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“The ‘West’ is Dead”. The Death of an Idea?

The events of 2025 have overshadowed all other discussion. The rules-based world order as we knew it has been upended, causing Martin Wolf of the *Financial Times* to declare that “The ‘west’ is dead.”¹ Europe has seen itself as an important part of ‘the West’ and, for some, as the most important part. But, as Timothy Garton Ash reminds us, we must see the world as it is, not as we wish it to be. Europe is a small continent of small and medium-sized powers, while the geopolitical stage is now planetary, and most of the players are non-western states.² “Nostalgia is not a strategy.”³

The problem for lawyers in Europe is that we are faced with a doctrinal war on multiple fronts. Russia is waging an unprovoked war against Ukraine without even a minimum token of respect for international law or human rights. Viktor Orbán calls into question the basic tenets of the European Union Treaties and legal system, ignoring judgments of the European Court of Justice.⁴ He is followed, albeit at a distance, by a new generation of populist leaders, and we have waited with trepidation to see which way the new President of Poland will turn.

The United States, once our closest ally, has become an engine of disorder. The President tears up treaties and other agreements that its predecessors have agreed, especially the agreements on climate change on which the future of human existence may depend.⁵ The forcible removal by executive order of foreign nationals in night raids by men in masks and helmets, without even the appearance of due process, was said to have been authorised by the Alien Enemies Act of 1798.⁶ History reminds us

¹ M. Wolf, “The US is now the enemy of the west,” *Financial Times*, 25 February 2025.

² T. Garton Ash, “In the new Trumpian era, liberal democracies must hold their noses – and engage with difficult partners,” *The Guardian*, 15 January 2025.

³ Mark Carney, Prime Minister of Canada at the Davos Forum 20 January 2026.

⁴ Court of Justice of the European Union (CJEU).

⁵ Executive Order 14199 of 4 February 2025 (Withdrawing the United States from and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations) and Presidential Memorandum of 7 January 2026 enumerating “Organizations from Which the United States Shall Withdraw.”

⁶ Presidential Proclamation No 10903 to detain and remove Venezuelan nationals “who are members of Tren de Aragua” (see: Supreme Court *per curiam* decision No. 24A931 of 7 April 2025) and, more generally, Presidential Order “Protecting the American People against Invasion” of 20 January 2025.

that, in Germany, the Enabling Act of 1933⁷ empowered the government to make and enforce laws without further legislation, effectively handing over the legislative power of the State to the Nazi Party, so giving their racial legislation the formal appearance of legality.⁸

It has been said that "international law is the nuclear weapon of small states,"⁹ but that is hardly true now. Large States disregard both the substantive provisions of treaties and conventions and the basic principles of international law.¹⁰ In the United Kingdom, there are renewed calls for the country to leave the European Convention on Human Rights¹¹ and, on a more sophisticated level, there is an ongoing debate between the Attorney General and his Parliamentary shadow from the opposing party as to the binding nature of international law.¹² Constitutional law, which might be said to have been the nuclear weapon of minorities and of the individual citizen, has been so manipulated in Poland and Hungary as to implant the toxins that could destroy its authority.¹³ Respect for the rule of law has become optional, so that *pacta sunt servanda* becomes a dead letter.

Lawyers must now decide on which side of the barricades they are to take their stand. In the United States, big law firms have already had to do so: some have bent the knee, others have not.¹⁴ The issue at stake is whether the law, in its widest sense,

⁷ *Gesetz zur Behebung der Not von Volk und Reich*.

⁸ The legal nature of the Nazi regime was analysed by Ernst Fraenkel in *The Dual State: A Contribution to the Theory of Dictatorship*, of which the text was smuggled out of Germany and first published in 1941, now republished with an Introduction by Jens Meierhenrich, Oxford 2017.

⁹ Saying attributed to Lennart Meri, President of Estonia.

¹⁰ D.J. Trump, "My own morality. My own mind. It's the only thing that can stop me. I don't need international law," *The New York Times*, 7 January 2026, <https://www.nytimes.com/2026/01/08/us/politics/trump-interview-power-morality.html> [accessed: 11.05.2026].

¹¹ S. Francis, "UK will leave ECHR if Tories win election, Badenoch says," *BBC*, 4 October 2025, <https://www.bbc.co.uk/news/articles/c1mxy2j2elro> [accessed: 11.05.2026].

¹² Lord Hermer (Attorney General), "The Rule of Law in an Age of Populism," *Bingham Lecture*, 14 October 2024, <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law> [accessed: 11.05.2026]; Lord Wolfson ('Shadow' Attorney General), "The Rule of Law: at home, abroad – and in Westminster," *Policy Exchange*, 25 March 2025, <https://policyexchange.org.uk/events/the-rule-of-law-at-home-abroad-and-in-westminster> [accessed: 11.05.2026].

¹³ V.Z. Kazal, "The misuse of the legislative process as part of the illiberal toolkit. The case of Hungary," *The Theory and Practice of Legislation* 2021, vol. 9, issue 3, pp. 295–316; J. Zajadlo, T.T. Konciewicz, "Restoration of the Polish Constitutional Tribunal as Reading the Constitution Forward," *Verfassungsblog*, 19 February 2024, <https://verfassungsblog.de/restoration-of-the-polish-constitutional-tribunal-as-reading-the-constitution-forward> [accessed: 11.05.2026]; N. Boy, "A new step in the Polish constitutional crisis: should fire be fought with fire," *I.CONnect*, 11 December 2025, <https://www.iconnectblog.com/a-new-step-in-the-polish-constitutional-crisis-should-fire-be-fought-with-fire-analysis-of-ruling-p3-25-of-the-polish-constitutional-tribunal> [accessed: 11.05.2026].

¹⁴ For a summary, see: E. Reyes, "In depth: Law firm and US bar strike blows against Trump – is the tide turning?," *The Law Society Gazette*, 16 May 2025, <https://www.lawgazette.co.uk/news-focus/in-depth-law-firm-and-us-bar-strike-blows-against-trump-is-the-tide-turning/5123314.article> [accessed: 12.05.2026].

places a limit on the exercise of the executive power of the State. That, surely, is what the idea of the West is about.

There have been, and no doubt still are, those who argue that the State has a transcendental personality – separate from, and superior to those of its citizens, with inherent rights to direct and control their lives – a belief that was, not so long ago, a tenet of political philosophers in the German tradition.¹⁵ It is characteristic of autocrats to expect of their citizenry a commitment to themselves as the embodiment of the State, and these arguments are avenues that lead to dark places.¹⁶ Even in England, the idealist philosopher, F.H. Bradley, wrote that

The rights of the individual are (...) today not worth serious criticism. (...) The welfare of the community is the end and is the ultimate standard. And over its members the right of the moral organism is absolute. Its duty and its right is to dispose of its members as seems to it best. Its right and duty is, in brief, to be a Providence to itself.¹⁷

For present purposes, I use the word State simply to refer to the amalgam of institutions, roles and functions that protect and regulate our daily lives and the society we live in. International conventions and treaties are concluded between and among States, but these documents avoid the metaphysics of statehood by *assuming* that states exist as international actors,¹⁸ defining the term State for the purposes of the instrument in question,¹⁹ or by reference to the characteristics of a body claiming to be a State.²⁰ Indeed, we cannot do without the notion of the State as a constituent of the way the political world is organised. To be stateless, without the protection of a State is a lamentable position as the Palestinians in Gaza and the West Bank bear witness. But the State in this sense is not by nature autocratic.

The answer to the autocratic view of the State was, I believe, best expressed by Hersch Lauterpacht (1897–1960) Professor of International Law at Cambridge and later Judge of the International Court of Justice. He was born not far from the city of Lemberg in Galicia (briefly Lwów and now Lviv), where he began his university studies, moving from there to Vienna and then in 1923 to England. Most of his family that remained in Galicia were murdered. He devoted much attention to the relation of the individual to the State, which he described as the main problem of law and politics.

In a paper presented to the Grotius Society in London in December 1942,²¹ he traced the idea of natural or fundamental rights from Greek and Roman political philosophy

¹⁵ Following G.W.F. Hegel, *Philosophy of Right*.

¹⁶ For example, the *Führerprinzip* that presented Hitler as the incarnation of national authority.

¹⁷ F.H. Bradley, "Some Remarks on Punishment," *International Journal of Ethics*, April 1894 (cited in H. Lauterpacht, *An International Bill of the Rights of Man*, New York 1945 (infra n. 24) footnote at p. 4).

¹⁸ United Nations Charter, Articles 3 and 4; Vienna Convention on Succession of States in respect of Treaties, Articles 1 and 2.

¹⁹ United Nations Convention on the Law of the Sea (UNCLOS), Articles 2 and 305(1).

²⁰ Montevideo Convention on the Rights and Duties of States, Article 1.

²¹ H. Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man," *Transactions of the Grotius Society* 1943, vol. 29, p. 1.

to the constitutions of modern States, asking the question, in what sense, if at all, are natural rights legal rights? He recognised the force of the counter-argument that:

in the last resort, such rights are subject to the will of the State, that they may – and must – be regulated, modified, and if need be taken away by legislation and possibly by judicial interpretation; that, therefore, these rights are in essence a revocable part of the positive law of a sanctity no higher than the constitution of the State either as enacted or as interpreted by courts and by subsequent legislation.²²

In answer, he stated his belief that

[T]he sovereign national State (...) is not an end unto itself, but the trustee of the welfare and of the final purpose of man. (...) [T]he purpose of the law of nations (...) cannot be permanently divorced from the fact that the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law.²³

He developed his idea in a book first published in 1945, *An International Bill of the Rights of Man*.²⁴

In triumphant vindication of the arguments of Lauterpacht and others, the Universal Declaration of Human Rights (1948) and at a transnational level, the European Convention on Human Rights (1950), brought to international law a new dimension going far beyond the legal relations between States, and recognising the human being as a unit of law. Eighty years on, the judgments and advisory opinions of the International Court of Justice stress the *human* dimension of the disputes concerning the Chagos Islands,²⁵ Ukraine,²⁶ and Palestine.²⁷

Unlike Martin Wolff, I do not believe the West is dead. It is true that there are now many unfriendly beasts in the jungle and that Europe must get used to its position as a continent of small and medium-sized states. But Europe has been the testing ground for many great ideas – not least the rule of law. The European Union and its forerunners, the European Communities, have been, from the beginning, an experiment in a form of government that is founded on a belief in a common willingness to accept the strictures of a legally binding political structure.²⁸

²² *Ibid.*, p. 10.

²³ *Ibid.*, p. 31.

²⁴ Published by Oxford University Press 1945, and republished by OUP 2013, with an Introduction by Professor Philippe Sands.

²⁵ *Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, of which the recent decision of the UK government to comply is still being contested in Parliament.

²⁶ *Ukraine v Russian Federation*, Judgment of 31 January 2024.

²⁷ *Advisory Opinion on Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 19 July 2024.

²⁸ See the obligation imposed on the Court of Justice to "ensure that the law is observed," ECSC Treaty, Article 31; EEC Treaty, Article 164; Euratom Treaty, Article 136; and now the explicit reference to "the rule of law" in TEU, Preamble, second paragraph, and Article 2.

Assuming, with Lauterpacht, that the human being is the ultimate unit of the law, how does this translate into the day-to-day situations with which judges and lawyers are faced? Over the years, I have met and worked with judges and advocates who have been compelled to live and work under an autocratic regime. In the light of that experience, what they most detest is the arbitrary. Taken at its simplest, the rule of law implies that we should live under *known laws impartially administered*.²⁹

This is a prescription to be applied as much to the legislator and the administrator as to the judge and the lawyer, imbuing every part of the work of the State. Looking at the situations with which we have been faced this year (discussed above), their common characteristic is the arbitrary and unpredictable character of what has been done and the evasion of what had been believed to be the legal limits of executive action. That is what the lawyer has a legal and moral obligation to challenge and the judge to strike down.

It is true that "the rule of law" is open to many interpretations. The liberal understanding, to which "the West" has been attached, was severely criticised by the Nazi theorist Carl Schmitt (1888–1985) and, post-war, by the Brazilian Roberto Unger (1947–) and the Critical Legal Studies movement in the United States. In response, Otto Kirchheimer (1905–1965) wrote an article discussing the concepts of Rule of Law in Britain and of *Rechtsstaat* in Germany from the point of view of a sociologist as much as that of a lawyer. He seems to me to divine the essence of the idea to which today's lawyers can respond:

Changes in the apparatus of government, and the substitution of executive and bureaucratic government for parliamentary government, bring about modifications of the rule of law without affecting the requirement that it serve the essential protective needs of the individual. *The true yardsticks of legal devices, as of the regimes to which they belong, are their practices.*

I think that for all the differences in historical roots and legal traditions [the] common denominator [of the two concepts] lies in the simple thought that the security of the individual is better served when specific claims can be addressed to *institutions counting rules and permanency among their stock-in-trade* than by reliance of transitory personal relations and situations. Beyond that, a good part of their common success probably lies in the mixture of implied promised and convenient vagueness. Who would not breathe more freely if told that the law can rule and that state and law may march hand in hand?

Wherein then lie the benefits derived from rule-of-law concepts and from the institutions to which they correspond? For both procedural and substantive goals, *rule-of-law concepts are best understood as yardsticks for performance*.³⁰

²⁹ J.F. Stephen, "Foundations of the Government of India," *Nineteenth Century*, October 1883, fourth paragraph before the end, https://fitzjames-stephen.blogspot.com/2016/09/foundations-of-government-of-india_23.html [accessed: 12.05.2026].

³⁰ O. Kirchheimer, "The *Rechtsstaat* as Magic Wall" [in: *The Critical Spirit: Essays in Honour of Herbert Marcuse*, eds. H.M. Wolff, B. Moore, Boston 1967, pp. 243–263. Reprinted in: *The Rule of Law under Siege*, ed. W.E. Scheuerman, Berkeley–Los Angeles–London 1996 (emphasis added).

In short, the rule of law is a practical precept that does not become any clearer from over-sophisticated analysis. It imposes upon the legislator, the administrator and the judge an implied promise to act with impartiality according to law. Those who practise the law ought to know instinctively whether this implied promise is met.

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Summary

David Edward

"The 'West' is Dead". The Death of an Idea?

The analysis argues that lawyers in Europe face a doctrinal war on multiple fronts with the basic tenets of the Treaties and the European legal system on the line and at stake. Looking at the processes around us with which we have been faced this year, their common characteristic is the arbitrary and unpredictable character of what has been done. It is this that it is the duty of the lawyer to challenge and of the judge to strike down.

Keywords: disorder, international law, Europe, arbitrariness, lawyers.

Streszczenie

David Edward

„Zachód jest martwy” – śmierć pewnej idei?

W przedstawionej analizie wskazano, że prawnicy w Europie stoją obecnie w obliczu doktrynalnej wojny na wielu frontach, a na szali znajdują się podstawowe zasady traktatów oraz europejskiego systemu prawnego. Wspólną cechą procesów i zdarzeń, z którymi jesteśmy konfrontowani, jest ich arbitralność i nieprzewidywalność. Tymczasem to właśnie wykluczenie arbitralności i przywracanie przewidywalności jest obowiązkiem prawników, do sędziów zaś należy eliminowanie skutków działań podjętych w sposób arbitralny.

Słowa kluczowe: nieład, prawo międzynarodowe, Europa, arbitralność, prawnicy.