Weronika Priesmeyer-Tkocz [ed.]

Common Values

Discussing German and Polish Perceptions of European Integration

Nomos

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Content

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Discussing different perceptions of European integration and common values – introduction

Weronika Priesmeyer-Tkocz[*]

European integration is not an end unto itself. It exists for the purpose of holding basic principles that determine the lives of the European Union citizens: peace, security, well-being, and common values. These principles have been an integral component of European treaties. The Treaty on European Union agreed in Lisbon upgraded the understanding of common values and underlined their importance in the newly-introduced Article 2:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[1]

The canon was completed by further articles of the Treaty on European Union and the previously introduced Charter of Fundamental Rights,[2] which states the basic rights and fundamental freedoms more precisely. Thus the Treaties establish the values on which the EU is based and to which all member states are bound. Although the legal document is enumerated, there is a lack of compliance regarding the assessment of the principles and values, and therefore leaves significant room for interpretation. Especially in times of crisis and integration challenges, those values and principles were exploited for national purposes during arguments with other member states and defamed as incompatible with 'national' or 'traditional' values.

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[1] *Treaty of Lisbon* amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, 2007/C 306/01, 17.12.2007.

[2] *Charter of Fundamental Rights* of the European Union, Official Journal of the European Union, C 364/1, 18.12.2000.

The word 'solidarity' is exemplary of the different interpretations by member states. It can be seen as an initial condition, motivation for action, or outcome of European policy instruments.[3] This open interpretation of the term generates discussions in the following dimensions: with or against us and how little or how much solidarity with each other. Dissent about the meaning of 'solidarity' became evident during recent EU challenges, particularly the European debt crisis, the Greek deadlock, the malfunctioning of the European migration and asylum policy regarding the refugee drama, and last but not least the persistent negotiations on the multiannual financial framework.

A further issue is the frequent questioning of the value provided by European integration from the inside. Right-wing populist and national conservative parties in the European Parliament, national assemblies, and government coalitions (Jobbik in Hungary, Law and Justice in Poland, Front National in France, Ukip in the United Kingdom, Danish People's Party, Alternative for Germany) play ping pong with values by claiming sovereignty over the interpretation of values like democracy, rule of law, equality, freedom of speech, and pluralism.

The developments in Poland during the last two years spurred new debate on the understanding of European values and principles in the academic, political, and public spheres. Law and Justice's parliamentary majority, combined with their hold of the Presidency, created one of most difficult democratic crises in the country's recent history and the open dialogue with the European Commission over rule of law. The actions of the government and party chairman Jarosław Kaczyński, who acted from behind the scenes, range from questioning of the separation of powers and the independence of the constitutional court – a re-interpretation of democracy (i.e. the state and law as instruments of power for the parliamentary majority) – to the instrumentalization of the public service media and gradual restrictions on freedoms of speech (i.e. the depiction of government critics as whistleblowers and traitors). However, is this recent development simply a showcase of power by the new government? Or is it a release of pent-up frustrations, thereby illustrating how European values and principles are not always compatible with 'traditional' national ideas and interests?

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3 Cf. *M. Knodt, A. Tews* (eds), Solidarität in der EU, Schriftenreihe des Arbeitskreises Europäische Integration 81, Nomos 2014.

Analysis of public discourse in Germany and Poland – especially regarding current political, social, and economic challenges in Europe, and the European Union in particular– makes clear that there are not only divergent visions for limits of integration, but there are also different interpretations regarding common values and principles. This diversity of interpretation, approaches, and interests is not only bi-national, but also intra-national, and applies to the strategies of political elites, media coverage, and public opinion as well as to analytic and academic discourse.

After a period of optimistic efforts,[4] the focus of discourse is again on German-Polish relations and German-Polish European policy. More than 50 years after the historic correspondence between the German and Polish bishops, 25 years after the definite acceptance of the Oder-Neisse border and signing of the bilateral treaty of friendship, and more than ten years after Poland's accession to the EU, the previous importance and progress on the German-Polish partnership in and for Europe are being questioned.

Against this background, this collected volume has the objective to address common areas, divergences, and arguments or counterargument in the German and Polish understanding of European integration, EU policies, and bilateral relations through the lens of common values and principles. A predominantly younger generation of academic personnel and analysts from Germany and Poland contributed to the collection. The approach was to present a volume that is multi-perspective, interdisciplinary, and that would enrich the German, Polish, and European discussion by presenting new research outcomes, reflective questions, trenchant conclusions, and possible joint courses of action.

The phenomena of 'democratic backsliding' or the advance of 'illiberal' tendencies in Europe as well as the question of the (mis)interpretation of common values are of main interest for the first two contributors. *Kai-Olaf Lang* analyses the main types of democracy deficits in the EU and possible responses on the European level, such as the EU toolbox to ensure democratic standards or informal instruments. Further he discusses some general hypotheses on the effectiveness of EU-action by sketching counter-strategies of criticized member states against steps which have been, or could be, taken. *Magdalena Musiał-Karg* follows the democratic path and analyses how the practice of using referenda on European issues

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4 Cf. *B. Neuss, A. Nötzold* (eds), Polen als Motor des europäischen Integrationsprozesses, Schriftenreihe des Arbeitskreises Europäische Integration 77, Nomos 2013.

became an increasingly popular instrument of internal politics in EU member states. Taking the 2016 British and Hungarian referenda as example, she discusses the multifold rhetoric about solidarity as a core European value and analyses the consequences for further EU integration.

The current developments in Poland are of main interest for the next three contributors. *Adam Jaskulski* sketches the developments in Poland after 2015 elections that brought the Law and Justice (PiS) party to power, with particular analysis of the political trends which led to the electoral shift, the repercussions of PiS policies for the Polish political and legal system in adherence to EU standards, and the role of the European Union and common values in Poland. *Adrian Chojan* and *Mikołaj Tomaszyk* explore the ideological foundations in Poland's foreign and European policy and the differences between the two periods of the Law and Justice party government, concluding that the current Polish government advocates for a Union of national states and thus acts as a voice of opposition to the current architecture of the EU institutions and the decision-making system arithmetic.

For the following four contributors, the intricacies of the German-Polish relationship are of primary concern. *Jan Muszyński* in his paper uses case studies to bolster his analysis of Polish and German telecommunication surveillance systems and the methods each country employs in an attempt to uphold (or not) fundamental rights and the rule of law. *Mariusz Ruszel* uses comparative analysis to identify the common interests and different strategic goals of German and Polish energy policy as well as the main challenges and risks for energy security facing both countries, with particular attention to Russia. *Maciej Cieślukowski* assesses financial solidarity between Germany and Poland and EU cohesion policy from the perspective of fiscal and market flows within the EU budget. *Adam Kirpsza* delineated and statistically tested several hypotheses in order to identify the main reasons and the areas of compliance and discrepancies that cause Polish and German representatives vote concordantly or separately in the European Parliament.

The implementation of EU law in member states, with its areas of harmonization and dissension, is the principal focus of the following two contributors. *Ida Musiałkowska* in her paper evaluates the process of transposition and implementation of the EU law in Poland, presenting statistical data analysis and assessment of the country's performance with regard to infringement procedures and lingering problems. *Kamila Schöll-Mazurek* discusses the mechanisms violating the principles of non-discrimination

and equality regarding the free movement of persons within EU member states, using the Polish workers in the German labor market as example, and proposes potential solutions.

The following three contributors explore the various facets and perceptions of communication using the Polish and German example. *Marta Kozłowska* focuses on the problem of polysemy, presents the role political elites play in shaping public discourse, and discusses preconditions and explanations among individuals and society for change. *Erik Malchow* provides an overview of the current German-Polish online relations, using examples of successful online communication and areas of divergent discourse. *Oliver Tettenborn* supplements Discourse Ethic (DE) theory to critique popular Western discursive software in its perception of the East and proposes a relationship-oriented framework to remedy the discoursive crisis of today's Europe.

The following four contributors focus on Polish and German perceptions and pursuit of effective foreign policy towards the East. *Ireneusz Paweł Karolewski* and *Thomas Mehlhausen* study plenary protocols of both the German and Polish parliaments to assess both national discrepancies and foundations for value-based cohesion for a joint German-Polish approach to the East, with particular attention to the hybrid war in Ukraine. Finally, *Weronika Priesmeyer-Tkocz* and *Bartosz Rydliński* highlight possible grounds for Polish-German cooperation towards Ukraine and other countries within the Eastern Partnership (EaP) as well as Russia. Further they evaluate the fundamental commonalities and potential avenues for joint actions on democratic and stable development in the post-Soviet area in light of more than 25 years of Polish-German partnership and neighborly cooperation in Europe.

Can Brussels save democracy?
The lacking effectiveness of EU democracy policy towards member states

*Kai-Olaf Lang**

Introduction

In a European Union beset by multiple crises, the quality of democracy in member states, and more generally the domestic political preconditions of European policy, is particularly relevant for European integration. Without stable and functioning democracies in member states, the EU would certainly have to redefine its self-image of being a community of values, of which democracy and rule of law are key principles. In a time of rising doubts about the shape and the direction of integration, a Union of varying democratic standards could easily turn into an ever looser association of national states bound together mainly by economic interests and some foreign policy objectives rather than by shared norms. That is why developments in some member states, whether justified or not, have sparked a debate about 'democratic backsliding' or the advance of 'illiberal' tendencies in the EU. This debate involves questions concerning the response to such tendencies: When and how should the EU become active? Does it dispose of appropriate instruments? What are criteria for triggering possible reactions on the EU level? How can democratic deviance be sanctioned?

Opposing this normatively inspired thrust of discussion is an orientation which argues that the EU has to respect the core of member states national competencies, especially their 'constitutional identity'. Indeed, according to EU primary law, modifications of the political system are the exclusive domain of the national states so long as no grave non-observance of basic democratic standards is committed. Referring to this, proponents of such a democratic sovereignism claim that what they do is change within the

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broad EU principles and values and not change of these principles and guidelines.

For the time being, the interplay of the various and enduring European crises has not been conducive to either side. Neither liberal interventionists for democracy pressing for value-based coherence, nor democratic sovereignists trying to use the crisis as an opportunity to decentralize competencies and to deprive 'Brussels' from any means to interfere into domestic affairs, were able to push through their position on the EU level. Rather there is a protracted debate between a normative view calling for the establishment of a European 'democracy policy' on the one hand and a particularistic attitude, which rejects the universalist model of a 'liberal democracy'[1] and proposes a "democracy without adjectives" on the other hand.[2]

Proceeding in three stages, this article aims to discuss the main types of democracy deficits in the EU and possible responses on the European level. First, it describes two forms of changes to democracy going along with potential or real cutbacks in democratic quality. Then, it analyses the EU toolbox to ensure democratic standards by sketching out a brief overview of the existing instruments. Finally, the paper discusses the impact of EU action by describing counter-strategies of criticized member states against steps, which have been or can be taken, and presents some hypotheses on the effectiveness of EU action.

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1 *Kormany*, Prime Minister (PM) Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp July 30, 2014, http://www.kormany .hu/en/t he-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-spe ech-at-the-25th-balvanyos-summer-free-university-and-student-camp [access 01.03.2017].

2 At the beginning of 2017 Poland's foreign minister Waszczykowski declared that he wanted neither 'socialist democracy' like in communist Poland, nor 'sovereign democracy' like in Russia, nor "'liberal democracy' built top-down by the Brussels elite. I simply want democracy."; Cf. *Wpolitice.pl*, „Nie chcę demokracji z przymiotnikiem. Chcę po prostu demokracji". Minister Waszczykowski w rozmowie z braćmi Karnowskimi na łamach 'wSieci', http://wpolityce.pl/polityka/278 055-nie-chce-demokracji-z-przymiotnikiem-chce-po-prostu-demokracji-minister-w aszczykowski-w-rozmowie-z-bracmi-karnowskimi-na-lamach-wsieci [access 13.01.2017].

1. *Changes of democracy in EU member states*

Looking at the state of democracy in EU member states, perceived tendencies of power centralization are typically the focus of debates and criticisms. Indeed, developments in some member states are worrisome, and attempts to install a firm grip on the power centres in the state and politics (as well as in the economy) are potentially damaging to the quality of pluralistic democracy and the rule of law. Whereas this kind of democratic reversal is often called 'illiberal practice', it is probably more adequate to talk about changes in the political system caused by ambitious ideological agendas of political, societal, and economic remodelling, or simply about 'ambitious transformation'. However, there is a second type of democratic deficit which is often overlooked or put in other contexts in spite of its high relevance: the erosion of democracy due to a lack of transparency and the existence of powerful corruption networks. In the following, both types of democratic deviance are shortly discussed.

1.1. *Changes of democracy as a result of 'ambitious transformation'*

After the elections in Hungary in 2010 and the landslide victory for Viktor Orbán and his conservative Fidesz party, developments in this country have given rise to doubts about the stability of democracy and the rule of law. Whereas the government in Budapest has constantly argued that it did not harm democratic standards, and that the storm of disapproval was initiated by ideological opponents in the country and abroad, a huge number of bold legislative measures (including the passage of a new constitution) and other political steps have substantially reorganized Hungarian politics and the appearance of Hungarian democracy. In Poland, the elections of autumn 2015 brought a national-conservative government to power. The winning Law and Justice (PiS) party began to swiftly implement thorough political change concerning the state, the economy, and the media. Especially the conflict around the Constitutional Tribunal, i.e. the squabbles about nominations of new judges and changes in the way the functioning of the court,[3] have led to complaints from within the country and from

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3 Cf. *A. Jaskulski*, The Polish road to an illiberal democracy, in this publication.

abroad that the government does not abide to democratic 'rules of the game'.

Irrespective of the definitive assessment of these steps, there is no doubt that they alter the framework of democracy. Not only opponents to such policies, but the governments themselves have declared that they intend to initiate major change in order to 'improve' the quality of democracy and rule of law. This kind of political change entails modifications to democratic practices as part of a broader agenda of reconstruction and transformation – be it political, economic or societal, or to the system as a whole. Governments disposing of clear or even supermajorities after democratic elections use their power to carry out demanding and often comprehensive programs of deep reforms. In their reasoning the governing forces usually emphasize the difficult or even dramatic situation of their countries, which requires appropriate, i.e. far-reaching remedies. In order to attain their goals, the governments in power need sufficient political leeway, thus institutional or procedural obstacles must be contained or removed. Three main tenets are especially characteristic of this kind of 'ambitious transformation'.

Firstly, proponents of ambitious transformation conduct politics according to the principles of majoritarian democracy and majoritarian legitimacy. They argue that due to their convincing victories in democratic elections, they have the right and the mandate to execute significant measures. Hence, their guiding principle of democratic practice is neither deliberation nor compromise, but "numeric democracy"[4]. The basic, unlimited, and unquestionable source for their political action is the will of the people, as it is enacted in the composition of the legislative body and the government accountable to it. This means a strong commitment to what is seen as rule by (the majority of) the people – i.e. popular sovereignty – and a clear declaration of parliament's primacy in the political process (irrespective of a *de facto* dominance of the executive branch or the leadership of the ruling party). Also, in the case of conflicts between branches of government, final decision-making rests with the electorally mandated parliamentarian or executive powers. As they enjoy a high level of legitimacy and enact the will of voters, they should not be restricted by a

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4 Cf. *P. C. Schmitter, A. H. Trechsel*, The Future of Democracy in Europe: Trends, Analyses and Reforms. A Green Paper for the Council of Europe, Strasbourg 2005.

'politicized' judiciary and especially the constitutional court, which is not supposed to act as a quasi-chamber of parliament.

Secondly, transformative governments and their majoritarian understanding of democracy imply a tendency to accumulate power and a more-or-less developed inclination to penetrate demarcated lines between separate branches of government. Instead of structural dispersion of power and institutional restraint of government action, the limitation of anti-majoritarian resources and hedging of minority reassurance are typical of their definition of democracy. Instead of an effective system of checks and balances, the philosophy of a cooperative relationship between the elements of the political system dominates.

Thirdly, in a broader sense, ambitious transformative politics is connected with an antagonistic definition of politics, and so is often accompanied by a substantial political polarization. To some extent, transformative politics, in the way it is described here, casts doubt on the legitimacy of the parliamentary opposition and on other independent political and societal actors.

It should be mentioned that these hallmarks of democracy in transformative politics are embedded, motivated, or fuelled by the ideological background of their proponents. As their core objective of change is to establish an autonomous or alternative model of social, political, and economic development and to challenge "liberal universalism",[5] they also contest the liberal version of democracy as a product of the Western or European normative mainstream.

1.2. The erosion of democracy

The second type of democratic deficits in EU member states results primarily from deficits in governance. The interplay of corruption, clientelism, nebulous but powerful networks, organized crime, and an ineffective judiciary has resulted in the weakening of fundamental factors for democratic accountability and the rule of law. As opposed to 'ambitious political transformation', governments in countries with this form of democratic shortcomings do not want to change the political *status quo*.

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5 *G. Schöpflin*, Why Western liberals misunderstand Hungary, 'Politico', 10.10.2015, www.politico.eu/article/western-liberals-have-misunderstood-hungary-migration-geneva-convention [access 01.03.2017].

On the contrary, they want to preserve the *status quo*, which is based on permanent non-transparency and which provides selective advantage to the participants of networks and structures of patronage. It is some 'older' member states in the Southern part of the EU and 'younger' members from South-Eastern Europe like Romania, Bulgaria, and Croatia which represent this kind of partially ineffective and limited democracy. Of course, acute attempts to expand powers against political opponents do also occur – as the events in Romania in 2012 have shown. The social-democratic government of Victor Ponta, during its conflict with president Traian Băsescu (whom it wanted to impeach and thus initiated a necessary referendum), attempted to contain the constitutional court, which for example had ruled that it was unconstitutional to lower the 50%-threshold for the validity of the referendum to oust the president.

Typical for constrained democratic systems of this kind are the existence of strong networks of enrichment (which can be found across the political spectrum), weak ideological divides between political parties, strong personal loyalties, and well-established grids of contacts and mutual benefits. Regarding political actors in office the seeking attitude is dominating over policy seeking postures, since the control of offices opens up access to resources and funds. Corruption is a key issue of political debates and conflict, but fighting it effectively is difficult, because anti-corruption events often fail due to mighty vested interests and an unconducive political culture.

2. How to respond?

The EU has tried to address possible democratic backsliding in various ways. After taking unskilled and ineffective actions against Austria in response to the 2000 inclusion of Jörg Haider's nationalist Freedom Party (FPÖ) into a coalition government with the centre-right People's Party (ÖVP), the discussion about an appropriate response to related developments in member states brought some results. Specifically, the EU established new legal and political instruments to redress possible violations of basic principles of democracy and the rule of law. In this context, formal and informal instruments and reactions can be distinguished.

2 1 Formal instruments

Looking at formal instruments, there are fundamental differences between the severity and the political intensity of possible sanctions. In principle, the EU can respond on three levels of action.

So called 'infringement proceedings' are situated politically on a rather low level. These proceedings are steps taken against member states if they do not fulfil treaty obligations. There are five basic forms of infringements against which action can be taken by the European Commission: 1) violations of treaty provisions, regulations, and decisions; 2) lacking transposition of directives into national law; 3) improper implementation of directives; 4) incorrect application of directives, and 5) non-observance with judgments of the European Court of Justice (ECJ).

If a member state does not comply, the Commission can turn to the ECJ, which is entitled to impose financial penalties. Whereas infringement proceedings are tried and tested instruments that can target member state non-compliance, their use in order to redress undesirable developments in the realm of democratic standards is limited. This has to do with the character of the procedure, which is necessarily highly specified and technical. It is true that member states can hardly evade the intentions of the Commission or the ECJ if there is a clear judgment by the court, but member states' governments can easily turn infringement proceedings into a bureaucratic and legal exercise without a significant political dimension. Governments also can adapt incriminating laws in a way that formally satisfies the Commission or the ECJ, but which does not abolish the main political intention of the original provision. All in all, the Commission will always face the challenge of using the formalized infringement proceedings in order to fight possible violations of general values and principles.

> "In other words, the infringement procedure is most effective in enforcing legal norms where they are very clear, and much less effective where norms are uncertain or vague […]. Whereas many EU regulations and directives are highly detailed in a way that facilitates enforcement […], the EU's requirements concerning fundamental values remain vague […] and, therefore, do not provide a sufficient basis for legal action."[6]

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6 *M. Blauberger, R. D. Kelemen*, Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU, Journal of European Public Policy, 24:3 (2017), p. 321-336, p. 325.

On the high end of the EU response is Art. 7 of the Treaty on European Union.[7] The new stipulation for democracy protection was enshrined as a consequence of the above mentioned experience with Austria.

> "Article 7 TEU is considered to have been both a gesture prompted by the future wave of EU enlargement and an attempt to tackle the discrepancy between the democratic model promoted by the EU in its external relations and its modest capacity to intervene whenever democratic values are at risk of being violated within one of its Member States."[8]

Article 7(2) grants the EU the ability to impose far-reaching sanctions on member states that breach democratic values in a "serious and persistent" way. The European Council can suspend membership rights, e.g. the right to vote in the Council. Apart from this penalty mechanism a preventive arm is foreseen in Art. 7(2): The Council "may determine that there is a clear risk of a serious breach" of democratic values (as mentioned in Art. 2, which is the reference article of all Art. 7 steps). Article 7, often called the 'nuclear option', has a strong capacity to punish democratic non-performers, but it has never been applied so far. The high thresholds, which have to be overcome to apply both the preventive and the penalty mechanism, are one reason for this. Determining the "risk of a serious breach" in the sense of Art. 7(1) requires a majority of four-fifths of member states after having received the consent of the European Parliament. The decision to actually stipulate that there is a serious breach (and not only a risk) has to pass an even higher hurdle. After having obtained the consent of the European Parliament the European Council has to act unanimously – of course, without counting the vote of the state concerned.[9] For theses demanding rules, but also due to the reluctance of member states

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7 Cf. *G. Budó*, EU Common Values at Stake: Is Article 7 TEU an Effective Protection Mechanism?*,* Documents CIDOB, No. 1, May 2014; *M. Bonelli*, Safeguarding values in the European Union: the European Parliament, article 7 and Hungary, SOG Working Papers 28, LUISS School of Government, October 2015.

8 *European Parliamentary Research Service Blog*, Article 7 TEU: a mechanism to protect EU values, 07.10.2013, https://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/ [access 01.03.2017].

9 Once the determination of Article 7(2) is taken, the step to impose sanctions is easier. Rights can be suspended by a qualified majority in the Council – Article 7(3).

and to solidarity within European party families, it is no surprise that Art. 7 has not yet been used.[10]

Owing to the limited applicability of those instruments, the EU has tried to close the gap between Art. 7 with its high thresholds on the one hand and the technicality of infringement proceedings on the other hand. Whereas experts and the political sphere have been calling for an upgrade of the infringement approach (e.g. by bundling action against isolated infringements together in order to target a systematic violation of fundamental values) or other methods to improve existing means,[11] only three innovations have found support in the EU: 1) the Council's Rule of Law Dialogue, 2) an EU Justice Scoreboard and 3) a Rule of Law Framework.

The Rule of Law Dialogue is an instrument through which member states have:

> "commit[ed] themselves to establishing a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties".[12]

Emphasizing the determination to act "without prejudice to the principle of conferred competences" or "respect for national identities of member states", it was clear from the outset that the annual dialogue would be rather cautious, since there was obviously no critical mass of member states that would be pressing for a more compelling approach in the Council. Hence it came as no surprise that the first meetings of the Dialogue did not touch upon potentially sensitive issues like the state of democracy or the judiciary in member states. The first Dialogue dealt with the tension between counter-terrorism measures and the observance of human rights. The second meeting focused on the respect for fundamental rights in the context of the refugee crisis and challenges of integration. In sum, the Dia-

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10 "[A] combination of voting rules, member state preferences and party politics make it difficult to use Article 7", in *U. Sedelmeier*, Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, Journal of European Public Policy, 24/3, 2017, p. 337-351, p. 339.

11 Cf. *M. Blauberger, R.D. Kelemen*, Can courts rescue national democracy?, p. 329f.

12 *Conclusions* of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law, General Affairs Council meeting, Brussels, 16.12.2014.

logue has been described as "rather non-committal [displaying] the limitations that typify weak open coordination processes".[13]

The EU Justice Scoreboard has also shown limited effects. The Scoreboard is supposed to regularly monitor the state of the rule of law in member states. However, the Scoreboard is connected to the European Semester and its country specific recommendations, i.e. a framework of the reformed economic governance mechanisms of the EU. For that reason the Scoreboard and the indicators it is based upon are seen as rather narrow, referring too much to the functionality of the single market.

> "[It] is therefore more suitable as an instrument to guide reforms to improve the efficiency of national justice systems, rather than for assessing their role in guaranteeing checks and balances and thus as a tool to identify threats to liberal democracy."[14]

The EU Framework to strengthen the Rule of Law is a tool, which has been communicated by the Commission in spring 2014.[15] The basic aim of the mechanism is

> "to ensure an effective and coherent protection of the rule of law in all Member States. It is a framework to address and resolve a situation, where there is a systemic threat to the rule of law."[16]

The Framework, which is triggered and implemented by the European Commission, operates outside the procedures of Art. 7, yet at the same time refers to it and is complementary to it, since it tries to:

> "resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms."[17]

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13 *A. Schout, M. Luining*, Diagnosing the EU's Rule of Law deficit, Towards a Public Management approach, Draft policy paper for discussion, 06.12.2016, https://www.clingendael.nl/sites/default/files/Diagnosing%20the%20EUs%20Rule%20of%2 0Law%20deficit%20-Discussion%20Paper%20SchoutLuining.pdf [access 01.03.2017].

14 *U. Sedelmeier*, Political safeguards, p. 347.

15 *European Commission*, Communication from the Commission to the Council and the European Parliament, A new EU Framework to strengthen the Rule of Law, Brussels, 19.03.2014, COM(2014) 158 final/2, http://ec.europa.eu/justice/effective -justice/files/com_2014_158_en.pdf [access 01.03.2017].

16 Ibid.

17 Ibid.

The Rule of Law Framework is based on a structured and phased dialogue, which can comprise up to three stages. In an initial step, the Commission can issue a 'rule of law opinion' to the member state in question. If concerns continue to exist, the Commission may release a 'rule of law recommendation' with specific measures to tackle deficits. This recommendation includes a deadline. Finally, if in the eyes of the Commission the member state has not resolved the problems in a satisfactory way, the Commission can initiate one of the options of Art. 7. The Framework was applied for the first time at the beginning of 2016, when the Commission initiated a related investigation against the Polish government.[18]

Even though the Framework has no coercive power and its ultima ratio is the activation of Art. 7 (which the Commission could also refer to without the existence of that mechanism), it brings a couple of advantages. It gives the Commission an instrument that goes beyond the scope of mere infringement proceedings and is transparently structured. It also sends a clear signal that "Brussels is active". During the rule of law procedure, the member state in question, at least to some extent, is the focus of debates and political attention in the EU and at home. Even though – in case of complete non-compliance by the member state – at the very end the Commission will meet the impediments of Art. 7, the option of activating it as the last stage of the process is inconvenient for the government concerned. With regard to member states, the Framework gives the Commission an autonomous instrument to act without the consent of member states and according to its role as nonpartisan guardian of the treaties.

Of course, due to the link to Art. 7, the final prospects for Commission action are restrained by member states' interests and party politics. Above all, there is still some legal uncertainty over the Framework, as the Council Legal Service delivered an opinion according to which the whole mechanism might not be lawful given that monitoring and dialogue processes beyond Art. 7 are not envisaged by EU law.[19]

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18 *D. Kochenov, L. Pech*, Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation, Journal of Common Market Studies, 54/5, 2016, p. 1062-1074.

19 Cf. in their critical review of the opinion *P. Oliver, J. Stefanelli*, Strengthening the Rule of Law in the EU: The Council's Inaction, Journal of Common Market Studies, 54:5, 2016, p. 1075-1084.

2.2. Informal instruments

Apart from formal mechanisms the EU can take advantage of various informal practices to exert influence in situations of 'democratic ill-behaviour' in member states. Naming, shaming, and blaming are traditional means of giving soft, but potentially effective, pushes to governments with tendencies toward democratic backsliding. Persuasion and shaming have had considerable implications during the accession processes of future EU members within the enlargement policy framework. In that situation, the EU had substantial leverage and sent strong messages to a membership aspirant e.g. during the regular reporting on progress in accession negotiations could not be ignored by governments as they could complicate their country's way into the community. However, soft nudging becomes less effective after accession, since governments, especially those that dispose of clear political support at home, do not simply back down to peer pressure from formally equal partners or bodies, which are considered 'technocratic' like the European Commission.

Nevertheless, the EU has sometimes resorted to informal action, or at least hinted at its use. Social or rather political pressure by EU institutions has been applied in the conflict with the Romanian government in 2012.[20] Under specific circumstances, the EU was able to convince the Romanian PM Ponta to reverse his measures during the quarrel with president Basescu. Whereas the success of EU measures was rightly attributed to low compliance costs (the Ponta government could pursue its objective of toppling Basescu with other means, albeit less efficiently), the weak political position of Romania and the Ponta government in the EU might also have had contributed to the flexible stance of the latter. Even though Ponta was part of the European social democracy, his party has a rather marginal relevance in the group, and Romania – due to numerous lingering problems after accession – needed and still does need EU support in various areas.

In this context party politics plays a special role. Whereas the membership in an influential European party network gives national governments protection (see below), it can also open up direct channels of communication and pressure. Influencing friends and partners can be easier than influencing ideological opponents, and can occur behind closed doors. Provided there is political will among members of the party association, they

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20 Cf. *U. Sedelmeier*, Political safeguards against democratic backsliding, p. 343f.

can also signal that maintaining problematic practices can lead to a loss of support or even membership. In 2006, the Slovak PM Robert Fico and his party Smer faced serious criticism for having formed a government coalition with nationalists and populists. Smer's membership in the European social democracy was suspended, even though the association finally abandoned its tough stance in spite of Fico's continued cooperation with the far right-wing Slovak National Party. The argument was that there were no serious developments in discrimination against minorities or other rule of law violations.

Another way to exert influence is issue linkage. This concept of politics in general, or international relations more specifically, is based on the idea of tying together diverse policy areas or negotiation dossiers to achieve an acceptable bargain. Trading across issue areas is a key feature of European affairs, since it has facilitated complex and multifaceted negotiations with divergent interests. Issue linkage can also be used to put pressure on a partner country in order to change its behaviour. Examples for such linkages are a possible conditionality of progress in rule of law reports (so called cooperation and verifications mechanisms) for Bulgaria and Romania and membership to the Schengen zone; access to a loan of the International Monetary Fund for Hungary in exchange for re-establishing the independence of Hungary's national bank; or attempts to sanction Hungary for an excessive budget deficit by freezing cohesion funds (which taken as such is a measure of the fiscal policy architecture of the EU, but its strict application would have been connected with domestic political developments that formally are unrelated to the situation of national public finances).[21]

3. The limited effectiveness of EU action

3.1. Counter-strategies of countries in question

Governments that are criticized for alleged violations of basic values and democratic cutbacks do not simply bide their time and watch events un-

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21 Cf. *U. Sedelmeier*, Anchoring democracy from above? The European Union and democratic backsliding in Hungary and Romania after accession, Journal of Common Market Studies, 52/1, 2014, p. 105-121.

fold. They adopt strategies and counter-strategies in order to hamper the effectiveness of EU measures.

One way to dilute external criticism is to launch alternative narratives and dialogues about the substance of the principles and values in question. Governments with a tendency to curb individual freedoms will not declare disdain for freedom and liberty, but instead will emphasize the importance, or even priority, of collective and national freedoms.

Another counter-strategy is a mixture of flexibility and determination. Governments that have crossed red lines and been issued with related decisions by the Commission or the Court of Justice will adapt their national regulations in order to comply with EU regulations, but may try to circumvent them via other ways. In the case of the Hungarian media law, the Hungarian government was prepared to change all the points, which were criticized by the Commission. Albeit due to limited possibilities to force Budapest to alter the law in a comprehensive way, the EU had to accept that the bulk of the law's provisions continued to exist. After the dispute with the Commission, the Hungarian government was better situated because it had not only 'rescued' the substance of the original text, but was able to gain EU certification.

On the political level, member states can always establish informal groups of friends or relations with like-minded countries. The most visible case in the context of rule of law has been the Polish-Hungarian mutual support between the ruling parties PiS and Fidesz. At an early point of the discussions about possible democratic backsliding in Poland, Hungary's PM Orbán announced that he would not allow the EU to interfere in Poland's domestic affairs.[22] It is clear that such a defensive alliance works in both directions. Even with less ideological background, governments under pressure from the Commission can easily count on support from the considerable group of non-interventionist member states, which then act a sort of safeguard against the Community institutions.

Party politics, or more precisely 'party solidarity', is another important way to mitigate EU action against possible misbehaviour on democratic issues by member states. Irrespective of the possible avenues of influence due to ideological proximity, which have been mentioned above, the mutual membership in the same party family usually means loyalty also with

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22 *Financial Times*, Orbán promises to veto any EU sanctions against Poland, 08.01.2016.

'difficult' partners. Most European parties have accepted a growing heterogeneity in their ranks, and a consistently hard line against 'problematic' members could easily cause the loss of substantial member parties or members of the political group in the European Parliament. The effects of party loyalty can be clearly observed in the cases of Hungary and Poland: whereas the PiS-government has to come to terms with the Rule of Law Framework, the Fidesz-government(s) has avoided the application of this mechanism in spite of fierce criticism from EU-institutions and member states. This is a visible difference that certainly contains a party-politics dimension (despite the 'non-partisan' Commission triggering the Framework, partisan considerations also play a role in the decision making of that body and in the preferences of particular Commissioners). In other words, Fidesz' membership in the European People's Party is a reassurance, of which Poland's PiS (as a member of the European Conservatives and Reformists group) does not dispose.

Finally, governments under pressure can stage the conflict with the EU as a big battle between 'Brussels', or the external world, on one hand and the national interest, or the people's will, on the other hand. As a consequence of the 'rally-round-the-flag' effect governments, which are supposed to be weakened by EU action are strengthened – their support tends to increase, whereas the EU risks to become less popular.[23]

3.2. *Some thoughts about effectiveness*

The last point in particular warrants a note of caution against high expectations for the effectiveness of EU action. A major impediment can be domestic aversion against external interventions, also a variety of restrictions in the political system of the EU including member states' interests and ideological components play a significant role. So, all debates about EU measures to redress democratic deficits should be realistic and aware of certain limitations. Nevertheless, the EU can have some impact under certain conditions. These conditions exist on many levels: on the level of the member states, on the EU level, and on the level of inter-state relations between EU member states and other actors in European policy. Bearing in

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23 *B. Schlipphak, O. Treib*, Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding, Journal of European Public Policy, 24/3, 2017, p. 352-365.

mind the complex interrelations between these factors, some tentative hypothesis can be formed.

1. EU action can have some effectiveness if public opinion in a member state is generally pro-European. In this case, conflicts with EU institutions – be it symbolic or soft encounters – are inconvenient for the government. Substantial sections of society or the electorate and powerful interest groups (e.g. from industries or regions) might be sensitive to criticism from Brussels, since they fear their country's broader political position in the EU deteriorating or being side-lined in the political process of the Union and thus losing benefits. Even though this might be partially offset by mobilization against foreign forces, in countries with a considerably Europhile public, the government cannot simply neglect domestic demands for embarking into dialogue with EU institutions. Of course, being 'pro-European' is quite a vague notion. It does not mean simply support for EU-membership, but entails a more active identification with European integration and a widespread feeling of ownership concerning European affairs.

2. EU action has greater potential for effectiveness if the country concerned is a *demandeur* in European politics. This means that either the country's general level of ambitions is high (e.g. because it considers itself an important shaper of international or European affairs), or it is in a situation that involves peculiar interests in important policy areas. Both factors facilitate issue linkage and can prepare a member state to act in more pragmatic ways.

3. EU effectiveness tends to be low whenever a member state accused of democratic wrongdoing is able to rely on close allies (either by being part of an influential party family or by having ideological friends). Ideological closeness, for example to anti-interventionist or sovereignist governments, is highly stable. Party loyalties can be weakened if the position of the party in the broader group is low.

4. The impact of EU measures tends to be low if the Union is preoccupied with other pressing issues or crises. It is particularly the mode of being faced with permanent and multiply crises, which attracts attention and political resources. The governments in question argue that domestic affairs are not only an off-limits area for Brussels, but also that possible deficits in a member state's rule-of-law are less relevant than financial or security crises of existential proportion.

5. EU attempts to compel member states to comply with democratic principles will face serious problems as long as there is no consensus about the nature of those core principles. This consensus will not emerge without a solid and balanced discussion about the varieties of democracy. Irrespective of the label, what is called 'liberal' or 'Western' democracy has many national specifications concerning, for example, the role of constitutional courts or the separation of powers (e.g. parliamentary sovereignty vs. strong judicial review). Therefore the EU and member states, instead of talking about abstract and general values, should rather work on a mutually defined and operationalized agreement on the bandwidth of Western democracy, i.e. of sub-types of democracy, which still are part of the EU consensus, and of sub-types, which have overstepped this field.

Given all this, it is unlikely that the EU will be able to develop an effective democracy policy toward its own members. The use of innovative mechanisms like the Rule of Law Framework and other instruments will not create an effective toolbox for EU intervention, but will rather show that member states continue to dispose of huge leeway to re-create democracy. Hence, the EU will have to live not only with a number of rule-of-law underperformers, but also with member states that display democratic malfunctions. This has implications for internal cohesion and external action, and for European identity and its ability to act as a community of values in international politics.

Direct democracy vs. European solidarity – 2016 British and Hungarian referenda

Magdalena Musiał-Karg[*]

1. Introduction[1]

The foundations of a united Europe – in the beginning of the process of integration of the old continent – were laid on acknowledged fundamental ideas and values, such as peace, unity, equality, freedom, security and solidarity. Undoubtedly, democracy – next to these universal values – has always been perceived as one of the key elements of each state involved in the processes of European integration.

Without fulfilling the requirement of being a democratic state with free and fair elections and respecting human rights a country was not able to join the European Union. Without doubt, in all member states of the European Union (EU) there is a democratic regime, but "there are apparently differences of opinion about the specifics (for example, disagreements between the European institutions and member states such as Poland or Hungary over constitutional tinkering)".[2] In such situations the EU tries to persuade certain countries to respect the fundamental principles of democracy by, for example, debating their internal developments in the European Parliament (EP).

The principle of solidarity is a fundamental European norm based on sharing both the advantages, i.e. prosperity, and the burdens, equally and

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2 *Debating Europe*, What are European values?, 29.01.2016, http://www.debatingeurope.eu/2016/01/29/european-values/ [access 03.01.2017].

justly among EU members.[3] It should be emphasised that the debate de-
voted to European solidarity has seen a significant boost since 2008, when
many European countries (e.g. Spain, Italy, Portugal, and Greece) were hit
by the global economic crisis.[4] The EU member states from southern Eu-
rope have been severly affected by the economic and financial crisis. Un-
doubtedly, their governments' efforts to minimise the consequences of the
crisis have led to major institutional changes and turning points for the
welfare state or labour relations. The eurozone crisis has left Greece in the
biggest recession ever. It seems that since 2010 the EU has been facing the
worst economic crises in its history.

It is argued that the Brexit referendum was to some extent a result of
the failure of economic and monetary union (EMU), even though the Unit-
ed Kingdom (UK) is not even part of the eurozone.[5] The arguments of fi-
nancial nature put forward by the opponents of UK membership in the EU
have been cited very often in the public debate and in the campaign before
the referendum. According to some commentators, the referendum on fur-
ther EU membership became a sign of UK lack of solidarity with other EU
member states – particularly those affected either by the financial and/or
refugee crisis.

> "[A]t the same time, Europe has been flooded with millions of migrants and
> refugees fleeing conflicts in Syria, Afghanistan, and Iraq, triggering strong
> domestic opposition and straining the economic and political resources of EU
> member-states."[6]

The European migrant and refugee crises have shown a serious division
over the understanding of fundamental values of the EU. The standpoints
of some EU member states (e.g. the Visegrád group countries) have
demonstrated that solidarity is defined in a different way than it is for ex-

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3 *Eurofound*, Solidarity principle, 04.05.2011, https://www.eurofound.europa.eu/obse
  rvatories/eurwork/industrial-relations-dictionary/solidarity-principle [access
  03.01.2017].
4 *M. Kontochristou, E. Mascha*, The Euro Crisis and the Question of Solidarity in the
  European Union: Disclosures and Manifestations in the European Press, Review of
  European Studies, Vol. 6, No. 2, 2014, p. 50.
5 *J. Warner*, The euro has destroyed the EU and led directly to Brexit, Telegraph,
  26.08.2016, http://www.telegraph.co.uk/business/2016/08/23/the-euro-has-destroye
  d-the-eu-and-led-directly-to-brexit/ [access 02.12.2016].
6 *WISC*, Europe in Crisis: Finance, Migration, Brexit and the Future of the European
  Union, University of Wisconsin-Madison, http://europe.wisc.edu/events /europe-cri
  sis-finance-migration-brexit/ [access 05.01.2017].

ample in Germany. The referendum of October 2016 initiated by the Hungarian government has therefore been described as the national referendum against European solidarity.[7]

The practice of using direct democracy instruments in EU member states shows that, besides numerous referenda held on matters of state, 'European issues' have become an increasingly popular subject of public debate followed by public voting. The stimulus to analyse the British and Hungarian referenda in 2016 was provided by the topicality and importance of the respective referendum issues both for the United Kingdom and Hungary, as well as for the whole European Union. The main thesis proposed in this paper is that in recent years referenda have become very popular instruments for making decisions with respect to European crises (Brexit, migrant crisis). It is argued that these national referenda seem to be manoeuvres by certain countries against the European Union, its solidarity and common interests. The main objective of this paper is to answer the question about using referenda on issues of European integration and about the course and consequences of the 2016 British and Hungarian referenda for the EU and for further use of direct democratic tools to decide European issues.

Using a national referendum to make decisions pertaining to the process of European integration is far from being a new phenomenon since the first such referendum was held as early as 1972. Since then, European integration has been the subject of nearly 60 national referenda in EU member states, candidate countries and in third countries bound to the EU (and its predecessor the European Communities) by all kinds of bilateral agreements (such as Switzerland or Liechtenstein). Although the majority of lessons learned in the process of holding referenda on 'European issues' are apparently positive, there have also been cases when referenda generated problems both for member states and the EU, for example when these concerned ratifying EU treaties.[8]

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7 *D. C. N. Raynold*, National democracy vs. European solidarity: Hungary's referendum on refugees, 01.10.2016, http://www.katoikos.eu/analysis/national-democracy-vs-european-solidarity-hungarys-referendum-on-refugees.html [access 05.01.2017].

8 Cf. *M. Musiał-Karg*, Referendum w państwach europejskich. Teoria, praktyka, perspektywy, Toruń 2008; *id.*, Instytucje demokracji bezpośredniej w procesie integracji europejskiej – od referendum ogólnonarodowego do europejskiej inicjatywy obywatelskiej, Rocznik Integracji Europejskiej, no. 6, 2012.

The 2016 United Kingdom European Union membership referendum was the 58th referendum on European issues and the third instance, following the vote in Greece of July 5, 2015 (on accepting financial aid on account of a financial crisis) and that in Denmark of December 3, 2015 (on advanced collaboration with the EU in justice and home affairs), where voters expressed their disapproval of deeper European integration. Attitudes of EU member states' societies like this make it possible to state that scepticism by European citizens towards integration processes in the 'old' continent is growing, which was probably triggered on the one hand by the financial crisis the EU has been struggling with since 2008, and on the other by the refugee crisis which the EU seems unable to resolve. These difficulties are probably exacerbated by problems over economic migration from 'new' EU member states into some countries of the 'old' EU-15 which frequently translates into resistance by the latter. Both 2016 referenda in the UK and in Hungary seem to respond to the crises mentioned above.

Furthermore, the EU seems to have accumulated somewhat traumatic experience concerning referenda on several treaties which had to be held twice, as the 'first' referenda held in some countries were contrary to advocates of deeper European integration.[9] This can be exemplified by the popular vote in Denmark in 1992 and 1993, on adoption of the Maastricht Treaty, or the repeated Irish referenda on the Nice Treaty (in 2001 and 2002) and on ratification of the Lisbon Treaty (in 2008 and in 2009). Two further national referenda on the 2005 Constitution for Europe Treaty should also be mentioned here. Both of these – in France on May 29 and in the Netherlands on June 1 – brought negative results, thereby causing a 'ratification crisis' in the European Union. This made other member states planning to hold referenda on the same issue (except Luxemburg, where a referendum was held on July 10) to suspend voting (e.g. the United Kingdom).[10] In June 2005, a 'time to reflect' on the Constitutional Treaty was announced, indicating that it would be practically impossible to adopt the document in the form as agreed in 2004.

After the Lisbon Treaty, aiming to modify earlier EU treaties (by means of incorporating a portion of the Constitutional Treaty provisions, among

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9 *M. Musiał-Karg*, Europejska inicjatywa obywatelska – uwagi na temat roli obywateli w procesie integracji europejskiej, Rocznik Integracji Europejskiej, no 8, 2014, p. 81-82.

10 Ibid.