

Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and ‘Value’ Differentiated Integration

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Abstract: *Constitutional pluralism (CP) and differentiated integration (DI) have been criticised as potentially legitimising democratic backsliding within the EU. Critics contend that effective measures require strengthening the legal authority of the Court of Justice of the European Union and the political authority of the European Commission. We dispute this criticism, which rests on a federal conception of the EU at odds with its confederal features. We argue that the value of democracy for the EU derives from pluralism between as well as within states, thereby justifying CP and DI. While both prove incompatible with democratic backsliding, they challenge the legitimacy of the strong assertions of federal authority some advocate to tackle it. Drawing on CP, we propose four criteria for EU action against backsliding regimes, and suggest processes and penalties that meet them. We liken the latter to ‘value’ DI, whereby backsliding states can be excluded from EU funding and voting rights.*

Zusammenfassung: *Verfassungsppluralismus (VP) und differenzierte Integration (DI) waren in der Vergangenheit dem Vorwurf ausgesetzt, demokratisches Backsliding in der EU zu legitimieren. Kritiker argumentieren, dass effektive Massnahmen die juristische Stärkung des Gerichtshofes der EU und die politischen Stärkung der Europäischen Kommission beinhalten müssen. Wir hinterfragen diese Perspektive, die auf einer föderalen Sicht der EU beruht, aber deren konföderalen Merkmalen zuwiderläuft. Wir argumentieren, dass sich der Wert der Demokratie in der EU aus dem Pluralismus innerhalb sowie zwischen den Mitgliedstaaten ergibt und somit VP und DI rechtfertigt. Beide sind mit demokratischem Backsliding unvereinbar, stellen jedoch die Legitimität starker föderaler Antworten in Frage. Ausgehend von einer verfassungsppluralistischen Perspektive entwickeln wir vier Kriterien, denen jegliche EU-Massnahmen gegen demokratisches Backsliding genügen sollten und schlagen Prozesse und Sanktionen vor, die diesen Kriterien gerecht werden. Wir nennen diese ‘wertebezogene’ DI, und verbinden damit den Stop der Ausschüttung von EU-Mitteln sowie die Aberkennung von Stimmrechten im Rat.*

Résumé: *Le pluralisme constitutionnel et l’intégration différenciée ont été accusés de légitimer le recul démocratique au sein de l’Union Européenne (UE). Certains critiques soutiennent qu’il faut renforcer l’autorité de la Cour de Justice de l’UE et de la Commission Européenne. Nous contestons cette critique qui s’appuie sur une conception fédérale de l’UE en décalage avec ses traits confédéraux. Nous considérons que la démocratie en Europe est fondée sur un double pluralisme, celui au sein des états-membres et celui entre les états-membres, qui justifie le pluralisme constitutionnel et l’intégration différenciée. Ces derniers sont incompatibles avec le recul démocratique, mais ils mettent aussi en question la légitimité de certaines revendications d’autorité fédérale proposées pour y faire face. Nous proposons quatre critères auxquels l’action de l’UE en*

réponse à ces reculs démocratiques doit se conformer et recommandons des processus et des sanctions en adéquation avec ces critères. Ces derniers outils permettent de bloquer l'accès aux financements européens des états-membres incriminés, et de limiter leurs droits de vote au sein du Conseil de l'UE.

KEYWORDS: Differentiated Integration, Democratic Backsliding, Pluralism, Constitutionalism, European Union

Introduction

Recent developments in Hungary and Poland have pushed the issue of democratic backsliding to the centre of political and academic debates about the nature and future of the European Union (EU). Democratic backsliding consists of a retreat by an incumbent government from democratic values and practices with the intention of curtailing criticism and inhibiting democratic opposition. As such, it involves a shift from democracy towards autocracy. This article seeks to show that a constitutional pluralist approach can offer a theoretically coherent rationale for the EU acting against such regimes, including applying conditionality requirements to the receipt of EU funds and removing certain voting rights in the Council - measures which we dub 'value' differentiated integration (DI).

Our defence of this approach is premised on a broadly confederal and what has been termed a demoiocratic view of the EU, and seeks to rebuff criticisms of constitutional pluralism (CP) and DI stemming from a more federal perspective. Confederal and federal are terms of art, and involve both descriptive and normative elements (Barber 2019). We understand a federal perspective on the EU as characterising its institutional framework as one in which authority is divided between different levels, in the EU case between the supranational and the member state (MS) level, with each level having the final decision on different issues, and with a federal court - the Court of Justice of the European Union (CJEU) - adjudicating disputes concerning federalism (Kelemen 2003: 185). By contrast, the demoiocratic view questions the first two elements, noting that the supranational level has strong intergovernmental aspects, and is a form of shared authority between the constituent parts that 'govern together but not as one' (Nicolaidis 2013: 351). For parallel reasons, explored below, they also dispute the third element of the federal perspective, contending, as per CP, that national constitutional courts and the CJEU likewise share authority as to which competences have been conferred on the EU and on what terms.

Some scholars of a federal persuasion doubt the coherence of the demoiocratic and constitutional pluralist approach, and see democratic backsliding as particularly revealing of its weaknesses (Kelemen 2016). They note how certain intergovernmental and demoiocratic features of EU governance, such as the need for consensus in the Council to trigger Article 7 (Müller 2015) or the way party groups in the European Parliament (EP) operate as coalitions of national parties (Kelemen 2017), have weakened the EU's response to democratic backsliding. They regard CP as similarly bolstering democratic backsliding regimes to resist EU action against them, by challenging adverse judgments by the CJEU or actions against them by the Commission as either *ultra vires* or invalid (Kelemen et al. 2020). Likewise, they see DI as offering a mechanism whereby these regimes might seek to opt-out from a commitment to meet the democratic standards enumerated in Article 2 as pre-conditions of EU membership (Kelemen 2019). These scholars advocate a more federal

approach, involving a more proactive role for the EU's supranational institutions, particularly the European Commission and the CJEU, potentially backed by a new 'Copenhagen Commission' (Müller 2015), dispute the validity of challenges from national constitutional courts to CJEU judgments (Kelemen et al. 2020, Von Bogdandy and Spieker 2019), and seek to weaken the blocking potential of the Council (Müller 2015, Blauberger and Kelemen 2017). By contrast, we propose a greater role for independent monitoring bodies as well as the opposition and civil society actors within the targeted MS and beyond (Schlipphak and Treib 2017). We shall argue that CP can supply such accounts with theoretical backing, legitimising measures that also constitute forms of what we call 'value DI' that entail excluding backsliding governments from accessing certain EU funds or voting on some EU decisions in the Council.

Why is such an exercise of interest? Normatively, those advocating the democratic and CP approach contend, in neo-Kantian manner, that the already existing forms of democratic life established within the various MS have moral worth for their citizens and that a moral loss would be incurred through their absorption within a more unitary and hierarchically ordered EU federation, which transfers supreme and final legal and political authority on certain issues to the supranational level (Bellamy 2019: 21; Nicolaïdis 2012: 260). Instead, they consider one of the achievements of the EU to be the encouragement of mutual concern and respect for the distinctive democratic systems and decisions of its MS – a concern and respect that EU institutions must also embody and accord in their turn. They regard CP as exemplifying a principle of constitutional toleration appropriate to such a democratic system (Weiler 2003: 18). Likewise, they view DI as a justified response to both the heterogeneous political and constitutional cultures of the MS as well as their divergent socio-economic systems (Bellamy and Kröger 2017). However, the normative appeal of this approach would be considerably reduced if it could not provide an adequate response to democratic backsliding. Conversely, its normative attractions might become more apparent if it could be shown capable of legitimating action against such regimes not simply from an EU perspective, but also from that of the MS. Pragmatically, even those who reject this normative case might concede that the EU's intergovernmental features and its reliance on the willing compliance of MS executives, courts and citizens might commend an approach grounded in the mutual respect of their respective constitutional and democratic processes. Such an approach may also be less susceptible to attempts by democratically backsliding governments to shift the blame onto the EU authorities for any EU action directed against them, such as the loss of funds or voting rights.

The argument proceeds as follows. In section 2, we argue that the democratic values of Article 2 possess both intrinsic worth for the EU's legitimacy in the context of a pluralist society, and instrumental worth for the effective and equitable functioning of the single market and the attainment of the EU's declared aims of peace and prosperity. As such, measures to tackle democratic backsliding and ensure all MS meet minimal constitutional democratic criteria cannot be regarded as *ultra vires*, since the democratic values enshrined in Article 2 should form a central part of the constitutional identities of all MS. Indeed, as section 3 shows, this condition provides the ontological basis for the democratic account of the EU, on which CP is premised. Therefore, CP arguments cannot be validly deployed to legitimise democratic backsliding. On the contrary, as we argue in section 4, they provide a basis for justifying action against democratic backsliding that arguably gains in legitimacy through being premised on respect for the democratic constitutional identities of the MS. Accordingly, we develop four criteria consistent with CP that action against a

democratic backsliding state should follow to be considered legitimate. Drawing on existing reform proposals, we suggest two forms of what we call ‘value’ DI that such action could take: the imposition of conditionality requirements on the disbursement of EU funds and the withdrawal of voting rights in the Council.

What is Democratic Backsliding, and Why Bother?

Democratic backsliding involves a retreat from values such as the rule of law and human rights in order to diminish pluralism and constrain criticism and opposition, thereby moving from democratic to autocratic rule. This section details why such values prove intrinsic to the operation of democracy, and how their curtailment involves instrumental costs. As such, democratic backsliding matters both intrinsically and instrumentally for the legitimacy and equitable and effective functioning of the EU. As we also indicate, and develop further in the next section, CP similarly rests on these values, only permitting DI for reasons consistent with them. Consequently, both CP and DI are inconsistent with, and opposed to, democratic backsliding.

To be as encompassing as possible of the different political arrangements found within the MS, we shall follow other commentators on democratic backsliding and adopt a minimal definition of constitutional democracy. Tom Ginsburg and Aziz Huq (2018: 10) argue that such a minimal definition consists of three interlocking components. First, a sufficiently free and fair electoral system to allow for the peaceful alternation in power of different parties offering alternative policies. Second, the upholding of those civil and political rights intrinsic to such a democratic process, such as freedom of speech and association. Finally, legal and judicial institutions possessing enough independence and integrity to uphold these processes and rights against pressures to bias them to favour the incumbents. Such institutions are central to the rule of law.

States engaged in democratic backsliding progressively undermine all three components of the minimal definition of democracy. First, they diminish the fairness of elections and amend the constitution so as to entrench their own ideological preferences, with the implication that they cease to be subject to party competition. For example, in the wake of their 2010 landslide victory, the Hungarian party Fidesz implemented electoral reforms favouring themselves (including redrawing constituency boundaries and extending the franchise to non-resident Hungarians, among whom support for Fidesz is disproportionately high) (Herman 2016: 259-262), and used their 2/3 parliamentary majority to make unilateral constitutional changes.

Second, backsliding states reduce civil and political rights, diminishing freedom of speech through control of the main public and private media outlets, making criticism of the government liable to persecution on grounds of defamation, slander or incitement to public disorder; and using tax law and regulations against foreign funding or interference in political processes to limit freedom of association and the organisation of opposition within civil society. For example, the CJEU has found Fidesz’ “Transparency Law” of 2017 to have “introduced discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU (regarding the free movement of capital) and Articles 7, 8 (concerning rights to private life and privacy of data) and 12 (regarding freedom of association) of the Charter of Fundamental Rights of the European Union” (CJEU 2020).

Finally, such regimes attempt to subvert the independence of the judiciary by packing the courts, and especially the constitutional court, with loyal supporters. For example,

Fidesz altered the term of sitting judges to make a raft of new appointments (Scheppel 2018: 550; Buzogány and Varga 2018: 820-821). The Law and Justice Party (PiS) in Poland has likewise turned the Constitutional Tribunal from “an effective, counter-majoritarian device to scrutinize laws ... into a positive supporter of enhanced majoritarian powers” (Sadurski 2019: 84; Scheppel 2018: 553).

These attacks on the three minimum components of constitutional democracy all serve to inhibit opposition and allow governments to rule unchecked. Moreover, they are justified using a rhetoric that is avowedly anti-pluralist, intolerant of minority groups and voices, and discriminatory towards racial, gender and religious as well as ideological differences (Müller 2016). As such, they strike at the intrinsic and the instrumental value of democracy, both of which relate to what John Rawls termed the “fact of pluralism” (Rawls 1993: 54-58): that is, the plurality of values and of life experiences, on the one side, and the divergent interests typical of complex and highly differentiated societies, on the other, which together entail that a legitimate legal and political order must embody the values of tolerance, non-discrimination and equality outlined in Article 2.

Democracy has intrinsic value in a pluralist society by offering a ‘content independent’ form of legitimising collective decisions by aggregating our views in an impartial way, that treats them all equally and without discrimination (Christiano 2015: 983). Pluralism leads to reasonable disagreements and conflicts of interests which limit the comprehensiveness and impartiality of any single individual’s or agency’s practical reasoning (Rawls 1993: 56-7). Even with the best of intentions, we are likely to view collective policies from the standpoint of our own life experiences, its associated values, and our interests, producing a partiality towards our own perspective on the world. A democratic system of majority rule by means of free and fair elections, based on one person one vote, offers a legitimate mechanism to resolve such disagreements and conflicts through being anonymous, neutral, and unbiased in ways consistent with the aforementioned Article 2 values (May 1952). Meanwhile, safeguarding the three minimum elements of democracy also has instrumental benefits. Countries possessing these qualities have a better record of upholding human rights (Christiano 2011), are associated with less corruption in public life (Rothstein and Varraich 2017), and are more prosperous (EC 2018) than those that lack them.

The intrinsic value of democracy plays a central role in the EU’s legitimacy. Not only does the legitimacy of its competences rest on them having been democratically conferred upon it, but so does the legitimacy of its decisions and their implementation, involving as they do the assent of elected governments and members of the EP, on the one side, and of national parliaments that transpose EU measures into domestic legislation, on the other. If, however, governments and the parliamentary majorities that constitute them are themselves not fully democratic, then neither the conferral of competences by them nor the transposition of EU law into domestic law can generate legitimacy for the EU, in fact it undermines it. Therefore, the involvement of democratically backsliding states in EU decision-making impairs and questions the democratic quality of the EU. Such states not only are unable to fairly represent their citizens in EU decision-making but also can distort votes determining EU policies in both the Council and the EP. As a result, the involvement of backsliding states adds to the notorious democratic deficit of the EU (Müller 2015: 143; Kelemen 2017). Moreover, this is a deficiency the EU itself is complicit with so long as it tolerates and even funds such governments (Theuns 2020: 149-50).

Democracy also provides instrumental support for the EU’s core aims of peace and prosperity. Democratic states tend not to go to war with each other, and to cooperate in peace-building initiatives. Democratic backsliding regimes within the EU potentially

weaken that commitment. For example, Hungary's relations with Russia have led it to criticise EU sanctions following Russia's 2014 annexation of Crimea and hampered NATO attempts to foster ties with Ukraine (Hopkins et al. 2019). As for prosperity and well-being, democratic backsliding threatens EU cooperation in a number of core areas, not least due to worries about corruption and a failure to apply EU law impartially. For example, concerns exist that EU structural funds are being systematically misappropriated in Hungary to favour the ruling party and associates of the government, thereby undermining their purpose. In 2015 OLAF (Office de Lutte Anti-Fraude) found 14 cases of embezzlement of EU funds in Hungary, which continues to have the most cases of fraud among the MS (European Anti-Fraud Office 2016).

In the next section, we shall contend that the normative claims of CP rest on and reinforce these arguments concerning the intrinsic and instrumental value of democracy. As we shall show, democratic backsliding therefore proves inconsistent with CP. On the contrary, as the following section shows, CP provides resources for legitimating EU action to curb backsliding.

Constitutional Pluralism and the Legitimate Limits of DI

This section explores two alleged weaknesses of CP and DI with regard to democratic backsliding. The first criticism is that they could be abused to give a spurious legitimacy to attempts by democratic backsliding MS either to request opt-outs from the values enumerated in Article 2, on the grounds that they conflict with the national political and constitutional traditions defended in Article 4, or to challenge EU action against backsliding as *ultra vires* (Kelemen 2019). Indeed, the Hungarian and Polish governments have appealed to such arguments in the wake of the *Weiss* judgment of the German Federal Constitutional Court (FCC).¹ The second criticism is that CP and DI potentially subvert the uniformity and coherence of EU law, which critics regard as necessary qualities for its equitable and effective implementation in a manner that treats all EU citizens fairly (de Burca and Scott 2000; Kelemen 2016). We dispute both criticisms, arguing instead that CP and DI derive from, and support, the intrinsic and instrumental values of constitutional democracy described in the last section. This discussion sets the scene for the exploration in the next section of how CP might legitimise EU action against backsliding regimes through forms of 'value' DI.

Before turning to the two alleged weaknesses, we shall define CP and DI. Constitutional pluralists contend that the conferral of competences upon the EU not only takes place in conformity with the different constitutional processes of the various MS but also remains constrained by them. EU law, therefore, has a plurality of different national sources. Meanwhile, the validity of EU law's claims to primacy "results from [each] state's amendment of constitutional and sub-constitutional law to the extent required to give direct effect and applicability to Community law" (MacCormick 1999: 117). EU law may itself constitute a distinct legal system and the CJEU be the highest authority with regard

¹ This case concerned the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP). The FCC questioned the compatibility of the PSPP Decisions with the Treaty's prohibition on monetary finance and the principle of conferred powers, and judged the Court of Justice's ruling on its legality to be arbitrary due to a lack of reasoning in its proportionality assessment and the poor standard of review employed. As a result, the Court of Justice judgement (C-493/17, *Weiss and Others*), and Decisions of ECB were deemed *ultra vires* and not applicable in Germany (BVerfG, Judgement of the Second Senate of 5 May 2020 – 2 BvR 859/15).

to the interpretation of its norms, as the CJEU insists, but the same holds for the highest court in each of the MS with regards to the national legal system, which thereby retains the competence to interpret the validity of EU law in its interaction with domestic law (MacCormick 1999: 118). Consequently, the potential exists for a stand-off, such as has arisen with certain judgments of the FCC,² whereby the CJEU asserts some right or obligation is binding under EU law for a person within a given national jurisdiction, which a national court argues to be either *ultra vires*, going beyond what has been conferred, or invalid, going beyond what is conferrable in terms of the identity of the national constitution. As a result, “the same human beings and corporations are said to have or not have a certain right” (MacCormick 1999: 119). Indeed, national and EU law are now so intertwined that domestic courts may find themselves having to decide whether to accept the supremacy claims of the CJEU or of the national constitutional court (Barber 2010: 166-167). However, although CP allows for the possibility of such a stand-off, it may never happen in practice. As has occurred so far, the conflicting authorities may reach a compromise or find a way to agree to disagree.

As to DI, it involves a MS either temporarily or permanently being excluded from or opting out of certain EU policies. As a result, MS possess different rights and obligations in these areas. Following Thomas Winzen (2016), we distinguish ‘capacity’ from ‘sovereignty’ DI. Capacity DI relates to the temporary exclusion or exemption of an MS from certain common policies because they do not meet the criteria to join (e.g. the Eurozone). Sovereignty DI refers to a voluntary opt-out by a MS in the context of Treaty revisions due to concerns relating to particular national values or objections to the transfer of certain state powers. These forms of DI may be permanent, though they can end up as temporary. For example, Ireland negotiated a protocol to the Maastricht Treaty to avoid being forced to accept abortion. However, abortion has since been legalized in Ireland following a referendum in 2018. Likewise, Denmark secured a protocol to the Maastricht and subsequent Treaties allowing it to decide if and when it would join the euro.

We now turn to the two criticisms. First, could CP encourage claims that EU action to support domestic democracy either illegitimately encroaches on the ‘fundamental structures’ of a MS (through identity review based on Article 4), or goes beyond the competences MS have conferred upon it (through *ultra vires* review based on Article 5)? And might similar reasoning justify sovereignty DI with regard to Article 2? This worry has gained credibility with the reaction of Poland to the *Weiss* judgment of the FCC of 5 May 2020. The *Weiss* judgment deemed the CJEU’s ruling on Decision 2015/774 of the ECB as ‘arbitrary’ and hence lacking the “minimum of democratic legitimation” necessary under Article 23(1) of the German Basic Law (2 BvR 859/15, para. 2). This judgment was immediately seized upon by the Polish government in its legal battle with the Commission and the CJEU over its judicial reforms, with the Ministry of Justice arguing that it vindicated a recent argument of the Polish Constitutional Court disputing claims regarding the superiority of EU over national law in such a domestic matter (Polish Ministry of Justice 2020). Some commentators fear Hungary may do likewise (Fleming et al. 2020). However, to invoke CP arguments is one thing, to be justified in doing so on the matter at hand quite another (Baranski et al. 2020). Arguments that are sound in themselves ought not to be excluded out of fear that they might be abused, as Kelemen et al. (2020) suggest

² For example, BVerfGE 37, 271 [1974] CMLR 540 (Solange I); *Brunner v The European Treaty* [1994] CMLR 57 (Maastricht Judgment); 2 BvR 2/08, 30 June 2009. (Lisbon Judgement); and 2 BvR 1390/12, 12 September 2012, (European Stability Mechanism Treaty).

and Maduro (2020) partially concedes. As David Miller (2021) has noted in a different context, on this logic we should avoid supporting gay rights lest they allow right-wing Islamophobes such as Geert Wilders to hypocritically deploy such arguments to exclude or deport Muslim immigrants for alleged homophobia. Rather, the issue is whether their use in a given case is consistent with the reasons that underlie and validate such arguments, in this case CP, and hence is legitimate.

As noted in the introduction, we ground our case for CP on a conception of the EU as a democracy, in which MS ‘govern together but not as one’ in those areas where they have conferred competences on the EU according to their respective legal and political systems (Nicolaidis 2013: 351). Accordingly, we read Article 4 TEU as requiring that respect for the equality of MS before the Treaties entails showing equal concern and respect for their ‘national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.³ From a democratic perspective, CP is hard wired into the very structure of the EU, necessitated by the heterogeneity of its MS and their citizens (Bellamy 2019: 6-7). It adopts the pluralist rationale for constitutional democracy within states and applies it to relations between them.

Just as pluralism among the persons constituting a demos within a state mandates democratic mechanisms that allow for critical opposition by citizens that protect their rights and limit the capacity of governments to act arbitrarily, so pluralism between demoi justifies mechanisms fostering opposition by the MS to protect their rights and avoid arbitrary rule by federal agencies, such as the CJEU. Such an arrangement produces what Miguel Maduro has termed a ‘counter-punctual’ system of political and judicial decision making (Maduro 2003: 98-100), analogous to domestic mechanisms such as the separation of powers, scrutiny by a second chamber, competition from opposition parties, and some form of judicial review. Such a system obliges MS and the EU to hear and harken to each of the others in ways that reflect equal concern and mutual respect.

Arguably the very introduction of fundamental rights protection into Community law is owed to this process (Maduro 2003: 99), whereby identity review by the German and Italian constitutional courts in particular led the then European Court of Justice to acknowledge that “measures which are incompatible with the fundamental rights recognized by the constitutions of [the MS] are unacceptable in the Community” (*Hauer* Recital 15; see Weiler 1999: 108-116). Even the *Weiss* judgment, condemning the CJEU’s reasoning as “not comprehensible” and thereby potentially exceeding its “judicial mandate”, can be regarded as “counter-punctual” in spirit, its undiplomatic language notwithstanding. As Dieter Grimm has noted (Grimm 2016: ch. 14), integration through law via the competence-stretching judicial decisions of the CJEU has proved a mixed blessing. While it may have filled a political void at times, it has also often tied the EU into policies that are not only inefficient and unfit for purpose, but also lack democratic legitimacy and become a focus for Euroscepticism. In forcing the EU to confront both the efficacy and legitimacy of the ECB’s mandate and the rules of EMU, the FCC could be

³ One of our reviewers noted that the Article could be read as not requiring treating equally the national identities and domestic political and legal structures of the MS, but merely respecting them. However, we contend ours is an allowable and arguably more natural reading, reflected in both Articles 5, on conferral, and 50, on withdrawal, and consistent with the view of the German Federal constitutional Court, e.g. in its 2009 Lisbon Judgement BVerfG, 2 be 2/08.

seen as providing precisely the form of “counter-punctual” check that is both desirable and necessary in a plural and democratic constitutional system (Bobić and Dawson 2020; also see Baranski et al. 2020 and Dani et al. 2020).

CP not only guards against over-reach by EU institutions, but also serves to tame the exclusive and self-interested nationalism of the MS (Weiler 1999: 341). For, the counter-punctual process described above forces national courts to engage with each other and the CJEU in the development of a system of EU law that entails mutual recognition of their plural orders (Weiler 2003: 18-22). However, to operate in this way all the MS must themselves be constitutional democracies and recognise pluralism. As we noted in the previous section, the intrinsic and instrumental qualities of democracy required for the legitimate and efficient and equitable functioning of an association of states such as the EU, depend on its MS possessing democratic qualities. Only democratic states can credibly represent their citizens and be counted on to honour their contracts, and so engage in what Article 4.3 terms “sincere cooperation” with other MS on the basis of “mutual respect” (Rawls 1999: 16, 18-19). Therefore, no basis exists for identity or *ultra vires* objections to EU actions in order to defend democratic backsliding, since these arguments involve a rejection of pluralism and mutual recognition both internally and externally. Internally, as we saw, they are designed to protect measures that curtail pluralism and democratic debate and opposition. Externally, far from being part of a ‘counter-punctual’ move aimed at improving the democratic quality and efficacy of EU decision-making, they are likewise purely self-serving measures on the part of the governments and their judicial appointees proposing them.

A similar logic can be applied to DI. Again, the legitimate driver of such demands stems from pluralism: economic heterogeneity in the case of capacity DI and political or cultural heterogeneity in the case of sovereignty DI (Bellamy and Kröger 2017: 628-630). From a democratic perspective, arguments for DI can relate to the lack of an equal stake in a given common policy, on the one hand, or claims of cultural difference, on the other (Bellamy and Kröger 2017: 630-633). Both these arguments can give rise to demands for self-government rights, special representation rights or distinct legislative rights in order to protect minorities (Kymlicka 1995). Moreover, these arguments are grounded in equality, whereby like cases are treated alike but relevantly unlike cases are treated differently (Dworkin 1977: 227). As in the case of disadvantaged groups, to be treated with equal concern and respect may require being treated in distinct ways. Therefore, the rationale underlying DI proves likewise counter to that of backsliding democracies that seek to deny minority rights and discriminate to subvert rather than advance equality.

The second criticism enters here. Does not the uniformity and coherence of EU law require that the CJEU act as a final and supreme legal authority in order to be effective and equitable? What happens in the event of either a stand-off, where no party gives way, or, as with democratic backsliding, when the pluralist rules of the game are abused? It should be noted that CP only leads to a stand-off and incompatibility if neither side blinks. Inconsistent laws need not produce inconsistent action (Barber 2010: 169-170). Each side can exercise restraint and either leave the constitutional dilemma unresolved or seek an “incompletely theorised” compromise (Richmond 1997: 417; Maduro 2003: 98-99), of a kind that often informs majority judgments within multi-member apex constitutional courts (Sunstein 1996: 39-44). As we remarked above, such tacit agreements to disagree form the norm, with derogation the exception, and the feared Mutually Assured Destruction (MAD) (Weiler 1999: 320-321) have so far been avoided. Therefore, CP need

not give rise to a lack of uniformity in the application of equal rules. Rather, it has been hitherto a way whereby those rules are reciprocally negotiated so as to be implemented in a mutually acceptable way.

However, this counter-punctual mechanism will not work in the case of a court or state that does not act reciprocally or breaches the very rules and values of the constitutional pluralist process. Does that make CP a “fair weather” argument (Kelemen 2019: 254)? Would it not be necessary in such circumstances for an apex court or political body, such as the European Council in the case of Article 7, to be granted the competence to decide the issue? And would that not go against the very idea of CP, revealing a logical incoherence at the heart of the confederal account as federal critics claim? The latter argue that only the CJEU can have the competence to judge not just compliance with EU law, but also where and when it applies, and hence must have competence over its own competence. Yet, as constitutional pluralists remark, such disputes cannot be resolved by appealing to a higher authority because the dispute turns on the question of supremacy and the fact that *all* the courts involved claim competence over their own competence (Barber 2010: 167-169). Having the CJEU rule on *ultra vires* decisions empowers one of the parties to the dispute. Moreover, the one attempt so far to legitimise such a claim to competence-competence, the attempted constitutional Treaty, failed (Weiler 2003: 8; Walker 2016; Bobić and Dawson 2020). The federal solution, therefore, would lack legitimacy, and as such would be liable to exacerbate the problem rather than providing a solution (Grimm 2016: 300-303).

Does that make a stand-off between the CJEU and a national court irresolvable, other than by a potentially MAD act risking mutual disintegration? Even with regard to democratic backsliding, the grounds for CJEU competence are potentially contentious. Identity and *ultra vires* defences of democratic backsliding may be spurious, but the CJEU’s competence-competence to adjudicate on such challenges remains questionable – the concern remains that it will be judge in its own cause. Meanwhile, even if this issue could be resolved, the Treaties are vague or silent on both the institutional mechanisms required to secure the rather broadly defined values in Article 2 and the Charter, and the basis on which their absence might be litigated. Indeed, to act the CJEU has had to ‘read in’ the implication that all MS have an independent judiciary into their legal obligation “to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law” in Article 19 (1) TEU and for the proper working of the preliminary ruling mechanism under Article 267, or find grounds under the infringement proceedings (Arts 258-260 TFEU) (for details, see EC 2019a: 4). Yet, an extensive use of such weakly based judicial rulings, such as some advocate (e.g. Von Bogdandy and Spieker 2019: 393-405), risk being treated as lacking either legitimate authority or an adequate basis in EU law, and might even help boost support for the elected governments against which they are used (Schlippak and Treib 2017: 362), a point conceded even by some federalists advocating legal sanctions (Blauberger and Kelemen 2017).

As a result of these potential legitimacy problems, we believe a different approach is warranted. In the next section, we argue that CP and DI can be part of the solution in providing a way of addressing democratic backsliding with less danger of arousing such criticisms.

Tackling Democratic Backsliding: Constitutional Pluralism and Value DI

How one conceives of the EU – as a federal and supranational, system of governance, or a confederal and democratic political and legal order – also influences the type of action scholars recommend to counter democratic backsliding, mirroring an academic debate on new forms of governance and the benefits of hard law vs. soft law in the late 1990s and early 2000s (Kröger 2009). On the one hand, more federal minded commentators are inclined to revert to hard law and, accordingly, put the CJEU and more stringent sanctions centre-stage in their reform proposals (Blauberger and Kelemen 2017; Müller 2015; Theuns 2020). As regards action by the CJEU, Michael Blauberger and Daniel Kelemen propose that secondary legislation be developed to put Article 2 TEU into effect (2017: 326), not least by operationalizing fundamental values more and providing a clear definition of the ‘rule of law’. Furthermore, they suggest that it should not be the exclusive competence of MS to protect the fundamental rights of their citizens. Instead, in cases where these rights are being violated systemically, MS ‘would lose this exclusive competence and open themselves up to review by European courts’, so that citizens of EU MS could rely on Union citizenship and the CJEU to see their fundamental rights protected (Blauberger and Kelemen 2017: 330). However, Blauberger and Kelemen concede that ‘ultimately, judicial safeguards alone are unlikely to succeed against a determined autocratic MS government. If European leaders want to defend democracy in a MS where it is under threat, they will have to intervene politically as well’ (Blauberger and Kelemen 2017: 322). Jan-Werner Müller in turn suggests that Article 7 should be extended in such a way that where ‘democratic institutions are not merely being eroded or partly dismantled but rather blown to bits, the EU ought to have the option of expelling a MS completely’, not least so as to ‘serve as a form of *deterrence*’ (Müller 2015: 147). Whilst Blauberger and Kelemen propose to build on recent EU institutional innovations such as the European Commission’s Rule of Law Framework (Blauberger and Kelemen 2017: 326) to mount the political pressure, Müller suggests the setting-up of a new body. Considering that the European Commission might become too politicised if directly involved in the required monitoring of democratic institutions in MS, Müller suggests the establishment of a ‘Copenhagen Commission’ which should not only monitor MS, but also have the competence to decide whether action (such as reducing subsidies or heavy fines) against the backsliding state should be taken or not (Müller 2015: 148).

On the other hand, more confederal minded scholars have suggested that given the current voting rules, MS preferences and party politics, and the resulting blame games (Schlipphak and Treib 2017: 355), soft law instruments that privilege social pressure should be used to rein in backsliding states (Sedelmeier 2014, 2017). However, they admit that social pressure alone can be ‘largely ineffective’ (Sedelmeier 2014: 119). Others envisage an independent supervisory body (Schlipphak and Treib 2017: 362), though with less far-reaching competences than the ‘Copenhagen Commission’. The body envisioned by Bernd Schlipphak and Oliver Treib would monitor developments in MS and collect information on relevant issues, and also be accessible to domestic civil society organisations and citizens by means of national offices. They contend such a body would work against the notorious blame-shifting that one can expect from backsliding governments.

We seek to develop aspects of both these positions. Before we delineate the contours of our own proposal, however, it is important establish what constitutes legitimate EU action against democratic backsliding states. As we noted above, Schlipphak and Treib have

shown (2017: 354-355) that federally inspired action by the CJEU and European Commission has been open to criticism as lacking constitutional or democratic authorisation, allowing democratic backsliding governments to shift blame onto Brussels for any adverse consequences of their actions, and to justify those actions as a necessary response to illegitimate EU control of domestic processes. It is crucial, therefore, that any EU action is not only normatively justifiable, but also perceived as legitimate by large parts of the population, both in the concerned MS as well as across the EU.

We maintain that to be legitimate EU action against a backsliding MS must fulfil four criteria that align with the account of CP developed in the last section. In particular, EU action must avoid appearing to be self-authorized – an exercise of ‘competence-competence’, whereby supranational institutions define on their own account the content of EU democratic norms, when they are contravened, and what penalties should follow. Instead, it is crucial for them to act in ways that can appeal to the joint authority of the demoï of both the other MS and, to a degree, even the backsliding state.

The following four criteria seek to support this aim. First, action must avoid inviting the charge of being an *arbitrary* imposition, which fails to consult the views and interests of the MS and their citizens, or to be accountable to them. Consequently, the European Commission and the CJEU should not be the organs that advise on whether EU action is in order. Rather, the process should gain authority from a body that can credibly represent the pluralism of the MS and be ultimately accountable to the Council. It should also involve actors from civil society and the opposition within the targeted MS. Second, the identification of any democratic failings needs to be undertaken in an *impartial* manner, which applies equally and consistently to all MS (Theuns 2020: 151-152). To meet this condition, the monitoring should come from an independent body (Schlippak and Treib 2017: 361-362; Blauberger and van Hüllen 2020: 9-10, 11-12). Third, sanctions must be *proportionate* to the degree of backsliding and operate according to a pre-determined scale. Fourth, sanctions should *target the government* rather than the entire population (Blauberger and van Hüllen 2020: 6-7).

We now briefly sketch our own proposal, which we relate to these four criteria. We put forward a process for identifying breaches and proposing action against them to meet the first two criteria, and measures which we term ‘value’ DI that conform to the third and fourth criteria.

To render the process compatible with our first and second criteria, we suggest a modification and development of the European Commission’s plans for a new annual Rule of Law review cycle (EC 2019b: 9) and its proposal for a joint regulation of the EP and the Council to protect the EU’s budget from ‘generalised deficiencies as regards the rule of law in MS’ (EC 2018). The EP has suggested with regard to the latter that a ‘Panel of Independent Experts’, consisting of a nominee from each of the national parliaments and five from the EP, should determine the severity of the ‘deficiencies’ (EP 2019: Amendment 45). Our proposal is that these nominees should form an Article 2 Commission but should be vetted for their knowledge and independence by the Panel constituted under Article 255 TFEU for determining the suitability of MS nominees to the CJEU – a process also used by the Council of Europe that incentivises the choice of suitable candidates. The Commission would receive evidence on deficiencies with regard to the three components of the minimal definition of a constitutional democracy given in section 2, which would be collected as part of the new annual Rule of Law review cycle. The evidence would come from a range of relevant organisations, such as bodies associated with the Council of Europe, and ensure the involvement of domestic civil society organisations and citizens.

The Commission will draw on this evidence to determine whether an infringement of Article 2 has occurred through a failure to satisfy one or more of the three minimal conditions of constitutional democracy, thereby lying outside an allowable ‘margin of interpretation’ of democratic values, and to calibrate its severity against a scale of penalties.

To render the penalties for democratic backsliding compatible with the third and fourth criteria, we suggest what we call value DI. Much as capacity DI allows the temporary exclusion or exemption of a MS from certain policies, such as the Euro, where they may lack the capacity to participate as equals, so value DI recognises that Article 2 values are necessary features for the legitimate functioning of the EU and the effective achievement of its aims. Consequently, a MS that fails to uphold them may likewise be justifiably excluded from full participation in the operation of the EU as lacking the democratic qualities required for what Article 2 terms “sincere cooperation” as a full MS. The two main exclusions under value DI are the halting of disbursements of EU funding to backsliding states and the suspension of voting rights in the Council.

The first type of value DI that we argue can be justified is of financial nature. In short, it means that EU funds are not disbursed to a backsliding state. Indeed, the EU in 2020 linked its 2021-2027 Multiannual Financial Framework (MFF) and the Covid19 related funds to rule of law conditionality, implying that funds will only be disbursed to those MS which observe the rule of law. However, the conditionality that was introduced does not cover all three minimum criteria of democracy laid out in section 2, but could be adapted to do so. Such financial penalties would be capable of being exacted in a proportionate and targeted way. They can be reduced on a sliding scale, with minor infractions attracting small and temporary limits to accessing structural and investment funds, and graver infractions more severe and longer-lasting economic sanctions, including fines and restricted access to the EU single market (Theuns 2020: 149). In certain instances, funding can also be given directly to end users rather than via government agencies (EP 2019: Amendment 23; Theuns 2020: 156).

The second type of value DI that we propose concerns the withdrawal of voting rights in the Council. In Article 7 para. 3, the possible suspension of voting rights in the Council is mentioned. One might object that the suspension of voting rights would undermine democratic legitimacy by subjecting a given MS to processes in which they had ceased to play a role in determining. Yet, as we noted in sections 2 and 3, democratic legitimacy is reduced and a deficit is introduced by having democratic backsliding governments involved in EU decision making in the first place. Nevertheless, this criticism might be partly met by the process whereby this decision is taken being non-arbitrary and impartial in the way specified above, and through its being proportionate – the MS can be excluded from decisions in policy areas where corruption and failures are apparent, for example, while the excluded MS could still take part in deliberations in the Council if not in the voting. Moreover, it can be targeted against the government by allowing all elected MEPs to retain voting rights in the EP. Whereas it can be justified to exclude MEPs from voting in policy areas their state has opted out of (Heermann and Leuffen 2020), that is not the case in this instance and removing the vote of MEPs would render opponents and supporters of the government alike second-class citizens. It would also treat the EP as a body of national representatives rather than as representing EU citizenry (Curtin and Fasone 2017: 130-140).

Much as advocates of the CJEU being able to rule against backsliding states suggest such judgments constitute a form of “reverse-Solange” (Von Bogdandy and Spieker 2019),

so we consider these value DI exclusions as a form of ‘reduced cooperation’. As with enhanced cooperation, its use must be regarded as a last resort, when attempts at persuasion have been tried, and only be adopted when the prospect of the offending MS rolling back from backsliding does not appear likely within a reasonable period of time, defined as an MFF long-term budgetary round (compare Article 20 TEU). It must of course remain open for the excluded MS to re-join once the requisite conditions are met. These conditions must be detailed by an independent authority in charge of the rule of law review cycle, and apply equally to all MS. As with the Article 2 Commission, value DI aims to limit the wiggle-room for blame-shifting from backsliding governments to the EU. It also forms an alternative to expelling a MS from the EU, offering instead a less drastic solution that provides a route back to full membership by encouraging a return to constitutional democracy.

These processes and measures do not require Treaty changes to be enacted. They meet the first criterion of being non-arbitrary through breaches being determined by a panel of experts suggested by NPs from each of the MS, consulting with actors within the MS, and rendering their recommendations accountable to the Council. They meet the second criterion of impartiality through the measures taken to secure the independence of the experts, and the rule of law review process applying equally to all MS. Meanwhile they can result in measures of value DI that we have seen can be rendered proportionate and be targeted at governments rather than all citizens in ways that meet the third and fourth criteria.

Conclusion

This contribution has argued that far from encouraging democratic backsliding, CP and DI provide a way of legitimately countering it. In a first step, we defined three minimum criteria of constitutional democracy and argued how they matter intrinsically as well as instrumentally for the legitimate and effective functioning of the EU. In a second step, we contended that the democratic features of the EU render CP an appropriate legal framework for it. This constitutional pluralist framework is inconsistent with democratic backsliding and would not justify opting out of aspects of Article 2 as a legitimate form of DI. On the contrary, in a third step we argued CP provides a legitimate justification for the EU to deploy action against a backsliding MS. On this basis, we developed four criteria that any EU action against democratic backsliding should meet to be legitimate. In a final step, we drew on existing proposals on how to counter democratic backsliding, and suggested a process and penalties, which we term value DI, that meet these four criteria. We likened value DI to a form of ‘reduced cooperation’ based on a lack of capacity to meet one or more of the three minimal requirements for a functioning constitutional democracy. We finished by sketching out two types of value DI – the cessation of disbursement of EU funds and the withdrawal of voting rights in the Council.

While space constraints mean a single article cannot avoid leaving many details undeveloped, our main aim has been to indicate the possibility and advantages of tackling democratic backsliding from a constitutional pluralist perspective and using the resources of a form of value DI. We have argued that such an approach reduces the likelihood of the EU being accused in its turn of overdrawing on its legal competences and democratic capacity. Moreover, the democratic and confederal conception of the EU, to which our proposals are related, have the more general benefit of not putting all of our democratic

eggs into one basket. If we had a federal EU, what if the EU went populist? In the confederal model proposed here, democratic sicknesses at the core need not contaminate the MS or vice versa.

Our proposal dovetails with the recent moves by the EU to introduce some conditionality as regards the disbursement of EU funds in the context of its MFF and the Covid19 fund. The near future will show whether this proves sufficient to restrain backsliding states such as Hungary and Poland. If it does not, we are likely to see further steps towards harsher measures given that the large majority of the European public is not ready to tolerate those who despise the rule of law (Blauberger and van Hüllen 2020). Our claim is that the approach we sketch here has a greater chance of legitimising such measures, should they prove necessary.

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