

Should the EU Protect

Democracy and the Rule of Law Inside Member States?¹

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Demokratie heißt, sich in die eigenen Angelegenheiten einmischen.

[Democracy means to meddle in one's own affairs.]

Max Frisch

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Abstract:

Against the background of recent developments in Hungary and, to a much lesser extent, Romania, the article discusses the question whether the European Union ought to play a role in protecting liberal democracy in EU Member States. First, it is argued that the EU has the authority to do so, both in a broad normative sense and in a narrower legal sense (though the latter is more likely to be disputed), as the entire EU constitutional order is premised on the Member States being proper liberal democracies. The article then asks whether the EU has the actual capacity to establish a kind of supranational militant democracy; here it is argued that at the moment both appropriate legal instruments and plausible political strategies are missing. To remedy this situation, the article proposes a new democracy watchdog, analogous to, but more powerful than, the Council of Europe's Venice Commission. Finally, it is asked whether EU interventions to safeguard liberal democracy would provoke a nationalist backlash in the Member States concerned. There is insufficient empirical evidence to decide this question, but there are reasons to believe that the danger of such a backlash tends to be overestimated.

Recent developments in Hungary and, to a much lesser extent, Romania have prompted a question that once would have been considered fanciful at best: could there be a dictatorship inside the European Union?² In both countries there have been attempts at what I would term ‘constitutional capture’: leaders have sought to gain control of the political system as a whole, weaken checks and balances, and cap the process with actually writing a new constitution. As of now, constitutional capture has not been implemented in Romania. But in Hungary the project seems to be succeeding. There the ruling Fidesz party has diminished the power of the constitutional court (the major check on governments in a unicameral political system in a highly centralized country with a largely ceremonial office of president). It has created a ‘Fidesz state’ by staffing offices with loyalists and securing their positions for exceptionally long periods. It is arguably now proceeding to create a ‘Fidesz people’ in that the last remnants of media freedom and independent civil society are being attacked (very often with the charge, familiar from

² On Hungary, see the special section on Hungary’s illiberal turn in the *Journal of Democracy*, vol. 23, no. 3 (2012) and the collection edited by Gábor Attila Tóth, *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Budapest: CEU Press, 2012); on Romania, see Vladimir Tismaneanu, ‘Democracy on the Brink: A Coup Attempt Fails in Romania’, in: *World Affairs* (January/February 2013), 83-87; Venelin I. Ganey, ‘Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007’, in: *East European Politics and Societies and Cultures*, vol. 27 (2013), 1-19; and Vlad Perju, ‘Constitutional Coup, Interrupted: Tales from a Romanian Summer’, *I-CON Symposium on Constitutionalism in Central and Eastern Europe*, Newton, MA, October 2013 (on file with author). There are other examples, to be sure: in actions reminiscent of what happened in the late Weimar Republic, the Czech Republic’s president Miloš Zeman has attempted to transform a parliamentary democracy into a presidential system through what was widely described as a constitutional ‘coup’. See ‘Zeman’s Coup’, Eastern Approaches blog, *The Economist*, July 2013, at: <http://www.economist.com/blogs/easternapproaches/2013/06/czech-politics-2> [last accessed 25 January 2014]. Let me add that I do not mean to suggest that all these cases can simply be equated. Nobody has gone as far as the Hungarian government, and nobody has been as openly ideological about it. I would insist, however, that Hungary does provide a template – and that there are very strong reasons to think that others are studying the template and are very tempted, given the right conditions, to follow it.

Putin's Russia, that civil society activists are really just foreign agents).³ It is rather an understatement to say that a country like Hungary is experiencing what a European Commissioner has called one of a number of 'rule of law crises'.⁴ Rather, democracy as such is under attack.

Clearly, an extended discussion of the relationship between the rule of law and democracy is beyond the scope of this article. Still, one needs to be precise about what kind of 'crises' we are witnessing and what might have to be the object of 'protection'. So far, EU officials and politicians concerned about developments in Hungary and Romania have referred almost exclusively to the rule of law as the thing that's threatened. One unintended consequence is that the national governments being criticized can keep claiming democracy for themselves, or even openly advocate a model of 'illiberal democracy' against supposed mainstream European liberal democracy.⁵ In other words, according to this (rather Schmittian) picture, the EU tries to safeguard liberalism; national governments, by contrast, assert proper democracy. But that picture is misleading. One can make this claim without having to argue that democracy and the rule of law are somehow identical or always fit together seamlessly (or are co-original, in Habermas's famous formulation). A political system with regular elections, but clear limits on media freedom, on election campaigning, and on autonomous activity by civil society is not on the road to being an illiberal democracy; it is on the road to not being a democracy at all. Unless

³ At the time of putting the final touches to this text (December 2014) there is evidence of increasing resistance from parts of civil society.

⁴ Viviane Reding, 'The EU and the Rule of Law – What Next?', at: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm [last accessed 26 January 2014].

⁵ See the speech by Viktor Orbán in July 2014, where he declared his intention to build an illiberal, work-based state, while not abandoning democracy: http://www.miniszterelnok.hu/beszed/a_munkaalapu_allam_korszaka_kovetkezik [last accessed 26 December 2014]; an English translation can be found at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> [last accessed 26 December 2014].

one wants to say that having elections is *all* that's required for calling a country a democracy, one should emphasize that limits on media freedom, for instance, is not only a rule of law problem or a matter of fundamental rights violations, but a threat to democracy itself. Leaving the 'd-word' – democracy -- to proto-authoritarian governments is what one might call an unforced semantic-normative error.

It would also be a mistake to think of these trends as just an unfortunate 'Eastern affair', a matter for those who have yet fully to internalize the values of liberal democracy: just a bit more catching-up to do, more or less harshly enforced by the enlightened bureaucrats from Brussels, and then all will be fine.⁶ Most worryingly, across Southern Europe written and unwritten social contracts have been coming apart as a result of EU-enforced austerity policies. It remains entirely possible that the discrediting of old political elites and deep social crises could produce proposals for moving towards forms of authoritarianism that citizens – even those sincerely committed to learning the lessons of the European twentieth century – might, in their desperation, find attractive.

What, if anything, can the EU do in this situation? Without wanting to argue that the democratic deficit of the Union itself has somehow magically disappeared, I wish to insist that some of the most urgent democratic deficits in today's Europe can be found *within* a number of EU Member States – and that the EU cannot remain indifferent to them.⁷ I shall return to the question whether these deficits have not in some direct or indirect way been produced by the EU itself; and I shall also ask whether any kind of enforcement of liberal democratic standards by

⁶ It would also be a mistake not to recognize that the developments discussed here are a different phenomenon than corruption – even if corruption can sometimes driven attempts at constitutional capture, as arguably was the case in Romania in July 2012.

⁷ Thanks to Dan Kelemen on this point.

Brussels does not fatefully parallel the punitive or at least harshly disciplining approach which the EU has increasingly pursued in the course of the Eurocrisis. But for now I wish to explore what kind of case can be made for the Union having a role in defending democracy and the rule of law – official ‘fundamental values’ of the EU, after all -- within its own Member States.

More particularly, I want first of all to ask whether the EU has the authority to act as a guardian of liberal democracy -- with authority understood both in a broader normative and a more narrow legal sense. Secondly, I will examine whether the Union has the capacity to fulfill such a role, looking closely at a number of existing legal instruments, but also evaluating a range of more directly political strategies. I shall argue that all existing approaches are problematic for one reason or another and that a new institution – a ‘democracy watchdog’, tentatively called the ‘Copenhagen Commission’ -- could strengthen the Union’s capacity for liberal democracy protection (without wishing to claim that such an institution should replace any of the existing tools; rather, it should complement them). Thirdly, and in a more speculative vein, I shall ask whether the EU has the required legitimacy – not in a normative, but in a plain empirical sense: would there not be a tremendous nationalist backlash against Brussels, if the Union started prescribing ‘correct’ understandings of democracy to its Member States? In this final section I shall also return to the larger picture, answering the question whether EU democracy and rule of law protection is not a matter of treating the symptoms of a malady which, ultimately, might have been caused by the Union itself.

Does the EU have the Authority to protect Liberal Democracy inside Member States?

The answer to this question is often short-circuited with the argument that an undemocratic institution like the EU cannot possibly act as a credible defender of democracy. Put differently, the EU is part of the problem for democracy in Europe today, not part of the solution. Various responses are possible with regard to such a stance. The minimal one would be to say that Member States, as *liberal democracies*, have freely delegated specific tasks and powers to the EU -- and that those tasks include the defense of Member State democracy. Put differently, the Union derives its legitimacy not from being a continent-wide democracy (at least at this point in time); rather, it can claim legitimacy, because national parliaments have freely voted to bind themselves and follow European rules – and, most important, they have freely established certain sanctions for those not following said rules, with Article 7 TEU being the clearest example.⁸

Article 7 TEU famously provides for the option to suspend the voting rights of a Member State in the European Council, if that Member State is in persistent breach of fundamental European values, as specified in Article 2 TEU. Having said that, one needs to emphasize what precisely Article 7 does: in fact, it does not mandate anything like intervention *within* a Member State. Rather, the core of Article 7 consists of a mechanism to *insulate* the rest of the Union from the government of a particular Member State deemed to be in breach of fundamental values; it enables a kind of *moral quarantine*, not an actual intervention (in the way that actual intervention by the Commission in national budgetary matters has been envisioned as a result of the Eurocrisis). The analogy with domestic militant democracy would be something like banning a party before its actions can have an effect on a liberal democratic political system as a

⁸ For an elaboration of this point see Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (New York: Oxford UP, 2010).

whole, including its possible destruction. So while clearly political in its intent, Article 7 can only bring about direct political change in the form of a ‘normative isolationism’ of the EU and its Member States vis-à-vis one ‘rogue State’. It is, of course, a reasonable hope that a country will get the message and mend its ways – in that sense, it is about intervention, after all. But, in the end, this is just a hope.

It is worth emphasizing that Article 7’s moral quarantine has a robust normative justification in democratic theory more broadly: the principle of all affected interests, sometimes simply called ‘the all-affected principle’. It has often been argued that this principle cannot be operationalized, if one has to look for all the effects political decisions and laws could have beyond the borders of the country where specific laws apply⁹: any kind of causation – who is affected by what? -- is simply too hard to specify. In the context of the EU, however, a more modest claim can be made for a specifically *legal* interpretation of the all-affected principle¹⁰: EU law applies across national borders, after having been created by individual Member States acting together. Hence, *every* European citizen has an interest in not being faced with an illiberal Member State in the EU, since that state will make decisions in the European Council and therefore, at least in an indirect way, govern the lives of *all* citizens.

Even beyond this concern about what one might call the ‘cross-border output’ of governments in breach of fundamental values, there is a concern about how actions within a state

⁹ For the general problems and dilemmas associated with the all-affected principle, see Robert E. Goodin, ‘Enfranchising All Affected Interests and its Alternatives’, in: *Philosophy and Public Affairs*, vol. 35 (2007), 40-68. To be sure, effects of the EU and EU Member States do not stop at the borders of the EU – but the fact that the EU is a clearly demarcated political community does mitigate the problems associated with the all-affected principle somewhat. Put differently: one can operationalize the concept in the context under consideration here without having to claim that the principle in general is the answer to the democratic boundary-problem.

¹⁰ Along the lines of Ludvig Beckman, ‘Democratic Inclusion, Law and Causes’, in: *Ratio Juris*, vol. 21 (2008), 348-64.

can affect those who make use of their right of free movement, for instance (think of the controversies surrounding the European Arrest Warrant). Combine this with the fact that Member States cannot, so to speak, retaliate against other Member States directly (along the lines of: ‘you nationalize our companies, we nationalize yours’), and one can see that a government going ‘rogue’ puts into jeopardy the entire European edifice – given that the latter depends crucially on mutual trust among Member States.¹¹ If national institutions of democracy and the rule of law fail, mutual recognition will end.

Put more bluntly, then: as long as a country remains in the EU, it concerns all European citizens; it is, so to speak, necessarily ‘our (normative) business’. This fact of interdependence (and the fact that, as of now, the EU seems unable to internalize the externalities of Member State behavior in important respects) has recently been brought home to Europeans by the Eurocrisis, but it has mostly been interpreted in financial and economic terms. However, there is a broader, freely chosen *political* interdependence, too. Countries have given up direct control of certain areas of political, social and economic life – which is another way of saying: their capacity to defend their citizens’ interests – because they trust Brussels to live up to the commitment properly to exercise its delegated powers and agreed tasks.¹² And precisely because Brussels can mistrust Member States, Member States can then trust each other.

Now, where does this leave any mandate for actual direct intervention in a Member State? Let me offer two further arguments: first of all, one might claim that de facto an overarching supranational constitutional order has emerged in the European Union. One might

¹¹ I am grateful to Jan Komárek on this point. See also Iris Canor, ‘My Brother’s Keeper? Horizontal Solange: “An ever deeper distrust among the people of Europe”?’ , in: *Common Market Law Review*, vol. 50 (2013), 386-421.

¹² I am grateful to Jan Komárek on this point.

then further argue that, in the absence of any possibility actually to eject a Member State (the current situation under the TEU), this order implies a right to safeguard this constitutional settlement through interventions within Member States. Put differently: it does not matter whether the EU is on the way to becoming something like a federal state or not. What matters is that every political community (and the EU surely is a political community, one that defines itself partly on the basis of common ‘fundamental values’) either has instruments for internal intervention or something like a right to expel one of its parts. At the moment, the EU certainly lacks the latter, as under the TEU states can only leave voluntarily.¹³

Concretely, such a view of the EU would imply that the European Commission – as the designated guardian of the treaties – could and should start infringement proceedings on the basis of Article 2, when fundamental EU values are being persistently violated. Politically, this seems hardly feasible at the moment. Moreover, legally, one can have very serious doubts that Article 2 confers any material competence upon the Union, and one might argue further that, just as in the Charter of Fundamental Rights, declared ‘values’ are simply meant to give some orientation to the Union and Member States when they implement Union law or policies. In short: values create no obligations.¹⁴ But the point is that, on a more abstract plane, accepting the idea of the EU as a distinct constitutional order -- which is predicated on the Member States being liberal democracies -- does imply that the EU has the required *authority* to ensure that the Member States remain liberal democracies; the problem is that this authority has not been translated appropriately into law yet.

This point could be pushed even further – this is the second argument I wish to pursue – if one holds that the EU is in fact already a democratically fully legitimate polity (or, put more

¹³ I thank Dan Kelemen for discussions on this point.

¹⁴ I thank Bruno De Witte on this point.

modestly, that EU constitutional law could be reconstructed in a democratic vein). An argument along these lines has been put forward most prominently by Jürgen Habermas recently, and I do not want to rehearse here the details of the possible understanding of the Union as a creation of both European citizens and peoples.¹⁵ Here the point is that in a system deemed democratic as a whole, the fact that decisions about militant democracy are made by an institution with no direct electoral accountability is irrelevant – in fact it should not be otherwise, as elected institutions would always be tempted to outlaw their electoral competitors.

To be sure, such an argument crucially depends on a theory of the EU as already conforming to democratic standards being successful – in which case a European institution analogous to a national constitutional court, while not being directly elected, could still draw on the democratic legitimacy of the constitutional settlement as a whole (again, analogous to a national constitutional court which is not ‘directly democratic’, but embedded in a larger and legitimate democratic structure). I think that such an argument – at this point – probably has least chance of success, given the widespread sense among European citizens that the EU as a whole, whatever its advantages and disadvantages, is *not* a proper democracy.

Instead, then, let me add a further justification for democracy protection that can bolster the EU’s authority (and possibly its empirical legitimacy), but that is not based so much on legal or political theory. This is the thought of the EU as a kind of political insurance scheme. After all, one of the explicit goals of European enlargement to the East was to consolidate liberal democracies (or, in the case of Romania and Bulgaria, complete the transition to liberal democracy in the first place). The region’s governments sought to lock themselves into Europe precisely so as to prevent ‘backsliding’; it was like Ulysses letting himself be bound to the mast

¹⁵ Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity, 2013), 1-70.

in order to resist the siren songs of illiberal and antidemocratic voices in the future.¹⁶ Hence neither Hungarian Prime Minister Viktor Orbán nor Romania's Victor Ponta, for instance, are right to accuse Brussels of some form of 'Euro-colonialism'. Orbán, comparing the EU to former colonial powers who oppressed the Magyars, has complained that 'they are trying to tell us how to live'. In fact, 'they' are only reminding the Hungarians and Romanians how they wanted to live when they joined the Union in 2004 and 2007 respectively (which is not to say that it is never legitimate to criticize the EU because of an initial commitment to Membership – it is just not reasonable to do so, when Brussels lives up to the very commitments a Member State population once sought).

Does the EU have the Capacity to Protect Liberal Democracy in Member States?

I have claimed so far that a number of plausible arguments can be marshaled for EU authority in protecting liberal democracy in Member States – as paternalistic as this might sound. The question, though, is whether it currently has the capacity to do so. Authority is one thing; having effective legal instruments and policies at one's disposal is another. It is here that the EU at present comes up short. Let me substantiate this claim by briefly examining existing legal approaches and more political strategies which have been proposed to rein in 'rogue governments'.

¹⁶ Jon Elster *Ulysses and the Sirens: Studies in rationality and irrationality* (Cambridge: Cambridge, 1979).

First, Article 7. The idea for such an article had in fact been pushed by two paragons of Western European democracy, Italy and Austria, in the run-up to enlargement, out of fear of what those uncouth Eastern Europeans might do (the irony being that sanctions – though not under Article 7 – were of course first applied against Austria in 2000).¹⁷ But nowadays Article 7 is widely considered a ‘nuclear option’, even by the former President of the European Commission, José Manuel Barroso. In other words: it is deemed unusable. Countries seem too scared that sanctions could also be applied against them one day; sometimes regional solidarity (especially in Central and Eastern Europe) might also play a role.

To be sure, these are all contestable empirical hypotheses. If, let’s say, the Greek colonels came back tomorrow, would we repeat the mantra that Article 7 is a ‘nuclear option’ that can never be used? Still, from what we know now, there are reasons to be skeptical about the efficacy of Article 7. After all, if in the cases of Hungary since 2010 and Romania in 2012, when Ponta attempted a ‘constitutional coup’ (or constitutional capture, in my terminology), the relevant actors could not even agree that there was a ‘risk of a breach of fundamental values’ (just a risk!), then when would they ever take the first step in the direction of Article 7?

What, then, about the Commission as the (supposedly) impartial guardian of the treaties? Put simply, the problem is that the instruments the Commission has at its disposal are often not a good match for the specific *political* challenges to liberal democracy. Infringement proceedings can, of course, only be based on EU law -- which often does not cover the relevant areas of democracy and the rule of law. This makes it much harder to address systemic problems, and efforts to undermine checks and balances in particular.

¹⁷ Wojciech Sadurski, ‘Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider’, in: *Columbia Journal of European Law*, vol. 16 (2009), 385-426.

The most striking example here is the Hungarian government's 2011 de facto decapitation of the judicial system by lowering the retirement age of judges from 70 to 62. Under Article 285 TFEU the Commission eventually took Hungary to the European Court of Justice for age discrimination – and won its case (meanwhile the Hungarian constitutional court had also ruled against the government). But the judges were never comprehensively re-instated; in other words, the new Fidesz government loyalists who were appointed have stayed in place. Despite its nominal legal success, Europe appeared impotent in getting at the real issue, which was political and had nothing to do with the discrimination of individuals.

As an alternative to going 'nuclear' or to infringement proceedings which can address the real political challenges only very indirectly at best, some legal scholars have proposed that national courts, drawing on the jurisprudence of the European Court of Justice, should protect the fundamental *European* rights of Member State nationals who, after all, also hold the status of EU citizens (something of which most Europeans are blissfully unaware, alas).¹⁸ As long as Member State institutions can perform the function of guaranteeing what these theorists have called 'the essence' of fundamental rights of EU citizens, as set out in the Charter of Fundamental Rights of the European Union, there is no role for either national courts or the European Court in protecting the specific status of men and women as *Union citizens*. But if such institutions are hijacked by an illiberal government, Union citizens can turn to national courts and, ultimately, the European Court of Justice, to safeguard what the Court itself has called the 'substance' of Union citizenship.

¹⁸ Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', in: *Common Market Law Review*, vol. 49 (2012), 489-520.

This is a clever thought: the aim of this ‘reverse *Solange*’-logic is not merely to bring in the European Court, but to strengthen *national* liberal checks and balances in times of political crisis. Yet one worry is that proto-authoritarian government will not be much impressed by rulings from Luxembourg. This may or may not be the case: the real problem here, I believe, is that some of the challenges to liberal democracy cannot be captured –let alone countered -- by focusing just on fundamental rights violations (serious as these can be). While some of the attempts to undermine checks and balances or to make genuine turnovers of power very difficult will eventually result in incidents that can very well be described as fundamental rights violations, even rulings against a particular government might not in the end result in a restoration of genuine liberal democracy (as in the age discrimination case just described). Abolishing Article 51 of the Charter of Fundamental Rights, as has sometimes been proposed, would do away with the legal contortions required by the reverse *Solange* approach – but it would not change the fact that the dangers to democracy are not all reducible to fundamental rights violations.

One is tempted, then, to conclude that plainly political challenges should be met with plainly political responses. In a sense, Article 7 does fit this requirement – it is a distinctly political and comprehensive judgment of a national government by EU institutions and a country’s peers in the EU. But given its seeming ineffectiveness, an alternative would be party politics outside EU institutions. What does this mean? It has often been said that the Eurocrisis has brought about the politicization of Europe -- and that it is now time for the Europeanization of politics: citizens of many Member States – possibly all Member States -- have woken up to the fact that what happens elsewhere in Europe has a direct impact on their lives; what we need, then, are ways to internalize these externalities and reach common European policies that can be

justified on the basis of election outcomes across Europe. Hence the call for a genuine European party system, with Europe-wide leading candidates in European elections, or *Spitzenkandidaten* (the point is debatable – but I would say that the latter hope was at least partially fulfilled in the European elections of 2014).

Alas, a less desirable effect of such a Europeanisation of politics might also have become apparent: the conservative European People’s Party has at various points over the last years firmly closed ranks around Orbán; on the other side of the political spectrum, Martin Schulz, President of the European Parliament and one of Orbán’s most outspoken critics, defended his fellow Social Democrat Ponta in Bucharest, at least initially. To be sure, partisanship might not always trump all other considerations: Slovakia’s Robert Fico was temporarily ostracized by European Social Democrats; and it seems that in the European Parliament at least some members of the European People’s Party did not oppose the Tavares Report that called for continuous monitoring of Hungary, enabling the adoption of the Report in an assembly in which the center-right had a majority in July 2013. Yet, quite apart from the normative problems of entrusting partisan actors with functions that *prima facie* require as much impartiality as possible, it seems naïve to think that party politics could be relied on for some kind of guardianship of democracy. At best, I would argue, it can complement other tools and strategies.

What can be Done?

Let us take a few steps back. What precisely was the problem again? The theoretical challenge, I submit, is to locate an *agent of credible legal-political judgment* as to whether a country is

systematically departing from what one might call the European Union's *normative acquis* – a task which is different both from assessing compliance with EU law and from ascertaining belief in values (whatever the latter might mean concretely anyway: a Committee on UnEuropean Beliefs and Activities in the European Parliament?). Technical-legal judgment of rule compliance in and of itself is insufficient; and philosophical consensus about values is simply not the issue (all governments continue officially to profess faith in democracy and the rule of law); nor, as I argued in the previous section of this essay, is it all a matter of fundamental rights violations, or proof of corruption. We are dealing with systemic, mostly constitutional challenges which will require some understanding of context, some sense of proportion, and, not least, some meaningful capacity for comparison of what is actually happening within different political systems. A simple check-list, as so often used in the EU accession process ('Do the judiciary's offices have computers? Check!'), will not do¹⁹; somebody needs to see and understand the whole picture and also the particular *sequencing* of the creation -- and possibly the dismantling -- of a liberal-democratic system.²⁰ As Dimitry Kochenov has shown, we cannot simply take the Copenhagen criteria of the legal (or perhaps, more accurately, normative) shelf and pretend, on the basis of the experience with accession processes, that 'protection of liberal-democratic values' ultimately equals compliance with the *acquis*. After all, the criteria were never sufficiently defined and they were often inconsistently applied.²¹

In addition – and beyond questions of criteria and judgment -- there is a clear challenge posed by the fact that authority in the EU remains highly diffuse and fragmented; there is not

¹⁹ See also Kalypso Nicolaidis and Rachel Kleinfeld, *Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma*, Sigma Paper 49/2012, and Alina Mungiu-Pippidi, 'EU Accession is no "End of History"', in: *Journal of Democracy*, vol. 18 (2007), 8-16; here 15.

²⁰ Many thanks to Renata Uitz on this point.

²¹ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer, 2008).

much by way of a consciousness of common European political space (let alone a shared public sphere where substantive arguments could be debated seriously across borders); it can be hard to get (let alone direct) something like common political attention. More particularly, there is as of now no clear legal or political actor clearly charged with, so to speak, pushing a red button first in order to alarm others about a potential deterioration in democracy and the rule of law inside a Member State.

What follows, then, from framing the problem this way? First of all, it seems to me that Article 7 ought to be left in place -- but it also ought to be extended. There might arise situations where democracy is not just slowly undermined or partially dismantled – but where the entire edifice of democratic institutions is blown up or comes crashing down, so to speak (think of a military coup). However, in such an extreme case, the Union ought actually to have the option of expelling a Member State completely. As said before, under the TEU, states may decide to leave voluntarily, but there is no legal mechanism for actually removing a country from the Union. True, these all might seem remote scenarios. But especially those who insist on the symbolic value of something like Article 7 – by which they might actually mean something not just symbolic, namely its importance as a form of *deterrence* – ought to be sympathetic to including the option of complete removal.

This still does not answer the question of *who* a consistent and credible agent of political judgment could be. ‘The European Commission’ might still seem the most plausible answer – especially in light of the fact that the Commission is acquiring new powers in supervising and potentially changing the budgets of Eurozone Member States. But many proposals to increase the legitimacy of the Commission (seen as a necessary complement to such newly acquired authority) contain the suggestion essentially to *politicize* the Commission: ideas to elect the

President directly or to make the Commissioners into a kind of politically uniform cabinet government all would render the body more partisan – *on purpose*. And such partisanship makes the Commission much less credible as an agent of impartial legal-political judgment.

My suggestion, then, is to create an entirely new institution which could credibly act as a guardian of Europe’s *acquis normatif*. I suggest a ‘Copenhagen Commission’ (as a reminder of the ‘Copenhagen criteria’, flawed as they might have been), analogous to the Venice Commission – a body, in other words, with a mandate to offer comprehensive and consistent political judgments.²² Ideally, the the body should be composed of legal experts and statesmen and stateswomen with a proven track record of political judgment – and the hope is that it would become sufficiently visible so as effectively to raise an alarm across whatever there is by way of a common European political space.²³

However, the real question is of course: *and then what?* What if a country seems systematically to undermine the rule of law and restrict democracy? My suggestion is that the Copenhagen Commission ought to be empowered to investigate the situation and then trigger a mechanism that sends a clear signal (not just words), but far short of the measures envisaged in Article 7. Following the advice of the Copenhagen Commission, the European Commission

²² I am indebted to Rui Tavares for discussions on this point. At first sight, it might seem most plausible that such a body should be legally constituted as an agency. The difficulty here is one that many political science studies of EU agencies have confirmed: agencies tend to be tightly controlled or even outright captured by Member States. This would be even more of a danger if a new body were to be set up outside the existing treaties, by intergovernmental agreement – but, in theory, this could be an option, too. A mere advisory body or high-level working group within existing EU structures would also be a possibility, as long as the determinations of that body were actually to be binding for the EU Commission (legally, or as a more informal norm).

²³ As to the question of how members would be selected: my tentative suggestion would be nomination by the European Commission, with the European Parliament having to approve nominees with a simple majority. But one might also want to consider the possibility of seconding judges from national constitutional courts.

should be *required* to cut funds for state capital expenditure, for instance, or impose significant fines. Especially the former might prove to be effective, if the EU budget as such were to be significantly increased in future years (a measure included in many proposals to tackle the Eurocrisis). Moreover, cuts of EU-specific funds would also reinforce the message that a country undermining the rule of law is doing something that concerns the Union as a whole -- and that the response is a genuinely European one.

At the same time, all the existing tools would remain at the disposal of the relevant actors: Article 7 could still be invoked; the Commission could take a Member State to the European Court of Justice; the Court could try to protect the substance of EU citizenship; and politicians could have a serious word with one of their peers in another Member State, if they feel that the State in question is leaving the broad European road of liberal democracy.

The Question of Criteria

It is one thing to identify a plausible agent of judgment; it is another to specify criteria on the basis of which judgments can be made. Especially against the background of the experience with the Copenhagen criteria and of the experience of the conflicts between Hungary and the European Commission in 2010-2014 or so, one may well wonder whether Europeans really agree on how they want to live, politically speaking? The concern here is that there are in fact no shared European values – let alone norms and standards that could be operationalized to judge

the shape of a particular democracy and a particular legal system. Yes, there is a single *market*, but no single model of liberal democracy -- and therefore, such a line of criticism would continue, all efforts to protect democracy and the rule of law in Europe are somewhat arbitrary. More particularly, even if standards could be specified a little more precisely, there is no *methodology* that could guide judgments about individual cases and help conclusively answer the question whether an EU Member State is violating these standards.

Let me offer two responses to this concern, which could be rephrased as: who ought to face a burden of justification vis-à-vis the rest of the EU, when they embark on significant political changes (and not just commit individual fundamental rights violations, which could be very serious, of course, but which generally can be dealt with by the Luxembourg and the Strasbourg courts)? First, from an essentially *historical* perspective, I want to say the following: I believe it can be shown that the whole direction of political development in post-war Europe has been towards delegating power to unelected institutions, such as constitutional courts.²⁴ And that development was based on specific lessons that Europeans -- rightly or wrongly -- drew from the political catastrophes of midcentury: the architects of the post-war West European order viewed the ideal of popular sovereignty with a great deal of distrust; after all, how could one trust peoples who had brought fascists to power or extensively collaborated with fascist occupiers? Less obviously, elites also had deep reservations about the idea of *parliamentary sovereignty*. After all, had not representative assemblies handed all power over to Hitler and to Marshal Pétain, the leader of Vichy France, in 1933 and 1940 respectively? Hence parliaments in post-war Europe were systematically weakened, checks and balances were strengthened, and

²⁴ I have made this argument at greater length in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (London: Yale UP, 2011).

non-elected institutions (constitutional courts are the prime example) were tasked not just with defending individual rights, but with defending democracy as a whole.²⁵ It is important to emphasize that constraining democracy in this way served to prevent democratic self-destruction; this is a very different ambition from a neoliberal one to isolate the economy from discretionary policy-making. In other words: constraining majorities for the sake of democracy was, historically *and* conceptually speaking, compatible with increasing democratic control – or affirming a primacy of politics – as far as the economy was concerned.

Distrust of unrestrained popular sovereignty, and even of unconstrained parliamentary sovereignty are, then, so to speak, in the very DNA of post-war European politics. And it is fair to say that these underlying principles of ‘constrained democracy’ were almost always adopted when countries were able to shake off dictatorships and turned to liberal democracy in the last third of the twentieth century: first on the Iberian peninsula in the 1970s, and then in Central and Eastern Europe after 1989.

European integration, it needs to be emphasized, was part and parcel of this comprehensive attempt to constrain the popular will: it added supranational constraints to national ones²⁶ (which is not to say that this entire process was master-minded by anyone, or came about seamlessly: of course, the outcomes were contingent and had to do with who prevailed at which point in particular political struggles). This logic was more evident initially with institutions like the Council of Europe and the European Convention on Human Rights, but

²⁵ One might add that dignity – and not freedom – is the master value of post-war constitutions.

²⁶ One might ask in what way, then, ‘constrained democracy’ differs from ‘guided’ or ‘defective’ democracy. The answer is that in the former genuine changes in who holds power is possible and that all constraints are ultimately justified with regard to strengthening democracy. In the latter no real change is allowed.

the desire to ‘lock in’ liberal-democratic commitments became more pronounced in a specific EU (or then: EEC) context with the transitions to democracy in Southern Europe in the 1970s.

To be sure, this is a very rough sketch, and any observer will immediately be able to think of exceptions. Very broadly speaking, those who never experienced totalitarian or fascist regimes had much less reason to distrust themselves. Consider Britain or Norway (Quisling notwithstanding) or even Denmark (collaboration notwithstanding), where tendencies towards ‘parliamentary absolutism’, if anything, became stronger after the Second World War (one might add that it cannot entirely be an accident that all the countries mentioned here are also fairly Euroskeptic, or, in the case of Norway, decided to stay outside the EU altogether).²⁷

It would be absurd, of course, to conclude that any country without a constitutional court, for instance, must somehow be suspect of not truly respecting fundamental European values. Rather, the historical, highly schematic account developed above is to serve as a point of reference and orientation informing judgment; it is not yet another fail-safe check-list of universal standards or a blue-print which could easily be super-imposed on messy empirical realities. What I would argue for is a reasonable presumption that radical departures from the particular post-war (and post-totalitarian) model of politics place a special burden of justification on Member State governments embarking on such a departure, *when they had previously very clearly committed to it*. This thought applies to Hungary, for instance, where the constitutional court and, in general, the non-elected institutions to which Hungary committed after 1989 *in the name of solidifying democracy* are being systematically weakened. But it does not apply to a country like Britain, where de facto constraints on – in theory unlimited -- parliamentary sovereignty have had a more informal character, at least up until recently, and where the

²⁷ I am indebted to Per Øhrgaard for discussions on this point.

observance of such constraints can generally be expected. Thus, not all countries in the EU will necessarily converge on constrained democracy, and, in any case, constrained democracy does not offer a set of uncontested normative, let alone legal, criteria. But in judging individual cases, overall context, and, in particular, an account of *historical trajectories* and *sequencing* are crucial.²⁸ The whole may well be something quite different than the sum of the parts, which is – to stress the point again – the main reason why check-lists in judging constitutions or political systems in their totality will not do. The Venice Commission made this argument very plain in its opinion on the proposed fourth amendment to the new Hungarian ‘Basic Law’ in 2013:

In constitutional law, perhaps even more than in other legal fields, it is necessary to take into account not only the face value of a provision, but also to examine its constitutional context. The mere fact that a provision also exists in the constitution of another country does not mean that it also ‘fits’ into any other constitution. Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the constitution of one’s own country. Each constitution is a complex array of checks and balances and

²⁸ I am indebted to Renata Uitz for making me understand the importance of sequencing.

each provision needs to be examined in view of its merits for the balance of powers as a whole.²⁹

Let me mention one other way in which a Member State government might reasonably be expected to face a special burden of justification. Of course all governments try to justify what they do continuously anyhow – whether anyone calls them from Brussels to do so or not. To govern is not just to talk; but all governing is accompanied by talk, that is to say: public argument. If the claims offered by a Member State government are notably inconsistent with what a government is actually doing, then more pressure should be applied to make that government explain itself.

To give one example: the current Hungarian government has emphasized that the new constitution that came into effect at the beginning of 2012 is a thoroughly democratic one – in light, or so it is claimed, of an entirely legitimate European ideal of parliamentary sovereignty. Now, whatever one thinks about the ideal of parliamentary sovereignty, the claim that the constitution conforms to it are hardly credible, when, as the Venice Commission and many internal and external critics have pointed out, the new Hungarian ‘Fundamental Law’ constitutionalizes many policy areas which in other countries would be subject to the vagaries of day-to-day, or at least election-to-election, political conflict. Again, whatever one thinks of such an ‘over-constitutionalization’, it is hard to see how to square it with the ideal that is being propounded by the defenders of the new Hungarian Basic Law. This kind of inconsistency calls for more justification and, quite possibly, a process of correction.

²⁹ http://www.venice.coe.int/Newsletter/NEWSLETTER_2013_03/1_HUN_EN.html [last accessed 26 January 2014].

Now, just on the point of ‘overconstitutionalization’, one might object that ‘overconstitutionalization’ precisely characterizes the EU itself – an argument made by Dieter Grimm and many other observers.³⁰ I actually agree with large parts of this critique, but would insist that it is not fatal to the idea of EU democracy protection as proposed here. The contemporary developments towards overconstitutionalization are not a continuation of the trend towards constrained democracy analyzed earlier. The latter was about limiting direct expressions of the popular will for the sake of strengthening democracy; what we have seen in the wake of the Eurocrisis does not have the same normative justification. Furthermore, some of the overconstitutionalization one can witness in Hungary is not just about economic policy, but about skewing or curtailing the political process itself in ways that cannot be squared with arguments one could reasonably make for constrained, or generally strongly anti-majoritarian, democracy. And, lastly, overconstitutionalization is not the only charge against the government in Budapest: it is the fact of overconstitutionalization combined with the weakening of what was previously the main check on a Hungarian executive – the constitutional court -- which poses such an acute threat to democracy. Again, the lesson should be that no focus on a single institutional variable (such as overconstitutionalization) will do: the entire picture needs to be seen.

Finally, let me address the question of criteria for *when* to intervene. Many observers have worried that calls for EU intervention might become the stuff of symbolic politics. In particular, there has been a concern that only *small* (and *newer*) Member States will ever be picked on (a concern reinforced, no doubt, by the invocation of ‘Copenhagen’). This is a common interpretation of what happened when Jörg Haider’s far-right party came to power in

³⁰ Dieter Grimm, ‘Die Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie’, in: Claudio Franzius et al. (eds.), *Grenzen der europäischen Integration: Herausforderungen für Recht und Politik* (Baden-Baden: Nomos, 2014), 27-47.

Austria in 2000. Leaders like Jacques Chirac and Gerhard Schröder – unable (or perhaps just unwilling) to do anything about Jean-Marie Le Pen’s National Front or the neo-Nazi NPD respectively at home – could moralize about small countries at no cost internationally, or so it seemed, while also scoring some points against their domestic opponents. Meanwhile, nobody ever dared to touch Berlusconi’s Italy. Powerful Member States – and especially founding member States of the EU – appeared to be above European standards.

However, it would be a mistake to conclude from a comparison between the cases of Italy, Austria, Hungary, and Romania that only weaker and newer Member States get picked on. For there are important differences here; teasing them out can help to further develop criteria as to what would make EU interventions legitimate. First, the problem with the ‘Haider Affair’ was partly that sanctions were imposed *before* the new government had taken any significant actions. To be sure, one can try to justify sanctions as essentially warning shots. But in the case of Austria they appeared more like expressions of displeasure with Haider’s past pronouncements (on Hitler’s employment policies, for instance), or at the most Haider’s election manifesto, rather than as principled objections to what the new government actually sought to do. This is a marked contrast with the cases of Hungary and Romania: in both countries governments had a clear track record of government action; what they were doing also had a *systematic* character and could not be excused as a matter of one-off mistakes.

Second, there is a significant difference between Berlusconi’s Italy and the two states further east. True, the *Cavaliere* also tried to weaken checks and balances.³¹ But the opposition,

³¹ To be sure, Berlusconi’s style of governing – to the extent that he actually governed – was highly personalistic and plebiscitarian; it involved less a comprehensive restructuring of the state than the creation of a court of devoted

despite its generally sorry state, remained just about strong enough to resist major constitutional re-crafting; throughout his time in office, Berlusconi was constrained by the fact that he headed coalition (i.e., not single-party) governments; the media was not completely dominated by Berlusconi's own empire, contrary to what outside commentators often claimed; crucially, the judiciary kept putting up a fight; and various Italian presidents – Giorgio Napolitano in particular, for all his faults³² -- would block Berlusconi's plans (for instance, to appoint allies, even his personal lawyer, to particular ministries, or to hold new elections when they suited him).³³ He also lost popular referenda, especially the 2006 constitutional one, which would have introduced far-reaching changes (and strengthened the office of the prime minister in particular). In short: there were reasonable grounds for thinking that the situation would over time self-correct through internal political struggle. Here outside intervention might easily seem illegitimate: it could look like Brussels picking a winner in a domestic fight for power; it would also cut short what one might call a 'democratic learning process'³⁴ through political struggle, thereby preventing the proper development of a democratic political culture.

followers. See Maurizio Viroli, *The Liberty of Servants: Berlusconi's Italy*, trans. Anthony Shugaar (Princeton: Princeton UP, 2011).

³² I do not wish to be understood as simply lauding Napolitano's role as guardian of the constitution – many of his actions are highly debatable.

³³ I am grateful to Giovanni Capoccia and Gianfranco Pasquino for information and views on this matter. See also 'The Future of Western Liberal Order: The Case of Italy', *Transatlantic Academy Paper Series*, January 2013, available at

http://www.transatlanticacademy.org/sites/default/files/publications/PasquinoEtAl_Italy_Jan13_web_Final.pdf [last accessed 11 February 2013].

³⁴ See also Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties', in: Shlomo Avineri and Zeev Sternhell (eds.), *Europe's Century of Discontent: The Legacies of Fascism, Nazism and Communism*, (Jerusalem: Magnes Press, 2003), 249-68.

Our discussion, then, yields at least three general criteria that need to be met for an actual negative opinion by something like the Copenhagen Commission: first, a Member State government has to have a *track record* of violating liberal-democratic political principles. There is no case for pre-emptive action. Second, that track record should also show a government's general conduct as well as specific policies to have a *systematic* nature: one-off violations might be deeply problematic, but they can generally be dealt with by courts, and they should be seen in context (above all, but not only, constitutional context). To be sure, mistakes cannot simply be excused by context, but they can be explained, and such explanations might also make it plausible that a particular government, despite mistakes, is fundamentally well-intentioned. Third, intervention is about enforcing commitments which were entered into voluntarily in the past. If there is reasonable hope that such commitments can, in the end, mostly be enforced internally, intervention should wait. *Self-correction* remains the best outcome, but whether it will actually happen, is, again, a matter of political judgment.

Objections

There are legitimate worries about the kind of new body I am proposing here. As Jan Komárek has put it, when Europe cannot solve a problem, it invents a new institution instead.³⁵ And indeed: if the political will is lacking that would be needed for an Article 7 procedure, or, say, for a revised and more robust mandate for the European Fundamental Rights Agency – what hope is

³⁵ Jan Komárek, 'The EU is More than a Constraint on Populist Democracy', at: www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/ [last accessed 26 January 2014].

there that a Copenhagen Commission would fulfill the task of democracy and rule of law protection?

First of all, some support has in fact been building for a new ‘mechanism’ that would send an early warning signal – witness the Tavares Report, which explicitly calls for a Copenhagen Commission-style institution, the March 2013 letter to the then President of the European Commission signed by four EU foreign ministers which stressed the need for mechanisms short of Article 7, and the European Commission’s own attempt to devise an early-warning mechanism, the results of which were first communicated in March 2014.³⁶ Second,

³⁶ In March 2014 the European Commission issued a Communication about a new framework for protecting the rule of law within EU Member States. The Commission explicitly makes the point that there can be systematic threats to the rule of law within Member States and that Article 2 TEU gives the Commission the mandate to intervene. The Commission also stresses the basic legal and normative argument that is crucial to counter the claim that such an intervention somehow constitutes an illegitimate meddling in internal affairs: the EU relies on the mutual trust of the Member States in each others’ legal systems; if a kind of ‘horizontal Solange’ were to replace this trust, the EU as we know it would be at an end. Hence the Commission is right to say that ‘the confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU’.

As for the concrete content of the new framework, the Commission envisages a ‘structured exchange’ with a Member State that appears to be undermining the rule of law. This would start with an assessment of the situation in a particular country, which could result in a ‘rule of law opinion’ expressing the concerns of the Commission vis-à-vis the national government in question. If the government fails to respond appropriately, Brussels will issue a ‘rule of law recommendation’; if the state still fails to comply, ‘the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU’.

Three aspects are notable here: first, the Commission gives itself leeway to draw on whatever sources it chooses for its assessment: the Venice Commission, the Fundamental Rights Agency, but also other, as yet unnamed sources. This gives it a fair amount of power to come up with a comprehensive judgment – as opposed to mechanically working through checklists. Second, the Commission emphasizes the ‘duty of sincere cooperation’ as set out in Article 4(3) TEU. This clearly reflects lessons learnt from the Orbán government’s rush to go ahead with the fourth amendment to the new Hungarian Fundamental Law, when the Commission had asked it to take a pause and talk. A government acting in bad faith or defiance is presumably now more likely to be faced with a Commission ‘rule of law recommendation’ and, ultimately, an attempt to get the European Council to vote for

irrespective of what is politically possible, it has to be remembered that Article 7 is not particularly good for issuing early warning signals. Building support for Article 7 is likely to take too long, and the FRA, at this point, simply does not have the appropriate mandate and is unlikely to acquire it. A properly designed Copenhagen Commission would have the right mandate and, above all, it would concentrate minds in a highly fragmented political space and in a weak, some would say non-existent, public sphere.³⁷

One might still object that the EU would just be duplicating existing institutions. Have the Venice Commission and the European Court of Human Rights not done relatively well in addressing the situation created by the Hungarian government, for instance? My answer is that, first of all, the EU has reached a depth and density of integration that finds no equivalent in the Council of Europe. EU law is also much more specific in areas such as data protection – and, arguably, the Council and the Venice Commission could not really comment on them. Second, it deserves mention that the Council of Europe is an even more fragmented political space (with no

Article 7. Third, the Commission seems to hope for the effects of a kind of naming and shaming. The fact of an assessment and a rule of law opinion will be publicly known, but the content won't be; in the next step of escalation, the recommendation as such would be made public. Clearly, the Commission itself has drawn the conclusion that its very public conflicts with the Hungarian and Romanian governments helped to prevent the worst.

In the end, however, no new sanctions are envisaged, and the hurdles for Article 7 ultimately remain as high as before. To be sure, the Commission might be making a bet that creating a public record of rule of law abuses – certified by everyone from the Venice Commission to prestigious judicial networks in the EU – and thus pushing the European Council on the basis of a 'reasoned proposal' (as the Treaty puts it), would actually shame the European Council into getting serious about Article 7. Still, because everything will come down to Article 7 in the end, it would be a mistake to think that the democracy and rule of law challenge could be solved by this new framework.

³⁷ To be sure, there is a potential problem here: how would the Commission gain a high public profile if it is only to raise the alarm in truly serious cases? The best answer might be to inaugurate the Commission with as much pomp and circumstance as possible.

shared public sphere at all). Third, the Council also contains members who probably would have a hard time meeting even the fuzziest or most consciously relaxed Copenhagen criteria. The problem of double standards – charges of hypocrisy abound in virtually any discussion of democracy-protecting interventions – would be exacerbated further.

Finally, the European Court of Human Rights can only properly address individual rights violations, whereas the Copenhagen Commission should take a more holistic view; the Venice Commission cannot be proactive, whereas the Copenhagen Commission could routinely monitor the situation in Member States and raise an alarm without having to be prompted. It would thus also build up an institutional memory that would make it easier to prevent double standards both in assessing an individual country over time and in comparing different countries.³⁸ In sum: without wanting in any way to fault the Venice Commission, I insist that, ultimately, there is no good principled argument for the Union permanently to ‘contract out’ core normative concerns.

To be sure, there might be a *pragmatic* worry among some Member States that the EU is likely to deepen its own legitimacy crisis if it were to pass judgment not just on budget numbers (and to sanction financial offenders), but also on liberal democracy (and to sanction political offenders). To deflect the blame, some Member State governments might think, the Union should delegate the unpopular work to the Council of Europe – just as some of the blame for austerity could be laid at the doors of the IMF, once the troika had been formed. But if one is serious about sanctions – and one ought to be – then it would still in the end have to be the EU who does the sanctioning. So one might as well accept the responsibility for forming judgments (and not just for implementing them), since, after all, there are also enough EU citizens who precisely placed their trust in the Union as a strong guardian of liberal democratic order (as

³⁸ Thanks to Kim Lane Scheppele for this point.

opposed to the Council of Europe which can hardly be said to have any ‘normative power’ at all).

That leaves two important normative concerns: first, the idea that what is distinctive (and valuable) about the EU is, in the end, *pluralism*: tolerance instead of homogenization; mutual opening and respectful peer review instead of a centralized institution defining and defending democracy and the rule of law, and thereby destroying the precious heterarchy of norms and institutions that has emerged in the Union.³⁹ We ought to have a longer argument about pluralism, which, after all, is not a first-order value such as liberty and equality, but which, to gain any normative traction, has to be justified with reference to another value or broader political principles: cultural diversity perhaps, or democratic autonomy, or the beneficial moral-psychological effects of living with differences.⁴⁰ For my purposes here it suffices to say that the EU has always been about *pluralism within common political parameters*. After all, the accession process itself has not had as its goal something like maximizing difference, but in fact has officially been meant to ensure sameness in certain regards (democracy, rule of law, state capacity, etc.). And as long as it has been taking in new members, the EU has been in the business of making definitive judgments on whether a country really is a liberal democracy or not (even if the Copenhagen criteria might have given a false sense of certainty about these judgments), and, more broadly, judgments on where the limits of pluralism are to be located. In that sense, mandating a distinct and highly visible body with keeping an eye on whether

³⁹ Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in: Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (New York: Cambridge UP, 2009), 326-55.

⁴⁰ See also Turkuler Isiksel, ‘Global legal pluralism as fact and norm’, in: *Global Constitutionalism*, 2 (2013), 160-195.

everyone is remaining a liberal democracy does not constitute a fundamental break with EU principles and practices at all.

The second worry is this: if supposedly technocratic ‘new constitutionalism’ is partly to blame for ‘backsliding’ (as Paul Blokker has forcefully argued), then is some form of ‘democracy oversight’ from on high not just adding to the problem?⁴¹ If constitutionalism never becomes part of lived political experience in newer Member States in particular, but is instead created and enforced by distant bodies of experts, then will more paternalistic ‘guardianship’ by Brussels not reinforce the lesson that constitutionalism is something that a particular ‘we’ does not do autonomously, is incapable of internalizing, etc.? My – perhaps too flippant – answer is this: nothing prevents one from starting a European Citizens’ Initiative to express concern about democracy and the rule of law in a Member State (and also search for allies within the national ‘we’ in question); nothing prevents a transnational European civil society from what governments will always condemn as ‘meddling in internal affairs’. The alleged ‘technocracy’ of the Copenhagen Commission and ‘grassroots initiatives’ are not mutually exclusive; it makes little sense here to play popular democracy off against ‘liberal technocracy’.

On this note, I also wish to stress that democracy protection in the EU is not analogous with the ‘authoritarian liberalism’ which some critics have seen emerge as a result of the Eurocrisis.⁴² To be sure, it can look like both are punitive approaches which result in disciplining national democracies and which effectively limit the diversity of expressions of the

⁴¹ Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania, and Slovakia* (New York: Routledge, 2013)

⁴² Michael Wilkinson, ‘The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union’, in: *German Law Journal*, vol. 14 (2013), 527-560. But see also Damjan Kukovec, ‘Law and the Periphery’, in this issue of the *ELJ*.

popular will across Europe; both can look like a project to make the economy and the rule of law respectively safe from popular democracy; both seem to rely on an ideal image of a thoroughly depoliticized Europe, or a politics-proof (or post-political) *Rechtsstaat* policed by economic experts and judges. Put less polemically: both are ultimately about dealing with externalities, whether normative or economic, through new assurance and enforcement mechanisms across national borders.

Yet such a simple equation is ultimately implausible, for two reasons: first, uniform austerity policies and surveillance of national budgets by the European Commission -- as well as economic prescriptions that are not even logical (not all countries can become ‘more competitive’ at the same time) – these are all about making Member States converge on one highly specific economic model, down to exact numbers in terms of national debt (which have no real justification in the dismal science – even mainstream economists simply do not agree on such numbers). This kind of specificity is absent from proposals for democracy protection. Having such specificity would amount to an insistence, for instance, that every country must have a particular kind of constitutional court. But nobody is proposing such constitutional micro-management or an undue narrowing of ‘pluralist constitutionalism’⁴³; democracy and rule of law protection is about guarding boundaries to pluralism, not about reducing, let alone abolishing pluralism.⁴⁴

⁴³ Marco Dani, ‘The “Partisan Constitution” and the corrosion of European constitutional culture’, *LEQS Paper*, no. 68/2013.

⁴⁴ A larger argument would have to address the question whether ‘Political Union’ as currently envisaged by at least some European elites would amount to an illegitimate reduction in constitutional pluralism. I am sympathetic to this argument, but it would not be sufficient to claim that democracy protection is automatically hypocritical. See also Alexander Somek, ‘What is Political Union?’, in: *German Law Journal*, vol. 14 (2013), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1522> [last accessed 27 January 2014].

Second, ‘austerianism’ and neoliberal prescriptions for a Europe under the surveillance of a European Commission enforcing budget discipline have clearly been adopted under duress. But it is a stretch to say that Member States adopted the values mentioned in Article 2 TEU under pressure from the most powerful actors inside the EU (the initial political decision to join the Union is a different matter than pre-accession strategies and the conditionality imposed by the Commission as a result of that initial decision). Along the same lines, I would also reject the argument that challenges to liberal democracy have been directly caused by the EU itself – which is not to say that the EU is blameless or that the single market has not de facto led to clear injustices in the newer Member States in particular. At least from a purely economic point of view, the impact of the EU has been positive – even if the abrupt end of the post-accession boom in 2007 undoubtedly exacerbated underlying political weaknesses in the newest Member States.⁴⁵

Would Democracy and Rule of Law Protection by the EU seen as Legitimate?

The very last section of this essay is necessarily more speculative. We have some record of the conflicts between the European Commission and Hungary and Romania respectively. But, in a more systematic empirical way, we simply do not know whether financial sanctions, for instance,

⁴⁵ Wade Jacoby, ‘The EU Factor in Fat Times and in Lean: Did the EU Amplify the Boom and Soften the Bust?’, in: *Journal of Common Market Studies*, vol. 52 (2014), 52-70.

would create a great nationalist backlash, as is often asserted, turning entire countries from being Euro-enthusiastic to Euro-scepticism. I would just offer two thoughts:

First, for Europe to try to ‘hold back’ or try to be ‘neutral’ in highly charged domestic conflicts is not costless and, in the end, actually also not really ‘neutral’. A reluctance to try to protect liberal democracy in a Member State will betray the hopes of all those citizens of the country in question who did put their trust in the Union as some sort of guarantor against new forms of authoritarianism. Moreover, any government eager to dismantle checks and balances, for instance, will on some level know that it is heading for a conflict with European institutions – hence it has every incentive to whip up Eurosceptic sentiments, whether the EU actually does very much or not. In other words, pre-emptive nationalism is likely to appear -- quite irrespective of any particular approach the Union adopts.

Second, there is little evidence that any of these nationalist campaigns have worked, or, for that matter, that strong exercises of EU leverage in general have produced any severe backlashes. Orbán’s self-declared ‘war of independence’, or so polls suggest, has not proven popular⁴⁶; and even very heavy-handed forms of conditionality by the EU in the past (think of Slovakia in the late 1990s) have not obviously rendered the EU illegitimate in the eyes of the populations of a Member State subject to conditionality.

To be sure, serious sanctions would always go against the very EU ethos of consensus finding, mutual accommodation, and even mutual normative self-relativization which has worked so well so often and which, to put it simply, is predicated on a shared willingness not to

⁴⁶ ‘Hungarian public opinion on Viktor Orbán’s “war of independence”’, in: *Hungarian Spectrum*, <http://hungarianspectrum.wordpress.com/2013/07/11/hungarian-public-opinion-on-viktor-orbans-war-of-independence> [last accessed 26 January 2014]

push things to the limit.⁴⁷ They would also, *prima facie*, go against notions of constitutional tolerance and ideals of European democracy which valorize particular national understandings of political values. But the actual choice might not be between upholding these ideals on the one hand and serious sanctions on the other. The choice is more likely to be between accepting the (inevitable) risks of sanctions and a cowardly, creeping cynicism that would slowly erode the Union as a whole from within.

⁴⁷ I am indebted to Alexander Somek on this point.