributions that defend at least some elements of the ordoliberal tradition. How significant is it that this kind of work tends to be sceptical as to the impact of ordoliberal ideas and critical in the evaluation of what is so widely perceived as an institutionalization and implementation of ordoliberal principles and concepts. To put this slightly differently: Could it be that references to ordoliberal notions not only in political discourses, but also in academic contributions no longer defend its foundational premises?
3. The third query mirrors the second: for decades, ordoliberalism has dominated what Germans call *Wirtschaftsrecht* (economic law is only an approximation to this notion). Why is it, one wonders, that this school, which is still well represented in German academia, remains so silent in the intense debates on Europe's 'crisis law'. How significant is it that the critics of ordoliberalism simply cannot name contemporary jurists who would defend what they criticize and skip over this difficulty and discuss other challenges.⁸ Franz Böhm, who passed away in 1977, is the only representative of the faction of ordoliberal jurists cited in an essay by Matthias Siems and Gerhard Schnyder.⁹

For all these reasons, ordoliberalism will figure here as a spectre, rather than a vibrant movement and school of thought. Why, then, care at all? Do the three queries even merit attention? My thesis is that the discovery of a culprit who is not alive is indicative of a deeper dilemma and a twofold crisis. The nomination of the culprit is a political gesture which camouflages deep uncertainties on the part of the critics about the causes of the European crisis and the means which could cure it. This is less disquieting than the other side of the dilemma. I will argue that the crisis has revealed the conceptual emptiness of Europe's crisis management. The lost paradigm has been replaced by discretionary managerialism while a conceptual renewal is not in sight. This is not to discharge either the spectre or the European *praxis*. It is to indicate that we have to liberate ourselves from the dichotomies which dominate the current debate.

The foundation of these messages will be elaborated in three steps. The first is a historical account which seeks to explain the ordoliberal

legacy. The second will deal with the European aspirations of ordoliberalism up to the Treaty of Maastricht, in particular with the project of a European economic constitution. Only the third will be directly concerned with the financial crisis.

TWO NARRATIVES

The writing of the history of ordoliberalism is dominated by protagonists and adherents to this tradition. This is a rich literature—and, unsurprisingly, one which underlines its accomplishments and merits. Nonpartisans have submitted more critical accounts.

The supportive reconstructions tend to start with the 1920s of the twentieth century. Anxieties about the economic downfall and social tensions of post-WWI and post-Monarchic Germany were about to get out of control. The first German republic was a democracy with strong antidemocratic opponents both from the radical right and from the radical left. Doubts as to the strength of the new order and the determination of its institutions, particularly the *Reichstag*, were widespread, and were nurtured by renowned teachers of public law (*'Staatsrecht'* and *'Verfassungsllehre'*).¹⁰ The ordoliberal legacy can be characterized as a then new variety of liberalism. This neoliberalism distanced itself from *laissez-faire* ideas, which, notably, Alexander Rüstow belittled as *'paläo-liberal'*.¹¹ Two influential manifestos were published at the peak of the great economic crisis in 1932: Walter Eucken's *Staatliche Strukturwandlungen und die Krise des Kapitalismus* ('Structural Transformations of the State and the Crisis of Capitalism'),¹² and Alexander Rüstow's *Interessenpolitik oder Staatspolitik* (roughly: 'Defending Interests or Striving for the Common Good').¹³ Other subsequently famous protagonists followed suit in the same year:¹⁴ Franz Böhm's seminal monograph on *Wettbewerb und Monopolkampf* (roughly: 'Competitive Order or Monopoly Struggle') followed just one year later.¹⁵ The thrust of these works was liberal in its rejection of the Historic School of Economics, on the one hand, and of socialist visions of *Wirtschaftsdemokratie* as propagated by the labour movement, on the other.¹⁶ It was post *laissez-faire* in that it assigned the task of ensuring the *ordo* of the economic sphere to the state. Walter Röpke used the oxymoronic notion of 'liberal interventionism' to characterize this function.¹⁷

The ordoliberal critique of economic power, the commitment to a strong antitrust law which aims to protect markets against self-destruction and an impartial state order, may attract popular support but are hardly a conclusive explanation for the broad acceptance and political success of ordoliberalism in the young Federal Republic. A plausible rationale for this impact has been submitted by Philip Manow in his exploration of the religious underpinnings of ordoliberalism. The notorious 'social question' which generated so much unrest in the late-nineteenth

and the early-twentieth century was a challenge to which *both* Christian Churches sought to respond. This is not major news as far as Germany's political Catholicism is concerned. But the story which Manow recounts about the importance of social Protestantism was hardly known.¹⁸ *Ordo* is a Catholic notion. Yet, the ordoliberal founding fathers who embraced it—Walter Eucken, Alexander Rüstow, Wilhelm Röpke—were all strongly linked to Protestantism.¹⁹ What both the Protestants and the Catholics sought was a third way between capitalism and socialism. The alliance which they formed was the basis of Germany's postwar social market economy, an ecumenical project which united Protestants and Catholics politically in the Christian Democratic Union.²⁰

Manow's resort to the Christian churches bridges the ordoliberal beginnings with their postwar success. But what about the in-between, the twelve years of the Third Reich? This is the reference point of the second narrative. Ordoliberals were not only prodded to explain their advocacy for a 'strong state', but were also suspected or accused of intellectual partisanship with the infamous Carl Schmitt or collaboration with the Nazi regime. It is clear that their third way was not a plea for a constitutional democracy. Their concept of an economic constitution was mistrustful of political processes. If they were not democrats, they must have been sympathizers with the Nazis and, at the very least, the Schmittians. *Tertium non datur!* Such presumptions and suspicions are unavoidable and have, indeed, been submitted.²¹ The title of Franz Böhm's famous monograph, published in 1937, sounds somewhat pathetic and may have had political appeal.²² But is there really a 'strong Schmittian flavour' in the 'The Ordo Manifesto of 1936', signed by Franz Böhm, Walter Eucken and Hans Großmann-Doerth,²³ as Julio Baquero Cruz has argued?²⁴ The manifesto is a critique of the erosion of the trust 'in a natural system in both law and political economy' by romanticism and historicism. The 'economic constitution' is understood as a 'general political decision on how the economic life of the nation is to be structured'. The line between unfair and permissible competition is to be drawn by the cooperative efforts of lawyers and economists.²⁵ Is this Schmitt's discretionary politics? Is it the authoritarian liberalism which Hermann Heller criticized?²⁶ This is what I suggested in my 'melancholic eulogy'.²⁷ That evaluation may have to be revised under the present crisis. The resort of the strong state to strong law and 'economic science' has an authoritarian touch. But this authority nevertheless invokes and legitimates its actions by valid law and economic science, and hence *not* on discretionary political grounds. Heller, publishing in 1933, does not mention ordoliberalism. His opponent is Carl Schmitt with his theses on the state of exception and the irrefutable dictatorship.²⁸ What Heller describes is an *economic* emergency. This is why he discusses, in the final pages of his essay, Schmitt's infamous talk on the 'strong state and the healthy economy'.²⁹ There are affinities in this talk with an interventionism establishing market mecha-

nisms. But Schmitt's proclamation of a strong state with unfettered powers, on the one hand, and a depoliticized economy which is obedient to authoritarian commands, on the other, can hardly be understood as a promotion of the ordoliberal agenda. Schmitt's plea for political decisions which depoliticize the economy, and his polemics against '*Wirtschaftsdemokratie*' (industrial democracy), form a tandem, although Schmitt's ideas about the role of the strong state in the economy seem somewhat opaque. We leave their deciphering to the Schmitt research, but will have to return to the substance of the problem in the concluding section on Europe's new 'crisis law'.

THE PROJECT OF A EUROPEAN ECONOMIC CONSTITUTION

The following brief reconstruction of the ordoliberal impact on the integration project is not an end in itself, but is meant to elucidate the flaws of the integration project which have contributed to its present *malaise*. I refrain from repeating my earlier reconstruction.³⁰ What I want to underline here is what I consider to be a merit of the ordoliberal reading of European law, and then focus on two further aspects, the rarely noticed hijacking of the ordoliberal school by the near-to unanimous³¹ reading of the EEC Treaty as a constitution which was written by the ECJ and, thereafter the reconceptualization of the EMU as established by the Treaty of Maastricht and the Stability Pact of 1997 as a 'diagonal' conflict constellation.

Economic Constitutionalism

'*Die Wirtschaft ist das Schicksal*' ('the economy is our destiny')—this insight of Walter Rathenau, politician and industrialist, murdered in 1922, is anything but trivial. My somewhat pathetic quotation alludes to a long-term *problématique* and a critique of European legal scholarship. The problem concerns the relation or tension between markets and politics, more specifically, between the democratically legitimated political rule in constitutional states and the autonomy of their economies. For European constitutionalism, the economy is *en quelque façon nulle*. This kind of complacency is (co-)responsible for a good number of failures, which include the benign neglect of the ordoliberal project. This complacency is remarkable. Walter Hallstein, the first president of the European Commission, was, after WWII, an avowed ordoliberal.³² One could have been interested in understanding what he meant when he famously characterized the EEC as '*Schöpfung des Rechts, Rechtsquelle, und Rechtsordnung*' ('created by law, the source of law, and legal order').³³ In a nutshell, European integration had been launched as an economic project, not as a political union. The ordoliberal version of economic constitutionalism provided a

conceptual framework within which European integration could be legitimated: the freedoms guaranteed in the EEC Treaty, the opening up of national economies, the antidiscrimination rules, and the commitment to a system of undistorted competition, were interpreted as a principled 'decision' for the establishment of a free-market economy and its competitive ordering.³⁴ And it is worth underlining that, in this reading, the community acquired a legitimacy of its own. The validity of Europe's economic governance was not dependent upon some foundational political democratic act. Quite the contrary, the EEC was perceived as a non-majoritarian settlement par excellence; its competitive order was based upon law, and shielded against political influence.³⁵ Interpreting the pertinent Treaty provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions elegantly resolved the legitimacy *problématique*. The legitimacy of the economic 'ordo' was independent of the state's democratic constitutional institutions. By the same token, it could be argued that it imposed limits upon the community and that discretionary economic policies were illegitimate and unlawful.

Integration through Law as Congenial Project

Ordoliberalism was by no means dominant within the—then quite small—community of European law teachers in Germany, and was simply unknown elsewhere. To be sure, the Federal Cartel Agency in Berlin made its views known to Brussel's legendary DG IV (Directorate General for Competition) and important officials from Germany were committed ordoliberals. This should have had its impact. It remains nevertheless somewhat mysterious that a school of thought which is unknown outside Germany and resorts there in the private law departments of Germany's law faculties should influence the formation of European law so significantly. There was, however, a kind of meeting of minds, which occurred between ordoliberal economic constitutionalism and the constitutionalization of the EEC Treaty, which the jurisprudence of the ECJ, an institution 'tucked away in the fairy tale duchy of Luxembourg',³⁶ promoted so successfully: the principles of direct effect, supremacy, preemption, with self-empowerment as the ultimate authority in the interpretation of European law, and, most importantly, the granting of economic rights to Europe's market citizens, which empowered them to move the integration project ahead through the defence of these rights against the legislative and regulatory activities of their home states.

This is all well known, a hardly questioned *fait accompli*, and yet it is equally mysterious. The famous formula of the 'object and the agent of integration'³⁷ was coined as late as 1990. At that time, the American law and society movement promoted the sociological study of law and all sorts of interdisciplinary 'law and' explorations. It inspired the 'law-in-

context' approach which was to become the methodological trademark of the Law Department of the European University Institute in Florence. 'Integration through law', taken literally, was both a concept and a strategy which disregarded the embeddedness of law in all sorts of social norms, and of its societal functions. The success of the 'integration-through-law' agenda can only be explained on metamethodological grounds. Since the commitment to 'more integration' was unquestioned with 'law' providing a normatively appealing means for its promotion, it is unsurprising that the support of the project through ever more legal harmonization and uniformity was so widely accepted. The methodological solipsism of the formative years, the doctrinal rigidity and its formalism, all enabled transnational interactions and acting, which instituted a European community of lawyers and legal scholarship long before social scientists started to take Europe seriously.³⁸ The price to be paid for this kind of progress was to become apparent only with the various rounds of enlargement and the ever-greater socioeconomic diversity and political salience of the integrationist moves. Integration through law rests upon a 'one-size-fits-all' assumption which was to become an ever more inadequate response to the challenges of European diversity. And the promotion of more unity as an end in itself was to become an ever more insufficient response to the quest for the legitimacy of European rule.

We conclude that the conceptual foundation of both economic and treaty constitutionalism was not impressive. Its considerable impact must have had metajuridical reasons. One such support was certainly the legitimacy of the postwar consensus on a peaceful European future,³⁹ another more mundane one, the neoliberal tilt of the integration project, which ensured its support by powerful actors.

The Maastricht Monetary Union as Diagonal Conflict

Neither the intellectual nor the broad political support, however, was as robust as it seemed during the successful years of the foundational period and the dynamics of the 'completion of the internal market' which Jacques Delors had initiated. The success stories need to be retold here. After the crisis, it is more important to explore the design failures which have contributed to Europe's by now apparent instability. The institutional and sociopolitical turning point, we submit, was the Treaty of Maastricht.

The Treaty of Maastricht, signed in 1992, in force since 1993, was perceived at the time as both a continuation and a deepening of what had been accomplished, a move towards 'an ever closer union', marked by an opening of new policy fields and the crowning of the completion of the internal market by monetary union.⁴⁰ In hindsight, we see a more complex picture, and what we are becoming aware of are institutional insufficiencies, and failures to deal with them. It is, by now, common wisdom:

the separation of monetary policy from fiscal and economic policy established by the Treaty of Maastricht is deeply flawed. The decoupling of monetary policy from national fiscal and economic policy has created an unruly space beyond the reach of law and European policy making. Simon Deakin provides further explanation:

[T]he national economies of the eurozone were on different economic growth paths. The future debtor states were mainly pursuing policies of financially-driven growth that were dependent on an expansion of private credit and on increasing asset prices in the markets for commercial and residential property.⁴¹

This is a significant point. It explains *why* more stringent cooperation was not conceivable and why a more stringent legal regime would have been bound to fail. These negative assessments do not yet tell us how we should characterize, in positive terms, what was actually established. As indicated, I suggest that the specifics of the Maastricht settlement can best be characterized as a 'diagonal conflict'. At this point, this notion needs to be explained further.

Monetary policy has become an exclusive competence of the Union under the Treaty of Maastricht (Article 3(1) c TFEU). The conferral of this competence did not include economic and fiscal policies. The exercise of these two policies can have external effects and can lead to 'horizontal' conflicts among member states. Very soon after 1992, tensions between Europe's monetary policy and the national policies could be observed where Member States felt that the European monetary policy did not respond adequately to their specific difficulties and interests. Germany's problems in the wake of the unification of the country provide the best-known example.⁴² The legal configuration of these tensions is 'diagonal'. It was not possible to invoke the supremacy or the preemption doctrine against the disobedient states. Monetary policy is neither 'supreme' to fiscal and economic policy, nor does it 'preempt' the exercise of national powers. Both the Union and the member states are certainly interested in the functioning of the economy, but the powers needed to accomplish this objective are attributed to two distinct levels of governance. The accommodation foreseen in Article 119 TFEU is 'the adoption of an economic policy which is based on the close coordination of member states' economic policies' as substantiated in Article 121 TFEU. This mechanism does not resolve the tensions and was not designed with such ambitions. Each and every member state has distinct fiscal and economic policy preferences. This was not just an unfortunate failure, but one which reflects the structural socioeconomic differences and varieties of capitalism in the Union.

To elucidate this further: the notion of diagonal conflicts characterizes a conflict constellation in the European multilevel system of governance, which has to be distinguished from vertical conflicts between the EU and

its member states, on the one hand, and horizontal conflicts among the member states, on the other. The notion also helps us to understand why uniform rules for the solution of such conflicts are simply unavailable as long as European diversity persists—as it does to an ever-increasing degree.

The notion also helps us to understand why the ‘integration through law’ project cannot cope with the EMU. The coordination of monetary, fiscal and economic policy occurs in constitutional democracies through political processes with political actors who can be held accountable by their constituencies.⁴³ A procedural legal framework within which coordination would take the diversity of Europe’s economies and societies into account has not been established, and, *hélas*, cannot be established in conformity with standards of democratic accountability under the Maastricht rules.

The responses to the European crisis which we have witnessed in recent years provide a dramatic illustration of this thesis. Characterizations such as ‘constitutional mutation’⁴⁴ are all too euphemistic. To be sure, the Maastricht regime was unsustainable and the need for legal change irrefutable. But this does not imply that the new constellation which European crisis politics has brought can be characterized as a constitutional move which would deserve recognition. This new constellation with its resort to a ‘strict conditionality’ of financial aid (Art. 136 (3) TFEU) can transform Member States ‘in difficulties’ such as Greece into ‘zero-choice democracies’—that is, into polities, in which the elected representative bodies no longer matter much.⁴⁵ We are witnessing how a Central Bank, which was supposed to operate outside the political sphere, is engaged in the correction and supervision of national politics.⁴⁶ It seems, indeed, that the ECB, through the changes in its lending and collateral policy ‘has risked attaining a stakeholder position *vis-à-vis* the banking sector, which may cause complications for its role as an independent monetary expert’.⁴⁷

These transformations will be discussed in the next section. For now, an interim summary on the ordoliberal project and economic constitutionalism can be drawn: (1) an ordoliberal imprint is clearly visible in the EMU. The commitment to price stability, the establishment of an independent central bank, the prohibition of monetary financing by Article 123 TFEU, the prohibition of bailouts by Article 123 TFEU and the objectives of the Stability and Growth pact all mirror the ordoliberal ‘stability philosophy’. Leading proponents of the Freiburg tradition continue to underline and defend these components.⁴⁸ They add, however, that this framework was never credible; it could not, and did not, ensure that member states would subordinate their fiscal autonomy to the ordoliberal stability philosophy.⁴⁹ (2) The reconstruction of the EMU as a ‘diagonal’ conflict constellation is again illuminating here. The ‘one-size-fits-no-one’ dilemma, which was established through the EMU, cannot be sub-

jected to general rules. The heterogeneity of the Eurozone instead necessitated managerial practices, bargaining processes and political compromises. In view of the ever-deepening socioeconomic diversity of the Eurozone, it follows that the failure of the EMU cannot be corrected through ever stricter rules. (3) The EMU did not establish an ordoliberal constitution and hardly deserves to be called a constitutional accomplishment of any kind.⁵⁰

CRISIS GOVERNANCE

The fragility of the Maastricht arrangement was a birth defect, which remained latent for a good number of years. This changed dramatically after 2008. The responses were equally spectacular. Within the time-span of half a decade, we have been witnessing the turbo-speed establishment of new modes of economic governance and regulatory mechanisms, such as the 'Europe 2020 Strategy' (March 2010), the 'European Semester' (May 2010), the 'EFSF Framework Agreement' (June 2010), the 'Euro Plus Pact' (March 2011), and the 'Six Pack' (December 2011), the 'European Stability Mechanism' (ESM, February 2012), the 'Treaty on Stability, Coordination and Governance' (TSCG, March 2012), the banking union (on the road since September 2012), the 'Two Pack' submitted back in 2011 and adopted with parliamentary blessing in March 2013. With regard to the compatibility of these measures with the Treaty, in particular its bailout ban (Article 125 TFEU), an *ex-post* revision procedure amending Article 136 TFEU has been undertaken in order to legalize financial assistance as of 1 January 2013.⁵¹

Each and every legislative act and political step has attracted broad academic attention and considerable judicial attention. Unsurprisingly, lawyers, academics and courts, provide arguments which seek to justify the practice of Europe's crisis management. I continue⁵² to believe that the veneer of legality offered is all too thin. Three features of the new modes of European economic governance seem particularly intriguing. First, through the supervision and control of macroeconomic imbalances, Europe's *praxis* disregards the principle of enumerated powers and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular the budgetary powers of the parliaments of the states receiving assistance. Second, the departure from the 'one-size-fits-all' philosophy orienting European integration in general and monetary policy in particular, nonetheless fails to achieve a variation, which might be founded in democratically legitimated choices; quite to the contrary, the individualized scrutiny of all member states is geared to the objective of budgetary balances and seeks to impose the necessary accompanying discipline. Under the conditions of a monetary unity, the member states can only respond to pertinent requests through austerity measures: re-

ductions of wage levels and reductions of social entitlements. Third, the machinery of the new regime with its individualized measures which are oriented only by necessarily indeterminate general clauses is regulatory in its nature, establishing transnational executive machinery outside the realm of democratic politics and the form of accountability which the rule of law used to guarantee. Core concepts used by new economic governance cannot be defined with any precision, either by lawyers or by economists, and are therefore not justiciable. This implies that rule-of-law and legal protection requirements are being suspended. This type of de-legalization is accompanied by assessments of member state performance, which cannot be but highly discretionary. The ‘excessive imbalance procedure’ as adopted in the Six-Pack and the Two-Pack regulations is the strongest conceivable illustration.⁵³ As Fritz Scharpf has put it so succinctly:

its economic logic dictates that it must operate without any pre-defined rules and that the Commission’s ad hoc decisions must apply to individual Member States in unique circumstances rather than to EMU states in general. Regardless of the comparative quality of its economic expertise, the Commission lacks legitimate authority to impose highly intrusive policy choices on member states—choices that are fundamentally controversial and have massively unequal distributive impacts.⁵⁴

Back to our beginnings: Has this reconceptualization of European governance been inspired by German ordoliberalism? Such assignments of conceptual responsibilities disregard the reserves and critique which ordoliberal scholars have raised against the Treaty of Maastricht. They also disregard their objections against conditionality provision of Article 126(3) TFEU, which are not normative, but instead underline that failure to comply with the imposed restrictions is inconceivable. They disregard, last, but not least, the *proprium* of that tradition, namely, its synthesizing of law and economics. This implies that economic policy must be guided by law and justiciable criteria.⁵⁵ The implementation of the new economic policy, however, is resistant against the guidance by general legal rules.

The situational and largely discretionary interventionism through the executive and governmental bodies is anathema to ordoliberal jurists. This reserve should have become even stronger after the Hayekian turn of the ordoliberal school in the 1970s. The current interventionist *praxis* replaces the exercise of individual freedoms and does away with the Hayekian ‘discovery procedure of competition’,⁵⁶ in which individual decisions are meant to be set in motion. As Michelle Everson has recently put it: just as the new regulatory interventionism can no longer be understood as a correction of market failures, the supervision of the politics of member states by technocratic rule cannot be understood as a mere cor-

rection of policy failures by expertise or a targeted compensation of the external effects of nation-state decision making.⁵⁷

As underlined in the introductory section, the new critique of ordoliberalism pays no attention to the synthesis of law and economics, which this tradition sought to accomplish. To be sure, the practices of new economic governance have apparently silenced ordoliberal jurists.⁵⁸ Is this an explanation or even an excuse for the disregard of law by social scientists? Even if this were the case, it would be necessary to substantiate the ordoliberal ingredients of the crisis recipes with some precision. This is by no means easy. To be sure, early ordoliberals expected, as Thomas Biebricher pointed out,⁵⁹ that the ‘science of political economy’ would provide objective guidance in instances where the law had no answers. But this trust was lost in the second generation of ordoliberals after Friedrich A. von Hayek’s philippic against the ‘pretence of knowledge’ in his Nobel Memorial Lecture, 11 December 1974.⁶⁰ This objection concerns the whole exercise of macroeconomic supervision, of macro- and micro-prudential controls—and it is more than euphemistic anyway to assume that the activities of the *Troika* are guided by something like science; the expertise which is operating here is necessarily politicized. Neither the much-cited Swabian housewife, nor journalistic slogans and buzzwords, represent ordoliberal scholarship.

CONCLUSION: THE LAW IN CRISIS

If the new economic governance cannot be qualified as an ordoliberal project, how else should it be characterized? The list of pertinent suggestions is long; in alphabetical order: ‘New sovereignty with largely unfettered power of rule’ (Chalmers);⁶¹ ‘executive powers beyond the reach of national and European democracies’ (Curtin);⁶² a ‘coordinative method’, in which ‘the level of sovereignty a state enjoys increasingly depends on its solvency’ (Dawson);⁶³ an ‘executive mode’ of governance (Enderlein);⁶⁴ ‘post-democratic executive federalism’ (Habermas);⁶⁵ ‘authoritarian managerialism’ (Joerges/Weimer);⁶⁶ a move from ‘democratic deficit’ to ‘democratic default’ (Majone);⁶⁷ ‘legally- and politically-unconstrained expertocracy’ (Scharpf);⁶⁸ ‘the consolidating state’ (Streeck);⁶⁹ and ‘authoritarian liberalism’ (Wilkinson).⁷⁰

All of these notions signal more or less intense discontent with the present European *praxis*. None of them fails to consider the pressures and constraints under which Europe’s crisis management operates. Its measures were taken to compensate for the failure of both the original EMU and the Stability and Growth Pact, and sought to prevent collapse of the financial system of the Eurozone. They cannot be understood as some wilful, let alone malicious, disregard of legal rules and principles. How then? Already back in 2010, Ernst-Wolfgang Böckenförde, a renowned

scholar and former judge of the German Constitutional Court, started to talk of a state of emergency.⁷¹ This is a notion with a dark legacy, in particular in Germany, of which Böckenförde is well aware.⁷² He substantiated his resort to this notion much earlier, defining the state of exception as a breakdown of the correlation between the regular situation presupposed in the law (*Normallage*) as the reference point of its regulatory objectives (*die intendierte Regulierungskraft der Norm*).⁷³ Such a breakdown generates a discrepancy and a tension between conferred powers and means, on the one hand, and the irrefutable challenges of a state of emergency, on the other.⁷⁴ In such exceptional circumstances, we will, so Böckenförde submitted, observe the quest for both exceptional powers and means to cope with such emergencies. Such explanations seem to capture the exigencies of the present crisis quite well. If we have to concede that the establishment of the EMU was a mistake which cannot be corrected by a stricter enforcement of its rules, the resort to exceptional measures after the collapse of this fragile edifice is unsurprising. We are, as submitted in the introductory section, witnessing a destructive disregard for the ordoliberal legacy of economic constitutionalism under the impact of the crisis. And why should we care, we have asked? We should care because we are witnessing the imposition of assumed functional necessities by Europe's new 'crisis law' on the European polity. These assumed necessities are devoid of any inherent normative foundation. This is 'what is left of the European economic constitution'.

NOTES

The 'II' in the title is to signal that this is a follow-up to my earlier essay 'What Is Left of the European Economic Constitution? A Melancholic Eulogy', *European Law Review* 30 (2005): 461–89 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635402), the elaboration of my introductory lecture to the *Summer Course of the Academy European Law in Florence*. The article got translated and published in five languages. This looks impressive, but the impact was marginal. The enthusiasm at the time for the promised land of 'ever closer Union' and its constitutionalization seems to have distracted the attention of Europeanists from the seemingly mundane issues of the economic ordering. In my 'Melancholic Eulogy', I argued that the ordoliberal project of economic constitutionalism had won but a Pyrrhic victory with the establishment of Economic and Monetary Union in the Treaty of Maastricht and the subsequent Maastricht *Urteil* (2 BvR 2134/92 & 2159/92, BVerfGE 89, 155. English translation: *Manfred Brunner and Others v. The European Union Treaty*, [1994] 1 *Common Market Law Reports*, 57. The message of this follow up is again concerned with ordoliberalism.

1. See <http://observer.theguardian.com>.

2. The paper is available at: http://www.ecfr.eu/page/-/ECFR49_GERMANY_BRIEF_AW.pdf.

3. Thomas Biebricher, 'The Return of Ordoliberalism in Europe: Notes on a Research Agenda' (2014) 9 *i-lex*, *Rivista di Scienze Giuridiche, Scienze Cognitive ed Intelligenza Artificiale*, Rivista quadrimestrale online, number 21, May 2014, 1–24: available in English and Italian at: www.i-lex.it/us/previous-issues/volume-9/fascicolo-21/147-the-return-of-ordoliberalism-in-europe.html.

4. See the publications listed at: <http://www.normativeorders.net/de/organisation/mitarbeiter-a-z?view=person&id=151>.

5. See the symposium 'Critical Exchange on Neoliberalism and Europe. Europe and the Political Philosophy of Neoliberalism' (2013) *Contemporary Political Theory* (advance online publication, 6 August 2013), with contributions by Thomas Biebricher, Josef Hien, Nikolaus Jabko and Anita Chari.

6. How else should one understand the portrayal of 'Alfred C. Ludwig Erhard' as a protagonist of ordoliberalism and the presentation of 'Otto Emminger' as an eminent *Bundesbank* economist in the otherwise interesting analysis of Sergio Cesaratto and Antonella Stirati, 'Germany and the European and Global Crises', *International Journal of Political Economy* 39 (2010–11): 56–86.

7. A noteworthy exception: *The Economist* of 18 October 2014, names "'ordoliberal" economists such as Hans-Werner Sinn', available at: <http://www.economist.com/news/books-and-arts/21625654-two-new-books-show-euro-crisis-far-over-ordoliberalism-revisited>. That is less daring than the presentation of the *schwäbische Hausfrau* (the Swabian housewife), invoked by Angela Merkel, as an ordoliberal policy model—Angela Merkel photo illustrates the book review in *The Economist*. On 'Angela Merkel's austerity postergirl, the thrifty Swabian housewife', see *The Guardian* of 17 September 2012, available at: <http://www.theguardian.com/world/2012/sep/17/angela-merkel-austerity-swabian-housewives>.

8. See Emiliios Christodoulidis, 'The Economics of Constitutional Renewal', in Massimo Fichera, Sakari Hänninen and Kaarlo Tuori, eds., *Polity and Crisis: Reflections on the European Odyssey* (Farnham, UK: Ashgate Publishing, 2014), chapter 3, 69; similarly, Gareth Dale and Nadine El-Enany, in their essay on 'The Limits of Social Europe: EU Law and the Ordoliberal Agenda', *German Law Journal* 14 (2013), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1524>, cite a wide range of critical comments on ordoliberalism but do not engage with representative authors.

9. 'Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation', *Governance: An International Journal of Policy, Administration, and Institutions* 27 (2014): 377–96.

10. Most famously, Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin: Duncker & Humblot, 1923), translated by Ellen Kennedy as: *The Crisis of Parliamentary Democracy* (Cambridge, MA: MIT Press, 1988).

11. Alexander Rüstow, 'Paläoliberalismus, Kollektivismus und Neoliberalismus in der Wirtschafts- und Sozialordnung', in *Christentum und Liberalismus: Studien und Berichte der Katholischen Akademie in Bayern*, vol. 13, edited by Karl Forster (Munich: Zink, 1960), 149–78; 'Freie Wirtschaft—starker Staat', *Tagung des Vereins für Socialpolitik, Dresden 1932*, in *Schriften des Vereins für Socialpolitik*, vol. 187, edited by Franz Böse: *Deutschland und die Weltkrise* (Munich: Duncker & Humblot), 62–69.

12. Walter Eucken, 'Staatliche Strukturwandlungen und die Krise des Kapitalismus', *Weltwirtschaftliches Archiv* 36 (1932): 297–321.

13. Alexander Rüstow, 'Interessenpolitik oder Staatspolitik', *Der Deutsche Volkswirt* 7 (1932): 169–72.

14. Alfred Müller-Armack, *Entwicklungsgesetze des Kapitalismus: Ökonomische, geschichtstheoretische und soziologische Studien zur modernen Wirtschaftsverfassung* (Berlin: Duncker & Dünnhaupt, 1932).

15. Franz Böhm, *Wettbewerb und Monopolkampf* (Berlin: Heymann, 1933).

16. Werner Abelshausen, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung* (Berlin: Kadmos, 2003), 158 et seq.

17. See Wilhelm Röpke, *German Commercial Policy* (London: Longmans Green, 1934), 40 et seq; see, also, *Die Lehre von der Wirtschaft* (Vienna: Springer, 1937); on Röpke, see, Maurice Glasman, *Unnecessary Suffering: Managing Market Utopia* (London: Verso, 1996), 52 et seq.

18. Phillip Manow, 'Ordoliberalismus als ökonomische Ordnungstheologie', *Leviathan* 29 (2001): 179–98. 'New' is, of course, a relative concept. In the core Section 3.5 on

'Social Protestantism and the Redefinition of Social Reforms', Manow points not just to primary sources but also to an impressive range of historical studies.

19. *Ibid.*, 180.

20. See, also, Christian L. Glossner, *The Making of the German Post-war Economy: Political Communication and Public Reception of the Social Market Economy after World War II* (New York: I. B. Tauris, 2010), 80–107.

21. See, for example, Dieter Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus* (Baden-Baden: Nomos Verlag, 1991). Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford: Hart Publishing, 2002), finds a 'strong Schmittian flavour' in the original ordoliberal version defined in 'The Ordo Manifesto of 1936', signed by Franz Böhm, Walter Eucken and Hans Großmann-Doerth (English version in Alan Peacock and Hans Willgerodt, eds., *Germany's Social Market Economy: Origins and Evolution* (New York: St. Martin's Press, 1989), 15–25.

22. Franz Böhm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* (Stuttgart-Berlin: Kohlhammer, 1937).

23. English version in Peacock and Willgerodt, eds., *Germany's Social Market Economy*, 15–25.

24. Cruz, *Between Competition and Free Movement*, 26.

25. 'The Ordo Manifesto of 1936', 16, 24 and 25.

26. Hermann I. Heller, 'Autoritärer Liberalismus', *Die Neue Rundschau* 44 (1933): 289 et seq.

27. Christian Joerges, 'What Is Left of the European Economic Constitution?', at 467.

28. Heller, 'Autoritärer Liberalismus', 646.

29. Heller referred, in his note 8, to original version of the 'Langname'-talk ('*Gesunde Wirtschaft im starken Staat*'—'A Healthy Economy in a Strong State') not to the revised version of this talk which was published under the title '*Starker Staat und gesunde Wirtschaft*' (A Strong State and a Healthy Economy), in: (1933) *Volk und Reich*, 81–94. The revised version is reprinted and meticulously annotated in Günter Maschke, ed., *Carl Schmitt, Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916–1969* (Berlin: Duncker & Humblot 1995), 71–91.

30. See, for example, note 1.

31. Among the dissonant voices that I am aware of, the most prominent one is that of Dieter Grimm; see, most recently, his 'Europe's legitimacy Problem and the Courts', Damian Chalmers, Markus Jachtenfuchs and Christian Joerges, eds., *Adjusting to European Diversity: The End of the Eurocrats' Dream?* (Cambridge: Cambridge University Press, forthcoming 2016).

32. See his 'Wiederherstellung des Privatrechts' (1946) *Süddeutsche Juristenzeitung*, 1 et seq.

33. Walter Hallstein, *Die Europäische Gemeinschaft*, 5th ed. (Düsseldorf: Econ, 1979), 33.

34. The exceptional status of agricultural policy may be less significant than is widely assumed.

35. Angela Wigger, 'Competition for Competitiveness. The Politics of the Transformation of the EU Competition Regime', PhD VU Amsterdam, 2008, 131 et seq.

36. Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law* 75 (1981): 1–27.

37. Renaud Dehousse and Joseph H. H. Weiler, 'The Legal Dimension', in: William Wallace, ed., *The Dynamics of European Integration* (London: Pinter, 1990), 242–60, at 243.

38. See out of the many pertinent works of Antoine Vauchez his 'The Force of a Weak Field. Law, Lawyers and the Government of Europe. Elements for a Renewed Research Agenda', *International Political Sociology* 2 (2008): 128–44.

39. J. H. H. Weiler, 'Europe in Crisis—On "Political Messianism"', "Legitimacy" and the "Rule of Law"', *Singapore Law Journal* (2012): 248–68.

40. See, for an early and still valuable collection of pertinent analyses, Renaud Dehousse, ed., *Europe after Maastricht: An Ever Closer Union?* (Munich: C. H. Beck, 1994).

41. Simon Deakin, 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Niklas Bruun, Klaus Lörcher and Isabelle Schömann, eds., *The Economic and Financial Crisis and Collective Labour Law in Europe* (Oxford: Hart Publishing, 2014), 83–106, at 90.

42. According to Fritz W. Scharpf, 'German monetary policy continued to be precisely targeted to German conditions which could differ from those of the other member economies. Hence, when, in 1992, the Bank decided to punish *Helmut Kohl* for the deficit-financing of German unification, other economies suffered as well—and the UK and Sweden (that had only recently joined the EMS) were catapulted out of the Monetary System by currency speculation.' See his 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy', MPIfG Discussion Paper 11/11, Cologne 1011, at 10.

43. The pre-Maastricht Federal Germany and its Bundesbank are no real exception and the recurring equation of its status with that of the ECB is mistaken; see, simply the old Article 88 of the Basic Law, which has been amended after the Maastricht Treaty and now reads: 'The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank that is independent and committed to the overriding goal of assuring price stability'; on the importance of the change, see, for example, Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far* (Cambridge: Cambridge University Press, 2014), 48 and 167.

44. Thusly, Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014), 119 et seq.

45. I am borrowing this term from Niklos Heplás, 'Supra-national Technocracy and Zero Choice Democracy: The Greek Experience', contribution to the workshop 'Technocracy and Democracy in Times of Financial Crisis', University of Darmstadt, 6–7 March 2014 (on file with the author).

46. See, very lucidly, Tuori and Tuori, *The Eurozone Crisis*, 134 et seq., and 221 et seq.

47. *Ibid.*, 226.

48. See, in particular, Lars Feld, 'Europa in der Welt von heute: Wilhelm Röpke und die Zukunft der Europäischen Währungsunion', Hamburgisches Weltwirtschaftsinstitut Policy Paper No. 70, Hamburg 2012, available at: <http://roepke.hwwi.de>.

49. Feld, 'Ein Scheitern ist nicht eingeplant, oder: Ordnungspolitische Prinzipien der Europäischen Währungsunion', *Impulsrede zur Sozialen Marktwirtschaft*. Wirtschafts-politischer Club Deutschland e.V., Berlin 2011, available at: <http://www.wpcd.de>; Kai Konrad, 'Balancing Austerity and Strategies for Growth', *CFA Institute Conference Proceedings Quarterly*, Second Quarter, 1–8, available at: <http://www.cfapubs.org/doi/pdf/10.2469/cp.v31.n2.8>.

50. As I have suggested it previously, see, for example, Christian Joerges, 'Economic Law, the Nation-State and the Maastricht Treaty', in Renaud Dehousse, ed., *Europe after Maastricht: An Ever Closer Union?* (Munich: C. H. Beck, 1994), 29–62; but see thereafter my 'What Is Left?'

51. As is well known, the objections raised by Mr. Thomas Pringle, Member of the Irish Parliament, against the legality of this amendment were rejected by the CJEU in *Case 370/12, Pringle v Ireland* judgment (Grand Chamber) of 27 November 2012, EU:C:2012:756. The European judiciary is ill-equipped to cure the design failures of EMU; see, in detail, Christian Joerges, 'Brother, Can You Paradigm?', *A Review Essay International Journal of Constitutional Law* 12 (2014): 769–85 and 'Pereat iustitia, fiat mundus: What Is Left of the European Economic Constitution after the OMT Litigation', *Maastricht Journal* 1 (2016) (forthcoming).

52. See, in some detail, Christian Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation', *German Law Journal* 15 (2014): 985–1028, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595.

53. See, for a useful summary of the pertinent documents by the Commission: http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.
54. Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability', in Wolfgang Streeck and Armin Schäfer, eds., *Politics in the Age of Austerity* (Cambridge: Polity Press, 2013), 108–42, at 139; see, also, Dariusz Adamski, 'Europe's (Misguided) Constitution of Economic Prosperity', *Common Market Law Review* 50 (2013): 47–86, note 7, and 52 et seq.
55. See Ernst-Joachim Mestmäcker, 'Power, Law and Economic Constitution', *The German Economic Review* 11 (1973): 177–92.
56. Friedrich A. von Hayek, 'Competition as a Discovery Procedure', *Quarterly Journal of Austrian Economics* 5 (2002): 9–23.
57. Michelle Everson, 'Banking on Union; or, Can the EU Survive Its 'Technocratic Governance'?', in Mark Dawson, Henrik Enderlein and Christian Joerges, eds., *The Transformation of the European Union: Challenges of Functionality, Design and Democratic Legitimacy* (Oxford: Oxford University Press, 2016 forthcoming).
58. Exceptional as usual Ernst-Joachim Mestmäcker; see 'Der Schamfleck ist die Geldverachtung' ('the shaming flaw is the disdainfulness of money'), in *Frankfurter Allgemeine Zeitung* (18 November 2011), 33; and thereafter 'Ordnungspolitische Grundlagen einer politischen Union' ('foundational principles for the ordering of a political union'), in: *Frankfurter Allgemeine Zeitung* (12 November 2012), 12. Mestmäcker builds on his prior work (see note 56). He is by no means merely repetitive. What I find insufficient, however, is the analysis and discussion of the reasons of the socioeconomic nonconvergence of the Eurozone.
59. Biebricher, 'The Return of Ordoliberalism in Europe', 1–24, at 5–6.
60. The lecture is available at: <http://pavroz.ru/files/hayekpretence.pdf>.
61. Damian Chalmers, 'European Restatements of Sovereignty', LSE Working Paper 10/2013.
62. Deirdre M. Curtin, 'Challenging Executive Dominance in European Democracy', Chorley Lecture, London 2013, published in *Modern Law Review* 77 (2014): 1–32.
63. Mark Dawson, 'The Euro Crisis and Its Transformation of EU Law and Politics', in: Hertie School of Governance, ed., *The Governance Report 2015* (Oxford: Oxford University Press, 2015), 41–68.
64. Henrik Enderlein, 'Das erste Opfer der Krise ist die Demokratie: Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008–2013', *Politische Vierteljahresschrift* 54 (2013): 714–39, at 722 et seq.
65. Jürgen Habermas, 'A Pact for or against Europe?', in Ulrike Guérot and Jacqueline Hénard, eds., *What Does Germany Think about Europe?*, *European Council on Foreign Relations* (Berlin, 2011), 83–89.
66. Christian Joerges and Maria Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?', in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott, eds., *Critical Legal Perspectives on Global Governance: Liber Amicorum for David M. Trubek* (Oxford: Hart Publishing, 2014), 295–322.
67. Majone, *Rethinking the Union of Europe Post-Crisis*, 196–202.
68. Fritz W. Scharpf, 'Political Legitimacy in a Non-optimal Currency Area', MPIfG Discussion Paper 12/15, Cologne, 2013.
69. Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014), chap. 3.
70. Michael A. Wilkinson, 'The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', *German Law Journal* 14 (2013), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1521>.
71. 'Not kennt keine Gebot?' ('necessity knows no rules?'), *Neue Züricher Zeitung*, 21 June 2010, available at: http://www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_gebot_1.6182412.html.
72. Section III.2.
73. 'Der verdrängte Ausnahmezustand. Zum Handeln der Staatsgewalt in außergewöhnlichen Lagen', *Neue Juristische Wochenschrift* 31 (1978): 1881–90, at 1884.

74. '[E]ine *grundsätzliche* Diskrepanz zwischen den vorgesehenen Befugnissen/ Modalitäten und einer Erfolgreichen Wahrnehmung der Aufgabe . . . angesichts einer unvorhergesehenen ernsten Gefahr', *ibid.*, at 1885.

TEN

Reflections on Europe's 'Rule of Law Crises'

Jan-Werner Müller

European integration was to advance through crises. Or so its founding fathers thought. To be sure, not just any kind of crisis; rather, Jean Monnet and other pioneers of what today is known as the EU envisaged crises that were eminently containable. Or, more precisely put, eminently containable through more integration. Whatever one thinks of this particular strategy of bringing about 'ever closer union', it is hard to deny that it is no longer available to European leaders today. For one thing, the kind of 'permissive consensus' that allowed integration to proceed without too much popular engagement has given way to what many scholars now call a 'constraining dissensus': more integration is always bound to be controversial and likely to generate an almost instinctual opposition to 'more Europe' in some countries. And then, there is the fact that the crises have simply become much more threatening; hence, containment is also politically costly both for national élites (governments can now fall over European issues) and the EU as a whole (whose approval ratings have declined dramatically over the past few years).

This is rather obvious with the Euro crisis, which has hit Europe like a perfect storm: a combination of failed institutional design (the currency union as envisaged in the 1990s simply could not work without some form of fiscal union), a series of banking crises, a state debt crisis (mostly as a result of the banking crises), and, finally, a very serious crisis of legitimacy for the EU as a whole (with the added complication that the Euro crisis—or, more precisely, the crisis management of the Euro crisis—keeps producing conflicts between nation-states along the lines of

'Germany *versus* Greece', the very thing the Union had been designed to prevent). All this is well known and expertly analysed elsewhere in this volume. What has received less public and also academic attention is what has sometimes been called Europe's 'rule of law crisis'. This crisis has, in fact, taken at least three forms, two of which directly relate to the Euro crisis: for one thing, member states kept violating the rules of the currency union with apparent impunity; second, in its response to the Euro crisis, member states, and the EU itself, took actions that are impossible to square with the basic principles associated with the rule of law (and also with ordoliberal legal theory, as Christian Joerges points out in his chapter¹): they broke the Treaty, so the argument usually goes, in order to provide assistance to the 'crisis countries'; leaders opted for discretion over legal rules; and, less obviously, the regimes put in place to supervise and 'condition' the conduct of the 'crisis countries' also violates the rule of law.² These (ongoing) rule violations are not a trivial matter, even if the responses by the EU might one day be judged as having rescued the currency union. After all, European integration has always been 'integration by law'—and persistent rule breaking puts the very idea of an entity functioning legally like a federal state (without actually being a federal state) at risk. Indeed, Walter Hallstein, the first Commission president, along with the founders, counted on the 'cultural force' of law; when that force ceases to function, there is little else—and certainly not popular enthusiasm—to take its place.

The rule of law crisis has taken a third form, one that has been much less discussed in Europe as a whole. I am speaking of the purposeful destruction of the rule of law inside EU member states, with Hungary being the most obvious example over the past half decade or so (other instances being Romania in the summer of 2012, and Poland since October 2015). To be sure, the conduct of the Hungarian government has been seen as a threat not just to the rule of law, but to other 'fundamental values' of the EU, as codified in Article 2 of the Treaty on European Union, democracy and human rights in particular.³ Yet, the European Commission as well as a number of national leaders have framed the issue as predominantly one of a 'rule of law crisis' (the European Council has been virtually absent in this discussion, very much unlike the Euro crisis).

The designation 'rule of law crisis' has itself been a political choice; there have been political reasons behind it and it has generated particular political consequences. This chapter explores these reasons and consequences, including the consequences for the notion that the EU ought to intervene in the member states in order to protect the rule of law. While it is not exactly news⁴ that the rule of law is not some always uncontested, de-politicized, technocratic, and the like, set of principles and institutions, it is still important to examine the precise shape a politics around the rule of law has taken. I shall argue that, in confronting proto-authori-

tarian conduct by member state governments, the focus on the rule of law seemed somehow to be a safer option for EU actors. At the same time, the very semantics of 'crisis'—suggesting something like a systemic failure without any clear account of individual agency—exacted costs, in that it made it harder to understand this particular 'rule of law crisis' as a serious *political* conflict (which is *not* to say that the criteria for judging breaches of fundamental values are all 'just' political or politicized by whoever calls the shots in the EU). This particular framing also made it more difficult for European actors to intervene, because the latter are now cast as the defenders of the rule of law, whereas those in breach of fundamental values can still claim to be the champions of (national) democracy. Finally, the ongoing deployment of the very concept of 'crisis' has had a further ambiguous results: one the one hand, it has been helpful in calling out populists who really are undermining the EU's fundamental values, but it has also assisted populists in doing what all populists do: polarize, sharpen conflict, and offering a story of good *versus* evil, of two forces that are bound to clash in an all-decisive battle. At the time of writing, this battle has been stylized as one of 'Christian' and 'national' (and, so the implication, authentically) countries such as Hungary and Poland *versus* decadent liberal Western states. The latter, so this story goes, are still dominant in EU institutions—but, if one were to believe leaders like Hungarian leader Viktor Orbán, they are governing against the wishes of their own people. One should not be alarmist about these new political confrontations—but some aspects undoubtedly are reminiscent of the *Kulturkampf* rhetoric of the interwar Europe, as analysed by Balázs Trencsényi in his chapter.⁵

EUROPE'S OTHER CRISIS, FROM 2010 ONWARD

The Euro crisis became fully apparent in early 2010. Another development that started later that year has received much less attention.⁶ In April, the right-wing *Fidesz* party won an absolute majority in the Hungarian national elections, defeating a left that had been plagued by corruption scandals and an abysmal economic record in the wake of the financial crisis. Due to Hungary's disproportionate election system, *Fidesz's* 52 percent at the polls translated into a two-thirds majority in parliament—a majority large enough to change the constitution. Declaring that the April election had, in fact, amounted to nothing less than a 'revolution in the voting booths', the government immediately started to amend the constitution (there were no less than twelve amendments in the first year of *Fidesz* rule) and also to engage in highly controversial symbolic politics such as establishing a day to commemorate the loss of Hungarian territories in the Treaty of Trianon in 1920. Despite the fact that the idea of a new constitution had not been debated in the spring

2010 election campaign, *Fidesz* also began to write a new 'Fundamental Law', which was passed with government votes only in April 2011 and came into effect at the beginning of 2012.

By autumn 2010, an increasing number of outside observers were beginning to be concerned about developments inside Hungary. The government passed a draconian media law that an OSCE representative compared to what one usually expects in totalitarian states. The constitutional court was both packed and institutionally enfeebled; this was particularly significant in a highly centralized country with a unicameral parliament and a rather weak president; the court had always provided the main constraint on government legislation. A whole range of nominally nonpartisan official positions were being filled with *Fidesz* loyalists, who were to enjoy unusually long appointments. The new constitution itself codified a peculiar, highly nationalistic, even ethnic, understanding of Hungarian history in its preamble. It also constitutionalized a whole range of policy decisions, such as national budgets, which would have been left to day-to-day political struggle in most other democracies.⁷

EU representatives, most notably members of the European Commission, started to criticize some of these actions vocally. But they found their own scope of action restricted by the fact that the Commission can only sanction member states when they apply EU law (or so conventional lawyer's wisdom had it; more on this below). So when, for instance, the Hungarian government drastically lowered the retirement age for judges—effectively decapitating the judiciary and then filling the open posts with loyalists—the Commission took Hungary to the Court of Justice of the European Union. The charge was 'age discrimination'. The Commission won its case legally. But *Fidesz* won its case *politically*—the judges were never comprehensively reinstated (many took the financial compensation that was offered, instead); in other words, the government in the end achieved the desired political effect.

A similar dynamic could be observed throughout the half decade after the supposed 'revolution in the voting booths'. The Hungarian government took a bold initiative which appeared to be blatantly designed to consolidate or even perpetuate its own power, then became defensive in the face of international criticism, retreated tactically but stuck to its strategic goals. Prime Minister Viktor Orbán even admitted that he had to perform a 'peacock dance' on the European stage to suggest compliance with EU expectations, while *de facto* advancing his domestic political agenda: two steps forward, one step back was the basic logic.

More particularly, the Hungarian government responded to international criticism with tactics of contesting through comparing (along the lines of: 'other countries do it, too!'), partial compliance, and, not least, shifting political attention elsewhere.⁸ This again and again put the burden on international, and, in particular, European, institutions to keep pointing to problems by explicating what certain measures meant in the

particular Hungarian context—a potentially lengthy process. These institutions also faced the difficulty of having to follow up properly on its criticisms and recommendations during times when much political attention (as well as political capital, alongside financial capital) were being absorbed by another crisis—that is, the Euro crisis. Under such circumstances, were European leaders, administrators, and, not least, jurists, justified in framing the crisis in Hungary as one primarily one of the 'rule of law'—and, by implication, are they right to repeat that framing in the context of Poland, after the Law and Justice party (*PiS*) came to power in October 2015 and started to implement its goal of creating 'Budapest in Warsaw'?

JUST WHAT IS A 'RULE OF A LAW CRISIS'?

Clearly, defining a rule of law crisis will depend on what one thinks the rule of law is in the first place. On one extreme, one might collapse rule of law and rule *by* law; such a purely procedural account would make it exceedingly difficult to claim that a rule of law crisis is anything but a crisis of the state as such (with rule having become completely informal, and the judiciary perhaps disintegrating). On the other extreme, one might subsume everything that might be desirable politically, from democracy to human rights, under the category of 'rule of law'—this, as we shall see further below, was eventually the approach taken by the European Commission, which argued that all fundamental values in Article 2 were connected and mutually-reinforcing (and thus could also be summed up with the shorthand notion of the 'rule of law').

More plausible, however, is the following understanding: first of all, a 'rule of law crisis' has to be something different from a 'rule of law violation'—in other words, it has to have a systemic character: it has, somehow, to put the whole *system* of the rule of law under threat. Otherwise, any infringement proceedings by the European Commission or any fundamental rights violation ascertained by the European Court of Human Rights would signal a 'rule of law crisis'. Arguably, this distinction was not properly observed by Justice Commissioner Viviane Reding in a 2013 speech, when she put a number of different problems and challenges into the same category: the 'Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law crisis in the summer of 2012'.⁹ As abhorrent as the treatment of the Roma by the Sarkozy government was, it did not appear to amount to a systemic problem in the French justice system. And as dangerous as Victor Ponta's power grab, or 'constitutional coup', was, it did not indicate a persistent problem in the Romanian legal system as such. Only if one were to return to one of the original meanings of crisis—as in *krinō*—as a *moment*, as opposed to a period, where a life-and-death decision or a

judgement is rendered, could France and Romania be said to have suffered a 'rule of law crisis': with the wrong resolution of the particular crisis, the whole system would disintegrate.¹⁰ But, even then, the Romanian case seems much more plausible than the French one, unless one argues that the latter involved a systemic breakdown of minority protections.¹¹

Second, a widely-shared notion of the rule of law defines it in essentially negative terms: it is about preventing arbitrary rule by official powerholders. In other words, there has to be equality before the law; procedures have to be fair and predictable; the judiciary has to be independent (hence, also the tendency to associate the rule of law with civil rights, as opposed to political rights and property rights). If a system that promises to deliver the rule of law begins to show evidence of many arbitrary, unpredictable or politically-motivated decisions, the rule of law can plausibly be taken as going through a crisis.

But then again: just how arbitrary is the creation and application of law in Hungary today? Arguably, the problem is precisely that, in many areas, the outcomes—and the next steps in institutional reengineering—are actually quite predictable (and, as Kim Lane Scheppelle has pointed out, usually done by well-trained lawyers able to bear rule-of-law sensibilities in mind): the resulting rules are very likely to work in favour of *Fidesz* loyalists or *Fidesz*-related business interests, but, on paper, they might not look like they simply license discretion or empower partisan actors. For instance, the decision to concentrate the power of assigning court cases in the hands of one person, the president of the National Judicial Office, was widely seen as a violation of the rule of law. However, the actual assumption behind this worry was not that the person—close to the Prime Minister and, in fact, married to the main author of the constitution that came into effect in 2012—would act randomly, but that she would do favours to her political friends (or family). Of course, one could still say that the danger remains arbitrariness or, in the language of republican political philosophy, 'domination': citizens are at the mercy of the will of another whose decisions they cannot foresee, let alone properly authorize or control.¹² That person might do things this way or that way and, on a good day, actually have mercy for the opposition.

In the same vein, one might argue that large parts of the Hungarian judiciary *de facto* remain independent and predictable in their decisions. But this could change in the future; hence, citizens can never be entirely secure in their expectations. Hungary might even become a kind of 'dual state', as it was famously theorized by Ernst Fraenkel in response to the rise of National Socialism: a 'normative state', on the one hand, where the rule of law continues to function, and a 'prerogative state', on the other, where arbitrary measures can be deployed by the regime (and where the government can shift the border between the two whenever it wishes).¹³ I do not mean to suggest that Hungary has reached this 'dual state' already

(let alone, that the dominant ideology is fascism); it is still more plausible to see a division into rule *of* law, on the one hand, and rule *by* law for political purposes (as opposed to completely unpredictable measures, which would fit Fraenkel's theory), on the other.

This risk of domination points to what might be described as the most fundamental challenge in the Hungarian context: the weakening of constraints on government power. One does not have to associate the rule of law with all sorts of other ideals, from justice to democracy, to claim that its proper understanding necessarily involves more than the notion of a 'government of laws, and not of men': it requires lawmakers to be subject to 'higher law', or, in the words of Gianluigi Palombella, there needs to be *jurisdictio* and not just *gubernaculum*.¹⁴ If real constraints go, one might assume that, sooner or later, democracy and rights protection are also likely to go.

It is here that the conduct of the *Fidesz* government has been most egregious: they peopled the institution upholding higher law, the constitutional court, with men to their liking; and when the court still found laws unconstitutional, they responded by putting the laws into the constitution itself. This removal of constraints has occurred at all political and legal levels: the political and legal structures are much more centralized than they were in 2010 (and, arguably, power was already very centralized even then); civil society has come under immense pressure (with arbitrary interference directed especially at organizations receiving funding from outside the country); and powerful economic actors who might have *de facto* provided a constraint on government action have been disempowered (put more bluntly, oligarchs have ceased to be a threat for the moment).

Now, one might be tempted to think that there is something contradictory about a government that wishes to be unconstrained (including by higher law) writing a constitution: Why create constraints when constraints are seen as always a problem? The answer is that the government essentially designed what Dieter Grimm has called an 'exclusive constitution', or what one might also term a *partisan* higher law: the constitution sets a number of very specific policy preferences in stone, when debate about such preferences would have been the stuff of day-to-day political struggle in normal democracies.¹⁵ Moreover, it excluded opposition parties in a double sense: they did not take part in the writing or passing of the constitution, and their political goals cannot be realized in the future, as room for policy choices is highly constrained. In other words, *Fidesz* can perpetuate its power even after losing an election.

It should have become clear, then, that Hungary's situation is not in any simple sense a 'rule of law crisis'. Rather, we have been witnessing a constitutional crisis, or, still more narrowly put, a crisis of constitutionalism, or, if I may try to say it more strictly still: the end of a crisis of constitutionalism (with *crisis* implying an ongoing state of affairs which

will require a resolution one way or another), and the beginning of a new era of what Kim Lane Scheppele and Catherine Dupré have called an ‘unconstitutional constitution’.¹⁶

An unconstitutional constitution in this sense (what I have elsewhere also called a ‘populist constitution’) is incompatible with democracy. It does away with the constitution as an instrument to preserve pluralism and to enable contained political conflict; even if a whole range of basic rights remain protected and political rights are retained on paper, the latter are bound largely to lose their meaning. Put differently, free speech, free assembly and free association might still be tolerated, but with the media in the hands of the government, electoral rules manipulated in the government’s favour, and policy changes in some areas virtually impossible, even if the government were to lose its majority, it is hard to see how we can still speak of democracy.

One can see why outside observers might have been reluctant to cry that democracy itself is in danger—‘rule of law’ suggests something more consensual, neutral or indeed technocratic (especially if one can, at the same time, effectively subsume democracy and human rights under the rule of law).¹⁷ More particularly, for EU officials, the ‘rule of law’ could be connected to concerns about the internal market; after all, the core business of the EU remains business, and a rule of law crisis just cannot be good for business.¹⁸ Invoking this link, Commissioner Reding at one point called for ‘justice scoreboards’ which were to measure the rule of law in member states partly upon the basis of what the experience of enterprises with a country’s legal system turned out to be. As Jan Komárek has pointed out, such management speaks about ‘scoreboards’ and ‘benchmarks’ which promise to evacuate politics from any confrontation between Commission and the member states—but politics, in one way or another, is likely to take its revenge.¹⁹ And, furthermore, such rhetoric is likely to encourage a view that sees the rule of law in purely instrumental terms—as opposed to endorsing it on principled grounds (and sticking to it, even when it is bad for business). Or, as Michael Oakeshott once observed, ‘the rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised’.²⁰

There are other reasons still for why it might have seemed advantageous to frame the issue as one of ‘rule of law crisis’, and avoid talk of democracy and other ‘fundamental values’. There appears to be a clearer understanding of the ‘standard operating system’ of the rule of law, while definitions of democracy seem to vary more and remain deeply contested even within European nation-states (or, as Poland’s foreign minister put it recently in response to criticisms of the Law and Justice party government’s treatment of the constitutional court, ‘there are dif-

ferent forms of democracy in the European Union . . . so there's no basis to stigmatise Poland').²¹

It may indeed seem that Europe has a common market, but no common model of democracy. In fact, many countries in the postwar period have converged on what one might call antitotalitarian or 'never again' constitutionalism, with a strong emphasis on fundamental rights protection as well as checks and balances.²² It would be wrong to suggest that only this model of constitutional democracy enjoys legitimacy in today's Europe—many states, for instance, do not have a constitutional court at all. But outside observers can make meaningful judgements of political systems as a whole, especially when they have understood the inner dynamic of a constitutional development over time, as opposed to taking legalistic snapshots. The Council of Europe's Venice Commission has rendered many such judgements, including in the case of Hungary, which was criticized for, among other things, writing too many policy decisions into the new constitution.

There is yet another suspicion that critics narrowing their diagnosis of the developments in Hungary to 'rule of law crisis' want to avoid talking of democracy and instead push for a judicialization of politics, because the EU itself falls so ruefully short of democratic standards.²³ In other words, they realize that they might be starting to throw stones from glass houses if democracy becomes the main issue.²⁴ However, it is far from obvious that an institution that seeks to protect democracy itself has to comply with standard models of electoral democracy. In countries featuring 'militant democracy', constitutional courts have legitimately been tasked with banning antidemocratic parties. One can find some of these decisions to be deeply problematical from a democratic point of view, but the problem is not usually the fact that the members of the constitutional court are not directly elected. In the EU, member states voluntarily sought to bind themselves with the treaty and, in particular, established an instrument that allows European action in cases of a persistent breach of fundamental EU values: Article 7 specifies that a government in violation of Article 2 values can have its membership rights in the European Council revoked. In other words, the fact that the EU itself might not be democratic is irrelevant for the question of whether member states can accept it, in principle, as an agent for protecting democracy within member states—and they have accepted it as such.

Shying away from democracy talk has led to a strange normative division between the national and the supranational in the EU: the EU gets the rule of law—or, more broadly put, 'liberalism'—while the nation-state keeps democracy. This has played into the hands of a self-declared antiliberal such as Orbán. The Hungarian prime minister has made clear his intention to create an 'illiberal state' in the Union, while retaining democracy; he has also objected to the supposed hegemony of liberalism in Western Europe and at the EU level, and tried to ignite

nothing less than a pan-European culture war, where his preferred vision of a 'Christian national' democracy is deployed against liberal democracy (a distinction which picks up some of the thought patterns described by Balázs Trencsényi in his analysis of the interwar period; it is not an accident that the *Fidesz* government has been attempting to reformat the cultural canon in Hungary, rehabilitating many interwar right-wing intellectuals in the process).

This split between liberalism and democracy, indirectly condoned by some European élites, it seems, is a fateful one. It makes liberalism into a kind of optional add-on for democracy, as opposed to a proper understanding of the fact that the rule of law as a set of constraints on power—as well as the preservation for democracy-constitutive rights, such as free speech and free assembly—are constitutive of democracy as such (as opposed to majoritarianism).²⁵

Finally, what disappears from the mental map which has the rule of law in blue and democracy in national colours is the concern that the EU itself in important respects does not quite live up to rule-of-law ideals (or even, as Dimitry Kochenov has argued, is barely different from Hungary under *Fidesz*, as far as the rule of law is concerned).²⁶ EU law, critics have charged, is presumed to be unclear and hence in need of clarification by courts through the preliminary reference procedure (as well as adversarial legalism). As Kochenov has also pointed out, the teleological interpretation of the law ('ever closer Union' and always more 'integration through law'), coupled with the omnipresence of proportionality, makes it difficult to judge what would be a violation of the law. At the same time, the core of EU law is presented as apolitical (even if it builds on clearly political assumptions), while no real control of *gubernaculum* through *jurisdictio* ultimately exists; in other words, EU law itself is not properly subject to something like higher law.²⁷

Alas, I cannot engage with this critique here—even though, if some of the points mentioned could be shown clearly to affect the 'protection of the rule of law' as well, this would be a much more serious challenge than saying that the protector of democracy is not itself democratic. Clearly, protection of the rule of law must itself be subject to the rule of law.

CRISIS TALK: A CRITIQUE

Article 7 is the prime means for the EU institutions and the member states to react to a persistent breach of the fundamental values of the EU. While the wording of the article does not contain the word *crisis*, it seems plausible enough that it gestures to something of the sort: the threat to values has to be systemic, and the problem must persist over time (*crisis* being a processual concept or, as Reinhart Koselleck put it, a *Verlaufsbe-*

griff).²⁸ Moreover, the article implies a contrast between some (normative and legal) normality, as well as the possibility of closure—crisis is the exception and, by definition, a crisis must, in principle, lead to a judgement (*judicium*) and have an end point.²⁹

So far, so good. What Article 7 does contain—and what 'rule of law crisis' fails to convey properly—is any kind of account of political agency. The treaty makes it clear that someone is consciously (and persistently) breaching fundamental values; 'rule of law crisis', by contrast, makes it sound like there is an objective failure in the system. While 'crisis' is certainly stronger than 'failure' (it is premised on a kind of mediation, or interpretation, by observers, as Benjamin Moffitt has pointed out) 'crisis' is still likely to be seen as a matter of institutional shortcomings, as opposed to a question of conscious choices by political actors.³⁰ Now, on one level, that is a good thing: constitutional courts, for instance, do de-personalize matters; it is the act that is the problem, not the actor.³¹ However, in the EU context, it is clear that it can be all too convenient to remake political conflict into something seemingly impersonal or even given, as the national actors are bound to have significant power that can be used to make life difficult for everyone in the EU (imagine a government that sees Article 7 sanctions on the horizon starting to wreak havoc in the European Council or forming alliances so that proto-authoritarian governments protect each other, as they threaten to veto sanctions imposed on one of their group).³²

The same relative de-personalization can be found in Article 7 itself. 'Crisis talk' generally legitimates action (to address the crisis), but, in the context of the EU, crisis talk tends to leave it unclear who exactly is to take action. After all, Article 7 does not specifically designate one institution (the Commission, the Parliament or the Council) as something like a 'democracy and rule of law watchdog'; under such circumstances, collective action problems and interinstitutional rivalries are likely to make effective sanctions more difficult.

Let me illustrate these points. In the summer of 2013, the foreign policy spokesperson of the German Social Democrats published an opinion piece on the rule of law crisis in Hungary.³³ It was interesting to note that the 'what to do about Hungary' question featured in the German election campaign that summer (even if in a very minor way); this background probably also explains why the author, Michael Roth, sought to distinguish his 'solution' from that of the governing coalition of Christian Democrats and Free Democrats. He argued that, upon the basis of continuous monitoring by the EU's Fundamental Rights Agency, Europe's 'democracy sinners' should receive 'points' for their sins (just as German drivers incur 'points' for violating traffic rules, until, with a certain number of points, one has to lose one's licence completely). However, rather than sanctions being the decisive factor in bringing about change in the conduct of political actors, Roth advocated for the creation of 'stable

structures' to ensure a functioning rule of law. Instead of cutting funds for a member state in breach of fundamental values, the funds should be redirected toward 'programmes and projects' which promote democracy and the rule of law. In short, then, the 'crisis' was portrayed as a matter of institutional deficits (to employ the usual 'accountant-speak' so prevalent when talking about the EU); it was simply not understood that Roth and everyone else in Europe had to face up to a *political* conflict (instead of treating Hungary, and potentially others, as a kind of legally underdeveloped country).

Now, it is clear that the EU has always been about minimizing political conflict in a certain sense: a culture of compromise and consensus-seeking has arguably been one of its genuine achievements. In recent decades, the EU has also put ever more emphasis on respectful peer review (as opposed to top-down judgements) and mutual self-relativization.³⁴ Article 7 is, in many ways, an anomaly in this culture of *not* naming and shaming, and it is interesting to note that, while it shames, it is actually more about insulating the rest of the EU from a member state whose government breaches fundamental values, as opposed to intervening in that member state (Article 7, one might say, brings about a moral quarantine of the country). Still, as many lawyers have rightly argued, it is a distinctly political article. Given that none of the EU institutions, let alone the member states, have been willing to use it against Hungary, the tendency has been to displace a political conflict into discussions about a 'crisis', as if the latter had somehow been caused externally or were a common problem that Europeans should constructively address together. This tendency has only been strengthened by the small contributions that the European Council has made to the debate on fundamental values: in December 2014, it decided to begin an annual 'Rule of Law Dialogue', which, the Council insisted, had to be 'evidence-based' and respect the principle of equality of member states. The outcome of the first such Dialogue in November 2015 sounded a tad anodyne at best: 'Ministers shared examples of best practices and challenges faced at national level in the field of the rule of law, and presented the approach chosen to respond to them'.³⁵

Note that this emphasis on the political nature of the conflict does not amount to saying that the standards used for judging breaches of fundamental values are all necessarily political, or easily subject to politicization by the most powerful member. As I argued earlier, while the quality of 'democracy' and 'rule of law' cannot be assessed by ticking boxes on a checklist or filling out numerical scoreboards, it is simply false to assert that there is such diversity of institutions in Europe that nobody can really say what democracy and the rule of law actually are. In fact, the EU itself—for all the rhetoric about diversity—does not follow such an 'anything-goes' logic; after all, every time a country accedes to the Union, someone somewhere has made the call that the prospective member state

has fulfilled the 'Copenhagen criteria' (which include a functioning democracy and the rule of law). The point is that neither the Commission nor the Council (in particular) can abdicate their *political* responsibility when faced with a political conflict in which a member state inside the Union is violating the same criteria.

CONCLUSION: A CRISIS OF CRISIS MANAGEMENT

Claus Offe has argued that the Euro crisis also constituted a crisis of crisis management: nobody seemed to understand how the Eurozone could really exit from the crisis, and the longer the crisis dragged on, the more it undermined the potential political forces that might have helped to resolve the crisis.³⁶ There is certainly a parallel between the Euro crisis and the rule of law crisis in that both started with 'rule breaking' in the widest sense by member states. In both cases, the Commission has to date turned out to lack the powers to be a genuine enforcer. One difference, however, is that, for better or for worse, in the Euro crisis, 'the markets' exercised another form of outside pressure on governments—and there is no equivalent of such enforcement in the case of 'rule of law crises' (unless one assumes, with Commissioner Reding and other 'rule of law promoters' that lack of the rule of law will also be so bad for business that it might ruin a regime). Hence, it is possible that the supposed crisis of the rule of law becomes permanent; the EU might feature a periphery of countries (not necessarily on the geographical periphery of the Union), in which 'fundamental values' are steadily, but not necessarily spectacularly, violated. Everyone will be in the know, and yet nobody will do anything. Such a scenario is arguably a much greater threat to the core moral and political promise of the EU than the Euro crisis ever was or will be.

NOTES

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1. Chapter 9 in this volume.

2. Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailout', *Oxford Journal of Legal Studies* 35 (2015): 325–53. See, also, Jonathan White, 'Emergency Europe', *Political Studies* 63 (2015): 300–18.

3. There is a whole other story to be told here about the advantages and disadvantages of framing the EU's basic *acquis normative* as one of 'values'—as opposed to principles, norms, and the like. I hope to tell that story one day, critically engaging Carl Schmitt's *Tyrannie der Werte* in particular.

4. See, in particular, the work of Martin Krygier.

5. Chapter 3 in this volume.

6. Space constraints make it impossible to provide empirical details and full justifications for my analysis of developments in Hungary since 2010. For these, see, for instance, the special section on Hungary's illiberal turn in the *Journal of Democracy* 23 (2012), the collection edited by Gábor Áttila Tóth, *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Budapest: CEU Press, 2012); Renáta Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', *International Journal of Constitutional Law* 13 (2015): 279–300, and the various Freedom House Reports over the years (which eventually downgraded Hungary from 'consolidated democracy' to 'semi-consolidated democracy').

7. A normative concern which also very much applies to the EU, of course. See, for instance, Dieter Grimm, 'Die Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie', in Claudio Franzius et al., eds., *Grenzen der europäischen Integration: Herausforderungen für Recht und Politik* (Baden-Baden: Nomos Verlag, 2014), 27–47.

8. On the problem of simple checklists to ascertain the presence of the rule of law (as well as the problem of selective comparisons), see the excellent piece by Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', *Governance*, 26 (2013): 559–62.

9. Viviane Reding, 'The EU and the Rule of Law – What Next?', available at: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm, last accessed 3 December 2015.

10. Reinhart Koselleck, 'Crisis', *Journal of the History of Ideas* 67 (2006): 357–400.

11. Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', *International Journal of Constitutional Law* 13 (2015): 246–78.

12. Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (New York: Cambridge University Press, 2013).

13. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, in collaboration with Edith Lowenstein and Klaus Knorr (New York: Oxford University Press, 1941).

14. Gianluigi Palombella, 'The Rule of Law as an Institutional Ideal', in Gianluigi Palombella and Leonardo Morlino, eds., *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010), 3–38.

15. Dieter Grimm, 'Types of Constitutions', in: Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), 98–132. For the notion of 'populist constitutionalism' as a form of perpetuating a purported ordinary popular will (while disabling pluralism), see my 'Populist Constitutionalism: A Contradiction in Terms?', forthcoming.

16. Kim Lane Scheppele, 'An Unconstitutional Constitution', available at: http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/?_r=0, last accessed 26 January 2016; and Catherine Dupré, 'Unconstitutional Constitution: A Timely Concept', in Armin von Bogdandy and Pál Sonnevend, eds., *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015), 351–70. See, also, David Landau, 'Abusive Constitutionalism', *University of California Davis Law Review* 47 (2013): 189–260.

17. See the Commission's Communication on its new Rule of Law Framework at: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf, last accessed 18 December 2015.

18. For an extensive critique of the rule of law promotion business in general along similar lines, see Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (New York: Cambridge University Press, 2010).

19. Personal communication, November 2015.

20. Michael Oakeshott, 'The Rule of Law', in *On History and Other Essays* (Totowa, NJ: Barnes & Noble Books, 1983), 119–64, at 164.

21. 'Polish "Coup" dispute threatens German relations', in *EU Observer*, available at: <https://euobserver.com/political/131523>, last accessed 18 December 2015.

22. Dupré, 'Unconstitutional Constitution', and Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models', *International Journal of Constitutional Law* 1 (2003): 296–324.

23. Jakob Cornides, 'The European Union: Rule of Law or Rule of Judges?', *EJIL Talk*, 11 November 2013, available at: <http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges>, last accessed 18 December 2015.

24. Joseph Weiler, 'Living in a Glass House: Europe, Democracy and the Rule of Law', in: Carlos Closa, Dimitry Kochenov and J. H. H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI RSCAS Working Paper 2014/25, 25–29.

25. See, also, my 'What is an 'Illiberal Democracy'?', *Transit*, forthcoming.

26. Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law* 34 (2015): 1–23.

27. *Ibid.*, and personal communication, December 2015.

28. Koselleck, 'Crisis', 361.

29. *Ibid.*

30. Benjamin Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism', *Government and Opposition* 50 (2015): 189–217.

31. Thanks to Kim Lane Scheppele on this point.

32. As we have learned recently, this is a real possibility: Viktor Orbán explicitly threatened to veto Article sanctions against Poland.

33. Michael Roth, 'Ein Grundwerte-TÜV für die Union', available at: <http://blogs.spdfraktion.de/fraktionsblog/2013/06/25/ein-grundwerte-tuv-fur-die-eu/#more-394>; the original article appeared in the *Frankfurter Allgemeine Zeitung*, 25 June 2013, last accessed 18 December 2015.

34. I thank Alexander Somek for this point.

35. See 'Main Results of the General Affairs Council: Rule of Law Dialogue and More', available at: http://eu-un.europa.eu/articles/en/article_17135_en.htm, last accessed 18 December 2015.

36. Claus Offe, *Europe Entrapped* (Cambridge: Polity Press, 2015).

ELEVEN

Democracy under Siege

*The Decay of Constitutionalization and the Crisis of
Public Law and Public Opinion*

Hauke Brunkhorst

An author from middle of the nineteenth century observed that the parliamentary regime is the 'regime of unrest':

[It] lives by discussion. . . . The struggle of the orators on the platform evokes the struggle of the scribblers of the press; the debating club in parliament is necessarily supplemented by debating clubs in the salons and the bistros; the representatives, who constantly appeal to public opinion, give public opinion the right to speak its real mind in petitions. The parliamentary regime leaves everything to the decision of majorities; how shall the great majorities outside parliament not want to decide? When you play the fiddle at the top of the state, what else is to be expected but that those down below dance?¹

The argument of this author from the nineteenth century is that it is the *legal form of the parliamentary constitution, which enables the dance of those down below*. As he shows in his analysis of the short history of the French Republic of 1848, once this legal form is destroyed, the dance comes to an end.

My general thesis is that the present political crisis that has been triggered by the global economic and financial crisis of 2008, and that it has become a crisis of the parliamentary regime. In some respects, this crisis resembles other crises of parliamentarism. Roughly compared with the crisis of the Weimar Republic, there are some obvious economic, social, cultural and political similarities, but there are also important differences.

Again, the economy is the trigger, and this comes as no surprise because any great economic crisis erodes mass loyalty in so far as it is based upon output legitimization. Therefore, a political crisis of legitimization becomes more likely, the smaller the substance of input legitimization is. My thesis is that this is the case both at global and at European levels. Despite the fact that national democracy, enabled and stabilized through a deep change in global public law towards democratic constitutionalism, worked much better after WWII than after WWI, in particular in the (small) Western segment of the (OECD) world, national parliamentary democracy came increasingly under pressure from global markets and from the postdemocratic global politics of neoliberalism. Europe is no exception, but paradigmatic. The threat to democracy increased dramatically as a result of the growing gap between one of the greatest global cultural revolutions ever and the capacities of the social welfare state to decrease, bridge or at least compensate the dramatically growing social differences effectively. We have, at the same time, a cultural transformation compared to which the cultural transformation in the course and aftermath of WWI were small, and an increase of social differences bigger than in the Weimar Republic. The question is whether, this time, parliamentary democracy (or a functional equivalent that is not less democratic) will prevail, and finally cope with the crisis. I will begin with a differentiation between two legal cultures, which were already at the centre of the Weimar jurists' debate.

TWO CULTURES

In his seminal history of modern international law, Martti Koskenniemi has distinguished two legal cultures, the legal *culture of dynamism* and the legal *culture of formalism*.² The legal culture of formalism (in the Weimar Republic, this was the legal culture of Hans Kelsen's Vienna School) is a 'culture of resistance to power', and resistance to 'the pull towards imperialism'.³ Legal formalism can (but must not) resist the pull towards imperialism because it is based upon the 'force of positive law' that 'is the force of the sharp lines that rules draw in a fluid world of opportunity'⁴—or a fluid world of shifting borders.⁵ 'This is why neither the revolutionary avant-garde nor the manager of a transnational company likes them'.⁶

The same is true of Hungary's leader, Viktor Orbán, the new Polish government, the members and leaders of the informal steering organ of the Eurozone, a shadow existence called the 'Eurogroup', which is not even mentioned in any legal document, and, last, but not least, France in the ongoing extended state of siege of the 2015 terror attacks.

Conversely, the legal culture of dynamism (in the constellation of Weimar, this was, in particular, the culture of Carl Schmitt's conceptual

'struggle with Weimar, Geneva and Versailles'⁷) is the culture of a professional legal and political *praxis* that transforms legal formalism into 'rational imperialism as a façade for cynical imperialism'.⁸ The legal form becomes a rational façade of imperialism once it is successfully used to *bypass the legal form of the democratic regime*, and to cut the 'necessary' relations between the 'debating club in parliament' and the 'debating clubs in the salons and the bistros', which are constitutive for democratic legitimization.⁹

Legal dynamism is the managerial mind-set of political realism. So-called realists such as Hobbes, Schmitt and Stalin always ask, as Stalin did it once: 'How many divisions does the Pope have?'¹⁰ A year after the US had taken military action against the democratic government of the Dominican Republic in 1965, there was a debate in the Association of the Bar of New York City between the legal and political realists A. J. Thomas and Adolf August Berle, who both defended the military intervention, and Wolfgang Friedmann, who was one of its sharpest critics. The dynamic legal argument of Thomas and Berle was that the free election of a leftist government in the Dominican Republic was an act of aggression against the US, and the dissolution of its government by the marines, was, therefore, a lawful act of self-defence. Friedmann felt like Alice in Wonderland. He had already arrived in the *Großraum*-regime of 'smart' and 'moving' borders, 'transportable legal walls' and 'constitution-free zones' that is the well-established border regime of the present continental powers, be it the hundred miles constitution free zone of the US (where two-thirds of US population lives), Europe's Schengen regime, or the Australian border regime.¹¹ Berle then asked Friedmann the Stalinist question, which, today, is the question of President François Hollande and ever more European Prime Ministers such as Horst Seehofer, Viktor Orbán and Beata Szydło: 'In international crisis, do you want actions, or do you want merely words?'¹² *Auctoritas, non veritas facit legem*. Friedmann responded: 'Whether we like it or not, law is based on words.' However, these words have a weak, but sustainable, force of *resistance to power* because they are 'words formulated in statutes, in treaties, in conventions, in customary law'.¹³ Words which have become 'positive law' are words that have the (however fragile) communicative power to 'emancipate us from informal domination', as Christoph Möllers put it in a pointed formulation: '*Zwingendes Recht befreit von informeller Herrschaft*' ('binding law emancipates us from informal domination').¹⁴ In particular, when it comes to modern constitutional law, the legal form is emancipatory, and law's *emancipatory form*—in another pointed formulation, this time from Alexander Somek—'can be halted or inhibited, but it cannot be eliminated'.¹⁵ This needs qualification. The emancipatory form of law cannot be eliminated by illegal military action because—if we follow Wolfgang Friedmann—law is not made by *auctoritas*, but by *words*, which are related internally to everybody's *veritas* (commitments to consistency,

truth, etc.). Therefore, as long as a society needs positive law for its functional stabilization, it needs at least some *veritas* (better insight, for example, a critique of law) to eliminate old law and replace it by new law—at least as long as law has the linguistic force of positive law *to draw sharp lines* in a fluid world of opportunities.¹⁶

Moreover, *positive law* which is modern is not only related to *veritas* because all law is based upon words, but is also *constituted* by the emancipatory form of *universal* and *egalitarian* freedom. For this reason, Rousseau and others have defined law as freedom: *Dasein des freien Willens* ('the realization of the free will').¹⁷ It is *Dasein*, hence repressive, but, at the same time, freedom. Therefore, modern law can be defined as the *existing contradiction of emancipation and repression*.¹⁸

RISE AND FALL OF GLOBAL AND EUROPEAN CONSTITUTIONALISM

In an earlier article on the UN, Martti Koskenniemi describes the emergence of *imperial formalism* (and the legal culture of dynamism) in the UN-system as a shift of power from the *temple* of the General Assembly to the *police* of the Security Council.¹⁹ During the Cold War, Security Council police action was blocked. The latter's immense *administrative power* was maintained in stable latency, while the General Assembly functioned very well as a vivid 'debating club in parliament' that was 'supplemented by' a rapidly emerging global network of 'debating clubs in the salons and the bistros', in particular, because it gave not only voice to the conflicting Super Powers but also to colonial liberation movements. The Assembly, step by step, crossed the 'colour line' (Du Bois) and opened its doors to the majority of world population.²⁰ Therefore, the temple became an important international institution of global influence. It had no divisions but it had considerable communicative power, embodied in the constitutional form of an emerging parliamentary regime.

At the beginning of the decade, in 1960, the year of Khrushchev's shoe-banging during a fierce speech in the temple, the American sociologist Talcott Parsons published a little noticed essay on 'Order and Community in the International Social System'.²¹ In contrast to the broad mainstream of political realism represented in the US foreign policies of Hans Morgenthau and later of Henry Kissinger, Parsons interpreted the then actual world situation not as regression to the old *international law of co-existence* (Art. 2, para. 7 UN),²² but as progression of the new *international law of cooperation* (Art. 1, paras. 2 & 3 UN)²³ towards *global democratic constitutionalism*.²⁴ Looking at the world through the sharp lenses of his AGIL-schema (Adaptation - Goal Attainment - Integration - Latency), he was probably the only one aware of the structural meaning of the new UN's 'regime of unrest' 'living by discussion'. Thus, he made a difference

between the legal formations of the new global society, its political structure, its economic relations and cultural dynamic, on the one hand, and the military options, strategic businesses, overkill capacities, and atomic threats, on the other. Without underestimating the latter, these differentiations enabled him to reconstruct the *constitutional interaction* between the 'debating club' in the assembly, and the global 'struggle of the orators on the platform' and 'the scribblers of the press', as an emerging global constitutional system of a proto-democratic competition between two opposing political projects over global leadership. The emerging global constitutionalism was not just a *superstructure* phenomenon—the dreams of presumably idealistic law professors such as Hersch Lauterpacht and Hans Kelsen. On the contrary, the temple had a solid basic structure due to the steady growth of global organic solidarity (that means in the differentiated globalization of all four societal dimensions of economic adaptation, cultural pattern maintenance, political goal attainment, and legal integration).²⁵

Unfortunately, the temple lost all its influence after the neoconservative and neoliberal turn of the West, and the complementary crumbling away of the Soviet empire, which proved to be unreformable and moribund from the late 1960s. When the latter finally imploded, both peoples and individual human beings were liberated from a bureaucratic dictatorship, but, at the same time, the power structure within the global constitutional system shifted from the communicative power of the *temple* to the administrative power of the *police* located in the Security Council and the *executive bodies of the major powers*. As we now can see, the project of democratic global *politics* was the loser, and the Security Council that is endowed with the 'perverse' 'right . . . to make a lawful threat of mass-destruction', together with the other agencies of the administrative global *police* were the winners.²⁶ The European project, as I have argued elsewhere, has gone through a similar development.²⁷ The police occupied the temple in 1989, and the present excessive extension of the state of siege in France is only the last step on the long slippery slope of a new formation of the 'double state'.²⁸ Here is the fitting quotation from Marx:

A splendid invention, periodically employed in every ensuing crisis in the course of the French Revolution . . . that of itself made its way over the whole Continent, but returned to France with ever renewed love . . . the state of siege . . . freeing civil society completely from the trouble of governing itself.²⁹

The final triumph of the *international law of cooperation* and *global constitutionalism* that was announced in 1989—and was supported by all of us, and rightly so—has come to an end in recent years. Two structural transformations indicate the crisis of global constitutionalism: *first*, the reluctantly emerging *global constitutionalism* was replaced by the rapid growth of *global administrative law*.³⁰

However, one could argue, as Poul F. Kjaer did in his remarks on this chapter, that global administrative law finally provides substance to the ideal of global constitutionalism. The factual creation of emancipative spaces through formalist law from the seventeenth century onward might be seen as essentially the history of administrative law providing the infrastructure of emancipation.³¹ This is true, but one must add that it needed the great legal revolution of the late-eighteenth century to transform 'absolutist' administrative law into modern constitutionalism (which was then able to use the administrative law of 'absolutism' as a basis for its own purposes).³² Another case is the German '*Verwaltungsrecht*' (administrative law) in the nineteenth century empire that was taken by the public lawyers as a substitute for the missing subsumption of the Prussian Monarchy under parliamentary rule of law. Unfortunately, this case did not lead to a revolution and the beheading of a Hohenzollern (a fact very much deplored by Max Weber) but had its part in the stabilization of the German *Anstaltsstaat* (bureaucratic state) and its disastrous aftermath.³³

Second, the reluctantly emerging, evolutionary new formation of *international public law* (backed by an impressive global human rights culture, and stabilized by new international public courts such as the International Criminal Court)³⁴ was replaced by an ever denser and rapidly growing network of *transnational private and civil law* (backed by the global episteme of neoliberalism, and a dense network of international corporations, private-public partnerships, arbitration courts, and other dispute settlement mechanisms).³⁵ The growth of global private law goes hand in hand with the growth of the global capitalist system. It is necessary for the functioning of a global society of free markets, which are largely disembedded from the democratic legal remedies of control, taxation, and the other communist threats of socialization, nationalization and public regulation.

From the sociologist observer's point of view, the looming *elimination of global constitutionalism by global administrative law*, together with the corresponding *replacement of international public law by international civic law* looks like a modernized return of old Roman Law, which was, like all civil law, primarily a law of coordination of the interests of the Empire's ruling classes. The emancipatory form of law comes under serious selective pressure and finally to an end.³⁶

The European Union is—different from its self-representation—far from resisting the neoliberal global tendency. On the contrary, it accelerates it, and does so not accidentally, but structurally. Due to the two legal cultures, which are internally related to the dialectical structure of modern law as the constitution of freedom, legal formalism is a double-edged sword. Thus, legal formalism has an important place in the imperial legal culture of dynamism. A good transnational example can be found in the Trilogue procedure of European legislation. Different from national par-

liaments, in the European Parliament, it is usual for draft statutes and agreements to be waved through on the first reading. Due to the autonomous self-organization (*'Organautonomie'*) of the Parliament, the Commission and the Council (which is constitutive for the checks and balances of powers), the Trilogue unites the leaders and leading parties of all three branches of power in a commission to negotiate all legislation before it goes to the public arenas of the ordinary legislative procedure. Checking and clearing the majorities in advance, the *debating club in parliament* becomes superfluous. The Trilogue is, as Jelena von Achenbach has shown in a brilliant study, formal self-organization of the three legislative powers of the EU, which leads to a *structural transformation of the ordinary legislative procedure*, which erodes the limitations of European constitutional law, changes the balance of powers in favour of the Council, de-formalizes the legislative procedure, and destroys its democratic function.³⁷

Thus, the Trilogue is a paradigm case of *legitimization through procedure*: Niklas Luhmann's *Legitimation durch Verfahren* (legitimacy through procedure) that *augments legislative efficiency at the price of democratic legitimation*.³⁸ Parliamentary legislation is finished before any public conflict about it can even occur. One reading, no discussion. The public has done its duty, the public can go.³⁹

Again (as in the global sphere), constitutionalism is reduced to technocratic administration, and, again, the European constitutional microcosm mirrors the structural transformation of the global constitutional macrocosm. What began as the cooperative work of the constituent power of the peoples (all founding members obliged their governments by constitutional law to found a politically united European republic) ended with the transformation of constitutional law into administrative law.⁴⁰

The reason is structural. The Treaty of Lisbon constitutes a transnational democratic community, however, the centre of European constitutional law is not the *system of democratic legitimation* (as in the seven articles of the US Constitution), but the *system of competition law*.⁴¹ Claus Offe has called it the 'hidden curriculum' of Europe, and rightly so.⁴² Due to the constitutional priority of competition law, and reinforced by the dramatically growing blackmailing power of the globalized economy, *state-embedded democratic class struggle* has been replaced by the *dis-embedded competition of national member states* over locational advantages, such as low taxes, flexible employment, cheap manpower, constitutional debt breaks, and so on. The complete constitutional design of the EU, and the Eurozone in particular, including the concretization of EU law through national parliaments, through European and national courts and administrations, is a smart mixture of formal and informal procedures designed to bypass the public sphere of constitutional law, contested will formation, and public decisions on political, social and economic alternatives.⁴³

With deconstructionist irony, the Nobel Prize Committee awarded the 2012 Peace Prize to the EU, in full knowledge of the fact that the presumably bright side of Europe's 'peaceful improvement of competition' (Marx) has its long-lasting dark side in the bloody regime of the colour line that goes back to the colonial civil war in Algeria.⁴⁴ When the French President, François Hollande (whose humanitarian interventions so far, have all been in accordance with the bloody farce of France's colonial past⁴⁵), declared war against everybody (*die Herrschaft des Verdachts*⁴⁶), and reintroduced the state of siege in France, a *legal concretization of the peaceful rule of law at Europe's borders* had already existed for twenty-five years.⁴⁷ The concrete norms of legal border control have revealed the rule of the law all over Europe *as the law of the colour line*.⁴⁸ The state of siege is just a nationwide expansion of the constitution-free zones of border control. The people who have been drowning in the Mediterranean Sea for decades are the victims of the Schengen regime, and this shows that Europe's rule of law, the pride of European lawyers, is not so different from that which allows American police officers to empty their bullets into the helpless bodies of its black citizens. In both cases, black lives do not matter.⁴⁹

So much for the *first structural transformation of the public sphere* that is the *public sphere of public law*.

I conclude with some further remarks on Europe and the *second structural transformation of the public sphere of public opinion*.

A SHINING EXAMPLE OF DELIBERATIVE DEMOCRACY . . .

World society has been a global sphere since the end of the nineteenth century.⁵⁰ It became ever denser with the globalization of mass tourism, the fall of the Berlin Wall, and the latest great revolution of electronic media. However, since the occupation of the temple by the police, the global public is *structurally weak*. Structurally weak is a public with rights, but with *no* (or only symbolic) *access to parliamentary decisions* through: (1) general elections; (2) alternative choices; and (3) sufficient representation of minorities or socially restricted majorities (e.g., women in the 1950s and 1960s)—or at least some *vibrant interaction* (significant influence and indirect representation) between the 'debating club in parliament' and the 'debating clubs in the salons and the bistros', such as in the General Assembly of the UN in the 1960s. Therefore, the global public of the 1960s was an already emerging strong public.

I should add some brief remarks on the distinction between strong and weak publics that was introduced by Nancy Fraser many years ago, and some further differentiations which I want to suggest here.⁵¹ Whereas a *strong public* couples public opinion via public will formation and elections structurally with legislative decision making, a *weak public* at

least influences legislative decision making, besieges the organs of decision making even if it has no direct electoral access to be represented sufficiently. Classical examples for the latter include the North American settlers before the Revolution who could appeal to a working parliamentary regime that did not represent them ('No taxation without representation'), and the women's and workers' movements for universal suffrage in England and Prussia in the nineteenth century, or minority movements without any chance in parliament because they are criminalized by parliamentary legislation (homosexuals in the 1950s and 1960s). Weak publics are publics acting within an environment of political institutions, where they have no *de facto* chance of changing the world, but a *de jure* chance, such as the Tea Party movement of 1773, or the LGBT social movements in the 1960s. Weak publics like the latter stand against a—as Theodor Adorno has called it—'*kompakte Majorität*' (a *consolidated majority*, such as, for example, the Richard Nixon voters in the 1960s). Therefore, *weak publics can become strong publics* either through *radical reformism* (such as universal suffrage movements, or LGBT movements since the 1970s) or through a *revolution* (as in the case of the 'Good People of the American Colonies' who, in fact, were slave owners). Weak publics are latently strong publics. In many cases, they have a high revolutionary potential.

However, publics like the present global public are *structurally weak*, and have been since the police occupied the temple. A very vivid, and, in real time, an ever more densely connected, global public exists, but it has no (or nearly no) influence on parliamentary and other political decisions any longer, because the 'debating club' in the parliamentary assembly of the UN no longer exists factually, only as a 'desiccated public sphere'.⁵² *Structurally weak publics* have, at best, a symbolic (but no real) chance of influencing political decisions, because the legal system either excludes parts or even all of the citizens from any access to such decisions, deprives them of their rights, and represses them directly, or else citizens and minorities (hence, all those affected by political decisions) have rights which only exist on paper, and which nobody respects.⁵³ The former (no rights at all) was the case of the American slaves after the Revolution, which, therefore, at the same time, was a *counterrevolution* that stabilized the, at that time, already endangered institution of slavery for a further hundred years.⁵⁴ The latter (rights only on paper) was and still is true, for example, with the publics of the European periphery, such as the Greek public during the Euro crisis of 2015. In the latter case, the Greek (and not just the Greek) public was successfully deprived not only of any influence on European decisions, but also of their own referenda, elections and parliamentary legislation, which were rendered null and void by the overwhelming blackmailing power of the capitalist economy, the formal and informal executive bodies of the *Troika*, the Euro Group, the European Council and, last, but not least, the German hegemon.⁵⁵ Again,

the police have occupied the temple. In this case, European and national constitutional law has regressed to the level of a symbolic constitution.⁵⁶ However, one must distinguish here between a structurally weak public *with some normatively effective rights to free expression, association, and movement*, and other basic human rights (such as, the abolition movements of the eighteenth and nineteenth centuries or Greek society in 2015) and those *without such rights* (as in the undercover public at Moscow's kitchen tables in the 1980s, or the slaves' Underground Railroad public of Louisiana before the insurgency known as the German Coast Uprising of January 1811).

The present *global public* of public opinion is a *structurally weak public* with international and (in most of its segments) nationally concretized *rights to free expression and association*, whereas the present *European public*—thanks to the technocratic regime of public appeasement and silencing—is now, nationally and transnationally, a *weak public* which, at least in some of its southern parts, is already structurally weak. My thesis is that the *weakness of the European public* together with the *democratically disastrous effects* of neoliberal globalization and the hidden curriculum of Europe (i.e., the constitutional hegemony of competition law) have transformed the formerly *strong publics* of Europe's national states *into weak publics*, and partly into *structurally weak publics*.

If we now look back at the 1950s and 1960s, the public sphere of that time in some crucial aspects resembles the present situation. Jürgen Habermas then suggested the very influential thesis of a 'structural transformation of the public sphere' that consisted in its 'desiccation'.⁵⁷ The desiccation of the public sphere was due to:

- a compensatory consumerist redistribution of wealth (output-justice/egalitarianism controlled by power élites);
- the advanced cultural industry;
- Nixon's 'silent majority';⁵⁸
- the gender and the colour lines: affirmative action was white, male and heterosexual, and the rest were excluded legally or factually.⁵⁹

The repolitization of the public sphere came with the cultural revolution of the 1960s and has returned in ever new waves over the last forty years. Probably, it was one of the largest cultural revolutions in history, and it was global, strongly enhancing the global public of public opinion.

If we look back, it is evident that this tremendous success of the political left was the result of a dialectical interaction between a radical minority of extraparliamentary or even antiparliamentary social movements and parliamentary legislation.⁶⁰ This was not just a national interaction that accidentally occurred in so many states and regions of the world, and not just in the Western world. On the contrary, it was already one of the many structural effects of the co-evolution of national public opinion and public law formation, on the one hand, and a global public and

international human rights legislation (and jurisdiction), on the other.⁶¹ The now more than forty years of global and national rights revolution that was concretized by national legislation was a great triumph of the legal form of the parliamentary constitution that is historically due to the existing contradiction of repression and emancipation that is modern law since the days of the Papal Revolution.⁶² Moreover, the existing contradiction of modern law was reflected by the existing contradictions between radical social movements and parliamentary legislation, the 'debating club in parliament' and the 'debating clubs in the salons and the bistros' (including the extremes of Richard Nixon's 'silent majority' and the Black Panthers' partially violent resistance). The whole rights revolution therefore was, and still is, a shining example of deliberative democracy, because deliberative democracy is democratic legislation through public contestation, conflict and social (class) struggle which, in spite of everything (sometimes even violent and revolutionary struggle), did not lose contact with the communicative power of the better argument.

... AND ITS ABYSMAL CONTRADICTION CAUSED BY THE LOSS OF ITS SOCIAL BASIS

However, the success of the rights revolution was *based* upon the *sociological premise that the social welfare state lasts forever*, comes ever closer to democratic socialism, and finally is diffused all over the world of national states.

Unfortunately, this was not the case. The welfare state crumbled under the pressure of internal problems (the inflation crisis), neoconservative propaganda, and successful neoconservative campaigns, followed by neoliberal parliamentary reformism and extraparliamentary military dictatorships (Chile, Argentina, etc.).

In the course of the last forty years, affirmative action became more and more colourful, *but, at the same time, it became a social class privilege*, thus losing its character *as* affirmative action, leaving ever more parts of the lower classes without any chance of enjoying the fruits of the global rights revolution. The great advances of the African American, the Indigenous and LGBT social movements in America, Europe, and even in Asia and Africa *no longer have a fair value* for everybody (John Rawls). No wonder that the political language of hard-currency *rights* was replaced by the private-property language of soft-currency *values*, in Europe and the Eurozone in particular.⁶³

The *great transformation of the global economic and political system* from state-embedded markets to market-embedded states has not only increased the blackmailing power of global capitalism dramatically but also caused an equally *dramatic social differentiation between rich and poor social classes*—both within Western societies and between Western (enlarged to

G20) societies, and excluded the rest of the world population that is beyond any hope, and, as a result, has only one perspective left, which is religious fundamentalism.⁶⁴ Again, as at the end of the nineteenth century, the social class line, overlapping (but not identical) with the colour line, divides a now completely integrated world society.

Inquiring into the relation of social and political inequality, Armin Schäfers has discovered one of the very few sociological laws: *increasing social inequality causes increasing political inequality*.⁶⁵ Social differences have been growing in most OECD countries for more than thirty years. No matter how high or low the absolute income and welfare costs for the lowest classes of society are, what matters is only: With every inch of growing social inequality, the poor (for example, the relatively worst-off part of a city), who overwhelmingly voted for socialist/left-wing parties, are increasingly *discouraged* from election to election, because, from election to election, the social difference increases steadily. Their turnout shrinks to 30 percent and less, and the *few* who still participate in elections switch to far right parties. The rich (for example, the relatively best-off part of a city), who overwhelmingly vote conservative/right-wing parties anyway, are *encouraged*, and their turnout comes ever closer to 100 percent, and they spend more and more money for right-wing parties and movements (from *AfD* [*Alternative for Germany*] and *Front National* to the GOP's Tea Party). The political effect is simple, logical and consistent: the parties on the left go right, stepwise from electoral campaign to electoral campaign.⁶⁶ Paul Krugman has rightly called this the 'timidity trap' that catches all the former major left parties, which (despite their assimilation and overassimilation to the right) are becoming ever smaller.⁶⁷

The effect for democracy is disastrous. Democracy is running out of (in particular, macroeconomic) alternatives—and there is no longer democracy if there are no longer substantial alternatives. The constituent power shifts from the political to the economic system. In June 1789, Emmanuel Joseph (Abbé) Sieyès had declared in the Assembly of the Estates-General that 'the Third Estate is the Nation', and that the Assembly of the Estates-General was therefore the National Assembly. The three words triggered the greatest democratic revolution in European history and established the *constituent power of the people*. It became the origin of the legal form of the parliamentary constitution, which over and over again enabled the 'dance' of 'those down below'. Exactly 223 years, one month and ten days later, the President of the European Central Bank, Mario Draghi declared on 26 July 2012, at a private investors' meeting in the City of London that 'the ECB is ready to do whatever it takes to preserve the Euro'. Again, it needed only a few words for the counterrevolutionary act that shifted the constituent power from the people to the bankers. The crisis did not destroy Europe. It destroyed European democracy. While European integration advanced, European democracy crumbled.⁶⁸

A SECOND CHANCE?

However, politics is not yet over. The shift from popular to economic sovereignty comes at a high price. It deprives the technocratic system of domination of its last legitimacy resource. The Greek 'No' at the bailout referendum 5 July 2015 was the first step to repoliticize the 'desiccated public sphere'.⁶⁹ The German Chancellor's legally-required decision to help refugees in urgent need of humanitarian assistance, rightly arguing that if any country could refuse such help, it could not be the country of a Federal Chancellor under the German Basic Law, was a further step towards repolitization, even if it came from a leader whose name had become an icon for de-politization and the renewed desiccation of the public sphere. By repolitization, I mean, in this case, that what we need is not only a parochial debate (including renewed class struggle) about the growing social differences between the centre and the (rapidly growing) periphery within the rich countries of the Western hemisphere, but also an extended debate (including a new transnational formation of class struggle) about the growing social differences between the rich countries and the global South, and, in particular, the fight for the enforcement of the existing law concerning refugees, in particular the unconditioned right to hearing and the conditioned right to settle.⁷⁰ The never-ending flow of migrants who are reaching the rich countries this way or that serves as an unwelcome reminder to the Western, especially European, wealthy nations of their colonial and imperial pasts ('All Europe contributed to the making of Kurtz.'⁷¹). The time of dispossession of the colonial past is over. Europe and the whole Western world have to face it. Therefore, the prevalence of the de-constitutionalized new border regimes will become the test of whether Europe and the other OECD countries can come to a democratic solution for a problem that needs the inclusion of *all* those affected on this side and on the other side of our borders, or whether we proceed regressively to the permanent state of siege.

There is not much hope for democracy left, it would seem. However, suddenly there are alternatives. One condemned alternative returns, and that is *democratic socialism*. Even in the centres of the neoliberal empire. The Third Way is over, but, surprisingly enough, this *is not the end of the parliamentary regime* within and beyond the national state. What Greek and Spanish left populists, American primaries and the British Labour Party leadership elections, and the new American students' movement now show, what, in particular, the campaign of Bernie Sanders, who speaks the language of rights and not of values, in the US Democratic primaries shows, is that the existing contradiction of radical public politics and legislative reformism that was the driving force of the 'parliamentary regime' can probably be reanimated. It still seems possible 'to play the fiddle' for the 'dance' of 'those down below'.

However, only if the centre of real parliamentary power (that includes sovereignty/statehood) shifts a considerable amount to the transnational level, will parliamentary democracy have a second chance. Unfortunately, this seems very unlikely at present, and then the pseudorepolitization of the public from the far right, from Donald Trump to Jean-Marie Le Pen, seems unavoidable.

NOTES

Many thanks to Poul F. Kjaer for his critical remarks on this chapter.

1. Karl Marx, *Der 18. Brumaire des Louis Bonaparte*, MEGA I/ 11 (Berlin: Dietz, 1985), 135 et seq. Quoted from: <https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch04.htm>, last accessed 29 September 2015.

2. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 500 et seq.

3. *Ibid.*, 500.

4. Martti Koskenniemi, 'Law's (Negative) Aesthetic: Will It Save Us?', *Philosophy and Social Criticism* 10 (2015): 1039–45, at 1042.

5. Ayelet Shachar, 'New Border and Citizenship Constellations: Implications for Law and Justice', paper presented at the WZB Workshop entitled 'Critical Theory and Constitutionalism', Berlin 11 December 2015, 12 and 32–35 (on file with the author).

6. Koskenniemi, 'Law's (Negative) Aesthetic'.

7. Carl Schmitt, *Positionen und Begriffe: im Kampf mit Weimar—Genf—Versailles, 1923–1939* (Berlin: Dunker & Humblot, [1940] 1988).

8. Koskenniemi, *The Gentle Civilizer of Nations*, 500.

9. Good examples are the *nominalistic constitutions*, which Löwenstein and Neves have analysed and distinguished from normative constitutions, see Karl Löwenstein, *Verfassungslehre* (Tübingen: Mohr, 1997), 148; Marcelo Neves, *Verfassung und Positivität des Recht in der peripheren Moderne: Eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Berlin: Duncker & Humblot, 1992); 'Zwischen Subintegration und Überintegration: Bürgerrechte nicht ernstgenommen', in *Kritische Justiz* 32 (1999): 557–77.

10. Hobbes actually would not have posed this question because, in his time, the Pope actually had many divisions.

11. Shachar, 'New Border and Citizenship Constellations', 10, 12–14, 19 and 26.

12. Wolfgang Friedmann, quoted from Koskenniemi, *The Gentle Civilizer of Nations*, 498.

13. *Ibid.*, 497.

14. Christoph Möllers, *Gewaltengliederung*, (Heidelberg: Universität Heidelberg, 2004), 300.

15. Alexander Somek, LSE Europe in Question Discussion Paper Series. LEQS Paper 60 (2013), 8.

16. Law, which draws a distinction within the fluid world of opportunities, can do this only through a linguistically explicable *act of negation*. Everything that is on one side of the distinction (e.g., the legal side) excludes (negates) everything that is on the other side, for example, the illegal side. To draw a distinction is an arbitrary act, but, because it occurs in a world of other distinctions (and distinctions drawn by other persons (and systems), the first negating distinction is always already confronted with consistency-, truth- and validity claims which become manifest once they are contested seriously by other persons (or systems in the medium of ordinary language). Therefore, the special language of the legal system *is not closed* against the special languages of other systems or the ordinary language of the public sphere in its environment, as Luhmann presupposes.

17. Georg W. F. Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt aM: Suhrkamp Verlag, 1971), § 29, English translation quoted from: Hegel, *Philosophy of Right*, available at: <https://www.marxists.org/reference/archive/hegel/works/pr/printrod.htm#PR15>, last accessed 18 January 2016.

18. Hegel, *Wissenschaft der Logik II* (Hamburg: Meiner, 1975), 59. For Luhmann, this is the 'risky paradoxical thesis that law is freedom': Niklas Luhmann, 'Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft', in *Gesellschaftsstruktur und Semantik*, Bd. 2 (Frankfurt aM: Suhrkamp Verlag, 1981), 45–104, at 62 et seq.

19. Martti Koskeniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View', *European Journal of International Law* 6 (1995): 325–48.

20. The famous sentence that discloses a new world of public conflict overlapping with and beyond social class struggle is: 'The problem of the Twentieth Century is the problem of the color-line.' W. E. B. Du Bois wrote this in the opening paragraph to the brief 'Forethought' to his *The Souls of Black Folk* of 1903, quoted from http://www.wwnorton.com/college/history/give-me-liberty4/docs/WEBDuBois-Souls_of_Black_Folk-1903.pdf, last accessed 18 January 2016; see Ira Katznelson, 'Du Bois' Century', *Social Science History* 23 (1999): 459–74.

21. See Talcott Parsons, 'Order and Community in the International Social System', in James N. Rosenau, ed., *International Politics and Foreign Policy* (Glencoe, IL: The Free Press, 1961).

22. UN Charter, Article 2, paragraph 7: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

23. UN Charter, Article 1, paragraph 2: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'; UN Charter, Article 1, paragraph 3: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

24. The distinction stems from Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964); see Charles Leben, 'The Changing Structure of International Law Revisited by Way of Introduction', *European Journal of International Law* 8 (1997): 399–408; Jürgen Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in Hauke Brunkhorst, ed., *Demokratie in der Weltgesellschaft, Soziale Welt: Sonderband 18* (Baden-Baden: Nomos Verlag, 2009), 185–94.

25. See Parsons, 'Order and Community'.

26. Koskeniemi, 'The Police in the Temple', 348.

27. Hauke Brunkhorst, *Das doppelte Gesicht Europas: Zwischen Kapitalismus und Demokratie* (Berlin: Suhrkamp Verlag, 2014).

28. The double state is a mix of (inclusive) norm-state (or *Rechtsstaat*) and (exclusive) prerogative state (or police-state), and there are more formations of the double state than prewar fascist regimes, on the paradigm case of the latter, see Ernst Fraenkel, *The Dual State* (New York: Octagon, 1969).

29. Marx, *Der 18*, 112, quoted from: <http://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch02.htm>, last accessed 19 March 2012.

30. See Nico Krisch, *Beyond Constitutionalism* (Oxford: Oxford University Press, 2010); Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law*, <http://law.duke.edu/journals/lcp> 2006. Despite of the prevalence of global administrative law and administrative power, there was still some growth of communicative power at global level. In particular, the formation of an ever-denser network of a new global civil society of national and international NGOs with some (and sometimes considerable) participatory access of functional élites to the

bodies of global administration is an important progress. *Participatory* access of a functionally specialized protest avant-garde is not nothing. However, *it is not democratic* because global administrative law is not a functional equivalent for the loss of egalitarian parliamentary representation. Even if civil society's NGO networks and emerging participatory structures are *partly* loaded with the motivational resources of a strong *global human rights culture*, and stabilized by a reluctantly emerging but still *very weak system of public global courts*, neither international human rights are *concretized*, nor international courts (now the main agency of concretising human rights) are *bound* by democratic legislation (Armin von Bogdandy and Ingo Venzke, *In wessen Namen? Internationale Gerichte in Zeitenglobalen Regierens* (Berlin: Suhrkamp Verlag, 2014).

31. In a way, this is backed by Chris Thornhill, in his *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge: Cambridge University Press, 2011).

32. See Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury Academic, 2014), 210–30 and 233–319. Tocqueville completely neglects this crucial meaning of the revolution in his book of the ancient regime and the French Revolution.

33. See Christoph Schönberger, *Das Parlament im Anstaltsstaat: Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1971–1918)* (Frankfurt aM: Klostermann, 1997).

34. Armin von Bogdandy, 'Grundprinzipien von Staat, supranationalen und internationalen Organisationen', in Paul Kirchhof and Josef Isensee, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band X, 275–304.

35. Gunther Teubner, *Constitutional Fragments—Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012); Christian Joerges, Inger-Johanne Sand and Gunther Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004).

36. I thank Michael Geyer for this gloomy (but unfortunately too true) speculation about the end of the Western legal tradition that I have tried to reconstruct in *Critical Theory of Legal Revolutions: Evolutionary Perspectives*.

37. Jelena von Achenbach, 'Trilogie Struktureller Wandel des europäischen Gesetzgebungsverfahrens durch Selbstorganisation', Manuscript, Gießen, 2015, 4, 11, 16, 18 et seq., and 34 et seq.

38. Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt aM: Suhrkamp Verlag, 1983).

39. Martti Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', *European Journal of International Law* 16 (2005): 113; Jürgen Habermas, *Zur Verfassung Europas: Ein Essay* (Berlin: Suhrkamp Verlag, 2011).

40. This is the thesis of Brunkhorst, *Das doppelte Gesicht Europas*.

41. Nevertheless, we must be aware that, in historical comparison, the situation of early transnational constitutionalism in Europe is not so different from early republican (and reluctantly democratic) state formation in the United States or France. The Marshall Court (in accordance with most federal and state legislative agencies) has established over a long period (150 years) an unchangeable interpretation of the Constitution in accordance with the class interests of big money and private property, and the Civil Code established the same constitutional facticity in France, lasting until 1944 (for a brief account, see Brunkhorst, *Critical Theory of Legal Revolutions*, 294–316).

42. Claus Offe, 'The European Model of 'Social' Capitalism: Can it Survive European Integration?', *Journal of Political Philosophy* 11 (2003): 463.

43. 'The policy preferences of the Union are constitutionally entrenched. Examples abound: monetary policy is geared towards "prize stability" instead of "full employment", energy policy focuses on competitiveness and energy security instead of democratic access, nondiscrimination policy fosters labour market access over dignity in the workplace, the Court's interpretation of Article 125 TFEU entails that financial assistance must be based on conditionality instead of solidarity, the excessive deficit procedure prefers austerity over Keynesian solutions, and the free movement provisions

themselves already express a very particular understanding of the interaction between state and market.' (Mark Dawson and Floris de Witte, 'From Balance to Conflict: A New Constitution for the EU', *European Law Journal*, published online December 2015; see Fritz Scharpf, 'Democracy Large and Small—Reforming the EU to Sustain Democratic Legitimacy on all Levels', *Juncture* (2015): 266–72; 'Political Legitimacy in a Non-optimal Currency Area', available at: www.mpifg.de/pu/mpifg_dp/dp13-15.pdf, last accessed 7 December 2014).

44. Gurminder K. Bhambra, 'Postcolonial Europe, or: Understanding Europe in Times of the Postcolonial', in Chris Rumford, ed., *The Sage Handbook of European Studies* (Los Angeles: Sage, 2009), 69–86.

45. See Tierno Monénembo, 'Nkurunziza und andere Potentaten—das koloniale Erbe in Francafriqueisteine Mischung der schlimmsten Makel Afrikas und Frankreichs', *Le Monde Diplomatique*, German edition, December 2015, 19.

46. Georg W. F. Hegel, *Phänomenologie des Geistes* (Hamburg: Meiner, 1952), 419.

47. Sonja Buckel, 'Welcome to Europe': *Die Grenzen des europäischen Migrationsrecht: Juridische Auseinandersetzungen um das 'Staatsprojekt Europa'* (Bielefeld: Transcript Verlag, 2013).

48. This at least has a German administrative court (*Verwaltungsgericht*) in Stuttgart meanwhile adjudicated (this shows that *Verwaltungsrecht* that is administrative law still can have emancipatory effects).

49. To be fair, the US is much more democratic than the European Union. However, the jury system and a lot of other measures enable the American police to erect a measure state of criminal law, in particular in the social system of mass incarceration, and in the terrorist police regime against African Americans; see Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford: Oxford University Press, 2014); Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011).

50. Jürgen Osterhammel, *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts* (Munich: Beck, 2010).

51. Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1992), 109–42; see Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MA: MIT Press, 2005), 137–42.

52. Jürgen Habermas, *Technik und Wissenschaft als 'Ideologie'* (Frankfurt aM: Suhrkamp Verlag, 1968), 100.

53. Löwenstein, *Verfassungslehre*, 148.

54. Gerald Horne, *The Counter-Revolution of 1776: Slave Resistance and the Origins of the United States of America* (New York: New York University Press, 2014).

55. See comment to this paper by Cristina Lafont, on file with the author.

56. Löwenstein, *Verfassungslehre*; Neves, *Verfassung und Positivität des Recht in der peripheren Moderne*.

57. Jürgen Habermas, *Strukturwandel der Öffentlichkeit* (Neuwied: Luchterhand [1962] 1969); *Technik und Wissenschaft als 'Ideologie'*, 100.

58. Richard Nixon, "Address to the Nation on War in Vietnam," 3 November 1969, available at: <http://watergate.info/1969/11/03/nixons-silent-majority-speech.html>, last accessed 6 December 2015.

59. See Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: Norton, 2005).

60. Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993); Bruce Ackermann, *The Civil Rights Revolution, We the People*, Volume III (Cambridge, MA: Harvard University Press, 2014).

61. On the co-evolution thesis, see Thornhill, *A Sociology of Constitutions*; Brunkhorst, *Critical Theory of Legal Revolutions*; Mathias Albert, 'Politik der Weltgesellschaft und Politik der Globalisierung: Überlegungen zur Emergenz von Weltstaatlichkeit', *Zeitschrift für Soziologie. Sonderheft Weltgesellschaft* (2005), 223–39.

62. On the crucial role of the latter for the emergence of modern law, see Brunkhorst, *Critical Theory of Legal Revolutions*.

63. In crisis and in 'state of siege' values are dispensable. Values can be realised by a small élite of their bearers. Values have a higher or lower price, depending on circumstances. Those who speak of values often hate rights. They hope that values can compensate ideologically for the loss of rights. Rights cannot compensate anything. Rights have no price. Rights are indispensable, and they only exist if they are everybody's rights. The turn from rights to values mirrors the decay of democratic constitutionalism.

64. Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014).

65. Armin Schäfers, *Der Verlustpolitischer Gleichheit: Warum die sinkende Wahlbeteiligung der Demokratie schadet* (Frankfurt aM: Campus Verlag, 2015); Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (New York: Bloomsbury, 2010); see Tony Judt, *Ill Fares the Land* (New York: Penguin Books, 2010).

66. Schäfers, *Der Verlustpolitischer Gleichheit*.

67. Paul Krugman, 'The Timidity Trap', *New York Times*, 21 March 2014.

68. Frank Schimmelpfennig, 'Integration in Zeiten der Krise—"Business as usual" oder Desintegration?', Potsdam, 18 September 2015. On façade, see Habermas, *Zur Verfassung Europas*'; on kitsch, see Koskenniemi, 'International Law in Europe'.

69. Habermas, *Technik und Wissenschaft als 'Ideologie'*, 100.

70. Shachar, 'New Border and Citizenship Constellations', 30 et seq.

71. Joseph Conrad, *Heart of Darkness*, Free eBook at planet eBook.com, 80–81 (quoted from https://www.aub.edu.lb/fas/cvsp/Documents/reading_selections/204/Spring%202013/CS-204-ReadingSelections-Conrad-HeartDarknestDarkness.pdf, last accessed 31 January 2016).

Part V

The Consequences of Crises and the
Future of Europe

TWELVE

Crises and Extralegality from Above and from Below

William E. Scheuerman

INTRODUCTION

Jonathan White uses the apt phrase *emergency Europe* to describe how recent European leaders have declared a panoply of urgent exceptional and even existential crises to justify measures ‘contravening established procedures and norms’ as necessary, unavoidable, and intrinsically rational.¹ The result has been growing dependence on legally dubious top-down executive measures and a demotion of ordinary legislative channels. As the legal scholar Christian Joerges similarly notes,

[t]he Union is experiencing a kind of state of emergency in which the law is losing its integrity . . . [T]he European Central Bank is disregarding its statutes; parliaments are contravened to make fast-tracked decisions that cannot be meaningfully discussed; Greece, and other members of the Union are being told that their sovereignty is now ‘limited’; changes of government take place under exceptional circumstances.²

White infers that one potentially fruitful response to European emergency government might take the form of popular or bottom-up ‘alternative emergency politics’, including mass civil disobedience, ‘whereby large numbers of people decide that the normal rules are suspended’ as a way of expressing their discontent. For White, politically motivated law-breaking represents ‘an archetypical form of emergency politics’, which, if properly conducted, could effectively subvert executive-level extralegality.³ He sees the makings of such alternative emergency politics in

recent social movements such as the Spanish *indignados* and the Greek *aganaktismenoi*.

My comments here speak to the 'Euro Crisis'. Not primarily to the crisis's underlying causes or long-term roots, but rather to what is at stake, and what, perhaps, critical-minded political actors should do in response to the European élite's top-down emergency response. I invoke the idea of an alternative emergency politics, drawing on a reservoir of US political experience, and particularly the iconic example of the US civil rights movement, that popular opposition to 'emergency Europe' will need to probe. Like US civil rights civil disobedients, contemporary European activists need to take seriously the possibility that their acts of symbolic law-breaking still need to express fidelity to the law and fundamental legal ideals at the heart of European democracy, ideals which have faced considerable pressure since the start of the crisis, and which, in some cases, have been systematically undermined. Relying on White's suggestive remarks, I investigate the relationship between executive-level emergency (or crisis) extralegality and popular forms of extralegal protest.

Why opt for the term *extralegality* rather than *illegality*? I do so for a simple reason. Even in basically democratic settings, both state officials and militant protestors can be observed violating legal and constitutional norms in a variety of ways. When doing so, they depend on a rich array of moral, political, and legal justifications. Since they nonetheless pretty much uniformly hope to distinguish their actions from ordinary criminality, the phrase *extralegality* seems better suited to this ambivalent situation than *illegality*, even if, in many cases, the grounds for law-breaking turn out to be legally suspect. Of course, some types of grassroots political illegality purport to be motivated by a fundamental and sometimes even 'highest respect for the law'.⁴ When high-level state officials tamper with or ignore ordinary legal procedures during a crisis, they commonly characterize their actions as necessary to protect the constitutional order. Admittedly, such appeals can mask far-reaching attempts to overhaul the constitutional status quo: the executive may be advancing *sovereign* and not *commissarial* dictatorship, to use Carl Schmitt's terminological distinction.⁵ Yet the fact remains that executive-level illegality is widely grounded on appeals to the law or constitutional government.⁶

As White intimates, and as the Euro Crisis readily corroborates, we can, indeed, identify a symbiotic relationship between extralegality 'from above' and 'from below', with executive extralegality oftentimes directly spawning and helping to legitimize extralegality 'from below'. Some modest lessons can be drawn from a closer examination of this neglected relationship. In particular, it helps recall some virtues of a *specific* model of grassroots extralegality, namely, nonviolent *civil* disobedience as it emerged in the context of the US civil rights movement and was subsequently theoretically codified by liberal and progressive intellectuals.⁷

When we dig a bit deeper, we also find a similar *political imaginary*—in particular, parallel ideas about what constitutes a ‘crisis’, and how best to respond to it—which characterizes the usual justifications provided for both executive and popular extralegality. Nonetheless, decisive differences remain. Consequently, it would be mistaken to envisage the two varieties of extralegality as equivalent. Defenders of executive-level extralegality should be expected to face a substantially higher burden of proof than the civil disobedient.

EXTRALEGALITY AS SYMBIOSIS

Countless scenarios can be identified in which the executive declares, by formal constitutional means or otherwise, a dire crisis or ‘state of emergency’, moves rapidly to promulgate exceptional measures, and, by doing so, probably inadvertently sets off militant grassroots protests. Emergency rule provides opponents with ample ground for pursuing a corresponding extralegal response. If emergency rule entails the abrogation of the usual legal (and especially legislative) channels for altering policy, or the suspension of basic rights, why should regime critics necessarily remain wedded to them?

In scenarios lacking a formal declaration of a state of emergency, yet where ‘the normal channels of [political] change no longer function and grievances will not be heard or acted upon’, or the regime ‘has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt’, grassroots extralegality is commonplace.⁸ As Hannah Arendt once noted, ‘[a]n emergency is certainly at hand when the established institutions of a country fail to function properly and its authority loses power’.⁹ When democracy malfunctions, and meaningful possibilities for participation have dried up, protestors will often find themselves engaging in unconventional and legally dubious action.

This helps explain what we are witnessing at present in Europe, where national governments are forced to accept external management of their economic and financial affairs, and with those paying the price consequently sceptical of both the legitimacy and the efficacy of ordinary political channels. With the European Central Bank, working alongside the Council, the Commission and Court of Justice of the EU, ‘but if need be also without them’, acting as the unelected ‘*de facto* government of the biggest economy of the earth’, nobody should be surprised by the resurgence of extralegal activism.¹⁰ Making mincemeat not just of democracy but of core components of legality, European crisis management in Greece, Italy, Portugal, Spain, and elsewhere invites grassroots extralegality ‘from below’.¹¹

Revealingly, when self-proclaimed defenders of ‘law and order’, like former US President Richard Nixon, accuse militants who skirt the law of

contributing to 'deterioration for respect for the rule of law',¹² they neglect to mention that extralegality 'from below' often succeeds government and especially executive extralegality. In contemporary Europe, the specific names and suspects have changed. Yet, the political logic remains the same.

As we can regularly observe, however, extralegal responses 'from below' often function unwittingly to outfit the executive with a convenient political cover. Violence, or other forms of popular illegality readily portrayed as irresponsible or dangerous, can play into the executive's hands. One advantage that the executive enjoys is the presumption that its actions rest on a principled allegiance to the law: it is, after all, the executive that enforces and implements the law, and determines its everyday meaning. The executive typically benefits from a certain presumption of legal and constitutional integrity. Protestors rarely enjoy the same presumption of innocence. They need to prove their allegiance to the law.¹³ Not surprisingly, if the executive plays his or her cards right, he or she can successfully present grassroots law-breaking as corroborating his or her diagnosis of an existential crisis demanding executive-centred rule. Though White neglects this possibility, the political backlash against 'alternative emergency politics' often favours the executive. The story is complicated, but one of its traits seems familiar enough: exploiting the political fallout that often follows mass-based extralegal protest, the executive funnels mass anxiety to turn the tables on opponents.

I leave it to others to decide whether something like this dynamic has been unfolding in 'emergency Europe'. Media reports have been replete with portrayals of unruly (and sometimes violent) protests in Greece, Spain, and elsewhere. Such media coverage ultimately works to the advantage of European élites, for whom it is imperative that their own emergency actions appear normatively superior to their opponents'. Where deeply rooted ideas of legality possess a well-nigh universal appeal, the executive not only faces fewer hurdles in depicting its acts as expressing fidelity to the law, but can readily equate those of its opponents with criminality. The commonplace portrayal of the *indignados*, the *aganaktismenoi*, and other protestors as unruly and criminal conveniently obscures the fact that their extralegalities are arguably no more controversial than the top-down emergency measures promulgated by European leaders.¹⁴

I make this point because of its potential political but also broader theoretical significance. Grassroots extralegality comes, of course, in different shapes and sizes. It can be uncivil, violent, and disdainful of the law, as well as poorly conceived and politically irresponsible.¹⁵ In the recent academic literature, we encounter a burgeoning tendency to discard the once paradigmatic model of *civil disobedience* as a 'public, non-violent, conscientious, yet political act contrary to the law usually done with the aim of bringing about a change in the law or policies of the

government'.¹⁶ In his recent book on political resistance to European crisis government, for example, Costas Douzinas sharply discounts this 'liberal' model of civil disobedience.¹⁷ Inspired by the experience of the US civil rights movement, this model now faces a wide-ranging intellectual assault. The sources of the attack are complex and multifaceted, and, unfortunately, I cannot examine them here.¹⁸ One of them, however, is the straightforward observation that it clashes with the realities of mass protest (and militant law breaking) 'on the ground', many examples of which appear to challenge the once sacrosanct idea of civil disobedience as a civil, nonviolent, and public act expressing basic fidelity to the law.

Our brief discussion of the symbiotic relationship between extralegality 'from above' and 'from below' should give pause to those now rushing to abandon the standard liberal model. Whatever its faults, that model grappled seriously with the possibility of a politically counterproductive backlash and reflected on how to neutralize it. Martin Luther King and the liberal and progressive intellectuals inspired by his actions grasped that politically viable extralegal popular 'emergency politics' would need to be perceived as superior to executive extralegality. They intuited that extralegality 'from above' enjoys a (sometimes undeserved) presumption of lawfulness that could only be successfully countered by the civil disobedient demonstrating his or her 'very highest respect for the law' in immediately intelligible ways.

King regularly portrayed civil disobedience as a necessary rejoinder to what, in the US in the 1950s and 1960s, amounted to systemic executive extralegality. In his view, only massive civil disobedience would be able to ignite the stalled enforcement of standing US law—most notably, the Supreme Court's landmark *Brown v. Board of Education* ruling mandating school desegregation—the enforcement of which had been stymied by an alliance of segregationists and sympathetic conservative officials at federal and state levels.¹⁹ Civil disobedience, from this perspective, was essential to bringing national attention to the shocking fact that rulings by the nation's highest court were being *de facto* invalidated by hostile and/or passive government officials. By effectively scuttling the Supreme Court's decisions, 'Old Man Segregation' was getting away with egregious violations of the law, with mass apathy and official complicity providing the requisite cover.²⁰ Even if civil rights activists openly abrogated segregation statutes, or local ordinances against trespassing, they did so only in order to counter egregious violations of fundamental US constitutional law.

King struggled to sketch out a model of law-breaking whose differences *vis-à-vis* executive extralegality could become lucidly transparent even to unsympathetic onlookers. The failure of the US political machinery to uphold *Brown* and other antisegregation rulings was surreptitious and generally unannounced,²¹ incurring few costs, and bringing many benefits to those who complied. In contrast, King emphasized, nonviolent

direct action was *public* and *open*, with disobedients evincing a willingness to undergo psychological and physical abuse, or what he described as laying down their ‘very bodies’. Peaceful law-breaking had to be delineated from the ‘uncivil disobedience’ of segregationists who committed terrible acts of violence under the cover of darkness so as to circumvent legal penalties.²² Disobedients directly expressed their fundamental respect for the basic idea—though by no means the unsatisfying reality of America’s existing (racist) system of legality—by accepting punishment even when meted out by segregationist judges and racist juries. The civil disobedient stood on the side of ‘law and order’, superficial appearances notwithstanding.

A hard-headed strategist, King’s brand of extralegality generated massive political dividends. In contrast to many unsuccessful and now forgotten experiments in militant illegality, it played a pivotal role in generating radical reform.

I do not mean to lionize King or to ignore the difficulties of exporting his ideas, the product of a particular time and place, to contemporary Europe. Nonetheless, it remains imperative that contemporary models of extralegality ‘from below’ not only cleanly differentiate their acts from extralegality ‘from above’, but also convincingly evince, as King intuited, their superior normative and especially legal credentials. Activists can perhaps draw some useful lessons from earlier European global justice activists, whose participants (at the Genoa G8 meetings and elsewhere) creatively reinvented core traits of civil disobedience and generated significant public sympathy for their cause and its global significance.²³

Notably, King was able to succeed in part because his cause presupposed a widely shared legal and political culture along with a common constitutional system. Given the present state of the European political order, it is unclear that civil disobedients there will be able to follow the same path. Europeans, as we know, could not even agree on a shared constitution. Though EU leaders have engaged in troublesome violations of legality, opposition has been fuelled, not surprisingly, by populist and nationalistic, rather than principled, appeals to common European constitutional or legal commitments. Europe’s complex and deeply pluralistic legal structure poses sizable impediments to any would-be supra-national-minded European Martin Luther King.²⁴

CRISIS IMAGINARY

The *imaginary* of executive-centred crisis or emergency government is already familiar since it occupies a prominent place in contemporary political consciousness.²⁵ According to the conventional story, a crisis represents an unpredicted and perhaps unforeseeable event or worst-case scenario, in which the community faces a mortal danger or an exis-

tential threat. Moments of uncertainty and urgency, crises call for looking beyond the usual legal toolkit; flexibility and the ability to respond rapidly are at a premium. The executive is commonly perceived as best suited to the tasks to be done. Unlike the slow-moving deliberative legislature or sluggish judiciary, what Alexander Hamilton dubbed the 'energetic' executive alone allegedly possesses the capacity for 'decision, activity, secrecy, and dispatch' requisite to effective emergency rule.²⁶ Predictably, crises represent a launching pad for executive extralegality, if not by formal declaration of a state of emergency, then by means of other familiar mechanisms (broad legislative delegations, for example, or creative legal or constitutional interpretation).

The crisis imaginary can take on dramatic and sometimes apocalyptic overtones: the executive is depicted as operating in a Manichean universe, where tough (and potentially tragic) choices have to be made in order to do battle with life-or-death enemies.²⁷ The stakes are high, with success depending on the executive's capacity for resolute action. Failure would mean disaster, while success might bring an unparalleled, and perhaps utopian, good.

Because this imaginary is readily recognisable, we need not dwell on it. However, two caveats should be kept in mind. First, as the legal theorist Tom Campbell has argued, it is out of sync with most constitutional systems, which typically provide neatly codified definitions of various emergencies (e.g., war, rebellion, natural catastrophes, economic crises) and proscribe what actions the executive can and cannot undertake. Most constitutional orders aspire to subject even violent emergencies to binding legal rules and procedures.²⁸ For complicated reasons that I cannot examine here, actual political practice, however, conforms more closely to the political imaginary of the emergency than the law 'on the books': even well-conceived constitutional and legal niceties become springboards for legally controversial executive measures.²⁹

Second, the imaginary is deceptive for another reason as well. It rests on a tendentious portrayal of the executive, based in early modern political thought, as a single 'unitary' actor and thus temporally efficient, flexible, and best suited to crisis exigencies. As any face-to-face encounter with the unwieldy apparatus of the modern state highlights, however, the on-the-ground realities of the administrative apparatus are messy, complicated, and by no means temporally efficient.³⁰ Particularly at the European level, where executive power is 'fragmented and dispersed by virtue of the multilevel and polycentric nature of the European construction', this point should be kept in mind.³¹ In the EU, where 'there is no single, comprehensive and unitary European executive institution or body', the executive contradicts conventional presuppositions about its suitability for crisis management even more dramatically than do national executives.³²

The executive possesses some institutional advantages *vis-à-vis* other institutions. Yet the traditional picture overstates and probably mischaracterizes them. Here as well, the crisis imaginary provides troublesome ideological support for those who prefer to seek executive discretion during a crisis.³³ Nonetheless, a disconnection between this imaginary and the executive's actual operations remains.

Less familiar is the decisive role played by elements of the imaginary in sophisticated thinking about grassroots extralegality. Once again, King provides an illuminating point of reference. He envisioned civil disobedience as a necessary response not only to executive extralegality, but also to what he regularly diagnosed as a 'crisis in racial relations', and then, in his later and most radical writings, as an 'international emergency which involves the poor, the dispossessed, and the exploited of the whole world'.³⁴ Paradigmatic for this restatement of the imaginary is how civil disobedience performs temporal functions parallel to those of the 'energetic' executive: it prods otherwise sluggish and slow-moving ordinary political and legal channels, viewed as creeping along at 'horse-and-buggy pace' and forcing them to catch up to the 'jet-like speed' of modern life.³⁵ Even if 'Old Man Segregation' was on his deathbed, civil disobedience alone could 'speed up the coming of the new age',³⁶ forcing a recalcitrant state apparatus to deal with the 'urgent necessity'³⁷ of 'our nation's first class crisis'.³⁸

This idea of civil disobedience as an accelerated crisis response 'from below' turns out to be surprisingly widespread among its proponents. I limit myself to two additional examples.

In a 1963 call for massive civil disobedience to ward off the 'extreme imminence of the peril' of nuclear war, the philosopher Bertrand Russell similarly highlighted its temporal advantages.³⁹ 'By means of lies and evasions', governments had irresponsibly downplayed the looming spectre of cataclysmic 'dangers and catastrophes'.⁴⁰ Because '[l]egally legitimate methods of spreading this knowledge have been proved to be very slow', Russell insisted, activists needed to pick up the temporal slack.⁴¹ Via conscientious nonviolent law-breaking, they could accelerate the public's acquisition of the requisite scientific and political know-how, perhaps before it was too late.

In his widely read *Disobedience and Democracy*, the radical intellectual Howard Zinn echoed King in diagnosing a series of perilous economic, racial, and social crises, adding that:

[w]henver great crises faced the nation in the past, the traditional workings of the government, including the decisions of the courts, had to be supplemented by much more vigorous activity going beyond the usual procedure.⁴²

For Zinn, as for King and Russell, civil disobedience proffered an energetic or rapid-fire political option that was superior to 'the slow work-

ings' of ordinary political and legal channels.⁴³ Its temporal virtues helped justify its increasingly privileged status among radical activists.

It is hard to miss some apocalyptic and even Manichean tones here. For Russell, '[a]ny day, at any time, the whole population of Britain may perish'.⁴⁴ For Bayard Rustin, a key figure in popularising Gandhian ideas among US civil rights activists, militant civil disobedience was necessary because '[t]he organizers and perpetrators of segregation are as much the enemy of America as any foreign invader'.⁴⁵ One also encounters the idea that an emergency vividly illuminates a dramatic moral or political choice. For King, the racial crisis constituted 'America's greatest moral dilemma'.⁴⁶ Civil disobedience meant that the morally conscientious could attack 'the forces of evil, rather than persons caught in the forces. It is evil that we are seeking to defeat, not the persons victimized with evil'.⁴⁷ According to Zinn, the multisided social crisis called for a resolute choice between radical reform via civil disobedience or the terrors of 'gigantic uncontrolled violence'.⁴⁸

What then, if anything, distinguishes the two seemingly parallel versions (that is, extralegality 'from above' and 'from below') of the crisis imaginary? The conceptual and semantic overlap certainly seems substantial. Both reproduce traits of modern crisis consciousness as skilfully analysed by Reinhart Koselleck.⁴⁹ Initially, Giorgio Agamben seems on the mark: '[t]he problem of the state of exception presents clear analogies to that of the right to resistance'.⁵⁰

Are we then dealing with fundamentally similar notions of crisis and extralegality?

For reasons which I outline in the next section, I do not believe this to be so. Most obviously, grassroots extralegality, at least when practiced according to King's model, is nonviolent, whereas executive extralegality enjoys the possibility of relatively direct recourse to state coercion. This simple, but crucial, difference, as we will see, proves decisive.

Another difference has already come to light. As noted, the traditional vision of the executive as a fast-moving, temporally efficient crisis manager needs to be subjected to critical scrutiny; too much empirical evidence contradicts it. In the EU, where executive power is deeply fragmented, the traditional view seems particularly far-fetched. What, then, of the parallel claim made on behalf of popular extralegality's temporal virtues? Is it not just as far-fetched—and potentially ideological—in light of what we should presume about the unavoidably time-consuming character of popular, and especially grassroots, protest politics? If mass-based extralegality depends, as it surely should, on slow-moving forms of free-wheeling exchange, where large numbers of participants engage in a meaningful (and, ideally, deliberative) give-and-take, what case can plausibly be made for its temporal merits *vis-à-vis* ordinary legal and political channels?

Many complexities notwithstanding, one basic point should be kept in mind: in real, existing democracies, conventional law-making is always shaped—and sometimes obviously stymied—by political parties, interests groups, administrative agencies, and powerful, organized social interests. This fact decisively shapes the real-life temporality of law-making, typically working to decelerate and even squelch demands for far-reaching reform that favours the politically and socially excluded. King and the civil rights movement were right to see the US Congress as a slow-moving and, indeed, racially reactionary institution lorded over by powerful southerners who owed their political privileges precisely to that local power structure that activists sought to destroy. Congress had a long and sordid history of resisting even modest calls for racial reform. In comparison, nonviolent disobedience, when capably pursued so as both to put pressing issues on the radar and to shame recalcitrant institutional actors into overdue action, in fact possessed some enviable temporal traits.

The case for civil disobedience's accelerated temporality makes sense in contexts such as that of the US, where an outdated institutional instantiation of the separation of powers means that the legislative process is probably more clunky, sluggish, and resistant to meaningful reform than in other democracies.⁵¹ Whenever legislative institutions 'creep at horse-and-buggy pace', civil disobedience is likely to appeal to those eager to speed up the pace of change when faced with a perceived crisis, real or otherwise.⁵² However, to the degree that elsewhere as well 'the established institutions of a country fail to function properly', civil disobedience is destined to garner universal appeal.⁵³ In the present-day EU, for example, civil disobedience probably offers a quicker way to ignite political debate and potential reform than the ordinary venues provided by its unwieldy and insufficiently responsive political machinery. With ordinary political channels at national level clogged by top-down EU emergency management, and with Europe-wide democracy itself under-developed, it is easy to see why so many Europeans are not only taking to the streets, but are also engaging in politically motivated law-breaking.

BEYOND FALSE EQUATIONS

Basic normative and pragmatic distinctions suggest why it would be a mistake to conflate the logics of extralegality 'from above' and 'from below'. Despite a shared crisis imaginary, executive-level extralegality poses perils which its popular correlate can successfully circumvent. Given the recent scholarly tendency to view executive extralegality as a potentially admirable way to counter dire crises or emergencies, some words of caution seem apposite.⁵⁴

Defending 1960s' civil disobedients, Hannah Arendt observed that their actions were motivated by the same 'organizing principles of action . . . from which sprang those voluntary associations' upon which the early American Republic once rested.⁵⁵ Following Alexis de Tocqueville in viewing freedom of association as essential to political action among equals, and thus as a linchpin of republican government, Arendt posited that 'civil disobedients are nothing but the latest form of voluntary association, and . . . are thus quite in tune with the oldest traditions of the country'.⁵⁶ In Arendt's view:

the civil disobedient is a member of a group, and this group, whether we like it or not, is formed in accordance with the same spirit that has informed voluntary associations. . . . The fact is that we are dealing with organized minorities, who stand against assumed inarticulate, though hardly 'silent', majorities, and I think it is undeniable that these majorities have changed in mood and opinion to an astounding degree under the pressure of the minorities.⁵⁷

Without the novel political opportunities provided by civil disobedience for equal citizens to come together, republican government could not thrive. Civil disobedience performs a cardinal function: in an increasingly ossified political system, it offers indispensable opportunities for meaningful political interaction and exchange.

Arendt's basic intuition remains sound: democracy thrives only when citizens can come together and engage in meaningful political action, and grassroots extralegality potentially represents a pivotal opportunity for such action. Of course, a thriving democracy should offer multiple (legal) arenas for participation. However, whenever 'the normal channels of change no longer function, and grievances will not be heard or acted upon'—or the government pursues legally and constitutionally dubious action—extralegality 'from below' can be justified.⁵⁸ Since popular law-breaking potentially exemplifies the citizen's 'continuing participation in all matters of public interest', it constitutes part of the very *sine qua non* of popular government.

Executive extralegality seems less amenable to such justifications. To be sure, executives sometimes legitimize their extralegalities by asserting that they are buttressing self-government; in some cases, this defence aptly captures their motives. Yet the claim still suffers from a congenital paternalism. In essence, the executive is asserting a right to 'know better' than the other political actors, institutionalized or otherwise, what is 'best' for the political community as a whole. Even when unpopular minorities engage in law-breaking and hope to persuade majorities of the mistaken nature of their views, their endeavours constitute direct manifestations of action in concert in a way that the executive's actions can rarely claim. Civil disobedients act *as* democratic citizens, whereas the executive can, perhaps, only *claim* to act *on their behalf*.

When the executive steps outside the normal boundaries of the law, its special institutional status means that its actions unavoidably take on more troublesome contours. When civil rights activists violated segregation statutes, for example, their acts did not thereby invalidate the statutes. Segregation laws remained universally binding, even though Martin Luther King and his allies obviously wanted to undermine them. In contrast, when the executive pursues extralegality, as the main institutional carrier of the state's coercive power, its acts immediately take on a binding character. The executive can mobilize organized violence to uphold moves that are even constitutionally and legally bogus. The presumption of legal innocence often enjoyed by the executive means that it can get away with doing so. When US President George W. Bush abandoned long-standing legal restrictions on state surveillance following the 9/11 attacks, his decision resulted in massive changes to government policy with far-reaching repercussions. Few dared to criticize the move for years.⁵⁹ Executive extralegalities not only enjoy a presumption of lawfulness but will be universally enforced, whereas grassroots law-breaking enjoys no such advantages. It relies on nothing more than the persuasive 'pressure' of symbolic (and, hopefully, *nonviolent*) action and the underlying public justifications provided.

Extralegality 'from above' also undermines the ideal of a community of political equals: the executive ignores standing law and effectively forces its controversial (extralegal) views on the community as whole. On King's model, civil disobedience successfully circumvents this consequence by agreeing in advance to accept possible legal consequences for its actions as a way of demonstrating proper respect for the law, and, with it, implicitly the idea of a political community of equals constituted by law.

To be sure, those who prefer 'uncivil' and/or violent extralegality may also end up violating the rights of other citizens. Yet such violations will still typically fail to rival the massive impact of the extralegality on the part of the executive on the political and legal system as a whole. Revealingly, and in some contrast to the civil disobedient, when the executive pursues extralegality it rarely concedes the legally or constitutionally contentious nature of its acts, instead, doing everything conceivable to avoid legal penalties.⁶⁰ The executive's close ties to state coercion, in conjunction with the presumption of innocence that it enjoys (in part because it enforces or implements the law and seems to speak directly on its behalf), are why its extralegalities are so dangerous: political history is filled with constitutionally disastrous cases of extralegality 'from above'.

Even well-meaning civil disobedience can be poorly executed and can get out of hand. Nor would I deny the possibility of crisis situations in which legally suspect executive action proves tragically unavoidable.⁶¹ Conceivably, recent proposals for taming executive extralegality could, perhaps, mitigate *some* of its inherent perils. Oren Gross and Fionnuala

Ní Aoláin call on the executive to pursue open and publicly justified extralegal measures while promising to accept any legal penalties.⁶² Like Schmitt, they believe that emergencies necessarily explode the confines of ordinary legality. Unlike Schmitt, they offer a liberal model for executive extralegality, demanding that it pass a series of strict tests. Interestingly, these tests (openness, publicity, and a willingness to accept legal sanctions) overlap directly with those found in standard models of civil disobedience. In this unabashedly liberal defence of executive extralegality, the conceptual affinities between extralegality 'from above' and 'from below' seem pronounced.

Nonetheless, grounds for scepticism remain. This model still fails to outline sufficient deterrents to possible abuse, and it never explains why political leaders would openly and publicly acknowledge the extralegal contours of their actions in the first place.⁶³ Because of its privileged institutional status, the executive's abandonment of ordinary legal mechanisms necessarily represents a qualitatively different and more dangerous creature than grassroots extralegality, and especially principled civil disobedience. As one scholar of executive power points out, 'as with any first mover in a game where sequence counts, a president's initiative may reshape in his favor the landscape on which political actors move'.⁶⁴ Real or imagined crises provide a ready justification for the executive to pursue contentious extralegal actions, for example, clamping down on the opposition, closing down newspapers, or deploying police and military against internal and external foes. A politically astute executive will have remade or reinvented the political landscape even before emergency counterpolitics can emerge, and, perhaps, so as to hinder it from *ever* emerging. The executive's ability 'to create facts on the ground'—and by doing so, *redefine the parameters of political debate*—potentially undermines overdue political criticism and can prevent an appropriate extralegal response 'from below' from ever taking place. Even when the executive faces attempts to check or censure its extralegalities, efforts to do so will potentially operate in a new political game. Is it any surprise that history offers so many examples of uncensored executive extralegality? Even cautious attempts to punish illegal executive-centred crisis rule often face a hostile reception because they emerge in a novel political universe which the executive has reconfigured.⁶⁵

CONCLUSION

After exploring the symbiotic relationship between executive-centred emergency government and 'alternative emergency politics', I have examined the shared 'crisis imaginary' implicit in ideas of extralegality both 'from above' and 'from below'. Despite some semantic affinities, principled differences remain. Because the executive typically enjoys certain

institutional advantages, its extralegal actions pose normative and practical dilemmas which are far more serious than those intrinsic to grassroots extra-legality, and especially civil disobedience, as commonly understood. Here, as in some other crucial respects, the overlapping crisis imaginary ultimately proves misleading. *Contra* Nixon, 'deterioration for respect for the rule of law' cannot be blamed on the supposedly 'corrosive doctrine' of civil disobedience. However, it can be blamed on the eerily commonplace belief among executives that crisis scenarios give them an 'inherent right to decide' on their own 'which laws to obey to and when to disobey them'.⁶⁶ Present-day Europe, unfortunately, seems to have more than its fair share of political 'leaders' who accept this truly corrosive doctrine.

NOTES

Thanks to Brian Milstein and Jonathan White for astute critical remarks on earlier versions, and also to the many participants in the 'European Crises from Weimar until Today' conference, organized by Poul Kjaer and Niklas Olsen, at the University of Copenhagen (December 2014).

1. Jonathan White, 'Emergency Europe', *Political Studies* 63 (2015): 300–318.
2. Christian Joerges, *Europe's Economic Constitution in Crisis* (Bremen: ZENTRA Working Papers in Transnational Studies, 2012), 12.
3. White, 'Emergency Europe', 315.
4. Martin Luther King Jr., 'Letter from a Birmingham City Jail' (1963), in Hugo Adam Bedau, ed., *Civil Disobedience in Focus* (New York: Routledge, 1991), 74.
5. Carl Schmitt, *Dictatorship*, trans. Michael Hoelzl and Graham Ward (Cambridge, UK: Polity Press, 2014).
6. For examples, see Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (New Brunswick, NJ: Transaction, 2002 [1948]). One advantage the term *extralegality* is that it covers a broad array of actions where political actors test the limits of the law.
7. King, 'Letter from Birmingham City Jail', 74.
8. Hannah Arendt, 'Civil Disobedience', in *Crises of the Republic* (New York: Harcourt Brace Jovanovich, 1972), 74.
9. *Ibid.*, 101–2.
10. Wolfgang Streeck, 'Heller, Schmitt, and the Euro', *European Law Journal* 21 (2015): 370.
11. Stephen Coutts, Leticia Diez Sanchez, Afrodit Marketou and Leonardo Pierdominici, *Legal Manifestations of the Emergency in National Euro Crisis Law* (Florence: European Union Institute, Department of Law, Working Paper Law 2015/14).
12. Quoted in Costa Douzinas, *Philosophy and Resistance in the Crisis* (Cambridge, UK: Polity Press, 2013), 90–91. In Nixon's case, the military draft resisters that he was reprimanding were responding to the illegalities of an undeclared war in Vietnam waged in violation of international law.
13. I am grateful to Brian Millstein for this point.
14. Recent electoral victories by left-populist parties in Greece and Spain perhaps suggest that attempts to depict the movements in question as irresponsible and lawless have not in fact succeeded.
15. Jennet Kirkpatrick, *Uncivil Disobedience: Studies in Violence and Democratic Politics* (Princeton, NJ: Princeton University Press, 2008).
16. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 364.

17. Douzinas, *Philosophy and Resistance in the Crisis*, 89–94. Martin Luther King, the model's inspiration, was more radical than the term 'liberal' captures.

18. But see my 'Recent Theories of Civil Disobedience: An Anti-Legal Turn?', *Journal of Political Philosophy* 23 (2015): 427–49.

19. Martin Luther King, 'Love, Law, and Civil Disobedience' (1961), in James Melvin Washington, ed., *Testament of Hope: The Essential Writings of Martin Luther King* (San Francisco: Harper & Row, 1986), 44.

20. King, 'Facing the Challenge of a New Age' (1956), in *Testament of Hope*, 141.

21. Of course, segregationists were oftentimes outspoken in advancing their agenda.

22. King, 'The Time for Freedom Has Come' (1961), in *Testament of Hope*, 164.

23. Donatella della Porta, Massimiliano Andretta, Lorenzo Mosca and Herbert Reiter, *Globalization from Below: Transnational Activists and Protest Networks* (Minneapolis: University of Minnesota Press, 2006).

24. Correspondingly, White emphasizes the limited role ideas about constitutionalism and the rule of law are playing in battles about 'emergency Europe' (White, 'Emergency Europe', 314).

25. The term imaginary means 'something much broader and deeper than the intellectual [or theoretical] schemes people may entertain when they think about' political reality. Modestly modifying Charles Taylor's definition of a 'social imaginary', I have in mind the ways people view political existence, how they see its pieces fitting together, what expectations they may entertain, 'and the deeper normative notions and images that underlie these expectations'. Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004), 23.

26. Publius [Hamilton], *Federalist Papers* (Federalist 70).

27. For a discussion, see Günther Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Cheltenham, UK: Edward Elgar Publishing, 2014), 97–146; see, also, Brian Millstein, 'Thinking Politically about Crisis: A Pragmatist Perspective', *European Journal of Political Theory* 14 (2015): 141–60.

28. Tom Campbell, 'Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory', in Victor Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008), 201–28.

29. A point made emphatically by Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

30. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore, MD: Johns Hopkins University Press, 2004), 100–102.

31. Michael Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', *German Law Journal* 14 (2013): 19; White, 'Emergency Europe', 312.

32. Deidre Curtin, 'Challenging Executive Dominance in European Democracy', *Modern Law Review* 77 (2014): 6.

33. See, for example, Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

34. King, 'The Trumpet of Conscience' (1967) in *A Testament of Hope*, 652. King, I should also mention, was influenced by Barth's 'crisis theology'.

35. King, 'Letter from Birmingham City Jail', 72.

36. King, 'Facing the Challenge of a New Age', 141–43.

37. King, 'The Current Crisis in Race Relations' (1958), in *A Testament of Hope*, 89.

38. King, 'In a Word: Now' (1963), in *A Testament of Hope*, 168.

39. Bertrand Russell, 'Civil Disobedience and the Threat of Nuclear War' (1963), in Hugo Adam Bedau, ed., *Civil Disobedience: Theory and Practice* (New York: Pegasus, 1969), 158.

40. *Ibid.*, 157.

41. Russell, 'Civil Disobedience', 158.

42. Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* (Boston: South End, 2002 [1968]), 101–2.
43. *Ibid.*, 7.
44. Russell, 'Civil Disobedience', 158. Here the apocalyptic tones may have been justified: nuclear war has been circumvented by sheer luck as much as by political skill (Eric Schlosser, *Command and Control: Nuclear Weapons, the Damascus Accident, and the Illusion of Safety* [New York: Penguin Books, 2013]).
45. Bayard Rustin, 'Civil Disobedience, Jim Crow, and the Armed Forces' (1948), in Devan W. Carbado and Donald Weise, eds., *Time on Two Crosses: The Collected Writings of Bayard Rustin* (San Francisco: Cleis Press, 2003), 29.
46. King, 'The Current Crisis in Race Relations', 88.
47. *Ibid.*, 87.
48. Zinn, *Disobedience and Democracy*, 108–9.
49. Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, CA: Stanford University Press, 2002), 236–47.
50. Giorgio Agamben, *States of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).
51. Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (Oxford: Oxford University Press, 2006).
52. Civil disobedience may indeed represent, as Hannah Arendt, 'Civil Disobedience', and others (e.g., Lewis Perry, *Civil Disobedience: An American Tradition* [New Haven, CT: Yale University Press, 2013]) have argued, a distinctly American contribution. Yet this may have as much to do with America's idiosyncratic and problematical version of constitutional democracy as with its peculiar political traditions and culture.
53. Arendt, 'Civil Disobedience', 101.
54. Gross and Ní Aoláin, *Law in Times of Crisis*, 110–70.
55. Arendt, 'Civil Disobedience', 94.
56. *Ibid.*, 96.
57. *Ibid.*, 98–99.
58. *Ibid.*, 74.
59. For the details, James Bamford, *The Shadow Factory: The Ultra-Secret NSA from 9/11 to the Eavesdropping on America* (New York: Anchor, 2008).
60. In this way, George W. Bush, for example, claimed a legal basis for even the most egregious abrogations of US and international law (e.g., the prohibition on torture).
61. Such action was essential in the US to the great (democratic) political achievements of both Abraham Lincoln and Franklin D. Roosevelt (Rossiter, *Constitutional Dictatorship*, 223–39 and 255–87).
62. See Gross and Ní Aoláin, *Law in Times of Crisis*, 110–70, which has garnered substantial attention among Anglophone jurists. See, also, Clement Fatovic and Benjamin A. Kleinerman, eds., *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford: Oxford University Press, 2013).
63. Victor Ramraj, 'Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis', in: Benjamin J. Goold and Liona Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007), 189–96.
64. Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2005), 39.
65. I am thinking of the failure of the US political and legal system to prosecute the blatant illegalities of the executive-driven 'war on terror'.
66. Nixon quoted in Douzinas, *Philosophy and Resistance in the Crisis*, 90–91.

THIRTEEN

'We Could Go Down the Road of Lebanon'

Crisis Thinking on the Anti-Muslim Far Right

Mikkel Thorup

In the prologue to his novel *Elementary Particles*, the controversial writer and attentive diagnostician of the present, Michel Houellebecq, writes that his 'book is principally the story of a man who lived out the greater part of his life in Western Europe, in the latter half of the twentieth century'. This contemporary life is both 'one person' and 'an age':

Though alone for much of his life, he was nonetheless closely in touch with other men. He lived through an age that was miserable and troubled. The country into which he was born was sliding slowly, ineluctably, into the ranks of the less developed countries.¹

This singular existence represents *the European in crisis*. Or rather, it represents a specific experience of decline, of sinking into the condition of those always meant to be 'less developed'. The sentiment was nicely echoed by the leader of the Flemish Party, Filip Dewinter, who commented on Arab immigration by saying: 'It puts at stake the physical survival of our European nations. We could go down the road of Lebanon'.²

The life described in the novel is that of a man's experience: 'The men of his generation,' Houellebecq writes, 'lived out their lonely, bitter lives. Feelings such as love, tenderness and human fellowship had, for the most, disappeared. The relationships between his contemporaries were at best indifferent and more often cruel.' This experience relates well to the American sociologist Michael Kimmel's notion of the 'angry white man'

feeling that his way of life, his status and his privileges, are all under attack. Kimmel calls this feeling, or maybe this reaction, 'aggrieved entitlement', meaning 'that sense of entitlement that can no longer be assumed and that is unlikely to be fulfilled'. Entitlement relates to privilege, not deprivation, and, when that privilege is seen as being under attack, the drive is 'to restore that which one feels has been lost'. This experience of loss can be politicized into 'an enraged protectionism, a sense that the threat to "us" is internal, those undeserving others who want to take for themselves what we have rightfully earned'.³ Unlike those who have 'nothing to lose but their chains',⁴ people fighting for privileges have both values and valuables to defend. Calling 'conservatism' what I would prefer to call the 'far right', Corey Robin says, 'conservatism really does speak to and for people who have lost something. It may be a landed estate or the privileges of white skin, the unquestioned authority of a husband or the untrammelled rights of a factory owner'.⁵ Or, I would add, the privileges of the European citizen.

This chapter is about crisis perceptions on the contemporary European anti-Muslim right; perceptions, I will argue, which have much to do with a *politicization of aggrieved entitlement*, a fear, to continue in Houellebecq's line of thought, of becoming indistinguishable from the 'less developed', of being transformed into something unrecognisable where being a male, white, Christian, European as well as Dane, Italian or other nationality is no longer something special, unique or privileged. The main spheres investigated and discussed in this chapter are those of European politicians and intellectuals on the far right. I will mainly focus on the last few decades, although I will also touch upon the history and transformations of the crisis discourse of the far right. It will be my argument that, although much of the discourse is recognizable from earlier periods, and, although I will argue that the thought structure of the crisis discourse of the far right has deep historical roots, modernity has always been in crisis in far right discourse. Crisis is both what modernity is and what it creates. I will also argue that a new intensity and a feeling of an approaching tipping point from crisis to catastrophe has also emerged in the discourse. Although there are important overlaps with both Eastern European and American discourses, this chapter will mainly be about Western Europe. It will concern discourses which have 'core Europe' as its frame of reference, and, for this reason, I limit my study to the discourses produced within Western Europe.

In this chapter, I will explore and discuss *how the fight for threatened privileges is fought out as a crisis discourse*. The chapter operates at three levels. First, we have the immediate and contemporary *event context* of mobilized far right parties and discourse. This exists in a situation of events and developments summarized under the process phenomena of globalization, multiculturalization, immigration, and Europeanization, as well as neoliberalism and a general transformation of the European econ-

omies from production economies to knowledge economies, with all these changes concomitantly disrupting existing patterns and redistributing both possibilities and losses. I will say little about this level and I make no attempt to explain far right electoral appeal or to make sociological claims on the resonance of the anti-Muslim far right message for various groups. Nonetheless, it is an essential part of the contextual background and of the source material of the crisis narratives and the far right ideologues that I do wish to explore. Approaching the subject from an intellectual history viewpoint, the chapter also explores two further levels to the event level described previously, namely, the *contemporary crisis narrative* and its *ideational background conditions*. I wish to highlight both a contemporary crisis narrative which is unfolding in contemporary Europe, and to see how it is informed not only by the events of the day, but also by longer strains of thinking in the history of far right thought. The far right is premised on an understanding of modernity as crisis. This has, in no small measure, to do with a profoundly politicized experience of loss and defeat emanating from the French Revolution onward. The experience of modernity is an endless series of losses and defeats. The historicization of contemporary far right ideological discourses of 'imminent crisis' aim to situate these discourses both in the present and in the actual events taking place, but far more in the realm of ideas and historically grounded matrixes of thought.

I use the term *far right* to highlight a complex and significant shift on the right, namely, what will be termed a 'hardened' defence of democracy and human rights and other open society values. This puts the groups and thinkers that I wish to discuss in opposition to the more traditional 'extreme right' or 'radical right' positions such as racism, fascism and Nazism.⁶ When looking at both the parties, groups and members of the far right, one is struck by the outspoken defence of not only 'Western values', but also 'liberal values'.⁷ Some strategic positioning is most certainly part of it, but, more importantly, it seems to reflect a shift in dominant right-thinking away from explicitly antimodern, antiliberal positions, and into a strained and hedged accommodation with open society values. As described next, the history of the right is one of endless defeats resulting in splits between stalwart but dying-out 'antimoderns' and the reformed 'moderns'. After WWII, the majority of the European right went Western, that is, it adopted a small version of liberal democracy subscribing to a pro-market, pro-Israel,⁸ anti-Communist allegiance to 'the West'. A stalwart minority went anti-Western, against NATO, the EU, the US, continuing to adhere to biological racism, anti-Semitism, and the like. The first position exchanged biological for cultural racism, started to address human rights, identity and cultural rights, and came to defend feminism, gay rights and other hitherto abominations. It is the ideological position of this first group which attracts my interest. Muslims and Islam have become the all-important 'other' of the far right

almost to the exclusion of everyone else. This is why I call the object of investigation the 'anti-Muslim far right'.⁹ They are anti-Muslim, rather than 'merely' anti-Islam or anti-Islamist, in their implicit, but oftentimes also explicit, unwillingness to distinguish between Islam and Muslims, as well as between Islam and Islamism.

We are presently witnessing a resurgence of the far right in Europe, one which articulates and profits from a 'crisis of public power and authority' (see the introduction, in this volume). It is the latest wave of a right-wing narrative of 'modernity as crisis', but it is also historically specific and unique. It links up to and makes reference to a number of European crises from the Siege of Vienna (1529) to the Weimar Republic (1919–1933) and the 1968 student protests, which are all seen as evidence of a European weakness caused by the inability to differentiate between high and low, sublime and banal, right and wrong, and to defend what is of value. An important thesis of this chapter is that, while there are clear ideational continuities running from the reaction to the French Revolution until today in the identification of and the framing and metaphorizing of what is understood as the present value and identity of the crisis, there is also something distinctly new. The new feature in 'far right crisis' thinking is the alignment of a far right discourse with a 'democracy and open society' values narrative, a development which I term a *democratization of reaction* and a *hardening of liberties*. Europe is being invoked as a 'core value reference' while the European institutions are numbered among its enemies. Representative democracy is being celebrated while, at the same time, its practice is being described as aiding and abetting the 'demographic invasion' of foreigners. Freedom of speech is being militantly defended while rights and liberties are denied to groups of citizens and foreigners who are not deemed worthy.

The resurgence of the far right as well as the 'crisis of public power and authority', not least at the EU level as evidenced in the Euro crisis and the 2015 refugee crisis, to which one could add the current climate crisis (although it seems to be of no interest to the far right) may testify to a broader governmental crisis in Europe stemming from what I would term the *normalization of Europe*, meaning the closing of the historical anomaly that Europe has been since the beginning of modernity, with productivity growth, national homogenization and territorially consolidated states, but also with a globally privileged position and self-understanding. Normalization becomes crisis when the normal is seen as a state of indistinction between oneself and those deemed to be inferior. The fear of becoming Lebanon is not just a far right fantasy. Loss of European 'privilege' is evident in the growth of the Chinese economy, the dismissal of Europe in Washington and other capitals, the inability to restart growth and productivity, the gridlocks in the EU, the weak response to the Ukraine crisis, and so on. The 'far right crisis' narrative, in which normalization means loss of privileges and a sense of superiority,

will not resolve the loss of European status and identity, but it does have the potential to change seriously what Europe is, and it will, ironically, if given the chance, accelerate the 'Lebanonization of Europe' by stirring up ethnic hatreds, dividing groups up into different clusters of rights and liberties, and by tribalizing the state. Reinstating lost privileges, compensating for lost birth rights, subdividing people into hierarchies of rights, will be the end of (the idea of) modern Europe.

In what follows, I will start with some historical and theoretical reflections on some major issues related to understanding both the deep trajectories and the identity of the far right, namely, a defence of privileges and a sense of a world adrift. In the second section, I will explore the contemporary 'democratization of reaction', the translation of aggrieved entitlement into a 'battle for democracy' by far right anti-Muslim writers. In the third and final section, I will illustrate the argument with readings of two prominent anti-Muslim texts which demonstrate how a 'far right crisis narrative' works in practice.

THE WORLD IS A BATTLEFIELD

In an article on Friedrich Nietzsche as a reactionary thinker, the French scholar of racism, Pierre-André Taguieff, has outlined what he terms the *anti-modern argument*, which consists of four propositions which I will cite and comment upon. My basic supplement to Taguieff's list is an observation on the 'modernization' of anti-modernity, or, as I will call it below, a 'democratization of reaction'. The first anti-modern proposition is that the 'modern world is in itself a process of *decadence*'. In my reading of the far right, this means that modernity is a perpetual and unfolding crisis, that modernity's core is a self-subversion. Modernity is crisis acceleration, and modernity's core principles are the motor of crisis. The second proposition is that 'decadence is, essentially, *loss* of supreme values, disappearance of absolute norms, whence it follows that no authority can be established and no hierarchy can be respected'. Decadence is, to use the language, a process of losing (cultural, national and religious) privileges. Suicidal modernity is established through ideas which question its own foundations, mock its idols, and tolerate difference. Third, we have decadence manifesting and accelerating 'through the general progression, in every field, of the *discussability* of principles and self-evident truths', which, in Taguieff's reading, is mainly religious ideas, but which, in the present context, is 'values', 'culture' and the 'nation', in its stead. To *discuss* is to question is to disbelieve. Equality is indifference is self-abnegation. And, finally, the 'modern process of decadence is *irreversible* and, because it is abnormal, untypical, or pathological, necessarily tends towards its own end, the fulfilment of a process of erosion and decomposition'.¹⁰ This is where we must add the most, because while the direction

is rightly observed—in that modernity is heading towards disaster—the catastrophe never really materialises. It is decadence, decline, rather than the ultimate collapse. The modernity of their anti-modernity is to interpret decadence as an ongoing, deepening crisis, rather than the ultimate (and redemptive) catastrophe.

The anti-modern argument has modernized and has substituted the ultimate break with the endless downturn. And, most importantly, irreversibility has been substituted for politics, promising a reinstatement of the difference between the worthy and the unworthy, the 'in' and the 'out', friend and enemy, and the like. All the constitutive differences belied by modernity are being pursued as policies and can be countered by resistance. Taguieff teaches us that anti-modernity, or the far right, understands modernity as a process of dissolution, of equalization of qualitative difference: 'Modernity,' the argument goes, 'erects the in-between and the "neither this nor that", the neutral and the mixed, the at-home-nowhere and the at-home-everywhere, the nomad and the cosmopolitan as normative types'.¹¹ Or, to speak with Houellebecq and Kimmel, modernity is the accelerating (threat of) reducing the differences between immigrant and citizen, Christian and Muslim, man and woman, first and third world.

Briefly historicizing this 'decadence fantasy' reading of the right, we can locate its first and constitutive expression in the Counter-Enlightenment understanding of the *philosophes* as an anti-Christian conspiracy. This had strong and path-dependent consequences for the right's understanding of the world from thereafter, always reading the world as being dominated by aggressive and always nearly triumphant forces of darkness. The nineteenth century witnessed the emergence of Communism as the internal enemy abated by weak liberals, only to be supplemented by an external enemy after the Russian Revolution. The twenty-first century saw a shift in character but a remarkable continuance of thought structure, when Communism was replaced with Islam, local Communists with Muslim immigrants, and Moscow with the Middle East. The inner enemy is now doubled as an alliance between the liberal do-gooders ('halal-hippies') and the Muslims; an alliance named by two Danish far right anti-Muslim agitators as 'the naïvists and the islamists'.¹² In the conspiratorial tract, *Eurabia*, of 2005, which alleges a secret cabal between European and Middle East leaders on the islamification of Europe (another instance of Houellebecq's third-worldification), the story line is one of:

Europe's evolution from a Judeo-Christian civilization, with important post-Enlightenment secular elements, into a post-Judeo-Christian civilization that is subservient to the ideology of *jihad* and the Islamic powers that propagate it. The new European civilization in the making can be called a 'civilization of dhimmitude'. The term dhimmitude comes from the Arabic word '*dhimmi*'. It refers to subjugated, non-Muslim

individuals or people that accept the restrictive and humiliating subordination to an ascendant Islamic power to avoid enslavement and death.¹³

The Europeans are weak, subservient peoples, who trade life for freedom and no longer believe in anything, whereas the Muslims are ascendant, conquering, marching.

In the current far right anti-Muslim agitation, the war narrative is dominant, making even the most trivial objects—such as a Christmas tree or a shower curtain—into all-important instances of invasion, islamization. The war is portrayed as ‘another phase of a very old war’ on the far right blog titled ‘Gates of Vienna’. It is a ‘very old war’, ‘a long war’, ‘the third world war’ or ‘the third Turkish siege’ as the Austrian leader of the *FPÖ*, Heinz-Christian Strache, has termed it,¹⁴ turning historical references into an eternal condition of conflictuality. These and other suchlike phrases are symptomatic of a thinking that views the world as being constituted both by and through war and conflict.

The ‘invasion’ can only take place because the West has lost its will to survive. This is another oft-repeated trope, one which I will illustrate with just one example.¹⁵ In June 1978, the exiled Russian writer Aleksandr Solzhenitsyn gave the opening address at Harvard University. While the text itself, ‘A World Split Apart’, is one long antimodernist cry, almost a reactionary rant, it also summarizes core notions of a far right crisis discourse. Western democracy, Solzhenitsyn claims, is unable to withstand the evil of communism and the degeneracy caused by its own values. The East and the West are but two symptoms of the same materialist, godless celebration of man, but while the East is gaining spiritual strength through suffering, Western man is progressively weakening through legalism, the free press, democratic politics, individual freedom, and material well-being, manifesting itself most prominently in a lack of the will to defend itself: ‘A fact which cannot be disputed is the weakening of human personality in the West while in the East it has become firmer and stronger’.¹⁶

There is, Solzhenitsyn observes, a ‘decline in courage’, ‘a lack of manhood’ causing the West to implode: ‘Must one point out that from ancient times a decline in courage has been considered the first symptom of the end?’¹⁷ The values of the West are what doom it against forces adhering to evil: ‘To defend oneself, one must also be ready to die; there is little such readiness in a society raised in the cult of material well-being.’¹⁸

Solzhenitsyn takes his place among the long list of thinkers who have portrayed the modern West as weak and unable to defend itself, risking its existence in the face of determined, non-Western foes. The fear of the inherent irresponsibility of liberal democracy when faced with existential threats has been seen in a number of different historical expressions, most notably in the Weimar Republic (which is also a constantly evoked

'proof'), the confrontation with totalitarianism in WWII and the Cold War, and now in what is perceived by some as a new totalitarian threat, Islamism, which is portrayed as both an external and internal threat. The claim now is simply that the liberal democratic preference for discussion, tolerance and proceduralism exposes Western countries to an existential threat in the evident shape of terrorism and the more hidden threat of a sneaking islamization.

The right fights battles of threatened privileges. If there was something akin to an explicit Enlightenment project, it was the abolition of privileges, which, in the words of Abbé Sieyès in 1788, 'are unjust, odious, and contrary to the supreme end of every political society'.¹⁹ Chris Thornhill's pertinent observation that modernity 'depended upon rights-mediated inclusionary processes' replacing privileges (see chapter 7 in this volume), goes a long way towards explaining the foundational 'modernity as crisis' and its opting for various privilege arguments in opposition to a fully-fledged modern project of equal rights to all. If anything, the political right is characterized by the fight for threatened privileges, whether it is the aristocratic privileges of the conservative right, the religious privileges of the antiseccular right, or the compensatory privileges on the free market right. Rights and entitlements are rarely privileges in the eyes of the beholder, but 'the way things have always been'. They are the 'natural order of things', normality, or, when questioned, one's birth right. Privileges, at least in a postfeudal era, were hidden in normalcy. Only when challenged by those not included, who call them unmerited privileges wrongfully reserved for the few, do they get verbalized.

The major difficulty for the right is to preserve privileges in an era of equality and democracy. One major answer to this difficulty has been to include the less fortunate in the ranks of the privileged. Modern biological racism developed in no small measure as an attempt to include the white underclass among the privileged. 'Making privilege palatable to the masses,' Corey Robin writes, 'is a permanent project of conservatism', adding that each generation of conservatives 'must tailor that project to fit the contour of its times.'²⁰ When losing battles for privileges, one option is that of nostalgic reaction. The other is the reconstruction of privilege under a different name, for instance, the preservation of property in the name of human rights or the preservation of power in the name of representative democracy. And it is the attempts at the reconstruction of cultural and national privileges on the contemporary far right which will be the focus of the rest of this chapter.

THE DEMOCRATIZATION OF REACTION

The right, and the far right in particular, is a 'party of losers'. Put slightly less polemically, it is the 'party of loss'. The development in right think-

ing has very much to do with accommodating what they recently thought and defined themselves *against*. And more than the left, who think of themselves as the protectors of those who are 'losing out', it has been the right which has thematized the sense of loss, not least the loss of privileges and status, but also the loss of certainty and truth. This accommodation is evident from any brief look at what the right has fought against and is now supporting, including: secularism, human rights, evolution, the sovereign rights of colonies, democracy, as well as equality between sexes, races and classes, to name but a few of the most significant ones. Each battle lost against modern society has resulted in a split on the right between the *few* adhering to the old values and the *many* finding an accommodation with the winning side, finding a right language within what used to be external and foreign to its ideology.

Importantly, such accommodation is not assimilation. Values and principles are adopted and accepted in redefined forms, mostly in hedged, minimalized and guarded forms. This is what I call a 'hardening of liberties', their redefinition in the form that Edmund Burke called 'a manly, moral, regulated liberty' *versus* excessive, uncontrollable 'French liberty'.²¹ To understand this hardening, we should observe the remarkable shift in perspective that has taken place in the last decade in the far right description of the values of open society. In the last decades of the twentieth century, these values were often portrayed as problematical, suicidal even. The values and ideals of open society, mobility, openness, conversation, tolerance, human rights, rule of law, international conventions and suchlike, were cast as problems which jeopardize our very existence by opening up European countries to mass immigration and by disallowing robust action against threats. The open society values were not described as positives or strengths, but rather as weaknesses, expressions of surrender and appeasement.

This is evident in the rambling tract of the Italian writer Oriana Fallaci, *The Rage and the Pride*, written in 2002, where one reads:

The more a society is an open and democratic society, the more it is exposed to terrorism. The more a nation is free, the more it risks the massacres which . . . have taken place for so many years in Italy and in the rest of Europe. . . . As blinded as you are by the myopia and the stupidity of the Politically Correct, you don't realize or don't want to realize that a war of religion is being carried out.²²

Politically correct being one of the preferred terms with which to smear the open society values as inauthentic, oppressive and dangerous. Open society was both in and of itself an accelerating crisis.

However, another prominent discourse has come into existence, or, perhaps one should say instead, a doubling of critical discourse has emerged, whereby critique is still directed at a supposedly weak and defeatist version of open society values, but is now supplemented by a

positive and affirming adherence to (most of) those same values. They have been turned from problems into weapons. In 2004, Nick Griffin, the leader of the British National Party, a party which has housed Nazis, racists and anti-Semites for decades, said: 'You can have Muslim fundamentalism *or* democracy. You can have Muslim fundamentalism *or* women's rights. You can have Muslim fundamentalism *or* peace. But you can't have both'.²³

Feminism, gay rights, freedom of speech, tolerance even, are now repositioned as positive values against the 'medieval values' of Muslims (and, by default, also against the left allegedly not defending such values against the 'Muslim threat'). These are now hardened concepts (see McCormick, chapter 5 in this volume). *Liberality* does not mean critique and change of what exists, but, rather, its affirmation and continuation. Rather than positioning itself against the prominent and dominating values of society, the far right has now opted to confirm them by redefining them.

In a comment on artists and culture, the then leader of the Danish People's Party, Pia Kjaersgaard, said: 'It is great to be controversial.' The artists in question, formerly accused of being provocative and disturbing, are now repositioned as ossified parts of 'the system'. It is politicians like her who are the real provocateurs: '[anyone] who dares to step forward and say that faeces in a glass, stuffed puppies and cut up horses—that has nothing to do with art'.²⁴ The status as controversial is now a positive, not as a challenge of normality and the *petit bourgeois*, but as their confirmation. The positively 'controversial' is the one challenging 'political correctness', who says what everyone presumably thinks, who speaks for the silent majority, who talks 'plain common sense', who says what others consider 'racist'. Liberty is rebranded as the right, the incontestable privilege, of the majority to say 'no'—or something a lot worse—to the minority. When publishing the Danish Muhammad cartoons in 2005, it was with the disclaimer that the Muslim minority should learn to put up with (accept and tolerate) 'scorn, mockery and ridicule'.

Freedom of speech is the most prominent example of this turn in discourse. In a commentary on the Swedish artist Dan Park, a Danish philosophical think tank, Centre for Vild Analyse, has interpreted the 'free speech' turn in far right agitation, as the cry: 'It is fucking not possible to be a white racist anymore!' Dan Park and all those defending free speech as the right to say racist things see themselves as a persecuted minority who no longer 'can say what you really feel if you are a white male'.²⁵ The racism and obscenities pouring out from under the cover of 'free speech' is aggrieved entitlement talking: 'They are invading our country. And I'm not allowed to speak up. Fuck it. And fuck them.' White privilege is eroding, so it feels for some. All that is left of it is white talk, and any accusation of racism becomes a confirmation that white

privilege is truly in danger. The accusation of racism is turned into an indictment of the people for whom 'the racist' speaks.

This hardening is the first dimension of the 'democratization of reaction'. The other is populism, which serves to link democracy and equality with hierarchy and exclusion. An essential part of 'right-wing populism is a democratic claim: right-wing populism today can easily identify with "we, the people" of the *bourgeois* revolutions—as long as "the people" are seen to be distinctly different from other peoples'.²⁶ Populism is appealing to the masses in the service of inequality by including 'the hardworking ordinary person' within the ranks of the privileged, or, more precisely, within the ranks of those with *threatened* privileges. By turning the nation into the principle and source of privilege, populism becomes a robust, even aggressive, confirmation of democratic credentials, and thereby an instrumentalization of democracy for reactionary purposes. Populism allows the far right to speak the universalistic language of democracy while defending privilege.

Populism is also a crisis discourse. It is dependent upon a civil war-like division between a treasonous élite and a 'pure' people. Politics is war, and the crisis identified by far right populism is a war waged against the people by an élite using subnational or nonnational groups as shock troops. The doubling of the nation in two, the authentic, hardworking, honest, decent, historically grounded, *versus* the rootless, corrupt and treasonous, is really a singularization of 'the nation'. It is not a coexistence, but an occupation. As Jan-Werner Müller remarks, the 'opposite of populism is not élitism, but pluralism'.²⁷ The conception of 'a one true and undivided people' is an antiplural and antiliberal idea. It enacts what Ivan Krastev, speaking of the Hungarian government of Viktor Orbán, has called a 'democratic illiberalism', which does not, as a classical far right, 'represent a challenge to democracy, understood as free elections or the rule of the majority. . . . What they oppose is the representative nature of modern democracies, the protection of the rights of minorities, and the constraints to the sovereignty of the people'.²⁸ Democratic representation, the populists says, is broken, subverted, ridiculed, while populism is the promise of the restoration of the primacy of *the people*. The existing democracy is undemocratic. It is, in actual fact, an ongoing attack on the people. The existing democracy is 'decadence in the making'; it is indistinction accelerated; it is the inability to separate foreigners from citizens, Lebanon from Europe.

In a move earlier identified by Hannah Arendt, the state and democracy are transformed 'from an instrument of law into an instrument of the nation'.²⁹ Human rights are now rephrased not as universal, but as *national*, rights; rights that we have as citizens, not as humans. They are defined not as individual protections against the state, but as the state's protection of national privileges. Human rights are repositioned as a defence of national privilege. It allows a transgression of both the rule of

law and international conventions by reference to those higher principles of national survival and popular sovereignty. Law and order does not have to abide by the rule of law. Populism allows for a 'democratic' protest against the checks and balances which disallow the free expression of 'the people's will'.

THE RHETORICS OF REACTION

In this third and final section, I want to offer short readings of two significant, but also quite different, versions of 'the rhetoric of anti-Muslim reaction'.³⁰ What they demonstrate is how urgent the crisis is thought to be and what an all-out far right crisis narrative looks like. We start with the 'moderate far right', if such a thing exists, and with a journalistic piece, before turning to a more extreme version of the same basic story line from a controversial and powerful politician.

Londonistan

Starting out on the left, the British journalist Melanie Phillips is now firmly located on the right (denying climate change, which seems to be a purely right-wing thing to do), and, in 2006, she published *Londonistan: How Britain Has Created a Terror State Within*. 'Londonistan' is both a place, the third-worldification of London, and 'a state of mind' with 'deep roots inside British culture'. It has come about through two 'lethal developments'. The first is 'the arrival in Britain of large number of Muslims . . . radicalized by a political agenda promoting the conquest and Islamization of the West'.³¹ The second development is the, by now familiar, theme of the enabling inner enemy. Britain has become 'a moral and philosophical vacuum that was ripe for colonization by predatory Islamism'. The former so proud, manly and self-confident 'Britain has become a decadent society, weakened by alarming tendencies towards social and cultural suicide. Turning upon itself, it has progressively attacked or undermined the values, laws and traditions that make it a nation, creating a space that in turn has been exploited by radical Islamism'.³²

The idea of a moral vacuum is generalized to a 'fundamental loss of national self-belief' and to 'a debauched and disorderly culture of instant gratification, with disintegrating families, feral children and violence, squalor and vulgarity on the streets'.³³ Violence and disorder spring from any relaxation of repression. Decadence theorists have always been extremely adept at collecting 'evidence' and turning that 'occasional feeling that everyone has of a world adrift' into a system: 'At an abstract level, such moral relativism destroyed the notion of objectivity, so that truth and lies were stood on their heads'.³⁴ This is decadence as indistinction. It

is, in her account, not only Muslims, but also 'militant gays, feminists or "antiracists"', who push this policy of nonpreference. While the élites have 'allowed and even encouraged Londonistan to develop', or, maybe, have just been 'sleepwalking into the arms of the enemy',³⁵ the result has been that Britain 'has drastically weakened from within' as a result of the multiculturalist ideology which 'holds that Britain is now made up of many cultures that are all equal and therefore have to be treated in an identical fashion'. It 'promotes the radical deconstruction of majority culture, the idea of the nation itself and the values of Western democracy—in particular, its understanding of morality and truth'.³⁶ What she means by the latter is not clear—what understanding of morality and truth does democracy have?—but its meaning is clear, namely, democracy as *our* nation, not yours, and *us* as non-Muslims, non-gay, non-feminists, non-critics of majority power. General uneasiness or confusion is given direction and address. The sense of drift, or of insecurity, is the result of the unequal being treated equal, of values overturned, of preference outlawed.

The answer is to be found in a hardening of values, 'absolute consistency', 'moral integrity' and 'strength of belief in values',³⁷ which apparently can only come about by denying others the right to their beliefs. A 'properly motivated nation would set about the remoralization and reculturation of Britain by restating the primacy of British culture and citizenship'. It would 'halt the drift towards social suicide by ending the culture of equal entitlement'.³⁸ Privilege and undeserved entitlements are what the *others* are receiving. Our birth right is what we want.

The Fall of Rome, Again

On 25 March 2011, the Dutch politician and leader of *Partij voor de Vrijheid* (the Freedom Party) Geert Wilders gave a talk in Rome on the failures of multiculturalism.³⁹ He begins by pitting a shared European 'Judeo-Christian culture' versus multiculturalism, which is 'a specific political ideology . . . that all cultures are equal'. Cultures are, however, not equal, Wilders says, and it is wrong to disallow the state to promote and to prefer one culture over others. Wilders is advocating a privileging of the Judeo-Christian culture against 'the multiculturalists [who] try to destroy our roots'. Multiculturalism teaches a policy of tolerance which is, in actual fact, indifference, if not self-loathing, saying to immigrants: 'You are free to behave contrary to our norms and values. Because your norms and values are just as good, perhaps even better, than ours.' Moving on to explain this alleged multicultural policy, he narrates a history of the Fall of Rome into the hands of barbarians as a metaphor for contemporary Europe: 'Rome fell because it had suffered a loss of belief in its own civilization. It had lost the will to stand up and fight for survival.'

This is Solzhenitsyn updated. Rome had, to put it like this, lost sight of the world as an endless battle, because it 'did not perceive the immigration of Barbarians as a threat until it was too late'. By not believing in its own superiority (endlessly reiterated in this kind of discourse as the 'will to war') 'Rome was sacked'. Today, the same plays out between a multiculturalism which 'has made us so tolerant that we tolerate the intolerant' who is an opponent 'keenly aware of our weakness'. A common theme running through radical right discourse is the 'will power of the other', their endless drive for domination, their understanding of real politics, whether that other is a *philosophie*, a communist or an Islamist.

The 'barbarian hordes' are now invading a defenceless Europe which is 'islamizing at a rapid pace' facilitated by a 'multiculturalist Left' whose exponents 'are aiming for a repetition of the fall of Rome and want to use exactly the same methods'. This 'historical explanation' provides a narrative of betrayal. The barbarians are always at the gate. Vigilance—and force—are always needed. Someone is always letting the enemy in, and they are doing this because they are unable or unwilling to differentiate and discriminate:

Multiculturalists consider Islam as being equal to our own culture. Sharia law or democracy? Islam or freedom? It doesn't really matter to them. But it does matter to us. The entire leftist elite is guilty of practicing cultural relativism. Universities, churches, trade unions, the media, politicians. They are all betraying our hard-won liberties.

This development 'has to some extent been deliberately planned'. The powers that be 'conduct an immigration policy aimed at the deracination of Europe. . . . It willingly sacrifices its own people to its political goal, without any consideration for the people involved'. Multiculturalism is 'a repudiation of Europe's heritages and freedoms. It weakens the West day by day. It leads to self-censorship of the media and academia, the collapse of the education system, the emasculation of the churches, the subversion of the nation-state, the breakdown of our free society'.

Given that it is being planned, it can be opposed and countered. It 'is time for change. We must make haste. Time is running out'. The proposals put forward at the end of the talk, freedom of speech, the end to cultural relativism, and a stop for islamization, relates to the 'hardening of liberties' described above. Or, more precisely, to the reinstatement of privileges, by which cultural preference and discrimination are rephrased as democracy and liberty. This makes Geert Wilders end his talk thus: 'I am confident that if we can safeguard freedom of speech and democracy, our civilisation will be able to survive. Europe will not fall. We, Europe's patriots, will not allow it'.

CONCLUSION

'For the right,' James Davis writes in an article on right-wing catastrophism, 'the political advancement of previously subjugated groups and classes of people represents an immediate threat to privilege and status', and ultimately constitutes 'an absolute threat to the existence of the ruling class'.⁴⁰ Taking out some of the Marxist rhetoric in this quotation, and substituting 'ruling class' with 'the nation', 'the people', 'man' or 'hard-working folks', is what I have tried to demonstrate in this chapter: a far right vision of society imbued with a crisis-ridden worldview which identifies the forces of destruction with the emergence and voice of the unprivileged, in this case, the Muslims. The leader of the French party, Front National, Marine Le Pen, has summarized this thinking when she stated that: 'if we go on like this, Europe will no longer be Europe [but] will turn into an Islamic Republic. We are at a turning-point, and if we don't protect our civilisation it will disappear'.⁴¹

Reinhart Koselleck and Janet Roitman have demonstrated how crisis in the eighteenth century became a free-floating concept which was able to attach itself to all kinds of events and developments. It became a historico-philosophical concept which was able to diagnose the present as a time of judgement and provide guidelines for the future. Crisis is both diagnostic and prescriptive.⁴² While this seems convincing, it may be relevant to observe how the far right, being both part of and in opposition to modernity, subscribes to two crisis perceptions, the one epochal, the other pointillist, the one embedded in modernity as such, the other diagnosing the present. While crisis, for the far right, is normality, they also subscribe to another temporal notion, as evidenced in the quotation by Le Pen, the notion of a turning- or tipping- point. There is, as David Runciman says, 'a fundamental ambiguity' between 'the idea of crisis as an acute moment of choice', vote right or Europe disappears, and 'crisis as an ongoing state of uncertainty or potential peril' as in modernity is crisis (Runciman, chapter 2 in this volume). If catastrophe is the fulfilment and culmination of crisis, then it is always present as the near future, as the dark possibility of extrapolating the present into the future. But here a distinctly modern feature of the far right emerges, namely, that it is not destiny, but choice which determines the future. The spectre being conjured is summarized in the title *Deutschland schafft sich ab* (Germany Is Abolishing Itself) by the controversial then-executive in the German Central Bank, Thilo Sarrazin, and subtitled 'How We're Jeopardising Our Country', a temporal notion of crisis in process.⁴³ But the thing to notice is that it is understood as a suicide perpetrated by the inner enemy unleashing forces of decay (immigration) and destruction (immigrants). And it is a development to be countered by politics.

One highly prominent feature of far right rhetoric can be summed up by a slogan from the Danish People's Party: 'Politics Matter', meaning

basically: ‘You’re right to feel the centre dissolving, to feel alienated in and from your own country, but this is the result of identifiable people, of decisions made, of treasons committed, and those decisions and developments are all—for a while yet—reversible. It is up to you.’ Crisis is instigated. Crisis can be countered—what is not articulated here but deeply embedded in far right thinking, is that ‘modernity as crisis’ is a given that cannot be countered. Political action can slow down degeneracy and halt immediate betrayal, but crisis is permanent.

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FOURTEEN

Conclusions and Perspectives

The Reconstitution of Europe

Poul F. Kjaer and Niklas Olsen

The Europe of today is not Weimar. Substantial structural and cultural differences exist between the Europe of the interwar period and today's Europe. Nonetheless, this book contends that Weimar is not as far away as we might hope, and as we would have thought only a few years ago.

The implosion of Weimar Germany emerged *after* German society had undergone several consecutive shocks: the defeat in WWI, the Treaty of Versailles, the hyperinflation from 1921 to 1924, the Allied occupation of the Rhineland between 1923 and 1925, the repercussions of the Great Depression and the breakdown of the international economic system from 1929 onward. These developments unfolded in a context characterized by a highly dysfunctional political and legal system, and by strong ideologically-charged challenges to both the overall legitimacy *and* the everyday politics of the Weimar Republic. Substantial segments of German society located both on the right and on the left side of the political spectrum, as well as core elements of its cultural, economic, military and political élites became engaged in activities which, step by step, eroded the normative integrity and functional setup of the democratic Weimar state. Against this background, one might speculate about potential further developments in Europe today. What could happen if the economic shock of the financial crisis and the subsequent Euro crisis were followed by another earthquake, or series of earthquakes, of the same magnitude as the Western-centred but nonetheless global economic system crisis that had its inception in 2007? Would the European integration project,

including the Euro, be able to survive another major shock, either of an economic nature, in the form of increasingly uncontrollable migration, as is the case at the time of this writing, or in the shape of a serious security threat, for example, triggered by current developments in the Middle East or in Russia? Would national democracies and the transnational institutional architecture, including its key institutions and their normative fundamentals, be able to withstand another push by 'illiberal' forces or increased pressure emerging from popular discontent?

A key insight of the book is that such breakdowns tend to emerge upon the basis of processes which unfold and gain strength over long timespans. Deep-seated societal crisis rarely emerge because a few unwise decisions are made by policymakers in otherwise well-functioning societies. Instead, they emerge as slow burning crises unfolding over years, even decades, before they gain strength and become fast burning and visible. This often happens in a sudden and complex dialectic between a multitude of coexisting crises, all of which are characterized by diverse characteristics in terms of duration, speed and intensity that is sparked and becomes reinforced due to some contingent and unpredictable reason.¹ In Europe, as well as the rest of the Western world, slow burning and coexisting fires have been burning for quite some time now.

Ideologically, fundamental challenges to the setup of democracy and the rule of law as established in Western Europe in the immediate post-WWII period have emerged in several disguises. The neoliberal, or structural liberalist,² discourse slowly gained ground from the 1970s onward; a discourse that sought to disassociate economic policy making from democracy through an emphasis on the 'objective laws' of the economy, aiming, first of all, at efficiency and growth.³ This move has, in many settings, implied an increased (re)privatization of segments of society which had, till that time, been part of the public domain, the emergence of new grey zones of dysfunctionality between the public and private, as well as a reemergence of paternalistic forms of interaction.⁴ Moreover, radical right movements emphasizing cultural and ethnic purity have emerged since the 1970s. Until recently, these movements were not taken seriously in most European settings, and the likelihood of them gaining substantial influence was seen as remote. These expectations have proved to be wrong. Not only have radical right-wing movements gained power in states such as Hungary and Poland, they have also grown into potential governing parties in a string of other European states, including the Scandinavian welfare states. Finally, left-wing populism as well as both left-wing and right-wing nationalist movements striving for the creation of new states in places such as Catalonia, Flanders and Scotland have emerged throughout Europe. The combinations of these different movements potentially provide a toxic cocktail of 'ungovernability'⁵ which threatens to undermine any systematic attempt to respond politically to the challenges of European society. This is especially the case in the

southern parts of Europe, such as Greece, Italy and Spain, as well as in many postcommunist countries, where the formal setups and requirements in relation to the rule of law and democracy have always been accompanied by the continued existence of strong informal clientelistic and paternalistic (and often also kleptocratic) networks capable of circumventing formal rules and procedures, thereby factually short-circuiting the day to day operations of the rule of law. Here, too, Weimar might prove instructive as a point of reference. Analysing the causes for the collapse of Weimar Germany, Franz L. Neumann identified the combination of radical political movements and such clientelistic and paternalistic networks factually rendering the state dysfunctional as a toxic cocktail that ultimately caused its collapse.⁶

These ideological challenges to liberal democracy and the rule of law were formed in and by societal contexts marked by profound structural transformations. Just as the interwar period was marked by fundamental technologically induced economic and social transformations related to the increased introduction of Fordism, modern business management and the embryonic emergence of mass consumerism, the European economy has gone through fundamental transformations due to processes of de-industrialization which have taken place since the 1970s. This development has been driven forward by a combination of technological developments, increased economic globalization and massive increases in the educational level of the average citizen. Asymmetric effects have been the consequence, in so far as the composition of socioeconomic 'winners' and 'losers' has fundamentally altered. On the one hand, one segment of society has better possibilities and greater resources than ever, while another segment is faced with increasing insecurity and a loss of status and privileges, thereby increasing the strain on societal coherency. Although they have not avoided some segments of their populations gaining and others losing, some states have responded successfully to such challenges adapting their welfare, labour market and education systems accordingly, a move which, however, has implied a turn from the 'welfare state' to the 'competition state' as the central *raison d'être* of late modern European states.⁷ In 1989, Gøsta Esping-Andersen could still assume that decommodification, the immunization of social relations from dependency on the market, was the central objective of welfare state provisions.⁸ Since then, state-based provisions in relation to areas such as education, health and social security have, in many European settings, been increasingly restructured into frameworks aimed at increasing the alignment of citizens with the market.⁹ This development has furthermore implied an expansion in the bureaucratization of social relationships. Over the past decades, the most advanced states in Europe have built up unprecedented capacities of micromanagement which no state has ever possessed before. The post-WWII Western European welfare states possessed the capacity to install generic unemployment schemes and other general wel-

fare provisions but the most advanced European states today possesses the capacity to develop individual action plans for every single unemployed person, to interfere in the nutritional habits of individuals, and to regulate working environments down to the smallest detail.¹⁰ Thus, it is not only the 'losers', but *all* segments of society that feel the pressure of the increased acceleration of societal developments through ever shorter temporal rhythms which are steadily increasing the demand for constant adaptation and flexibility thereby providing the basis for individualized motivational crises to emerge as a central symptom of today's society.¹¹ Other states, such as Italy and Portugal, have, in contrast, been marked by long periods of virtual standstill in their state-driven societal developments, which has led to an increased erosion of the institutional grid holding these societies together. In some European settings, a new generation is therefore channelling their disappointed socioeconomic expectations, as measured against the well-being of their parents' generation, into political movements which are challenging or have the potential to challenge the institutions of the rule of law and representative democracy.

But how can Europe possibly emerge from its current crisis? How can the region regain legitimate and stable foundations of public power and authority? To answer this question, a view on Europe's historical place in the modern World Order and on the origins of the European integration project might be instructive.

From the mid-nineteenth century to the outbreak of WWI, the world experienced an unprecedented wave of globalization.¹² One of the many consequences of this development was that the US and Japan emerged as central political, economic and military factors, thereby initiating the breakdown of the Eurocentric world from August 1914 onward. The interwar period therefore became marked by a highly unstable and weak institutional transnational architecture. The leading European powers were no longer in a position to stabilize the global system on their own, while the US, in particular, did not take up a role that adequately reflected its importance in the global economy and global affairs in general. This first happened after WWII where the US decisively put its weight behind the construction of a new order through Bretton Woods, NATO and a host of other international organizations. From the 1970s onward, another wave of globalization emerged through the modernization of a string of East Asian countries, the opening of China, and the breakdown of the Soviet Empire. One of many consequences of this development is that the Western-centric global institutional architecture no longer corresponds to the reality against which it is oriented. Once again, the world is at a stage where a fundamental discrepancy exists between the location and structure of global developments and the institutional frameworks aimed at stabilising the world.¹³ As such, the 'international community' might face an increasing strain on its capacity to respond to fundamental

crises. The world economy avoided a complete breakdown in the wake of the financial crisis of 2007, but even in this respect whether the global architecture will be able to survive another shock remains doubtful.

In Europe, a particular variant of this development has emerged due to the rapid evolution of the EU in recent decades. The integration project has, as Jan-Werner Müller points out in his contribution, been driven forward as an institutional response to societal transformations and sudden crises. The internal logic of the integration project has furthermore been one of 'functional spillover', in so far as integration in one policy area made subsequent integration initiatives necessary. The integration project advanced through controlled 'mini-crises' in which integration in one area rendered purely national solutions in neighbouring policy areas increasingly dysfunctional and unattainable thereby creating a need for integration in these areas as well. For a long time, this worked very well. The launch of the internal market in the 1980s, for example, led to a spillover into areas such as consumer protection, food safety and environmental policy. The launch in the 1990s of the monetary union without a corresponding fiscal union and the creation of the borderless EU through Schengen without a corresponding common migration and refugee policy also followed the logic of functional spillover. However, in both cases, the result has not been a controllable 'mini-crisis'. Instead, both integration initiatives have been contributing factors to the unleashing of fully-fledged and potentially uncontrollable crises which are potentially life-threatening for the Union itself. EU integration might have overreached itself, due to advancing too fast and producing severe unintended consequences, just as the *modus operandi* upon which the integration project has relied until now no longer seems adequate to the challenges facing Europe today.¹⁴ When the Berlin Wall came down in 1989 and Germany was united in 1990, Europe was at a crossroads, either leaping back into nation state competition or advancing the integration project. Together with the EU enlargements in 2004, 2007 and 2013, the monetary union and Schengen provided the answers. But these responses have unleashed problems of their own and proven to be insufficient with regard to the question of the stability of Europe. A final institutional response to the earthquake unleashed by the collapse of the Soviet Empire has not yet been developed. As such, bold moves aimed at recasting the Union, its functions and objectives, are needed.

In more general terms, the ongoing crisis can be understood as reflecting a discrepancy between the structural setup of the social processes which make up society and the institutionalized mechanisms in place aimed at normatively stabilising these social processes.¹⁵ The world has changed, but our institutions have not kept pace. From the architecture of global governance to the EU and European states, a fundamental need can be observed to recast and reconstitute the basic institutional architecture through which norm-based societal coherency is established. Not only is

the EU itself, and the global architecture within which it operates, facing a potentially life threatening crisis but deep-seated constitutional conflicts and crises can, in different ways and with different degrees of intensity, be observed in relation to a whole range of European states, from Belgium, Hungary, and Poland, to Italy, Spain and the UK.

The last time (Western) Europe and the West faced a constitutional movement was in the immediate post-WWII years and the result was a *dual and simultaneous* transnational and national constitutional process. Strongly backed by the resources and power of the US, an intense level of transnational 'founding acts' occurred from Bretton Woods in 1944, through the establishment of the UN in 1945, and the GATT and OEEC in 1947 (and with the latter the Marshall Plan running from 1948 to 1952) culminating with the launch of the European integration process with the establishment of the ECSC in 1952. Furthermore, from 1945 to 1953, almost all the European states that had not succumbed to Soviet control, gave themselves new, or substantially revised, constitutions, and launched extensive economic and welfare reforms. All governments (except the Danish) of the states occupied by National Socialist Germany were exiled in London during WWII, and the plans for this reconstitution of Europe were, to a large extent, developed in this highly transnational setting.¹⁶ Intense cross-national exchanges unfolded both during and in the aftermath of the war, leading to a high level of 'constitutional borrowing'. One result of this was that five of the six states which came to act as the founding states of the ECSC inscribed a commitment to international and European cooperation and integration in their constitutions (the only exception was Luxembourg). Thus, Europe responded to the catastrophe which followed the breakdown of Weimar Germany by reconstituting itself nationally as well as transnationally. As such, one might speak of a multifaceted dual (trans)national constitutional process through which European nation states as well as numerous but intertwined transnational frameworks were simultaneously and successfully (re)constituted.¹⁷

Current developments in Europe are far away from the atrocities of WWII and the Holocaust. But Europe is nonetheless faced with the challenge of reconstituting itself, and, this time around, Europe will have to pursue this process without American guardianship and in a move that includes those parts of Europe which still are suffering from the repercussions of communist rule. The question remains as to whether Europe has learned from its past and is capable of initiating such a process before a real catastrophe strikes. The future is contingent and unknown, and, as such, no firm forecasts can be made concerning the Europe to come. 'Weimar' is, however, a powerful metaphor for one possible path which Europe, in a worst case scenario, might follow, unless it faces up to ongoing challenges and engages in a fundamental recasting of its constitutional architecture.

NOTES

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3. See William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (London: Sage, 2014).

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