THE EU AS A MILITANT DEMOCRACY, OR: ARE THERE LIMITS TO CONSTITUTIONAL MUTATIONS WITHIN EU MEMBER STATES?

JAN-WERNER MÜLLER (1)

Princeton University

I. Should the EU Play a Role in Democracy-Protection?.—II. Is EU Intervention feasible?—III. A Watchdog for Constitutional Mutations in Member States: Towards a Copenhagen Commission.

RESUMEN

Este artículo investiga la cuestión de si la UE está legitimada para intervenir en los Estados miembros cuando hay mutaciones en los mismo que apuntan en un sentido antidemocrático o iliberal. Se argumenta que la UE tiene legitimidad para este tipo de intervenciones pero que hasta el momento carece de instrumentos jurídicos y políticos apropiados para tales intervenciones.

En respuesta, el artículo propone una nueva institución provisionalmente denominada Comisión Copenhague y un nuevo conjunto de instrumentos de sanciones financieras para poner remedio a esta situación.

Palabras clave: UE; democracia militante; intervención; protección de la democracia; carta europea.

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ABSTRACT

The article investigates the question whether the European Union is legitimated to intervene in Member States when there are constitutional mutations in the latter that pint in a clearly undemocratic or illiberal direction. It is argued that the EU has the legitimacy for such interventions, but that that at present it lacks appropriate legal and policy instruments for such interventions.

In response, the article proposes a new institution —tentatively called Copenhagen Commission— and a new set of instruments, financial sanctions, to remedy this situation.

Key words: EU; Militant Democracy; Intervention; Democracy Protection; European Charter.

The EU has been undergoing profound constitutional mutations in recent years —and many observers fear that these mutations are, if anything, increasing the Union's much-lamented «democratic deficit». What has received much less attention, by comparison, is the constitutional mutations inside a number of Member States, and, in particular, the illiberal or even outright undemocratic direction in which some Member State governments have been trying to take their countries (developments which have been largely overshadowed by the Eurocrisis). In short: we might now also find distinct democratic deficits *within* individual Member States (2). This prompts the question how, if at all, the EU —and the European Commission in particular— should react to what is sometimes for shorthand called liberal-democratic «backsliding»? Is some form of intervention justified? Is it feasible?

In this article I shall argue that it is legitimate for Brussels to intervene in individual Member States specifically for the purpose of protecting liberal democracy. The EU has a broad mandate in this area already through the treaties on European Union; but an argument for intervention is also justified on the basis of democratic theory, especially the all-affected-principle; and, more particularly, intervention would make good on the implicit promise of EU enlargement that the Union would prevent «backsliding». I further argue that a number of common concerns about such interventions are largely misplaced: first, the criticism that they are hypocritical because the Union is itself not democratic and therefore in no position credibly to act as the guardian of liberal democracy on the continent; second, the worry that there is no single, fully agreed model of European liberal democracy that could

(2) I am indebted to DAN KELEMEN on this point. Of course this dichotomy is a little simplistic, but it is all that is needed for the purposes of this article.

be used as a template to decide whether countries are departing from shared «European values»; third, the concern that only smaller, relatively powerless Member States would ever be subject to interference from Brussels (in a sense, then, this criticism also comes down to a suspicion of hypocrisy).

I shall address these concerns explicitly and, in the process, develop a set of criteria as to when and how EU intervention is justified. Then we get to the real problem. The actual difficulties, I contend, arise not at a relatively abstract legal and normative level, but when it comes to legal instruments and political strategies for intervention. As of now, the EU has no convincing «tool kit» to deal with situations which probably not many Eurocrats —or, for that matter, European elites more broadly—ever foresaw: they famously formulated the «Copenhagen criteria» in 1993 to make sure that countries seeking accession to the EU were democracies committed to the rule of law; but they gave little thought to what is now sometimes called the «Copenhagen dilemma», which consists of the EU's apparent incapacity to enforce the criteria for states inside the Union. The repertoire of legal and political instruments the EU has at its disposal at the moment to exert pressure on Member States might occasionally work, as has been seen with EU reactions to developments in Hungary and Romania -- but these instruments can also appear arbitrary and opportunistic, and successes might be highly contingent. Therefore I wish to propose extending this repertoire and, in particular, the creation of a new kind of «democracy watchdog» —tentatively called the «Copenhagen Commission»—which can raise a Europe-wide alarm about deteriorations in the rule of law and democracy. Such a body also ought to be able to trigger a limited set of «smart sanctions».

I. Should the EU Play a Role in Democracy-Protection?

A major worry about the EU protecting democracy is that the Union itself is not democratic —hence Brussels is fundamentally hypocritical in speaking out for and in the name of values to which it does not adhere itself. This concern misses the point that 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 (3). In the Eurocrisis this logic of self-binding has clearly been under attack— markets have not found the model of

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

rules and sanctions credible. But with the single market it has worked well for decades: nobody is complaining that Brussels is taking Member State governments to court for violating competition rules, for instance (4).

One might still object that the parallel between interventions to safeguard the single market and interventions to protect democracy is misplaced. Are the purity of beer and the length of cucumbers not a categorically different matter than the basic shape and form of national political institutions? Is European integration not predicated on the fact that Member States remain both «masters of the treaties» and, in many clearly demarcated areas, masters of their own political fate? Or, taking a different line of attack: is the European Union not meant to be irreducibly *pluralist* in character? Is the spirit of its laws, so to speak, not something that can best be described as a matter of mutual recognition and mutual accommodation, where conflicts are resolved by trying normatively to relativize oneself and open oneself to the point of view of the other, or at least to find higher common ground and shared terms to address disputes —and never through just bowing to commands from above, so to speak? Less abstractly: does not the Lisbon Treaty itself enshrine the very principle that the Union ought to respect the national identities of the Member States? And are peculiar constitutional identities, sometimes formed through centuries of democratic struggle, not an obvious political part of what therefore needs to be respected?

Three responses are in order here; one drawn from law, one drawn from political theory, and one drawn from political science (to put it rather schematically). The crucial point with regard to the first is that EU Member States have of course already decided that democracy protection ought to have a European dimension: after all, Article 2 of the Treaty on European Union spells out Europe's fundamental values, democracy and the rule of law in particular; Article 7 allows both Member State governments and the EU institutions (Commission and Parliament) to suspend the voting rights in the European Council of a Member State in persistent breach of the EU's fundamental values. In other words, the principle of democracy-protection is already in the treaties; what precise form it has taken so far and whether its implementation is satisfactory is a question to which I shall return later in this article.

Second, there is an argument drawn from political theory which is rarely advanced in debates about democracy-safeguarding EU interventions, but which constitutes the core of any normative case for such interventions:

(4) To be sure, self-binding is not the only source of legitimacy. This is not the moment to enter into a debate about the «democratic deficit», but even the most hardened critics of the EU would concede that democratically elected governments, national parliaments, and the European Parliament all have meaningful roles in European decision-making.

every European citizen has an interest in not being faced with an illiberal Member State in the EU. After all, that state will make decisions in the European Council and therefore, at least in an indirect way, govern the lives of *all* citizens. Strictly speaking, there are no purely internal affairs in EU Member States; all EU citizens are affected by developments in a particular Member State. It might be true that there are far-away countries containing people about whom we know nothing— but as long as they are in the EU, they concern us (5). This fact of interdependence (and the fact that, as of now, the EU seems unable to internalize the externalities of Member State behavior) has recently been brought home to Europeans by the Eurocrisis, but it has mostly been interpreted in financial and economic terms. However, there is freely chosen *political* interdependence, too (6).

Finally, it has to be remembered —and this is again a political point, not a legal one— that 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 so as to prevent «backsliding»; it was like Ulysses binding himself to the mast in order to resist the siren songs of illiberal and antidemocratic voices in the future (7). Hence neither Hungarian Prime Minister Viktor Orbán nor Romania's Victor Ponta, for instance, are right to accuse Brussels of some form of «Eurocolonialism». Orbán, comparing the EU to Turks, Habsburgs, and Russians

(5) Which is not to say that the all-affected principle is easy to make sense of in practice; for some of difficulties surrounding an idea that seems intuitively so plausible, 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.

(6) This is a different point than the more general right for democracy-saving interventions promoted by Gregory H. Fox and Georg Nolte, «Intolerant Democracies», *Harvard International Law Journal* vol. 36 (1995), 1-70.

(7) This thought has come under much criticism recently —including by Jon Elster who made it influential in the first place. While one can indeed question the notion of «self-binding», the case under discussion here is actually a matter of «wanting to be bound by others»— and clearly renouncing the power to unbind oneself, short of jumping the (EU) ship altogether. See the chapter «Ulysses Unbound: Constitutions as Constraints», in *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (New York: Cambridge UP, 2000), 88-174; for the original theory, see Jon Elster, *Ulysses and the Sirens: Studies in rationality and irrationality* (Cambridge: Cambridge, 1979).

-- all former oppressors of the Magyars -- complains 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 (8).

But, one might object, do all Europeans really agree on how they want to live, politically, beyond bromides about democracy and the rule of law? Is the devil not obviously in the details? 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, so such a line of criticism would continue, all efforts to protect democracy 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 straying from common European norms or not.

Let me offer three 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 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 (9). 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? (10) Less obviously, elites also had deep

(8) Put in republican language: the EU is interfering to track the avowed interests of the citizens of the Member State concerned; it is authorized (or «licensed») to interfere. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford UP, 1997).

(9) I have made this argument at greater length in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (London: Yale UP, 2011). See also PETER L. LINDSETH, «The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920-1950s», in: *Yale Law Journal*, vol. 113 (2004), 1341-1415.

(10) This was the core of the case for judicial review in these countries: there were no proven democratic institutions and there were good reasons to believe that many citizens would not take individual rights seriously. Cf. JEREMY WALDRON, «The Core of the Case Against Judicial Review», in: *Yale Law Journal*, vol. 115(2006), 1346-1406.

reservations about the idea of *parliamentary sovereignty*. After all, had not legitimate 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 non-elected institutions (constitutional courts are the prime example) were tasked not just with defending individual rights, but with defending democracy as a whole (11). In short, distrust of unrestrained popular sovereignty, and even of unconstrained *parliamentary* sovereignty (what a German constitutional lawyer once called «parliamentary absolutism») are, so to speak, in the very DNA of post-war European politics (12). And it is fair to say that these underlying principles of what I have elsewhere called «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. Going out on a conceptual limb, one might even consider this model of democracy as a kind of European «basic structure», analogous to the basic structure doctrine of the Indian Constitutional Court (13).

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 ones (14) (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 in particular political struggles— a point which is particularly clear in the case of individual rights protection, a role for which national courts and the European Court of Justice were competing). This logic was more evident initially

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(11) One might add that dignity —and not freedom— is the master value of post-war constitutions.

(12) Of course, this is another way of saying that while there are indeed «constitutional pluralism» and «constitutional tolerance» in the EU (and while both of these have an important normative dimension), both are still constrained— a fact which every accession process makes clear. See NEIL WALKER, Neil Walker, «The Idea of Constitutional Pluralism», in: *Modern Law Review*, vol. 65 (2002), 317-59 and J. H. H. Weiler, «Federalism Without Constitutionalism: Europe's *Sonderweg*», in: Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford UP, 2001), 54-70.

(13) Compare the considerations on constitutional identity and the basic structure doctrine in Gary,

(14) 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.

with institutions like the Council of Europe and the European Convention on Human Rights, but 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.

Now, history is not destiny and its supposed lessons do not automatically generate legitimacy. But it seems a reasonable presumption that radical, sudden departures from this post-war model of politics place a special burden of justification on Member State governments embarking on such a departure. 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 observance of such constraints can generally be expected (15). So: not all countries in the EU will necessarily converge on constrained democracy. But in judging individual cases, overall context, and, in particular, an account of *historical trajectories* and *sequencing* are crucial (16).

Let me mention another way in which a Member State government might reasonably be expected to face a special burden of justification. Of course all government try to justify what they do continuously anyhow —whether anyone asks them from Brussels 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 critics from the outside have pointed out, the new Hungarian «Basic Law» constitutionalizes many policy areas which in other

(15) Clearly, the picture has changed somewhat with the Human Rights Act of 1998 — though it is worth noting that recently the adherence of the UK to the European Convention on HUMAN RIGHTS has been highly contested. It is not a fanciful scenario at this point that the country will reverse course and create a new «bill of rights» which de facto uncouples the UK from supranational European rights protection.

(16) I am indebted to RENATA UITZ for making me understand the importance of sequencing.

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 Basic Law. This kind of inconsistency calls for more justification and, quite possibly, a process of correction.

Finally, let me address the question of criteria for intervention head-on. 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. This is a common interpretation of what happened when Jörg Haider's far-right party came to power in Austria in 2000. Leaders like Jacques Chirac and Gerhard Schröder —unable 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 (17). Meanwhile, nobody ever dared to touch Berlusconi's Italy, no matter how much political bunga-bunga was going on. Powerful Member States —and especially founding member States of the EU —appeared to be above the law (or at least above European values).

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 also point us to convincing 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) 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; what they were doing also had a systematically illiberal 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 remove checks

(17) See also MICHAEL MERLINGEN, CAS MUDDE, and Ulrich Sedelmeier, «The Right and the Righteous? European Morms, Domestic Politics and the Sanctions Against Austria», in: *Journal of Common Market Studies*, vol. 39 (2001), 59-77. Perhaps not so surprisingly, the evidence suggests that both domestic party-political incentives and an ideational environment favorable to human rights protection had to come together to motivate sanctions.

and balances and would have wanted to stay in power more or less permanently (and therefore also out of prison…)(18). But the opposition, 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; the judiciary kept putting up a fight; and various Italian presidents —Giorgio Napolitano in particular— would block Berlusconi's plans (for instance, to appoint allies —even his personal lawyer— to particular ministries, or to hold new elections)(19). 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)(20). 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» through political struggle, thereby preventing the proper development of a democratic political culture (though one could of course reasonably ask whether Italians should not have figured out by the end of Berlusconi» second stint in office at the very latest that the *Cavaliere's* statecraft was somewhat deficient)(21).

Our discussion, then, yields at least three general criteria that need to be met for an actual EU intervention: first, a Member State government has to have a *track record* of violating shared 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 *syste-*

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

(19) 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].

(20) Nadia Urbinati, *Prima e Dopo* (Rome: Donzelli, 2011).

(21) 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.

matic nature: one-off violations might be deeply problematic, but they can generally be dealt with by courts (the European Court of Justice and the European Court of Human Rights in particular), and they should be seen in context: mistakes cannot 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. Put differently: there is a place —in fact: a need —for *political judgment* here. 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 also a matter of political judgment.

It needs to be emphasized again that *all* Member States and *all* European citizens have an interest in enforcing liberal-democratic commitments. Their expressions of interest and concerns cannot be dismissed with the claim that they constitute something like meddling in internal affairs. However, having said that: Member State governments and citizens also do owe each other *respect* across the Union. In particular, nuances in political language and tone matter, when it comes to talking about members of the «European family» (which can be no less dysfunctional and unhappy in its own way than any other family…). On the one hand, criticism from the outside should never be suspect just because it comes from the outside —as I have been arguing, EU citizens share one political space and ought to make it their business what others in that space do. But neither European politicians nor European intellectuals should generalize about, for instance, «the Hungarians», as opposed to a particular government. And Brussels should never treat Member States as if they were like unruly or immature children who are a bit slow in getting liberal democracy: the EU as lived experience can be very different from the textbook account of «transitions to democracy», where peace, prosperity and political happiness reign ever after. In Hungary, for instance, accession in 2004 was already the moment of bust after the boom, when companies were moving still further east in search of tax breaks and cheap labour. No wonder, then, that liberal political languages are today widely discredited: «liberalization» is identified as the imposition of neoliberal economic policies by elites that are protected by «Europe» (and, in the eyes of critics, can always escape to Europe, that is, a cushy EU or multinational business job) (22). Less obviously, there is a strong sense in the country that time and again the West

(22) See UMUT KORKUT, *Liberalization Challenges in Hungary: Elitism, Progressivism, and Populism* (New York: Palgrave, 2012).

has raised high moral and political expectations —only to leave the Magyars in the lurch when it truly mattered (the failed liberal revolution of 1848/49, 1945, and, of course, above all, 1956). The point is not that such sentiments —«the EU is only about capitalism» or «the West is always hypocritical» — need to be accepted at face value; but there ought to be an awareness of them. And both European rhetoric and conduct ought to be sensitive to them.

II. Is EU Intervention feasible?

Legitimacy and having appropriate policy instruments at hand is not the same thing. In this section, I would like briefly to inspect the EU's existing tool-kit, when it comes to the challenge of safeguarding liberal democracy in Member States. I shall conclude that even where the tools seem to fit the task, so to speak, they are either unusable because of political reasons (something which, to be sure, could change over time) or have other drawbacks (mostly to do with the time it might take to apply them).

First, Article 7 of the Treaty on the European Union allows for the suspension of membership rights for states persistently violating basic European values. 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 Eastern enlargement, clearly out of a fear of what those uncouth Eastern Europeans might do (the irony being that sanctions —though not under Article 7 and not by the EU as such— were of course first applied against Austria in 2000) (23). After the «Haider Affair» an intermediate step was introduced to allow the EU to send a strong signal that there exists a «clear risk of a serious breach by a Member State of the values referred to in Article 2». In other words, the Union opted for an approach which allowed for step-by-step escalation, instead of having only the choice of immediately confronting a government with the charge that it is in fact in violation of shared European values.

However, even with this differentiated approach, there is today a sense that Article 7 as a whole somehow constitutes a «nuclear option», as the President of the European Commission recently put it (24). In other words: it is

(23) 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.

(24) The point was explicitly conceded by the President of the European Commission in his 2012 State of the Union address. As Barroso put it, «in recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check». He went on to claim that «these

unusable. Countries, it seems, are simply too concerned that sanctions might also be applied against them one day —and since Article 7 is obviously about a political, not a judicial, process (which makes national executives the decisive actors), there is no reason to think that their inherent «sensitivity about sovereignty» (Mattias Kumm) will not always make them extremely reluctant to take sanctions against one of their own (25). In fact, the very idea of sanctions goes against what might be called a whole EU ethos of compromise, mutual accommodation, and mutual trust, as well as deference towards national understandings of political values— the kind of EU self-understanding which celebrates diversity and pluralism.

True, some of the constraints on Article 7 might be very contingent; they could change over time, if Member States were somehow to become less sensitive about sovereignty. But a clear-eyed assessment of the limits of Article 7 has to reckon with the fact that nowadays attempts to undermine democracy and the rule of law are not likely to be undertaken with reference to the great advantages of authoritarian governance, or by invoking precedents of authoritarian, let alone totalitarian, regimes in the twentieth century. This is a problem familiar from debates about «militant democracy» within democratic states; just think of the controversial (and difficult to prove requirement) for party bans in what is undoubtedly the most famous example of militant democracy in post-war Europe, the German *wehrhafte* or *streitbare Demokratie*: parties have not only to indicate some general hostility to the liberal democratic order; they also have to exhibit what the German Constitutional Court has called an «actively fighting, aggressive attitude» (26). Member State governments, it seems reasonable to assume, would always seek to claim that they are engaged in a legitimate political struggle *within* the parameters of liberal democracy, and that they are simply pursuing somewhat different values than other Member States (or that they are in fact close to some Member States in terms of values and simply the victim of a partisan or ideological campaign of some other Member States).

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situations also revealed limits of our institutional arrangements. We need a better developed set of instruments— not just the alternative between the «soft power» of political persuasion and the «nuclear option» of article 7 of the Treaty».

(25) Of course this problem has been even further exacerbated by the rise of what Jürgen Habermas, following Stefan Oeter, has called «executive federalism» in the EU — the process which has systematically sidelined the European Commission, the European Parliament, and the national legislatures. See JÜRGEN HABERMAS, *Zur Verfassung Europas* (Berlin: Suhrkamp, 2011).

(26) For an extended discussion of the dilemmas associated with militant democracy, see my «Militant Democracy», in: MICHEL ROSENFELD and ANDRÁS SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford UP, 2012), 1253-69.

This was clearly Orbán's strategy, when he explained to a German newspaper in March 2012 that the problem consisted simply in the fact that the Western European Left did not like his advocacy of national pride, Christianity and family values (27). In other words, the fight was not about norms and institutions; it was a European-wide *Kulturkampf*, where one side was pretending to speak in the name of Europe as a whole and malign the other side as undemocratic, just because it did not like the other side's values. The references to «values» in Article 7 and in European debates more widely can in fact encourage such a reading: after all, one ought to be able to ascertain whether law has been broken or not and whether common principles are adhered to; whether we ultimately really «share values» seems a much more subjective matter to verify. It does not help that the post-war understanding of democracy I discussed further above is not in any way legally codified. Its invocation could certainly serve to make a case for the use of Article 7; but it is not in any clear sense contained in Article 7 itself -- or in Article 2, for that matter. So what options are there then other than vague talk about «values»?

As an alternative to Article 7, a number of legal scholars have proposed that national courts, drawing on the jurisprudence of the European Court of Justice, should protect the fundamental rights of Member State nationals as EU citizens (all nationals of EU Member States automatically hold the status of EU citizens -- something of which most Europeans are blissfully unaware, alas) (28). As long as Member State institutions can perform the function of guaranteeing what these scholars have called «the essence» of fundamental rights as set out in the European Charter of Fundamental Rights, there is no

(27) «Viktor Orbán im Gespräch: "Es gibt ein verborgenes Europa"», in: *Frankfurter Allgemeine Zeitung*, 4th March 2012, at http://www.faz.net/aktuell/politik/europaeische-union/viktor-orban-im-gespraech-es-gibt-ein-verborgenes-europa-11671291.html [last accessed 1st October 2012]. A basic insight of the democratization literature is that subnational authoritarianism in a democracy is threatened by a nationalization of political conflict (see Edward L. Gibson, «Boundary Control: Subnational Authoritarianism in Democratic Countries», in: *World Politics*, vil. 58 [2005], 101-32). At the same time, weaker parties to a conflict generally have an interest in «socializing» or, in this case, Europeanizing a conflict —an argument going all the way back to Schattschneider. Hence Orbán«s calculation might be that going *mano-a-mano* with the Commission in isolation is in fact a losing proposition, whereas igniting a European *Kulturkampf*— which reframes the conflict as one of moral and cultural, not legal and political, values —is very risky, but could turn out to be a winning strategy (not least because it calls the impartiality of official guardians of the treaties into question— after all, they might just be strongholds of radical, secular European left-wingers).

(28) 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.

such 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, to safeguard what the Court itself has called the «substance» of Union citizenship-or so a proposal by a group of scholars led by the German legal theorist Armin von Bogdandy suggests.

This is a clever thought. It counters the concern about a potential flood of rights claims by European citizens, once the separation of EU law and Member State law in general has been breached, by reversing the famous *Solange* («as long as») decision of the German Constitutional Court (Karlsruhe had held that it would not review rights protection at the European level *as long as* such rights protection could be presumed to be comparable to that at the German national level). At the same time, the proposal aims not merely to bring in the European Court, but to strengthen *national* liberal checks and balances in times of political crisis (29). It reinforces the basic insight that the EU cannot function without well-ordered liberal democratic states, that, as Advocate General Miguel Poiares Maduro put it once, «respect for fundamental rights is intrinsic in the EU legal order and …without it, common action by and for the peoples of Europe would be unworthy and unfeasible» (30). Not least, it underlines what Europeans have in common —the status of Union citizenship— instead of potentially pitting Member States against each other in an interminable conflict over the correct interpretation of political values (as is potentially the case with uses of Article 7). Thereby, one might say, it also goes to the heart of the matter: at issue is the violation of fundamental rights through illiberal or outright undemocratic governments; unlike with infringement proceedings initiated by the European Commission, where the charges might fail truly to take account of the threats to the rule of law and democracy, such an approach allows a direct engagement with a Member State's violations of European norms, as expressed in individual rights for European citizens. For instance, think of the Commission taking Hungary to the Court for age discrimination, after the Hungarian government drastically

(29) I leave here aside the possibility of a stronger role for the ECHR and the Venice Commission. I have addressed the drawbacks of «outsourcing» democracy-protection to these institutions in «The Idea of Democracy Protection in the EU Revisited», Verfassungsblob.de, at www.verfassungsblog.de/en/the-idea-of-democracy-protection-in-the-eu-revisited/ [last accessed 16 December 2013].

(30) Centro Europa 7 Srl v. Ministerio delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni, European Court of Justice, Opinion of Advocate General Poiares Maduro, Case C-380/05 (2007), available online at http://curia.europa.eu/juris/document/document.jsf?text=&docid=62786&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=661182.

lowered the retirement age for judges. Of course, age discrimination is at issue— but here infringement proceedings are at best a very indirect way of getting at the real threat: a systematic undermining of the independence of the judiciary, since the government could (and did) end up staffing the most senior positions in the judiciary with its own appointees.

As said above, the reverse Solange approach is very ingenious. Yet it still fails in the eyes of critics who suspect that all Member State governments would be very reluctant to even come close to the possibility of the European Court of Justice empowering itself systematically to review the rule of law within Member States. After all, there had been extensive discussions of involving the European Court in deciding on sanctions against Member States, when the idea of Article 7 was debated in the late 1990s and early 2000s -- and such a role was in the end clearly rejected by Member States (which, not surprisingly, sought to make the Council the central actor) (31).

There is also a more fundamental question of how much political weight EU citizenship can bear: after all, EU citizenship has not been the result of a political process or, put more dramatically, it has not been the outcome of a real struggle for citizenship rights —citizenship was granted from above and extended by the European Court in way that could well be labeled «constitutional paternalism» (32). One also has to wonder whether concepts like «the substance» of EU citizenship can be sufficiently (and consensually) specified: the vagueness of value talk might just be replicated here on another level.

Then there is also the banal fact that, whether on a national or European level, judicial proceedings take a fair amount of time (and the related concern that, like the ECHR, the Court might soon be overwhelmed with case load). And, realistically speaking: a government determined to undermine democracy and the rule of law might not be much impressed by rulings from Luxembourg anyway.

Finally, there is the worry that a legal response to an essentially *political* challenge will not do; that one should not rely on legalism -- single citizens enforcing European values through court cases -- instead of invoking a common, public European purpose; that at issue are whole political systems (and,

(31) SADURSKI, «Adding Bite to the Bark», 394.

(32) See also the comments on the «Heidelberg proposal» by Anna Katharina Mangold, «Rescue package for fundamental rights», online available at http://www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-anna-katharina-mangold/#.UKZVllLSzxs and Michaela Hailbronner, «Rescue package for fundamental rights», available online at {http://www.verfassungsblog.de/rescue-package-for-fundamental-rights-comments-by-michaela-hailbronner/#.UKZeJlLSzxs. I borrow the term «constitutional paternalism» from Paulina Ochoa Espejo, *The Time of the Popular Sovereignty: Process and the Democratic State* (University Park, PA: Penn State University Press, 2011)

in Montesquieu's language, their «spirit»), not just isolated individual rights; that we need is more *Europolitics* instead of yet more *Eurolegalism* (33).

So what would a properly political response look like? 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. People across the continent have woken up to the fact that what happens elsewhere in Europe has a direct impact on their lives; Brussels is not just some technocratic machine which produces decisions best for all; what we need is a European party system, so that different options for Europe's future can be debated and voted on across the continent.

Fair enough. But one less desirable effect of such a Europeanisation of politics has now become apparent: the conservative European People's Party has 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, has defended his fellow Social Democrat Ponta, at least initially (34). So, if in doubt, it appears to be all party politics instead of an impartial protection of European standards.

But then again, this is perhaps just another way of saying that one cannot have it both ways: if politicization is the royal road to democratic legitimacy, then partisanship (and more or less uncontrollable partisan political passions) is the risk one has to be run (and potentially the price that has to be paid). Democracy, unlike the rule of law, *should* mean uncertainty (nobody can know —or should know— in advance the outcome of elections, or, more generally put, political struggle within commonly accepted constraints). So whereas courts and the Commission, prima facie, have some claim credibly to act as impartial guardians of democracy, supranational European democracy saving national democracy within Member States is perhaps a riskier proposition, one that might or might not succeed in harnessing partisanship and political solidarity for democracy-protecting ends.

Put more concretely: the EPP, not to discredit itself by having a de facto proponent of illiberal or «managed» democracy in its midst, could put pressure on the Hungarian government; it could reinforce the sense that all party

(33) R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, Mass.: Harvard UP, 2011)

(34) Schulz initially talked about a political conflict of surprising intensity between two irreconcilable camps». Quoted in Matthias Krupa, «Ist Rumänien noch eine Demokratie?», in: *Die Zeit*, 12th July 2012. The Austrian Social Democrat (and leader of the socialists in the European Parliament) Hannes Swoboda criticized the Commission for being hypocritical and biased (towards the right); see his opinion piece «A Critique too far», in: *European Voice*, 17th September 2012, in http://www.europeanvoice.com/article/2012/september/a-critique-too-far/75152.aspx [last accessed 16 December 2013].

members are engaged in a collective, genuinely European political project, and that betraying that project has consequences. But of course that logic can also be reversed: better to hush up a deviation from that project, better not to lose allies in power, better not to go against the invocation of shared values such as Christianity, the family and the nation. Alas, the more significant European party politics (and the European Parliament) becomes —the more likely that a supranational *Fraktionsdisziplin* will prevail, as well as what one might imagine as a kind of horse trading or mutual back-scratching (to employ the not always terribly appealing metaphors associated with the US Congress): if you leave Hungary alone, we leave Romania alone— those sorts of deals.

III. A Watchdog for Constitutional Mutations in Member States: Towards a Copenhagen Commission

How, then, could the EU deal with challenges to liberal democracy more effectively, while not overstepping the limits of its legitimacy? To address this question it is important to be precise about what the theoretical and practical challenges are precisely; a plausible answer is one that best addresses these challenges. The theoretical challenge, I submit, is to locate an *agent of credible legal-political judgment*, which is different both from assessing rule compliance and from ascertaining belief in values. Philosophical consensus is simply not the issue (all governments continue to profess faith in democracy and the rule of law); and technical-legal judgment in and of itself (supposing one could successfully isolate such a thing), is insufficient, for reasons mentioned a number of times in this article: we are dealing with systemic 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 (as opposed to the claims about what is happening within these systems by local elites) (35). A simple check-list, as so often used in the EU accession process («Do the judiciary's offices have computers? Check!»), will not do; somebody needs to see and understand the whole picture and, as said above, also the particular sequencing of the creation and, possibly the dismantling, of a liberal-democratic system (36).

(35) Cf. Ronald Beiner, *Political Judgment* (New York: Routledge, 2010).

(36) See also Kalypso Nicolaïdis and Rachel Kleinfeld, *Rethinking Europe's «Rule of Law» and Enlargement Agenda: The Fundamental Dilemma*, Sigma Paper 49/2012, and the acerbic, but entirely justified comment by Alina Mungiu-Pippidi on the Commission's

On a practical level, a clear challenge has been that authority in the EU remains highly diffuse and fragmented; there is not 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 and direct something like common political attention. More particularly, there is as of now no clear legal or political actor 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 is well known, under the Treaty on European Union states may decide to leave voluntarily— but there is no legal mechanism for actually removing a country from the Union (and even voluntary exit would in all likelihood be a very drawn-out affair). 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 at all, namely its importance as a form of *deterrence*— ought to be sympathetic to including the option of complete removal (37).

More needs to be done, though, to equip the EU as a proper guardian of liberal democracy. A difficulty with the existing harsher sanctions envisaged in Article 7 is, of course, that it needs agreement among all Member States (and even the preventive option still requires four-fifths of the members of

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elaborate monitoring procedures depending upon an «overall «prescription mechanism» according to which countries are evaluated by the number of measures adopted from detailed Commission «roadmaps» rather than by indicators measuring real changes on the ground. This is as if a doctor evaluated a patient by the number of prescribed medicines taken, rather than by measuring the patient's fever to check on the effect of the medicines. Both the adequacy and the impact of such measures in each country were presumed rather than demonstrated». See Alina Mungiu-Pippidi, «EU Accession is no «End of History»», in: *Journal of Democracy*, vol. 18 (2007), 8-16; here 15.

(37) It's not that the possibility of complete exclusion has never been discussed in the preparation of various treaty revisions. But the option of exclusion has been rejected because, as the report of a Reflection Group appointed by the European Council put it, «this would call into question the irreversibility of membership [in] the Union». See Sadurski, «Adding Bite to the Bark», 390.

the Council). So short of extremely dramatic deteriorations in the rule of law and democracy, the EU ought to have tools available that exert pressure on Member States, but whose employment does not require a lengthy process of finding agreement among all or a large majority of Member States. One suggestion would be that the Commission begins to monitor the state of the rule of law (essentially: the quality of the systems of justice) in all Member States consistently and continuously (38). It is important that such monitoring be done uniformly in all countries; while there are of course precedents in singling out individual countries for surveillance (Romania, Bulgaria), it simply sends the wrong signal to target only some countries, if there is no evidence for singling them out. Such a «universalist» surveillance, an institutionalized blanket suspicion, if you wish, also effectively counters the rhetoric —amply used by member of the current Hungarian governing party, for instance— that some Europeans are treated as «second-class citizens», or that there is a two-tier Europe, where some are trusted and some are not.

However, one might question whether the Commission can really be what above I called a credible agent of legal-political judgment. To be sure, the Commission is acquiring new powers in supervising and potentially changing the budgets of Eurozone Member States. But many —possibly all -- 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* (39). And such partisanship makes the Commission much less credible as an agent of legal-political judgment (40).

An alternative to the Commission undertaking such a task itself would be to delegate it to another institution, such as the Fundamental Rights Agen-

(38) A suggestion that has in fact been made by Commissioner VIVIANE REDING recently. See «EU keen to rank justice in member states, in: *EU Observer*, 13th September 2012, at http://euobserver.com/justice/117535 [last accessed 27th September 2012].

(39) Not that the Commission today is truly «apolitical» — but the fiction that Commissioners upon taking office lose their party-political identities does have some disciplining effect, I would submit. In the scenario envisaged by proponents of the Commission as de facto (and possibly even in name) a European government, the whole point is that the body would be —and ought to be— visibly partisan.

(40) There is also the less obvious point that every harsh criticism of a newer Member State can be seen to fall back on the Commission itself — did they not do the proper work before recommending admission? See in this context also TOM GALLAGHER, *Romania and the European Union: How the Weak vanquished the Strong* (Manchester: Manchester UP, 2009).

cy (41), or perhaps an entirely new institution which could credibly act as a guardian of what one might call Europe's *acquis normatif* (42). One could think of a «Copenhagen Commission» [as a reminder of the «Copenhagen criteria» (43)], analogous to the Venice Commission— a body, in other words, with a mandate to offer comprehensive and consistent political judgments (44). The hope is also that such a body— ideally composed of legal experts and statesmen and stateswomen with a proven track record of political judgment - could become sufficiently visible so as effectively to raise an alarm across whatever there is by way of a common European political space.

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 should be required to cut funds for state capital expenditure, for instance, or impose significant fines (45). 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).

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(41) As suggested by the liberal MEP Alexander Graf Lambsdorff in his piece «Zwei Premiers führen die EU an der Nase herum», available online at http://www.cicero.de/weltbuehne/ungarn-rumaenien-ponta-orban-zwei-premiers-fuehren-die-eu-der-nase-herum/52076 [last accessed 16 December 2013]. As Lambsdorff rightly points out, the mandate of the FRA would have to be significantly amended— as, one might add, would have to be its culture: at least for the moment is has gained a reputation of being over-sensitive to Member State executives.

(42) One might be tempted to think of decentralizing such an agency: having ombudsmen or something analogous to discrimination agencies in each country — the obvious counter-argument being that such actors and agencies would likely be subject to national capture.

(43) Not that the criteria provide an unproblematic template that could simply be taken off the shelf, so to speak, or an undisputed legacy of the institutional success of EU conditionality. For a comprehensive critique, see Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer, 2008).

(44) I am indebted to Rui Tavares for discussions on this point.

(45) A major problem here is of course that such measures tend to punish populations, and not governments. The present Hungarian government attempted at one point to constitutionalize the principle of visibly passing EU-related fines on to all citizens, clearly hoping that such «democracy taxes» will increase resentment vis-à-vis Brussels. This danger is also acute if one thinks of cutting EU cohesion funds— such cuts would clearly hurt those who are already poor. Less obviously, countries suffering from deficiencies in the rule of law already cannot absorb much of such funds— so this kind of sanction might not hurt as much as one might think by just looking at the gross numbers. I am particularly indebted to Kim Scheppele for discussions on this point.

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. Surely, the «Haider Affair» taught the lesson that sanctions should not give the impression that individual nation-states are lining up against— or, put more drastically, *ganging up on* -- an EU Member State; action of this kind by the European Commission implementing the judgment of the Copenhagen Commission would make it very difficult for a country to try to divide other Member States, or play them off against each other, or peel off more powerful countries from a coalition of the sanctioning, so to speak.

At the same time, all the existing tools would remain at the disposal of the relevant actors: Member States could vote on Article 7; 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.

Now, none of the above means that some of the pluralist principles and practices in the EU have become irrelevant (or were a fiction all along): all the relevant actors can also retain something like a margin of appreciation to account for national idiosyncrasies; they can in the first instance suggest to an offending government to take seriously the idea of informal peer review and try to negotiate disputes away, etc. However, what the above also suggests is that it cannot be pluralism all the way down. As one political community, the EU has outer and *inner* boundaries: where constitutional mutations go so far as to make liberal democracy and the rule of law dysfunctional, there Europe ends.