

The Illiberal Challenge in the EU: Exploring the Parallel with Illiberal Minorities and the Example of Hungary

Zsolt Körtvélyesi*

The long history of liberal multiculturalist theories grappling with the challenge posed by illiberal minorities – Parallel with the illiberal challenge in the European Union – Differences between the state/minority focus, the cultural/political considerations, the individual/systemic violations – Why these do not undermine the parallel – Propositions from multiculturalist theories to draw the line between toleration and legitimate interference – Severity, internal consensus, the exit option, and historical agreements – Forms of engagement to strengthen coherence, fairness, and solidarity

*Assistant professor, ELTE Eötvös Loránd University, Faculty of Social Sciences, Budapest, Hungary; researcher, Institute for Legal Studies, Centre for Social Sciences, Hungarian Academy of Sciences. I would like to thank for their comments: Iyiola Solanke and Liav Orgad and other participants of the 2018 European Junior Faculty Forum for Public Law and Jurisprudence at EUI; Mattias Kumm for comments on related papers presented at WZB; participants of the lecture at the Institute for International Legal Studies at the National Research Council of Italy; András Jakab and others at the work-in-progress seminar of the Institute for Legal Studies in Budapest; anonymous reviewers and editors of the *European Constitutional Law Review* who showed faith from the early phases and made extremely useful suggestions. I am grateful to Eszter Timár for her thorough language editing. I owe special thanks to Balázs Majtényi, who tirelessly discussed with me the issues covered as the manuscript was taking shape. All errors are mine. The research was conducted within the scope of the H2020 project Democratic Efficacy and the Varieties of Populism in Europe (DEMOS) and was funded by the European Commission under the Grant agreement 822590. Any dissemination of results here presented reflects only the author's views. The Agency is not responsible for any use that may be made of the information it contains.

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INTRODUCTION

The challenge to the common values of the European Union coming from member states has been engaging European thinkers¹ and actors for the past decade. In her speech as candidate for the Commission Presidency, von der Leyen underlined the importance of maintaining the rule of law, rejecting any compromise on the issue.² In her first round of interviews as elected president, she seemed to scale back, arguing that no one is perfect; she described current debates as bitter and not objective enough, leading to unnecessary rifts with Central and Eastern European countries.³ These positions aptly illustrate the difficulty of recognising pluralism and member state diversity while maintaining core European values. Is a principled coexistence of these two goals possible? I will argue that this is indeed possible and necessary, and that multiculturalist approaches provide guidance for their optimal reconciliation.

Several analogies have been proposed, mostly in the context of discussing Article 2 TEU violations and the Article 7 TEU procedure, that provide insights for an approach to enforcing common values while maintaining diversity. For example, Müller relies on the militant democracy literature,⁴ and Kelemen suggests looking at cases of sub-national authoritarianism for informative parallels.⁵ This article argues that justification for whether and how the EU should intervene if member states deviate from common values can be informed by multicultural experiences of whether and how to interfere with illiberal minorities living in liberal states. The most common examples concern religious practices that conflict with gender equality, but resistance by an autonomous community to calls for

¹Two guest editorials of leading European journals: A. von Bogdandy et al., 'A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines', 55 *CMLR* (2018) p. 1; R. Uitz, 'The Perils of Defending the Rule of Law Through Dialogue', 15 *EuConst* (2019) p. 1.

²Election of the President of the European Commission: statement by Ursula von der Leyen, candidate for President of the Commission, *European Parliament, Multimedia Centre*, 16 July 2019, <multimedia.europarl.europa.eu/en/election-of-the-president-of-the-european-commission-statement-by-ursula-von-der-leyen-candidate-for-president-of-the-commission_1175885-V_rv>, visited 23 November 2020.

³Z. Weise, 'Von der Leyen rows back on "United States of Europe"', *Politico.eu*, 18 July 2019, <www.politico.eu/article/ursula-von-der-leyen-rows-back-on-united-states-of-europe/>; 'Von der Leyen outlines position on migration, other EU challenges', *DW.com*, 19 July 2019, <www.dw.com/en/von-der-leyen-outlines-position-on-migration-other-eu-challenges/a-49643733>, both visited 23 November 2020.

⁴J.-W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', 21 *European Law Journal* (2015) p. 141.

⁵R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union', 52 *Government and Opposition* (2017) p. 211.

internal democracy,⁶ or limitations on free speech and the right to education also fall into this category. The difficulty for liberal states is that they must decide whether to accept, uphold, recognise, and legalise these practices, or to try to tame or eliminate them. Viewed from the perspective of the author – who lives under an illiberal regime that is, in turn, subject to liberal norms – the structural similarities are too pronounced to be missed. Both for the EU and for a liberal state with minorities, the context is a liberal framework that is motivated by the dual goal of maintaining pluralism without slipping into the illegitimate imposition of uniformity and sustaining core liberal norms.

The endeavour has a legal character, in that it addresses a question central to constitutional law: how to define the limits of permissible variation within a system that seeks to maintain freedom and pluralism. The paper is a first attempt to explore the parallel between illiberal minorities in liberal states and illiberal member states in the EU, and to exploit structural similarities. De Witte draws on the federalist parallel under which the EU is best seen as ‘a developed form of international organization which displays characteristics of an embryonic federation’.⁷ Note that the analogy is based on structural similarity rather than a formal legal analogy. The EU is not a state, and member states are not minorities. These are *different* cases that raise *structurally similar* questions. This also means that the application of the insights from a synchronous reading of the two cases of illiberalism should consider the specificities of EU and member states relations.

The commitment to pluralism is inherent to the EU,⁸ but is a qualified commitment, with limits enshrined most importantly in Article 2 TEU. Besselink draws a parallel with multiculturalism in that there is at least a minimum of shared values which, crucially ‘include the acceptance that not all values are shared’.⁹ This type of balancing exercise is based on the history of European integration, which sought to preserve national diversity – i.e. France as France or Germany as Germany – but conditionally, and without the tradition of hostilities. Such

⁶As an example, see a democratic critique of the hierarchical structure of the Catholic Church (often defended by mystifying its role): M. Lisak, ‘Democratization of a Hierarchical Religion: The Roman Catholic Church in the Time of a Credibility Crisis Caused by Sexual Abuse Misconduct’, 45 *Studia Religiosa* 1 (2012) p. 7.

⁷B. de Witte, ‘EU law: Is it international law?’, in C. Barnard and S. Peers (eds.), *European Union Law*, 2nd edn. (Oxford University Press 2017) p. 177 at p. 196, quoting D. Wyatt and A. Dashwood, *European Union Law*, 5th edn. (Sweet & Maxwell 2006) p. 132.

⁸See Arts. 2, 3(3) and 4(2) references to pluralism, minorities, diversity and national identities. For a similar point, see P. Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox’, 4 *International Journal of Constitutional Law* (2006) p. 496.

⁹L.F.M. Besselink, ‘National and Constitutional Identity Before and After Lisbon’, 6(3) *Utrecht Law Review* (2010) p. 36 at p. 49.

conditional affirmation is central to multiculturalism; it is based on values and, as such, is not a 'blank cheque to all ways of life and practices'.¹⁰

Considering these complex issues through the multiculturalist parallel will help us realise the importance of differences, including the disparate impact of possible financial sanctions on beneficiaries or the accusation of double standards. Shifting our focus also helps us test our biases. It is in this sense that Raz acknowledges the parallel as a useful thought experiment, but in the opposite direction:

'when one thinks in the Netherlands or in Britain of the right way to deal with cultural groups within our countries, one should always imagine what one would want to happen had the question affected not the Turks, let us say in the Netherlands, or the Bangladeshis in Britain, but the Dutch or the British in Europe. If we always start by applying this procedure and transferring the answer to the case of cultural communities within our countries, subject to the modifications which are really required by the differing circumstances, then we will not go far wrong.

This is in brief my view about multiculturalism'.¹¹

The thought experiment might also help soften the 'sovereignty reflex', the attitude that routinely treats supranational (or international) interference as a nuisance and which became particularly strong after the economic crisis,¹² and in EU debates around financial measures and migration. The reflex proves especially powerful when it comes to discussing matters of domestic constitutional structure, as in the case of key illiberal measures.

Before I detail the problem and the proposal, some disclaimers are in order. The scope of the article is limited in three ways. First, for the sake of brevity, it relies on classic accounts of illiberal minorities by Kymlicka and Shachar, and does not provide a complete review of all applicable theories.¹³ I focus on the broad concern that most multiculturalist accounts share – whether more communitarist or more pronouncedly liberal in maintaining a liberal core while

¹⁰L.S. Da Guarda, 'Multiculturalism and Criminal Law: Between the Universal and the Particular', in A. Condello (ed.), *New Rhetorics for Contemporary Legal Discourse* (Edinburgh University Press 2020) p. 50 at p. 57, citing Z. Bauman, *Community: Seeking Safety in an Insecure World* (Polity 2001) p. 80.

¹¹J. Raz, *The Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) p. 175.

¹²H. Grabbe and S. Lehne, 'Defending EU Values in Poland and Hungary', *Carnegie Europe*, 4 September 2017, <carnegieeurope.eu/2017/09/04/defending-eu-values-in-poland-and-hungary-pub-72988>, visited 23 November 2020.

¹³For an overview that includes other thinkers, see Z. Körtvélyesi and B. Majtényi, 'Justifying Supranational Responses to the Anti-constitutionalist Challenge. Applying Liberal Multiculturalism as a Background Theory' (forthcoming in *Global Constitutionalism*).

allowing for diversity beyond it – i.e. policing the boundaries of difference. The theories used are widely cited, central to multiculturalist discussions,¹⁴ and should be sufficient for assessing the applicability of the parallel. Kymlicka's account is useful, for it combines a normative ambition with a pragmatic political goal: 'political stability of liberal democracies that are ethnically diverse'.¹⁵ Shachar, in turn, addresses more specific institutional questions of how to respond to illiberal challenges.

Second, I illustrate the challenges mostly with the Hungarian example, limiting my discussion of this case to what is necessary to make my point, as the relevant developments have already been abundantly documented.¹⁶ Hungary is the first fully-fledged illiberal challenge within the EU, with far-reaching domestic constitutional changes.

Third, the paper assesses the parallel at a general, conceptual level. I argue that: (a) a coherent approach to setting limits and providing for sanctions is needed, and (b) debates and experiences relating to multiculturalism offer useful insights, which can help us design a coherent and principled approach.

In what follows, I present the challenge, introduce the parallel, and finally offer remarks on what this means for the EU's illiberal dilemma.

THE CHALLENGE

If we speak of the 'illiberal challenge', we should first clarify that 'liberal' is a shorthand reference to the commitment to equal rights and liberties protected by a constitutional structure with rule of law guarantees and separation of powers, which goes hand in hand with a commitment to maintaining democracy, including the protected rights of the opposition and specific guarantees for minorities. The Copenhagen Criteria¹⁷ provide such an example, as does Article 2 TEU:

'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'.

¹⁴For a similar argument from a work also relying on Kymlicka as a representative theory, see F. Levrau, 'Expanding the Multicultural Recognition Scope? A Critical Analysis of Will Kymlicka's Polyethnic Rights', 14 *The Pluralist* (2019) p. 78 at p. 80.

¹⁵Noted, in a critical way, in S. Choudhry, 'National Minorities and Ethnic Immigrants: Liberalism's Political Sociology', 10 *Journal of Political Philosophy* (2002) p. 54 at p. 71.

¹⁶E.g. European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)).

¹⁷European Council, Presidency Conclusions, Copenhagen, 21–22 June 1993, SN 180/1/93 REV 1, p. 13.

Note that ‘pluralism’ is explicitly recognised, albeit at the ‘society’ level. Pluralism, which is necessary for liberty as well as for democracy,¹⁸ is crucially present in the EU: at the national as well as at the European level. The Treaty on European Union in its Article 4(2) specifically calls for the ‘national identities’ of member states to be respected. The relevant first sentence reads:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.

While the earlier version in the Maastricht Treaty added democracy as a constraining condition (‘The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy’¹⁹), the present text does not take into account the possibility of conflict between Articles 2 and 4(2) TEU.²⁰ Von Bogdandy and Schill argue that there are no ‘clear rules of hierarchy’ and that a balancing exercise should assure proportionality ‘between the uniform application of EU law, a fundamental constitutional principle of the EU, and the national identity of the Member State in question’.²¹ In the following discussion, I will not distinguish between violations in the form of a full-scale rejection and those cast as legitimate but different interpretations of core values.²² Illiberalism can be presented as another form of democracy, which should be tolerated under the Treaties. A bolder defence could rely on Article 4(2) and state that even deviations from democratic values should be shielded under this clause. The nature of the challenge is the same in both cases: EU bodies have to decide whether deviations, either in the form of limitations on democratic rights or different interpretations, can be tolerated or not. What we need, in both cases, is a conceptual framework to make sense of these rules and resolve the conflict.

It is an open question whether the term ‘identity’ is useful for this conceptualisation. The fact that EU law is talking the identity talk is an invitation to rely on multiculturalist debates, where negotiation between conflicting individual and

¹⁸R.A. Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1973).

¹⁹Art. F. Emphasis added.

²⁰E. Cloots, *National Identity in EU Law* (Oxford University Press 2015); G. Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’, in W. Benedek et al. (eds.), *European Yearbook of Human Rights* (Intersentia 2014) p. 512; B. Majtényi and Z. Körtvélyesi, ‘Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary’, 18 *GLJ* (2017) p. 1721.

²¹A. von Bogdandy and S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’, 48 *CMLR* (2011) p. 1440–1441.

²²The latter strategy is a tool of ‘faking compliance’, a common move to undermine meaningful conditionality in the EU context. See, from the enlargement literature, G. Noutcheva, ‘Fake, Partial and Imposed Compliance: The Limits of the EU’s Normative Power in the Western Balkans’, 16 *Journal of European Public Policy* (2009) p. 1065.

collective identities plays a central role. Identity-based claims might be problematic due to their subjective nature which can undermine the rational debate necessary for liberal approaches to conflict resolution.²³ This underlines the importance of opening up the box of identity and, instead of accepting the identities as given, balancing them against each other, taking account of the very specific 'role a practice or value plays in constituting the identities of parties involved in a conflict'.²⁴ Since such claims do arise, cast in culturalist, religious, ethnicist and other terms, and presented as protected rights, we should propose ways to deal with them in a systemic manner.

The first clear instance of Article 2 violation was the Hungarian case – with Poland quickly jumping on the bandwagon. The measures labelled as the 'Hungarian illiberal challenge' have been accurately documented by commentators²⁵ and institutions.²⁶ While commentators have been debating about the right terminology for the post-2010 Hungarian political regime, Viktor Orbán, in a 2014 speech held in Romania shortly after his re-election,²⁷ called the regime 'illiberal'. He did not use 'illiberal democracy', the expression many commentators use,²⁸ and he called 'Singapore, China, India, Russia and Turkey' '[t]he stars of international analysts today' and models to follow, breaking with Western approaches.²⁹ He further claimed that 'the most popular topic in thinking today

²³J. Waldron, 'Cultural Identity and Civic Responsibility', in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press 2000) p. 155, arguing that identities are 'interpersonally and socially non-negotiable' (p. 158), and that it is our duties as citizens living in a plural world that we present these cultural allegiances as reasons (p. 174).

²⁴Eisenberg argues that instead of thinking about dilemmas about conflicting rights, one should focus on 'the role a practice or value plays in constituting the identities of parties involved in a conflict' and weigh these claims against each other: A. Eisenberg, 'Identity and Liberal Politics: the Problem of Minorities within Minorities', in A. Eisenberg and J. Spinner-Halev (eds.), *Minorities within Minorities. Equality, Rights and Diversity* (Cambridge University Press 2004) p. 249 at p. 259 and 261.

²⁵For early reactions, see G.A. Tóth (ed.), *Constitution for a Disunited Nation* (CEU Press 2012).

²⁶Two examples in addition to the Tavares and Sargentini reports of the European Parliament: the Venice Commission's numerous assessments: (www.venice.coe.int/webforms/documents/?country=17&year=all), visited 23 November 2020; D. Hegedűs, 'Hungary – Nations in Transit 2019', *Freedom House*, 2020, (freedomhouse.org/country/hungary/nations-transit/2020), visited 3 December 2020.

²⁷See the English translation on the site of the Government of Hungary, of the speech the Hungarian premier made in Băile Tuşnad, Romania: Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, (2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp), visited 3 December 2020.

²⁸Throughout the speech, he consistently talked about an 'illiberal state': *ibid.*

²⁹*Ibid.*

is trying to understand how systems that are not Western, not liberal, not liberal democracies and perhaps not even democracies, can nevertheless make their nations successful'.³⁰ This 'illiberal' statement had been foreshadowed by a series of policy measures that challenged the basic tenets of a liberal democracy, including moves to domesticate the Constitutional Court and other independent institutions. However, it was the speech cited that gave this development a clearer articulation and also a denomination; the 'illiberal' label seems to have stuck. Today the main point of contention is whether the regime is still a democracy, or already an autocracy (and an electoral or competitive one³¹), or whether it should be considered a hybrid regime.³²

One could argue that the Hungarian case could be more fittingly called 'anti-constitutionalist', using the terminology suggested by Walker: the current regime in Hungary does not fit in his category of 'nonliberal constitutionalism', which would cover 'nontyrannical politics with a decent rule of law' combined with a 'more or less alarming combination' of non-liberal elements.³³ It deviates from the Western liberal political commitments and is a turn against the core idea of constitutional limitations on power. The term 'anti-constitutionalist' seems to capture a crucial feature of the regime, which is part of how illiberalism is understood in the current European debate. To remain closer to the terminology the literature uses in discussing Hungary and Poland, and also to the terminology in multiculturalist discussions, however, I will stick to 'illiberal', maintaining that the defining element of the illiberal challenge is the rejection of constitutionalist principles, ultimately threatening not only the rule of law and human rights, but also the pluralism and political fairness necessary to maintain democracy.

The Hungarian regime is built on an anti-pluralist challenge to constitutional restraints, which in many cases translates into measures that undermine democracy. Domesticating the Constitutional Court,³⁴ eliminating the independence of

³⁰Ibid.

³¹For what is probably the most insightful account on the nature of such regimes, see A. Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (Oxford University Press 2013).

³²For the latter view, see A. Bozóki and D. Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', 25 *Democratization* (2018) p. 1173.

³³G. Walker, 'The Idea of Nonliberal Constitutionalism', 39 *Nomos* (1997) p. 154 at p. 156.

³⁴The illustrative example is the 2016 Constitutional Court decision on the EU asylum quota, where after a failed government-initiated referendum against the quota, and the government's subsequent attempt to adopt a constitutional amendment inserting a clause on the protection of 'national identity', at the initiative of the ombudsperson, the Constitutional Court effectively read that clause into the Fundamental Law: Decision No. 22/2016 of the Constitutional Court of Hungary, para. [67]. Official English translation available at http://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf, visited 23 November 2020. The referendum was given the green light by the Court despite persuasive arguments that it was unconstitutional on three separate grounds: Z. Sente, 'The

bodies like the main electoral board and the State Audit Office, and appointing a chief prosecutor who selectively drops cases, or a media authority with one-party nominees, together constitute a playing field that greatly weakens meaningful opposition activity and other challenges to government power. Other signature moves of the regime, such as passing the law that targets civil organisations³⁵ or ousting the Central European University,³⁶ to cite only recent cases, can be added to the list. The term 'illiberal' might not tell the whole story, but it captures the main challenge the regime poses to the EU and it is arguably a closer shot than, say, 'populist'.³⁷

What differentiates the Hungarian case is not the presence of illiberal *elements*. As Kymlicka warns, '[t]he liberality of a culture is a matter of degree [...] all cultures have illiberal strands, just as few cultures are entirely repressive of individual liberty'.³⁸ It is in a similar vein that Von der Leyen noted that 'no one is perfect'.³⁹ Hungary might be quite illiberal for an EU member state, but its government has repeatedly taken (or claimed) inspiration from other member states.⁴⁰

Controversial Anti-Migrant Referendum in Hungary is Invalid', *Constitution Making & Constitutional Change*, 11 October 2016, (<constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/), visited 23 November 2020. More generally, see Z. Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014', 1 *Constitutional Studies* (2016) p. 123; Magyar Helsinki Bizottság, Társaság a Szabadságjogokért and Eötvös Károly Intézet [Hungarian Helsinki Committee, Hungarian Civil Liberties Union, and Károly Eötvös Institute], *Egypárti alkotmánybírák a kétharmad szolgálatában. Az egypárti alkotmánybírák 2011–14 között hozott egyes döntéseinek elemzése [One-party constitutional judges in the service of the two-thirds majority. Analysis of selected decisions of the one-party judges from 2011–14]* (2015), (<tasz.hu/files/tasz/imce/2015/ab_kiadvany_70_oldalal_vegleges.pdf), visited 23 November 2020; G. Halmi, 'In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíróság első éve' ['In memoriam Hungarian constitutional adjudication. The first year of the one-party constitutional court'], 18(1-2) *Fundamentum* (2014) p. 36.

³⁵ECJ 18 June 2020, Case C-78/18, *Commission v Hungary*.

³⁶Judgment of the Court of Justice (Grand Chamber) 6 October 2020, Case C-66/18, *European Commission v Hungary*.

³⁷See, e.g., the exchange at I-CONnect Blog on Constitutional Courts and Populism, (<www.icconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/), visited 23 November 2020.

³⁸W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) p. 171.

³⁹Weise, *supra* n. 3; 'Von der Leyen outlines position...', *supra* n. 3.

⁴⁰This happened first with the controversial media laws. See the report of the Center for Media & Communication Studies of the Central European University at (<medialaws.ceu.hu>), visited 23 November 2020. For an argument that these parallels can paralyse and derail comparative constitutional analysis, see R. Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', 13 *International Journal of Constitutional Law* (2015) p. 279.

The Hungarian Prime Minister's speech gave a key to what the regime is *not*, defining it in negative terms (while remaining somewhat obscure about what the regime *is*). It seems to revolve around freedom and liberal democracy, values fundamental to the functioning of the EU, as stated in Article 2 TEU. The speech confirms that there is an outright rejection of those ('Western') values.⁴¹ Speaking about the post-communist region, Sajó observed as early as 2006 the '[i]nstrumentalism and the hidden contempt of the rule of law and constitutional values in general'.⁴² What happened after 2010 is that these failures and deficiencies turned into defining elements of a system built not only on 'contempt of the rule of law' but also the will to establish an outright illiberal state as a new model. We should note a systemic challenge with interconnected and mutually reinforcing measures and should seek remedies accordingly.

The EU is not a mere bystander in these dramas: it has responsibility in supporting the illiberal regime in Hungary. It cannot not react, since not reacting is seen as confirmation. I argue that the EU's actions and non-actions contribute to the continuance of the regime, not that the EU bears responsibility because of having any power to change the regime.⁴³ A strong correlation is evident between consumer trust and support for the government.⁴⁴ There appears to be consensus that without EU transfers (comparable to the Marshall Plan⁴⁵), the regime could not have maintained its steady GDP growth ever since 2010.⁴⁶ It is hard to avoid

⁴¹Orbán declared that it is possible 'to construct a new state built on illiberal and national foundations within the European Union. Our membership of the European Union does not rule this out. It may be true that [...] we must fight many battles there': Prime Minister Viktor Orbán's Speech, *supra* n. 27.

⁴²A. Sajó, 'Becoming "Europeans": The Impact of EU "Constitutionalism" on Post-Communist Pre-Modernity', in W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer 2006) p. 175 at p. 176.

⁴³I thank an anonymous reviewer for raising this point.

⁴⁴G. Tóka, 'A centrális erőter bomlása' ['The decay of the central force field'], in A. Szabó and B. Böcskei (eds.), *Választás 2018 [Elections 2018]* (Napvilág 2019) p. 78 at p. 98.

⁴⁵Euroológus [Eurologist], 'Tíz éve dől a lé' ['Money pouring in for ten years'], *Index*, 12 February 2014, <index.hu/gazdasag/2014/02/12/tiz_eve_dol_a_le/>, visited 23 November 2020.

⁴⁶It is a commonplace to point out that Hungarian economic growth is fuelled solely or chiefly by EU funds – a large part of which was spent on regime-building by financing the enrichment of government-affiliated oligarchs. E.g., a study by KPMG and GKI curated by the Hungarian government found that between 2006 and 2015, GDP growth was 4.6% which would have become a negative growth of 1.8% without EU funding, a 6.4% difference between a shrinking and a slightly growing economy. KPMG, *A magyarországi európai uniós források felhasználásának és hatásainak elemzése a 2007-2013-as programozási időszak vonatkozásában. Makrogazdasági elemzések összefoglalása [Analysis of the use and impact of EU funds in the 2007–13 period. Summary of macroeconomic analyses]*, 2 March 2017, <www.palyazat.gov.hu/download.php?objectId=69961>, visited 23 November 2020, p. 1 and 8.

the conclusion that EU funds have contributed to maintaining and solidifying the regime.⁴⁷ Similarly, membership itself (of the EU, its various bodies, or of the European Peoples' Party) grants legitimacy that helps the regime in various ways. To the extent that these elements contributed to the strength of illiberalism,⁴⁸ there is an associated EU responsibility to combat such effects.

Human rights, the rule of law, and democracy are ingrained in the European construction, and compromising these in a systemic manner upsets the entire regime. The European Convention on Human Rights talks about constraints that are necessary in a *democratic* society. As Wildhaber, former President of the European Court of Human Rights, once said: 'the Convention guarantees are applied in a context defined by the democratic society in which they function'.⁴⁹ When the independence and integrity of domestic courts is in danger,⁵⁰ European cooperation is undermined.⁵¹ Flexibility and the toleration of divergence is shrinking, as problems in the functioning of a 'democratic society' are growing. Elected in unfair elections, member state politicians representing their constituencies in the Council and the Parliament with dubious credentials may also challenge the legitimacy of EU actions. While pluralism and respect for

⁴⁷Additionally, a considerable chunk of these funds has been channelled to the oligarchs who directly support the government agenda and to outlets that spread uncritical government propaganda.

⁴⁸See also the literature on the detrimental effects of readily available resources: on 'resource curse', A. Huliaras, and S. Petropoulos, 'European Money in Greece: In Search of the Real Impact of EU Structural Funds', 54 *Journal of Common Market Studies* (2016) p. 1332; and on 'rentier states', A. Huliaras, and D.A. Sotiropoulos, 'The crisis in Greece: The Semi-rentier State Hypothesis', LSE GreeSE Paper No. 120 (2018), (eprints.lse.ac.uk/87077/1/GreeSE-120.pdf), visited 23 November 2020. See also M. Blauburger, and V. van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?', *Journal of European Integration* (2020) p. 1.

⁴⁹L. Wildhaber, 'The European Court of Human Rights: The Past, the Present, the Future', 22 *American University International Law Review* (2007) p. 521 at p. 535, quoted in H. Hannum, 'Reinvigorating Human Rights for the Twenty-First Century', 16 *Human Rights Law Review* (2016) p. 409 at p. 443.

⁵⁰Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, CDL-AD(2012)020-e, 12–13 October 2012, ([www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e)), visited 23 November 2020.

⁵¹On the issue that compromising the independence of the judiciary directly undermines EU law, see, e.g., M. Steinbeis, 'Polish Courts are Our Courts', *Verfassungsblog*, 15 July 2017, (verfassungsblog.de/polish-courts-are-our-courts/), visited 23 November 2020; D. Kochenov and L. Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation', 54 *Journal of Common Market Studies* (2016) p. 1062; Speech of Commissioner Jourova at the High level seminar: Finland 100 years – Finnish and European perspectives to the Rule of Law, 31 October 2017, (ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-high-level-seminar-finland-100-years-finnish-and-european-perspectives_en), visited 23 November 2020.

member state identity are important building blocks for the EU, this is not a free-floating affirmation of differences.

The exact point of switching to autocracy is never unequivocal, but the trend is clear: the Hungarian regime goes against fundamental tenets of constitutionalism, and undermines checks, pluralism and, ultimately, democracy. Hence, the transition can be safely termed an authoritarian turn. The question is whether at this point the turn also warrants interference by EU institutions. Taking a positive view, the illiberal challenge is not only a threat, but also a chance for the EU to realise and confirm liberal commitments. To achieve this, however, we need to know what those commitments are, where they dictate toleration and where they require counteraction. This is where, I argue, the multiculturalist parallel provides some guidance.

THE PARALLEL

The EU is now facing the challenge of member states undermining the fundamental values declared in Article 2 TEU. Article 4(2) TEU can be seen as an invitation to exemptions⁵² from general rules, akin to exemptions granted to minorities in a multicultural setting.⁵³ This is not an argument for a multiculturalist Europe, but a call to recognise the features of the EU that resemble a multiculturalist setting and to learn from the similarities of the illiberal challenge in the two settings. Amid the backlash against the politics of recognition, institutions are still legitimately expected to show respect for difference while maintaining a level of uniformity following their mandates under the law. Taking diversity seriously means accepting that toleration is not only owed to things we like, but includes the idea that there is a dark side to pluralism. Strong and sustainable defence can only come from a principled overview of what must be protected and why (Article 2), as opposed to areas where national deviation should be respected and accommodated (Article 4(2)). All constitutional systems need an agreement on where divergence is not tolerated, as opposed to rejected-but-tolerated;⁵⁴ or where different interpretations of core values are accepted and where deviation is subject to sanctions.

Kymlicka argues in his 1995 book for far-reaching rights for minority groups, including deviation from general norms. He adds, crucially, that there are (justified) limits to embracing diversity in liberal democracies. He goes on to discuss

⁵²Von Bogdandy and Schill, *supra* n. 21, p. 1444. Or veto rights, that they call ‘emergency brake mechanisms’, p. 1445.

⁵³Kymlicka, *supra* n. 38, p. 109–110 and 38 on exemptions from general rules and veto rights, respectively.

⁵⁴‘[T]o tolerate is not necessarily to respect, quite often toleration in the negative sense is simply the kinder and gentler side of nonrespect’: A. Addis, ‘On Human Diversity and the Limits of Toleration’, 39 *Nomos* (1997) p. 112 at p. 120.

toleration in the case of non-liberal minorities and seeks to describe a principled approach that recognises the right of minorities to maintain their cultures, including some non-liberal elements and avoiding non-justified 'imposition of liberalism', while also maintaining, and enforcing, core liberal commitments by setting limits to this toleration.⁵⁵ To make a compelling argument for the parallel, in addition to showing the structural similarities between the two cases – illiberal minorities in liberal states and illiberal states in the European Union – I will demonstrate that certain differences between them do not undermine this reading. In the following, I address three broader groups of concerns⁵⁶ in drawing the parallel: states are not minorities; cultural does not equal political; an isolated violation is not a structural threat.

States are not minorities

The first question is the extent to which the state–minority parallel works in the light of multiculturalist debates. Kymlicka relies on the parallel when he argues that it is inconsistent to be 'more reluctant to impose liberalism on foreign countries, but more willing to impose liberalism on national minorities',⁵⁷ as the two sets of cases are comparable. In an early account, Kymlicka describes the connection as follows:

'There are some illiberal minority cultures, but there are also illiberal majority cultures and illiberal homogeneous nation-states. In all of these cases, liberals both within and outside the illiberal culture face the question of what actions are legitimate in promoting their liberal ideals. Whatever answers are appropriate in these other cases are likely to be appropriate for minority cultures'.⁵⁸

Kukathas, who is more critical of such parallels, argues that 'if the image of a society of mutual toleration presents domestic society as a kind of international society, this is because that is indeed what domestic society is like'.⁵⁹ The EU falls in between the two cases (international and domestic society), for there is a vision of a society of sorts with the ambition to maintain a value-based solidarity community. This is why the EU's dilemma is different from what Rawls describes in

⁵⁵See Kymlicka, *supra* n. 38, Ch. 8 esp. p. 163-170.

⁵⁶I thank the anonymous reviewers and editors for raising points that pressed me to elaborate more on these arguments.

⁵⁷Kymlicka, *supra* n. 38, p. 167.

⁵⁸W. Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas' 20 *Political Theory* (1992) p. 140 at p. 145.

⁵⁹C. Kukathas, 'Cultural Toleration', 39 *Nomos* (1997) p. 69 at p. 97.

the example of ‘Kazanistan’, a ‘decent hierarchical society’, where Rawls rejects the idea that nonliberal societies should be subject to sanctions.⁶⁰ The EU has specific commitments to protect the liberties of individuals subject to illiberal rule. But the EU also has member states who in many cases act like minorities who want to keep their separateness but are in fact living with us. It remains true that a number of assumptions made in the multiculturalist and illiberal minority setting will not apply, such as the obvious domination of the larger entity,⁶¹ but there are enough similarities to make the parallel work.

Kymlicka and Norman cite the European Union as an example of maintaining one political jurisdiction while retaining several systems of law, an important multiculturalist policy.⁶² Since Kymlicka’s theory relied on European integration, for my parallel this means that he acknowledges the structural similarities. To push this even further, there is an argument from Kukathas that multiculturalism is, in fact, properly applied to states, not minorities,⁶³ which would even go beyond what I argue for. Both Kymlicka’s and Shachar’s proposals build on insights from federalist experiences, just as they build on the liberal tradition and its concern for the limits of toleration. Despite overlaps, multiculturalist insights are better positioned to deal with the illiberal problem, because they are more directly engaged with the goal of recognising and accommodating diverse collective identities while seeking to create or maintain one community of solidarity.

Cultural does not equal political

A further concern is that minority groups are cultural, while states are political entities, and the parallel risks blurring the distinction between the two and can even legitimise cultural arguments. It is a key aspect of the illiberal regime that it sees itself as a threatened minority (a phenomenon observed in the post-socialist region),⁶⁴ displaying the ‘purposive’ feature that, for Levy,

⁶⁰J. Rawls, *The Law of Peoples, with The Idea of Public Reason Revisited* (Harvard University Press 1999) p. 60 and 75–78. Sanctions and interventions sometimes labelled ‘interference’ are reserved for ‘outlaw societies’: *ibid.*, p. 81.

⁶¹‘Since the state is the more powerful entity, the presumption in the negotiations must be in favor of the group’: A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press 2001) p. 129.

⁶²W. Kymlicka and W. Norman, ‘Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts’, in *Citizenship in Diverse Societies* (Oxford University Press 2000) p. 1 at p. 28 and 35.

⁶³See C. Kukathas, ‘Survey Article: Multiculturalism as Fairness: Will Kymlicka’s Multicultural Citizenship’, 5 *Journal of Political Philosophy* (2002) p. 406 at p. 421–422.

⁶⁴See the notion of ‘minoritized majorities’: W. Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity* (Oxford University Press 2007) p. 185.

distinguishes states from intermediate groups.⁶⁵ Kymlicka calls these ‘societal’ cultures: ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both the public and the private sphere. These cultures tend to be territorially concentrated and based on a shared language’.⁶⁶

The Hungarian regime relies on arguments that the government needs to protect national identity, e.g. in the area of migration,⁶⁷ but also that challenges to democracy and the rule of law are in fact not violations, but merely a different perspective on what the terms mean, a pronouncedly Hungarian vision of the world. The regime uses nationalist discourses about the self-defence of groups threatened in their existence or about the protection of the status quo of Hungary’s, mostly imagined, ‘ethnic homogeneity’.⁶⁸ The fact that a member state government relies less on Enlightenment and rationalist ideals of legitimation,⁶⁹ and more on traditionalist-culturalist-nativist arguments (and on being the sole legitimate leaders of the nation⁷⁰) makes the multiculturalism parallel even more fitting. The liability of multiculturalism to reinforce collective elements (or ‘parallel societies’) makes it a better match for the EU setting. It is a specific acknowledgment that pluralism at this collective level helps in accommodating diverse ways of life. The fact that the parallel gives an initial boost to illiberal measures, framed as supporting diversity against liberal oppression, serves as a push to acknowledge the genuine and fundamental dilemma instead of hastily dismissing the legitimacy of member state deviation from the liberal European mainstream.

⁶⁵[I]ntermediate groups are and ought to be purposive in ways that both call for and legitimize substantive rules of conduct and belief, rules that would be illiberal if adopted as state legislation’: J.T. Levy, *Rationalism, Pluralism, and Freedom* (Oxford University Press 2015) p. 266, *see also* p. 53–55.

⁶⁶Kymlicka, *supra* n. 38, p. 76.

⁶⁷There is a strong parallel between nativist-nationalist anti-immigration claims and multiculturalist protection of minorities to maintaining the community which can include the protection from immigration.

⁶⁸‘I find it very important that we should preserve our ethnic homogeneity [...] because life has confirmed that too much mixing causes trouble. [...] we must not take the risk of altering the country’s fundamental ethnic character, because rather than enhancing our position, this would degrade Hungary, and would plunge us into chaos’: Prime Minister Viktor Orbán’s speech at the Hungarian Chamber of Commerce and Industry’s ceremony to mark the start of the 2017 business year, 28 February 2017, (2015–2019.kormany.hu/en/the-prime-minister/the-prime-minister-speeches/prime-minister-viktor-orban-s-speech-at-the-hungarian-chamber-of-commerce-and-industry-s-ceremony-to-mark-the-start-of-the-2017-business-year), visited 3 December 2020.

⁶⁹I am not discussing the extent to which illiberalism is inherently linked to anti-Enlightenment ideas, simply noting that anti-liberal features often gravitate towards anti-Enlightenment views.

⁷⁰For this, *see* Müller’s problematisation of what amounts to anti-democratic features: J.-W. Müller, ‘The People Must be Extracted from Within the People’, 21 *Constellations* (2014) p. 483.

An isolated violation is not a structural threat

It may be countered that the parallel breaks down insofar as the illiberal vision is not only offered internally but also as an alternative to a European Union based on liberal values. This argument would assume that the problem of illiberal spill-over, the threat to the Union as a whole, is missing from multiculturalist debates, but this is not the case. The relationship between internally oppressive measures and an external authority is present in the form of a concern about outside effects, and there is also the problem of ‘minority capture’.⁷¹ It has been a primary concern in relation to toleration that illiberal pockets of society can ultimately undermine the liberal character of the entire setup.⁷² As Green argues, the question of the limits to toleration is actually about maintaining and nurturing pluralism, but ‘without respect for internal minorities, a liberal society risks becoming a mosaic of tyrannies; colourful, perhaps, but hardly free’.⁷³ This is exactly the EU’s concern with the emergence of authoritarian pockets.

The deeper the integration, the more the violations radiate far and wide. As the authors of the reverse Solange proposal argue concerning the example of media freedom in Hungary,⁷⁴ violations by one member state’s government impact the basic structure of integration, if in no other way, at least through their effect on the freedom of movement. Undermining property rights through targeted law-making threatens the security required for investment and freedom of capital and commerce. Non-compliance in asylum matters can sink common migration policies. Finally, the institutional foundations are at stake if the independence of courts or the democratic credentials of national representatives are questioned. Through its hostility to constitutionalism, illiberalism necessarily undermines an integration based on mutual trust in the observation of basic liberal democratic tenets.

The above should suffice to show the structural similarities between the two cases: illiberal minorities in liberal states and illiberal states in the European Union. We now turn to the question of what this parallel can teach us when

⁷¹One could think of the connection between ‘laïcité’ and the history of a powerful Catholic Church in France. Levy specifically raises the problem of ‘minority group capture’ through ‘legal and political victories’: Levy, *supra* n. 65, p. 258.

⁷²Levy treats the issue of the non-state actor that is ‘especially large or powerful, or otherwise occupies a quasi-governmental role or social space’ as one of the justifications for state action: Levy, *supra* n. 65, p. 279.

⁷³L. Green, ‘Internal Minorities and their Rights’, in J. Baker (ed.), *Group Rights* (University of Toronto Press 1994) p. 257 at p. 270, quoted in Kukathas, *supra* n. 59, at p. 87. Similarly, Kymlicka describes the millet system in the Ottoman Empire as ‘a federation of theocracies’: Kymlicka, *supra* n. 38, p. 157.

⁷⁴A. von Bogdandy et al., ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’, 49 *CML Rev* (2012) p. 489.

considering the legitimacy and form of the European reaction. The two remaining sections will address the two (distinct but interrelated) questions that arise under the parallel: when to intervene (consistent standards for legitimate interference); and how to intervene (institutional solutions).

THE LEGITIMACY OF LIBERAL INTERFERENCE

In this section, I will revisit the legitimacy of liberal interference by relying on Kymlicka's account. There is general scepticism about liberal intervention,⁷⁵ with the principle of autonomy at the centre.⁷⁶ In the form of subsidiarity and proportionality (Article 5 TEU), EU law has a principle against uniformisation that is deeply ingrained in its DNA. More uniformity means more room for legitimate interference and less room for manoeuvre for member states. The questions regarding EU 'interference' in case of Article 2 violations concern, first, whether there has been a violation and, second, what type of response is warranted.⁷⁷

Endorsing liberal values does not mean that one agrees with their imposition on those who disagree with them;⁷⁸ 'white lines' of disagreement should not readily translate into red lines of non-tolerance. If there is no consensus or principled agreement on the fundamentals, we either opt for a shallower *modus vivendi* type of accommodation⁷⁹ or for coercion. The problem with accommodation is that 'the majority will be unable to prevent the violation of individual rights within the minority community'.⁸⁰ The alternative, coercion, requires strong justification and should only be used as a last resort. Kymlicka notes that '[t]he line between incentives and coercion is not a sharp one'⁸¹ and specifically cites EU membership as 'a powerful, but non-coercive, incentive for liberal reform'.⁸² In Hungary, public opinion is still predominantly supportive of remaining in the EU.⁸³

⁷⁵Kymlicka, *supra* n. 38, p. 165–166 and 167.

⁷⁶*Ibid.*, p. 153 and 165.

⁷⁷The first prong is itself partly about what values should be shared and the exact content, or interpretation, of these. In the present discussion I will treat different interpretations as a disagreement over the content.

⁷⁸*Ibid.*, p. 164.

⁷⁹Kymlicka, *supra* n. 38, p. 168.

⁸⁰*Ibid.*, p. 168.

⁸¹*Ibid.*, p. 168.

⁸²*Ibid.*, p. 168.

⁸³The votes for and against membership would have been 63% versus 19%, according to a 2019 poll: A. Bíró-Nagy and G. Laki, *15 év után. Az Európai Unió és a magyar társadalom [15 years after. The European Union and the Hungarian society]* (Friedrich-Ebert-Stiftung and Policy Solutions 2019) p. 30, (www.policysolutions.hu/userfiles/Policy_Solutions_15_ev_utana_EU_es_a_magyar_tarsadalom.pdf), visited 23 November 2020.

A consistent approach to setting limits and imposing sanctions in the EU would mean that those supporting the illiberal regime will have to decide whether their commitment to illiberalism outweighs the desire to stay in the Union.

Post-2010 developments in Hungary aptly illustrate the problem of shallow constitutionalism where apparent agreements do not rest on shared and deeply held commitments. They show that there is at best a weak overlap with core EU commitments, and an agreement that does not cover certain basic liberal values. When is interference justified in such a case? Kymlicka applies a four-prong test to decide when interferences are warranted, ‘in the internal affairs of a national minority [as well as] in the international context’.⁸⁴ His considerations, which I apply to the case of Hungary in the EU, are: (a) ‘the *severity of rights violations* within the minority community’; (b) ‘the degree of *consensus within* the community on the legitimacy of restricting individual rights’; (c) ‘the *ability* of dissenting group members *to leave* the community if they so desire’; (d) ‘the existence of *historical agreements* with the national minority’.⁸⁵ In relation to minorities, Kymlicka in fact adds a fifth question, (e) whether the non-liberal dissident group is composed of ‘*newly arriving* immigrant groups’.⁸⁶ I refer to these considerations using the terms: ‘severity’, ‘internal consensus’, ‘exit option’ and ‘historical agreement’ and ‘newcomers’, respectively. I discuss them in this order, combining the last two points.

Severity

The severity assessment is operationalised in Article 7(1) and 7(2) TEU – ‘clear risk of a serious breach’ and ‘serious and persistent breach’, respectively – and in the Rule of Law Mechanism.⁸⁷ In the multiculturalist setting, Kymlicka argues that intervention is clearly justified in cases of gross and systematic violation of human rights.⁸⁸ What about less obvious cases? Taking the sensitive area of criminal law, an Australian report on ‘Multiculturalism and the Law’ proposes a test to decide where deviation from general laws can be accepted.⁸⁹ It suggests asking the following questions: ‘what rights and interests does the law protect?’;

⁸⁴Kymlicka, *supra* n. 38, p. 169.

⁸⁵*Ibid.*, p. 169–170. Emphases added.

⁸⁶*Ibid.*, p. 170. Emphasis added.

⁸⁷Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

⁸⁸Kymlicka, *supra* n. 38, p. 169.

⁸⁹For a theoretical overview on (multi)culturalist exemptions, see Da Guarda, *supra* n. 10. For more on culturalist defences in criminal law, see the overview in D.L. Coleman, ‘Individualizing Justice through Multiculturalism: The Liberals’ Dilemma’, 96 *Columbia Law Review* (1996) p. 1093.

‘what harm does it seek to prevent?’; ‘what belief or practice is at stake?’; ‘to what extent would an exemption, if granted, undermine the law’s effectiveness?’⁹⁰ The formulation of these questions is useful in that it highlights both aspects: severity can be assessed from the perspective of the individual whose rights are violated, as well as that of the liberal legal regime whose operation is at stake. The individual aspect should be part of the equation, and outright oppression taking place in a systemic manner should not be tolerated in a liberal polity like the EU. But the questions, especially the last one, also suggest a more systemic view of what makes violations ‘severe’: they highlight violations that undermine cooperation.

We have seen that the illiberal challenge can come closer to an existential threat rather than an isolated source of trouble. Dubious democratic credentials of the government officials voting in EU bodies may undermine the legitimacy of these institutions, and compromised judicial independence undermines European cooperation. Evaluated under the severity test, this would suffice to conclude that it is necessary to consider some type of intervention. This conclusion is supported by arguments based on the problems of multiculturalist accommodation.

Internal consensus

We have pointed out that balancing is not always legitimate: there are serious violations where no level of internal support should shield governments from liberal interference.⁹¹ But there is a margin where there are more genuine doubts about the legitimacy of interference, and where some consideration of the level of consensus plays into the balancing, as is also the case of standards like an ‘emerging consensus’ or ‘European consensus’.⁹² Liberal interference, in the form of a judicial or external decision, comes at a cost, as the burgeoning literature on the legitimacy of judicial review demonstrates.⁹³ Focusing on democratic consent is also important because it connects narrower liberal considerations based on human rights and the rule of law to broader questions of (de-)democratisation.

⁹⁰‘Multiculturalism and the Law’ (1992) ALRC 57, para. 8.20, (www.alrc.gov.au/wp-content/uploads/2019/08/alrc57.pdf), visited 23 November 2020.

⁹¹In Kymlicka’s words, we ‘should not enable a group to oppress its own members’: Kymlicka, *supra* n. 38, p. 194.

⁹²For an account on related democratic concerns, see T. Kleinlein, ‘Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control’, 28 *European Journal of International Law* (2017) p. 871. For a US – Europe comparison, see J.A. Brauch, ‘The Dangerous Search for and Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights’, 52 *Howard Law Journal* (2008) p. 277.

⁹³S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013); T. Gyorfi, *Against the New Constitutionalism* (Edward Elgar 2016).

The Hungarian government can claim strong support, having won the general elections in 2010, 2014 and 2018. Yet, criticism concerning the unequal playing field and the undermining of pluralism on the political scene and in the media quickly surfaced, leading to conclusions by the Organization for Security and Cooperation in Europe as early as 2014 that the ‘governing party enjoyed an undue advantage because of restrictive campaign regulations, biased media coverage and campaign activities that blurred the separation between political party and the State’.⁹⁴ The government-dominated media landscape contributes to the distortion.⁹⁵ This phenomenon was even more pronounced in the 2018 elections. In a 2016 case, documented on video, where physical force was used against a prominent opposition politician to prevent a referendum on a topic sensitive to the government, the perpetrators were never charged.⁹⁶

A government cannot have its cake and eat it: it cannot undermine its democratic credentials and, at the same time, continue to use the argument of its democratic legitimacy to shield itself from external criticism. This strengthens the case for liberal interference on two accounts: because of the severity of violations that undermine democratic decision-making, and because of the inability of illiberalism to rely on genuine consent from the populace.

The exit option

The possibility of leaving a group is the flipside of consent and applies to a range of violations: where these are too severe, or where they are insignificant and isolated, the exit option does not make a difference, but it may play a role in other cases. In many liberal accounts, including multiculturalist theories, the exit argument plays a crucial role.⁹⁷ Kukathas argues that illiberal minorities should be free to maintain their own norms as long as they allow members to leave the group, making this the sole condition of toleration.⁹⁸ Newman rejects the central role of the exit

⁹⁴OSCE, Hungary – Parliamentary Elections 6 April 2014 – OSCE/ODIHR Limited Election Observation Mission – Final Report, 11 July 2014, (www.osce.org/odihr/elections/hungary/121098), visited 23 November 2020.

⁹⁵Mérték Media Monitor, *Fidesz-friendly media dominate everywhere*, 2 May 2019, (mertek.eu/en/2019/05/02/fidesz-friendly-media-dominate-everywhere/), visited 23 November 2020.

⁹⁶Megszüntették a kopaszok elleni nyomozást’ [‘Investigation against the bald men closed’], *Vs.hu*, 17 August 2016, (vs.hu/kozelet/osszes/megszuntettek-a-kopaszok-elleni-nyomozast-0817), visited 23 November 2020.

⁹⁷Exit is central to what Levy describes as the ‘pure liberal theory of freedom of association’: Levy, *supra* n. 65, p. 42–51.

⁹⁸Kukathas, *supra* n. 59. Kymlicka challenges this view in his response to Kukathas: Kymlicka, *supra* n. 58.

option, and argues that ‘rights of exit are neither necessary nor sufficient’.⁹⁹ Exit, then, is one element among others, without a distinctive position. Benhabib lists the exit option as one of the key components of what she calls ‘multicultural pluralist arrangements’ in the legal sphere, in addition to ‘egalitarian reciprocity’ (equal rights for members of minorities and majorities) and ‘voluntary self-ascription’.¹⁰⁰ In the EU, the European Court of Justice has specifically relied on the exit argument. In the *Commission v Poland* (‘Supreme Court judges’ retirement age case’) case, it cites Articles 49 and 50 TEU and argues that, as a result of the exit option and the consensual accession, ‘the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them’.¹⁰¹

The right to leave a group can be translated as the ability of individuals to opt out of illiberalism. Should this be about mere physical presence, or about the recognition of membership in a more abstract way? In the leading international minority rights case, Sandra Lovelace wanted to move back permanently to the territory of her tribe, and challenged the tribe’s refusal to grant her membership based on discriminatory rules.¹⁰² In the Hungarian case, the connection between presence and membership emerges in a different way: it is increasingly difficult to remain outside the regime while living in Hungary. Government control has been extended to ever more areas. The regime has been taking over independent entities like universities and the Academy of Sciences, while silencing critical media. Cases of censorship and intimidation have been reported in relation to the judiciary,¹⁰³ the media, academia and even Facebook.¹⁰⁴ People active in the asylum field risk criminal sanctions and special taxes. Non-governmental organisations receiving funding from abroad are subjected to hostility and to a law inspired by the Russian ‘foreign agents

⁹⁹D.G. Newman, ‘Exit, Voice, and “Exile”’: Rights to Exit and Rights to Eject’, *University of Toronto Law Journal* (2007) p. 43 at p. 44. For a different critique of Kukathas’ argument, see Addis, *supra* n. 54.

¹⁰⁰S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) p. 131-132.

¹⁰¹ECJ (Grand Chamber) 24 June 2019, Case C-619/18, *Commission v Poland*, para. 42.

¹⁰²*Sandra Lovelace v Canada*, Human Rights Committee, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

¹⁰³Amnesty International Hungary, *Fearing the Unknown. How Rising Control Is Undermining Judicial Independence In Hungary*, 2020, <www.amnesty.eu/wp-content/uploads/2020/04/FINAL_Fearing-the-Unknown_report_Amnesty-Hungary_E1.pdf>, visited 23 November 2020.

¹⁰⁴J. Spike, ‘Second person in 24 hours arrested for “fearmongering” after sharing a Facebook post’, *Insight Hungary*, 14 May 2020, <insighthungary.444.hu/2020/05/14/second-person-in-24-hours-arrested-for-fearmongering-after-sharing-a-facebook-post/>, visited 23 November 2020.

law'.¹⁰⁵ Sometimes the exit option is not an option, but a necessity: people affiliated with the Central European University are relocating to Vienna against their will, after the government effectively outlawed its operation in Hungary.¹⁰⁶ This means that the real 'exit option' appears to be either silence and inactivity in politically sensitive areas or leaving the country. According to the most recent official statistics, around 330,000 people had left Hungary by 2016 to work elsewhere in the EU.¹⁰⁷ It is hard to assess the influence of the political situation as a factor motivating emigration, because people's decisions are likely to be based on several reasons.¹⁰⁸

The paradox of the physical exit option – protected under one of the EU's four freedoms – is that it serves the regime by filtering out those who would support opposition and regime change, thereby helping the homogenising vision of illiberalism.¹⁰⁹ This effect aggravates the systemic threat, further entrenching the regime, and increasing the severity of the violations. When assessing the legitimacy of interference, what should be factored in is the space left for internal dissent. If enough space remains open in the form of institutional refuge and civil society activism, the oppressive elements of illiberalism might be mitigated. Where such spaces are increasingly disappearing or where the regime is in fact actively pushing people outside the nation¹¹⁰ and the country, liberal interference is more justifiable. This is in line with the idea that the right to exit is ultimately a guarantee of liberty and pluralism.

¹⁰⁵The ECJ found that the law violated EU law: see ECJ 18 June 2020, Case C-78/18, *Commission v Hungary*.

¹⁰⁶For the view that this violates EU law: ECJ, Advocate General's Opinion, 5 March 2020, Case C-66/18, *Commission v Hungary*.

¹⁰⁷I. Gödri, 'Nemzetközi vándorlás' ['International migration'], in J. Monostori et al. (eds.), *Demográfiai portré 2015 [Demographic Portrait 2015]* (KSH [Central Statistics Office] 2015) p. 187 at p. 188.

¹⁰⁸One study put political causes at eight per cent and economic factors at 40% among young people: B. Siskáné Szilasi et al., 'A magyar fiatalok erősödő kivándorlási szándékának kiváltó okai és jellemzői' ['Reasons and characteristics of the Hungarian youth's increasing emigrational intentions'], 31 *Tér és Társadalom* (2017) p. 131 at p. 141, (real.mtak.hu/74060/1/2885-9904-1-PB.pdf), visited 23 November 2020.

¹⁰⁹This is identified by Kelemen as one of the three major factors contributing to what he calls the EU's 'authoritarian equilibrium': R.D. Kelemen, 'The European Union's authoritarian equilibrium', 27 *Journal of European Public Policy* (2020) p. 481.

¹¹⁰There is also a sense in which the regime excludes people who do not fit its vision of good Hungarians, e.g., members of the opposition, civil rights activists, critical media, homeless people, gay people, trans people etc.

The historical agreement and the newcomers argument

The newcomers argument¹¹¹ as part of Kymlicka's list is not directly applicable to my parallel. There is nobody in this case who has 'left behind the set of institutionalised practices, conducted in their mother tongue, which actually provided culturally significant ways of life to people in their original homeland'.¹¹² Yet, the core of the argument seems applicable: 'imposing liberal rules on immigrant groups is more legitimate, [...] since acceptance of liberal principles can be seen as one of the terms of their admission'.¹¹³ What seems relevant is the *how*, the *when*, and the *conditions* of joining. This is the consent argument, now applied at the European level rather than internally. Upon accession, members consented to the then-existing rules, which strengthens arguments for the legitimacy of applying those rules even where they require intervention. Article 2 TEU is specifically linked to admission by Article 49. The EU resembles the most permissive home states, presenting the maximum of sovereignty options with unilateral secession possible under Article 50.

Examples of historical agreements carving out exemptions in the EU context are often agreements surrounding accession, including those with Hungary concerning the postponed opening of the market for agricultural land. Closer to Article 2 TEU commitments, in the case of other member states, we also find examples like Protocol No. 30 seeking to restrict the application of the Charter of Fundamental Rights,¹¹⁴ or Protocol No. 35 concerning Ireland and its constitutional restrictions on abortion.¹¹⁵ A deviation in the other direction is the Co-operation and Verification Mechanism established for Bulgaria and Romania to monitor the rule of law situation in those countries.¹¹⁶

The difficulty with the newcomer argument is that it might result in treaty guarantees (like the Co-operation and Verification Mechanism) which create a sense of discrimination. I think a combination of the newcomers argument and a type of severity argument will provide an adequate answer: it might be legitimate to apply more burdensome transitory requirements to new members, but in the long run, only a genuine assessment of the likelihood of serious violations warrants sustained and differentiated conditionality. A cautionary historical

¹¹¹It is the basis of Kymlicka's distinction between immigrants and other (national and indigenous) groups. For a powerful critique, see Choudhry, *supra* n. 15.

¹¹²Kymlicka, *supra* n. 38, p. 77; similarly, p. 170.

¹¹³W. Kymlicka and R. Rubio Marín, 'Liberalism and Minority Rights. An Interview', 12 *Ratio Juris* (1999) p. 133 at p. 151.

¹¹⁴Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 306/156, 17.12.2007.

¹¹⁵Protocol on Article 40.3.3 of the constitution of Ireland, OJ C 326, 26.10.2012.

¹¹⁶See the annual reports at ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania, visited 23 November 2020.

parallel is the fate of the interwar minority protection regime, which introduced some ‘conditionality’ in a completely one-sided fashion that did not apply to the great victorious powers. This ultimately contributed to the fall of the peace treaty system through the unilateral invalidation of these commitments in the 1930s.¹¹⁷

When states are already singled out at the time rules are adopted, this undermines the legitimacy of the measures – not to mention a possible violation of the equality of states.¹¹⁸ Imagine the reaction of Polish and Hungarian leaders if the Rule of Law Mechanism or Article 7 TEU had been adopted in a way to apply only to the states on the periphery, raising suspicions of neo-colonialism. The further we move away from the time of accession and the less persuasive it is to use the time of accession (and geography) as a proxy for the likelihood of violations, the less legitimate special arrangements will be. (Consider how in the US a ‘geographical discrepancy’ argument was used to invalidate the 1965 Voting Rights Act, a key minority protection measure in the civil rights context.¹¹⁹) On the other hand, the way the debate around Article 2 plays out in the case of Hungary and Poland sets a precedent that could work like a ‘historical agreement’. If the EU fails to respond to illiberal domestic measures and to draw a red line, it creates a historical precedent for how far member states can go while retaining their membership without fear of an effective response.

To sum up, upon accession Hungary consented to Article 2 values, making enforcement through interference legitimate, but these processes should pay special attention to even-handedness. This leads us to the question of the forms and goals of liberal interference.

THE FORMS AND GOALS OF LIBERAL INTERFERENCE

Successful justification of liberal interference depends partly on the type of interference sought. Interference is the reverse of toleration¹²⁰ and can take many forms, from speaking out against violations and lending support to overcome illiberal practices, to outright coercion. Establishing and enforcing universal norms as opposed to singling out particular countries is among the more principled and widely used tools. In the case of the EU, this implies supporting mechanisms to

¹¹⁷A year after Nazi Germany left the League of Nations, Poland denounced its international minority rights obligations, ‘pending the introduction of a general and uniform system for the protection of minorities’: M. Mazower, ‘Minorities and the League of Nations in Interwar Europe’, 126 *Daedalus* (1997) p. 47, quoting Colonel Józef Beck, Polish Minister of Foreign Affairs.

¹¹⁸See Art. 4(2) TEU.

¹¹⁹*Shelby County v Holder*, 570 U.S. 2 (2013). The relevant federal power to intervene applied to states with considerable voter suppression as of 1964. The Supreme Court found that 50 years later this amounted to ‘disparate geographic coverage’ and unconstitutionality.

¹²⁰‘To tolerate something is to refrain from intervening against it’ in the face of disapproval: T. Mulligan, ‘The Limits of Liberal Tolerance’, 29 *Public Affairs Quarterly* (2015) p. 277 at p. 278.

maintain the values contained in Article 2 even outside the EU framework, such as the European Convention on Human Rights or the Venice Commission. But this does not eliminate the need for guarantees within EU law. Interference in the EU context may concern funding, as well as voting rights, but may also target other areas of cooperation based on mutual trust, such as legal recognition of judicial and administrative decisions, and political forms of recognition, such as participating in discussions, getting a platform, and sustaining membership in entities like the European People's Party. Article 7 provides for a centralised procedure to suspend rights attached to membership.

Legitimacy and fairness are key to a widely accepted and trusted normative framework that polices the foundations of European integration and maintains the values enshrined in Article 2 TEU. In the remainder of this article, I seek to show how multiculturalism can demonstrate a way of providing a unifying story for the various bureaucratic, legal, and political responses to illiberalism. This should ensure that the responses ensue from a coherent and fair framework that effectively addresses authoritarian aberrations. I will first clarify what is essential in order to make these procedures effective, then show how Shachar's proposal for transformative accommodation could help, and, finally, I reflect on the broader goals of intervention in light of insights from multiculturalism: creating, strengthening, and maintaining a community of solidarity built on mutual trust.

Effectiveness, fairness, and coherence

In order to enforce core values effectively, we need ways to ensure transparency and consistency in their application.¹²¹ The procedure under Article 7 and similar attempts to safeguard Article 2 values should form the basis of a consistent practice that conveys a sense of even-handedness: due regard for domestic value choices together with uncompromising commitment to maintaining core values.¹²² Mutual interdependences in multicultural, federal, and supranational

¹²¹This is a truism in pre-accession conditionality literature: 'credible conditionality requires normative consistency': F. Schimmelfennig, 'EU Political Accession Conditionality after the 2004 Enlargement: Consistency and Effectiveness', 15 *Journal of European Public Policy* (2008) p. 918 at p. 920.

¹²²The political mechanisms established in response to the illiberal challenge are good steps in this direction. See the DRF Pact, the Commission Blueprint for Action, and the Rule of Law Review Cycle: European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409; W. van Ballegooij and T. Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report* (Rapporteur Sophie in 't Veld) (European Parliamentary Research Service 2016) PE.579.328, (ec.europa.eu/info/sites/info/files/7_en_act_part1.pdf), visited 23 November 2020.

settings create complex structures. Shachar describes the complexity of the problem as follows: 'It requires both imagination and a strong political will to advance a multicultural institutional design that respects differences and protects rights, while empowering individual agency'.¹²³ Malik argues that it is possible to escape the binary choice of liberal principles and what she calls 'minority legal orders' and move to a spectrum of possible approaches to accommodating diversity.¹²⁴ De Schutter argues that multinational federalism should be grounded in an ability to provide 'a fair way to adjudicate between conflicting identities among the citizens that make up the component nations'.¹²⁵ While 'adjudication' has an air of a strictly legal procedure, a fully-fledged response will combine political and legal elements.

There are areas where legal standards can be applied, whereas other fields will remain unavoidably political. While political responses are equally important and legitimate, the multiculturalist outlook may suggest that more aspects will be open to judicialisation than suspected. Even complex issues of feminism and multiculturalism can be addressed by traditional legal methods. A proposal grounded in conflict of laws and public policy exceptions shows how seemingly moral, value-based evaluation can become part of legal assessment proper. Under this account, conflicts between multiculturalism and gender equality can be resolved in many cases through legal techniques borrowed from conflict of laws. Crucially for our discussion, this comes with an acknowledgement that formal legal solutions do not provide a full and adequate solution to broader problems but can be effective as workable responses.¹²⁶ We apply the law as if the wider reality could be captured by the limited scope of law and legal procedure, all the while remembering this tentative aspect. The argument runs as follows:

'one must fight to maintain the uncomfortable tension of "as if" and not allow it to devolve into "is," or even worse, into "ought." [...] The point of form is not [...] to avoid questions of values and politics, but the exact opposite: to provide us with a language within which to formulate, assess, and ultimately resolve, at least for the specific case, clashes of values that would remain irresolvable if taken in another way'.¹²⁷

¹²³Shachar, *supra* n. 61, p. 130.

¹²⁴Malik lists prohibition, non-interference, group rights, voluntarism (individual opting in), and mainstreaming: M. Malik, 'Minorities and law: Past and Present', 67 *Current Legal Problems* (2014) p. 67.

¹²⁵H. De Schutter, 'Federalism as Fairness', 19 *Journal of Political Philosophy* (2011) p. 167 at p. 168. Naturally, much depends on how we define 'reasonable pluralism' as opposed to 'unreasonable' diversion.

¹²⁶K. Knop et al., 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style', 64 *Stanford Law Review* (2012) p. 589 at p. 627-628.

¹²⁷*Ibid.*, p. 646-647.

As long as we do not lose sight of the centrality of enforcing values, legal and political procedures can work hand-in-hand in sustaining core commitments of a community.

Similarly, Shachar seeks to combine political goals with the constraints of legal procedures to create mutually reinforcing mechanisms in the multiculturalist context. She is concerned with abusive practices in groups that require additional protection, even support for undermining power hierarchies in the group.¹²⁸ In the following section I revisit her proposal.

Engagement through strengthening interdependence

Shachar's proposal of 'transformative accommodation' offers a yardstick to measure how institutions perform in motivating state behaviour in line with core values. It can teach us to look at existing rules and practices in a way that highlights perverse incentives, where violators are better off with non-compliance. These are the concerns behind the EU's struggle with financial conditionality and the fair distribution of asylum duties. Insights from transformative accommodation can help us design institutions and procedures that avoid the so-called 'authoritarian equilibrium', the institutional structure that ends up supporting and maintaining authoritarian tendencies in member states.¹²⁹ Shachar is concerned with guarantees that can 'increase [. . .] accountability and sensitivity to otherwise marginalized group members',¹³⁰ who are most likely to suffer under illiberal rule. The lesson is that refined forms of power sharing, overlapping competences and interdependence can in themselves act as brakes on illiberal tendencies: not only not rewarding violators but disincentivising violations.

Shachar lists five possible types of joint jurisdictions to address multicultural challenges,¹³¹ of which I focus only on her preferred solution: transformative accommodation. She argues that we can go beyond the common pattern where challengers of illiberal group norms are relegated to the whistle-blower role. A purely external form of challenge, Shachar argues, 'may merely entail a deeper silencing of internal dissent, by singling out those who dare to challenge the conventional interpretations of the tradition as cultural traitors',¹³² a scenario familiar in present-day Hungary.

¹²⁸A. Shachar, 'The Paradox of Multicultural Vulnerability', in C. Joppke and S. Lukes (eds.), *Multicultural Questions* (Oxford University Press 1999) p. 87 at p. 100, cited in Newman, *supra* n. 99, p. 45.

¹²⁹Kelemen, *supra* n. 109.

¹³⁰Shachar, *supra* n. 61, p. 117.

¹³¹*Ibid.*, p. 88-116.

¹³²*Ibid.*, p. 138-139.

What she proposes instead is to create in key areas of contestation a mutual dependence that encourages both levels ‘to become more responsive to *all* its constituents’,¹³³ creating ‘a catalyst for internal change’, while allowing for ‘cultural differences to flourish’.¹³⁴ She describes the resulting structure as a competition, or bid, between the two entities for the ‘individuals’ continued adherence to its sphere of authority’.¹³⁵ Her key insight is that by eliminating exclusivity and creating joint spheres of authority, the two levels have to find other means of appealing to constituents than raw power.¹³⁶ To achieve this, transformative accommodation follows three core principles. First, her proposal creates overlapping jurisdictions in ‘contested social arenas’, divides them into “sub-matters”: multiple, separable, yet complementary legal components’, and then allocates authority along these lines. The catch is that disputes can only be resolved when these sub-matters and jurisdictions are combined, creating mutual dependence. Second, under the no monopoly rule, ‘certain aspects of a given dispute [have] to be within group jurisdiction, as well as linked to aspects within state jurisdiction’.¹³⁷ Third, this is counterbalanced by the ‘clearly delineated choice options’ requirement that makes it transparent for actors on all three levels (individual, sub-unit, and larger polity) where choice is available and under what rules.¹³⁸ This form of joint governance combines discretion in limited areas with what is a mutually constraining environment.¹³⁹ As a result, transformative accommodation does not require the setting of minimum standards upfront; these will result from mutual adjustments, avoiding the associated problems.¹⁴⁰

The central element of Shachar’s proposal is the conditional opt-out for individuals in the case of violations.¹⁴¹ EU law provides myriad such possibilities through rules of mutual recognition. It is most apparent in business decisions, where lawful operation in the member state of a company’s choice will mean access to markets in other countries. Education (obtaining diplomas), marriages (including same-sex marriages), forum shopping in family or asylum matters all show the scope of individual choice where all other member states have to follow the resulting decision. It is national courts that often enforce opt-outs by relying on EU law to avoid or override the application of certain national laws. Competition in this sense is central both to EU law and to Shachar’s

¹³³Ibid., p. 117. Emphasis in the original.

¹³⁴Ibid., p. 118.

¹³⁵Ibid., p. 117.

¹³⁶Ibid., p. 122.

¹³⁷Ibid., p. 121.

¹³⁸Ibid., p. 122-126.

¹³⁹Ibid., p. 121.

¹⁴⁰Ibid., p. 127.

¹⁴¹Ibid., p. 123.

transformative accommodation. Also, in both cases, opting out is conditional, otherwise this option would undermine the functioning and existence of the smaller entity (minority group/member state). But the fact that this choice is available makes ‘in-group subordination more costly to the group’, creating a pressure to transform oppressive elements.¹⁴² If the group is too oppressive, opt-outs will undermine its authority. She identifies four preconditions for this type of accommodation, all of which are fulfilled in the EU and member state context: the multiple affiliations, interests, interactions, and legitimacy questions¹⁴³ are all part of the interplay between the EU and member states.

By way of illustration, Shachar lists cases from family and criminal law, as well as education and immigration,¹⁴⁴ citing concrete examples from Canada, the United States, and Malaysia.¹⁴⁵ In the EU context, asylum law is an area of shared competences as well as a key area of contention.¹⁴⁶ Through the lens of transformative accommodation, the problem of ‘asylum shopping’ (asylum-seekers going to countries where the asylum regime complies with European and international standards) becomes a key guarantee against violations. Competition and opting out does not directly solve the problem; what it can do is put pressure on the violator, making deviation more costly. Individual decisions to avoid the application of illiberal national norms by relying on EU law create a push to amend the underlying norms. In the case of asylum law, what is missing is a clear set of conditions and an element attaching responsibility to non-compliance, in addition to restricting the authority to grant or deny asylum. Quotas requiring the integration of a certain number of refugees recognised by other member states could be a step in this direction. Any reform of the European asylum rules should seek to create the dynamic Shachar describes, leading to fruitful competition between the European and the national level, with an eye to the individuals concerned.

The transformative accommodation proposal can also help us make sense of the diverse landscape of financial instruments. Some funds are distributed through national governments, with some level of European oversight, while

¹⁴²Ibid., p. 126.

¹⁴³Ibid., p. 118.

¹⁴⁴Ibid., p. 117-145 (family law examples) and 151-165 (the three other examples).

¹⁴⁵Ibid., p. 132-133. The two Northern American jurisdictions discussed in the immigration context: p. 151-154.

¹⁴⁶See illiberal opposition to EU ‘diktats’ and identity arguments. ‘A koronavírus-járvány miatt fokozódhat a migrációs nyomás Európán’ [‘Migration pressure on Europe can increase due to COVID pandemic’], *Hirado.hu*, 26 May 2020, (hirado.hu/belfold/cikk/2020/05/26/a-koronavirus-jarvany-miatt-fokozodhat-a-migracios-nyomas-europan), visited 23 November 2020. Cf Judgment of the Court of Justice in Joined Cases C-924/19 PPU, C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, effectively outlawing closed transit zones.

others are distributed directly to local governments, companies, non-governmental organisations, and other institutions and individuals. Transformative accommodation would require general conditions for national governments to distribute funds. In case of non-compliance, funds would not simply be revoked, but would be distributed by supranational mechanisms. A related criminal law rule would allow supranational institutions to take over cases if national prosecution fails to act (as happens in many politically important cases in Hungary¹⁴⁷). These are all cases where progress has been made or proposals are currently under discussion in EU bodies (see the establishment of the European Public Prosecutor's Office or the budget-related rule-of-law conditions¹⁴⁸).

While admittedly not a panacea,¹⁴⁹ Shachar's proposal provides a better framing for the identitarian-sovereignist claims than an absolutist interpretation of the national identity clause in Article 4(2). It has the advantage of transforming the question from a two-sided debate between the EU and a member state into a triadic relationship that centres on the individual concerned. At the same time, the proposal relies not on the leaders' goodwill but 'upon a *realpolitik* consideration'.¹⁵⁰ It converts value-based arguments into interests with institutional protection and helps us formulate concrete legal-institutional solutions to address the illiberal challenge.

The positive take inherent in Shachar's proposal for engagement points to a deeper multiculturalist concern. The goal is not simply to find a *modus vivendi*, but to build and maintain a community that, while accommodating differences, also transcends divisions. I now turn to this aspect.

Strengthening solidarity

When thinking about the forms of liberal interference, it is easy to get lost in the technicalities of assigning authority and setting limits. The multiculturalist parallel is also helpful in forcing us to take a broader outlook, focusing on the longer-term goals of integration, and designing responses accordingly. Rather than taking the

¹⁴⁷'[T]urning a blind eye' and 'decid[ing] in the government's favour in several corruption cases': Transparency International Hungary, *Corruption, Economic Performance and the Rule of Law in Hungary. The Results of the 2019 Corruption Perceptions Index* (2020) p. 15, <transparency.hu/wp-content/uploads/2020/02/Korruptci%C3%B3-gazdas%C3%A1gi-teljes%C3%ADtm%C3%A9ny-%C3%A9s-jog%C3%A1llamis%C3%A1g-Magyarorsz%C3%A1gon-CPI-2019-EN-1.pdf>, visited 23 November 2020.

¹⁴⁸H. von der Burchard and L. Bayer, 'European Parliament Clashes with Merkel over Rule of Law in Budget Talks', *Politico.eu*, 9 July 2020, <www.politico.eu/article/european-parliament-clashes-with-merkel-over-rule-of-law/>, visited 23 November 2020.

¹⁴⁹Shachar, *supra* n. 61, p. 150 and 144-145.

¹⁵⁰*Ibid.*, p. 143. Emphasis in the original.

traditional liberal notion of toleration, multiculturalism seeks accommodation and mutual engagement. Its aim is not simply normative cohesion, but the maintenance or strengthening of solidarity,¹⁵¹ crucial for a functioning polity. Illiberal member states challenge solidarity directly when they refuse to share what they see as the liberal burden of participation.¹⁵² In addition, the way such states operate may trigger reactions from other member states and their citizens, who wish to revoke solidarity because of systemic illiberal violations. A less than coherent European response can strengthen sentiments of unfairness, which undermine feelings of European solidarity in illiberal polities.

We often forget that behind the EU's complex system of mutual recognition, from democratic legitimacy to judicial independence, there is the fundamental idea of a community built on solidarity. Similarly, we may forget that liberalism is not a mere 'philosophy of politics',¹⁵³ but also a matter of personal commitment.¹⁵⁴ Ultimately, liberal engagement with illiberalism is about winning the hearts and minds of European citizens, at least to the extent that they accept its legitimacy based on core commitments that sustain the Union. Liberal democracies cannot be maintained without securing domestic popular support for constitutionalism,¹⁵⁵ or an overlapping consensus,¹⁵⁶ and this type of consent cannot be magically created. This shows the importance of sustained efforts to make the illiberal groups 'liberalise their culture'¹⁵⁷ in the longer term. Without

¹⁵¹ See Kymlicka's inquiries into the impact of multiculturalist policies on feelings of solidarity and, more specifically, redistribution: K. Banting, and W. Kymlicka, *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford University Press 2006). A similar line of thought is pursued early on by Addis who talks about the need for a positive form of toleration, 'pluralistic solidarity': Addis, *supra* n. 54.

¹⁵² See the opposition to asylum obligations as an obvious example.

¹⁵³ '[L]iberalism is not a philosophy of man, but a philosophy of politics': C.E. Larmore, *Patterns of Moral Complexity* (Cambridge University Press 1987) p. 129, quoted in Mulligan, *supra* n. 120, at p. 282.

¹⁵⁴ 'The viability and stability of political liberalism turns on the effective cultivation of a comprehensive liberal culture and identity within and among groups who otherwise embrace very different commitments surrounding religion, nationality, ethnicity, morality, etc. The diversity of value and belief that political liberalism teaches us to respect depends on how we are taught to identify and value the *persons* and *groups* who produce this very diversity': G. Doppelt, 'Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum', 12 *Journal of Contemporary Legal Issues* (2001) p. 661 at p. 692.

¹⁵⁵ As Kymlicka warns, 'liberal institutions are likely to be unstable and transient when they have arisen as a result of external imposition, rather than internal political reform. In the end, liberal institutions can only really work if liberal beliefs have been internalized by the members of the self-governing society': Kymlicka, *supra* n. 38, p. 167.

¹⁵⁶ J. Rawls, 'The Idea of an Overlapping Consensus', 7 *Oxford Journal of Legal Studies* (1987) p. 1. In the multiculturalist context, see Kymlicka, *supra* n. 38, p. 167.

¹⁵⁷ Kymlicka, *supra* n. 38, p. 168.

engagement, what we get is a shallow, truce-like *modus vivendi* where commitment is lacking – a disappointing lesson from enlargement conditionality. Citing British constitutional theorist Dicey, Kymlicka talks about ‘a very peculiar state of sentiment’ required by citizens of multinational federations: ‘they must desire union, and must not desire unity’.¹⁵⁸ Direct and immediate responses can be crucial in dealing with the most direct consequences and preventing, in the short term, radical deterioration. The liberal multiculturalist literature, however, advises us to focus also on the goal of forming liberal citizens.¹⁵⁹ Maintaining Article 2 values requires citizens willing to stand up for those values, who rely on and protect the institutions meant to serve and embody them. Thinking about responses to the illiberal challenge in multiculturalist terms helps us consider how to strengthen such commitments.

CONCLUSION

The legitimacy of enforcing liberal values and imposing constitutionalist norms is rightly debated. With the emergence of the illiberal challenge, this has become a vividly contested question within the EU. I have used the example of illiberal minorities from the multiculturalism literature to bring insights to this debate. Not all deviations from Article 2 values should automatically trigger responses from key EU institutions. Pluralism entails some margin of appreciation, showing how far states can go without facing sanctions or leaving. Finding where these lines (should) run is not easy and involves many practical considerations. Normative guidance is not only useful but should underscore all actions as public justification based on common commitments. We have seen examples where EU actors have been engaging with illiberalism, using political statements, infringement procedures, legislative proposals, and institutional responses. Many argue, rightly, that more needs to be done. This paper adds that a more coherent vision is required to drive these responses. Theories of multiculturalism offer insights on how a value-based community based on mutual trust and solidarity can be created, maintained, and strengthened.

Kymlicka’s theory, which I applied with some liberty, suggests that the more severe the violations, the more systemic the threat, the less the genuinely democratic mandate, and the less room for internal dissent, the more legitimate liberal

¹⁵⁸Kymlicka, *supra* n. 38, p. 192 (see also p. 172); A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) p. 75. Note also the parallel with the EU’s motto, from Leibniz, ‘unity in diversity’.

¹⁵⁹Modern liberals like Brian Barry [...] have argued that the liberal state must not tolerate illiberal practices but should engage in an ethical project of forming liberal citizens’: C. Joppke and J. Torpey, *Legal Integration of Islam* (Harvard University Press 2013) p. 146.

interference is. Accession, participation, and the option to leave the EU also bolster the legitimacy of enforcing the core values. The legitimacy and effectiveness of interference also depend on the transparency, fairness, and coherence of the legal and political framework. Standards and sanctions should be applied in an even-handed manner. With its roots in multiculturalism, the proposal confirms pluralism within principled boundaries. Thus, it can form the basis of an adequate answer to post-colonialist sensitivities mushrooming with the populist *Zeitgeist*, including arguments about Western states applying double standards and imposing norms on Eastern members in a one-sided fashion. The multiculturalism parallel also seems useful when calling for consistency in the debate from the perspective of the two-directional claims of illiberal regimes: measures to curb internal dissent are hard to defend externally when, by the same move, the regimes seek a right to dissent from the wider community's liberal norms.

The overview suggests that engagement is superior to mechanical enforcement. Shachar's transformative accommodation allows for the exercise of group discretion while also reinforcing mutual dependence in crucial areas. This leads to a competition that centres on the individual and makes violations more costly. Ultimately, accommodation creates a pressure to transform oppressive practices, but this requires time. The multiculturalist parallel warns us that no quick fix is possible. After the upsetting of norms that had been thought to be settled, defining the terms of coexistence will require constant adjustment. Academic and political calls for immediate action are justified; late action may be less effective. But reactions should go hand-in-hand with long-term, strategic thinking about the consequences of the responses and the resulting framework.

Engagement with illiberalism is an opportunity to clarify the core commitments of a liberal community.¹⁶⁰ As Doppelt, a critic, put it, 'the phenomenon of illiberal groups constitutes the most powerful litmus test for any viable multicultural liberalism'.¹⁶¹ Illiberalism (or, more broadly, populism) plays a somewhat similar role in the EU. It provides a chance to express and confirm core commitments. Unfortunately, it also has contaminating effects: if illiberal solutions 'work' – politically – liberal forces can be tempted to adopt some of them. Mainstream politics sliding towards illiberalism can be as threatening to integration and common values as illiberal parties gaining force.

The *raison d'être* of the EU is to preserve peace and cooperation based on common values and mutual trust.¹⁶² Liberal interference should strengthen the sense

¹⁶⁰See the argument that engagement with a comprehensive doctrine like Islam can alter liberal tenets: A.F. March, 'Liberal Citizenship and the Search for an Overlapping Consensus: The Case of Muslim Minorities', 34 *Philosophy & Public Affairs* (2006) p. 373.

¹⁶¹Doppelt, *supra* n. 154, p. 661.

¹⁶²Art. 3(1) TEU.

of solidarity not only at the level of member state governments, but also that of citizens. The proposal seems apt to show how an additional layer of attachment in the EU could develop and ground more substantive arguments for why this added level of political decision-making can be justified along with long-established national polities. Regardless of whether we embrace a pathway towards federalisation or stick to a peoples' Europe, without a coherent political and legal framework to deal with the dangers of anti-constitutionalist illiberalism, pluralism might turn into a patchwork decorated with autocracies, with uncontrolled deviation in some member states.

