

Socialization Trouble. European Populist States and Compliance with Human Rights Norms

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Résumé de l'article

Cet article vise à re-conceptualiser les cadres théoriques qui étayent les paradigmes de la théorie de la socialisation en droit international européen. L'approche optimiste, quelque peu insouciant de la conformité avec les normes internationales de droits humains et basée sur la supposition que la victoire du paradigme libéral des droits humains au sein de l'Union européenne est incontestable et évidente, a dominé la décennie précédente. Les paradigmes de socialisation appliqués aux pays d'Europe centrale, de l'Est et du Sud-Est ont compris ce processus comme étant principalement unidirectionnel et basé sur une relation « professeur-élève » claire. Toutefois, avec l'arrivée au pouvoir du Fidesz hongrois, cette conviction édifiancée a été assombrie par de premiers doutes. Le populisme hongrois au pouvoir a démontré les premiers traits du futur ensemble de stratégies complexes appliquées, entre autres, en Pologne, en Roumanie et en Italie. L'indépendance du droit comme garantie des droits humains a été contestée non seulement en pratique, en poursuivant des objectifs politiques par la violation ou le contournement de normes valides, mais aussi théoriquement, par la doctrine de l'État « illibéral » proclamée en premier par le Premier ministre hongrois Viktor Orbán. Même si ces transformations ont rencontré des réponses de la part des institutions européennes, elles ne furent ni rapides ni efficaces. La Hongrie, en tant qu'enfant terrible de l'UE, fut aussitôt rejointe par d'autres États de l'Union. La Cour de justice de l'Union européenne (CJUE) et la Cour européenne des droits de l'homme (CEDH) ont réagi à l'augmentation des violations des droits humains, mais sont dépourvues du droit de traiter la question de la « démocratie illibérale » de manière systémique. Conséquemment, la révolte populiste à l'endroit du concept même des droits humains demande une évaluation beaucoup plus large et complexe. Sa force consiste en une concentration du pouvoir effectif de l'État (et du parti) combiné avec des stratégies rhétoriques contre les droits humains et leurs mécanismes de protection. Dans cet article, je confronte les paradigmes de socialisation avec la crise de la protection des droits humains introduite par la vague populiste. Je soutiens qu'afin d'adresser cette crise adéquatement, les angles morts des paradigmes de socialisation précédents doivent être reconnus et surmontés.

SOCIALIZATION TROUBLE. EUROPEAN POPULIST STATES AND COMPLIANCE WITH HUMAN RIGHTS NORMS

*Przemyslaw Tacik**

This paper aims to reconceptualize the theoretical frameworks that underpin paradigms of the theory of socialization in international and European law. The somewhat carefree optimistic approach to the compliance with international human rights norms, based on the assumption that within the European Union (EU) the victory of the liberal paradigm of human rights is unquestionable and self-evident, dominated the previous decade. Socialization paradigms applied to Central, Eastern, and Southeastern European countries understood this process as mostly unidirectional and based on a clear “teacher-student” relationship. However, with the rise to power of Hungarian Fidesz, this uplifting conviction was shadowed by first doubts. Hungarian populism at power demonstrated the first traits of the future complex set of strategies applied, among others, in Poland, Romania and Italy. The independence of the law as a human rights guarantee was challenged not only practically, by pursuing political goals through violation or circumvention of valid norms, but also theoretically, by the doctrine of the “illiberal state” first heralded by the Hungarian Prime Minister Viktor Orbán. Even though these transformations encountered responses from European institutions, it was neither prompt nor effective. Soon enough Hungary as the *enfant terrible* of the EU was joined by further countries of the EU. The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) reacted to the increase of human rights violations, but they are deprived of an entitlement to address “illiberal democracy” in a systemic manner. Consequently, the populist revolt against the very concept of human rights requires a much broader and complex assessment. Its strength consists in the focus of effective state (and party) power coupled with rhetorical strategies against human rights and its mechanisms of protection. In this paper, I confront socialization paradigms with the crisis of human rights protection brought about by the populist wave. I argue that in order to address this crisis adequately, the blind spots of previous socialization paradigms need to be recognized and overcome.

Cet article vise à re-conceptualiser les cadres théoriques qui étayaient les paradigmes de la théorie de la socialisation en droit international européen. L'approche optimiste, quelque peu insouciance de la conformité avec les normes internationales de droits humains et basée sur la supposition que la victoire du paradigme libéral des droits humains au sein de l'Union européenne est incontestable et évidente, a dominé la décennie précédente. Les paradigmes de socialisation appliqués aux pays d'Europe centrale, de l'Est et du Sud-Est ont compris ce processus comme étant principalement unidirectionnel et basé sur une relation « professeur-élève » claire. Toutefois, avec l'arrivée au pouvoir du Fidesz hongrois, cette conviction édifiante a été assombrie par de premiers doutes. Le populisme hongrois au pouvoir a démontré les premiers traits du futur ensemble de stratégies complexes appliquées, entre autres, en Pologne, en Roumanie et en Italie. L'indépendance du droit comme garantie des droits humains a été contestée non seulement en pratique, en poursuivant des objectifs politiques par la violation ou le contournement de normes valides, mais aussi théoriquement, par la doctrine de l'État « illibéral » proclamée en premier par le Premier ministre hongrois Viktor Orbán. Même si ces transformations ont rencontré des réponses de la part des institutions européennes, elles ne furent ni rapides ni efficaces. La Hongrie, en tant qu'enfant terrible de l'UE, fut aussitôt rejointe par d'autres États de l'Union. La Cour de justice de l'Union européenne (CJUE) et la Cour européenne des droits de l'homme (CEDH) ont réagi à l'augmentation des violations des droits humains, mais sont dépourvues du droit de traiter la question de la « démocratie illibérale » de manière systémique. Conséquemment, la révolte populiste à l'endroit du concept même des droits humains demande une évaluation beaucoup plus large et complexe. Sa force consiste en une concentration du pouvoir effectif de l'État (et du parti) combiné avec des stratégies rhétoriques contre les droits humains et leurs mécanismes de protection. Dans cet article, je confronte les paradigmes de socialisation avec la crise de la protection des droits humains introduite par la vague populiste. Je soutiens qu'afin d'adresser cette crise adéquatement, les angles morts des paradigmes de socialisation précédents doivent être reconnus et surmontés.

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Este artículo pretende volver a conceptualizar los marcos teóricos que apuntalan los paradigmas de la teoría de la socialización en derecho internacional europeo. El enfoque optimista, un tanto descuidado del cumplimiento de las normas internacionales de derechos humanos y basado en la suposición según la que la victoria del paradigma liberal de los derechos humanos en la Unión Europea es incuestionable y evidente, dominó la década anterior. Los paradigmas de socialización aplicados a los países de Europa central, del Este y Sudeste entendían que este proceso era principalmente unidireccional y se basaba en una clara relación “profesor-alumno”. Sin embargo, con la llegada al poder del Fidesz húngaro, ésta edificante convicción se ha visto ensombrecida por las dudas iniciales. El populismo húngaro en el poder ha mostrado los primeros rasgos del futuro conjunto de estrategias complejas aplicadas en Polonia, Rumanía e Italia, entre otros. La independencia del poder judicial como garantía de los derechos humanos se ha puesto en entredicho no sólo en la práctica, al perseguirse objetivos políticos mediante la violación o elusión de normas válidas, sino también teóricamente, por la doctrina del “Estado iliberal” proclamada por primera vez por el primer ministro húngaro Viktor Orbán. Aunque éstas transformaciones tuvieron respuesta por parte de las instituciones europeas, no fueron ni rápidas ni eficaces. Así que pronto se unieron a Hungría, como *enfant terrible* de la UE, otros Estados de la Unión. El Tribunal de Justicia de la Unión Europea (TJUE) y el Tribunal Europeo de Derechos Humanos (TEDH) han reaccionado ante el aumento de las violaciones de los derechos humanos, pero carecen del derecho a abordar la cuestión de la “democracia iliberal” de forma sistémica. En consecuencia, la revuelta populista contra el propio concepto de derechos humanos requiere una evaluación mucho más amplia y compleja. Su fuerza consiste en una concentración de poder efectivo del Estado (y del partido) combinada con estrategias retóricas contra los derechos humanos y sus mecanismos de protección. En este trabajo, confronto los paradigmas de socialización con la crisis de protección de los derechos humanos introducida por la ola populista. Argumento que, para abordar adecuadamente ésta crisis, hay que reconocer y superar los puntos ciegos de los anteriores paradigmas de socialización.

For the European Union (UE), the year 2020 is much different from what could have been expected in 2004 when ten new countries of Central-Eastern (CEE) and Southern Europe became members of the Union and the age-old West-East division finally seemed to dissipate. Instead of a peaceful land of uncontested liberal values and smooth cooperation, the Old Continent turned into a restless mosaic of differentiated regions ravaged by manifold problems that all add up to a multi-dimensional chain of contestation of the liberal order. The three Eastern enlargements determined, at least to a certain degree, the horizon of political and legal imagination of the future. Just as in the Hegelian vision of “bad infinity”,¹ back then it was depicted chiefly as a prolongation of the pre-accession period with no possibility of structural reconfigurations of dominant value orders, approaches to legality and modes of governmentality. The post-enlargement era, however, proved that such reconfigurations are not only possible, but also probable due to a backlash from the liberal socialization of the 1990s and the 2000s.

As a consequence, the prevailing paradigm of socialization studies delivered in that era now seems to exhibit a deceptively linear approach to how the process of socializing to liberal values looks like, especially in CEE. An often explicitly exposed presupposition is that the key moment in socialization is the beginning of the path: here some countries of CEE were portrayed as champions (Poland, Hungary and the Czech Republic), some as lagging behind, although with a general pro-EU direction (Romania and Bulgaria), and finally some were put on a blacklist of inveterate anti-liberal states that could be influenced by liberal socialization only to a very limited extent (e.g. Belarus). This initial division was assumed to be rather unmodifiable, just as if being a “champion” once was a token of an optimistic future for the country. The best example may be found in this 2006 text by Frank Schimmelfennig, Stefan Engert and Heiko Knobel:

the Eastern European countries with a *liberal party constellation* had to go through the economic trough of transformation. Although they pursued different strategies of economic reform (for instance, gradualism in the Czech Republic and shock therapy in Poland), the population has had to suffer from the hardships of economic adjustment sooner or later, and used the ballot to oust the incumbent parties from government. Moreover, political scandals have taken their toll. Whereas some of these countries have shown a remarkable stability of governments and parties (such as the Czech Republic and Slovenia), in others, they have been highly fluctuating and short-lived (such as in Poland and the Baltic countries). What distinguishes these countries from the other Eastern European countries, however, is a general orientation of the major parties toward liberal democracy and Western integration. Thus, whenever a government was dismissed or voted out of office, its successors followed the same basic parameters of political change. This not only applies to the parties of the centre and the moderate right but also to the reconstructed post-communist parties that came to power through democratic elections only a few years after the communist breakdown in Hungary, Lithuania, and Poland.²

¹ G W F Hegel, *Wissenschaft der Logik. Erster Teil. Die objektive Logik* (Frankfurt am Main: Suhrkamp, 1969) at 166-70.

² Frank Schimmelfennig, Stefan Engert & Heiko Knobel, *International Socialization in Europe European Organizations: Political Conditionality and Democratic Change* (Basingstoke: Palgrave MacMillan, 2006) at 246.

The authors rightly recognized structural differences between the countries of “the liberal group”, but it seems that the dominating paradigm was so strong that they did not reckon with a possibility of a backlash (although in 2006, the Polish party Law and Justice, then already clearly Eurosceptic, rightist and mildly populist, was in power for the first time). The greatest threat was identified in the legacy of post-communist parties and not in the right or far-right movements that fed upon the unrest and resentment caused by the post-transition inequalities. Naturally, this short-sightedness was a token of the unconditionality of the liberal paradigm rather than of shortcomings of the research itself. Just as Thomas Kuhn perspicaciously noted,³ paradigms hold sway over the very horizon of what seems possible and what is in advance excluded from the research field. It was not until the tectonic displacement—to use a Foucauldian term—was provoked by the populist anti-liberal revolt that the linearity and unconditionality all too often presumed in the socialization research were explicitly challenged.

It seems therefore that the socialization paradigm requires a theoretical reconfiguration and adaptation so that it may confront the developments within the EU after 2010. This date, despite its inevitable element of arbitrariness, marks the beginning of the openly populist era in many European countries (with the Hungarian Fidesz’s accession to power) which structurally differs from non-liberalism from the 1990s. Admittedly, that decade of unbridled trust in the liberal order was still confronted with a number of countries backsliding from the democratic track (like Slovakia, Ukraine or Russia) or openly disavowing it (like North Korea); it is worth remembering that the term “illiberalism” was used already back then by Fareed Zakaria.⁴

Nonetheless, this contestation was local: it involved self-ensconement in national boundaries against the forces of liberalism and globalization rather than attacking them on their own battlefield. It corresponded well with the paradigm of socialization because the path of development in itself seemed uncontested: illiberal countries of this time simply did not take the royal path and, even if they produced counter-narratives to their domestic use, it hardly leaked outside of their national strongholds. Belarus, for example, could not propose to the EU or CEE countries any cogent and enticing proposal of “another way”. The same applies to human rights protection; in the 1990s and early 2000s many countries with not necessarily high standards of protection overbid in their willingness to belong to the Council of Europe (CoE) and the EU just in order to present themselves in a better light. These times tolerated hypocrisy much better than open contestation: there seemed to be only one path and sometimes paying lip service to it with local violations of human rights was much easier than disavowing the need of protection whatsoever.

The year 2010, however, augured a sea change. “Illiberal democracy”—Viktor Orbán’s own term of choice—⁵began to be heralded as a counter-model within the EU. As we will argue in this paper, it is hardly a coherent and positive proposal, but it does not lack

³ Thomas S Kuhn, *The Structure of Scientific Revolutions*, 3rd ed (Chicago: The Chicago University Press, 1996) at 43-65.

⁴ Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) 76:6 *Foreign Affairs* 22 at 22-24.

⁵ Csaba Tóth, “Full Text of Viktor Orbán’s Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014” (29 July 2014), online: *The Budapest Beacon* <budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

the audacity to openly challenge the liberal consensus. Simultaneously, at the heart of Western democracies, the populist revolt rekindled contestation of the liberal model. As a consequence, the centres lost their power of attraction rooted in self-confidence and, simultaneously, the peripheries disavowed the unconditionality of the path. Alliances between Western and Eastern populists run across the old division between “the developed West” and “the aspiring East”, which much complicates the old paradigm of socialization understood as a more or less predetermined moving from the musty world of post-socialism to the liberal welfare of the West. Arguably, the deep contestation of liberal values which—with different intensities—afflicts the public debate in EU countries has significantly troubled the milieu of socialization: the former “students” may now point out the structural problems of Western countries and invoke rhetoric of *Rassemblement national* or *Alternative für Deutschland*, not to mention the *Brexit*ed Conservative and UKIP parties, in order to demonstrate that there is no longer one goal to aspire to. This, in turn, is not only a powerful anti-socialization factor, but also a starting point for asking queasy questions for socialization as such: on what grounds the legitimacy of “the Western example” and its dependence-inducing power?

Moreover, the new wave of populism brought unprecedented brazenness in undermining the rule of law and, sometimes, openly violating the *European Convention of Human Rights (ECHR)* and EU law. As I will demonstrate, CoE and EU institutions were surprisingly lenient in their approach to populist violations of international and EU law (especially by Hungary and Poland), which not only prompted the populists to act more radically, but also put in doubt the effectiveness and objectivity of socialization mechanisms. Contemporary populism or “illiberalism” is only partly a problem of two CEE countries; more importantly, it is a problem of liberal institutions which found themselves challenged and did not stand up to the challenge. It seems that their own hesitation and lingering contributed to the dismantlement of the socialization framework.

This paper will be structured in the following manner. First, we will outline briefly the main directions of the socialization theory in its application to the European human rights protection system, together with its inherent shortcomings. Then, we will present the sea change in the approach to the rule of law and human rights introduced by populist legality, based on the examples of Hungary and Poland. We will contrast it with the reaction of the CoE, the European Court of Human Rights (ECtHR) and EU institutions in order to track possible consequences for the socialization paradigm. Finally, we will attempt to reconsider the applicability of the socialization paradigm to the contemporary EU.

I. Socialization Paradigm, Human Rights and CEE

A. The Socialization Paradigm and its Shortcomings

The period between approximately 2000 and 2015 was instrumental in the development and ossification of the socialization paradigm in its application to the relations between “the liberal West” and the broadly construed “aspiring East” of Europe

(not necessarily in a geographical sense, but economically, symbolically or politically). A number of influential publications readapted the old-age dispute between constructivism and rationalism to the more nuanced situation of states turning liberal at the epoch of strong liberal hegemony.

It seems that the crucial elements of study were the emergence of voluntary self-appropriation of a norm. Jeffrey T. Checkel in his 2007 study put special stress on this aspect in his distinction between type I and II socialization:

There is more than one way in which agents may follow a logic of appropriateness. On the one hand, agents may behave appropriately by learning a role—acquiring the knowledge that enables them to act in accordance with expectations—irrespective of whether they like the role or agree with it. The key is the agents knowing what is socially accepted in a given setting or community. Following a logic of appropriateness, then, means simply that conscious instrumental calculation has been replaced by conscious role playing. We call this Type I internalization or socialization.

On the other hand, following a logic of appropriateness may go beyond role playing and imply that agents accept community or organizational norms as “the right thing to do.” We call this Type II internalization/socialization, and it implies that agents adopt the interests, or even possibly the identity, of the community of which they are a part. Conscious instrumental calculation has now been replaced by “taken-for-grantedness.”

It is important to keep the two different types of internalization in mind when analyzing socialization. Both represent a shift away from a logic of consequences; both require a logic of appropriateness; and both capture distinct aspects of the socialization dynamics observed in contemporary Europe.⁶

This “type II socialization” is in fact nothing less than the emergence of an objective claim to rule-conformant behaviour that appears with the emergence of normativity; it was analyzed already by Kelsen in his canonical chapters of *Reine Rechtslehre*.⁷ In Checkel’s team research, it was used in order to differentiate between the three following patterns of socialization: (1) the classically rationalist “strategic calculation”, (2) the mezzanine category of “role playing”⁸ which already includes recognition of the validity of the norm, albeit not autotelically, but for the sake of following a shortcut in deciding on one’s behaviour, and finally (3) the proper “normative suasion” based on appropriation of the norm and taking up the identity of its addressee.⁹ Checkel’s approach was coupled with acknowledgment of reinforcement mechanisms

⁶ Jeffrey T. Checkel, “International Institutions and Socialization in Europe. Introduction and Framework” in Jeffrey T. Checkel, ed, *International Institutions and Socialization in Europe* (Cambridge: Cambridge University Press, 2007) 3 at 6.

⁷ Hans Kelsen, *Pure Theory of Law* (New York: A.M. Kelley, 1969).

⁸ Alastair Iain Johnston prefers to associate this pattern with “mimicking”: “Mimicking is a mechanism whereby a novice initially copies the behavioural norms—including discursive practices—of the group to navigate through an uncertain environment”. See Alastair Iain Johnston, *Conclusions and Extensions Toward Mid-Range Theorizing and Beyond Europe*, (Cambridge: Cambridge University Press, 2005) at 218.

⁹ Checkel, *supra* note 6 at 10-13.

which were categorized in three dimensions: first, reinforcement can be based on rewards or punishments; second, it can use tangible (material or political) or intangible (social or symbolic) rewards and punishments; finally, it can proceed through an intergovernmental or a transnational channel.¹⁰

Nonetheless, detailed patterns and factors of socialization may be much more diverse. The studies from the aforementioned period also adopt the following: elite learning (mainly due to the soft power of the hegemon), upwards mobilization of ideas from the masses, processes of change resulting from persuasion, inducement, social influence, membership conditionality, shaming and coercion (international and domestic), as well as processes of domestic institutionalization and regional competition.¹¹

In the above-mentioned period, the process of socialization of CEE countries to the rule of law, human rights and minority protection was usually understood in a linear form. The initial multifaceted dynamics between socializing forces and socialized countries were understood in terms of reduction of complexity: the desired goal was “habitualisation of norms”¹² which “consumed” the significance of previous multifarious socializing factors. As Schimmelfennig, Engert and Knobel wrote in 2006, “successful socialization requires that the target state reliably complies with fundamental international community rules in the absence of external sanctioning mechanisms”.¹³ Champions of the region (Hungary, Poland and the Czech Republic) were believed to reach this stage (despite many reservations and shortcomings), whereas other CEE States were conceptualized as variously positioned dropouts from the process. Rapid changes in this categorization, if at all imagined, were rather believed to happen from the category of lingering countries to the peloton, as in the case of Croatia and Slovakia.¹⁴ After the initial “rushing” for the prize of Western recognition and rewards, scholars expected CEE countries to gradually adopt the perspective of belonging to a common group of liberal states.¹⁵

The strength of the liberal paradigm—in which visions of linearity without a possibility of serious backsliding were rooted—influenced conclusions of empirical socialization studies from this era. Their theoretical apparatus, when applied to CEE countries of the 1990s and the 2000s, often rendered disconcertingly tautological results. The ultimate determining factor of the successful socialization process was

¹⁰ Frank Schimmelfennig, “Strategic Calculation and International Socialization Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe”, (2005) 59:4 Intl Organization 827 at 831.

¹¹ Susan Park, “Socialization and the liberal order” (2014) 51:3 Intl Politics 334 at 334-349; Quddus Z Snyder, “The illiberal trading state: Liberal systemic theory and the mechanism of socialization” (2013) 50:1 J Peace Resarch 34; Judith Kelley, “International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions” (2004) 58:3 Intl Organization 425 at 428-435.

¹² Susan Park, *supra* note 11 at 340.

¹³ Schimmelfennig, Engert & Knobel, *supra* note 2 at 243.

¹⁴ Trine Flockhart, “Complex Socialization: A Framework for the Study of State Socialization” (2006) 12:1 Eur J Intl Relations 89 at 104.

¹⁵ Quddus Z Snyder, *supra* note 11 at 38.

seen not in the incentives, rewards or punishments from international organizations or Western countries, but in a state's own political momentum. Schimmelfennig claimed:

the sustained compliance with liberal norms in most of the CEECs with a liberal party constellation is strongly indicative of internalization. These countries have attained high conformance levels ahead of EU or NATO accession conditionality and have maintained them across numerous elections and changes in government. This observation suggests, however, that the contribution of international institutions to internalization has been small. At best, they have helped to reinforce and stabilize a preexisting domestic consensus (which may well have formed by diffuse transnational influences during the Cold War). It is highly probable that these countries would have embarked and continued on the path of democratic consolidation in the absence of any norm promotion by international organizations, be it in the form of persuasion, social influence, or membership incentives.¹⁶

The key argument here is that socialization works because a state submits to the process of socialization, in which external factors play a secondary role. In other words, the central prognostic factor is indeterminable: a state either cooperates with the process of socialization or not, and no external pressure can ultimately change this orientation. Conclusions of Schimmelfennig, Engert and Knobel's study link the orientation of the countries with the existence of liberal or non-liberal party constellations in their domestic political scene (although this, as the ultimate factor, once again eludes further explanation):

1. In countries with a liberal party constellation, international socialization will not only be effective but also quick and smooth. Except in the case of conflict about minority protection, international socialization will be far advanced ahead of credible EU and NATO membership promises;
2. In countries with a mixed party constellation, international socialization will also be effective but take longer and proceed via stop-and-go or up-and-down processes. International socialization will stagnate ahead of credible EU and NATO membership promises;
3. In countries with an anti-liberal party constellation, international socialization will not be effective.¹⁷

In turn, Zürn and Checkel sought the factors of socialization in the existence of a student-teacher relationship and a weak domestic opposition to changes:

The most important result is that different socialization mechanisms take place and are effective. Socialization can come about via different pathways—a complexity best explained by seeking complementarities and points of contact between rational choice and constructivism. However, the extent of the socializing effect depends on scope conditions: The socialization of states

¹⁶ Frank Schimmelfennig, "Strategic Calculation and International Socialization Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe", *supra* note 10 at 856.

¹⁷ Schimmelfennig, Engert & Knobel, *supra* note 2 at 248.

is most likely to take place when opposition to change is weak and the socialized state sees itself as the student in a teacher-student relationship. Moreover, institutional design and domestic politics play significant—if undertheorized—roles.¹⁸

It seems therefore that many studies from this period did not address the true multidimensionality of socialization, focusing rather on the external signs of compliance. The strength of “the teacher-student relationship”, which requires explanation in itself, was taken for a token of socialization. Quite similarly to Molière’s *Imaginary Invalid*, where *virtus dormitiva* was believed to explain why opium made people sleep,¹⁹ effective socialization (and a milieu conducive to socialization) was posited as an explanation why CEE States were socialized.

To sum up, the liberal paradigm of socialization excelled in elaborating a list of potential factors, but was hardly apt to address socialization as: (1) not necessarily linear, (2) a process which is based on a strength of liberal hegemony which can be undermined, both in the West and in the East, (3) a process which is prone to backsliding or even reversal, (4) a multi-dimensional phenomenon that produces a backlash which can emerge already after “successful” socialization, (5) a process in which states should not be taken for ready-made totalities, but rather complex politics in which socialization is never final and meets with tacit contestation or sometimes open resistance at various levels of political and social life, (6) an instrument of producing a post-dependence relationship between states, the legitimacy of which should not be taken for granted.

B. Socialization and Human Rights in CEE

These dimensions usually omitted in socialization studies apply to human rights protection as well. At the surface, the post-1989 history of human rights in CEE seems to be generally a success story. All countries of the region signed, ratified and made the *ECHR* enter into force within the period 1991-1994, in which they championed post-Yugoslav States (with the exception of Slovenia) and Ukraine. The *ECHR* and the ECtHR’s jurisprudence have had significant influence on legal systems of these countries.²⁰ In Poland, for example, it helped shorten excessively long proceedings by introduction of a systemic legal remedy,²¹ determine—with one of the first landmark pilot judgments—²²compensation rates for post-WWII deportees from former Eastern territories of Poland, reduce overcrowding in Polish prisons,²³ curb

¹⁸ Michael Zürn & Jeffrey T Checkel, “Getting Socialized to Build Bridges Constructivism and Rationalism, Europe and the Nation-State”, (2005) 59:4 Intl Organization 1045 at 1075.

¹⁹ Molière, *Œuvres complètes* (Paris: Louandre, 1910), vol I at 686.f.

²⁰ Adam Bodnar, “Skuteczność Europejskiej Konwencji Praw Człowieka w Polsce” in Tomasz Giaro, ed, *Skuteczność prawa*, (Warszawa: LIBER, 2010) 189 at 206-212.

²¹ *Kudła v Poland* [GC], No 30210/96, [2000] XI ECHR 197; *Rutkowski and Others v Poland*, No 72287/10 (7 July 2005).

²² *Broniowski v Poland*, No 31443/96, [2005] IX ECHR 1.

²³ *Orchowski v Poland*, No 17885/04 (22 October 2009); *Sikorski v Poland*, No 17599/05 (22 October 2009).

excessive application of temporary arrest,²⁴ reduce anti-LGBTQ+ bias in Polish law,²⁵ combat anti-atheist discrimination in Polish schools²⁶ as well as safeguard the practical availability of legal abortion.²⁷ One of the most consequential interventions of the ECtHR in the region from the pre-populist period concerned actions undertaken by the Polish government in the aftermath of 9/11 attacks. Poland was found responsible for violating rights of Afghan applicants unlawfully detained on the Polish territory by American authorities in secret prisons.²⁸ This judgment triggered a huge debate on the country's imbalance between strategic interests (alliance with the United States) and human rights protection, thereby raising social awareness as to the absolute prohibition of torture. Jurisprudence of the ECtHR was largely discussed not only by lawyers, but also in Polish mass media; especially in the 2000s the ECtHR was perceived as the last resort for cases unfairly resolved by the domestic legal system. In Hungary, the impact of the ECtHR's jurisprudence was probably less spectacular, but still noticeable. The ECtHR helped reduce analogical overcrowding in Hungarian prisons²⁹ and spurred effective investigations of alleged mistreatments by the police.³⁰ Systemic influence of the *ECHR* seems more low-profile than in the case of Poland, but a high number of typical cases concerning accidental violations brought Hungary closer to the Western parties of the *ECHR*.

As far as human rights protection mechanisms within the EU are concerned, CEE countries were not treated as newcomers for long. Contrary to the *ECHR* system, which in the aforementioned period evolved rather slowly, the EU system underwent significant transformations: entry into force of the *Lisbon Treaty* and the binding force of the *Charter of Fundamental Rights* (2009), development of the Fundamental Rights Agency (since 2007), and gradual adoption of second-generation regulations and directives of the Area of Freedom, Security and Justice (including development of the Common European Asylum System). Even though some of the CEE countries, such as Poland, lagged behind in the implementation of EU anti-discrimination law,³¹ the East-West divide in the socialization of human rights norms seemed to be overshadowed by common challenges for the EU.

Consequently, when seen from this perspective, the region did not seem to have more significant problems with socialization to human rights protection other than the ones that afflict also Western countries (*e.g.* excessive length of execution of judgments, stricter boundaries of the freedom of speech than the ones established by ECtHR's standards, ineffective investigations concerning violations of Articles 2, 3 and

²⁴ *Kauczor v Poland*, No 45219/06 (3 January 2009).

²⁵ *Kozak v Poland*, No 13102/02 (2 March 2010); *Baczkowski and Others v Poland*, No 1543/06 (3 May 2007).

²⁶ *Grzelak v Poland*, No 7710/02 (15 June 2010).

²⁷ *Tysiąc v Poland*, No 5410/03, [2007] I ECHR 219.

²⁸ *Al Nashiri v Poland*, No 28761/11 (27 July 2014); *Husayn (Abu Zubaydah) v Poland*, No 7511/13 (27 July 2014).

²⁹ *Varga and Others v Hungary*, No 14097/12 (10 March 2015).

³⁰ *Barta v Hungary*, No 26137/04 (10 April 2007).

³¹ European Union Agency for Fundamental Rights, "Annual Report 2010" (2010) at 27, online (pdf): [European Union Agency for Fundamental Rights <fra.europa.eu/sites/default/files/fra_uploads/917-ar_2010-conf-edition_en.pdf>](http://fra.europa.eu/sites/default/files/fra_uploads/917-ar_2010-conf-edition_en.pdf).

5 of the *ECHR*) or predictable troubles of post-transition states (need for systemic reforms, predominantly of economic character or burden of historical injustice to overcome, including the need of lustration). Participation in the ECtHR framework began early enough to give these countries ample time for adaptation to the legal culture of the *ECHR*. In the 2000s, it seemed that their participation in the *ECHR* legal system was gradually honed. In turn, the EU fundamental rights protection system was in the process of rapid expansion and CEE countries were not necessarily in the “student-teacher relationship”, but participated actively in shaping the system even if in the role of moderators (such as Poland opting for the infamous *Polish-British Protocol* to the *Treaty of Lisbon*).³²

Nevertheless, this optimist story of socialization to human rights protection was based on an all-too-general picture. It did not take into account a couple of significant factors: (1) the high level of compliance with human rights norms was largely a work of domestic judiciary and lawyers who, in CEE, quickly and autotelically adopted liberal standards and defended them against politicians; (2) human rights compliance was a crucial legitimization for governments, which did not always had to be the case (as demonstrated by Hungary after 2010 and Poland after 2015); (3) the high level of compliance did not rule out the possibility of backsliding; (4) the culture of human rights could wither everywhere in the world, especially in post-truth societies of spectacle; (5) there was a powerful current of delegitimization of human rights as focused on the rights of the first generation; population harmed economically after the transition and the 2008 crisis could display some distrust towards liberally biased human rights as defended by the ECtHR, the CoE and the EU; (6) human rights standards could produce a long-term conservative backlash against fragile and politically exploitable issues such as abortion or the role of religion in the public sphere. Already the negotiations of the *Lisbon Treaty* demonstrated that some CEE countries harboured illusory fears about “losing their own cultural identity” as a result of expansion of human rights. Nonetheless, it was not until the 2010s that the anti-socialization backlash came to the surface in all its strength.

II. Populist Legality in CEE

A. “Really Existing Populism” as a Negative Constitutional Project

In the 2010s, two CEE countries—Hungary and Poland—turned into laboratories of what may be dubbed “really existing populism”. Despite being undoubtedly one of the terms that sparks great interest of contemporary academia,³³

³² Anna Wyrozumska, “The Charter of Fundamental Rights of the European Union in the Reform Treaty and the Polish Objections” (2007) 16:4 *Polish Q Intl Affairs* 11 at 19.

³³ See Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016); Cas Mudde & Cristobal Rovira Kaltvasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017); Benjamin De Cleen, Jason Glynos & Aurelien Mondon, “Critical Research on Populism: Nine Rules of Engagement” (2018) 25:5 *Organization* 649; Benjamin De Cleen & Yannis Stavrakakis,

“populism” remains an elusive, usually pejorative term³⁴ of long history in many parts of the world (especially in Latin America), a term whose vagueness and deplorable inoperationalizability are subjects of ritual complaints.³⁵ There seem to exist a few core elements usually invoked when speaking about populist movements or regimes: anti-elitism, identification of the movement with the entire nation, scapegoating and compulsive producing of enemies, permanent fight, intolerance for pluralism as well as drawing legitimacy from majoritarian rules understood as the will of the united nation.³⁶ Populism has obviously a long history and was by no means invented recently, let alone in CEE.³⁷ Nonetheless, in many respects it seems useful for grasping some contemporary political processes in many countries, even if there are other competing terms, such as “illiberalism” and “democratic backsliding”,³⁸ “neo-authoritarianism”³⁹ or even “fascism”.⁴⁰ In order to avoid miring in endless terminological debates—which can hardly be resolved until the future of populist regimes is clarified—we will use the term understanding it as a floating signifier rather than a rock-solid concept.⁴¹

“Really existing populism” is, in turn, a concept that allows to grasp the practical side of regimes built by contemporary populist regimes in Europe. In this respect, Hungary and Poland provide crucial examples. Naturally, the region had previously experienced various forms of flawed democratization or semi-authoritarian regimes (such as Slovakia under Vladimír Mečiar), but this new form of governmentality was structurally different for a few reasons. First, it was established as a result of a long-term process of political radicalization and populist

“Distinctions and Articulations: A Discourse Theoretical Framework for the Study of Populism and Nationalism” (2017) 24:4 *J European Institute for Communication & Culture* 301; Robert Adam, “Populist Momentum in the EU?” (2017) 23 *Online J Modelling New Europe* 19; Tom Gerald Daly, “Democratic Decay: Conceptualising an Emerging Research Field” (2019) 11:1 *Hague J Rule L* 9.

³⁴ There is, however, a great tradition of positive (or at least neutral) valorisation of populism as part and parcel of democracy; see the founding work of this tradition: Ernesto Laclau, *On Populist Reason* (London & New York: Verso, 2018); Chantal Mouffe, *For a Left Populism* (London & New York: Verso, 2018).

³⁵ Cf Zoran Oklopcic, “Imagined ideologies: Populist figures, liberalist projections, and the horizons of constitutionalism” (2019) 20:2 *German LJ* 201 at 201-06.

³⁶ Takis S Pappas, “Populists in Power” (2019) 30:2 *J Democracy* 70 at 70-74; David Prendergast, “The judicial role in protecting democracy from populism” (2019) 20:2 *German LJ* 245 at 246-252; Andrea Pin, “The transnational drivers of populist backlash in Europe: The role of courts” (2019) 20:2 *German LJ* 225 at 227-230.

³⁷ See Attila Antal, “Communist Populism in Hungary” (2018) 40:4 *Society & Economy* 622 at 624-631; Adam, *supra* note 33 at 20-21.

³⁸ Laurent Pech & Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *Cambridge YB Eur Leg Stud* 3 at 5.

³⁹ Maciej Gdula, *Nowy autorytaryzm* (Warszawa: Wydawnictwo Krytyki Politycznej, 2018).

⁴⁰ Rob Riemen, *To Fight Against This Age: On Fascism and Humanism* (New York: W. W. Norton & Co, 2018); Madelaine Albright, *Fascism: A Warning* (New York: Harper, 2018); there is also another influential term: “postfascism”; see Mikkel Bolt Rasmussen, “Postfascism, or the Cultural Logic of Late Capitalism” (2018) 32:5-6 *Third Text* 682; on the parallels between contemporary right-wing populism and interwar fascism, see Cosmin Cercel, “The Destruction of Legal Reason: Lessons from the Past” (2019) 89 *Folia Iuridica* 15.

⁴¹ Jacques Derrida, “Structure, Sign and Play” in Jacques Derrida, ed, *Writing and Difference*, translated by Alan Bass (London: Routledge 2001) at 365-366.

swerve of major right-wing parties (the Hungarian Fidesz and the Polish Law and Justice). It would be fallacious to take these regimes for a temporary malfunction of otherwise solid democracy: the movements which built them grew in strength and built their strategies within liberal democracies and, in this sense, are inherent by-products of the latter.

Second, both countries have experienced full-fledged populist regimes for a much longer time than any other European state. Contrasted with the ten years of Hungarian illiberalism—a form of government proclaimed officially by Victor Orbán,⁴² the country’s populist leader—and the five years of Polish neo-authoritarianism, Italian short-termed rule of the coalition led by the Lega as well as Austrian government’s flirt with the far-right Freedom Party of Austria (FPÖ) appear just as passing attempts at populist governmentality. Hungary and Poland are unique not only because of the timespan of the populist rule, but also because the populist parties in both countries managed to secure parliamentary majorities (in the case of Hungary, even constitutional majority for a larger part of the Fidesz’s rule). Legally or illegally, they have attempted to reshape their respective countries that previously had been governed by liberal constitutionalism adopted after the fall of the Iron Curtain in 1989.

Third, the length of populists’ rule and their aspirations—by far exceeding just some local, makeshift reforms—demanded new political and legal projects. In this respect, both countries have been struggling with the inherited liberal form of governmentality, and to a mixed effect. Hungary adopted a new, allegedly “illiberal” constitution in 2011,⁴³ but even this *Constitution* can be seen as a form of hybrid governmentality, mixing liberal forms (guarantees of individual rights) with profuse nationalistic, religious and tradition-affirming rhetoric. Contrarily, the Polish ruling majority did not have its constitutional moment because it failed to safeguard the parliamentary supermajority; therefore, the Polish populist revolution was undertaken haphazardly, by adoption of sub-constitutional laws that violated the Constitution. In both cases, the overall “populist project” is relatively vague and, in many respects, constructed just in opposition to liberal constitutionalism. In this sense, Hungary remains an “unfinished revolution”, deprived of a final and positive legal framework. In contrast, Poland displays features of a “failed revolution”: it seems to have undergone a significant political transformation but without the proper symbolic and legal underpinning.

Consequently, both populist regimes purport to offer something more than just a set of demagogic and tactical measures aimed at safeguarding the political power of the ruling party. Nonetheless, the ideological supplement to these measures is often provisional; the core of both regimes seems to reside counter-reactions to the liberal status

⁴² In his famous Băile Tuşnad speech in 2014, Orbán said: “[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.”: Tóth, *supra* note 5.

⁴³ Hungary, *Hungarian Fundamental Law*, 18 April 2011 [*Hungarian Constitution*].

quo. It is therefore highly debatable whether a positively constructed “populist constitutionalism” may exist⁴⁴ (to say nothing about its acceptability). Hungary and Poland exhibit a hybrid form of governmentality which is largely based on active negation of liberal democracy with few coherent proposals of how it should be positively constructed.

Third, both Hungary and Poland were regional champions of rapid transition to the free market, political pluralism and liberal constitutionalism after 1989. In this process, the adoption of the rule of law standards was, as Jíří Příbáň once claimed, a “ticket for a back-to-Europe journey”.⁴⁵ The rapidness of the transition in the era of the liberal consensus meant that the rule of law was adopted often hastily, with numerous legal transplants and the aura of unconditionality as to the choice of methods. Quite naturally, some commentators are tempted by the simplifying “regression” story, in which CEE attempted to adopt Western patterns, but finally failed to do so and returned to the primacy of the political over the legal that seems to have been a trademark of socialist law.⁴⁶

This story, however, is in many respects problematic. There was nothing “natural” in this backsliding: it was purposely chosen to be an element of the agenda of populist parties and, as such, deliberately implemented. In both countries, the backlash against the imposition of populist legality from judges, prosecutors, lawyers and the academia was too powerful to believe that the “backward” countries simply returned to the dim realm of legal nihilism⁴⁷ they have supposedly always belonged to. Finally, both countries were champions of the socialization of the rule of law and human rights norms. The fact that it was these states that fell victims of populist backlash points out rather to flaws of the socialization project itself rather than to local and temporary failures of an otherwise successful process.

Moreover, Hungary and Poland may now be European laboratories of populist governmentality, but it would be fallacious to believe that other members of the populist international, such as the French Rassemblement national, would not use a similar range of measures if only given a chance to implement them.⁴⁸ Countries of CEE may be “weaker links” of liberal democracy, but the fight they witness—including a fierce cultural war between progressives and reactionary conservatives—are the same battles which are fought elsewhere in Europe and in the world. It might seem easy to

⁴⁴ See Gabor Hálmai, “Is there Such Thing as ‘Populist Constitutionalism’? The Case of Hungary” (2018) 11:3 *Fudan J Humanities & Social Sciences* 323; Gábor Halmi, “A Coup Against Constitutional Democracy. The Case of Hungary” in Mark A Graber, Sanford Levinson & Mark Tushnet, ed, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) at 243-256; Théo Fournier, “From rhetoric to action, a constitutional analysis of populism” (2019) 20:3 *German LJ* 362 at 381.

⁴⁵ Jíří Příbáň, “From ‘Which Rule of Law?’ to ‘The Rule of Which Law?’: Post-Communist Experiences of European Legal Integration” (2009) 1:2 *Hague J Rule L* 337 at 337.

⁴⁶ Pech & Scheppele, *supra* note 38; see also Gabor Hálmai, “Transitional Constitutional Unamendability?” (2019) 21:3 *Eur J L Reform* 259 at 262.

⁴⁷ See Evgenia Ivanova, *Legal Nihilism as Social and Discursive Practice: The Case of Belarus* (Saarbrücken: VDM, 2010).

⁴⁸ Fournier, *supra* note 44 at 375-379.

pigeonhole these States into the category of post-socialist flawed democracies, but this is nothing but exporting the problem which afflicts the majority of contemporary democracies of “the wild east”.

The phenomenon of “really existing populism” in CEE arises therefore from the juxtaposition of universal afflictions of contemporary democracy with the local, semi-peripheral and post-socialization states. Specificity of their regimes cannot be grasped without this interposition of contexts; otherwise it is all too easy to fall into the trap of the “Eastern backwardness story”.

B. “Really existing populism” and human rights protection

Populist legality in CEE has a complex and uneasy relationship to human rights protection. It can be analyzed in at least three dimensions: (1) nationalist devaluation of liberal vision of human rights, (2) undermining of the rule of law, and (3) tactical limitations or violations of human rights.

First, following the example of many right-wing populist movements in the world, CEE populisms tend to challenge the very culture of human rights as too individualistic and universal; arguments pointing to the needs of the nation or the community are believed to trump the liberal concept of human rights. This aspect is particularly visible with the “National Avowal” that opens the *Hungarian Fundamental Law*:

We hold that human existence is based on human dignity.

We hold that individual freedom can only be complete in cooperation with others.

We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love.

We hold that the strength of community and the honour of each man are based on labour, an achievement of the human mind.⁴⁹

The liberal vision of the autotelic and independent status of human rights is here subtly, yet clearly undermined by the link–nationalistic in spirit–between rights and the effort individuals are due to the state and the community. In the absence of a proper constitutional amendment in Poland, analogical re-evaluation takes place in the jurisprudence of the Polish “new” Constitutional Court (CC) (“new”, that is, partly composed of unconstitutionally appointed judges and completely loyal to the ruling populist majority). When the CC wanted to uphold a new law on public gatherings—which gave preference to the so-called cyclical gatherings organized in order to commemorate “significant events of Polish history” over all the other

⁴⁹ *Hungarian Constitution*, *supra* note 43.

assemblies,⁵⁰ with a clear aim to protect the rallies of government supporters against the opposition—it changed the accents within the set of norms and principles it took into account. Its reasoning, referred to case law of the ECtHR and the CC, analyzed the sense of the freedom of assembly, but ultimately put more stress on nation-centred values deduced from the preamble as trumping individual rights.⁵¹

Second, “really existing populisms” in CEE provoked a serious interruption in the hitherto uncontested applicability of the law and the rule of law. As a consequence, applicability of human rights norms as guaranteed by independent institutions (judiciary in particular) also suffered a critical blow. In this respect, however, Hungary and Poland differ significantly. The Hungarian Fidesz, disposing of the constitutional majority, undertook its reforms in general respect of formal legality; it was the content of particular amendments that raised doubts as to their compliance with international law, EU law and standards of liberal democracy.⁵² The Polish Law and Justice, however, took a much more dangerous path. Not being able to amend the *Constitution* formally, it defused institutions that protected it—particularly the CC—and subsequently adopted a vast array of sub-constitutional laws which are non-compliant with the *Constitution*. As a result, the hierarchical order of norms and applicability of the some of the constitutional provisions were disrupted.⁵³

To add insult to injury, the Polish ruling majority undertook a systematic attack on the independence of the judiciary by: (1) strengthening disciplinary procedures against judges and establishing a new Disciplinary Chamber of the Supreme Court,⁵⁴ (2) introducing an extraordinary legal remedy against all final judgments delivered after the entry into force of the *Constitution*, that is 1997,⁵⁵ (3) appointing lay judges of the Supreme Court, whose duties encompass adjudicating on these extraordinary remedies and who are appointed by the Senate,⁵⁶ (4) changing the composition of the National Council of the Judiciary (NCJ)—a constitutional organ in charge of nominating candidates for judges—whose members representing the

⁵⁰ Art 26a-26e Ustawa z 24 lipca 2015 r. Prawo o zgromadzeniach [*Act of 24 July 2015—Law on Assemblies*], Journal of Laws 2015 item 1485 (Poland).

⁵¹ Polish Constitutional Court, 16 March 2017, *Case Kp 1/17* at paras 181-182.

⁵² On the evolution of Hungarian populist constitutionalism, see Gábor Attila Tóth, *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Budapest: Central European University Press, 2012); Bojan Bugarič, “Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge” (2014) 79 LSE ‘Europe in Question’ Discussion Paper Series 1 at 7-14; Kim Lane Scheppele, “Understanding Hungary’s Constitutional Revolution” in Armin von Bogdandy & Pál Sonervend, ed, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, 1st ed (München: Beck, Hart & Nomos 2014) 111 at 111-124.

⁵³ A good overview of the key developments in the Polish constitutional crisis can be found in: Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019) at 62-65; Sava Jankovic, “Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?” (2016) 9:1 Baltic JL & Pol 49; Tomasz Tadeusz Konieczny, “The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux” (2018) 43:2 Rev Central & East Eur L 116; Wojciech Sadurski, “Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler” (2019) 11 Hague J Rule L.

⁵⁴ Arts 27, 72-76 Ustawa o Sądzie Najwyższym [*The Supreme Court Law*] (Poland).

⁵⁵ *Ibid*, arts 115 at par 1, 89 at para 1.

⁵⁶ *Ibid*, art 61 at para 2.

judiciary are no longer elected by judges themselves, but by the lower chamber of the Parliament,⁵⁷ (5) establishing direct control of the Minister of Justice–Prosecutor General over presidents of common courts who can effectively discipline and block judges who are loyal to the *Constitution* and European law, (6) adopting the so-called “muzzle law” which punishes judges who—in application of EU law and the *Polish Constitution*—cast doubt on the legality of appointment of judges nominated by the “new” NCJ,⁵⁸ and (7) appointing—with a violation of the constitutional procedure—the new First President of the Supreme Court, who is a former vice-minister in a Law and Justice government.

Even if human rights protection is not the direct target of this struggle for domination over the judiciary, it is its first victim. In broader sense, the main safeguard of human rights protection is defused. In a more limited sense, judiciary dominated or even controlled by the executive *ipso facto* breaches the guarantees of the right to a fair trial under Article 6(1) of the *ECHR* and Article 47(2) of the *EU Charter of Fundamental Rights (CFR)*. Even though the scope of protection offered by the ECtHR against undermining of independence and impartiality of the judiciary may be limited,⁵⁹ the ECtHR has set some standards that Poland clearly breached. In its established jurisprudence, the ECtHR will find violations of Article 6(1) of the *ECHR* if: (1) the relations between the judiciary and the executive or the legislative are shaped in an entirely improper manner, which entails structural judicial dependence on other state powers,⁶⁰ (2) important domestic rules pertaining to the independence of the judiciary are disrespected by the executive or the legislative,⁶¹ (3) there are particular inadmissible interventions of the executive in the work of the judiciary.⁶² Poland has experienced all three kinds of violations: (1) the link between the parliamentary majority which elects the NCJ that, in turn, nominates judges, including judges of the disciplinary branch, makes the judiciary subordinated to the legislative and the executive; (2) in determining disciplinary proceedings for judges and recomposing the Supreme Court, the ruling majority violated constitutional norms and EU law, as indicated by the Court of Justice of the European Union (CJEU);⁶³ (3) a recent report by Iustitia, an association of Polish judges, lists 34 cases

⁵⁷ *Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* [Law Amending the Law on the National Council of the Judiciary and Some Other Laws], [2018] OJ at 3, art 1 (1); see also Paweł Filipek, “The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence” (2018) XVI *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* at 177-196; Anna Śledzińska-Simon, “The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition” (2018) 19:7 *German LJ* 1839.

⁵⁸ *Law Amending the Law on the National Council of the Judiciary and Some Other Laws*, *supra* note 57.

⁵⁹ See Przemysław Tacik, “Habitual Deference? Strasbourg Standards of Judicial Independence and Challenges of the Present” (2019) XVII *Rev Intl, Eur & Comparative L* at 47.

⁶⁰ *Kulykov and Others v Ukraine*, No 5114/09 et al (19 January 2017) at paras 135-137; *Vardanean v Moldova and Russia*, No 22200/10 (30 May 2017) at paras 34-47.

⁶¹ *Posokhov v Russia*, No 63486/00, [2003] IV *ECHR* 137; see also *Yegorychev v Russia*, No 8026/04 (17 May 2016) at paras 64-68.

⁶² *Zand v Austria*, No 7360/76 (16 May 1977); *Tanışma v Turkey*, No 32219/05 (17 November 2015) at para 81; *Sürer v Turkey*, No 20184/06 (31 May 2016) at paras 42-47.

⁶³ *Commission v Republic of Poland* [GC], C-619/18, [2019] *ECR* I-531; *Commission v Republic of Poland* [GC], C-192/18, [2019] *ECR* I-924.

of hard pressure of the executive on particular judges and 25 cases of soft pressure,⁶⁴ which altogether manifestly prove improper influence of other state powers on the judiciary.

Third, the derailed culture of human rights protection coupled with the demise of independent institutions and the judiciary make a fertile breeding ground for systemic violations of particular rights. In this respect, the populist regimes are selective in two dimensions: firstly, they usually target more politically sensitive rights that either limit state power (such as the protection of correspondence which limits tapping) or allow for a political self-expression (freedom of assembly). Secondly, they zero in on particular groups that may prove dangerous to the populist power and its nationalist ideology: judges, lawyers, opposition supporters, feminists, LGBTQ+ activists and immigrants.

In this respect, both Hungary and Poland exhibit deep similarities. The most recent report of the Polish Ombudsman (for 2018) lists the following systemic human rights violations under the populist rule: unconstitutional liberty of the police and secret forces to demand phone billings and control internet activity (allegedly to combat terrorism), limitations of the freedom of assembly (both by adopted laws, such as the one establishing the aforementioned “cyclical assemblies”, and by practical measures such as recording identity of persons participating in anti-government manifestations by the police), excessive limitation of purchasing and selling agricultural land, chaotic reform of education which made many students attend overpopulated schools far from their domicile as well as informative pro-government bias of the public media.⁶⁵ As demonstrated by the ECtHR case law and monitoring by the CoE and the Organization for Security and Co-operation in Europe (OSCE),⁶⁶ the Hungarian regime targets similar human rights: independence of the judiciary,⁶⁷ right to a fair trial and applicability of EU law,⁶⁸ freedom of expression for politicians,⁶⁹ activists⁷⁰ and citizens,⁷¹ excessive surveillance motivated by anti-terrorist campaign⁷² as well as freedom of assembly.⁷³ The Hungarian specificity consists also in notable cases of anti-Roma racism displayed by public authorities.⁷⁴ Moreover, both countries are leaders in

⁶⁴ “Justice under pressure—repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019” (2019), online (pdf): *Iustitia* <www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf>.

⁶⁵ Rzecznik Praw Obywatelskich, “Stan przestrzegania wolności i praw człowieka i obywatela oraz informacja o działalności Rzecznika Praw Obywatelskich w Polsce w roku 2018” (2018) at 15-17, online (pdf): <www.rpo.gov.pl/sites/default/files/Synteza%20informacji%20rocznej%202018.pdf>.

⁶⁶ Peter Oliver & Justine Stefanelli, “Strengthening the Rule of Law in the EU: The Council’s Inaction” (2016) 54:5 *J Common Markets Studies* 1075.

⁶⁷ *Baka v Hungary* [GC], No 20261/12 (23 June 2016).

⁶⁸ *Somorjai v Hungary*, No 60934/13 (28 August 2018).

⁶⁹ *Karácsony and Others v Hungary* [GC], No 42461/13 (17 May 2016).

⁷⁰ *Magyar Kétfarkú Kutya Párt v Hungary* [GC], No 201/17 (20 January 2020).

⁷¹ *Tatár and Fáber v Hungary*, No 26005/08 (12 June 2012).

⁷² *Szabó and Vissy v Hungary*, No 37138/14 (12 January 2016).

⁷³ *Sáska v Hungary*, No 58050/08 (27 November 2012); *Szerdahelyi v Hungary*, No 30385/07 (17 January 2012); *Patyi v Hungary*, No 35127/08 (17 January 2012).

⁷⁴ *Király and Dömötör v Hungary*, No 10851/13 (17 January 2017); *R.B. v Hungary*, No 64602/12 (12 April 2016).

anti-immigrant policy of the Visegrád Group: not only, as confirmed by the CJEU, they violated EU law in refusing to execute relocation decisions in 2015,⁷⁵ but also their governments propagate anti-immigrant narratives that strongly influence the public opinion's view on migration policy.⁷⁶

To conclude, Hungary and Poland exhibit a noticeable tendency of decreasing the level of human rights protection after their respective populist parties came to power. This decrease has a specific structure that may be accounted for only if we take into account that both countries nominally remain liberal democracies, even if, in practice, they have turned into “hybrid regimes”. As a result, changes happen at all three above-mentioned levels: (1) constitutional axiology becomes displaced towards ethnonationalism, although it preserves to a large extent human rights guarantees, (2) liberal institutions (especially courts) are targeted as the crucial enemy in the quest for populist hegemony, (3) some human rights are curbed, but only those whose exercise collides with populists' political or ideological power. Even more importantly, the two countries no longer feel bound by international and European standards in this respect, thereby openly defying the element of normative suasion in compliance with human rights. For example, the Polish so-called “muzzle law” was adopted in blatant disregard of a judgment of the CJEU and against recommendations of the Venice Commission.⁷⁷ The institutional and judicial framework of protection has been largely dismantled and/or intercepted by the ruling majorities. This approach not only contrasts sharply with the previous stance of CEE champions of democratic progress, but also calls for remodeling the socialization paradigm.

It does not mean that Poland and Hungary do not comply with human rights norms of European or international origin. Precisely as “hybrid regimes”, they follow some norms which do not encroach upon populists' vital interests, but disregard those which are engaged in political fight. Nonetheless, the exceptionless compliance has been undermined: currently all cases in which Poland or Hungary execute EU law or international law are shrouded with an aura of voluntary action that may be suspended at any moment.

III. A European Response

From the optimist perspective of the 1990s and the 2000s, such a turn of events was hardly imaginable. But there is an even more important element that

⁷⁵ *European Commission v Republic of Poland, Hungary and the Czech Republic*, C-715/17, C-718/17 & C-719/17, [2020] ECLI:EU:C:2020:257 [not yet published].

⁷⁶ See “Hungary's unwavering opposition to migrants and refugees, in figures” (28 March 2019), online: *Kafkadesk* <kafkadesk.org/2019/03/28/hungary-unwavering-opposition-to-migrants-and-refugees-in-figures/>; Beata Łaciak & Justyna Segeš Frelak, “The Wages of Fear. Attitudes Towards Refugees and Migrants in Poland” (2018), online (pdf): *Institute of Public Affairs* <www.britishecouncil.pl/sites/default/files/attitudes_towards_migrants_pl.pdf>.

⁷⁷ Council of Europe, Venice Commission, *Poland- Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws*, Opinion no 977/2019 (16 January 2020) CDL-PI(2020)002.

cluded the then horizon of possibilities: powerlessness of European institutions. The socialization paradigm put faith not only in the “student-teacher relationship”, but also in the “teacher’s” ability to react swiftly by adopting adequate measures to counteract democratic backsliding. It seems, however, that the shared shortcoming of the socialization paradigm as well as European institutions was the belief that normative suasion was already at work and no systemic recourse to strategic measures of enticement, persuasion and coercion would be necessary. As described above, “really existing populisms” in Hungary and Poland—and, to a lesser extent, more low-profile flirt of the Czech Republic, Slovakia and Romania with populist governmentality—brought this shortcoming to daylight. Both European institutions and the doctrine found themselves in a limbo of delayed, inadequate reactions for which there was no longer a coherent theoretical framework.

The reactions to populist governmentality and violations of human rights that it involved may be divided into two categories: (1) systemic reactions and (2) local interventions.

A. Systemic Reactions to Really Existing Populism

From the perspective of ten years that passed since the Fidesz began remodeling Hungary into an “illiberal democracy”, the lack of coherent and, more importantly, effective general measures adopted by European institutions jumps out. Even though the Hungarian case triggered the adoption of new mechanisms of monitoring the rule of law, they are hardly an added value: it rather seems that their main goal was to stave off the painful moment of using Article 7 of the *Treaty on European Union (TEU)* or introducing economic sanctions. Moreover, the strategy of lingering proved not only ineffective, but also iatrogenic: the mild reaction to Hungarian populism additionally enticed Polish populists to follow Viktor Orbán’s example.

The initial reaction of the EU to the Hungarian populist governmentality was focused on soft measures such as political pressure, statements and communications;⁷⁸ it took four years until the first targeted legal instrument was adopted, namely the *EU Rule*

⁷⁸ See the speech of Vice-President Reding at “The EU and the Rule of Law—What next?” (4 September 2013), online: *European Commission* <ec.europa.eu/commission/presscorner/detail/de/SPEECH_13_677>; for the European Parliament resolutions setting out various recommendations to the EU institutions on how to strengthen the protection of Article 2 of the *TEU*, see: CE, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Rui Tavares, *Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))*, A7-0229/2013, PE508.211v04-00, 24 June 2013, online (pdf): <www.europarl.europa.eu/doceo/document/A-7-2013-0229_EN.pdf>; CE, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Kinga Góncz, *Report on evaluation of justice in relation to criminal justice and the rule of law (2014/2006(INI))*, A7-0122/2014, PE527.913v02-00, 17 February 2014, online (pdf): <www.europarl.europa.eu/doceo/document/A-7-2014-0122_EN.pdf>; President Barroso highlighted in his State of the Union address of September 2013, the framework “should be based on the principle of equality between Member States and activated only in situations where there is a serious and systemic risk to the rule of law, and triggered by predefined benchmarks”: “State of the Union address 2013” (11 September 2013), online: *European Commission* <ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684>.

of *Law Framework (RLF)*.⁷⁹ Ironically, the *RLF* was presented by the European Commission (EC) as a tool more flexible and quicker than Article 7 of the *TEU*:

the preventive mechanism of Article 7(1) *TEU* can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) *TEU* only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 *TEU*. The thresholds for activating both mechanisms of Article 7 *TEU* are very high and underline the nature of these mechanisms as a last resort.

Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments. A new EU Framework to strengthen the Rule of Law as a key common value of the EU is needed in addition to infringement procedures and Article 7 *TEU* mechanisms. The Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law.⁸⁰

This, however, was not the case. The *RLF* targeted specifically post-2015 Poland,⁸¹ but to little avail. For the Polish ruling majority, the dialogue with the EC was little more than a public spectacle of assurances that inaptly veiled continuation of the previous actions.⁸² In 2017, soon after the major overhaul of the Polish judiciary, the EC decided to file a proposal for launching Article 7 of the *TEU*.⁸³ Nonetheless, the Council up to this date did not decide to act on it. The only institution that proved deeply involved in defending against rule of law violations was the European Parliament which tirelessly adopted resolutions calling for a concerted action,⁸⁴ including launching Article 7(1) of the *TEU* against Hungary as well.⁸⁵

⁷⁹ EC, *Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law*, [2014] OJ, COM/2014/0158 final.

⁸⁰ *Ibid* at 5-6.

⁸¹ "Rule of law in Poland: Commission starts dialogue" (13 January 2016), online: *European Commission* <ec.europa.eu/commission/presscorner/detail/en/WM_16_2030>.

⁸² Pech & Scheppele, *supra* note 38 at 5.

⁸³ EC, *Reasoned Proposal in Accordance with Article 7(1) of The Treaty on European Union Regarding the Rule of Law in Poland*, [2017] OJ, COM(2017) 835 final; see also "Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court" (14 August 2018), online: *European Commission* <ec.europa.eu/commission/presscorner/detail/en/IP_18_4987>.

⁸⁴ See EC, *European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP))*, [2016] OJ, C 58/148; EC, *European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP))*, [2015] OJ, C 407/46; EC, *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))*, [2013] OJ, C 75/52; EC, *Recent political developments in Hungary (2012/2511(RSP))*, [2013] OJ, C 249 E/27; EC, *Media law in Hungary (European Parliament resolution of 10 March 2011 on media law in Hungary)*, [2011] OJ, C 199 E/154.

⁸⁵ EC, *European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a*

As of 2020, no effective systemic measures have been adopted by the EU. Article 7(1) of the *TEU* procedure remains uncompleted, whereas the attempts to enact a regulation that would make EU financing dependent on the respect of the rule of law are far from a successful end.⁸⁶ The OSCE and the CoE continuously expressed their concern; the latter promptly reacted to the Polish “muzzle law” by adopting a resolution that opened up a monitoring procedure over Poland.⁸⁷ Nonetheless, the scope of measures these two organizations may adopt is necessarily limited.

B. Local Interventions

Facing hardships in triggering general measures, the EC chose a path of more local interventions which consist in launching particular proceedings against populist countries for failing to fulfil obligations of EU law. Especially in the Polish example, this strategy brought some limited success.

The CJEU was able to halt—through interim measures—⁸⁸ logging of the Puszcza Białowieska, one of the last primeval forests in Europe whose heavy exploitation was directed by the Law and Justice government. Even though the Polish government sought to derail the proceedings and for a certain time refused to respect the CJEU’s ruling,⁸⁹ the final result was overall positive. The CJEU played an even more important role in staving off the “reform” that aimed to dismiss a large group of Supreme Court judges by lowering their retirement age (the President of the Republic was also given discretion to decide which judge could continue her mission).⁹⁰ Analogical ruling was delivered in the case concerning judges of ordinary courts.⁹¹ The CJEU made some ambitious legal decisions in cases concerning the Polish judiciary: finding domestic judges to be judges of EU law, it applied to them guarantees of Article 47 of the *CFR* and set standards for judicial independence in application to the newly established Disciplinary Chamber of the Supreme Court.⁹² Finally, it openly gave courts of other states the competence to suspend the presumption of mutual trust in the execution of European Arrests Warrants (EAW) and assess independence of the courts in countries that undermine the rule of law.⁹³ If the criteria of independence safeguarding the right

serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), [2019] OJ, C 433/66.

⁸⁶ EC, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, [2018] OJ, COM/2018/324 final.

⁸⁷ Council of Europe, PA, 4th Sess, *The functioning of democratic institutions in Poland*, Texts Adopted, Rec 2316 (2020).

⁸⁸ See the Order of the Vice-President of the Court of 19 October 2018: *Commission v Republic of Poland*, C-619/18 [2019] ECR I- 852.

⁸⁹ See Przemysław Tacik, “Poland’s Defiance Against the CJEU in the Puszcza Białowieska Case (C-441/17)” in Clara Rauegger & Anna Wallerman, ed, *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Oxford: Hart, 2019) at 67-86.

⁹⁰ *Commission v Republic of Poland* [GC], C-619/18, [2019] ECR I-531.

⁹¹ *Commission v Republic of Poland* [GC], C-192/18, [2019] ECR I-924.

⁹² *A. K. and Others v Sąd Najwyższy* [GC], C-585/18, [2019] ECR I-982.

⁹³ *Request for a preliminary ruling from High Court (Ireland)* [GC], C-216/18 PPU, [2018] ECR I-586.

to a fair trial under Article 47 of the *CFR* are not met, domestic courts of EU states may refuse to execute a EAW.

Nonetheless, these are necessarily limited actions. They target only particular matters related to EU law and do not address the general decline of legal culture as well as human rights protection in Poland and Hungary. Moreover, they involve the CJEU in a nationalist smearing campaign that populist governments enact before their domestic audience. The success of these cases, however limited, stems from the competence of the CJEU to impose palpable pecuniary penalties. But they do not guarantee respect of rulings: the Polish “muzzle law” was adopted against the CJEU’s judgment and, unless penalties are imposed, there are slim chances of the Polish authorities conforming to EU law in this respect.

Other local interventions were undertaken by the ECtHR. Its scope of action, although broader than the CJEU’s due to the lack of limitation to the domain of EU law, does not offer general measures either. The ECtHR proved instrumental in declaring the aforementioned violations of the independence of the judiciary and the freedom of assembly in Hungary, but the long-term calculus of its actions is more disappointing than in the case of the CJEU. In lack of interstate cases, the ECtHR needs to rely on individual applications which—unless the procedure of pilot judgments is triggered—allow for less systemic resolutions than in the case of the CJEU. Moreover, time proves crucial in proceedings before the ECtHR: most violations that occurred in Poland in the period 2015-2020 have not yet had the chance to be assessed because a filed application usually waits a couple of years until the ruling is delivered. Finally, actions of the ECtHR are possible only insofar as particular victims of violations file their individual applications; therefore systemic infringements of the *ECHR* need to first afflict individuals who must be willing to take an action. As a consequence, the ECtHR often does not even have the chance to adjudicate on a given measure.

To conclude, reactions from the European courts were quite satisfying if we take into account their scope of action. Nonetheless, the necessarily limited character of usable legal remedies did not allow to offer a concerted action in defence of liberal democracy against the “really existing populisms”. The interventions they ventured—sometimes with ambitious interpretations of the law (the CJEU finally gave body to the doctrine of the domestic courts acting as courts of EU law and allowed of imposing penalties for breaching a provisional order on interim measures)—could not but have a local scope of influence. From a more general perspective, at best they slowed down the process of interception of the independent judiciary in Hungary and in Poland. As instigating particular proceedings is costly in time and effort when compared with general actions, the former will never be able to supplement the latter.

IV. Reevaluation of the Socialization Paradigm

In the two previous chapters, we demonstrated that the socialization paradigm suffered a serious blow in the 2010s. On the one hand, two champions of CEE modernization developed hybrid regimes which blatantly refute some (although

undoubtedly not all) European and international norms in their attempt to build “illiberal democracies”. Other countries of the EU (mostly “new members”: the Czech Republic, Romania, Slovakia, Croatia, but also established EU players, such as Italy and Austria) flirted with more dispersed forms of populist governmentality. On the other hand, the previous socializing institutions lost their power of attraction as well as—to a large degree—methods of enticement and coercion which proved so effective before enlargements. The ongoing populist crisis is as much the trouble of Hungary, Poland or any other afflicted country as it is an *internal* trouble of the EU, whose methods of governance—based on compromise, negotiations and soft power—proved not only inadequate when confronted with populist regimes, but also conducive to their development. Hungary and Poland are still two EU members who profit economically, politically and symbolically from their belonging to the UE, but at the same time develop a hybrid, non-liberal form of governmentality.

The natural proneness to linearity inherent in the socialization paradigm as established in the 1990s could tempt us to perceive this process either a result of “flawed socialization” or backsliding from socialization. Nonetheless, both of these perspectives do not grasp the ongoing development adequately. First, “flawed socialization” does not question the theoretical, linear framework behind the process, but it only assumes it went wrong in its empirical dimension. Yet Hungary and Poland of 1989 and of 2020 are totally different countries, both politically and economically. Socialization did work to a point, but it did not produce uniformly liberal states as previously assumed. If by a “flawlessly socialized” country we understand a state in which anti-liberal parties do not exist or are completely marginal, then there has never been a “properly” socialized European state. If, however, we mean by that a state which is institutionally safeguarded against anti-liberals coming to power, then after the last decade in CEE, it is difficult to imagine bulwarks that cannot be breached. As Gabór Hálmai recently noted, even an “eternal constitution” modelled after the German Grundgesetz would not prevent the current populists from intercepting and remodeling the state.⁹⁴ The liberal forces in Poland and Hungary are far from being negligible, so taking these countries for badly socialized does not do justice to the complexity of their political and social scene. Finally, the fact that it was two champions of modernization that turned populist should raise doubts as to the socialization paradigm. In its conceptual framework, it allowed for states dropping out of the race, like Belarus, but the champions were believed to head with determination toward the liberal future. Nonetheless, it seems that socialization provoked complex counter-effects that finally derailed this linear track. The flaws of the socialized countries may be in part effects of the socialization process itself. If this link is disregarded, the reaction to populist legality boils down to mourning the inexplicable “theft of democracy” by some barbarians.⁹⁵

Second, backsliding from socialization is intellectually even more conservative. “Backsliding” assumes that there is a clearly determined uphill path of modernization that some states simply fell off from. “Backsliding” as an overarching concept might have its merits: it fits with full coherence into the pattern of linear socialization, because Hungary

⁹⁴ Hálmai, “Transitional Constitutional Unamendability?”, *supra* note 46 at 277.

⁹⁵ András Sajó, “The Rule of Law as Legal Despotism: Concerned Remarks on the Use of “Rule of Law” in Illiberal Democracies” (2019) 11:2/3 Hague J Rule L 371 at 376.

and Poland may be pigeonholed into the same broad category that in the 1990s encompassed Belarus, Ukraine and, temporarily, Slovakia and Croatia. Nonetheless, it is even more misleading, because it preserves somewhat post-dependence (or even, in a more metaphorical sense, post-colonial) relation of the emanating centre towards which one can climb, but with a risk of falling off. This view is untenable when the post-Brexit UE has its centre profoundly afflicted by strong populist movements, whose hitherto limited successes are partly due to the economically and symbolically central position of Western states (in this context Italy, heavily touched by the post-2008 economic crisis and in this manner pushed away from the centre, provides a good example confirming the rule). In a purely analytic perspective, “backsliding” could be therefore a good analytic tool if it were not obsolete and took into account the change of political context.

If so, how should we relate the socialization paradigm to the post-2010 Europe? In the form it took in the 2000s, it was possible only under the then strong hegemony, both of the Western countries and of the liberal model. Consequently, it was an expression of its historical moment rather than a universal analytical model. In current circumstances, it must be nuanced and deconstructed to bring it in line with complexities of the populism-afflicted Europe. We believe there are five main lines of development it should take in order to address challenges of the present.

First, it needs to take into account the process of ongoing profound reconstitution of liberal democracy as we know it. “Populism”—in its many hues—seems to be an inner response to the structural blockade of democratic reforms. It should not be explained just as a contingent return of barbarism or unpolishedness; much more likely it is a fragmentary, bottom-top attempt to renegotiate conditions of distribution of social dignity, recognition, clout and wealth that our post-war democracies, now heavily hollowed out by global capitalism, can no longer change within their self-imposed limits. There can no longer be an effective “teacher-student relationship” if the teacher herself cannot address acute social problems. As a consequence, we need to carefully reconsider what is being instilled as the explicit or hidden content of socialization. Without this debate, we only contribute to upholding structures of hegemony whose legitimacy is crumbling in the eyes of many Europeans.

Second, instead of following the beaten path of associating populism just with CEE countries of the EU (and believing them to be unsuccessfully socialized), the tensions between liberal democracy and populism should become the crucial line of analysis that encompasses the entire Europe. Hungary and Poland are laboratories of forms of governmentality that may easily spread to other EU countries as soon as their own populist parties come to power. In other words, if socialization is to be an explanatory concept, it should renounce the underlying presumption that it has a clear geographical dimension. Socialization must describe a set of relations that concern every European country, precisely in the tension between the problems of its own democracy and the looming populist response to them.

Third, the exclusive relation between normative suasion and strategic calculation needs to be more nuanced. It is not that a country either responds to calculated enticements or fully identifies with given norms. Such a simple vision does not take into account the

whole complexity of backlashes, counterforces, repression and, above all, mimicry. In this context, Homi Bhabha's notion of mimicry, first elaborated in the post-colonial context, finds its perfect adaptation. The process of socialization never reaches completion not because of shortcomings of the socialized, but due to the complex dynamics of a subject who is in relation to its mimicked Other. Slippage and excess, as Bhabha notes, are necessary parts of the game.⁹⁶ Therefore, a country may seem to reach the level of normative suasion, but it is still imbued with mimicry that may still burst the tight corset of "full identification with a norm".

Four, populism is also an internal problem of the EU which still has not found a good replacement of the socialization paradigm. Sanctions imposed by the UE seem to still belong to it, but the EU itself prefers to mask them with mechanisms and rhetoric of equality. As a result, it can neither use effective methods of coercion nor convincingly breakup with remainders of the hierarchical vision of socialization. We have dropped the hierarchical paradigm of socialization, but as long as we invent a new one, its old structures are still at work, paralyzing actions of the EU. A more federative approach, in which all countries are perceived as equal members of one totality and precisely for this reason are shielded against irruptions of illiberalism, would make reactions easier and more effective. Just as the Eurozone crisis stemmed not from a too ambitious integration, but from reaching a mezzanine, incoherent level of integrative effort, so does national populism thrive in the EU's structure that lacks cohesion.

Five, the socialization paradigm needs to be understood multi-dimensionally: in a non-linear way, encompassing all forms of political culture of a country, with all the complexity of liberal and non-liberal domestic forces. Socialization should not be state-oriented, but rather understood as a broad process of adaptation amongst political contestation, both at EU and domestic levels. If socialization is perceived principally as a relation between a country and international norms, it will only fuel nationalist rhetoric of populists who excel in portraying "foreign interventions" into domestic autonomy.

The socialization paradigm might have augured a bright future in the 2000s, but the challenge of post-2010 European populism demands its urgent reconsideration.

⁹⁶ "Colonial mimicry is the desire for a reformed, recognizable Other, as a subject of a difference that is almost the same, but not quite. Which is to say, that the discourse of mimicry is constructed around an ambivalence; in order to be effective, mimicry must continually produce its slippage, its excess, its difference. The authority of that mode of colonial discourse that I have called mimicry is therefore stricken by an indeterminacy: mimicry emerges as the representation of a difference that is itself a process of disavowal. Mimicry is, thus the sign of a double articulation; a complex strategy of reform, regulation and discipline, which 'appropriates' the Other as it visualizes power. Mimicry is also the sign of the inappropriate, however, a difference or recalcitrance which coheres the dominant strategic function of colonial power, intensifies surveillance, and poses an immanent threat to both 'normalized' knowledges and disciplinary powers": Homi Bhabha, *The Location of Culture*, 2nd ed (London & New York: Routledge, 2004) at 122-123.

The crumbling of the liberal consensus disclosed its manifold shortcomings: linearity, crude understanding of relations between a state and its international environment, carefree approach to the questions of legitimacy and hegemony.

Up until 2010, it might have seemed that the path towards European and international socialization of CEE countries was unidirectional and generally optimistic. The influence of human rights guarantors led by the ECtHR on the adaptation of CEE legal systems to the requirements of modern liberal democracies could not be overestimated, especially in such areas as standards of criminal procedure and freedom of speech. Yet, since 2010, the liberal consensus has been on the wane: Hungary was a pioneer in the region, but other countries quickly followed suit in experimenting with forms of populist governmentality. This transformation had a tremendous impact on the culture of human rights that underpins compliance with European and international norms. Anti-European discourses began to flourish and be perceived as legitimate; European institutions, CJEU included, were presented as hostile towards national identity of particular member states. The response of the EU and CoE was generally restrained: official communications expressed concern and sometimes condemnation of dismantlement of liberal democracy, whereas hardly any practical measures made it through the process of negotiation and discussions. The CJEU and the ECtHR proved effective in particular cases, especially concerning the right to a fair trial, but due to the nature of legal remedies, their act upon this reaction could not be systemic.

Naturally, this conundrum poses practical questions: how should international and EU institutions react? What can be done to tackle the anti-liberal wave in CEE? We believe that the answer to this question might have been simple as long as EU institutions were still able to demonstrate self-confidence and firmness in defence of EU values. When this chance was missed, however, the inertia of the EU symbolized by its political deals with “illiberal democracies” and permanent, inconclusive “dialogue”, became part of the problem. It brought to daylight the decay of liberal hegemony and the hitherto dominant socialization paradigms. We are convinced that, without thorough reconsideration of the blind spots of old frameworks through which compliance was perceived, the current transformation cannot be properly addressed. In other words, the time for quick responses is gone; what we need now is reflection and reconstruction, both at the level of theoretical frameworks and political actions.

The European legal area—and the very model of European liberal democracy—are now at the crossroads. We have inherited old conceptual frameworks which are now largely hollowed out and, to a certain degree, misleading. The EU straddles between a vision of equality among states and inaptitude in using tools at its disposal. Meanwhile, populism needs to be addressed as a complex phenomenon that should make us perceive Europe as more united rather than once again mired in geopolitical classifications. Socialization should be therefore weaned off from its dependence-oriented understanding, nuanced and adapted to the times of common struggle for a new, better and more egalitarian democracy.