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THE FUTURE OF THE EUROPEAN UNION IS NOW

1. AN UNPRECEDENTED DEMOCRATIC EXERCISE

In May 2021 the European Union embarked upon an unprecedented democratic exercise. The Member States and the EU institutions decided to organize the Conference on the Future of Europe which consisted of a year-long EU-wide reflection on the future of the integration process. However, the very launch of the Conference was marred by a profound public health crisis provoked by the Covid-19 pandemic. The Conference ought to have started already a year earlier, but it was postponed due to travel bans and the overall closure of public life. After all the crises the Europeans had been hit by, we only need to recall the financial, economic, security, migration crises as well as the crisis of constitutional democracy, few could have imagined that worse times could still be lying ahead. Nevertheless, the public health crisis, which affected millions and led to thousands of deaths and still an unaccounted number of people suffering from long Covid-19, pushed Europe even deeper in the abyss. However, having learned the lesson of the financial and economic crises, which demonstrated that the European Union could prove successful only when the Member States act together in the spirit of solidarity by joining forces in the institutions on the supranational level, the Covid-19 crisis was, as the old cliché goes, a crisis that was indeed used as an opportunity.

Despite the unprecedented public health, economic and social challenges, the European Union after Covid-19 emerged stronger than it had been before it. Under the duress of the crisis, the Member States agreed on a huge supranationally funded financial program: The Next Generation Europe. This was to ensure not just the economic recovery of the Union, but also to facilitate its transition to a more sustainable, resilient, green,

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and digital economy.¹ Against this backdrop and with the pandemic gradually subsiding, the Conference on the future of Europe, which in person and on-online mobilized thousands of individuals throughout Europe, was conducted in a much more optimistic spirit. It resulted in no fewer than 49 proposals across a broad range of EU policies striving for a more resilient, stronger, efficient, and democratic Union² that could, eventually, grow even into a federal polity³ with a new documented constitution.⁴ As the citizens have thus spoken, the Member States and the institutions were expected to act upon their expectations, to institutionalize the ideas developed in the democratic brainstorming, and to bring about the future of the European Union by taking the process of integration to a new level.

However, instead of the future looming at the horizon, the past descended on Europe. With the Russian full-blown aggression against Ukraine in February 2022, which has led to an all-out war in the following weeks and months, Europeans suddenly found themselves back in the times prior to the fall of the Berlin Wall. The achievements of the march of the liberal democracy, which has been admittedly in and of itself struggling already under the weight of the aforementioned crises,⁵ have been rolled back at once. Not only are today NATO and Russia again at loggerheads, even the threats of nuclear Armageddon have resurfaced. Instead of bringing the countries, their people, and indeed the globe as a whole, closer together through the means of international trade, which have been intended to increase mutual dependencies so to make, to paraphrase the Schuman declaration, the war “not merely unthinkable, but materially impossible”,⁶ at the close of the year 2022 the world finds itself in a situation

1 EU, *NextGenerationEU, Make it Real*, (https://europa.eu/next-generation-eu/index_en).

2 Conference on the Future of Europe, 2022, Report on the Final Outcome, (https://future.europa.eu/rails/active_storage/blobs/redirect/eyJlcmFpbHMiOnsibWVzc2F-nZSI6IkJBaHBBN1UzQVE9PSIsImV4cCI6bnVsbCwicHVyIjoiYmxvY19pZC-J9fQ==--a8e0633a7b60d869ec3b2142f1ac7fd16743eb4b/Book_CoFE_Final_Report_EN_full.pdf).

3 The German coalition agreement, however, explicitly calls for a European constitutional convention as a follow up to the Conference on the Future of Europe that would lead to the establishment of the European Federal State. See Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP, Mehr Fortschritt wagen: Bündnis Für Freiheit, Gerechtigkeit und Nachhaltigkeit, para. 4421, (<https://www.politico.eu/wp-content/uploads/2021/11/24/Koalitionsvertrag-2021-2025.pdf>).

4 Avbelj, M., 2021, Revitalization of EU Constitutionalism, *European Law Review*, Vol. 46, pp. 3–19.

5 Levitsky, S., Ziblatt, D., 2018, *How Democracies Die?*, Broadway Books, Crown.

6 European Union, *Schuman Declaration May 1950*, (https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en).

in which inter-statal, regional and international relations are strained and tense more than ever in the post-WWII era. This global turmoil is, unfortunately, not limited to the high politics, but it trickles down to the ordinary people's lives, who under the inflationary pressure, looming recession, and dwindling, but increasingly costly energy supplies struggle to make their ends meet and look with fear towards the coming winter.

It is in this context that the European Union now needs to move beyond the rhetoric and democratic exercises to really engage seriously with its future. It turns out that the three decades after the end of the Cold War eventually did not render a stable system of global governance, built on liberal intergovernmentalism and rule-based world order, resting on the universal protection of human rights that all states would increasingly be complying with in practice. It seems instead that a period after the collapse of the Berlin Wall was nothing else than a time of re-consolidation of global powers which are still devoted to the maximization of their partial interests at the expense of global collaboration, solidarity, and the universal well-being of all the peoples and the planet as a whole. While it is, of course, harder to make systemic choices about the future in the shadow of war than in a time of peace and tranquillity, it is precisely because the times are hard, and quite likely bound to get even harder, that the EU must now truly decide how to steer its course in the future, both in the shorter as well as in the longer run. In what follows, we will reflect on how the EU might respond to this challenge.

2. THE FUTURE OF THE EUROPEAN UNION IN THE SHORTER RUN

The spiral of crisis in which the EU and its Member States have been entangled over the course of the last two decades has had a profound impact on the very fabric of the integration process. The financial and economic crises revived and deepened the cleavages in the economic model between the North and the South. Solidarity was lost amid the conflicts between the more frugal Member States and those who pleaded for a more expansive EU monetary and fiscal involvement to compensate for the weaknesses of the economies of the southern European states, resulting both from the national economic mismanagement as well as from the fiscal asymmetries in the single market. The uneven burden of the migration crisis, which was again shouldered mostly by the economically weaker EU Member States, deepened this divide further, but it also kindled the *Kulturkampf* between the West and the East. For various reasons which

have been thoroughly explained elsewhere,⁷ the EU witnessed the rise of populism, which in some countries of Central and Eastern Europe, most notably in Hungary to be followed by Poland,⁸ led to an official endorsement of a new political paradigm described as an illiberal democracy.⁹

This paradigm shift introduced a schism in the fundamental values of the Union. The repercussions were felt not only in the political arena, in which the political tensions between the West and the East have grown stronger than ever before, but they also resonated in the EU legal order. The Constitutional Court of Poland, which has been due to the political interference of the ruling party declared by the European Court of Human Rights as no longer meeting the attributes of a tribunal established by law,¹⁰ openly defied the rulings of the Court of Justice of the European Union, thereby putting into question the very autonomy of EU law.¹¹ The political institutions of the European Union reacted to this rule of law and democratic backsliding by the budgetary conditionality mechanism which, in order to protect the financial interests of the EU that could be imperilled by the serious gaps in the national rule of law system, allows for withholding of the EU funds from being transferred to the Member States.¹² In assessing the validity of this regulation, the CJEU importantly held that the values of the European Union, stipulated in Article 2 TEU, cannot be questioned, as they present the cornerstone of the EU constitutional identity.¹³

7 Sadurski, W., 2022, *A Pandemic of Populists*, Cambridge, Cambridge University Press.

8 Magyar, B., 2016, *Post-Communist Mafia State: The Case of Hungary*, Budapest, CEU Press; Sadurski, W., 2019, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press; Avbelj, M., Letnar Čerňič, J., 2020, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and beyond*, Oxford, Hart Publishing.

9 Halmai, G., 2019, Illiberalism in East-Central Europe, EUI Department of Law, *Research Paper* 5, pp. 1–39.

10 ECtHR, *XERO FLOR w POLSCE sp. z o.o. v. Poland*, no. 4907/18, Judgment of 7 August 2021.

11 TRIBUNAL.GOV.PL, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, (<https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>).

12 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

13 The values contained in Art. 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties. See CJEU, case C-156/21, *Hungary v. European Parliament and Council of the European Union*, Judgment of 16 February 2022, ECLI:EU:C:2022:97, para. 127; CJEU, case C-157/21, *Republic of Poland v.*

If anything, the development described in the above paragraphs attests that the EU is facing the decision about its future deeply split by socio-economic as well even value-based divides. Not only does such a division makes reaching an agreement about the future course of action much more difficult, in face of the Russian aggression which is also intended to revamp the post-cold war world order, but it also presents a major weakness of the integration, to the extent it may even pose an existential threat to it. A political disunity in the EU, which could even deepen, especially if growing economic hardship leads to pan-European popular unrest, would bring grist to Putin's mill and facilitate his quest to "destroy the European Union".¹⁴ With this in mind, it is clear that the paramount short-term political objective for the future of the EU is to preserve the unity of the integration. This is not to say that the unity of the integration should be defended by all means, including those that are detrimental to the fundamental values of the Union. To the contrary. Those values should be unconditionally upheld, as they are constitutive of the EU *qua* the EU. Nevertheless, the political means for securing those values ought to be chosen in the awareness that the unity of the integration is now important more than ever before, while they must still remain within the boundaries of what is permissible under EU law.

Despite the temptation of succumbing to the proverbial *modus operandi* in hard, let alone war-ridden times, according to which *inter arma silent leges*, the EU must never part with its *telos* of being a community of law.¹⁵ However, simultaneously the time has come to recognize that the community of law cannot exist in a void. To ensure its viability in the longer run, it must be backed up by a political community. This means that

European Parliament and Council of the European Union, Judgment of 16 February 2022, ECLI:EU:C:2022:98, para. 127.

- 14 Burchard, H. von der, 2022, "I don't blame myself": Merkel defends legacy on Russia and Ukraine, *Politico*, (<https://www.politico.eu/article/merkel-defends-legacy-russia-ukraine-interview/>).
- 15 The authorship of this terminus *technicus*, which has incrementally grown into a powerful symbolical slogan to become part of a common sense of European students and stakeholders, is ascribed to Walter Hallstein. See Hallstein, W., 1964, *La Communauté Européenne, nouvel ordre juridique*, in: *Les Documents Communauté Européenne* 27, p. 1. For an overview, see Pernice, I., 2001, *Der Beitrag Walter Hallsteins' zur Zukunft Europas, Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft*, *Walter Hallstein-Institut Paper*, 9/01. The notion of community of law was then taken over and importantly strengthened by the proponents of the integration through law, which can be considered as the most influential branch of the supranational narrative. Cappelletti, M., Seccombe, M., Weiler, J., 1986, *Integration Through Law: Europe and the American Federal Experience*, Vol. 1: *Methods, Tools and Institutions*, New York: Walter de Gruyter and Co.

the EU should move beyond its utilitarian character by supplementing, much more than before, the output legitimacy with the input legitimacy. For that, the supranational political nature of the EU should be reinforced, by strengthening the supranational political ethos of its *pouvoir constituant mixte*.¹⁶ In particular, democratic political awareness and political commitments should be, as recommended by Habermas, lifted up from the predominant, sometimes even exclusive, national political environment to the supranational level.¹⁷ In other words, the supranational democratic life of the Union should become more meaningful, rather than just a second-rate extension of the national political arenas. The EU as a genuine political community, which draws its legitimacy from two concurrently existing democratic political sources: national and supranational is indispensable for the development of a genuine, functioning, and legitimate area of freedom, security, and justice,¹⁸ as well as for the evolution of a common foreign, security and defence policy on the basis of which the EU could defend its own values and interests at home and promote them externally. The question that this raises is, of course, how to bring about the political union, being mindful of the deep cleavages that separate several Member States, while at the same time ensuring that the social engineering of a political union does not threaten the unity of the integration and hence its very existence. This is a single most important long-term challenge for the future of the EU, to which we, therefore, turn in the next section.

3. THE FUTURE OF THE EUROPEAN UNION IN THE LONGER RUN

In the longer run, the European Union should both enlarge and deepen. The deepening of the European Union by gradually replacing its intergovernmental features, which are most tangible in those sectors of competences where unanimity remains, with supranational ones is part of the process of boosting its own political autonomy. Differently, as this has been the case in the past, this politicization of the European Union cannot again occur by stealth. The integration by stealth,¹⁹ while merited

16 Habermas, J., 2012, *The Crisis of the European Union: A Response*, Cambridge, Polity; Habermas, J., 2015, Democracy in Europe: Why the Development of the EU into a Democracy Is Necessary and How It Is Possible, *European Law Journal*, Vol. 21, No. 4, pp. 546–557.

17 *Ibid.*

18 Avbelj, M., 2021, pp. 3–19.

19 Majone, G., 2009, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford, Oxford University Press.

on the exclusive utilitarian premises, is eventually profoundly damaging for the EU's overall legitimacy. It takes place as long as it suits the national governments, typically under the benign neglect or even (complete) unawareness of their citizens, but when the national interests no longer overlap with the supranational ones, then the aggrieved national political elites resort to the scapegoating exercise, blaming the Union which has allegedly usurped all those powers, for the national incapacity of mending the problems on their own.²⁰ To prevent this scapegoating effect, the desired or even required politicization of the European Union entails a new stage in the development of EU constitutionalism.

As it is well known, the EU has been long regarded as having a constitution, which is unwritten, mostly developed through the jurisprudence of the CJEU, and which is strong in its legal and economic dimensions, but much weaker in its political layer.²¹ As Joseph Weiler once put it, the EU has a constitution, but it lacks constitutionalism.²² The latter within the meaning of a public political ethos, which infuses the legal and economic constitutional framework of a polity with a political sense, a democratic commitment of those in the name of which and for whom this constitutional framework exists, could come about by launching a formal constitution-making process leading towards the adoption of a written EU constitution. Launching a formal process of documentary constitutionalization, however, is far from being uncontroversial. It could be seen as futile, even undemocratic, given that in the past a similar attempt was already aborted.²³ What is more, a formal documentary constitutionalization, which would necessarily come with an open EU wide public debate, in which nothing would be off the table, could, especially in the present fragile situation in which the EU and its Member States find themselves, lead up to the opening of a can of worms, exacerbating the existing divisions even further at the time that this is the least appropriate.

20 Hobolt, S. B., Tilley, J., 2014, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford, Oxford University Press.

21 Avbelj, M., 2008, Questioning EU Constitutionalisms, *German Law Journal*, Vol. 9, No. 1, pp. 1–26, (<https://doi.org/10.1017/S2071832200006283>).

22 Weiler, J., “We Will Do, and Hearken” – Reflections on a Common Constitutional Law for the European Union, in: Bieber, R., Widmer, P., (eds.), 1995, *The European Constitutional Area*, Zurich, Schulthess.

23 Hobolt, S. B., Brouard, S., 2011, Contesting the European Union? Why the Dutch and the French Rejected the European Constitution, *Political Research Quarterly*, Vol. 64, No. 2, pp. 309–322; Cuperus, R., “Why the Dutch Voted No: Anatomy of the New Euroscepticism in ‘Old Europe,’” *Progressive Politics*, 4/2, in: Boxhoorn, B., Scott-Smith G., (eds.), 2005, *The Transatlantic Era (1989–2020) in Documents and Speeches*, London, Routledge.

While all these concerns are certainly legitimate, it is submitted that in the longer run the interests of a viable future of the European Union speak in favour of openly addressing the differences that tear its Member States apart, rather than glossing over them in the hope that they will either go away or will at least not too much hinder the functioning of the integration. However, rather than concealing the differences, it might merit more to invest in the strategies of managing them and in fact, the European Union, its primary and secondary law, are full of examples how this could be done productively.²⁴ In short, the EU should, perhaps even more than before, build on the practices of differentiated integration.²⁵ The idea is the following. If it is in the overall: internal and external interest of the European Union to develop into a political union, which would democratically legitimate the existence of an economic, monetary, health, energy, and defence union, but the national differences act as an obstacle toward that goal, then it is time to formally adopt a constitutional framework that would allow for a more flexible development of the integration.

This could be achieved by turning the EU in the integration of concentric circles. The innermost circle would join those Member States, which so wish and desire, in the political union, while the grip of the integration would be loosened towards the external concentric circles. There the single market could represent the minimum common denominator of the integration as it presently stands. What is more, more flexible integration could also facilitate the process of enlargement. It is not only the geo-strategic political considerations that dictate, more than ever before, that the candidate states from the Western Balkans and now even Ukraine and Moldova become members of the EU. This is also a question of justice. Historically, the peoples of Europe, especially those living at the periphery, away from the geographical heart of Europe, have been subject to whims and injustices of greater powers, their hegemonic tendencies, and frequently also totalitarian regimes. As a matter of justice, they too deserve to be “returned to” Europe, which could only with their membership indeed be “whole, free and at peace with itself.”²⁶

Of course, it goes without saying that the enlargement, while both necessary and just, would further increase the diversity in the Union and

24 Avbelj, M., 2013, Differentiated Integration – Farewell to the EU-27?, *German Law Journal*, Vol. 14, No. 1: Special section – The ESM Before the Courts, pp. 191–211.

25 Avbelj, M., 2017, What Future for the European Union?, *WZB Discussion Paper SP IV 2017-802*, (<https://ssrn.com/abstract=3009672>, <http://dx.doi.org/10.2139/ssrn.3009672>).

26 Bush, G. H. W., 1989, “A Whole Europe, A Free Europe” (31 May 1989), *Voices of Democracy*, The U.S. Oratory Project, (<https://voicesofdemocracy.umd.edu/bush-a-whole-europe-speech-text/>).

render its functioning even more complex, therefore less efficient, but most probably also more conflict-ridden. It is for that matter that a more flexible EU constitutional frame, formally endorsed by the Member States and EU citizens as part of an open constitution-making process, is also essential for making the enlargement actually happen. The EU of concentric circles would be capable of embracing more Member States, which could despite their objective shortcomings in their overall systems of governance achieve full EU membership that would be exercised in those concentric circles for which the Member States prove willing and capable. On the top of it, such a flexible European integration, made of concentric circles, could also provide for a legal, economic and political platform in which the United Kingdom, despite leaving the Union, as well as Turkey, whose candidate status has been long in suspense, could participate.

In a nutshell, the future perspective of the European Union in a longer run could be one of a non-statist federation, composed of functional concentric circles, stretching from the political union across the monetary union to the single market and customs union, in which new Member States, as well as the UK and Turkey, could take part. For that, a new constitutional settlement, following a constitution-making process, would need to be adopted in the hope of improving the requisite input legitimacy for the EU as a political union.

4. THE FUTURE OF THE EUROPEAN UNION BETWEEN IDEALISM AND REALISM

How realistic, or rather idealistic, perhaps even utopian, is our reflection on the short- and long-term future development of the European Union? As Niels Bohr allegedly quipped, it is hard to make predictions, especially about the future. The idealistic or realistic character of our above discussion is thus conditioned by the vagaries of time. This is something that is as self-evident, as it also goes without saying that the arguments presented herein are normative theoretical claims. As ideational constructs, they draw possible maps that the actual practical development might (or not) follow to the greater or lesser extent. For once, however, the above discussion is certainly not entirely utopian. It is namely informed by the history of European integration which has taught us that countries, like men, do make transformative decisions in hard times, at the moment of crisis, once they are kicked out of their complacent zone of comfort.²⁷ While the

27 Europe will be forged in crisis, and will be the sum of the solutions adopted for those crises. See Monnet J., 2015, *Memoirs: Jean Monnet*, Third Millennium, Main edition.

EU has been in such a moment of crisis for more than a decade now, the Russian war in Ukraine literally pushed the EU *status quo* to the verge of sustainability. When, as now, change and reforms are necessary, it is the role of EU scholarship to help charting the most suitable path.

Finally, several normative proposals presented above can already be seen as finding support in the actual political developments taking place in Europe over the course of the last few months. In the epilogue phase of the Conference on the Future of Europe, the European Parliament voted in favour of convening a European Convention that would lead to a Treaty change.²⁸ The European Commission, admittedly so far merely rhetorically, followed suit.²⁹ The Member States, while approving the positive outcome of the Conference, emerged out of it fairly divided. Most of them reacted in a relatively conservative manner, arguing in favour of the existing *status quo* that should be amended to the extent really necessary and only after the existing competences have been effectively used, or if they prove insufficient.³⁰ Hungary is stuck with the regressive course of action. It insists on the classical international law conception of the EU, whose central concern is the preservation of its Member States to which the EU should be as much as possible ancillary, and instrumental.³¹ This strikes a chord with Poland too, which has also insisted on the sovereign equality of all Member States as a bulwark against the potential imperialism being born inside the Union.³² On the other hand, France, to a certain extent also

28 European Parliament, 2022, *Parliament activates process to change EU Treaties*, (<https://www.europarl.europa.eu/news/en/headlines/priorities/eu-future-conference-follow-up/20220603IPR32122/parliament-activates-process-to-change-eu-treaties>).

29 European Commission, 2022, *State of the Union*, (https://state-of-the-union.ec.europa.eu/index_en).

30 Government Offices of Sweden, 2022, Non-paper by Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden, (<https://www.government.se/information-material/2022/05/non-paper-by-bulgaria-croatia-the-czech-republic-denmark-estonia-finland-latvia-lithuania-malta-poland-romania-slovenia-and-sweden/>); Conference on the Future of Europe: Common approach amongst Austria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Malta, the Netherlands, Slovakia and Sweden, (<https://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2021/03/24/non-paper-on-the-conference-on-the-future-of-europe/Non-paper.+Common+approach+to+the+Conference+on+the+Future+of+Europe..pdf>).

31 Deme, D., 2022, Viktor Orbán Sets out His Vision Concerning Hungary's Future in a Decade of Conflict, *HUNGARY today*, (<https://hungarytoday.hu/viktor-orban-sets-out-his-vision-on-hungarys-future-in-a-decade-of-conflict/>).

32 Morawiecki, M., 2022, Historical Challenges and False Directions for Europe at the Crossroads, *Euroactiv*, (<https://www.euractiv.com/section/europe-s-east/opinion/historical-challenges-and-false-directions-for-europe-at-the-crossroads/>).

supported by Germany,³³ has pushed forward most ambitiously, in the direction not unlike the one supported by this paper.³⁴ The most important sign of that has been the creation of the European Political Community,³⁵ which met for the first time in Prague on 6 October, bringing together all European states in a manner resembling the outermost concentric circle of the future non-statist European federation, based on a flexible and differentiated constitutional framework.

While it is thus indeed hard to predict the future, and only time will tell how this will eventually come about, and therefore how realistic or utopian our discussion here has been, it is indisputable in the present geo-political circumstances that the future for Europe is already happening now. The EU, its Member States, and their people should thus be aware of the decisiveness of the moment in which we live and seize the opportunity that it brings, to avoid and prevent the great risks that might result from the potential inaction.

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33 The experience of past months shows in fact that blockades can be overcome. European rules can be changed – in very short order, if need be. And even the European Treaties aren't set in stone. If, together, we come to the conclusion that the Treaties need to be amended so that Europe makes progress, then we should do that. See The Federal Government, 2022, *Speech by Federal Chancellor Olaf Scholz at the Charles University in Prague on Monday, 29 August 2022*, (<https://www.bundesregierung.de/breg-en/news/scholz-speech-prague-charles-university-2080752>).

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CASE LAW

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