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Statehood: the Essential Prerequisite for Law and Liberty

- **ABSTRACT:** *The attempt to subject Poland and Hungary to procedures under EU law for allegedly not respecting European values has its roots both in the supranational nature of the EU project and also in the differing concepts of the nation in the Eastern and Western halves of the continent. The hegemonic West is deeply post-modern while former Communist states have retained some faith in the nation. Globalisation generally, and the EU project in particular, are based on functionalist assumptions whose origins lie in the early 19th century, yet these fail to understand the eminently political nature of law: all jurisdictions are rooted in society and the state and it is the role of government to adjudicate between the competing claims of citizens. This makes it very difficult, impossible even, to formulate universal rights since their formulation and application depend on interpretation, i.e. on jurisdiction, and therefore on the sovereignty of the ultimate decision-maker.*

- **KEYWORDS:** statehood, sovereignty, Hungary, Poland, law, liberty.

In 1962, when a constitutional reform introduced direct election by universal suffrage for the office of president of the French Republic, the incumbent head of state, Charles de Gaulle, turned to his minister of justice, the eminent jurist, Jean Foyer, who had helped draw up the constitution of the 5th Republic four years earlier, and said, ‘Remember this: first there is France, then there is the state, and then, to the extent that the major interests of these two are protected, there is the law.’²

De Gaulle is well known for having restored French sovereignty after the twin humiliations of defeat and collaboration. He is also known for having almost mystically embodied France³ in his own person during the war: when Britain recognised Free

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2 Foyer, 2006, p. 7.

3 Bouthillon, 1995.



France on 28 June 1940 as the true representative of the country⁴, it was essentially a one-man show. But the fact that this remark about the correct relationship between the state and law was made in the context of establishing a direct national election for the head of state indicates that there is a link between De Gaulle's hierarchy of norms and democracy. Law is based on, and flows from, the state and the state is in turn based on the country or the nation, i.e. its territory and people. Law is not somehow above the state or prior to it: on the contrary, it requires the state, which in turn requires the nation, in order to have force.

De Gaulle's dictum is helpful in the context of the current conflict between the Brussels institutions and various EU member states in Central Europe, notably Poland and Hungary against which Article 7 proceedings are under way. That conflict pits two levels of jurisdiction against one another, the national and the supranational as the Brussels institutions seek to invert De Gaulle's hierarchy, putting 'the law' above both state and country. The conflict is the logical culmination of at least two decades in which supranational government has grown in size and power, in Europe and at around the world. The proliferation of organisations like the International Criminal Court or the World Trade Organisation, the doctrine of humanitarian interventionism, the internal dissipation of the state by NGOs, and of course the ever increasing federalisation of the EU are all based on the presumption that 'universal values' should override national politics.

Let us first dwell on the first part of De Gaulle's hierarchy: first the nation, then the state. He was affirming that the state is a product of the nation and that it flows from its existence. Nations precede states and are the pre-requisite for them but states also reinforce nations and protect them. When states like the Hungarian kingdom were created, the Hungarian nation already existed: the kingdom would not have been possible without the nation. But the existence of the new state gave the nation new strength. History gives us examples of nations which have lost their states (Poland being the obvious example) and then striving to recover it for fear that otherwise the nation itself might disappear.

The symbiotic relationship between nation and state explains why both of them are equally opposed by the post-national and anti-political functionalism of organisations like the European Union. We all know that the European construction is based on the absurd proposition that nationhood leads to war; less well understood is its specifically managerialist ideology which aims to replace the political art of government by the allegedly scientific practice of administration. The 'Monnet' method consists in incrementally transferring areas of state power specifically to bureaucratic, executive bodies: when Robert Schuman made his Declaration on 9 May 1950, the only body he proposed was the 'High Authority' (the future European Commission). This DNA remains decisive in the EU today: it seeks to dissolve nationhood not just through

4 Churchill wrote to his Foreign Secretary, Lord Halifax, to say that De Gaulle's 'Free France' was 'the responsible constitutional representative of France'. See Winston S. Churchill (1940) Letter to Lord Halifax, 24 June 1940, Churchill papers, 20/13, in: *The Churchill War Papers*, 404.

supranationalism but also through depoliticisation. Politics is considered just as as the nations of which it is the expression.

1. The nation, East and West

In Europe today there is an East-West split on the question of nationhood. The radically different historical experiences of the two halves of the continent explain, in large measure, this split and thus the current political conflict between Brussels and Poland and Hungary. In Central Europe, national identity played a major role in the fight against, and ultimate victory over, communism. In Western Europe, by contrast, national identity was severely damaged by the Second World War and nothing has happened since to repair it.

Everyone recalls how the election of Pope John Paul II seemed to tear open the iron curtain a decade before it finally fell. Poles were decisively energised in their national and religious identity by this event – a Catholic nation oppressed by a foreign and atheistic regime. Fewer people outside Hungary recall – but they should – that a young man called Viktor Orban was the first person in the Warsaw Pact publicly to call for the withdrawal of Soviet troops, on Heroes' Square in Budapest in June 1989 on the occasion of Imre Nagy's reburial. This was a momentous national event in which the Communist leadership tried to burnish its national credentials and spectacularly failed. Orban made his call specifically in the name of national liberation, and with reference to Hungary's long historical struggle for it over the centuries but especially of course in 1956.

These experiences meant that the movements which led to the collapse of Soviet rule in Central and Eastern Europe were not, as some liberal ideologues claim, fighting 'for Europe', at least not in the sense of post-political functionalism. What they wanted was national liberation – nationhood and the liberty which goes with it. Like their 19th century predecessors, they knew that you could not have the one without the other. 'Gulash communism' was a grotesque fraud designed to dupe Hungarians into believing that their communist regime was somehow national. Yet internationalism and anti-nationalism were the very core beliefs of Marxism, much more important than the international class struggle or state ownership of the means of production. The great move of the Marxian dialectic is towards internationalism and the withering away of the state: as Marx and Engels wrote, 'the worker has no country'⁵.

In the post-war period, the situation in Western European states – with the single exception of Britain – was the opposite from that in Central Europe. In every single Western European state, national feeling had been severely discredited by the experience of the Second World War, when Western European states suffered the humiliations of defeat or occupation or both. In Germany and Italy, of course, their experiments in

5 Marx and Engels, 1848.

extreme nationalism ended in abject failure: in Germany's case, catastrophe coupled with moral abomination. In France and other occupied countries, the shameful memory of collaboration with the occupant has largely eclipsed the memory of heroic national resistance. The British exception (which also explains Brexit) lies in the fact that Britain's war success was due to a very strong national sentiment, especially when Britain stood alone in the period 1940–1941. Nationalism in Britain led to victory, not defeat. To be sure, Central and Eastern European countries also lived through dark times during the war but their subsequent national resistance to Communism paradoxically gave back to those countries a national feeling which Western European states never regained.

No sooner had the war ended than Western Europe embarked on the post-national project of European integration which quickly became a political ideology which continues to hold the entire political class in its grip. Moreover, Western European states generated subversive and Marxist popular culture in a way that Eastern European states did not, or less so. If John Lennon imagined, like his near namesake Lenin, a post-modern, post-historical and post-heroic world without countries and without identity ('nothing to live or die for, and no religion too'), Eastern European popular music often had a folksy dimension which emphasised the national over the post-national, and the rooted over the rootless.

For generations, Western universities have been dominated by Marxists which explains the rise to power in recent decades of former (or not so former) Marxists, usually of the Trotskyite or Maoist variety, such as José Manuel Barroso, student leader of the Maoist Reorganised Movement of the Proletariat Party during the Carnation Revolution of 1974, or Tony Blair, who has several times referred to his admiration for Trotsky. Jean-Claude Juncker, Barroso's successor as president of the European Commission, admitted to having 'flirted' with Trotskyism in his youth.⁶ He seemed to relive his youthful errors on the eve of his retirement when, in 2018, he spoke at a ceremony in Trier to commemorate the 200th anniversary of Marx's birth, at which a huge bronze statue of the philosopher donated by China was unveiled, and where Juncker called Marx 'a forward thinking philosopher' and said that he was not responsible for the things done in his name.⁷ If statues are being erected to Marx in the West, while they have been pulled down in the East, it is because in the West national sentiment was discredited while in the East Marxism was discredited.

To understand this intellectual hegemony of Marxists in Western Europe we need to understand the cultural politics of the Cold War. As Frances Stonor Saunders explains in *The Cultural Cold War*, the anti-Soviet left was especially targeted and

6 Noyon, 2016. This article contains a link to the site of the government of Luxembourg which contains the quotation by Juncker about his Trotskyism but unfortunately the link no longer functions.

7 'Ein in die Zukunft hineindenkender Philosoph'. See *Participation of Jean-Claude Juncker, President of the EC, in the event commemorating the 200th anniversary of birth of Karl Marx, in Trier 4 May 2018*, Audiovisual Service, European Commission, <https://audiovisual.ec.europa.eu/en/video/I-154723>.

financially supported by the American secret services, not only in order to draw them away from Moscow but also for a more profound ideological reason: the West tried to beat Communism on its own terms, by presenting itself as more progressive and more materially successful than the Soviets. The West did not, generally speaking, present itself as more conservative or traditional but instead denounced the USSR precisely for being reactionary – for preferring Shostakovich to Stockhausen and socialist realism to Jackson Pollock. This is why it waged and won the Cold War from an essentially left-wing perspective.

This also explains the phenomenon of those left-wing dissidents who dominated the final days of the Communist system and, in many cases, the politics of post-communist states after its fall. Some Marxists came to the view, even before the collapse of Communism, that the Soviet system had become socially, culturally and economically reactionary. Milan Djilas, for instance, understood that globalisation was what Marx had been arguing for when he said that the bourgeois revolution would accelerate the end of nationhood. Just as Marx and Engels had argued that

‘The need of a constantly expanding market for its products chases the bourgeoisie *over the whole surface of the globe* ... The bourgeoisie has through its exploitation of the world market given a *cosmopolitan character* to production and consumption *in every country*. To the great chagrin of Reactionists, it has drawn from under the feet of industry *the national ground on which it stood*. All old-established national industries have been *destroyed*.’⁸

so Milovan Djilas realised, in the late 1990s,

‘Every Marxist, going back to Marx himself and forward past Lenin, regarded the creation of a world market and all that it brought about (strengthening each and every link among peoples, tearing down the barriers between nations, etc.) as a progressive fact of capitalism and a necessary condition for proletarian internationalism itself and the true convergence of peoples in socialism.’⁹

It is because of this ideological continuity that globalisation was so eagerly seized upon by Western elites in the euphoria of the ‘end of history’ at the end of the Cold War. It meant that a man like Barroso could easily progress from Maoist student leader to law professor (including at the CIA college, Georgetown University), to leftist politician, to president of the European Commission and, finally – the cherry on the cake – to chairman of the very crucible of globalist ideology, Goldman Sachs, a bank which has often been compared to a cult.

⁸ Marx and Engels, 1848, emphasis added.

⁹ Djilas, 1998, p. 135.

In fact, the internationalist programme was deployed long before the age of globalisation (if that is said to begin in the 1990s) and for the same reason. Just as, in the cultural field, the West sought to portray itself as more avant-garde than the USSR, which indeed seemed mired in endless performances of *Swan Lake* at the Bolshoi, so in the political field the European project, which began in 1951, was also designed to draw support away from Moscow by appealing to left-wing and internationalist ideas. Robert Schuman made his famous *Declaration* on 9 May 1950, unilaterally announcing the plan to create a coal and steel community, at least partly to counter the influence of the Moscow-backed ‘peace movement’ in the West by creating a mini-USSR also devoted to peace, just like its big rival based in Russia. In discussions with the US Secretary of State, Dean Acheson, in Paris the day before the Schuman Declaration, Schuman told Acheson, ‘We must counter (the) powerful Communist peace propaganda theme, which is making dangerous headway even in non-Communist circles ...’¹⁰ That is why the first words of the Schuman Declaration he read out the next day are ‘World peace...’ and not just ‘peace in Europe’ (i.e. between France and Germany). Moreover, he chose to call his new organisation a ‘community’ no doubt partly because the word sounds like a reassuringly cosy-sounding substitute for its more intimidating etymological cousin, ‘communism’.

2. Different concepts of the state

It is not just concepts of the nations which differ between East and West but also concepts of the state. Under communism, the states of Central and Eastern Europe continued to exist as officially sovereign entities. Like today’s member states of the EU, they had all the attributes of statehood including membership of the United Nations, their own governments, police forces and armies. Yet they were not sovereign because their national governments were in reality under foreign control by means of the Communist international. The citizens of Central and Eastern Europe have therefore had 45 years of experience of bogus statehood and especially of the radical disconnect between, on the one hand, the official policy and behaviour of the state and, on the other, the real desires of the nation. This has inoculated them against the same deception practised by the EU whose governments are similarly connected by a trans-national ideology which becomes explicit when, as often occurs, different national governments simultaneously use the same slogan (‘Build Back Better’ is only the latest example).

The experience of Central and Eastern European states was therefore of a return to the natural symbiosis between the nation and the state. Their struggle to recover their national sovereignty, was inspired by the conviction that the sovereign state was the necessary precondition for freedom. This was the very opposite of the Leninist (and

10 *Telegram from the Secretary of State to the Acting Secretary of State*, Paris, 8 May 1950, 10 pm. Office of the Historian, Foreign Relations of the United States, 1950, Western Europe, Volume III, p. 1007.

Lenonist) view, which held precisely that the state was only an instrument of oppression. ‘So long as the state exists, there is no freedom. When there will be freedom, there will be no state.’¹¹

This return of the symbiosis between the nation and the state in Central Europe did not occur immediately after the events of 1989–1991. On the contrary, there were many years in which left-wing pro-European and post-national figures dominated the politics of the region, the most famous example being Vaclav Havel but other former Communists, recycled as Social Democrats, also proliferated across the region. These years were therefore also a learning experience for the region whose initial enthusiasm for the EU project soon cooled as politicians and electorates began to understand the full implications of it.

Havel was one of the main theoreticians of these implications, the most important of which was the explicit goal of ending national sovereignty, i.e. the sovereignty of the nation-state, and instead moving towards functionalist global governance. In 1999, in a speech entitled ‘Kosovo and the end of the nation-state’ delivered to the Canadian parliament, Havel announced that the heyday of national sovereignty was now in the past. He denounced ‘the idol of State sovereignty,’ which, he said, ‘must inevitably dissolve in a world that connects people – regardless of borders – through millions of links of integration ranging from trade, finance and property, up to information; links that impart a variety of universal notions and cultural patterns.’¹²

Like Marx, Havel thought that the nation-state would be swept aside by technological advance and international communication and trade. It is striking that Havel used the word ‘dissolve’ to describe the end of the nation-state because that is also the vocabulary used by Marx and Engels to describe their vision of the withering away of the state, a key Marxist doctrine: ‘The society which organises production anew on the basis of free and equal association of the producers will put the whole state machinery where it will then belong – into the museum of antiquities, next to the spinning wheel and the bronze axe.’¹³ Engels used the vocabulary of ‘disintegration’ to describe what he saw as unquestionably a matter of progress: ‘The disintegration of mankind into a mass of isolated, mutually repelling atoms in itself means the destruction of all corporate, national and indeed of any particular interests and is the last necessary step towards the free and spontaneous association of men.’¹⁴

The key notion in Havel, as in Marx, Engels and Lenin, is that the evolution towards a supranational system is a development towards a more rational system than the current irrational national one. This is why Havel derided the state as ‘an idol’, a ‘cult-like object’ and ‘a dangerous anachronism’. This thought is the direct continuation of the old slogan (wrongly attributed to the Comte de Saint-Simon¹⁵, and which

11 Lenin, 1917.

12 Address by Václav Havel, President of the Czech Republic, to the Senate and the House of Commons of the Parliament of Canada, Parliament Hill, Ottawa, 29 April 1999.

13 Engels, 1848, Chapter IX, *Barbarism and civilization*.

14 Engels, 1844 cited by Phillips, 1980, p. 24.

15 See the very useful article by Kafka, 2012.

instead in fact originated with his disciple Auguste Comte in 1822, but which Engels made famous in the *Anti-Dühring* of 1877) that the government of men would soon be replaced by the administration of things. In what is undoubtedly the first use of this famous thought, ('The government of things will then replace that of men') Auguste Comte makes it absolutely explicit that his 'scientific politics radically excludes arbitrariness' and that henceforth government will be conducted only according to the law. 'Then there will be truly law in politics, in the real and philosophical sense attached to this expression by the illustrious Montesquieu.' He concludes the passage by saying that scientific politics will abolish both the 'theological arbitrariness' of 'the divine right of kings' and the 'metaphysic arbitrariness' of 'the sovereignty of the people'.¹⁶ In other words, the 'rule of law' is designed to do away with the human choice, including democratic choice, which Comte denounces as 'arbitrary', and that it will be replaced by a rationalist, functionalist technocracy acting as if automatically according to impersonal rules or laws and not on the basis of decisions.

3. Different concepts of law

There is a direct link between the fantasies of Comte and Engels that the science of industrial production would replace the dangerous vagaries of government, and the now hagiographic account of the 'declaration' by Robert Schuman on 9 May 1950 that henceforth Franco-German coal and steel production would be placed in the hands of a High Authority. It is quite explicit in Schuman's proposed new community that the High Authority would 'bind' the members states and that choice would no longer be possible: the High Authority was the only institution Schuman proposed in his Declaration, the more decisionist bodies, the Court of Justice and the Assembly (the future European Parliament), being only added in later, as an afterthought.

This fantasy that governmental (or administrative) measures can and should be implemented 'scientifically' rather than 'politically' was not confined to 19th century positivists or to Communists. On the contrary, it also seduced at least a generation of jurists, especially in the latter half of the 19th century, who campaigned for a new kind of international law to constrain the activities of states. As Martti Koskenniemi has shown in his magisterial account¹⁷, the growth of modern international law starts with the creation of the Institute of International Law in Ghent in 1873. In its journal, numerous jurists explained that they wanted their new law to constrain states and thereby to serve the cause of world peace. The German jurist August von Bulmerincq put this idea very forcefully when he wrote in 1877, 'Where the law penetrates and advances, politics must withdraw. Law, which is the guardian of civilisation, must end up prevailing more and more, just as darkness must end up fleeing the light. Whoever loses faith in the growing and final triumph of law no longer believes in the triumph of

¹⁶ Comte, 1822.

¹⁷ Koskenniemi, 2001.

civilisation.¹⁸ Like today's EU ideologues, Bulmerincq equates politics with the forces of darkness.

As with the Marxists and the positivists, these grand bourgeois liberals explicitly identified their cause with that of civilisation and humanity as a whole. Whoever opposed their ideas was either a cretin or a criminal. Like the positivists and the Marxists (of whom we must never forget that they regarded themselves as scientists, Engels having explicitly compared Marx to Darwin at the oration he gave at the former's funeral in Highgate in 1883) these 19th century architects of the new legal world order believed that they were progressives bringing rationality where previously there had been only arbitrary and unenlightened decision-making. One of the main pillars of the Institute of International Law, the Dutch jurist, Tobias Asser, made the link between the natural or exact sciences and the science of law in the founding document of the Institute when he declared, 'Just as communes and provinces learned to recognise the superior unity of the state, so states are beginning to submit to the superior unity of the great human society. Already, under the influence of this new way of thinking, the exact sciences, industry and economic institutions have made astonishing progress. It is impossible that the science of law should not reflect this in turn. It is up to the legislators and jurists of civilised countries to study this movement and to direct it.'¹⁹

Universalism and scientism went hand in hand. If the laws of science were universal, how could nations or individuals possibly diverge from them? Any such divergence must surely be irrational and possibly evil if it represented an opposition to the interests of the human race. In this new world view, particularism became unintelligible. Moreover, because these various categories of people regarded themselves as progressives, any opposition to their cause was reactionary, stupid, nasty or all of the above – Hilary Clinton's 'deplorables'. In order to justify to themselves that their cause was right and just, these people saw politics as an eternal struggle – against the forces of reaction. They did not see their views as one opinion among others, but instead instead regarded them as the dividing line between civilisation and barbarism. Politics became an existential battlefield and the political adversary became either an enemy to be destroyed or a criminal to be punished – using the law, again. The Article 7 sanctions proposed against Hungary and Poland are only one part of this much broader trend.

Indeed, nowhere has the law been used so overtly to pursue a political project than in the European Union. In the early years of the European construction, the 1950s, 1960s and 1970s, activist jurists constructed, by their rulings, a supranational legal order which had not basis in the treaties themselves until it was retroactively incorporated into the Treaty on European Union at Lisbon in 2009 (Declaration 17). The jurists who undertook the task of creating a new legal order, over and beyond what the treaties then provided for, did this with the same ideological conviction as that expressed by von Bulmerincq, Asser and others nearly a hundred years earlier: that law had to prevail over politics in order to preserve peace.

18 Von Bulmerincq, 1877.

19 Asser, 1902, p. 117.

The lead in this project was given by the first president of the European Commission, Walter Hallstein. Hallstein is the least well known of the ‘founding fathers’ of the EU and yet his influence was immense. As acting foreign minister (Hallstein was *Staatssekretär* in the *Auswärtiges Amt*; Adenauer held the post of foreign minister) he attended the Messina conference in 1956 which led to the signature of the Treaty of Rome the following year. As the first president of the European Commission, he was able to mould the new institutions according to his own supranational conceptions. His influence extended to the new Court of Justice because, as a law professor who liked to be addressed as ‘Professor Hallstein’ instead of ‘President Hallstein’, he took a great interest in juridical matters.

As it happens, Hallstein had already devoted part of his professional life to the juridical implications of political unification. During the 1930s, Professor Hallstein, who had been a protégé of Hans Frank and a member of his Academy of German Law, had belonged to no fewer than four Nazi legal organisations including the *Nationalsozialistischer Rechtswahrbund* (National Socialist League of Guardians of the Law). He addressed this organisation in Rostock in January 1939 on the juridical implications of the Anschluss (Austria having a different legal system from that of the German Reich). When he became president of the European Commission, he approached the same problem but from a different angle: how to push ahead with political unification using the law as an instrument.

Together with jurists from the Court of Justice, Hallstein developed a doctrine according to which it was for jurists and the law to cement political union in Europe. Antoine Vauchez recounts²⁰ how Hallstein played a key role in discretely encouraging jurists at the ECJ to push for a maximalist interpretation of the treaties and to find things in them which were not, in fact, there. Much of this work was done behind the scenes: Hallstein as president of the Commission had to be careful.

No sooner had the European Economic Community been created in 1957 than Hallstein set about encouraging the Court to engage in judicial activism. His first major success, and a definitive one, was the seminal rulings in 1963 and 1964 in *Van Gend en Loos v. Nederlandse Administratie van Belastingen* and *Costa v. ENEL*. These two rulings established the twin principles of primacy and direct effect – that EEC member states had limited their sovereignty by joining the organisation, and that EEC law had direct effect on natural and legal persons, unlike classical international law which affects only states and not their citizens. Hallstein worked behind the scenes to obtain these rulings and then put a definite spin on them in his own speeches and writings to ensure that everyone understood their significance once they had been handed down.

Having started in 1962 to formulate the idea that the EEC was not a normal international organisation but instead something *sui generis*²¹ he explained after the *Costa v. Enel* and *Van Gend en Loos* rulings that they had established a new principle.

20 Vauchez, 2013.

21 Hallstein, 1962, p. 29.

At a conference in October 1964, Hallstein explained that the European communities were not really economic at all – because they did not merely regulate economic or commercial matters – but that instead they constituted an embryonic political union.²²

The following month, in a lecture delivered to the law faculty in Paris, and entitled ‘The European community, a new juridical order’ (a title which bore a glancing resemblance to ‘The legal unity of Greater Germany’ delivered at Rostock in 1939), Hallstein explained that the European community was unique because it had created a system. ‘I do not hesitate to employ the term ‘constitution’ to describe the basic norms of this system ... By creating the Community, the member states have subjected themselves to this new juridical system to the extent that they have transferred powers to it. National rules which are in opposition give way even if they are promulgated after the community norm. This result is completely in conformity with the ruling of 15 July 1964 of the European Court of Justice’²³ (i.e. the *Costa v. ENEL* judgement). In this speech, incidentally, Hallstein also struck a distinctly political note, saying that ‘the United States of Europe would never be achieved until defence became part of community policy, a pious wish that continues to be repeated, in vain, to this very day.

After he ceased to be Commission president in 1967, Hallstein waxed even more lyrical about the transformative power of law. In *The Unfinished Federal State (Der unvollendete Bundesstaat)* published in 1969, he wrote, ‘The Community is a creation of law. That is what is decisively new about it. That is what distinguishes it from earlier attempts to unite Europe. Neither force nor subjection has been used as a means but instead a spiritual and cultural force, the law. The majesty of the law will achieve what blood and iron were unable to do for centuries.’²⁴

It is essential to understand the assumption underlying Hallstein’s doctrine that law will unite Europe. It is that law is universal and that it therefore can and should encompass previously separate states and ultimately the whole of humanity. Here we can see quite clearly in operation the mathematical or geometrical presuppositions which govern so much of modern thought and which, in the field of morals, were formulated by Immanuel Kant using the language of law: Kantian philosophy has been influential including in the judicial domain because it embodies the liberal idea that the whole of humanity has the same interests. Hallstein is of course also following in the footsteps of the 19th century jurists who, as we have seen above, unequivocally identified the law with civilisation and progress.

22 Hallstein, 1964.

23 Walter Hallstein, *La communauté européenne, nouvel ordre juridique*, speech given to the Law Faculty at the University of Paris, 21 November 1964, and published by Bureau d’information des Communautés européennes. For a report on the speech by Le Monde at the time, see here: https://www.lemonde.fr/archives/article/1964/11/21/m-hallstein-les-etats-unis-d-europe-ne-sont-pas-concevables-si-la-defense-n-est-pas-inseree-dans-le-processus-d-unification_21-16680_1819218.html

24 Hallstein, 1969.

4. Judgement and sovereignty

The idea that science and universal abstract laws will enable humanity to progress is perhaps the key thought of modern progressivism – what Pierre-André Taguieff calls ‘the civil religion of modern man’.²⁵ It was born in the early 17th century with Francis Bacon’s *The Advancement of Learning* (1605). This notion of progress (or advancement) has come to dominate our age, including in politics: in his seminal work which first expressed the desire for a new international law to be above that of states, *On the reorganisation of human society* (1814) Henri de Saint-Simon stated one of the key notions of progressivism: ‘The golden age of humanity is not behind us, it lies before us, in the perfection of the social order.’ Like Marx, Saint-Simon believed that politics was a science: ‘Politics, is, to sum up my thinking in two words, the science of production.’²⁶

The Covid pandemic and the way governments have reacted to it have illustrated the highly questionable consequences of politics allegedly based on science. Authoritarian measures, brushing aside fundamental rights and restricting or destroying basic liberties, have been introduced all over the world. Many people are sceptical when politicians claim to be basing their decisions on science, because the science often does not seem to justify the decisions taken (the illness is not as bad as scientists feared; there is no consensus about the health effects of lockdown, etc.). However, everyone can see that liberty is restricted as a result (whether or not they agree that it should be). In other words, there seems to be a clear link between politics as science and an end to liberty, which is no doubt why numerous works of science fiction have indeed portrayed science-based regimes as dictatorial, from Laputa in *Gulliver’s Travels* (1726) to Aldous Huxley’s *Brave New World* (1932). The word ‘robot’, indeed, comes from Karel Capek’s 1920 science fiction novel about androids taking over the world and destroying the human race.

Yet this alleged pre-eminence of the mathematical model, and of the exact sciences in general, is itself a historical development and therefore deserves to be questioned. It was precisely the change in the understanding of the universe, which occurred in the 16th century, which pushed mathematics and geometry into the foreground, as the only certain sciences, while relegating other forms of knowledge into the background. For Alexandre Koyré, the difference was brought about by the change in perspective of the universe, which after Galileo and Copernicus was believed to be infinite, not finite and clearly structured as the medievals, following Aristotle, had believed. Left without any structure, and above all having lost its heavenly status, i.e. its status as that to which inhabitants of the heavy earth aspired to elevate themselves, the universe could henceforth be comprehended only by means of the abstract and universal laws of geometry, without any notion of hierarchy, rather as the new science of astronomy, developed in the Tudor period, had enabled to apparently infinite sea to

25 Taguieff, 2001, p. 5.

26 Saint-Simon, 1817.

be navigated using latitude and longitude. This in turn led to a devaluing of being in general, which henceforth had no intrinsic value, in favour of new abstract sources of order, the universal rules of Euclidian geometry. The universe was no longer itself a source of value but instead just an empty space onto which man had to project order using the inventions of his mind, rather than deducing the existence of order from his observations.²⁷ Knowledge no longer came from observation but instead from calculation.

In politics, of course, this movement led to positivism – to the view that law had to be invented in order to exist. It was the end of the belief in natural law. Hobbes is the natural successor of Galileo, his monster-state Leviathan being nothing but an instrument to protect men from death and violence. Law becomes an emanation of the human will, in Hobbes as in Kant where moral laws are valid only if universal and only if they can be coherently willed. Laws, for Hobbes, are commands; they are not, as before, conclusions about the intelligible nature of the universe derived from observation, prior knowledge, reflection or even judgement.

The fact that scientific politics seems to leave no room for judgement is especially striking, in view of the fact that law is precisely all about judgement. The law is only very partly a command; it is above all also a discernment. When a judge is faced with litigation, he must decide, between two parties who have competing and differing claims, which one of them is right. Alternatively, he must adjudicate between a prosecutor and a defendant: is the accused guilty as charged? His judgement may well lead to a command in the form of a sentence but it is not only that. On the contrary, it is a judgement of fact. This is why the vocabulary of law is deeply infused with the etymology of truth. At the end of a trial, the judge gives a *verdict*: he says the truth. Law itself in many languages (*Recht* in German, *pravo* in Russian) directly expresses the notion of veracity (*Du hast recht*); in other languages the notion of veracity is expressed slightly more indirectly though the vocabulary of straightness (*droit, diritto*, etc.) To the extent that the judge's ruling contains a command – to acquit or convict – it is based only on the findings of fact which have taken place during the trial. A judge's ruling can under no circumstances be compared to a command like that of a general in battle.

The research into the facts of the matter constitute the essence of all judicial procedures. Once they have been established, the judge then has to establish into which legal category they fit. The overriding concern, of course, is equity – the right balance between the competing claims of citizens and the state, a balance which is symbolised by the scales held by the symbolic representation of justice. 'Therefore let this be the goal in civil law: the preservation of lawful and traditional equity in the affairs and the legal proceedings of citizens.'²⁸ As Michel Villey writes, law does not consist of commandments, as if dictated by a master. Instead, judicial proceedings are dialectical: they weigh up the competing claims of litigants and they decide on what the fair share

27 Koyré, 1957.

28 See Cicero, *De Oratore* I, 188, 'Sit ergo in iure civili finis hic: legitimae atque usitatae in rebus causisque civium aequabilitatis conservatio.'

is, after due consideration of these claims. The golden mean is sought and found after consideration of each side.

This understanding of the judicial process found its reflection in the scholastic method of disputation, in which a 'sentence' or judgement would be given after due consideration of opposing points of view. Villey writes, 'Right is discovered by observing social reality because right is precisely this mean, the right proportion of things distributed between members of a polity.'²⁹ Justice is therefore a right relation or a proportion between members of a polity – as Aristotle says, 'a species of the proportionate.'³⁰ It is a relationship between things and people, a relationship of harmony, uniting a multiplicity of individuals within a social order. Justice is the equilibrium achieved between citizens assembled in a polis. Those citizens have different interests and claims, and justice is the balancing out of those competing claims in a proportionate and harmonious way. Punitive justice is about rectifying the imbalance created by a crime, and by imposing a punishment through which the guilty man pays his debt to society.

In other words, justice is inseparable from society. It is the orderly arrangement of that society. There is no positive law without judges, and judges can function only in organised polities. Justice presupposes the existence of a state, within which certain proportions are established and preserved by a functioning judiciary. Justice is specifically social. For the ancient Greeks, the *polis* provided the framework for the evaluation of all excellence and virtue; it was therefore the indispensable framework for the administration of justice. Alistair MacIntyre writes, '*Dike* (natural and social order) is the ordering of the *polis* ... for the *polis* is human community perfected and completed by achieving its *telos* (end), and the essential nature of each thing is what it is when it achieves its *telos*. So it is in the forms of the *polis* that human nature as such is expressed ... *Dike* orders by the giving of just judgements, and justice (*dikaioisune*) is the norm by which the *polis* is ordered, a norm which lacks application apart from the *polis*.'³¹ In short, there is no justice without the state.

These reflections help us to understand why the concept of 'universal' human rights is so difficult. A right is precisely something very individual and particular: I have a right to a certain salary because of the contract I have signed: my rights differ from those of my colleague. I have the right to live in the house I own: my rights differ from those of my neighbour. Universal rights can only be formulated in very general terms ('right to life', 'right to found a family') and everything then depends on the interpretation given to these deliberately vague expressions. On their own, they are essentially meaningless, at least juridically. In recent years, we have seen constitutional courts claim to find things, like gay marriage, in constitutions even though they have not been there for centuries.

So-called universal rights are not only problematic from the juridical point of view. They are also morally very problematic. The danger of moral angelism is very

29 Villey, 1983, p. 54.

30 See Aristotle, *Nicomachean Ethics*, V, 3.

31 MacIntyre, 1988, p. 97.

great, because the moral certainty which flows from statements of universal right gives the accuser an intoxicating sense of superiority over the accused. This certainty grows in intensity the more abstract the alleged moral law is – in other words, the more the actual facts are not allowed to get in the way. Yet, as we have seen, it is precisely the very careful consideration of facts (and not of universal principles) which are essential to arrive at a judgement. It is precisely because of the complexity of facts that judgement needs to be made carefully, according to agreed procedures, and within a social context.

However, while facts and the careful consideration of facts (what Aristotle called ‘dialectics’) play an absolutely essential role in judgement, there is also a non-factual element in legal judgement, namely the authority of the judge. His authority derives from his learning, from his professional record, from his skill – but also from his position in society. Of course if a judge is biased his judgements will not be respected, but there are plenty of cases in which the rulings of a judge are obeyed even if people disagree with them. This acquiescence in the authority of the judge, and of the state in general, even when one disagrees with the substance of the decision, is the inevitable and natural consequence of the fact that authoritative judgement and authoritative government is essential for the smooth running of society, and because people understand that the costs of undermining legitimate authority are higher than the costs of obeying a judgement or a policy with which one disagrees.

In other words, government is never about science alone. We recognise the necessity of a system of authoritative judgement for the smooth running of society because we recognise that there will always be differences of opinion about everything. The unpolitical notion that politics can be dissipated away by science or law is deeply misleading and fails to integrate the supremely political concept of authority (or legitimacy) which cannot itself be subsumed into law. The great paradox of all jurisdictions is that they are maintained in place by something which is outside and beyond law – the authority of the overall political-judicial system and the authority which accrues to the various officers of that system (including judges). The interplay between the social rootedness of the fundamental legitimacy of the state, the social and political conditions in which judgements are made and applied, show once again how adjudication is a profoundly political and social act which makes sense only within a social context.

All this delicate constitutional balance is upset when an outside body intervenes in the juridico-political process. Within a state, there is a balance between the judiciary and the legislature in which it is embedded. The judiciary is an integral part of the structure of the state and there is an interplay between those who apply the law and those who make the law. Above all, the powers enjoyed by the state in the legislative and judicial fields are justified by the protection which the state provides to its citizens. This is the absolute cornerstone of the social contract: a state become tyrannical if it does not protect its citizens but instead oppresses them. But this key element of the social contract simply disappears when an international court or body interferes in the internal affairs of a state. An international body can never be held to account by the

citizens of the state in which it interferes: it wields power without responsibility. All international bodies suffer from this systemic constitutional weakness which is why the principle of non-interference and national sovereignty is essential to the proper functioning of all states.

Instead, law must grow out of a society and be rooted in it. The state which makes laws has to live with the consequences of its decisions. International bodies, by contrast, are systemically protected from those consequences: they wield power without responsibility and this is why, from the European Court of Justice to the European Court of Human Rights, they are easily hijacked by political, activists. The right not only to make laws but also to adjudicate them therefore belongs to the state (legislature and judiciary) and not to a supranational body which, like Laputa, the floating island of crazy scientists in *Gulliver's Travels*, is as absurd as it is detached from reality. The attempt to foist laws onto states like Hungary is not just an exercise in political correctness. It is also designed to dissolve the very concept of national sovereignty itself. Such an exercise can only be anti-democratic. De Gaulle summed up his position very clearly: 'In France, the Supreme Court is the people.' This should be the motto of all European nation states.

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