

The Impact of European
Institutions on the Rule of
Law and Democracy

Slovenia and Beyond

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and
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with a chapter by Gorazd Justinek

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1

Constitutional Backsliding in Central and Eastern Europe in Lieu of Back to Europe

A specter is haunting Eastern Europe: the specter of what in the West is called ‘dissent’. This specter has not appeared out of thin air.¹

I. INTRODUCTION

1 MAY 2004 was a day of huge symbolic importance across Europe. The European dream of eight former Communist nations, left behind the Iron Curtain in the decades-long communist freeze of the Cold War, became a reality. Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary and Slovenia returned to Europe. This was a historic moment to celebrate. Parties were held in all the big cities of the new Member States. Bands and crowds chanted farewell to Russia and the Balkans. Border controls were symbolically waived, and the leaders of the old and new Members States rejoiced, shook hands and raised glasses to toast the success of the big-bang enlargement. This time around, and not at the moment of the collapse of the Berlin Wall, history indeed came to an end² and the future was about to begin. At least for the peoples of the new Member States. Modernity, with its promise of individual and national emancipation, showing the capacity of humans to affect change and to use it for the better, following the idea(l) of progress,³ in 2004 seemed to reach its climax in these Central and Eastern European (CEE) countries achieving EU membership.

In more down-to-earth, purely legal and economic terms, the moment of enlargement confirmed the successful conclusion of an almost decade-long

¹ Václav Havel, ‘The Power of the Powerless’, October 1978, https://s3.amazonaws.com/Random_Public_Files/powerless.pdf (accessed 24 April 2019), 1.

² Francis Fukuyama, *The End of History and the Last Man* (New York, Free Press, 1992).

³ Matej Avbelj, ‘Transnational Law Between Modernity and Post-modernity’ (2016) 7(3) *Transnational Legal Theory* 406, 410.

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process of accession to the EU. The purpose of this accession process was to ensure a legal, institutional, political and economic streamlining of the new Member States with the overall EU *acquis*. With the enlargement of the EU, the new Member States were considered on par with the old Member States. Having done their pre-accession homework, they were accepted as equal members of the club, subject to the same rights and duties stemming from the overall construction of the EU as the old Member States had been. If anything, there was no doubt that all Member States, but in particular the new ones, which had fought hard to escape years of communist tyranny, shared the same fundamental values. It was thus entirely impossible in 2004 to entertain even the slightest doubt as to *the fact* that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.⁴ For these values were indeed ‘common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.⁵ The elites in the old Member States did not anticipate any substantial hurdles in translating those values to the new Member States.⁶

The post-communist Member States set these values in their constitutional stone. They relied on them, in writing as well as in countless oral declarations, purposefully and explicitly to effectuate a discontinuity with their totalitarian past. The latter should be replaced by a new liberal constitutional identity, reflecting that of the Western EU Member States, from which the CEE countries were forcefully torn apart after World War II. All of this was best explicated and institutionalised in the Visegrad Group, pioneered by Vaclav Havel and established in 1991 by Poland, then Czechoslovakia and Hungary. As it follows from its founding declaration, the Group was destined to achieve five basic objectives: a full restitution of state independence, democracy and freedom; elimination of all existing social, economic and spiritual aspects of the totalitarian system; construction of a parliamentary democracy, a modern state of law, respect for human rights and freedoms; creation of a modern free market economy and full involvement in the European political and economic systems, as well as the system of security and legislation.⁷ Full membership in the EU was a sign and confirmation of the achievement of these goals.⁸ Or, so we believed. But we

⁴European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Art 2 [2002] OJ C325/5.

⁵*ibid.*

⁶Jernej Letnar Čarnič, ‘Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe’ (2008) 10(1) *Hague Journal on the Rule of Law* 111.

⁷Visegrad Declaration 1991; for a more in-depth discussion see Matej Avbelj, ‘Central Europe as a Legal Phenomenon’ (2015) 2(13) *European Perspectives – Slovenia’s Role in Visegrad Group* 53.

⁸See Wojciech Sadurski, ‘That Other Anniversary’ (2017) 13(3) *European Constitutional Law Review* 417, 419, who has argued that: ‘The accession by 10 Central Eastern European states was powerfully idealistic in nature, promoting romantic ideals of a “return to Europe” and pan-European solidarity. It was a timely reminder that the EU’s identity is based on values, and not just a calculus.’

were fooled: in fact, ‘the end of the end of history’,⁹ rather than the future, has just begun.

The Europhilia and European dream of the CEE countries has not lasted long. Just a decade later, the European Union was to witness a complete U-turn. It came from Central Europe, a region that Vaclav Havel in the early 1990s described not only as a historical and spiritual phenomenon, but as a special body that could make a genuine contribution to Western Europe.¹⁰ It indeed has made a contribution, but one very different from that envisaged by Havel. Instead of enriching Western liberal constitutional values with their post-communist experience, these states have rather started a new populist movement in the form of constitutional backsliding whose final objective is the creation of an illiberal state.¹¹ As is well known, the main protagonist has been Viktor Orbán. He has, as one commentator succinctly put it, in only three years succeeded in transforming Hungary ‘from one of the success stories of the transition from socialism to democracy to a semi-authoritarian regime based on the illiberal order systematically dismantling checks and balances and thereby undermining the rule of law’.¹² He could do so thanks to a landslide victory in the 2010 election in which the Hungarian people reacted to the complete fiasco of the preceding socialist government under whose rule the corruption and clientelism flourished as never before.¹³

Equipped with a constitutional majority, Orbán embarked on a systematic political overhaul, which has since been described as a constitutional capture of the state. It all started with the adoption of an unconstitutional constitution.¹⁴ This has facilitated legislative hypertrophy by the Fidesz-run parliament which has dismantled the main checks and balances. The next goal was to populate the institutions of the state with ruling-party loyalists. The composition of the existing institutions has therefore been changed, but not infrequently new institutions have been created too, to make room for party loyalists and to ensure the gradual irrelevance of the old institutions without interfering with

⁹Kim Lane Scheppele, ‘The End of the End of History’, lecture, Berlin, 7 June 2017, www.rewi.hu-berlin.de/de/lf/oe/lsi/termine/prof-dr-kim-lane-scheppele-the-end-of-the-end-of-history (accessed 24 April 2019).

¹⁰Václav Havel, Speech in the Polish Parliament, 25 January 1990.

¹¹Viktor Orbán, Speech at the XXV-Bálványos Free Summer University and Youth Camp, quoted in Csaba Tóth, ‘Full Text of Viktor Orbán’s Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014’ *Budapest Beacon* (29 July 2014) <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> (accessed 24 April 2019).

¹²Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’, LSE ‘Europe in Question’ Discussion Paper Series No 79/2014; see also Jan-Werner Müller, ‘The Hungarian Tragedy’ [Spring 2011] *Dissent* 5.

¹³Jan-Werner Müller, ‘Eastern Europe Goes South: Disappearing Democracy in the EU’s Newest Member States’ [March/April 2014] *Foreign Affairs*.

¹⁴Kim Lane Scheppele, ‘The Unconstitutional Constitution’ *New York Times* (2 January 2012) <http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/> (accessed 24 April 2019).

them directly.¹⁵ In particular, the judiciary came under attack. Under the pretext of lowering the special retirement age of judges to a general retirement age, several hundred judges were removed from their posts and replaced with those chosen by the Fidesz regime. The independence of the judiciary was thus directly assaulted. The country's Constitutional Court has not fared any better. Not only was its composition changed completely, its competences too were drastically restricted, reaching as far as voiding the pre-2012 jurisprudence of the Constitutional Court.¹⁶ As a result, Hungary emerged as a politically distinctive case of authoritarianism,¹⁷ but unfortunately not an exclusive one.

Due to a lukewarm, and essentially ineffective, reaction by the EU, to which we shall return below, the incipient illiberal democracy created in Hungary has been used as a role model by the new Polish government.¹⁸ In 2015 the Law and Justice Party (PiS) took over the Polish parliament, but fell short of a constitutional majority which would enable it to constitutionally capture the state following the Hungarian example. Instead, the Kaczynski-influenced government decided to capture the country's Constitutional Court. Taking advantage of its political predecessor's attempt to fill the posts of the expiring judges' mandates prematurely, it appointed its own judicial loyalists, contrary to the clear and precise rules of appointment. Having done so, it additionally modified the organisational and procedural framework of the Constitutional Court to ensure that its forthcoming constitutional democracy transforming legislation enjoys at least a *de facto* constitutional immunity. In the next step, the target has moved to the ordinary judiciary. A set of laws has been proposed to enable the ruling coalition to replace more than 40 per cent of the Supreme Court justices and to control the selection of all others by effectively taking over the control of the National Council of Judiciary.¹⁹ As Sadurski has convincingly argued, the Polish backsliding scenario is both milder and graver than the Hungarian one.²⁰ It is 'milder because the illiberal changes are not constitutionally entrenched, and graver because it involves a systematic set of actions that violate binding constitutional law'.²¹ These, like in the Hungarian case, also stretch to the control of the public media and politicisation of the civil service.²² In so doing, the existing

¹⁵ Bugarič (n 12).

¹⁶ Kim Lane Scheppele, "Constitutional Revenge" in Hungary', *Eutopia Law*, 6 March 2013, <https://eutopialaw.com/2013/03/06/constitutional-revenge-in-hungary/> (accessed 24 April 2019).

¹⁷ See eg Erin K Jenne and Cas Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?' (2012) 23(3) *Journal of Democracy* 147.

¹⁸ Arch Puddington, 'Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians', Freedom House, June 2017, 38.

¹⁹ Wojciech Sadurski, 'Judicial "Reform" in Poland: The President's Bills Are as Unconstitutional as the Ones he Vetoed', *Verfassungsblog*, 28 November 2017, <http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/> (accessed 24 April 2019).

²⁰ Sadurski (n 8) 419.

²¹ *ibid* 424.

²² For an overview, see Gabor Halmai, 'Second-Grade Constitutionalism? The Case of Hungary and Poland', CSF-SSSUP Working Paper 1/2017, 9–12.

Polish Constitution, while formally untouched, has been de facto transformed.²³ All in all, constitutional standards have in many CEE countries slid backwards, to the surprise of many, even in some of those countries, in the last few years.²⁴ The European Commission monitors the state of the rule of law in Poland as it is compromised on a daily basis, similarly in Hungary.²⁵ More specifically, Uitz even argues that ‘were the Hungarian government to succeed in its recent efforts, it may well seriously shatter whatever is left from the rule of law in Europe’.²⁶

The described regression in the democratic rule of law and democracy itself, which took place abruptly and was conducted relatively swiftly, took everyone, academic and institutional stakeholders, somewhat by surprise. In particular, the response of the EU has been slow, mild, muted and, as a rule, ineffective and therefore frustrating. Theoretical, legal, political, democratic and geostrategic obstacles have stood in the EU’s way of addressing the problem comprehensively and effectively. Theory has traditionally grappled with the rule of law as an essentially contested concept.²⁷ The elusiveness of the meaning, or rather meanings, of the rule of law in theory has also hindered its operationalisation in practice. The open-ended character of the rule of law has presented itself as a legal obstacle to the direct effect of Article 2 TEU, at least in the eyes of the Council’s legal service. Politically, of course, this has provided more leeway to the rogue states in their de jure and de facto pursuit of a constitution-capturing agenda. Simultaneously, the consensus-seeking approach of the EU institutions has turned Article 7 TEU into a so-called nuclear option,²⁸ reducing the likelihood of launching a therein defined procedure and, even more so, of bringing the latter to its logical and meaningful conclusion while this was still at least theoretically possible. Even this possibility has, however, been lost as the Hungarian backsliding passed unaffected and the Polish imitators could now rely on Orbán’s support in the European Council when its unanimity is necessary for launching a systemic infringement procedure, and vice versa. Furthermore, the European People’s Party (EPP) has been very lenient toward Orbán in order not to estrange

²³ Wojciech Sadurski, ‘What Is Going on in Poland Is an Attack against Democracy’, *Verfassungsblog*, 15 July 2016, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/> (accessed 24 April 2019).

²⁴ Anne Sanders and Luc von Danwitz, ‘The Polish Judiciary Reform: Problematic under European standards and a Challenge for Germany’, *Verfassungsblog*, 28 March 2017, <http://verfassungsblog.de/the-polish-judiciary-reform-problematic-under-european-standards-and-a-challenge-for-germany/> (accessed 24 April 2019).

²⁵ Agata Fijalkowski, *From Old Times to New Europe: The Polish Struggle for Democracy and Constitutionalism* (Aldershot, Ashgate, 2010).

²⁶ Renáta Uitz, ‘The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe’, *Verfassungsblog*, 5 April 2017, <https://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/> (accessed 24 April 2019).

²⁷ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida?)’ (2002) 21(2) *Law and Philosophy* 137.

²⁸ As the former Commission President Barroso referred to it in his 2012 State of the Union Speech, Strasbourg, 12 September 2012, http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm (accessed 24 April 2019).

a member of the political family whose numbers in the European Parliament have been dwindling in recent years. These myopic, indeed hypocritical,²⁹ (in)actions of the European centre-right have further weakened the chances of any meaningful action being taken against Hungary. On the other hand, due to PiS being a member of the party of European Conservatives and Reformists, and not the EPP, the political approach to Poland has been more stringent than that to Hungary. This has again not acted in favour of the rule of law in the EU. It has permitted the Polish government to invoke grounds of discriminatory treatment and make a case for politically motivated charges.

On top of this, the EU lacks democratic legitimacy for interfering with the internal constitutional functioning of these Member States in order to turn them into well-ordered polities, observing the foundational values of the Union.³⁰ The half-built European constitutional structure, its competence handicap, legitimacy deficit and the democratic illusion in which citizens of Member States partake has allowed the backsliding Member States to get away with violations of even the most basic values of the Union.³¹ Finally, the geostrategic situation, in particular the migration crisis has, unintendedly, provided an additional boost to the Orbán regime. By acting unilaterally, swiftly and determinedly he managed to portray himself as a saviour of (Christian) Europe and has thus won explicit, but even more so implicit, sympathies not just among his Eastern but also among his Western political counterparts who found that the Hungarian border-wall had relieved them of the refugee burden.

All the described factors hindered the European institutions from tackling the rule of law and democracy crisis in the new Member States effectively and while would still have been possible to reverse the course of these adverse political developments. This is now becoming increasingly unlikely. The single-market-based, judicially enforced violations against Hungary,³² occasional (attempts at) judicial sanctioning of Poland,³³ the use of the informal rule-of-law framework, the formal initiation of the Article 7 procedure first against Poland³⁴ and eventually also against Hungary³⁵ are, even if they are ever brought to a successful

²⁹ Jan-Werner Müller, 'If You're not a Democracy, You're not European Anymore' [22 December 2017] *Foreign Policy*.

³⁰ Matej Avbelj, 'Pluralism and Systemic Defiance in the European Union' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford, Oxford University Press, 2017).

³¹ Matej Avbelj, 'What Future for the European Union?', WZB Discussion Paper SP IV 2017-802.

³² Judgment of the Court of Justice of the European Union (First Chamber), Case C-286/12, 6 November 2012.

³³ Judgment of the Court of Justice of the European Union (Grand Chamber), Case C-216/18 PPU, 25 July 2018.

³⁴ In December 2017 the Commission invoked the Art 7(1) procedure for the first time, by submitting a Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland, http://europa.eu/rapid/press-release_IP-17-5367_en.htm (accessed 15 May 2019).

³⁵ In September 2018 the European Parliament invoked the Art 7(1) procedure also against Hungary: European Parliament, Press Release, 'Rule of law in Hungary: Parliament Calls on the

conclusion resulting in the voting rights of the rogue states in the Council being suspended, simply insufficient. At best, they will just scratch the surface of the existing and still deepening rule-of-law and democracy crisis in this part of Europe. For this crisis is truly a systemic one and runs deep in the very mindset and comprehensive *modus operandi* of the post-communist societies in the CEE countries. To those who have been following the evolution of these transitional societies since the collapse of the communist regimes and to those who pride themselves with at least some basic knowledge of the history of this part of Europe, the political desire and the actual implementation of illiberal democracy, the systemic undermining of the rule of law and the authoritarian ambitions of political parties of any colour to use the state as an instrument of their political and indeed even more often for individual self-enrichment should come as no surprise. Unfortunately, it has come as such for many others.

Furthermore, the constitutional democracy and the rule of law in Slovenia and the majority of CEE countries, in contrast to Hungary and Poland, did not have anywhere to slide backwards to. The rule of law in those countries appears to have been, since the fall of the iron curtain, under attack from *nouveau riche* elites very much connected to the former totalitarian regimes. Old practices of corruption, nepotism, clientalism and ‘dirty togetherness’ have not only not been eradicated, but remain present in the centre of institutional and public space in certain CEE countries.³⁶ Most of those countries have not undertaken a fully fledged reform of the rule of law and have retained a post-socialist formal and authoritarian mentality. For instance, since democratisation, others, such as the countries of the former Yugoslavia, have faced serious difficulties of translating the values of the rule of law *de jure* into the rule of law *de facto*.³⁷ This trend has been underway for quite some time and from the number of pending applications before the European Court of Human Rights (ECtHR) at the end of 2018 it does not appear to be ceasing any time soon.³⁸ Similar developments can be seen in other CEE Countries.

Another facet of the rule-of-law crises concerns the influence of the Council of Europe institutions, particularly the ECtHR, on the constitutional democracy

EU to Act’ (12 September 2018) www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act (accessed 24 April 2019).

³⁶ See eg Adam Czarnota, Martin Krygier and Wojciech Sadurski, ‘Introduction’ in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (Budapest, Central European University, 2005). See also Bojan Bugarič (2015) ‘The Rule of Law Derailed: Lessons from the Post-Communist World’ (2015) 7(2) *Hague Journal Rule Law* 175.

³⁷ Gentian Zyberi and Jernej Letnar Čerňič, ‘Transitional Justice Processes and Reconciliation in the Former Yugoslavia: Challenges and Prospects’ (2015) 33(2) *Nordic Journal of Human Rights* 132. See also Dragoljub Popović and Tanasije Marinković, ‘The Emergence of the Human Rights Protection in Serbia under the European Convention on Human Rights: The Experience of the First Ten Years’ in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge, Cambridge University Press, 2015) 373–400.

³⁸ The ECtHR in Fact & Figures 2018, https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf, 4 (accessed 24 April 2019) 4.

and rule of law in Slovenia and elsewhere in Central and Eastern Europe. The impact of the ECtHR on the rule of law and human rights protection in Slovenia has been relatively positive, particularly in comparison with most of the other CEE states.³⁹ More specifically, it has had a three-fold dimension. First, it has introduced normative standards of the rule of law and human rights protections in the newly established Slovenian constitutional legal order. Second, the accession of Slovenia to the Council of Europe handed individuals the right to individual application in the case of alleged human right violations by the Slovenian authorities. Third, several areas of the exercise of the rule of law have been substantially improved following the ECtHR's judgments in all three pilot cases. On the other hand, Slovenia and several other countries have struggled to internalise the liberal values of the European Convention on Human Rights (ECHR) into the daily institutional life of all branches of the newly established states based on democracy and the rule of law. The judiciary, in particular, has shown resistance against the full internalisation of rights such as the right to a fair, independent and impartial tribunal. In other CEE states, including countries of former Yugoslavia,⁴⁰ most of those challenges have been tied to the old mentality and old ways of doing business, which are in short a complicated mixture of corruption, nepotism, clientelism, actual and perceived conflicts of interest, formalism and an authoritarian mentality. The ongoing presence of these characteristics has contributed to the liberal values of the ECHR not being fully internalised and as there has been strong resistance, and at times even organised opposition, to the internalisation and application of the rule of law and human rights standards.⁴¹ For those observers familiar with the regulatory milieu of CEE countries, recent developments in the erosion of rule-of-law standards have been somehow expected. Those countries where democratic institutions have been demolished and captured after decades, not only in Central and Eastern Europe but beyond, have been easy prey for illiberal, authoritarian or even totalitarian forces to remerge or retain their old interests in newly dressed forms of democratic governance.⁴² This book in the ensuing chapters therefore explains in detail the reception of EU and Council of Europe standards and reasons for rejection of their internalisation. The book also explores why deficiencies in the exercise of the rule of law and human rights protections have never been fully eliminated.⁴³ As a result, it outlines in chapter 12 sets of recommendations on how to reform the rule of law and democracy in Slovenia.

³⁹ Letnar Čerňič (n 6).

⁴⁰ Zyberi and Letnar Čerňič (n 37).

⁴¹ Jernej Letnar Čerňič, 'The European Court of Human Rights in the States of the Former Yugoslavia' (2018) 1 *East European Yearbook on Human Rights* 32.

⁴² See eg Luka Lisjak Gabrijelčič, Conversation with Timothy Snyder: 'Ljudje znamo dobro lagati in dobro znamo ubijati. Zelo težko pa priznamo, da smo ubijali zaradi laži' [Autumn 2016] *Razpotja* 46, 48. See also Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (New York, Tim Duggan Books, 2015).

⁴³ Jernej Letnar Čerňič, *Slovenija na razpotju: Geneza varstva človekovih pravic v slovenski družbi* (Kranj, Nova Univerza–Fakulteta za Državne in Evropske Študije, 2018); Jernej Letnar Čerňič et al,

II. THE ARGUMENT OF THIS BOOK

This book argues that the surprise about the depth and breadth of the rule-of-law and democracy crisis in the EU provoked by CEE Member States derives from fundamental misunderstandings by old Member States and EU institutions about the sociopolitical nature of these countries and daily practices of not only their institutional and public spheres, but also of their ways of doing business in the private sphere. This misunderstanding has been born out of ignorance on the part of the Western stakeholders. It has been also caused, in part, by deception practiced by the CEE elites and the lack of internalisation of the values of modern liberal democracies in their domestic systems. Certainly, Western stakeholders have been aware of some of the challenges in the exercise of the rule of law in new Member States.⁴⁴ Finally, the current situation is in many ways the outcome of a deliberate, even if benign, neglect of the real sociopolitical state of affairs in these countries by the old Member States and the Brussels-based institutions out of a desire to make the EU big bang enlargement of 2004 a success story, or at least to portray it as such. To a certain extent the international- and supranational political as well as economic alliances played their role too. When these alliances have been undermined or even broken – largely under the duress of the financial and economic crisis that began in 2008 – the Potemkin village of CEE states irreversibly started collapsing too.

The country spearheading this Potemkin village scenario, and therefore the most suitable means for buttressing the enlargement success story, was the case of Slovenia. Since its independence and throughout the accession procedure, Slovenia was portrayed as the best disciple and as a poster-child for the New Europe. In less than 20 years after winning its independence from Yugoslavia, the country has become a full member of the EU, a member of the Schengen regime as well as of the eurozone. The Slovenian example has thus embodied the EU dream. It has proven the success of the enlargement and it has stood as a role model for all the countries east and south of the present EU borders that have been aspiring to full membership.

This book claims that the widely shared narrative of the Slovenian EU dream has, unfortunately, been just a myth. In many ways, Slovenia fares even worse than its contemporary constitutionally backsliding CEE counterparts. The understanding of the depth and breadth of the rule-of-law and democracy crisis in Slovenia, the authors of this book hope, will also contribute to critical intellectual awakening and better comprehension of the real causes of the present

Slovenija pred Evropskim Sodiščem za Človekove Pravice: 1994–2016 (Ljubljana, Fakulteta za Državne in Evropske Študije, 2017).

⁴⁴ See eg European commission, ‘Cooperation and Verification Mechanism for Bulgaria and Romania’, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en (accessed 24 April 2019).

crises across CEE Member States, which threaten the viability of the EU project as such. It is only on the basis of such better understanding that causes of the crisis can be more accurately identified and, consequently, also more appropriately addressed on the national, transnational and supranational levels. All in all, this book aims, first, to portray the various pathways of the backsliding of the rule of law and democracy in Slovenia, and secondly to draw parallels and lessons for the broader CEE region.

The existing international literature on constitutional democracy and the rule of law has been at best partial and at worse misinformed. There has been a notable lack of in-depth research focusing on democracy and the rule of law in Central and Eastern Europe, exploring mutual relationships and interactions between national levels and European institutions; such research could also produce normative proposals for the reforms necessary, which would also be applicable in comparative contexts. This gap is most notable and concerning in the field of law. A comprehensive approach to the problems analysed in this book is also necessary to ensure the presence of Slovenia in international discourse and analysis. The review of the leading international literature, which has been concerned with the transition of the post-communist states and their road to EU membership, demonstrates a curious absence of Slovenia and an absence of any analysis of the success or failure of European institutions in strengthening the rule of law and democracy in that country.⁴⁵ The international rule-of-law and democracy focus has mostly been on Hungary, Poland, Romania and Bulgaria, while the specific Slovenian problems have gone by undetected,⁴⁶ with some rare exceptions.⁴⁷ From the legal point of view most of the dimensions of Slovenian

⁴⁵ See eg Jacques Rupnik and Jan Zielonka, 'The State of Democracy 20 Years On: Domestic and External Factors' (2013) 27 *East European Politics and Societies* 3; Siobhan Kattago, *Memory and Representation in Contemporary Europe: The Persistence of the Past* (Farnham, Ashgate, 2012).

⁴⁶ See eg Müller (n 13); Gabor Halmai and Kim Lane Scheppele (eds), 'Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws', February 2012, http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf (accessed 24 April 2019); Lane Scheppele (n 14). See also a vibrant debate at *Verfassungsblog*: 'Hungary: Taking Action' <https://verfassungsblog.de/hungary-taking-action/> (accessed 24 April 2019); Mark Dawson and Elise Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) 14(10) *German Law Journal* 1959; Bugarič (n 12); Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford, Hart Publishing, 2014); Kim Lane Scheppele and Vlad Perju, 'Separating Law and Politics in Romania' *New York Times* (12 July 2012) http://krugman.blogs.nytimes.com/2012/07/12/guest-post-separating-law-and-politics-in-romania/?_php=true&_type=blogs&_r=0 (accessed 24 April 2019); Kim Lane Scheppele, 'Romania Unravels the Rule of Law' *New York Times* (5 July 2012) <http://krugman.blogs.nytimes.com/2012/07/05/guest-post-romania-unravels-the-rule-of-law/> (accessed 24 April 2019).

⁴⁷ See Matej Avbelj and Jernej Letnar Čerňič, 'Slovenia' in Leonard Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague, Eleven International Publishing, 2012); Jan Zobec, 'Slovenia: Just a Glass Bead Game?' in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, (Cambridge, Cambridge University Press, 2016); Jan Zobec and Jernej Letnar Čerňič, 'The Remains of the Authoritarian Mentality

democracy and the rule of law remain undertheorized and underresearched. Nor has much been written on the mutual relationships and influence between national levels and European institutions in Central and Eastern Europe.⁴⁸ This book is closing this gap by offering, for the first time in the global academic environment, a systematic and a comprehensive scrutiny of the state of the Slovenian constitutional democracy and the role of European institutions in it.

A comprehensive treatment of the reasons for the failure of the rule of law and democracy in Slovenia and failure of the European institutions is thus clearly lacking. This book therefore analyses several dimensions of Slovenian democracy and the rule of law that could be useful in the comparative contexts, which are at the moment missing from global academic discourse. To the extent that such literature exists, it is mostly concerned with endogenous factors. The book aims to remove all these gaps. Different sectors of the rule of law and democracy are interconnected. The present book brings out these connections, focuses on their advantages and disadvantages, and proposes a set of reforms from both an internal and an external perspective. Finally, it also for the first time in the global academic environment produces a systematic and comprehensive analysis of the consequences that deficiencies in democracy and the rule of law have for human rights protection in Slovenia and beyond.

The book is an example of legal research. This harbours its own specific 'scientific' approach, instruments and research methods, which are markedly different from those typical of natural sciences and even from those characteristic of social sciences and humanities. The methodological approach thus follows the established scheme of legal research. As a result, it is based on descriptive, explanatory and normative methods. The descriptive method aims at a comprehensive and undistorted representation of factual and legal context in order to delimit the object of research. The explanatory method concentrates on establishing the causal relations between the various constitutive elements of the social phenomenon under research. The most important method, however, is a normative method, which is a prerequisite of new and original scientific discoveries. This method critically evaluates the social phenomenon under investigation, sheds light on its drawbacks and disadvantages, and, most importantly, results in normative proposals for the possible reforms and improvements.

This book is, accordingly, structured in the following way. After this introductory chapter, Chapter 2 describes the genesis of the contemporary Slovenian state, the ideal and actual nature of its democracy and economic character, which determines the functioning of the country in practice. In so doing, the

within the Slovene Judiciary' in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Oxford, Hart Publishing, 2015).

⁴⁸ See Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Oxford, Hart Publishing, 2015); Leonard Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague, Eleven International Publishing, 2012).

parallels are drawn with other CEE Member States that have in recent years come under EU and international scrutiny. Chapter 3 explains the historical reasons for a discrepancy between Slovenian constitutional and rule-of-law ideals and actual practice by focusing closely on the challenges of transitional justice in Slovenia. A decisive factor in this discrepancy has also been a specific Slovenian model of economic governance, which has set Slovenia importantly apart from other CEE countries. The Slovenian model of economic gradualism marked by a notable absence of reforms is therefore analysed in Chapter 4. It is argued there that such a model of economic development has also been instrumental to the contemporary crisis of constitutional democracy in Slovenia. Chapter 5 moves the debate from the past to the present to discuss the several faces of the crisis of the rule of law and democracy in Slovenia. It concentrates on the problematique of human rights protection in Slovenia and the selective, perhaps even arbitrary, approach of state institutions and NGOs to these issues. Chapter 6 focuses on the rule of law problematique in Slovenia, more specifically on the functioning of the judiciary (*lato sensu*) and the role of European institutions in identifying as well as remedying these problems. Chapter 7 takes up the challenges of democratic governance in Slovenia, foremost in institutional terms – the tendency of the captured state, corruption, the implosion of the political system and populism, as well as unfair elections. The discussion of the democratic governance is followed, in Chapter 8, by an in-depth review of the problematique related to freedom of expression and media in Slovenia, and hate speech. Chapter 9 addresses the deficiencies of the Slovenian welfare state, which have been (in)directly caused by the constant crises of constitutional democracy and the rule of law. Finally, Chapter 10 takes a horizontal look across all the previously discussed domains of democracy and rule of law in Slovenia to study the impact of the Council of Europe on them in identifying as well as remedying these problems.

Chapter 11 does the same with respect to the influence of the European Union. Chapter 12 wraps up the discussion by drawing normative conclusions about the particularities of the Slovenian rule-of-law and democracy crisis and explains how the latter could be alleviated, also by involving EU institutions, and how the lessons hence learned could be extrapolated to the wider CEE region.

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⁴⁹ 'Reform of Democratic and Rule-of-law State in Slovenia', Research Project J5-7359 (A) ARRS (1 January 2016–31 December 2018) Slovenian Research Agency, Nova Univerza – Fakulteta za

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državne in evropske študije, www.fds.si/index.php/en/school/research-and-consulting/raziskovalna-skupina/research-projects/1232-reform-of-democratic-and-rule-of-law-state-in-slovenia (accessed 24 April 2019); 'Integral Theory of the Future of the European Union', Research Project J5-1791 (1 July 2019–30 June 2022) Slovenian Research Agency, Nova Univerza – Fakulteta za državne in evropske študije; Holistic approach to business and human rights: a normative reform of Slovenian and international legal order, Research Project J5-1790 (1 July 2019–30 June 2022) Slovenian Research Agency, Nova Univerza – Fakulteta za državne in evropske študije.

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