

'There is dissatisfaction about Europe – one must want to listen to that'

A judgment of the *Bundesverfassungsgericht* shocked the legal order in the EU in May. Then, Poland and Hungary put the Union under high pressure with their veto against the European budget. We are at a crucial crossroads, warns [René Smits](#), emeritus professor of European law at the University of Amsterdam ([UvA](#)). 'Populists emerge for a reason.'

[Daan Ballegeer](#) [Han Dirk Hekking](#) 8 January 2021

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Photo's in FD [not shown here]: [Kiki Groot](#) for FD

<https://fd.nl/weekend/1366249/er-is-onvrede-over-europa-en-dat-moet-je-willen-horen>

In brief:

'One of the scariest things of the past twenty years is the fear of populists', thinks René Smits, European law professor.

At the same time, he warns: 'One shouldn't keep moving to the right until, at a certain, point the normal right is the extreme right of twenty years ago.'

'It cannot be that European money helps to keep illiberal politicians in power.'

To outsiders, [Hoofddorp](#) appears as a random collection of new housing estates in various stages of aging that can be found all over the west of the Netherlands. It could also be [Purmerend](#) or [Almere](#).

But through a footpath between the typically suburban houses and along the inevitable [Hoofdweg](#) where the wind blows, René Smits takes his visitors to the [sculpture garden](#) behind the [Joannes de Doperkerk](#) in what in [Hoofddorp](#) known as 'the center'. There, one finds a large collection of Biblical statues, most of which were made by [Karel Gomes](#).

We walk past the statue of [Ruth](#) as gleaner behind the reapers: symbolic in this time of difference between rich and poor, and beyond the imposing *The Struggle of Jacob*, who fights with a stranger (who may be God) in [the book of Genesis](#).



Photo: Daan Ballegeer

Europe seems to a permanent struggle, as well. Smits, who, in addition to his professorship of European law, [advises the ECB on objections to central bank decisions](#), knows all about it.

The German Constitutional Court in Karlsruhe, the seat of the [Bundesverfassungsgericht](#), underlined this struggle, by ruling in May in a [judgment](#) that the [European Court](#) had not fulfilled its mandate in when assessing an [asset purchasing program of the ECB](#). Conclusion of 'Karlsruhe': the ECB and the European Court had overstepped their mandate.

For lawyers this was a 'very intense issue', says Smits. After all, according to European law, national courts have to comply with decisions of the highest EU court. But the German court considered that the European Court had acted "objectively arbitrarily" and, thus, contrary to European law.

Nonsense, says Smits, who perceives a different motivation. The German constitutional court holds views that are no longer appropriate for this time. It sticks to the nation-state, while Germany is part of European society. The *Bundesverfassungsgericht* cannot take decisions on its own that affect all 342 million inhabitants of the eurozone'

A small present: fifty million Zimbabwean dollar

A walk through a sculpture garden, talking about Europe, the Netherlands and society at large - that befits Smits. Earlier, he challenged his students to consider beginning their presentation on judgments of the European Court with a poem.

Those students proclaimed him '[Lecturer of the Year](#)' at the *UvA* in October. Previously, they had already expressed their appreciation in other ways. One of them thanked Smits with a 50 million Zimbabwean dollar bill, a silent witness to how dramatic a money press out of control can be. A German student was delighted that Smits had given her a completely different view of the law of the Economic and Monetary Union than the 'teachers only focused on German doctrine' in her home State.

Smits now also detects doctrinal sounds in the Netherlands, especially when it comes to reporting about Europe. 'It is too populist for me, and from a narrow framing: 'Are you for or against Europe?' As if during political discussions in the Netherlands one keeps asking whether one is for or against the Netherlands.'

Words spoken by populists are valuable

So what is the correct framing, then? He gives a few examples. 'Are you for or against intensive policy from Europe to combat climate change? Should the Netherlands contribute more to joint border security and take in more refugees? What should be the goals of European monetary policy today?'

He understands that there are citizens who turn against Europe "because we have no say there". 'I think these are people who also feel alienated from national politics. More experiments need to be undertaken to allay their unrest. That is what the new European political movement [Volt](#) stands for. This [party](#) is committed to ensure that policies are locally formed as much as possible, and that people actually have a say in it.'

Smits: 'One of the scariest things of the past twenty years is the fear of populists and the refusal to recognize what is valuable in the words of the populists. Because they don't emerge out of the blue. It is with a reason that they express themselves as they do.'

Smits continues: 'There is discontent and one should hear that discontent. One should do something with that too, if one is able to. Or one has to explain why one can't do anything about it. But you shouldn't move further and further to the right - to put it very politically – until, at a certain point, the new normal right is the extreme right of twenty years ago.'

'Unelected bureaucrats'

Another frame is that unelected bureaucrats in Brussels run Europe. 'A completely wrong picture', says Smits. 'The corona crisis has completely debunked that. The pandemic has made it painfully clear in how many instances unanimity among member states is required before anything can happen. Europe, for example, has almost [no competences](#) when it comes to health.'

Moreover, the powers granted are sometimes so vague that they provoke resistance. This is evident, for example, from the discussion whether the ECB through its monetary policy may or should even encourage the greening of the economy. According to critics, [President Christine Lagarde](#) should only focus on the [mandate of price stability](#), but Smits 'completely disagrees'.

The European Treaty states that the central bank must support general economic policy in the Union, he points out. 'Within its mandate of price stability, the ECB may, yes must, therefore, make its policy greener. After all, the [European Commission](#), the [Parliament](#) and the [European Council](#) have adopted a [Green Deal](#). Its objectives are clear: more protection of the environment, for example, and intergenerational solidarity so that our children do not have to contend with the consequences of climate change.'

He does, however, adduce an important footnote. 'The ECB itself cannot decide what is green and what is not. If she did, she would take the seat of the legislator. The [classification of what counts as "green"](#) should be ready by the end of the year, so that the ECB can start making its policy more sustainable.'

Thus far, the consequences of 'Karlsruhe' were not as bad as expected

At first glance, the 'Karlsruhe coup' fizzled out in the end. The ECB once again neatly listed its motivation for the assets purchasing program, the Bundesbank sent some paperwork to Berlin, and that was the end of it.

However, the *Bundesverfassungsgericht* gave ammunition to Hungary and Poland, both of which are in the European dock for breaches of the rule of law in their own States. They can invoke 'Karlsruhe' to question whether the European Court has the final say in conflicts.

These two States also oppose the 'rule of law mechanism', which could lead to States that fail to respect the rule of law losing EU subsidies. That is why they decided to block the [European long-term budget](#), as well as the [€ 750 billion corona recovery package](#). On 10 December 2020, the [EU member states reached an agreement](#) on the budget after all.

'It cannot be that European money helps to keep illiberal politicians in power', says Smits. He is 'not happy' with the compromise reached. 'The budget must go through, but I see in the deal a further weakening of the possibility of taking action against the use of community funds in favour of those in power who undermine the rule of law.'

Actually, the [stance based on the sanction instrument](#) comes much too late, he believes. 'A framework for testing the rule of law in EU States should have been effective long ago already. This never came about because it was supposedly unnecessary. The idea was that the European Union could always rein in a single State [editor's note: via the so-called [Article 7 procedure](#) that can lead to a Member State losing its voting rights in the Council]. But what to do when there are two States that are out of line, and they back each other up, like Poland and Hungary are doing now?'

The wolf of Gubbio



Photo: Han Dirk Hekking

In the Hoofddorp sculpture garden, the eye catches another work by Karel Gomes, and thus touches on another theme that René Smits has been engaged with for a long time. It is the statue of [Francis](#) with the [wolf of Gubbio](#). Tradition has it that the Italian city groaned under the terror of the four-legged predator until Francis talked to the beast and agreed with the city that it would feed the wolf. The animal and Gubbio lived happily ever after.

Smits, a vegetarian for forty years, is committed to animal rights. When he was still working for the [Dutch competition authority](#), he handled a case about the living space for chickens. The poultry destined for the Dutch market was given slightly more space – ‘as large as an iPhone’ - than animals destined for export.

‘It was against the internal market rules to split production lines in this way’, says the emeritus professor. ‘But, even worse, there was no heart for the animals, only for commerce. Only chickens for consumers who consider animal rights important were given more space, for the other animals this worse treatment was apparently no problem.’

He continues: ‘It is a paradox that, in the Netherlands, a [Party for the Animals](#) is represented in Parliament, whilst, at the same time, we are one of the greatest killers of other living beings in the world. Pigs, chickens, cows, ... To give an example: every minute, 1,150 broilers are slaughtered in the Netherlands.’

‘Our anthropocentric society’ listens too little to animals, says the emeritus professor. Research shows that animals have a much greater ability to [express their preferences](#) than we humans think we can establish.’

New ideas, that's what it's all about, he says. Also in Europe. ‘The debate about Europe is being conducted too much in old ideas. One way or another, we have to take a leap and surpass ourselves.’

CV René Smits

66 years

Studied sociology and law at [Vrije Universiteit Amsterdam](#)

1977 defends [PhD thesis on the ECB](#) at the University of Amsterdam (*UvA*)

1977-2001 Employed at [De Nederlandsche Bank](#), from 1989 as head of legal affairs

2000-2020 Professor of EMU law at the *UvA*

2001-2014 Employed in various legal positions at the Dutch Competition Authority (later [ACM](#))

2007-present [Consultant](#), monetary law and banking supervision

2013-present Assessor at the [Belgian Competition Authority](#)

2020 Elected '[Lecturer of the year](#)' at the *UvA*

As professor emeritus, teaching at the [UvA](#) and the [Università di Bologna](#)