

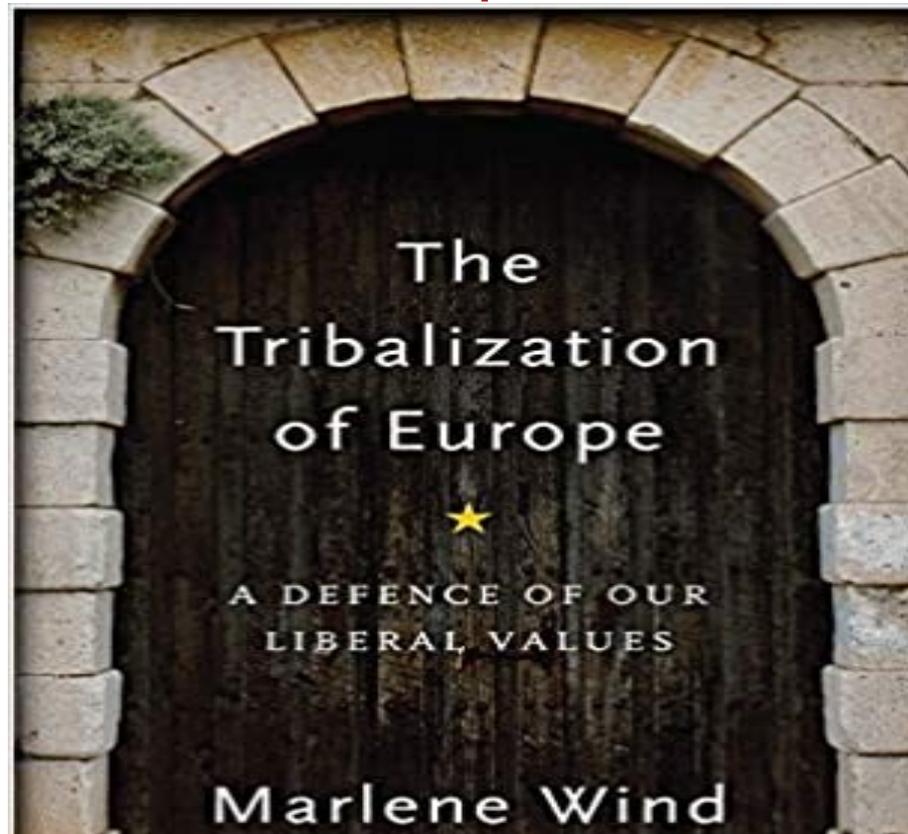
# The Tribalization of Europe and the EU's 'Rule of Law Challenge' – why is it existential?

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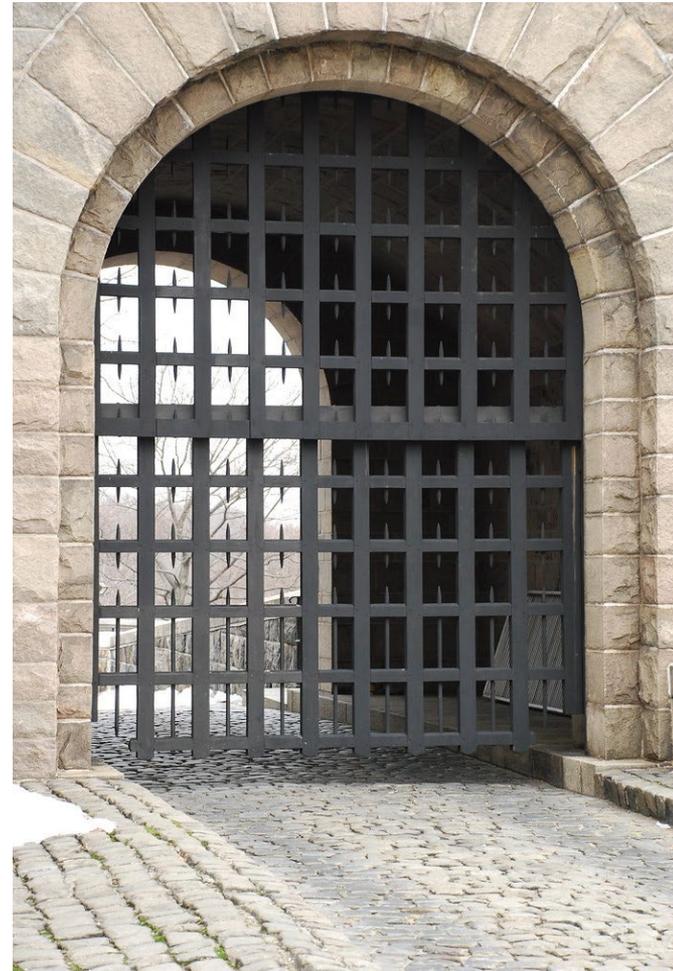


Book on the EU's Rule of Law crisis, published by Polity (2020) also out in Danish and Spanish <https://www.wiley.com/en-us/The+Tribalization+of+Europe%3A+A+Defence+of+our+Liberal+Values-p-9781509541676>

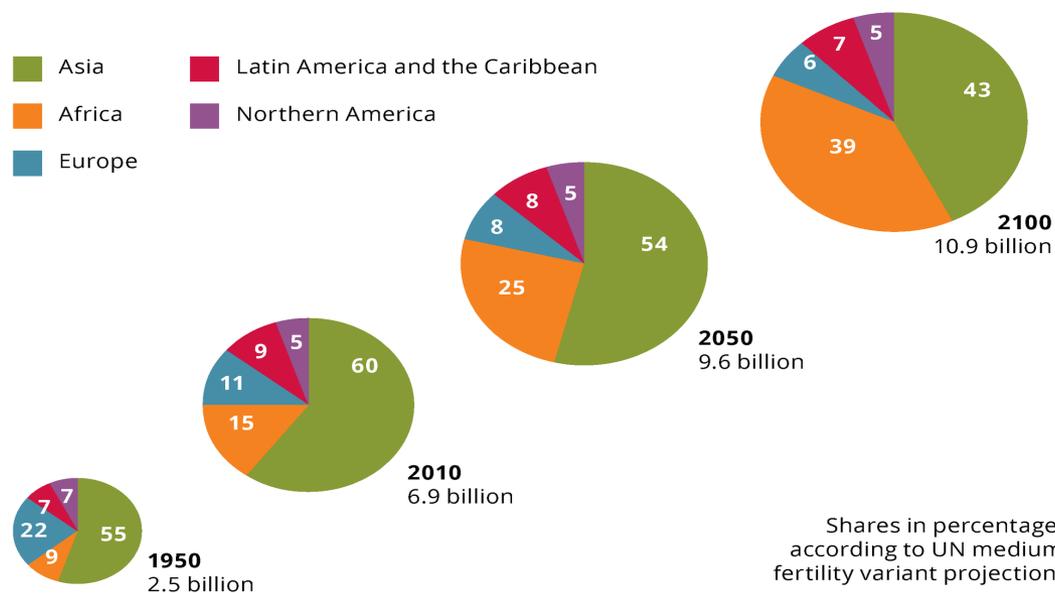


# What is meant here by Tribalization?

- In 1989 – when the Berlin Wall fell we thought the world was coming together
- Today we are building fences (inside Europe) and using identity politics to shut others out
- Brexit, nationalism, populism, cultural exclusion etc.
- Our common rules, values are undermined -> identity politics (us-them rethoric) employed by cynical leaders who lie and build narratives they don't believe in themselves.



The books conclusion: Europe is a shrinking continent. Only 8% of the worlds population in 2050. Will we pass on democracy to our children and grandchildren if we don't defend it internally today?



# Will they rule the world – should they?



My claim in the book: The EU's value crisis is much more fundamental than prior European crisis and challenges.

The EU will only be able to counter tyranny on the global stage if we dare to fight it at home!

This is NOT the case at the moment

Not even with the new rule of law mechanism adopted last November



# The EU's own internal fight with tyranny

- The EU rests on and can only survive if we agree on what democracy and the rule of law is
- The EU only accepts democracies and rests on rule of law principles and the supremacy of EU law
- Today some EU MS would not live up to the EU's democratic criteria to enter
- How did it come to this and why are the EU – institutions and heads of state in the Council not acting?

# After the 2 WW but increasingly after the fall of Communism most European countries became constitutional democracies

- All southern- and Eastern European countries adopted more or less the German constitutional model with strong courts and constitutions
- A requirement to enter the EU: Copenhagen criteria and art. 2 of the Lisbon treaty
- Rule of law and independent courts, democracy, freedom of speech, protection of minorities, equality between the sexes etc



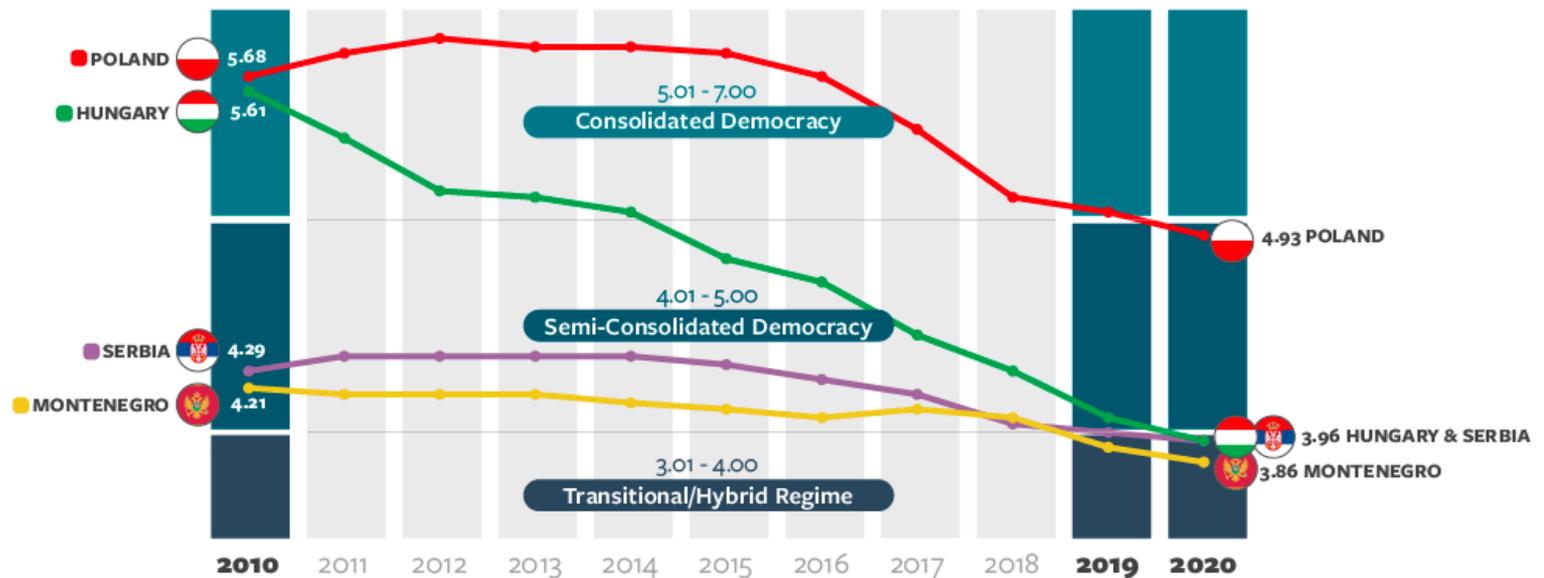
In 2018, 2019 and 2020 Freedom House (and many others) report that:

- The “Freedom in the World 2020,” says that Hungary and Poland are today no longer democracies, but “semi-consolidated or hybrid” regimes with worsening scores for political rights and civil liberties. The first two countries in the EU that are no longer listed as



### Leading the Democratic Decline

The breakdown of the democratic consensus has been most visible in Central Europe and the Balkans, which experienced the greatest gains after the end of the Cold War.



# How did it come to this? (Focus in the book on Poland and Hungary)



# Orban says that he wants a *illiberal* democracy (speech in 2014)

- But what is illiberalism and is an illiberal democracy even to be named a 'democracy'?
- How has Orban transformed Hungary (and how has he inspired Kaczynski, Babis and others?)



# What is the problem in Hungary and Poland?

- Hungary is clearly the most problematic country, but the Commission has mainly targeted Poland most - why?
- Already in December 2017 it was decided to introduce an art. 7 procedure against Poland
- In September 2018 the EP did the same to Hungary on the basis of the Sargentini rapport



# Common 'autocratic' development

1. Attacking or taking over the courts and the justice system (prosecutors). Setting up disciplinary courts for judges who disobey/challenge the government (Poland)
2. Limiting media independence and civil society's rights to organize and criticize the government
3. Changing (Hungary) or attempted to change (Poland) the constitution and election laws so that those in power easier wins the next elections



## Technique used: 'Autocratic Legalism' – Kim Lane Scheppele

- “They attack the institutions of liberal constitutionalism with constitutional amendments. They carefully preserve the shell of the prior liberal state—the same institutions, the same ceremonies, an overall appearance of rights protection—but in the meantime they hollow out its moral core. Constitutional institutions survive in the same buildings, but their liberal souls have been killed” (2018)



## Orban and Fidesz

- Came to power in 2010 – got 53% of the votes, but ended up with 68% of the seats in parliament and the right to amend the constitution
- Adopted a new constitution januar 2012 – which was revised in their favour 7 times
- With this amendment the constitutional court was transformed and 11 new Fidesz supporters hired as judges

# The Court reform that no one reacted to in 2011

- New pensionage lowered from 70 to 62 – meaning that 200 judges were forced to step down
- New rules for the Supreme court president which made Orban fire the current president
- A new National Judicial Office with a manager appointed by the government: he could appoint new judges after those who had to retire. Can also move judges around.



# No media pluralism

- Orban and his friends have bought 80% of the critical media
- Soros law adopted against NGO's
- All funds from foreign investors have to be registered
- New restrictive rules on universities - > Central European University has had to move its international departments to Vienna



# COVID19 Pandemic 'dictatorial' measures – Von der Leyen has been weak

- Most governments have adopted restrictions for their citizens during the pandemic – but all with
- Sundown clauses
- Orban still rules by decree, 5 years in prison for criticizing the government and NO sundown clause
- 100.00 deaths



# Poland inspired by Orbans illiberalism

- In the spring 2018 the government dismissed judges by lowering their pensionage. 2/3 of the judges were forced to retire (the case – rearding the Supreme court - ended at the EUD and was partly withdrawn)



# Court reform in 2018

- Disciplinary court against non loyal judges: judge Tuleya has lost his immunity for challenging the justice reforms - > put before a so-called disciplinary chamber



## Other measures during COVID19

- The Poles went ahead with presidential election – despite criticism as no one can vote in person (government candidate Duda won)
- Go ahead with anti-abortion law -> hard to take to the streets to demonstrate as civil society has done previously
- LGBT free zones in over 100 municipalities (not legal)
- Disciplinary cases continue against judges
- New media tax

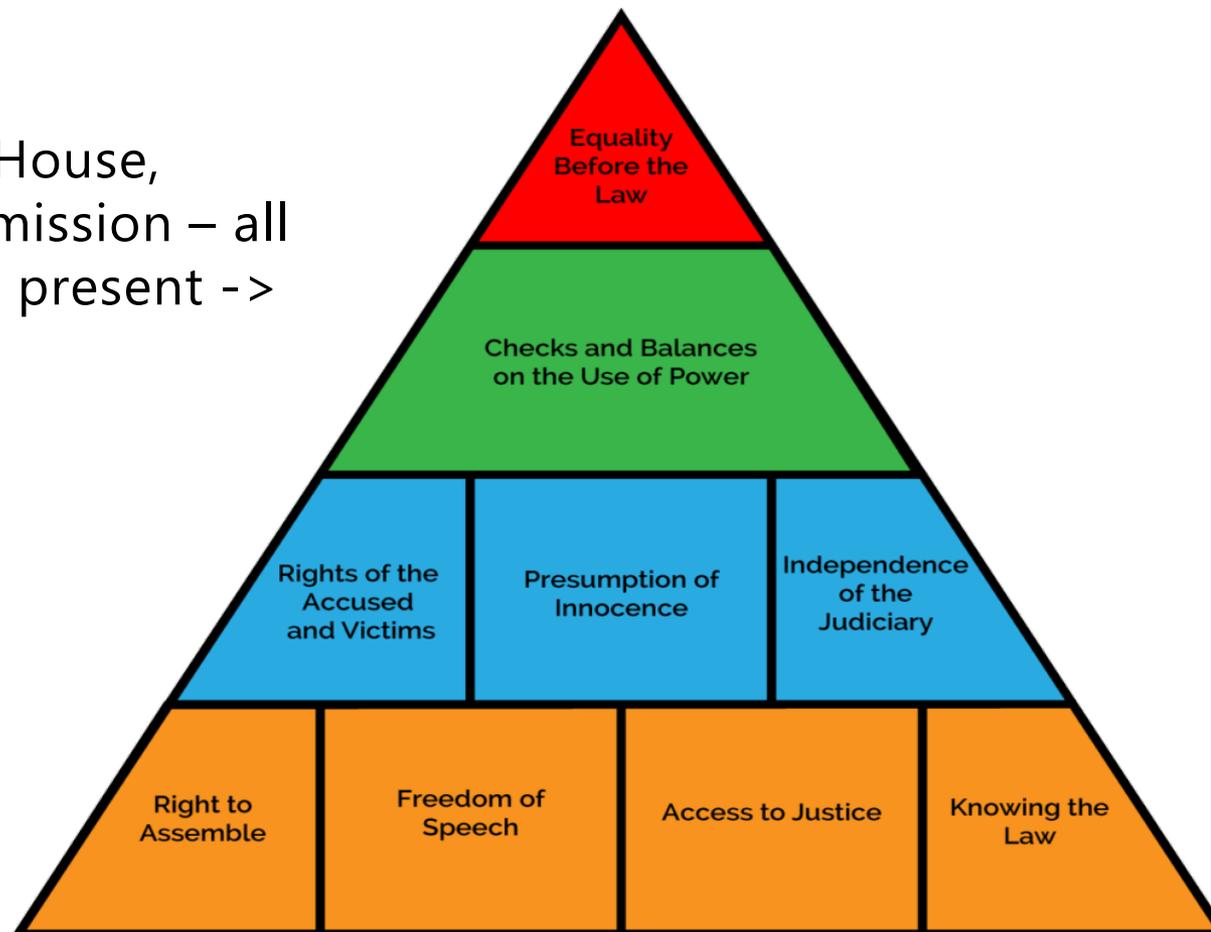
Babis & Orban – the EU's most corrupt leaders and those who receives most EU subsidies. See the embassaing (also for the EU) reportage in NYT 'The Money farmers':  
<https://www.nytimes.com/2019/11/03/world/europe/eu-farm-subsidy-hungary.html>



Illiberals often claim that they are legitimate because they have been voted into office.

But democracy is more than elections!

According to Freedom House, OSCE, The Venice Commission – all these things have to be present ->



## It is a misnomer to even call an illiberal democracy a democracy

- Following: Kelemen, Perch, Mudde, Muller in particular Hungary is no longer a democracy because:
  - You cannot talk about democracy, when you only meet the election criteria. And when a majority in parliament unravels all 'checks' from independent institutions, media and civil society
  - Autocratic legalism has made it difficult for the EU to agree on acting!

# What is the problem for the EU? Not just internal: The EU is a 'normative power' and the worlds largest aid donor

- In its foreign policy, its accession policy, its aid policy but also in its legal DNA and structure, the EU has defended and insisted on the principles of democracy and the rule of law
- Can this be continued if the EU no longer consists of 'true' democracies?

# What can the EU do?

- Three strategies/options
  - A) Article 7 (TEU)
  - B) Economic sanctions? (MMF budget rule of law mechanism)
  - C) Ordinary infringement cases
  - D) Rule of law mechanism
  - E) Fidesz no longer a member of EPP (in the European Parliament – maybe that will mean change?)

# Article 7

- **Article 7 of the Treaty on European Union** is a procedure in the treaties of the European Union (EU) to suspend certain rights from a member state. (There is no mechanism to expel a member).
- In the end there has to be unanimity in the Council so nothing will happen

# GenerationX-budget: The Commission will retain or delay EU funding, if corruption or 'rule of law' principles are overstepped – but will it work?

- 'Rule of law mechanism' establishes that if "general rules of law problems" and misuse of funds -> it can recommend to reduce, retain or suspend EU funding from the EU-budget.
- BUT: qualified majority and there has to be rule of law breaches AND misuse of funds at the same time.
- We still do not know how the Commission will define a concrete breach
- Poland and Hungary have challenged the mechanism at the CJEU

# Why not demand that all receivers of EU funding sign up to the public prosecutors' office

- Can investigate fraud independently from the MS
- But not mandatory
- Underfunded
- Just started working
- Will it be effective?

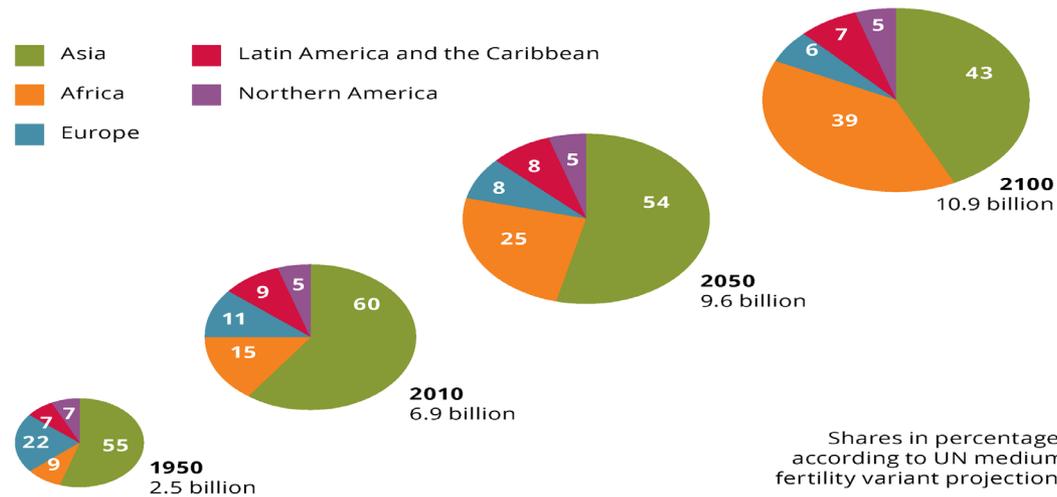


# Can the internal market function if a countrys legal system is not free and independent??

- Business and citizens may loose confidence in countries where judges and courts are not impartial
- Undermining of democracy and rule of law can destroy the internal market



Europe is a shrinking continent. Noone promised us that we – 8% - of the worlds population will come to decide the future



It may be these guys instead



Thank you!