



Why and How Should the European Union Defend its Values?

Tore Vincents Olsen¹

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Abstract

This article provides a normative framework for evaluating the moral permissibility of various defences of European Union (EU) values against their violation in EU member states. This requires, first, a coherent interpretation of EU values as the values of liberal democracy; second, a clear notion of when they are violated; third, a theory of how liberal democracy can be defended with measures that are consistent with the values of liberal democracy themselves; and, finally, a discussion of what the EU's role is in this defence. The article argues that it would be permissible for the EU to combine a number of political, cultural, socio-economic and legal responses in a concentric defence of liberal democracy as long as they respect the separation of powers doctrine and do not rely on problematic notions of collective responsibility.

Keywords European Union · EU values · Democracy · Rule of law · Transnational militant democracy · Moral permissibility

Introduction

There is a wide-ranging debate on how the EU should defend its values against member states that violate them.¹ This article offers an outline of a critical and comprehensive normative theory concerning this question. Retrieving and combining relatively well-established insights on the principles of liberal democracy and of its

¹ Since both the public debate and large parts of the academic debate speak about 'values' rather than 'fundamental principles' or 'norms', the article sticks to this vocabulary and uses the terms 'values' and 'principles/norms' interchangeably even if—strictly speaking—only principles and norms can be violated or breached, while values are realised to a greater or lesser extent (e.g. Habermas 1996, pp. 254–256).

✉ Tore Vincents Olsen
tvo@ps.au.dk

¹ Department of Political Science, Aarhus University, Bartholins Allé 7, 8000 Aarhus C, Denmark

defence, it identifies the kind of responses that are consistent with EU's values and explains which institutions should respond and how. The article serves as a corrective to the many contributions in the debate that tend to focus on the most efficient ways to bring member states back in line with EU values while not being clear about whether what they propose would be consistent with those very values themselves and thus would be morally permissible.² Of course, the article is not the only one of its kind. Very recently we have seen more good attempts at addressing the EU question from the viewpoint of normative political theory (e.g. Bellamy and Kröger 2021; Theuns 2020). However, few if any offer the same comprehensive framework for discussing the defence of EU values as the one laid out here.

The EU's values are 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Treaty on the European Union (TEU) Article 2). The article defines the moral permissibility of EU responses by whether they are in line with the values they are to protect under moderately non-ideal circumstances. The latter refers to non-compliance with central EU values at the level of (a limited number of) member states and relates to the key rights and institutions, not least democratic rights and institutions, but does not reach a level and an extent which requires extraordinary measures such as immediate humanitarian interventions (cf. Gilibert 2018: 268f.). The assertion is that under conditions of moderate non-compliance, any normative order ought to stick to measures for its defence which minimise both moral costs and the potential loss of effectiveness resulting from the employment of measures that contradict its basic principles (because it is perceived as hypocritical).

The article begins with a brief review of the responses currently available to EU actors and the debate about how they might be improved. The review points to the predominant preoccupation with political feasibility and effectiveness and the relative neglect of moral permissibility. Still, to discuss permissibility in depth, it is necessary to have a good and internally coherent understanding of EU values because only then can you identify breaches and know which responses to them are consistent with them. To that purpose Section 'EU Values as the Values of Liberal Democracy' proposes that we conceive the EU's values as the values of liberal democracy and look to Jürgen Habermas's theory of liberal democracy for a coherent interpretation of them. While this theory emphasises that the concrete interpretation of the values of liberal democracy always rests with the citizens as legislators, it helps us as an ideal theory to clarify some fundamental issues with regard to EU's values and how to respond to them. Section 'In Defence of Liberal Democracy' explains why and how liberal democracies under non-ideal circumstances can legitimately defend themselves against non-liberal democratic forces and investigates how respectively socio-economic, cultural, political and legal means can be employed for this purpose. It also clarifies why the EU can and should defend its values when they are violated in one of its member states. Section 'Targeted EU Responses: Political,

² See Blauberger and Kelemen (2017), Kochenov and Pech (2016), Oliver and Stefanelli (2016), Sedelmeier (2017), Schlipphak and Treib (2017) and the various contributions in Closa and Kochenov (2016) and Jakab and Kochenov (2017).

Cultural, Legal and Socio-Economic’ discusses a number of morally permissible political, cultural, legal and socio-economic responses in the defence of EU values and briefly considers their feasibility and effectiveness. Section ‘**The Separation of Powers: Who Should Decide on What Basis?**’ elaborates on what is required for the EU to observe the separation of powers doctrine inherent to liberal democracy.

EU Responses, Political Feasibility and Effectiveness

The debate on the defence of EU values against breaches in member states is currently dominated by concerns over feasibility and effectiveness of the various responses, while the question of permissibility is being neglected. Space does not allow an extensive review. Some brief critical observations will have to suffice.

Currently, the EU can respond in a number of ways: (1) express criticism (naming and shaming), (2) material sanctions (fines, suspending EU funds and rights) and (3) preventive policies, for example, ones that promote civic values among citizens and other key stakeholders such as members of the judiciary.³ Non-compliant member states have been criticised by various EU institutions, such as the Commission, the European Parliament (EP) and the Council, and all member states are now put under critical ‘rule of law’ review (European Commission 2014, 2017, 2020a, b; European Parliament 2018; Council of the European Union 2014). The hope is that reviews will work both preventatively and make non-compliant states correct themselves. However, one problem with this evaluative criticism is that there is no clearly specified and authoritative democratic basis for it. Almost all observers agree that the values in Article 2 TEU, cited earlier, are far too general to serve as a basis of critical evaluation, let alone material sanctions (Scheppele 2016; Kochenov 2015; Von Bogdandy et al. 2017; Schlipphak and Treib 2017; Sedelmeier 2017; Müller 2017; Bárd et al. 2016). Another often-invoked source, the Charter of Fundamental Rights (CFR), has been created for other purposes and has problematic scope conditions (Von Bogdandy et al. 2017).⁴ To explain, the problem is twofold. First, the value of democracy would imply that the European legislator be the source of the basis for evaluation and make this explicit through—as a minimum—secondary law. Second, the missing basis for evaluation and for issuing sanctions means that the EU contradicts the rule of law, including the principle of legal certainty.

Most commentators agree that it would be infeasible to provide a specification of the EU values through a treaty change, while there is disagreement about whether it is possible to pass secondary EU legislation specifying what EU values mean in terms of rights and institutional standards (cf. Von Bogdandy et al. 2017; with Scheppele 2016; Kochenov 2015) All agree that objective standards applied by an impartial body would be most effective, since it would generate more acceptance

³ Criticism and sanctions can be issued by way of the procedures in Article 7 of the Treaty of the European Union (TEU), and the regular infringement procedures in Treaty of the Functioning of the European Union. General policies are possible within the competences of the EU.

⁴ The CFR only applies to national authorities when they implement EU law (CFR Article 51.1).

and support in the general public, but there is disagreement on which bodies would be seen as impartial.

Some advocates of the EU using legal infringement procedures and going through the European Court of Justice (ECJ) to have member states judged and sanctioned have lost patience and argue that key legal actors, the Commission and the ECJ, should develop and apply concepts such as ‘Reverse Solange’ and ‘systemic infringement’ on the basis of the existing case law.⁵ This is seen as both feasible and effective. Legal scholars have strong confidence in the effectiveness of material sanctions. Again, the problem is that *prima facie* it violates the values of democracy and the rule of law since it amounts to ‘judicial law making’ (Blauberger and Kelemen 2017, p. 326).

Advocates of using the TEU Article 7 procedure, the formal procedure when it comes to value violations by member states and where the political actors (Commission, EP, (European) Council) are in charge, also disagree about the feasibility and the relative effectiveness of criticism on the one hand and material sanctions on the other (Schlippahk and Treib 2017; Sedelmeier 2017). Again, criticism seems unproblematic as long as it is based on the right source (which is currently missing) and especially when it is directed at those specific actors (persons, parties and governments) who are responsible for the breach. However, the material sanctioning of the whole member state as envisioned in TEU Article 7.3 is problematic because it is based implicitly on the notion of collective responsibility (Müller 2017, p. 242). Conscious of this, some authors do make the observation that sanctions should be targeted in such a way that they do not punish those who are not at fault, and they even contemplate the idea that EU intervention should take place on the initiative of minorities in members states, because this will give less of an image of illegitimate outside-EU intervention into domestic politics (Schlippahk and Treib 2017). This targeted sanction is better aligned with liberal values. However, Schlippahk and Treib (2017) make the argument on the basis of the effectiveness of such interventions and not on the grounds that non-targeted sanctions would violate the very values that they are supposed to protect.

These observations illustrate how current EU initiatives and the scholarly debate are dominated by feasibility and effectiveness considerations, while reflections on moral permissibility only surface occasionally and sometimes for the wrong reasons. The next section will argue that such reflections require a clear and coherent conception of European values as the values of liberal democracy.

⁵ The Reverse Solange would imply that member states remain autonomous in the protection of fundamental rights only for so long as they can secure the essence of fundamental rights enshrined in Article 2 TEU (Van Bogdandy et al. 2017, p. 220). The proposed systemic infringement procedure implies that the Commission and the ECJ can bundle a number of cases against a member state and consider them as all part of a systemic infringement of EU values (Scheppelle 2016).

EU Values as the Values of Liberal Democracy

EU values are often interpreted as the values of liberal democracy; liberal democracy protects and promotes the equal dignity and freedom of all citizens through human rights, democracy and the rule of law. The historical background for the values is built from the experiences from the interwar period and the horrors of the Second World War. They created great suspicion against national parliamentary democracy unconstrained by the rule of law and the protection of individual rights (Müller 2011; Norman 2017).

However, the historical lessons are challenged by developments in Hungary and Poland. Moreover, the historical lessons leave it indeterminate how to interpret the values and their relationships. For example, how should we prioritise democracy and human rights respectively? The Polish and Hungarian governments have cited their democratic majorities in support for policies and constitutional reforms which have attracted much criticism for undermining basic rights and the rule of law (BBC 2013; Davies undated).

The apparent tension between (national) political autonomy and democracy on the one hand and human rights and the rule of law on the other calls upon a conception of liberal democracy, an ideal theory of liberal democracy, that integrates these values into a coherent whole and gives them a determinate meaning. Without this ideal theory, we and the EU cannot know what counts both as a breach of its values and as morally permissible responses to defend them (cf. Simmons 2010). A strong candidate for providing such a conception is Habermas's theory of liberal democracy (1996) based on his argument about the 'co-originality' of basic individual rights and popular sovereignty. It states that democracy can only be established effectively at a societal level by way of law, which is conceptually tied to individual rights. The specification and distribution of rights co-ordinate, at a societal level, the actions of individuals and place them in a specific relation to each other. To establish democracy, civic, political, socio-economic as well as process rights need to be instantiated as they place all individuals and citizens in free and symmetrical relations to accept or reject the political/legislative proposals of others (Habermas 1996, pp. 122–123). However, the specific content of these rights needs to be elaborated by the citizens themselves with a view to realising the equal freedom of all through the democratic procedure and not given beforehand by some external standard or authority (Rummens 2006, 2007). Otherwise, citizens would not be able to see themselves as politically autonomous. In sum, democracy and human rights are each other's presuppositions and the various values of liberal democracy should be seen as a coherent whole. The many criticisms of Habermas's theory cannot be discussed here. And the intention is not to discuss Habermas's view of the EU as such (see e.g. Habermas 2012, 2015a, b). The main point is that the EU needs to interpret its values along the lines of a theory like this in order to develop a coherent conception of them.

Nonetheless, Habermas's theory helps us clarify some further important issues. First, the separation of powers should be based on a differentiation of discourses. The legislative power is based on discourses of justification through

which the legislature should specify in terms of concrete rights and institutions that the values of the liberal democracy require in light of society's concrete and changing circumstances (Habermas 1996, pp. 151–168). By contrast, the courts should not justify norms but apply them to individual cases on the basis of discourses of application. Although courts are involved in some measure of norm production, this takes place in connection with the application of norms, not their justification. The role of courts is to make sure that the law and the rights of individuals are not violated by the state (the executive) and other (private) actors in individual cases and they should be prevented from programming themselves by being tied to existing law (Habermas 1996, p. 172). This view implies scepticism towards judicial law-making and some versions of strong or abstract judicial review. Fundamental rights review should ideally be carried out by the legislature itself as part the legislative process (Habermas 1996, pp. 241–242). Nonetheless, constitutional courts can play a role in reviewing whether the procedures are sufficiently inclusive and have been properly followed in the legislative process, including whether publicly accessible reasons have been provided for any legislation in question (Habermas 1996, p. 280). This may have far-reaching implications for a broad understanding of procedures including, for example, whether all groups in society feel equally recognised as democratic citizens and/or have sufficient socio-economic preconditions for political participation. However, the underlying logic behind the separation of powers implies limitations on the role of courts. The elaboration of the procedures, including the definition of citizens' rights, belongs to the legislative process and, institutionally, to the legislature. It is part of democracy's reflexivity. Courts should abstain from producing their own legal bases.

Second, the constitution and ordinary legislation should be understood as parts of an ongoing project to realise the equal liberty of all under changing societal circumstances. However, given the key role of the legislature in specifying the content of rights with this purpose in mind, constitutions should primarily be conceived as procedures. Therefore, if constitutions are difficult to change, they should not include large parts of substantive policies and their 'bill of rights' should be defined at a relatively abstract level to allow the legislature to specify in detail each individual right via legislation.

The theory has important implications with regard to EU value compliance. First, the separation of powers doctrine implies that the concrete interpretation of European values, as indicated above, should be left to the European legislator (which notably consists of a number of different institutions, the Council, the EP and the Commission, with pertaining consultation procedures including with national parliaments), while the application of the normative standard that results from this should be carried out by an independent (judicial) body on the basis of a discourse of application. The ideal of liberal democracy demands that sanctions are issued on the basis of a set of publicly known legal norms that provide a relatively clear sense of what falls inside or outside those norms. They should not be issued on a normatively ad hoc basis.

Second, it is possible within the liberal democratic ideal to vary on the question whether constitutional courts should be able to carry out strong constitutional

review. A strong or abstract judicial review is not inherent to the ideal of liberal democracy. Courts could reasonably be given a role in controlling whether proper democratic procedures have been followed and publicly accessible reasons, including reasons referring to fundamental individual rights, have been provided through the legislative process. However, under the presumption of general compliance with liberal democratic principles they are not expected to have a role in overruling and substituting the discourses of the legislative process. This is a role that they would be assigned under the introduction of certain ‘realistic’ presumptions in the theory for example that the focus of legislators is short term and on policy rather than rights, or as part of a non-ideal theory of liberal democracy (to which I will return shortly). This means that if a member state does not have an institutional set-up with strong constitutional review that does not by itself imply that it is not consistent with liberal democratic principles. It also means that it would be possible to make institutional reforms which removes strong constitutional review without thereby falling outside the parameters of liberal democracy. That said, it does not follow that all current institutional reforms in say Hungary and Poland are motivated by a liberal democratic agenda and consistent with it (Szente 2017; Sadurski 2019). There would have to be other mechanisms in place to secure that the popular will is oriented towards realising the equal freedom of all, and it is unclear that this in fact is so in these two much-discussed cases.

Third, if constitutions are primarily conceived as procedures, it would go against the liberal democratic ideal to have large parts of substantive policy defined in the constitution or at a similar fundamental level that places them outside the reach of (future) democratic majorities and undermines their democratic equality (constitutional capture) (Szente 2017). This does not, however, imply that political and civil rights as well as legal guarantees which presuppose independent legal institutions can be absent or be defined in whatever way seen fit by a ruling majority. Their specifications have to be oriented towards realising the equal freedom of all. Similarly, the theory points to some general institutional preconditions for liberal democracy in addition to independent courts, including an autonomous civil society, independent (public) media, and open and fair electoral and legislative procedures (cf. Bernhard 2021, pp. 599–600; Surowiec et al. 2020).

With this ideal theory of liberal democracy in hand we can insert some nuance into the debate especially with regard to the role of (national and European) constitutional courts while still being able to identify some of the most glaring violations of EU values and explain the strong concern with the rule of law. The latter is not only important from a functional perspective and that of individual (economic) actors. It is also important for its internal relationship with democracy and the self-determination of citizens. We can also explain why the EU legislator (and not other actors) in order to realise both the values of democracy and the rule of law should specify EU values further in terms of concrete institutional standards and individual rights. The next step is to explain why and how liberal democracy can defend itself against value violations and what specifically justifies the EU’s efforts to secure member state compliance. The step implies that we move from the level of ideal theory which sets the abstract evaluative standards and where general compliance

with the principles of liberal democracy is presupposed to the level of non-ideal theory where the main issue is non-compliance with those principles (Simmons 2010; Valentini 2012). The next section addresses the questions of why and how in turn.

In Defence of Liberal Democracy

Theories of militant democracy and more recently of democratic defence argue that democracies are permitted to defend themselves against actors who seek to undermine them (Loewenstein 1937a, 1937b; Rummens and Abts 2010; Malkopoulou and Norman 2018; for a review of the literature see Müller 2016). They are non-ideal theories about defending and promoting liberal democracy under circumstances in which not all relevant actors are supporting and complying with the principles and norms inherent to this ideal (Kirshner 2014, p. 4). Theories of democratic defence are controversial. The main objection is that some measures employed in liberal democracy's defence, for example party bans, violate the equal respect for all inherent in the ideal of liberal democracy by restricting the democratic freedom of some. One key argument against democratic defence measures is that with them democracy loses its value neutrality and that democratic participation should allow for an equal chance for all to have their preferences become law regardless of the latter's content (Kelsen 2006 [1932]; Invernizzi Accetti and Zuckerman 2017, pp. 7–10; Schupmann 2017, pp. 205–207; Vinx 2020). Space does not allow for a detailed rehearsal of this discussion. However, the rejoinder is that liberal democracy should be conceived as setting limits on what can be considered democratic decisions: they have to meet the requirement that legal norms respect the equal freedom of all including their (future) equal political freedom (Rummens 2006, 2007; Vinx 2020, p. 691). People who want to use liberal democratic rights and institutions to change them into something else do not live up to this requirement and thus do not respect the equal freedom of all. It is therefore also implausible that their ambitions to change the regime is owed the same respect as ambitions to protect it (Kirshner 2019, p. 62). Also, note that the defence of democracy does not in general exclude anyone from participating in democracy. It generally only restricts certain actions and political agendas that have the aim of turning liberal democracy into something else and thus has the purpose of realising the equal freedom of all under non-ideal circumstances, i.e. circumstances in which not all accept and comply with the principles of democracy (Rummens 2019; Vinx 2020).

The next question thus is how democracy should defend itself, and the following will look at measures that are considered morally permissible from the viewpoint of liberal democracy. The approach taken here broadly follows the argument for a concentric defence of liberal democracy set out by Rummens and Abts (2010) on the basis of a Habermasian theory of liberal democracy. Their model of concentric defence relies on two further features of Habermas's theory. The first is the notion that for liberal democracy to work properly, the formal rights and institutions have to be supplemented with a liberal democratic political culture rooted in the citizenry (Habermas 1996, pp. 130–131, 358–359). This political culture cannot be engineered but can legitimately be stimulated through *inter alia* civic education

(Habermas 1996, p. 359; see also Kymlicka 2002, pp. 284–327). The second feature is the idea that democracy and democratic deliberation depend on the exchange between ‘the centre’ of formal institutions (parliaments, executives, etc.) on the one hand and ‘the periphery’ consisting of the informal public sphere and civil society on the other (Habermas 1996, ch. 8).

Rummens and Abts argue that the interests of non-liberal-democratic actors and voters should be included in political deliberation by allowing them to be voiced in the public sphere, but that they should be filtered in the movement towards the centre in such a way that the liberal democratic institutions and the liberal democratic rights of all citizens are not altered by them. This involves using different measures at different stages. Some of these are long term, while others are more short term. With regard to the public sphere, Rummens and Abts argue for the use of civic education, publicly sponsored campaigns of civil society organisations for the promotion of civic values and with it the creation of a citizenry which is generally prepared to defend liberal democracy when it is threatened (Rummens and Abts 2010, p. 655). It would also be appropriate for public authorities to clearly express what the principles underlying liberal democratic rights are and to criticise views that conflict with them (Brettschneider 2010). These *cultural means* can thus immunise the public from falling sway to non-liberal-democratic views (Pedahzur 2004; Malkopoulou and Norman 2018). Another part of a long-term ‘immunisation’ strategy is the creation of socio-economic conditions that would enable all citizens to participate politically by giving them sufficient resources to use their formal political rights. This can further the feeling among citizens that they have a positive stake in society. Moreover, adequate socio-economic conditions would arguably produce less fertile ground for non-liberal-democratic actors to appeal to them (Malkopoulou and Norman 2018; Mounk 2014). Both *cultural* and *socio-economic means* are part of general policies that according to the separation of powers doctrine ought to originate in legislation passed by the legislature (unless they are provided on a voluntary basis by civil society organisations).

Legislation should also form the basis of a third means, namely legal means. According to the concentric defence strategy, the closer the challengers of liberal democracy get to the centre of political institutions the more robust the means should be. Organisations with non-liberal-democratic purposes can have their rights to propaganda and assembly limited. Similarly, public funding of parties can be made conditional on a declaration of loyalty to liberal democratic values, and parties can ultimately—as a very last resort—be banned if they pursue non-liberal-democratic agendas that would imply an immediate threat to the rights of others (Rummens and Abts 2010, pp. 654–655). Legal means require a legal basis that is clear and can be applied by courts, including the protection of all the rights of the defendant to contest the decision in public and via appeal to higher level courts (Kirschner 2019, p. 66; Rijkema 2019; Rummens 2019, p. 126). Legal means are not just legal: they are also in their own way cultural and political due to their expressive content. The law covering this area expresses what the values of liberal democracy are and clarifies their boundaries.

Legal defence measures such as party bans should be contemplated only when the other lines of concentric defence of democracy have failed (Rummens and

Abts 2010, p. 655). Legal defence measures are most closely connected with both older and more recent theories of militant democracy. An issue with such measures is that they might be of less relevance in cases where a party is not openly anti-democratic, but instead appeal to democracy and even fundamental rights. Arguably, some populist parties fall into that category, and they, along with other parties, constitute a detection problem (Rijkema 2018, 2019).⁶ Nonetheless, legal measures would be permissible as a matter of principle and their expressive value should not be underestimated.

One important line of defence between, as it were, cultural and socio-economic means on the one hand and legal means on the other is political means. Political means concern how liberal democratic parties relate to non-liberal-democratic parties (NLDPs) and the attempt of the latter to gain influence and power. It is here possible to distinguish between four different strategies: ignoring NLDPs, excluding them, co-operating with them and co-opting their policy positions (Downs et al. 2009, pp. 155–158). Rummens and Abts (2010, pp. 655–658) generally argue that mainstream parties should strongly criticise the non-liberal democratic views of NLDPs as part of public debate in order to mark the principled difference between them and the basic principles of democracy, and should exclude NLDPs from gaining influence on the political system. On their analysis, exclusion—establishing a *cordon sanitaire*—will be the most effective strategy generally, and they worry that collaboration with NLDPs and/or co-optation of their policies will lead to NLDPs gaining influence on institutions and policies in the manner that should be avoided. Other studies indicate that collaboration and/or co-optation of policies are more effective means than exclusion, but they also ‘risk [...] core values and the mainstreaming of intolerance’ (Downs 2012, pp. 176–177; Downs et al. 2009; Van Spanje and Weber 2019; Van Spanje and de Graaf 2018).

To sum up, the concentric defence of democracy employs four different types of measures: cultural, socio-economic, legal and political. Cultural and socio-economic measures can be seen as long-term proactive measures that aim to immunise the citizenry against non-liberal democratic agendas, while legal and political measures are more short-term reactive measures. All types of measures are morally permissible when they are put in place in order to secure the preconditions for liberal democracy and to the extent that they do not remove the rights and lead to the repression of legitimate interests of some citizens. Political, cultural and socio-economic measures are the least controversial since they either rely on the voluntary choices of political parties or because they can be justified as general preconditions for the realisation of liberal democracy. Legal measures are more controversial. However, legal restrictions on non-liberal democratic organisations, parties and propaganda are not identical to disenfranchisement or the removal of civil rights of some citizens (Wagrandl 2018, p. 150).

Finally, and more specifically with regard to the EU, some of the suspensions of rights and funds envisioned in the procedures of Article 7 TEU punish not only

⁶ However, see Lührmann et al. (2021) for possible reliable ways of spotting non-liberal parties who will move towards autocracy if they gain government power.

non-compliant governments but the whole population including the democratic minority whose rights are being undermined. This also applies to extreme measures such as the theoretical option of expelling a ‘rogue member state’ from the EU (Theuns 2022, Patberg 2021). Collective sanctions sit uneasily with the values of liberal democracy. Of course, conventional conceptions of the minority’s responsibility for democratic decisions combined the regular use of collective sanctions in international politics might speak in favour of applying collective sanctions against non-compliant states. However, as I have argued elsewhere, this argument holds less force when it is the democratic rights of the minority that are under attack and when collective sanctions are unnecessary because more targeted sanctions are both possible and likely to be (more) effective. Collective sanctions amount to punishing the minority for the violation of their own rights (Olsen 2019).

The concentric model for containing non-liberal-democrats relies on four kinds of actors: state institutions, political parties, civil society organisations and ordinary citizens. If or when NLDPs have reached the centre and obtained parliamentary majority and government power, the main responsibility for defending democracy shifts away from government institutions and towards other actors; actors who have independence from government institutions. To the extent that the NLDPs have not gained control of the judiciary, courts may be considered an independent check on government power, and as part of ‘militant constitutionalism’ constitutional courts may move to strike down unconstitutional reforms (Sajo 2019). As such they can be an alternative or addition to the other measures mentioned above when they block reforms that undermine the liberal democratic rights of citizens. However, as recent developments in Hungary and Poland arguably demonstrate, the judiciary can also lose its independence and become instrumentalised in the pursuit of a non-liberal-democratic agenda. This points to yet other actors, among them international or supranational organisations.

The responsibility of the latter institutions can be seen as part of a natural duty to establish and maintain just institutions (Simmons 2010, pp. 17–18). However, in the case of the EU and its member states, there are more specific reasons for intervening. Among those often cited are that non-compliance (1) undermines the EU’s credibility towards external parties, (2) weakens the trust needed to make the internal market, the area of freedom security and justice and the administration of EU funds work and that it (3) risks spreading through the EU legislative process when non-liberal democratic governments are participating (Closa 2016, pp. 16–22; Müller 2015, p. 144). From a liberal democratic point of view, a key reason is that the EU constitutes a transnational legal, economic and political order in which citizens have to establish and maintain relations of equal citizenship between them to avoid domination (Bohman 2010; Forst 2015; Olsen and Rostbøll 2017).⁷ This requires a defence of its liberal democratic values in member states because national institutions are central parts of this transnational order. In a word, democratic backsliding in member states is simultaneously democratic backsliding in the EU system. First, when equal (political) rights are violated on the input side of politics in member states, it affects the democratic credentials and

⁷ Space does not allow discussing EU’s democratic deficit (see Føllesdal and Hix 2006, p. 557).

representativeness of those governments and national parliaments which form part of the overall European institutional structure. Also, on the output side it affects not only citizens living in the member state, but also those who have a right to move to it (basically all EU citizens). Second, national institutions and rights are crucial parts of the political and legal infrastructure of European politics per se. If the national political opposition is treated unequally, the political opposition concerning European issues is also treated unequally, including the ability of opposition members to make appeals to European citizens outside the country. Member state value non-compliance excludes citizens from interacting across borders in a democratic manner based on the full and secure freedom of all.

As stated, the aim of the article is not to discuss the details of Habermas's specific vision of the EU but to suggest that the EU adopts a basic theory of its values that conceives them along the lines of Habermas's general theory of liberal democracy. In regard to the EU, Habermas has argued that the development and protection of liberal democratic institutions and rights primarily should be the task of the member states. They should be conceived as the results of a democratic process through which the demos of each member state has interpreted the principle of equal freedom for all citizens in light of their specific societal circumstances and their national (political) culture and identity. Member states are thus 'guarantors of the already achieved level of justice and freedom' (Habermas 2015b, p. 40). This might seem to contradict the view espoused here. However, it is important to note, first, that one of Habermas's key arguments in favour of EU integration is its contribution to securing the public autonomy of citizens under conditions of globalisation, and, second, that Habermas presupposes that member states *are* defenders of justice and freedom and generally working towards the realisation of the equal freedom for all. If this presupposition does not hold, as in cases of democratic backsliding, it does not follow from his general argument that EU interventions with the aim of protecting liberal democratic rights of citizens are off limits.

Thus, with a theory of why and how a liberal democratic order can defend itself, and of why the EU should react to value violations, we can now return to the discussion of how the EU permissibly can respond. This is the topic of the two sections which also briefly address the feasibility and effectiveness of the various responses. Lack of feasibility could speak against a specific response, keeping in mind, however, that the immediate likelihood that something will happen is not the only relevant conception of feasibility there is. With a consistent effort, 'soft' political, economic and cultural constraints may be removed and make something possible later that is currently very unlikely (Gilabert and Lawford-Smith 2012). Lack of effectiveness *prima facie* also speaks against a given measure. However, effectiveness should be seen in a broad perspective. An important dimension of the validity of general norms or values is that they are generally followed. Liberal democratic orders such as the EU should therefore secure general compliance and the addressees of measures therefore include all member states and not just the currently non-compliant ones.

Targeted EU Responses: Political, Cultural, Legal and Socio-Economic

Earlier I distinguished between cultural, socio-economic, legal and political measures. Focus is here on the EU as public authority. However, to the extent that European party federations can be considered parts of the official EU institutions, they ought to react towards parties which are part of value-violating member state governments by excluding them (Kelemen 2020; Wolkenstein 2020; Olsen 2021). Naming and shaming strategies whereby the EU expresses criticism of value violations is another *political measure* since it produces political pressure against specific parties and member state governments. At the same time, it is also a cultural measure that can contribute to the consolidation of a political culture that can inculcate citizens with liberal democratic values and make NLDPs seem less legitimate in the eyes of voters.

Other *cultural responses* could be to sponsor NGOs that promote liberal democratic values in society, in particular in value-violating member states, and establish educational programmes that can help consolidate liberal democratic values. In fact, this is something the EU is currently doing and an area in which the Commission is proposing new programmes. A rather bold idea would be to expand EU competence to the area of education in order to ensure (some control over the) civic education in member states. Cultural measures could be effective unless they are framed as ‘foreign intervention’ and/or obstructed by member states. As suggested by Schlipphak and Treib (2017), measures could in part be organised in such a manner that it is left to NGOs in value-violating member states to take the initiative to apply for funding. Except for the idea of EU regulation of national educational policy, they also seem reasonably politically feasible.

Together with cultural measures, *socio-economic measures* can be seen as a way of ‘immunising’ the citizenry against adopting or supporting anti-liberal democratic views. EU regional development and cohesion funds might be seen in this light, and this counts in favour of their political feasibility, but, apparently, against their effectiveness (Kelemen 2020). The EU’s initiatives to mitigate the consequences of the COVID-19 pandemic (2020–2021) could be seen in the same light. A much more ambitious step would be to create a social and financial union that would ensure decent living conditions for all European citizens through economic transfers from richer to poorer countries in the EU (Habermas 2015a, b). Whether this would be effective and politically feasible would depend very much on how it is framed by the political leadership. It may underestimate the significance of ideological convictions and identity concerns among supporters of NLDPs (Hawkins et al. 2017) and would take strong leadership to bring about in the current political climate in Europe.

Finally, *legal responses* consist in the suspension of rights. According to the aforementioned discussion, to be morally permissible, legal responses should be targeted towards the actual wrongdoers. We can think of legal sanctions both in terms of rights that pertain to European law and institutions and in terms of rights pertaining to national law and institutions. The former is generally less controversial (but not uncontroversial) and more politically feasible than the latter.

They may also seem more normatively appropriate given that many people do not consider the EU to be a fully fledged federation. In the following, I will discuss both kinds in order to draw a more complete picture of morally permissible legal measures.

In relation to European law, more targeted economic sanctions could be established by the EU administering economic funds directly and making sure that funds were only given to supporters and promoters of EU values within the member states. This type of sanction might in fact be possible within the current treaty framework (Barsøe 2018). The Commission's proposal to introduce a rule of law conditionality into the budget follows this line of thought (Commission 2018; see Blauburger and Hüllen 2021 for an evaluation). Such sanctions could be combined with personal embargoes banning individual government members and their supporters in parliament from travelling in and making economic transactions with other member states. The latter would require treaty changes making them significantly less politically feasible. There is disagreement as to whether economic sanctions are effective, although the majority of observers including the Commission seem to think that they are. The review of the effectiveness of personal embargoes is mixed (Drezner 2011).

The next level of sanctions would also require treaty changes. They could entail the exclusion from participation in European and national political institutions of parties that act contrary to EU values. First, with regard to European law and institutions, government representatives should be excluded from the Council without robbing the opposition of their presentation in the same place. This would require a reorganisation of the votes and the representation in the Council in such a way that when the government is excluded, the opposition representative(s) remain(s) in place.⁸ The argument also implies that MEPs from governing parties should be excluded from the EP.

Second, with regard to national law and institutions, the EU could be enabled to issue party bans at the national level against parties that are a credible threat to continued support for EU values. Here, close attention should be paid to the question of whether parties have explicit intentions to act in ways that contravene liberal democratic values, for example, concrete political programmes or legislative bills (Kirshner 2014, ch. 5; Müller 2016). Should parties of this kind already have gained government power and control over key national institutions, as is arguably the case in Hungary and Poland, the EU could be authorised to dissolve the government, ban parties and call new elections that would allow the majorities in the member states to 'correct themselves'. If this does not occur, EU envoys would be able to take over the administration of the country.

In sum, these latter, rather hypothetical legal measures, if appropriately balanced, are morally permissible. What counts against them in the EU context is obviously that they are politically extremely unlikely and that we have good reasons to believe

⁸ There might be circumstances under which the level of democracy in a member state is so poor that elected opposition politicians cannot be regarded as genuinely representing anyone and that they therefore should be excluded from the Council.

that they are ineffective or counterproductive (Downs 2012; Downs et al. 2009; Capoccia 2005; Bourne 2018; Kaltwasser 2019).

In the end, how the EU should respond depends on how to weigh the considerations of political feasibility and effectiveness of policies that are morally permissible. A further requirement is, however, that they respect the separation of powers.

The Separation of Powers: Who Should Decide on What Basis?

The task of specifying the EU's fundamental values lies with the legislative power of the EU (the Commission, the (European) Council, the EP). Proactive cultural and socio-economic policies to stabilise the support for liberal democratic values have to be based on legislation from their hand (as is also currently the case). The same applies to reactive political and legal responses but in a different way. EU legislators should produce norms through discourses of justification but not apply them to individual cases. This task belongs to an institutionally independent body working on the basis of a discourse of application. The current sanction procedure found in Article 7 TEU is therefore problematic from the viewpoint of moral permissibility.

Many observers agree that EU values are in need of further specification to secure transparency and legal certainty. Even if expressing criticism is only a political measure, when it comes from the EU as such (and not from, say, political peers), it should refer to an official basis.

EU legislators have so far neglected the explicit specification of EU values. Of course, the Commission has developed its own Rule of Law Framework, has begun making annual rule of law country reports in all member states, and the EP has issued critical reports on both Poland and Hungary. These things clearly involve an interpretation of what the EU values mean and are steps in the right direction. However, neither the EP nor the Commission has a pre-set list of concrete criteria on which they base their judgements. This gives their evaluations an ad hoc nature. Moreover, the EP and the Commission tend to refer to third parties for their concrete interpretation of values, predominantly the Council of Europe, the Fundamental Rights Agency, the Organisation for Security and Co-operation in Europe and the United Nations (see e.g. European Parliament 2018; Commission 2014, 2017, 2020). While it is not problematic per se to refer to generally established standards, and it is clearly done in an effort to 'depoliticise' the evaluation and make it more impartial, it does not amount to the required explicit democratic elaboration of what the values mean.⁹

This also points towards problems with seeing, for example, the CFR and European Convention of Human Rights (ECHR) as concrete interpretations of European values (see Jakab 2016; Scheinin 2016). First, the CFR explicitly does not apply to member states acting within the remit of their remaining national competences (see

⁹ Regulation 2020/2092 of 16 December 2020 'On a General Regime of Conditionality for the Protection of the Union Budget' is an important first step by the EU legislator to reach a concrete interpretation of EU values. However, the regulation concentrates on the rule of law and largely neglects other values.

van Bogdandy and Spieker 2019 for an opposing view). Second, seeing the ECHR as the specification of EU values would imply that the dynamic development of EU values would be ‘sub-contracted’ out to the Council of Europe, and not least the European Court of Human Rights. This would contravene the democratic aspect of the EU’s values. This ongoing interpretation of EU values would actively have to rest with the European legislators. Of course, it is very plausible that the currently missing elaboration of what EU values mean could be or include an elaboration of the normative content of the Charter of Rights and/or the ECHR. As discussed above, there is disagreement about the feasibility of reaching agreement among legislators about this. However, it does not seem completely out of reach, and if we are right about the effect of neutral and impartial reviews of value compliance, this may increase the effectiveness of EU responses.

The independent body to make the evaluation and decision should be one that is part of the European framework. Here, the ECJ might be the obvious choice and one preferred by adherents of the legal approach, but in principle, it could be left to a specialised body with a more broad recruitment base to give it higher empirical legitimacy (see Müller 2017; Bellamy and Kröger 2021). The main point is that it should operate on the basis of a discourse of application of pre-existing norms; not on a discourse of justification, nor on an ad hoc provision of evaluation criteria. One might object that a change of the already established procedure found in Article 7 TEU is unlikely. However, even with this problematic procedure in place, the creation of a clear and transparent basis for evaluating breaches will be an improvement. It will allow EU legislators to make a shift towards a discourse of application.

Conclusion

Violations of EU values in member states is a problem not only for the citizens of individual member states, whose liberal democratic rights are being undermined, but for the entire EU, because the national institutions are part of an overall institutional structure in which European citizens in turn rule and are being ruled by each other. Simply put, the democratic backsliding in member states creates a new (or yet another?) European democratic deficit. Many people feel the urgency of the problem and focus on how it is possible most efficiently to bring value violation to an end. The aim of this article has been to remind us that the EU ought to act in ways that are consistent with its own values, which should be interpreted in a coherent manner as the values of liberal democracy, and argued that the EU is justified in responding to non-compliant member state governments using cultural, socio-economic, political and legal responses as long as these responses avoid problematic notions of collective responsibility and respect the principle of the separation of powers.

Tore Vincents Olsen is associate professor in political theory at the Department of Political Science, Aarhus University. His research interests include multiculturalism, recognition, toleration, democracy, constitutionalism and the political theory of the European Union. He has published articles in journals such as *International Theory*, *Nations and Nationalism*, *Ethnic and Racial Studies*, *Comparative Education* and the *Journal of European Public Policy*.

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