The Democratic Disconnect

Citizenship and Accountability in the Transatlantic Community

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On the cover: A protest of prison abuse in Georgia in 2012. © Corbis

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*B*ookended by the U.S. presidential election campaign in the autumn of 2012 and the latest phase of the ongoing euro crisis in Cyprus in the spring of 2013, our stay at the Transatlantic Academy has been witness to the joys as well as miseries of democratic politics. We are a very diverse group of scholars, and orchestrating the shared conversation that finally resulted in this report would not have been possible without the directorial skills of Stephen Szabo who, like a careful choir master, led us to fine tune our thoughts as well as calibrate our prose. Nicholas Siegel offered us fine support throughout, displaying an elegant combination of analytical and diplomatic skills that those who know him well will be familiar with. Ted Reinert was indispensable to the research and editing of our report in all its phases. We owe him great thanks for his patience in dealing with our inner group negotiations with care. Jessica Hirsch, with humor and competence, provided administrative backup and logistical support, and Joana Allamani helped us with research assistance toward the end of the project.

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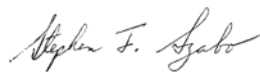
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From the Executive Director

Over the past four years, fellows at the Transatlantic Academy have examined a number of themes central to the transatlantic relationship, including immigration, the nature and implications of Turkey's new foreign policy, the rise of China, and the growing global competition for natural resources. The theme of the past year and of this report comes closer to home with a consideration of the future of the liberal order in the Atlantic community. *The Democratic Disconnect* provides a description and assessment of the new challenges, dangers, and opportunities facing Western democracies as they try to balance a liberal order with a democratic one. While in some respects, democracies are always in trouble as they try to balance individual rights with the needs of governance, the nature of the new challenges are different from those faced earlier in the liberal era. Today, most Western democracies are in a period of severe economic and financial constraints, in contrast to earlier periods when democracy was bolstered by economic growth and a widespread increase in the standard of living. National governments have lost much of their ability to adjust to this new context as globalization — and in the European case, the centralization of powers in Brussels — eclipse them giving markets greater autonomy from political control. This has led to a disconnect between citizens and the institutions of governance. At the same time, demographic shifts, especially from declining birth rates and immigration, have resulted in more pluralistic societies and a redefinition of citizenship in the Atlantic space. In East and Central Europe, new democracies are attempting to consolidate in this unfavorable context while hybrid and outright authoritarian regimes persist with little indication that they are on the path to democracy. It is these and other related challenges that this group of fellows has taken on. This theme will be continued through a wider lens in the Academy's 2013-2014 year with an examination of the future of the liberal international order.

This report represents the collective efforts of the fifth group of Transatlantic Academy fellows. It is the product of the research of the full-time academic fellows informed by contributions by the Bosch Public Policy Fellows and Compagnia di San Paolo Fellow, who were in residence at the Academy for shorter periods and provided practitioners' perspectives. The insights of two of our non-resident fellows, Daniela Schwarzer and Jan Werner Müller, were also important and they have made contributions to two of the chapters in this report. The fellows engaged in an intensive collaborative research environment in which they presented their work and critiqued the work of their colleagues. They interacted with a wide range of experts and policymakers in the United States, Canada, Egypt, and Europe as they shaped the research for this report. Special thanks to Nicholas Siegel, the Academy's Senior Program Officer, who saw the project through from the beginning, and Ted Reinert who offered invaluable editorial support.

The Academy would like to acknowledge the support of its donors in making this study and the broader Academy possible. It was thanks to their support that the fellows were able to spend nine months in Washington working in collaboration on this theme, including study trips to Egypt and Spain and in numerous workshops and discussions with academics, policy analysts, business people, journalists, and government officials in North America and Europe. As was the case with the previous reports, we hope this report helps bridge the Atlantic policy and academic communities, and makes a contribution to the transatlantic dialogue on the nature and implications of these substantial challenges confronting the liberal order.

Stephen F. Szabo

Stephen F. Szabo
Executive Director
The Transatlantic Academy

Executive Summary

*T*his report revisits the paradigms of liberalism and democracy, and questions the ways in which liberal and democratic values are expressed domestically and promoted globally. We examine the dynamics of democracy, and the forces and mechanisms that derail or obstruct democratic development, or, alternatively, foster democratic sustainability at the national and international levels. The atrophy we observe today in more or less established democracies forces us to revisit the question of how core liberal democratic features can be enhanced. We reject the argument that these challenges are merely fleeting or shallow, or that they are simply an ongoing part of democracy's normal travails. They are new, and they have created novel circumstances that liberal democracies must confront. Our focus lies in the messy and ever-changing world of contemporary liberal democracies in the transatlantic realm as well as on the phenomena of hybrid regimes and democratic regressions.

We argue that there is a yawning *democratic disconnect*, a gap between citizens and those institutions at the national, regional, and transnational levels tasked to answer to the challenges of governance. On one hand, the internet-empowered social activism of a new generation has never been more vibrant or agile. Movements insisting on international transparency and the free-information commons have placed completely new demands on public accountability. Citizens are empowered as never before in norm-disseminating and rights-claiming networks across borders. Yet little of this participatory mobilization from civil society seems effectively to connect with formal structures and institutional processes. Individual mobilization and empowerment all too often evaporate in the face of irritatingly opaque and powerfully resilient institutional structures.

We investigate democracy's discontent across several countries. We look at the reasons for gridlock in the United States and executive predominance in Canada. Several chapters focus on the current euro crisis and examine the reasons behind the eruption of civic disconnect in countries as diverse as Italy, Hungary, and Greece. Just as Europe is bedeviled by a legitimacy crisis, we argue that many hopeful transitions away from authoritarianism in countries such as Ukraine and Georgia have atrophied or corroded, giving rise to a new form of "hybridity."

The domestic and the international are profoundly interdependent and liberal democracies have always promoted institutions of international cooperation and governance which form the backdrop to many domestic political changes. In particular, the spread of the rule of law and the rise of a global human rights regime are noteworthy. The EU itself, by fostering of the European Court of Human Rights and the European Court of Justice, has created binding constitutional and human rights commitments. Yet, as several chapters show, while the impact of these changes on some non-EU countries such as Turkey may be considerable, they are less effective when it comes to EU-member countries such as Hungary. Furthermore, in the international realm, liberal democracies have pivoted away from universal and multilateral institutions toward forms of minilateralism and exclusivity. How do these changes affect efforts at democracy and rule of law promotion?

Our core argument is that serious problems co-exist with greater potential for re-energizing democracy across the transatlantic area. The juncture is one of both threat and possibility. The key to developing the positive potential lies in enhancing the participatory vibrancy that represents the cornerstone of high quality democracy. We offer ideas for how the dynamics of participation and representation can be better connected. The way forward for democracy is unlikely to be smooth and will undoubtedly be subject to sobering constraints

and disappointing setbacks. Yet, the faint stirrings of democratic renewal can be detected. With sufficiently innovative reimagining, democracy's future may not be as bleak as many prophesy.

The Democratic Disconnect

One

*D*emocracy is in trouble. The collective engagement of a concerned citizenry for the public good — the bedrock of a healthy democracy — is eroding. Democratic governments often seem crippled in their capacity to deliver what their people want and need. They are neither as responsive nor as accountable as they need to be in an era of hard choices and rising non-democratic powers.

There is widespread concern about apparent declining rates of voter participation and about the alienation or disaffection of citizens from the political process. In Europe, there is fear that the distance between ordinary citizens and the politicians and bureaucrats in Brussels compromises democratic legitimacy. In the United States, lamentations about gridlock and polarization are the order of the day. Canadians worry about the tendency of their political system to place largely unaccountable power in the hands of the prime minister.

Acute crises are putting political systems under stress, both in the United States after the 2008 financial crisis, and in Europe today. Angry demonstrations in Greece and elsewhere over externally enforced austerity programs inevitably raise questions about the stability of the democratic system itself. Citizens have ways of expressing themselves when their vital interests are being harmed — but increasingly in a manner that seems to challenge, rather than reinforce, democratic government. Democratic governments, for their part, frequently behave in ways that are incomprehensible to their citizens.

These two architectural features of liberal democracy — citizenship and governance — are connected, or ought to be. But today they seem increasingly *disconnected*. Domestically, there is a deepening *democratic disconnect* between the formal government institutions of established and aspiring democracies, on one hand, and the lived democratic experience of their citizens, on the other. This report contends that both sides of this citizen-government relationship merit serious policy attention.

There is a deepening democratic disconnect between the formal government institutions of established and aspiring democracies, on one hand, and the lived democratic experience of their citizens, on the other.

The democratic disconnect also shows itself in the international community's half-hearted responses to persistent authoritarianism or to dynamic popular upheavals such as the Arab Spring. The engagements in Iraq and Afghanistan have left the very notion of liberal interventionism widely discredited. Democracy promotion is beset by self-doubt. The economic success of some rising nondemocratic regimes accentuates democracy's malaise.

Established democracies in the West struggle to meet the demands of their people. Economic and financial globalization has been empowering for some citizens, but for many others, it appears to reduce government to a passive mediator between the demands of global financial markets and citizens' expectations. Democratic governments themselves are hostage to the imperatives of international financial flows. Increasingly, we see the privatization of gain and the collectivization of pain. Meanwhile the global institutional infrastructure mutates from traditional multilateralism to "minilateralism" at a time when resilient institutions are ever more needed to address proliferating problems of global governance.

Angst about democracy is not new. The seminal product of a previous period of soul-searching, the Trilateral Commission's report on *The Crisis of Democracy*, declared that *governability* was the central dilemma facing Western democracies in the 1970s: "The demands on governments grow,

while the capacity of democratic governments stagnates." This was understood both as *government overload* — the result of citizens asking for too much — and *government incapacity* —the result of obsolescent institutions seeking to serve the needs of modern states. Whereas the Trilateral Commission bemoaned overload and incapacity, we see disengagement and ossification — citizens vacating the *polis* or reinventing it elsewhere, and governments that are too stiff-jointed to respond imaginatively to the issues with which they are confronted.

Along with the difficulties of assuring democratic legitimacy in the face of a volatile international financial situation, we see deep problems in the practice of democratic citizenship. While citizen activism in many of the older liberal democracies of the West is muted, we are also witnessing the rise of transnational activism, of which the Arab Spring is a prime (if so far only partially successful) example. In the 1960s and early 1970s, when the Trilateral Commission was doing its work, persistent, organized opposition fed by the youth radicalism of the 1960s challenged both the ideology and the policies of Western governments. It was a close-up confrontation between established authority and organized resistance.

Today's challenges are of a different order. Citizen participation in conventional electoral politics in many established democracies is in steady decline, as is public trust in politicians and public institutions. Many citizens have left the building, sometimes abandoning "normal" politics altogether, sometimes fashioning networks of political participation and discussion that escape the conventional boundaries of politics. For the conventional politician faced with declining levels of electoral participation, this may look like passivity and a lack of interest. But it is better understood as the scattering of political impulses, as sites for public discourse, often mediated by the internet, proliferate far away from the executive and the legislature.

Democracy's full achievement is out of reach for many peoples of the world who live in an ambiguous half-way house between oppression and freedom. The burden of history rests heavily on societies aspiring to put their authoritarian past behind them. An increasing number of "hybrid" regimes seem "stuck" somewhere between their authoritarian past and what their citizens hope will be their democratic future.

There are other countries where governments exploit the minimal forms of democratic procedure — such as periodic and ostensibly "free" elections — while sapping at the substance of democracy: respect for human, civil, and political rights; encouragement of a vibrant opposition in a free civil society; a free public sphere without state manipulation and control of the media and the internet; and an independent judiciary. Regimes such as those in China, Venezuela, and Iran exploit one or more of the formal features of democratic societies as window-dressing for their continued authoritarianism.

As the economic crises of North America and the eurozone deepen, we find that a meritocratic authoritarian technocracy à la Singapore, with one-party rule and a decimated opposition, increasingly attracts admirers. Indeed, Singapore's authoritarian state-capitalism offers an appealing model for some countries, since it guarantees sufficient economic freedoms that enable economic success, while continuing to muzzle a free opposition and limit civil and political rights.

The Arab Spring has increased the salience of the debate about the compatibility of Islam with democracy. Contemporary Islamist ideologies include irredentist movements led by charismatic preachers and dedicated to the violent destruction of the infidels and of their "corrupt" partners in Muslim countries, but also include schools of thought that are more pragmatic, reconciled to modernity and accepting of democratic procedures. In Turkey and Indonesia, for example, parties deriving inspiration from Islam and drawing support from the pious have found productive coexistence with democracy. Egypt's newly empowered Muslim Brotherhood looks to Turkey's successful AKP (Justice and Development

Party) as an example, but is currently caught in a half-way house between its insurrectionist and charismatic past and the rules and institutions of liberal democracy. So far, Egypt has held ostensibly democratic elections but has failed to produce a liberal constitution that guarantees the universal human and civil rights of women as well as of Coptic Christians, who constitute 10 percent of the population.

There are thus many competing political systems in existence in the world today, but we believe liberal democracy stands out in its universal appeal and its ability to orchestrate the peaceful transfer of power. Yet it is widely in need of repair, and imaginative proposals for institutional reform and renewal within and beyond Western liberal democracies are few and far between. Today, one rarely encounters terms such as "Refolution," (reform and revolution at once), once popular after the 1989 democratic openings of the East and Central European societies. Institutional imagination and constitutional passions seem at a standstill, as the United States struggles with the legacy of 18th century institutional blockages, and current European leaders lack the courage and the conviction to come up with solutions that would help the EU tackle its current challenges. At the global level, the renaissance of state sovereignty and an accompanying turn to ad-hoc cooperation among informal groups of states and "coalitions of the willing" increasingly militate against legitimate but often ineffective international organizations such as the UN and multilateral innovations that would better serve global governance.

While we acknowledge much reason for despair, we also believe that strong potential exists for renewal. Our concluding chapter offers reflections on how democracy's disconnect can be repaired. The solution to democracy's travails lies in reinvigorating liberalism's core ethos, not in searching for or accepting the inevitability of illiberal models and norms. Our concluding thoughts draw from the report's uniquely comparative focus on democracy's current

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challenges. Mindful of the global picture, this report focuses on how to overcome these challenges in the liberal democracies of the transatlantic area. Some issues are common across many countries, some are particular to one or two. We suggest that common threads weave their way through debates in North America, Europe, the post-Soviet space, and at the international level. Visions of top-down problem solving are insufficient. Open-ended and vibrant democratic deliberation is needed, and should be valued as an end in itself as well as the guarantor of responsible democratic leadership. While the tensions between liberalism and democracy are mediated by constitutional guarantees and the rule of law, these must be conceived so as to empower and galvanize, rather than forestall active citizenship. This bottom-up civic regeneration is also a key principle for dealing with the increasingly prevalent phenomena of hybrid regimes. It boosts liberal norms at the international level and is enhanced by those norms. Our conclusions offer both a broad set of guidelines for how to think about democracy's renewal and a series of more concrete policy ideas. Our driving conviction is that for all its current problems, democracy can and must be reinvigorated; a focus on reconnecting citizens with their public institutions is the core imperative in launching such a renewal.

The Untidy World of Liberal Democracies

Two

*W*hile democracy's vitality has been a matter of concern in earlier periods, democratic dilemmas are of a different order today. The digital revolution, global power shifts, global financial and economic integration, terrorism, the rise of the national-security state, and the increased salience of religion in politics have all intensified debates over the health of what has come to be known as the liberal world order and of the democratic states that are critical to its continued well-being. This context-framing chapter provides a brief panorama of the different components of this multiple set of challenges. It does not offer an exhaustive review of what are many rich areas of academic inquiry, but rather extracts the main conceptual concerns that guide our policy-oriented report. To this end, the chapter

- summarizes current debates over more effective democratic citizenship;

- looks at how so-called hybrid regimes are afflicted by simultaneous challenges in a way that widens the democratic disconnect;

- highlights the rising tension between globalization and democracy; and

- warns of a declining support for liberal democratic values at the international level, as a new global order takes shape.

We argue that all these different challenges have a common thread: they test democracy's capacity to reform itself in the face of an array of forbidding 21st century pressures. It is that capacity we examine in the empirical chapters that follow.

Citizenship, Participation, and Accountable Government

Democracy's contemporary challenges reflect concerns over the very core premises of how governments are held to account and how citizens are able effectively to exercise their rights. A rich debate has taken shape that points to profound problems with long-standing concepts of accountability, representation, and citizenship. This applies to citizenship understood both in a national and transnational or cosmopolitan context.

Traditional mechanisms of representation in the West are being sidelined by other forums. Many democratic theorists contend that citizens today structure their identities and channel their interests through local civic initiatives, virtual forums, community bodies, ethnic structures, or religious movements. Long-standing concerns over the health and effectiveness of political parties have become even more pressing and acute. There is broad agreement that the standard mechanisms of democratic representation are today more easily deformed by powerful vested interests, rendering it necessary to conceive of new measures of popular influence over policy outcomes.

Many of the recent writings on democracy have focused on the potential for a bottom-up regeneration of active citizenship. This has been given a boost by movements such as the *Indignados*, Occupy, and Idle No More. While traditional notions of liberal democracy saw a somewhat passive citizen, whose rights were protected and who was content with periodically electing representatives, a more proactive notion is now widely advocated, with the citizenry organizing to hold power more systematically to account. Citizens have become more critical and less deferential of power, even as they withdraw from the traditional channels of party membership and voting. While a previous phase of democratic theory concerned itself with the competing merits of different institutional templates, today's thinking sees more hope invested in citizen-centered and non-hierarchical channels of interest representation. While democracy is seen to suffer from a malaise of unresponsiveness and disengaged electorates, the same trends also hold the promise of reimagined forms of accountability and collective democratic citizenship. Examples of this potential include the much-cited local bodies that have come to monitor community decision-making in areas like public sector budgeting and local service delivery. Many of the innovations that emerged from countries like Brazil and India now find their resonance in Western democracies. In consequence, many

argue that the most pressing need in democracy's rejuvenation is to build on the more effective and inclusive deliberative forums that have gradually taken shape in recent years. Effective and legitimate democracy requires well-designed state-level institutions but is equally dependent upon the glue of inter-personal trust networks, which are built up through active citizenship.

This cluster of concerns invites us to revisit what is required for effective democratic citizenship. Citizenship in liberal democracies has been understood to encompass a number of different dimensions. The first of these refers to the right to rule and be ruled in turn, in Aristotle's famous formulation. Citizenship entails the prerogatives as well as duties of participating in those institutions and practices through which the laws that govern a people are articulated. Historically, the extension of this right of active citizenship to women, the property-less, non-Western races, and religious minorities involved bitter and long struggles.

As noted by the British social scientist, T.H. Marshall, modern citizenship has an added, second dimension: the entitlement to a bundle of rights and benefits such as to guarantee "a civilized standard of living," in his famous words. The modern welfare states arose in part to bridge the inequalities generated by the dysfunctionalities of the capitalist marketplace. The pacification of

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class struggles resulted in the extension to the wage-earning citizens of a "bundle of rights and entitlements."

A third dimension of citizenship entails some sense of collective identity and solidarity. In pursuit of this, struggles have ensued to extend the boundaries of the *ethnos* to permit a more inclusive *demos*. Liberal democracies are not only sites of "struggles for redistribution" but also sites of "struggles for recognition" by those who have not been included in "we, the people." Today's liberal democracies have to contend with an increasingly multi-national, multi-ethnic, multi-racial, and multi-religious demos, whose memories and experiences need to be held together in some fashion as they form a *political nation*. Moreover, as the reach of the authoritative allocation of values extends far beyond the nation state, as in the EU today, solidarity must not end at national borders. It is this necessary extension of inclusiveness and solidarity that also obliges us to explore the means of deepening effective citizenship at the international and cosmopolitan level, and not merely within the increasingly constricted container of the nation states. How to attain such a sense of political union and some form of solidarity gives rise to one of the distinctive challenges of our times, namely the management of deep diversity of the demos.

Within the European context, the evolution of the European Union has been accompanied by the rise of movements for autonomy or independence, from Flanders to Catalonia to Scotland to northern Italy. Nor are such developments restricted to Europe alone. The Middle East and North Africa region is in the throes of intense struggles. Several authoritarian regimes, often based upon the privileging of one ethnic, religious, or tribal group over the others, have collapsed. This has engendered intensive debate over how the political nation itself can be reconstituted. In short, in all these places and at myriad levels, it is necessary to explore how the three core components of citizenship — political rights and duties, entitlement to rights and benefits, and identity as a political nation — can be reconfigured in order to render its practice more meaningful and effective.

Liberalism and Democracy

As we see it, the main components of a liberal-democratic political order are:

- *citizenship with political rights and duties;*

- *representative and accountable government;*

- *rule of law and an independent judiciary;*

- *civil society and popular participation; and*

- *economic freedoms.*

A key debate is over the relationship between liberalism and democracy. The linking of the two concepts of liberalism and democracy, which we take for granted today, was in no sense assumed in the early days. Indeed, historically, many thought the two were incompatible. Liberty had to be protected from the people, not exercised by the people; the unregulated passions of the demos could trample the rights of minorities and undermine the rule of law. Many democracies are markedly illiberal in that they do not uphold civic liberties and political rights.

There are conceptual tensions not only between liberalism and democracy, but within each of these two sets of political principles as well. Perhaps the most severe tension lies between economic and political liberalism. Bitter experience has shown that an unchecked market, domestic or international, which leaves individuals and private corporations free to pursue their profits alone with little or no restraint, can ultimately undermine the practical capacity of citizens to exercise their rights and enjoy their freedom. Similar tensions may exist between the principles of sovereignty and non-intervention, on one hand, and the protection of human rights, on the other.

There are often also conflicts between rights, not to mention different understandings of what a given right or set of rights may mean. Blasphemy laws illuminate the clash between freedom of expression and freedom of religion. While under the influence of a rigorous defense of the First Amendment, U.S. jurisprudence remains committed to a strong interpretation of freedom of speech. European courts and governments show themselves more ready to regulate freedom of expression as well as freedom of religion in the name of public order and stability.

The list of human rights and liberties — civil, political, and economic — varies across liberal democracies, and the institutional guarantees are also different. Despite growing convergence in the content of constitutional rights provisions, there are nevertheless notable differences as well, with respect to the rising popularity of social, economic, and environmental rights, reflected in more recent constitution-making. The right to property is interpreted and applied differently by countries based on their domestic socio-economic policies.

Similar conceptual tensions are present in the idea of democracy. Representative and participatory democracy models have been in conflict with one another throughout the modern period.

The reality of liberal democracy, then, is not that of a pleasing architectural monument, where each of the elements fits neatly into a harmonious whole. It is better thought of as a messy assemblage of components, which survives as much by creative tension and constant adjustment as it does by formal design. Liberal democracy thrives through the translation of democratic insights and energies into the formal institutions of rule and government.

The Challenge of Simultaneity in Hybrid Regimes

As established democracies labor to meet the expectations of their people and regain legitimacy, citizens' hopes in the newer democracies waiver even more precariously. While the fall of the Berlin Wall in 1989 was hailed as the end of non-democratic regimes around the world, now more than two decades later, we can see that many of the states that embarked on the democratization path are still fluctuating on what Valerie Bunce, Michael McFaul, and Kathryn Stoner-Weiss called "a continuum from democracy to dictatorship,"[1] with a variety of *mixed* or *hybrid* regimes in-between. Originally, democratization was defined as a process that followed specific stages: the breakdown of a previously authoritarian regime, democratization or transition to democracy, and eventual democratic consolidation. In reality, none of these stages represents a neat and bounded phase of political transformation. Moreover, in some contexts, the applicability of democratization sequencing itself may be questionable.

Regime break-ups follow different patterns in different countries, and subsequent political transformations, with few exceptions, fail to lead to considerable and durable democratization. To underscore these challenges, Guillermo O'Donnell, in fact, stressed that we should be talking about transitions *away* from authoritarianism and not *toward* democracy. A number of adjectives have gained currency in recent political commentary that all point to an incomplete and often

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ambiguous form of democratization — "illiberal democracy" in Hungary, "stalled democracy" in Ukraine, "managed democracy" in Russia, "façade democracy" in Belarus, and so on. It has even been argued that most of the Soviet successor states are better understood as "unconsolidated autocracies rather than as emerging democracies."[2] In this context, "hybrid" can be defined as a condition where liberal and illiberal norms, institutions, and actors coexist, interact, and often clash.[3]

For such regimes, the question of the success and durability of democratization remains open. While we know what some of the core democratic institutions and norms are — such as free and fair elections, voting rights and the right to stand for elections, freedom of speech and association — we are also increasingly aware of the importance of deeper structural factors that should complement the more formal procedural aspects of democracy. Some of these tensions are not new. Yet, what is different in the age of globalization is the challenge of "simultaneity." This refers to the threefold demand to build state institutions anew; deal with pressures for more economic openness, privatization, and deregulation; and foster the active participation of citizens in an age when increased mobility makes for easy exit, especially for the younger and more educated — and to solve all of these challenges at the same time.

The countries of the Middle East and North Africa (MENA) region that have experienced regime transformations in the wake of the Arab Spring, such as Egypt, Tunisia, and Libya, also face the problem of "simultaneity." They need to consolidate political institutions, build viable economies that can function in the global market place, and empower their citizens in democratic virtues and the peaceful negotiation of conflicts. Their task is all the more daunting since not only do they face the legacy of corrupt and plutocratic elites who have, in many cases, impoverished their own

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[1] V. J. Bunce, M. McFaul, and K. Stoner-Weiss, *Democracy and Authoritarianism in the Post-Communist World*, (New York: Cambridge University Press, 2010)

[2] L.A. Way, "Authoritarian State Building and the Sources of Regime Competitiveness in the Fourth Wave: The Case of Belarus, Moldova, Russia, and Ukraine," *World Politics* 57 (January 2005), 232.

[3] This definition is adopted from R. Belloni, "Hybrid Peace Governance: Its Emergence and Significance," *Global Governance* 18:1 (2012).

societies, but they also face the task of consolidating the political nation, so it can function beyond the schisms of religious and ethnic violence.

These incomplete projects of democratic transition make these challenges and tensions ever more evident. They are illustrative of the broader crises in democracies, and cannot necessarily be measured on a singular spectrum from liberalism to autocracy. Innovative reimagining is required in conceptualizing the widespread problems of hybridity and simultaneity.

Globalization and Democracy

Democracy's travails within individual states are closely tied to change at the global level. In the last 30 years, the world has experienced a space-time contraction. Globalization has increased and intensified the movement of peoples, goods, information, and assets across time and space. While levels of international trade were just as dense in the period before World War I, today's globalization is not only an economic and financial phenomenon, but also a cultural, social, and technological one, made possible by the dizzying rise of the electronic media and the digital revolution. Never before have human lives been so interdependent and never before have policies and actions in one country produced so many foreseen and unforeseen effects on the lives and well-being of those in others.

As democracy is expected to promote individual and collective freedom and to ensure economic well-being, and economic globalization is intended to foster individual and collective welfare by ensuring the effective use of scarce resources across all borders, the question arises: Do the two phenomena go together and produce reinforcing effects or do they undermine each other? There is some comforting evidence of a positive nexus between the two. Increased trade and financial openness tend to raise the expectation of democratization (though there are of course prominent counter examples, e.g. China).

However, globalization and financial mobility can undermine democracy in various ways. Global

capital markets and in particular "cheap credit" can foster irresponsible behavior. Policymakers tend to over-borrow to gain or maintain popularity and banks are often too eager to over-lend. Crises-hit governments have little choice but to implement drastic economic and budget cuts to regain market confidence. If they have to resort to institutions that provide credit (for instance the International Monetary Fund), they will have to accept conditionality which limits national sovereignty. Voters are likely to be alienated by their governments' visible loss of control. Populist or nationalist solutions that blend economic illusions, an anti-elite discourse, and scapegoating of external actors or groups within the society may emerge. Even if there is no substantial threat to democracy or political stability, movements against economic liberalism, openness, and internationalism may alienate a society from the liberal-democratic order.

More fundamentally, globalization limits political choices for governments. The more mobile capital gets, the more internationalized economies become. The further competition among states increases, the stronger the bias toward supply-sided policies. As welfare states are cut back, questions arise over how far this can go on without undermining the legitimacy of national democracies. Particularly in Post-War Western Europe, democratic legitimation is closely intertwined with the welfare state. If global capital mobility restricts policy choices for democratically elected governments, their sovereignty and legitimacy are undermined.

The economic consequences of globalization for the welfare of democracies do not present a smooth path as many neo-liberals claimed a few decades ago; *pace* Thomas Friedman, "the world is not flat," but full of perilous peaks and ravines. The socio-cultural and informational consequences of globalization for democracies are even more intractable. Undoubtedly, although human beings do not move across borders as rapidly as capital, news, germs, and fashion do, migratory movements in the first decades of the 21st century have increased. Migrations complicate the composition of the citizenry and compound socio-cultural

pressures of integration and political identity consolidation.

Globalization, accompanied with the rise of the world-wide web, gives rise to a different kind of simultaneity as well. The space-time contraction means that citizens in practically all corners of the world can now witness revolutions, coups, wars, massacres, and other forms of violence in all other corners of the world and often in real time. Overwhelmed by a mass of information, news, and images, the new global public vacillates between democratic outrage, international activism, and voyeuristic indifference and "compassion-fatigue."

Liberal Internationalism and Human Rights

Globalization has provided additional impetus for the growth and spread of what has come to be known as the liberal world order — a version of liberal internationalism that was shaped during the Cold War decades after 1945.[4] Liberal internationalism was characterized by international institutions and regimes that embodied values and practices associated with liberal democracies, such as free markets and open trade, as well as reflecting preferences in terms of global power and influence. How does the current transformation of the international order impinge upon the democratic disconnect that this report seeks to dissect?

The current crisis of liberal democracy is most often described in domestic terms, but it has also been exacerbated by international causes and a new "transitional" phase of liberal internationalism. Among foreign policy elites within Europe and North America, China's rise is widely taken as an indicator that structural weaknesses at home will undermine influence abroad. The fixation on domestic problems and national interests, combined with the desire to catch up with rising challengers, feeds resurgent sovereigntist tendencies at home. It also nourishes the inclination toward ad hoc "minilateralism,"[5] the coordination among the

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[4] G. J. Ikenberry, "Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order," *Perspectives on Politics*, 7: 1 (March 2009), 71-87.

[5] M. Naím, "Minilateralism: The magic number to get real international action," *Foreign Policy*, July/August 2009.

The fixation on domestic problems and national interests, combined with the desire to catch up with rising challengers, feeds resurgent sovereigntist tendencies at home.

smallest possible number of countries presumably needed to solve a particular problem. One effect of these trends is a halt (or possibly even decline) in the efforts of liberal democracies to expand the domestic rule of law to the international sphere by creating or enlarging "juridified" organizations such as the World Trade Organization or concepts such as the "Responsibility to Protect" (R2P).

The promotion of the rule of law both domestically and internationally is essential. Yet it is difficult to see where the agents who are willing and capable to work for the preservation and expansion of the distinctly liberal elements of the current world order might be located.

The traditional view sees the great powers as the source of order creation and maintenance. According to the dominant narrative in the United States, the current order is largely the product of benevolent U.S. hegemony. Others see an emerging vacuum of power in international politics, with a grim outlook for order maintenance in general, not to mention a *liberal* world order.[6] The focus on states does not do justice to the proliferation of transformative agency on a global scale. While great powers will continue to play a crucial role in shaping global order, one of the key questions is whether the liberal democracies of North America and Europe will muster the will and

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[6] I. Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (London: Portfolio, 2012); C.A. Kupchan, *No One's World: The West, the Rising Rest, and the Coming Global Turn* (New York: Oxford University Press, 2012).

mobilize the resources needed to reinvent liberal internationalism.

These transformations of world order are occurring alongside the rise of the international human rights regime that is one of the main achievements of the phase of liberal internationalism after World War II. Today, roughly two-thirds of the 193 member states of the United Nations are party to some international human rights covenant or treaty, adding to the intensification of clashes between state sovereignty claims and the universal recognition of human rights, already present with the Universal Declaration of Human Rights. The ethical and political dilemmas of humanitarian interventions faced by democratic-liberal nations — when, if, and how — to interfere in other sovereign states and failed nations, is growing.

The Rule of Law and International Democracy Promotion

These varied trends mean that the context for encouraging the international spread of democratic norms has fundamentally changed. The way in which democracy support has been undertaken throughout the post-Cold War era exhibits a continuity that sits uneasily with the radical changes to the international order now unfolding. The misadventures of nation-building in Iraq have left an indelible stain in many minds on the appeal of active democracy promotion. Whether fairly or not, Western democracy promotion policies are seen in many parts of the world as instrumental cover for power politics, rather than a laudable effort to make foreign policy more ethical. Financially strained Western governments are under pressure to demonstrate tangible returns on funds invested in democracy support, though the value to citizens of this kind of investment is less obvious than the value of building roads and hospitals at home. Authoritarian regimes have found more innovative ways to frustrate low-level Western backing for reforms and have begun to band together in more effective and reform-resilient alliances. The developmental successes of non-democratic states have put the democracy promotion community on the defensive.

Whether fairly or not, Western democracy promotion policies are seen in many parts of the world as instrumental cover for power politics, rather than a laudable effort to make foreign policy more ethical.

Democracy promoters have struggled to respond to demands for support more geared to locally specific forms of political reform. The overarching context within which democracy promotion policies are fashioned is no longer one seen as favorable as it used to be.

Criticisms leveled at democracy promotion efforts around the globe can be grouped in two clearly interrelated sets of problems. The first set of problems derives from how democratization and its main goals are understood by those who promote it. It has been argued that a one-dimensional "cookie-cutter" approach, which overlooks complex relations between different components of democracy assistance and fails to contextualize those for specific polities, results in poor impact on the overall democratization process. The second set of problems relates to implementation failures and to the lack of learning over time. Over the last two decades, most donors have consistently favored civil society organizations at the expense of other domestic groups as their prime interlocutors. Yet, ironically, this privileged engagement has led to negative rather than positive results. The so-called NGO-ization of domestic civil societies resulted in fostering professionalized "ghetto-ized NGO communities" due to dependency on the donors, gatekeeping and competition within civil society, and lack of collaboration with other actors in those societies. The challenges of rendering effective support for the rule of law are especially acute. Models for the rule of law have largely been

transplanted from Western liberal democracies. Criticisms of such an approach to Rule of Law programs have grown into a powerful chorus — at the level of conceptualization, program design, and implementation. Some commentators consider the work of aid agencies in the area of rule of law to be a failure, while others have criticized specific aspects of rule of law assistance, such as its contradictory ideological foundations and the lack of adequate knowledge accumulation.[7]

Furthermore, the internationalization and supranational codification of such principles runs the risks of overlooking the political, socio-economic, and cultural nuances of countries for which rule of law reforms are suggested. While such principles offer interesting lessons drawn mostly from established liberal democracies, processes of legal transplantation carry risks, including the danger of cancelling out the alternative conceptions of indigenous legal change that populations on the ground may develop for themselves. Engagement with local models of conflict resolution, deliberation; and decision-making, which are sometimes referred to as "alternative epistemic communities," may help bridge the chasm between Western liberal democracies and non-Western religious communities, indigenous peoples, and tribes. Such engagement can provide opportunities for crafting innovative policy approaches. If we are to follow through on the promises of democracy promotion, a serious reflection on how to improve the design, implementation, and evaluation of these efforts is crucial.

Repairing the Democratic Disconnect

This scene-setting chapter has given a broad-brush overview of some of the causes and consequences of the current challenges to liberal democracies, both internal and external. On one side of the ledger are the perennial issues of modern democracies, such as tensions between liberal rights and majoritarian and populist politics; between economic liberalism

and political liberalism; between market capitalism and citizens' equality; and between representative institutions and more participatory models. On the other side of the ledger lie new problems associated with the rise of economic globalization and the digital revolution; the challenge of simultaneity in hybrid regimes and beyond; the decline of multilateralism and the return of multipolarity in great power politics; and shortcomings in international support for human rights and democratic norms.

We are concerned that institutional rigidities now stultify the responsiveness of democratic institutions to citizens' aspirations. In established and aging democracies such as the United States, for example, institutional gridlock has been a fixture of the political scene for decades.[8] Other democracies also suffer from voter fatigue, institutional skepticism, inertia, and fragmentation. In emerging democracies and hybrid regimes, the simultaneity problems have meant that institution-building, global economic competitiveness, and consolidating the political nation all have to occur within the same time-span.

Our report hones in on this core question: what kinds of measures are needed to close the multiple democratic disconnects that we have identified? What kinds of learning processes can one expect of busy and harried citizens? In answering these questions, we need to encourage first and foremost new institutional imagination and experimentation. The countries of Europe have undertaken the most courageous reconfiguration of state sovereignty through the formation of the European Union, but at the present the learning process, propelled by the memory of two World Wars and the pledge of a former generation of Europeans that never again would there be war on the European continent, has come to a standstill. Caught between Scylla of the financial tyranny of European and global banks and the Charybdis of half-hearted elites who fear losing national sovereignty, the EU's capacity for self-correction is being tested.

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[7] T. Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge,* working paper of the Carnegie Endowment for International Peace Rule of Law Series #34 (2003); W. Channell, "Lessons Not Learned About Legal Reform," *Promoting the Rule of Law Abroad: In Search of Knowledge* (T. Carothers ed. 2006) 153.

[8] R.A. Dahl, *How Democratic is the American Constitution?* (New Haven and London: Yale University Press, 2001).

The Frustration of the Empowered

Ivan Krastev

Why at the very moment when democracy has become the only political idiom spoken globally do so many in Europe and the United States question the ability of their democratic regimes to serve a collective purpose? Why at a time when citizens of Western democracies are freer than ever before are many of them losing trust in democratic institutions and political leaders? Why is the individual empowered while the voter is frustrated?

If we agree that democracy is in crisis today, this crisis is not an outcome of some institutional failure of democracy or the rise of powerful anti-democratic alternatives. On the contrary, it is a product of democracy's success. It is the result of five revolutions that have shattered our world in the last 50 years and made us more free but less powerful than before: the Woodstock-to-Wall-Street revolution of the 1970s and 1980s; the "end of history" revolutions of 1989; the digital revolution of the 1990s; the demographic revolution; and the political brain revolution ushered in by new discoveries in the brain sciences and behavioral economics.

All five of these revolutions profoundly deepened our democratic experience. The Woodstock-to-Wall-Street revolution and the unholy but happy marriage between the social revolution of the 1970s and the market revolution of the 1980s broke the chains of the authoritarian family and weakened gender and racial stereotypes, giving new meaning to the idea of individual freedom. It made consumer choice an undisputed value and the sovereign individual the lead protagonist of the social drama ("The market gives people what the people want instead of what other people think that they ought to want," opined Nobel Memorial Prize-winning economist Milton Friedman). The demographic revolution, marked by the decline in birth rates and the rise in life expectancies, contributed to the social, economic, and political stability of Western societies. The "end of history" revolutions succeeded in making democracy the default option of mankind and gave birth to a truly global world. The revolution in the neurosciences offered a deeper understanding of individual decision-making and broke down the wall between the mythical rational voter and the irrational voter. And, when it comes to democracy, the promise of the digital revolution might be summarized in five words: "Make democracy real, not representative." It made us believe that societies could once again become republics.

Paradoxically, the same five revolutions that deepened our democratic experience now animate the current crisis of liberal democracy in the West. The Woodstock-to-Wall-Street revolution contributed to the decline of a shared sense of purpose. As the politics of the 1960s devolved into the aggregation of individual private claims upon society and the state, our society became more tolerant and inclusive, if increasingly separate and unequal. The demographic revolution made aging societies culturally insecure and fearful of immigrants. The European "end of history" revolutions of 1989 deemed democratization to be essentially a process of how best to imitate Western institutions and took the creative tensions out of it. The revolution in brain sciences expelled ideas and visions from politics and reduced electoral campaigns to the processing of big data and the application of different techniques of distraction, customer targeting, and simulating real political change, while ultimately retaining the status quo. Meanwhile, the digital revolution questioned the very legitimacy of the institutions of representative democracy, calling for a more transparent and simplified point-and-click democratic ethos. It strengthened the negative power of the citizen while weakening the deliberative nature of democratic politics. The Internet is

better at "No" than "Go," in the words of Micah Sifry, co-founder and editorial director of Personal Democracy Media.

All five revolutions empowered the citizen while simultaneously removing much of his or her voting authority. The negative outcomes were multifold: a fragmented society, a growing mistrust between the elites and the public, and a profound crisis of democratic politics that assumes different forms in Europe and the United States. In the United States, the crisis is seen in the government's paralysis and the incapacity of the country's institutions to govern. In Europe, the crisis is witnessed by a suspension of politics and an attempt to substitute democracy with technocratic government.

Some of the most insightful theorists of modern democracy insist that we are wrongly alarmed with the declining trust in the institutions of representative democracy. They say that mistrust is a critical element of the political system and that democracy is not so much about trust as about the organization of distrust. In short, we live in an age in which average citizens will be able to efficiently monitor the executive power and voters will be able to kick out the rascals in power, yet in which citizen-voters will also have to concede that it is not up to them to decide in what kind of society they will live. But are citizens really ready to concede. Can democracy survive when it has lost the possibility of meaningful political choice?

In the days of national democracies, the citizen-voter felt more powerful because he was at the same time a citizen-soldier, citizen-worker, and citizen-consumer. The property of the rich depended on the readiness of the workers to defend the capitalist order. The citizen-voter was important because the defense of the country depended on his courage to stand against his enemies. He was important because his work was making the country rich. And he mattered because his consumption was driving the economy. To understand why citizens today throughout the West cannot easily control politicians by democratic means, we need to look at the way in which various extra-electoral forms of dependence of politicians on citizens have been eroded. When drones and professional armies replace the citizen-soldier, one of the main motives of the elite's interest in public welfare is substantially weakened. The flooding of the labor market by low-cost immigrants or outsourced production has also reduced the elites' willingness to cooperate. The fact that over the course of the recent economic crisis, it became evident that the performance of the U.S. stock market no longer depends on the consumer power of the Americans is one more argument why citizens are losing their leverage over the ruling groups. It is the decline of the leverage of the citizen-soldier, citizen-consumer, and the citizen-worker that explains voters' loss of power. And it is in the voters' loss of power where the secret of the growing mistrust toward democratic institutions lies.

Matters are not all that different for the United States. Institutional sclerosis is the game in town, and many have forgotten Benjamin Franklin's famous adage. Asked at the end of the Philadelphia Convention of 1787 what the delegates had achieved, he replied "A republic, madam, if you can keep it." To keep an 18th-century republic in the 21st century also requires a learning process. In Canada, a discredited and unrepresentative Senate contributes little to federal democracy while the first-past-the-post electoral system awards majorities to national political parties, which often lack effective representation in significant regions of the country.

In addition to such institutional self-corrections, the public political culture of democracies needs to be transformed. The global media reduce citizens to consumers, passive receivers of the ever-seductive marketing of goods, messages, and habits. Talk shows on radio and television degrade political speech into an orgy of mutual insult and hatred.

Nearly a century ago, Walter Lippmann derided the myth of "the omni-competent democratic citizen," who, he claimed, was "as lost as David Hume claimed the self to be." Today the democratic citizen sounds like an honorific phrase, left over from an ancient time.

Yet new modalities of democratic citizenship are emerging, be it through the practices of "liquid democracy," the "critical citizen," and transnational watch groups or through the mobilization across borders of activists in various movements for women's, gay and lesbian, and indigenous rights, for the environment, for local autonomy, and more. As we emphasize throughout this report, the democratic disconnect of our times arises because these oppositional energies are not translated into strategies for institutional self-correction in liberal democracies. We now turn to the different spheres in which this *problématique* is playing itself out.

Gridlock and "Friendly Dictatorship": Citizenship and Democracy in the United States and Canada

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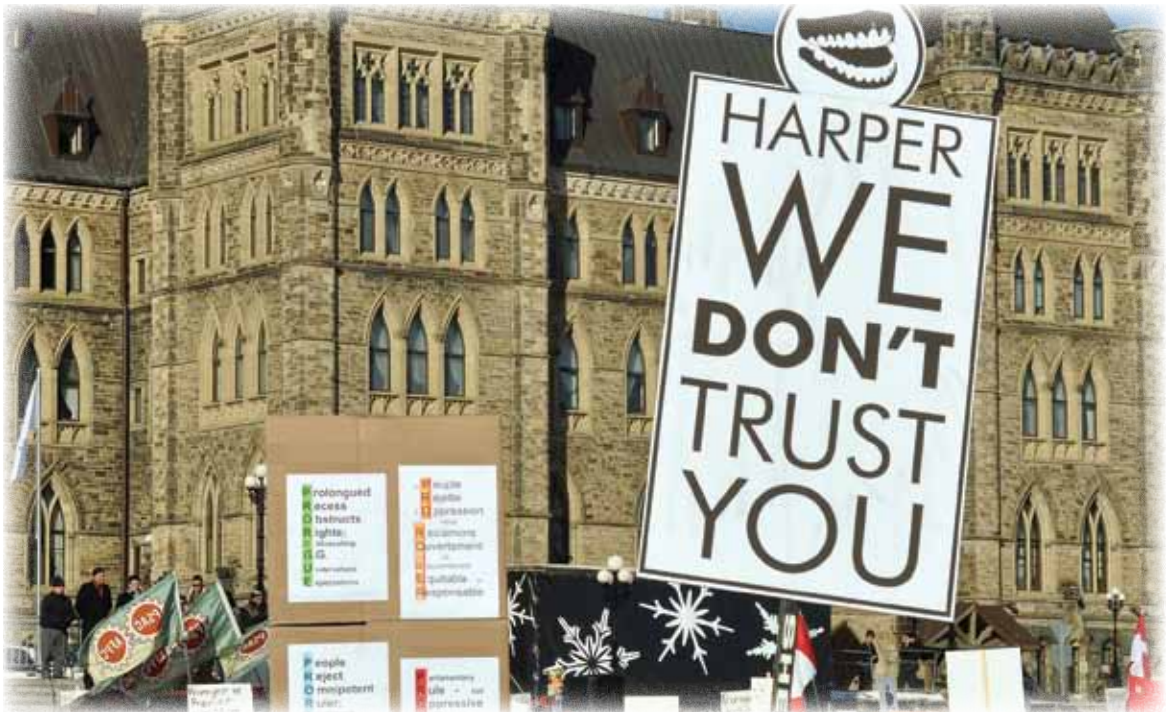
David Cameron and Robert Vipond

Photo: Ottawa, Canada - January 23, 2010: Thousands of Canadian citizens gather at Parliament Hill in Ottawa to protest Prime Minister Stephen Harper's decision to prorogue Parliament. © Paul McKinnon

*N*orth America is home to two of the world's oldest and most successful democracies — countries that, for generations, have been a magnet for those seeking economic opportunity and political freedom. But democracy in the United States is ailing, and badly in need of reform. Canadian democracy is currently working better, although there is a risk of dark clouds gathering on the horizon.

In Washington, voter suppression, gerrymandering, and gridlock corrode the faith of Americans in the integrity and effectiveness of their political system. Economic inequality is hollowing out the middle class. Military interventions and unsuccessful armed nation-building projects in Iraq and Afghanistan have damaged the international image of the United States. The 2008 financial crisis, matched with China's economic rise, has been a further blow to the status of the United States as a superpower, generating severe economic pain at home and gloomy debates about America's decline.

There is a deepening recognition that this is in part a governance issue — an issue of *how* U.S. democracy operates, not simply *what* it does or does not do. In his 2013 State of the Union speech, President Barack Obama declared that "the greatest nation on Earth cannot keep conducting its business by drifting from one manufactured crisis to the next." He talked not just about gridlock in Washington, but about citizenship in the country:

> "Defending our freedom is not the job of our military alone. We must all do our part to make sure our God-given rights are protected here at home. That includes our most fundamental right as citizens: the right to vote. When any Americans — no matter where they live or what their party — are denied that right simply because they can't wait for five, six, seven hours just to cast their ballot, we are betraying our ideals."

The president reflects a widely held view that there is much that is broken in U.S. democracy.

Canada, on the other hand, does not carry the burden of global power on its shoulders, nor has

it traditionally seen its political system as a model particularly worthy of international emulation. It stayed out of the Iraq adventure, but participated in Afghanistan. It largely avoided the financial crisis that has ravaged the economies of Europe and the United States. Yet Canada is suffering from some of the same forces that are at work in the United States, such as rising inequality and declining confidence in certain public institutions. While its electoral processes generally work well, and there is a dynamism in the party system not evident in the United States, there is concern about the unrepresentative results of the plurality or first-past-the-post method of counting votes (although seemingly little interest in reform). There is a sense that the quality of Canadian democracy is diminished by the tendency of the political system to generate governments with untrammeled executive power. What is more, when these powerful federal governments are put in place without effective representation from Quebec, it raises long-term questions about the impact of this situation on the unity of the country.

Institutional Design and Citizenship

Canada and the United States rest on different constitutional foundations, which shape their democratic strengths and weaknesses. The images of gridlock in Washington and "friendly dictatorship"[9] in Ottawa signal the different ways in which the political systems in the two countries are designed and function.

The U.S. founders — suspicious of political power and jealous of their liberties — designed a federal and republican regime with checks and balances, with many points in the system where public policy and political action could be blocked until their manifest benefits could be established. The system works. But sometimes it works too well, and there is gridlock.

In Canada, where there was no revolutionary break from the British crown, government was not seen as a mortal threat to political freedom, but its

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[9] The expression comes from a Canadian journalist, Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland and Stewart, 2001).

protector. The fathers of Confederation established a parliamentary government in 1867 designed to permit decisive government action, not to block it. The first-past-the-post electoral system fairly efficiently provides election-winning political parties with a majority of seats in Parliament, and in provincial legislatures,[10] even if they almost never have a majority of all votes cast.[11] So strong are the executives this system produces that the parliamentary concept of responsible government is turned on its head, with the government party in the House of Commons effectively responsible to its leader, the prime minister, instead of the prime minister and his cabinet being responsible to the legislature. Hence, the term "friendly dictatorship."

These structural differences shape government, democratic practice, and citizenship in the two countries, as they do the virtues and vices of the two systems. Gridlock is not a phrase one hears in Ottawa or in Canada's provincial capitals; dictatorship, friendly or otherwise, is not a significant feature of serious political discourse in Washington — certainly not insofar as domestic policy is concerned. It is rather the president's *incapacity* to pursue his agenda that is the subject of comment.

Citizen-Centered Perspective

At the beginning of this report, we refer to the Trilateral Commission's 1975 analysis in *The Crisis of Democracy*, which identified *governability* as the core democratic problem; demand for public services was greater than the capacity of governments to respond. This framing of the democratic dilemma remained persuasive in the decades that followed.

Our perspective, though not incompatible with governability, is slightly different. We explore the democratic performance in the United States and Canada less from the perspective of governability

than through the lens of citizenship, paying attention to the notable disconnect between citizens and the constituted political authority of the two countries in which they live. In our view, citizenship means two related things. First is the sense, privately felt and publicly acknowledged, that one is part of, and identifies meaningfully with, a larger political community. Here citizenship means sharing a common, civic identity. This is the *self* in self-government. The second is that citizenship entails participation in the creation and receipt of public goods. Here citizenship means sharing burdens and benefits. This is the *government* in self-government. We argue that the conceptual grounding and experience of citizenship — sharing a civic identity and sharing in the production and consumption of public goods — have eroded significantly over the last generation in both Canada and the United States, although more acutely in the United States. We argue, more pointedly, that what has changed is that this sense of diminished citizenship is now pervasive across the socio-economic spectrum. The problem, in both Canada and the U.S., is not just that the promise of citizenship remains out of reach for traditionally marginalized populations, but that the opportunities and demands of citizenship no longer seem to resonate strongly either with economic elites or even with growing numbers of the middle class. In Canada, there is an additional distinctive democratic challenge relating to cultural and linguistic duality, which we will discuss toward the end of this chapter.

> *Citizenship means sharing a common, civic identity. This is the self in self-government. And it means participation in the creation and receipt of public goods. This is the government in self-government.*

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[10] Our focus in this chapter is on the national political system in both countries. There is a rich democratic life in the states and provinces of the United States and Canada, but that is beyond the scope of this study.

[11] In the 2011 federal election, for example, the Conservative Party secured a clear majority of seats in the House of Commons (166 out of 308 seats) with less than 40 percent of the popular vote.

The United States

For marginalized populations, the historical narrative of citizenship is best characterized by what Judith Shklar aptly called a "quest for inclusion."[12] Shklar was thinking specifically of attempts to redress the legacies of slavery, but the term is a useful way of situating other forms of marginalization — like poverty and immigrant status — that highlight deficits of political voice and social trust in the United States' political experience. Here the recent evidence is mixed. One can celebrate the election of the first African-American to the presidency in 2008 as a turning point in racial citizenship; even more impressive in a sense is the way traditionally marginalized groups mobilized to re-elect Barack Obama in 2012. At the same time, growing economic inequality undercuts the promise of equal citizenship. A significant body of recent evidence suggests that "low-income Americans have lower chances of upward mobility than counterparts in Canada and Western Europe,"[13] a trend that reflects, and is reinforced by, inequalities in educational participation and attainment. Traditionally, citizenship in the United States was reconciled with significant inequality by the belief that everyone had a fair shot at the American dream. As that belief ceases to reflect reality, one of the dynamic supports of common membership in a legitimate political and economic order falters. When a significant minority of the population remains, permanently, outside the social and economic mainstream, citizenship itself retreats. In this context, it is telling that the most stirring and memorable parts of Barack Obama's second Inaugural Address spoke to recentering the U.S. political imagination around the idea of equality and the struggle for inclusion: "We, the people, declare today that the most evident of truths — that all of us are created equal — is the star that guides us still, just as it guided our forebears

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[12] *American Citizenship: The Quest for Inclusion* (Boston: Harvard University Press, 1991)

[13] J. DeParle, "For Poor, Leap to College Often Ends in a Hard Fall," *The New York Times* (December 23, 2012). Jacob Hacker and Paul Pierson note that "there is more intergenerational mobility in Australia, Sweden, Norway, Finland, Germany, Spain, France, and Canada." *Winner-Take-All Politics* (New York: Simon and Schuster, 2010), pp. 29.

> *Growing economic inequality undercuts the promise of equal citizenship.*

through Seneca Falls, and Selma, and Stonewall…. It is now our generation's task to carry on what those pioneers began."

More surprising and more striking is the retreat from citizenship that now characterizes the moral tone of at least some influential economic elites. One misunderstands the right wing of the Republican Party if one thinks of them simply as anti-government and pro-market. They are not. Tea Party supporters, for instance, embrace programs like Social Security that benefit hard-working Americans (like themselves) who have earned their benefits. What angers them is that public programs also support individuals they see as lazy, irresponsible, or otherwise undeserving. Of course, highlighting the differences between the virtuous and the undeserving is hardly a new theme in U.S. history. But the current version of the story feels different. In the current version, the righteous seem less willing to engage, reform, and redeem those who do not measure up, and more inclined to insulate themselves from the undeserving and undesirable — that is, their fellow citizens.

The growth of gated communities, the development of niche charter schools, the erosion of public space, even the popularity of luxury boxes at sports events, all spring from the same desire: to associate with those who are like you and to deal as little as possible with those who are not. Mitt Romney found it difficult to appeal to "the 47 percent" in part because he found it hard to respect them as co-equal citizens. What united the 47 percent, after all, was that they were "dependent" — or, one might say, not fully citizens. And they — African Americans, Hispanics, and young people — related to the state, according to Romney in his conference call to donors after his defeat in the presidential

election,[14] as recipients of "gifts" from the government of the day, not as civic participants in a political and governmental process whose programs brought them burdens and benefits as it did other members of the political community.

The relationship of the middle class to citizenship is still more complex, whipsawed between the "push" of domestic ideological change and the "pull" of globalization. On the domestic side, what is immediately striking is the shrinkage of the middle class. Where in 1970, 65 percent of Americans lived in middle-income neighborhoods, only 44 percent live in middle-income neighborhoods now;[15] overall income inequality has risen, and mobility has stagnated as much for the middle class as for poor people. The economist Emmanuel Saez has declared that "income inequality in the United States is at an all-time high, surpassing even levels seen during the Great Depression."[16] Pew Research summarizes the evidence by saying that "since 2000, the middle class has shrunk in size, fallen backward in income and wealth, and shed some — but by no means all — of its characteristic faith in the future."[17]

Yet as Jacob Hacker has argued, rising inequality is actually less significant in a sense as an indicator of citizenship than the rise in what he calls income insecurity and the shift away from pooling or sharing risk. From the point of view of risk, "we see that the most fundamental transformation felt by most workers is much simpler and [more] profound: the loss of the belief that jobs provide a stable path to or guaranteed place in the American middle class — the loss, in a nutshell, of workplace security." [18] The "risk shift" Hacker describes

entails a retreat of citizenship. Individuals ought to be responsible for themselves; they should take "ownership" of their individual lives rather than expect others — government, corporations or fellow citizens — to take on their burdens. This "personal responsibility crusade" is aimed squarely at the sort of middle class expectations and entitlements that were the foundation of U.S. social citizenship: career employment and adequate unemployment insurance, affordable education and healthcare, and secure retirements. Only in the case of healthcare can one reasonably conclude that middle class citizenship has advanced over the last generation; in every other case, citizenship defined as burden sharing has retreated since the publication of *The Crisis of Democracy* in 1975.

Perhaps not surprisingly, this retreat from citizenship is accompanied by disengagement from citizenship. As the introductory chapter notes, the evidence for disengagement includes such things as the withdrawal of citizens from participation in conventional electoral politics and the erosion of public trust in politicians and public institutions. On this score, the U.S. case certainly provides grist for the mill. To borrow the title of a recent book on the current state of U.S. politics, "it's even worse than it looks."[19] Participation in national elections is low by international standards, particularly in mid-term elections. As Walter Dean Burnham once quipped, the largest political party in the United States now is neither the Democrats nor the Republicans, but the party of non-voters. Confidence in government is low and declining, and trust in Congress, specifically, even lower.[20]

Our emphasis on citizenship, however, suggests another pathology that is not fully captured by statistics on citizen attitudes and electoral turnouts. The obverse of vacating the polis is erecting barriers

[14] A. Parker, "Romney Blames Loss on Obama's 'Gifts' to Minorities and Young Voters," *The New York Times* (November 14, 2012).

[15] S. Tavernise, "Middle Class Areas Shrink as Income Gap Grows, New Report Finds," *The New York Times* (November 15, 2011).

[16] Cited by the Conference Board of Canada, *How Canada Performs* (http://www.conferenceboard.ca/hcp/details/society/income-inequality.aspx). The Saez quotation is drawn from *Striking It Richer: The Evolution of Top Incomes in the United States* [Update With 2007 Estimates]. (August 9, 2009).

[17] http://www.pewsocialtrends.org/series/the-middle-class/

[18] J.S. Hacker, *The Great Risk Shift: The Assault on American Jobs, Families, Health Care, and Retirement and How You Can Fight Back* (New York: Oxford University Press, 2006).

[19] T.E. Mann and N.J. Ornstein, *It's Even Worse Than It Looks* (New York: Basic Books, 2012)

[20] N. Nevitte and S. White, "Citizen Expectations and Democratic Performance: The Sources and Consequences of Democratic Deficits from the Bottom Up," in *Imperfect Democracies*, eds. Lenard and Simeon, pp. 54-5. A January 2013 Public Opinion Polling survey found that Congress was less popular than colonoscopies, cockroaches, and root canals. Its overall favorability rating was 9 percent. (http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf)

to entering it — or trivializing the experience once there. Making voter registration more difficult, for instance, by requiring voter ID or imposing short registration deadlines, are examples of ways to pre-empt participation. A systematic effort to suppress voting is another. Techniques here include insufficient voting hours and infrastructure, which can cause the long lines cited by President Obama in his victory speech and the 2013 State of the Union address; deliberate misinformation about voting procedures and locations; the inappropriate purging of voter rolls; and the disenfranchisement of felons, even those who have paid their debt to society. Sophisticated gerrymandering that undermines electoral competition to protect incumbents or favor one party is yet another.[21] Countries like Australia, Canada, and the U.K. have independent bodies responsible for redefining electoral boundaries after a census. In the United States, this function is performed at the state level; with rare exceptions like California, which recently created an independent redistricting commission, it is carried out by practicing politicians who have an interest in warping the redistricting process for partisan advantage. The results can be grotesque. In too many states, then, the administration of the national electoral process is deployed as an instrument of partisan conflict.

Finally, the growing importance of certain "battleground states," where presidential candidates concentrate their attention while largely ignoring other parts of the country, discourages participation. This phenomenon arises in part because of the way the Electoral College functions. Americans do not elect their president directly, but rather vote for "electors" at the state level who

Maryland's 3rd District, widely considered the most gerrymandered in the country
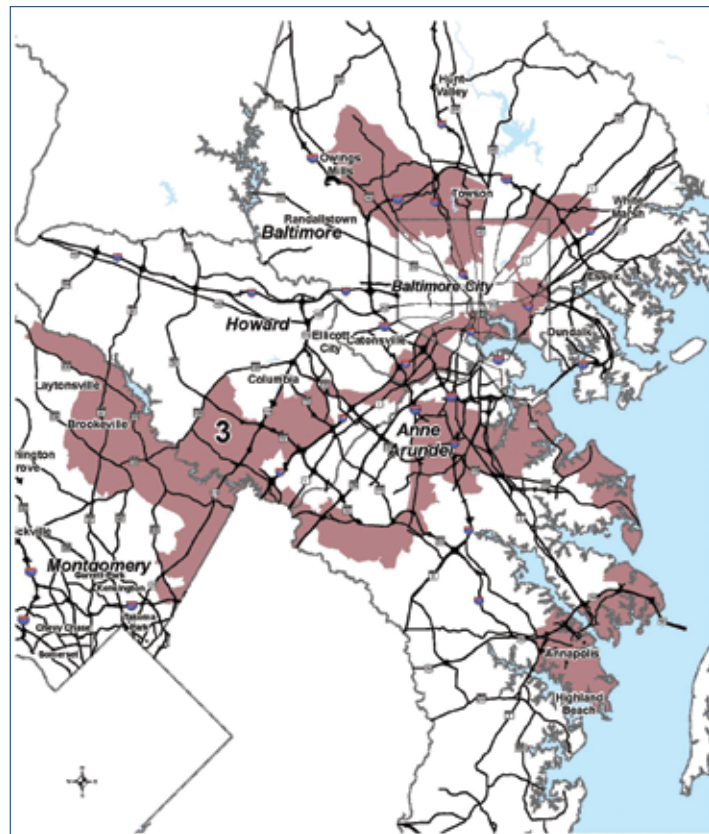
Source: Maryland Department of Planning

then cast their votes for the president.[22] All states except Maine and Nebraska use the winner-take-all system in which all the Electoral College votes in a state go to the candidate who wins the popular vote, even if it is only by a few percentage points. A state that habitually votes Democrat (like California) or Republican (like Texas) will be regarded as uncompetitive, and the candidate from the other party will spend little time or electoral resources campaigning there.

What these anti-democratic practices have in common is revealed by the answer to the question: whom do these practices serve? An electoral system is supposed to serve citizens by serving democracy itself — by providing an open and honest way in which citizens can choose their representatives. But

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[21] It is the main reason why the Republicans have a 33-seat majority in the House of Representatives, even though their candidates attracted a million fewer votes than the Democrats (Steve Coll, "Building a Better Democracy by Putting and End to Gerrymandering," *The New Yorker* (January 10, 2013).

[22] This system means a President can be elected with fewer popular votes than his opponent. George W. Bush won the presidency in 2000, even though he lost the popular vote, with 50.4 million to Al Gore's 50.9 million.

who is served by voter suppression techniques, by gerrymandering, by obstructive voter registration rules? Not the citizen, but the political class. Just as the market works best when economic competition is fair, so does democracy, when electoral competition is fair. That is why so many democracies have installed independent electoral commissions, why they have campaign finance regulations, why they have professional redistricting processes: to make sure that politicians — indeed, everyone — plays fair.

Cynical political practices have had consequences. They have fostered a form of partisan struggle that appears to inhibit the expression of the national interest rather than supporting it. By almost any measure, partisanship has transformed U.S. political institutions at all levels. Parties — led in this instance by the GOP — are now more ideologically coherent and more adversarial than they were when *Crisis of Democracy* was published in 1975. Yet as Mann and Ornstein note, the result is a "serious mismatch between the political parties, which have become as vehemently adversarial as parliamentary parties, and a governing system that, unlike a parliamentary democracy, makes it extremely difficult for majorities to act."[23] It used to be that the most powerful incentives in Congress induced members, in Sam Rayburn's famous adage, to "go along to get along." Now "the incentives to obstruct have grown" so that, especially on the Republican side, "leaders see only gain in bringing Washington to an acrimonious standstill"[24] — especially on issues that deal centrally with redistribution and other forms of burden sharing. Under the circumstances, it is no wonder that some citizens have disengaged from the political system.

Canada

A number of the forces affecting citizenship and democratic practice in the United States are at work in Canada, too, although typically in diminished strength. Income inequality, while less of a problem than south of the border, is also an issue in Canada.[25] A report on income inequality gives a C grade to Canada and a D to the United States, noting that Canada is the only country out of 17 peer countries whose relative grade dropped between the mid-1990s and the mid-2000s.[26] The middle class, which has been the bedrock of Canadian democracy for years, is threatened, and feelings of economic insecurity have grown. The manufacturing and public sectors accounted for about half of national employment in the 1970s; the proportion has dropped to about 30 percent today.[27] Secure jobs with decent pay, benefits, and pensions are harder to find. All of this has gone hand-in-hand with the growing capacity of economic and professional elites to insulate themselves from the effects of weakening public-sector capacity. Canada's richest 1 percent took 32 percent of all growth in incomes in this generation's peak-growth decade, 1997 to 2007. The last time the economy grew so fast was in the 1950s and 60s, when the richest 1 percent of Canadians took only 8 percent of all income growth.[28]

Canada, like many Western democracies, has experienced long-term decline in voter turnout and reduced public trust in certain key political institutions.[29] Until 1993, voter turnout in federal elections was consistently better than 70 percent, sometimes reaching as high as 79 percent.[30] Not one of the seven elections held since 1993 has reached the 70 percent mark; in the 2008 election,

[23] Mann and Ornstein, p. xiii.

[24] Hacker and Pierson, p. 294.

[25] http://www.conferenceboard.ca/insideedge/2011/nov2011/nov7-pres-message.aspx.

[26] Conference Board of Canada, *How Canada Performs* (http://www.conferenceboard.ca/hcp/details/society/income-inequality.aspx). For different analyses, see TD Bank Report, *Income and Income Inequality — A Tale of Two Countries* (December 11, 2012), and The Fraser Institute Research Study, *Measuring Income Mobility in Canada* (November 20, 2012), and the response of Hugh Mackenzie, Centre for Policy Alternatives, (http://www.policyalternatives.ca/publications/commentary/why-99-cent-still-matter-canadian-politics).

[27] A. Yalnizyan, "Middle Class in Decline is the Electoral Elephant in the Room," *The Globe and Mail*, (April 7, 2011).

[28] A. Yalnizyan, *The Rise of Canada's Richest 1 Percent,* (December 2010).

[29] Nevitte and White. See also E. Gidengil, R. Nadeau, N. Nevitte and A. Blais, "Citizens," in *Auditing Canadian Democracy*, ed. William Cross (Vancouver: UBC Press, 2010)

[30] In only two elections (August 10, 1953 and February 18, 1980) out of the 15 held between 1945 and 1988 did the turn-out rate fall below 70 percent.

turnout fell to 58.8 percent, the lowest level ever. [31] In the 25 years between 1981 and 2006, there has been a general decline in confidence in legislatures in both Canada and the United States, but the drop has been less dramatic in Canada. The proportion of citizens who express "a great deal" or "quite a lot" of confidence in legislatures declined modestly in Canada over those 25 years; in the United States, it dropped from 53 percent to 21 percent.[32] As we have seen above, it has only gotten worse in the United States since 2006. While this decline in confidence is paralleled in attitudes toward media and business in both Canada and the United States, there appears not to be a decline in confidence in Canada in the courts, unions, or the public service.[33]

Canada has few of the problems that plague the U.S. electoral process. Indeed, one scholar declares that Canada today has "one of the fairest, most transparent and inclusive electoral democracies in the world."[34] The franchise has been progressively expanded over the years on the basis of a 1982 constitutional right-to-vote provision; judicial interpretation has extended the vote to prisoners, mentally handicapped persons, and judges. Today, no group is excluded. The chief electoral officer, who oversees the fairness of federal elections, enjoys a high degree of independence. Gerrymandering is now a thing of the past in Canada; three-member electoral boundary commissions chaired by a judge redistribute federal seats in each province after every decennial census.[35] Finally, for more than a decade, Canada has had a user-friendly electronic

register of voters. While these arrangements have been subjected to pressures from time to time (most recently, with voter-suppression robo-calls in the 2011 election, and robo-calls to foster public opposition to a proposed redistribution of federal seats in Saskatchewan), by and large, the regulation of federal elections in Canada has worked very well, and appears to have the support, not only of citizens, but of the politicians as well.

Canada's federal political party system has become more polarized in recent years, with the decline of the centrist Liberal Party and its replacement as the Official Opposition by the left-of-center New Democratic Party, but there is nothing remotely resembling the social and political polarization that plagues the United States. The Liberals held a privileged position in Canadian politics so long as national unity was a — and often "the" — salient issue. For most of the post-war period, the Liberals were the federalist, national-unity party of choice in Quebec, and were seen as the party of multiculturalism and immigration, although for much of the time, they had scant representation in Western Canada. With the question of Quebec's continued membership in Canada no longer a central preoccupation, and with the Conservative Party supplanting the Liberals as the party of immigration, social and economic issues have assumed pride of place in the political arena. The contest between the Tories and the NDP reflects this new political world.

While Prime Minister Stephen Harper has brought in conservative policies in a number of fields — reducing taxes, backing away from the Kyoto Protocol, pursuing a tough-on-crime agenda (despite falling crime rates), and rescinding the Liberal legislation requiring long-gun owners to register these firearms — he has refused to touch the hot-button issues dear to the heart of his fundamentalist Christian wing, squashing the efforts of his red-meat militants to force them onto the national agenda. Since a Supreme Court decision in 1988 striking down laws relating to abortion as unconstitutional, Canada is one of very few countries that has no legal regulation in this area. Harper has expressed no interest in legislating

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[31] Elections Canada, *Voter Turnout at Federal Elections and Referendums* (http://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e)

[32] Nevitte and White, pp. 53. The authors note that the experience of the United States is unexceptional, compared with that of France, Germany, and the Netherlands.

[33] Ibid, 54.

[34] J. Courtney, "Can Canada's Past Electoral Reforms Help Us to Understand the Debate over Its Method of Election?" in Patti Lenard and Richard Simeon, eds. (*Imperfect Democracies: The Democratic Deficit in Canada and the United States* (Vancouver: UBC Press, 2012), 112.

[35] It should be noted, though, that Canada strays further than the United States from the one person-one vote principle in variations in the size of its electoral ridings, largely because of the constitutional and statutory protection of federal representation in small provinces (Courtney, in *Imperfect Democracies*, 115).

in this field. The same with gay marriage. Federal legislation in 2005 legalized same-sex marriage; Harper has not touched this issue. While he has welcomed a degree of political polarization on some economic issues, he does not want it on most social issues, and for a very good reason: the folly of offending the broad-based social liberalism of most Canadians. There is not, therefore, the deep ideological chasm that exists in the United States between conservatives who tend to be Republicans and liberals who identify with the Democrats. Harper's position makes it possible for socially progressive, but economically conservative citizens to vote Conservative. Furthermore, the absence of a rigid two-party system in Canada further pluralizes the political spectrum.

So far we have been talking about patterns of inclusion and exclusion, understanding the map of citizenship largely in socio-economic terms and citizen-government relations, but there is also a distinctive social reality in Canada that is significant for democratic practice. Canada is not a nation-state, but a bi-national country. Perhaps the best way of understanding that is to look at its linguistic composition. While the country's 34 million people speak an impressive range of languages, there are only two linguistically complete societies.[36] It is possible to live a full, modern life in French or in English in Canada. Francophones in Quebec lead a complete life in French — educationally, socially, culturally, politically — just as Anglophones elsewhere in Canada do so in English. The existence of these two national communities, defined today chiefly by language, but embodying very different historical experiences, constitutes the defining fault line in Canada.

For years, Quebec was critical to the formation of federal governments. However, in 2011, the Conservatives managed to form a majority government with minimal support from Quebec; they won just seven seats out of the province's 75, down from 10 in 2008. Thus, there is feeble representation from one of the country's national

communities in the councils of the federal government. Perhaps not surprisingly, the effects are felt not only on the input side (political representation), but on the output side as well (government policies). This weak representation allows the Conservatives to pursue policies that are opposed by the bulk of the French-speaking population of Quebec, including relaxing gun control, strengthening the status of the monarchy, criminal sentencing and rehabilitation, aggressive support for Israel, and the like. It will likely be difficult for the Conservatives to rebuild a competitive political base in Quebec. Indeed, the 2011 election saw the displacement from the federal Parliament of the sovereigntist Bloc Québécois, which lost 45 of its 49 seats in the province, matched by an astonishing surge of the social-democratic NDP, never before a serious contender in Quebec. It went from a single Quebec seat to 59, becoming the Official Opposition in Ottawa. As we have seen, it was in this same election that the Conservatives lost ground.

If this situation — a majority government in Ottawa with minimal Quebec representation — were part of a cycle of shifting political alliances and patterns of representation, in which Quebec could reasonably expect to be a significant part of the national government in a few years' time, the short-term reality might not matter as much. While prediction is difficult, given the dynamism of the party system, especially in Quebec, there is a good prospect that the Conservative Party will hold power in Ottawa over an extended period. The opposition is divided between a demoralized Liberal Party and a rising NDP, and its capacity to seriously challenge the Conservative incumbency seems limited for the foreseeable future, especially when faced with a tactically proficient prime minister.

In these circumstances, there is a risk that the representational deficiencies in the Canadian democratic system will cause national disunity in the future, as they have often done in the past. The difference this time, however, would be that it is not simply a province or provinces that is alienated, but one of Canada's national communities.

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[36] French is the mother tongue of about 7 million Canadians (22 percent of the total population), most of whom live in Quebec.

Quebec would be effectively excluded from federal governance and from the opportunity to shape federal policies reflective of its own interests and needs. The other deficiencies we have identified earlier in this chapter are real, significant, and well worth addressing, but continuing democratic dysfunction of the sort we are discussing here, linked to the question of national unity, has explosive potential. The exclusion and marginalization of significant classes of citizens gravely undermines the health of a democracy; the exclusion and marginalization of a national community threatens, not just the health of the democracy, but the viability of the polity itself.

Conclusion

We have trained our gaze less on governability — the gap between aspiration and performance —

than on the experience of citizenship, defined as shared civic identity and the common sharing of benefits and burdens. What we have detected is a significant, though uneven, retreat from citizenship in both the United States and Canada. The retreat is much more pronounced in the United States than north of the border. Polarization has rendered U.S. political institutions dysfunctional, breeding anger and apathy among citizens. That said, the representational weaknesses in Canada, touching as they do the heart of Canada's identity as a bi-national community, are potentially grave as they could threaten the viability of the polity itself.

Crises in the Euro Area and Challenges for the European Union's Democratic Legitimacy

Daniela Schwarzer and Richard Youngs

Photo: The Greek Parliament is guarded by riot police in December 2010. © GYI NSEA

*D*emocracy's health is under scrutiny not only at the national, but also regional level. The EU's travails have become symptomatic of the challenges that beset the current global order. It has become increasingly apparent that the crises in the euro area engender political, not merely economic, challenges. A major tension has taken root between economic decision-making and popular disquiet. The EU's crisis adds another complex dimension to this report's dissection of democracy, namely the triangular relationship between market logic, popular legitimacy, and partial regional integration. It is necessary to identify those aspects that are of new, more serious concern, in what has been a long-standing and exhaustively covered debate over the EU's democratic deficit. Here we unpack what is at stake for the EU's democratic legitimacy in an attempt to resolve the economics of the eurozone crisis. We then assess how proposals for political union may, as currently crafted, misdiagnose what is most amiss with European democracy.

Market and Democracy in Collision

Economic Liberalism and the Challenge for Democracy

In relation to the potentially destabilizing effects of economic, especially financial openness,[37] the European Union poses a particular challenge to its member states. The creation of the single market and the introduction of the single currency considerably limited governments' ability to control economic developments in their home countries. The euro area members have handed monetary and exchange rate policy to the European level — ceding national control over the most powerful instruments of economic policy. Yet there are no other European instruments for macro-economic policymaking in the absence of a euro area fiscal capacity, or European economic and labor policies. As a consequence, for euro area member states, macro-economic policy developments are no

Proposals for political union may, as currently crafted, misdiagnose what is most amiss with European democracy.

longer a matter of unfettered political choice. Governments implement policies that reflect national preferences. Yet, they do not take into account the new realities of sharing a currency and economy, together with the monetary policy of the European Central Bank (ECB), and generate externalities for other member states that in former times were absorbed by exchange rates.[38] Within certain limits defined by European coordination procedures, macro-economic developments are a more or less random result of the aggregate of national policy choices. This can be economically highly inefficient as a single currency requires an adequate aggregate fiscal policy stance, which, together with monetary policy preserves macro-economic stability. This inefficiency has made it harder for the eurozone to rely on output-based legitimacy.

Moreover, capital mobility, in particular under the conditions of a single currency, has increased the pressure on governments to become more competitive. Monetary and financial market integration have led to a bias toward supply-sided policies at the national level in order to attract investment and corporations, which are tempted to move to sites with lower taxes and production costs.[39] Until the sovereign debt crisis hit the eurozone in early 2010, low interest rates in the less competitive and less fiscally sound member states hid these new constraints. But since markets switched from an under- to an over-emphasis of country risk, these same governments are exposed to severe constraints.

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[37] S.G. Jones, J.A. Ocampo, and J.E. Stiglitz (ed.), *Time for a Visible Hand: Lessons from the 2008 World Financial Crisis*, Oxford University Press. See also the introduction of this study for a brief discussion of causal mechanisms.

[38] See S. Collignon, *The European Republic. Reflections on the Political of a Future Constitution* (London, The Federal Trust/Kogan Press, 2003).

[39] F. Scharpf, "Legitimate Diversity: The New Challenge of European Integration," *Les Cahiers Européens de Science Po*, No 01 (2002).

All euro member governments face narrower policy choices and can no longer credibly claim that they are able to exert primary influence over growth and employment in their country. They are under pressure to reduce tax-financed welfare spending while unions face tough choices of either accepting lower wages and less attractive employment conditions or seeing jobs move out of the country. The challenges to post-war social market economies are substantial: measures to regulate employment and production conditions are as much at stake as redistributive welfare and taxation policies that were designed to temper unequal distribution effects and help build stable democracies in the post-war period. In a reaction to this, some pressure groups and governments, which see no particular benefit in embarking on a liberalization track, turn to the EU to provide the protection that used to be ensured by the nation state. This would indeed be the logical level to deal with these challenges given monetary integration and factor mobility. But neither the EU nor the euro area have tools to provide social protection to its citizens and there is little chance that member states will put the necessary competencies, instruments, and financial means at its disposal in the near future. Given the intimate inter-linkage between the post-war concept of liberal democracies and the welfare state in the EU, the erosion of state capacity to provide social security and regulation menaces the stability of national democracies — and threatens seriously to delegitimize the European Union.

On the "input side" of democratic legitimacy, the European economic governance structures are equally flawed. Given the national fragmentation of decision-making in a highly interdependent policy area and the resulting hazardous nature of macro-economic developments, it can hardly be argued that citizens effectively authorize the developments that deeply affect them. Meanwhile, the European Central Bank is the only European body with the effective ability to influence macro-economic developments in the euro area according to its mandate, giving priority to monetary stability over other economic policy goals such as growth

and employment. Basic monetary and financial stability secured by an independent Central Bank is a necessary prerequisite to governments having effective democratic choices. However, the imbalance between different policy levers and the paucity of democratic control of the EU's overall macro-economic set-up have become increasingly problematic.

Technocracy versus Democracy

The fact that the crises have hit the euro area so hard has revealed fundamental flaws in the architecture of the currency union. In response to the crisis, the EU reinforced its rule-based, technocratic coordination both for national fiscal and economic policies. Rules permit less political leeway, and the possibility to sanction member states has been extended to the preventive arm of the Stability and Growth Pact. Meanwhile, the so-called "European semester" aims to streamline the European coordination processes and national decision-making.

A number of problems with democratic quality emerge. The sets of rules and annual targets limit democratic policy choices while economic and fiscal policy choices, imposed on a liberal democracy by unelected bodies, deprives national democracies of their core business. All this is made worse if the rules-based governance framework does not deliver sound macroeconomic results. Moreover, if too detailed and constraining rules are enshrined in secondary legislation or are constitutionalized at the national level, the ability of democracies to self-correct is weakened.

As a result, some governments may choose not to respect the rules set by "Brussels," and justify this on the grounds of democratic legitimacy. This then poses another threat to the EU's legitimacy: member states that actually abide by the rules and take financial risks in the European rescue mechanisms are likely to judge the economic governance set-up illegitimate if not all parties play by the rules (as flawed as they may be). The recent elections in Italy and the threat for the euro area that emerges from its prospective political

instability poses a threat that could even eventually threaten the survival of the European Union.

Technocratic intervention is particularly important for member states that have applied for a rescue program of the Troika (comprised of the European Commission, European Central Bank, and International Monetary Fund). In a country like Greece, the population's say over economic decisions has been rendered largely nil, raising concerns that a solution to the country's predicament is "no longer compatible with democracy."[40]

Moreover, some experts find that the EU's economic agenda has come to rely unhealthily on "grey zone politics" or deals cut outside formal channels, the political equivalent of the informal shadow economy.[41] Moreover, in some member states, the increasing demand on national governments to meet specific budgetary objectives is leading national governments to attempt a recentralization of powers domestically in order to control regional spending.

In sum, the EU's traditional reliance on output legitimacy now rests on shakier ground, as the EU and national governments have failed to deliver in terms of growth, employment, and social security. The EU is increasingly seen as the problem (both by debtor and creditor countries) for low growth rates, restrictions on public spending, and high unemployment, rather than as a solution. This is not just a temporary, crisis-linked problem. Given the generally weak economic outlook, global competition, and demographic developments, this is likely be the economic context in which the EU operates for the foreseeable future. In order to improve its general economic performance and democratic legitimacy as much as possible, measures are needed to improve competitiveness and recover economic decision-making sovereignty so as to allow the euro area members to take legitimate and efficient policy decisions.

The EU's traditional reliance on output legitimacy now rests on shakier ground.

Crisis Management and Integration at Gun Point

Additionally, the way decision-making has taken place both in crisis management and in governance reform has widened the democratic deficit. At acute moments of crisis, key decisions were taken at emergency summits, discarding the European Parliament, providing a key role to Germany and France to the detriment of medium-sized and smaller member states, and national parliaments were able only to give their consent after the fact — at such a high price for dissent that this was hardly ever a realistic option. Crisis management decisions were characterized by a lack of transparency and accountability and made worse by a lack of political leadership and public communication. Many necessary financial steps to resolve the crisis could not be taken because of the clash between what creditor and debtor countries needed to do to retain domestic support and democratic legitimacy.[42]

The design of crisis management instruments has created a vicious circle of declining legitimacy. Focus group research has found that citizens in states that received bail-outs felt little gratitude for the support but rather saw rescue packages as designed to help save a European cabal of political and banking elites in league with each other.[43] Meanwhile, public opinion in the donor countries is likewise critical of the financial help they have to pay for. As soon as real losses become apparent, this sentiment will worsen. The crisis endures partly because a lack of legitimacy in EU decisions prevents the steps toward "more Europe," which could eventually provide a solution. Governments

[40] W. Munchau, "Greece will have to default if it wants democracy," *Financial Times* (February 20, 2012).

[41] AUGUR project on Challenges for Europe in the World on 2030, Report from Work package 8, prepared by the Tiger Group of Kozminski University (2011).

[42] S. Tilford, "Has the eurozone reached the limits of the politically possible?," CER Comment (July 12, 2012)

[43] A. Hurrelmann, A. Gora, and A. Wagner, "The politicisation of European integration: more than an elite affair?," paper presented to the IPSA XXII Congress, Madrid (July 2012).

are squeezed between what markets want and what populations will accept.[44]

This is one of the reasons why governments have resorted to the ECB as the principal crisis manager. It expanded its potential role with the announcement of the Outright Monetary Transaction program in September 2012. This could eventually involve unlimited bond purchases from troubled member states, in exchange for conditionality that governments, the European Commission, and IMF will have to police. However, this move may eventually entail financial losses, which end up being borne by the ECB's shareholders — the euro area member states and their taxpayers. As of early 2013, crisis responses seem to have quelled concerns that the euro might break up, but at the cost of further erosion of the EU's democratic legitimacy.

Routes to Democratic Legitimacy

European leaders, governments, and institutions raised anew the prospect of political union as the means of injecting stronger democratic accountability into EU decision-making processes. In a report presented by Council President Herman Van Rompuy in December 2012, the main focus for enhancing democratic control has been on strengthening the powers of the European Parliament, often counterbalanced by adding to the latter a chamber of national parliamentarians. Proposals have been discussed in detail within the various Brussels institutions and member states to alter the relative powers of existing EU institutions and strengthen their reporting requirements to the EP and national parliaments.[45] A report launched by 11 foreign ministers in September 2012 advocated a familiar array of institutional options, such as a directly elected president for the European Commission and a "two-chamber parliament for Europe" based on the present European Parliament (EP) and the Council of Ministers.

As yet, the various plans put forward remain silent on the precise division of roles and precisely how new centralized rules can generate stronger democratic accountability rather than simply deepening the problem of technocracy. A first step would be a decisive move in the fiscal field toward the goal of a euro area-wide fiscal stance governed at the euro area level. The level of deficits individual member states run should be determined according to their cyclical and structural situation, while decisions on income and expenditure remain largely national. Moreover, a euro area-wide automatic fiscal stabilization mechanism[46] should be introduced, which would ensure that cyclical divergence does not reach such destabilizing degrees as it has before and during the current crises. The mechanisms that are used to coordinate and control national budgetary and economic policies should be backed by stronger democratic legitimacy. Part of the challenge the current set-up poses to national democracies and the EU's legitimacy is that of setting up a democratically controlled government responding to European elections and that is tasked to govern the common goods in the euro area.

Such top-down, high-politics reform should be accompanied by bottom-up democratic regeneration. Closing the democratic deficit requires accountability based on participation and associative dynamics as old forms of legitimacy erode. Injecting "democracy" into the Union will be different from the institutional forms of the nation-state and are predicated more on cosmopolitan networks of participation.[47]

The grip of the executive on decision-making has increased, leaving parliaments and public debate with the message that there is "no alternative." Bottom-up approaches, while no easy panacea to

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[44] M. Leonard, "Four scenarios for the reinvention of Europe," European Council on Foreign Relations (November 2011).

[45] T. Chopin, J.F. Jamet and F. Priollaud, "A political union for Europe," Fondation Robert Schuman, policy paper 252 (September 2012).

[46] Ideas on how to construct this have been put forward by S. Dullien and D. Schwarzer, "Bringing macro-economics into the EU budget debate," *JCMS: Journal of Common Market Studies, Vol. 47, Issue 1* (January 2009) pp. 153-174, and H. Enderlein et. al "Making one size fit all," Policy Paper 61 (January 23, 2013), http://www.eng.notre-europe.eu/media/cyclicaladjustmentinsurancefundenderlein-guttenberg-spiessne-jdijan13.pdf

[47] U. Beck and E. Grande, "Cosmopolitanism: Europe's way out of crisis," *European Journal of Social Theory*, 10/1, 2007: 67-85; J. Dryzek, *Global Deliberative Politics* (Cambridge, Polity, 2006).

the economic aspects of the Union's crisis, would, of course, open the door for skeptical as well as pro-European voices. However, they are a necessary component of any democratic regeneration, for a number of reasons.

First, the crisis teaches us that patching together economic deals and supranational financial norms cannot provide long term stability where they do not include meaningful debate over economic choices. In the future governance set-up of the euro area, more vibrant civic deliberation will foster a joint understanding of common challenges and joint answers. Democratizing the EU is about more than a few EP procedures being added as an after-thought to sanctify an economic policy mix already pre-determined by set rules.

Second, the proposals for political union put forward so far consist of formulaic, institutional reconfigurations, not ideas for fundamentally revitalizing the spirit of European democracy. The elitist, federal vision today sits uneasily alongside a profound, sociological dispersal of power.[48] An exhaustive mapping of crisis-induced social movements finds that these see the EU as a problem rather than a site of potential solution; talk of political union is the antithesis of the "horizontality" that defines and motivates these groupings, as the EU has failed to present itself as "a creative space to reimagine democracy."[49] The Commission has indicated willingness to support a European Civil Society Observatory, but this has remained at a very preliminary stage of considering what its terms of reference might be. The European Citizen's Initiative became available in April 2012, but social movements dismiss its relevance, especially because of the requirement to gather 1 million signatures for any petition. Little has been done to foster the conditions for a broader European public space, through generating media awareness and framing EU issues at the national level. While social mobilization suggests that the

civic component of liberal democracy is in good shape, the protests provoked by the crisis have failed to offer comprehensive alternative visions that can be acted on by representative institutions.

Third, the crisis suggests that diversity cannot be pushed to the side. Political union means very different things to different member states. Not surprisingly, creditor nations see it as a means of limiting the use of resources on the periphery. Debtor nations see it as a means of compelling greater resource transfers from the center. Legitimacy in the north is quite a different matter from renewing the EU's credibility in the south. France is likely to be a swing state in these debates as much of its elite retains adherence to sovereigntist concepts of legitimacy. It is still rather easily assumed that a set of common European values already exists to provide the necessary normative underpinning for political union.[50] Debates over the last three years must raise serious questions over this hypothesis. The notable point is that these differences argue in favor of a more open-ended and pluralistic process of deliberative dynamism.

In sum, moves to regain powers at the EU level are essential but moves to political union risk diverting member states from addressing the pathologies that have come to inflict democracy at the national level — which are described in other chapters of this report. Some in southern member states may feel that political union offers an escape valve from the weaknesses of their domestic institutions; yet their own commitments to tempering these same dysfunctionalities at the national level remain questionable.[51] In the United States, the crisis of democracy is one of polarization; in Europe, it is one of frustration with an elite consensus politics that provides no real alternatives. Slightly amending the role of the European Parliament or bringing in national Parliaments is light years away from rectifying democracy's European malaise.

[48] M. Mazower, "What Remains: On the European Union," *The Nation* (September 5, 2012).

[49] M. Kaldor and S. Selchow, "The bubbling up of subterranean politics in Europe," London, LSE Civil Society and Human Security Unit (2012), pp. 18-19 and p. 24.

[50] For example, J. McCormick, Europeanism (Oxford: Oxford University Press, 2010).

[51] N. Bolleyer and C. Reh, "EU legitimacy revisited: the normative foundations of a multilevel polity," *Journal of European Public Policy*, 19/4 (2012), pp. 472-490,

Conversely, if the worst of the economic crisis now abates and member states no longer judge any moves toward political union to be necessary, the risk is that promises to deepen democratic accountability will once again be quietly forgotten.

Conclusion

The democracy crisis in the euro area is about the eroding ability of democratically elected governments to influence key economic and social developments such as growth and employment; the rise of technocratic interventions in member states without democratic legitimacy; and an accelerated process of de facto integrative deepening without the concomitant democratic legitimacy. There is a mismatch between the root causes of this challenge to democracy, on one hand, and current policy proposals, on the other. Any move to political union must be formulated so as to revitalize democratic control over economic policy choices, not set them further beyond political debate. The crisis has not spurred the kind of civic-led reimagining of legitimacy that has long been advocated by analysts of the democratic deficit. Moreover, lessons remain to be learnt from the devastating effects of what happens when democratically elected governments can

no longer effectively implement economic policy choices and ensure certain levels of welfare and social cohesion. While formal political union may prove itself desirable, it must be recognized that in certain forms, it risks aggravating existing distances between citizens and decision-making centers, and that democratic shortcomings reside in a broader need to foster civic vibrancy.

If political union does not prosper — which for now seems highly likely — alternative routes to democratic legitimacy will be even more necessary. Yet, most debate has still been couched in familiar terms of the balance between supranationalism and intergovernmentalism. It is necessary to deliberate more on how the EU can thrive by crafting more innovative, multi-actor, and looser networks of policy expertise. Revitalizing the EU's democratic legitimacy is not about a few instrumentally conceived add-on parliamentary consultations; even if not apparently pertinent to immediate crisis management, over the long-term it must involve a more vibrant and open-ended political process based on a mutually reinforcing combination of representational and participative dynamics. There is little evidence that EU leaders have so far grasped the magnitude of this challenge.

Democracy, Italian Style

Gianfranco Pasquino

The paradox of democracy in Italy is that all the indispensable requisites of a democratic political order exist and, on the whole, function. That is, since 1946, elections have been free and fair and their outcomes have gone unchallenged (which the exception of a misplaced and misfired attempt by Silvio Berlusconi in 2006). Electoral participation has remained at comparatively high levels. The battery of civil and political rights, as well as "social" rights, is wide and practically all-encompassing. Their violations by the state have been quite limited in number. Mostly those violations have come from the police, for instance in the infamous case of the G8 held in Genoa, and occasionally from the judiciary. An exaggerated number of trials take too long and many sentences arrive beyond the time frame set by the statute of limitations. Those who can afford several lawyers enjoy significant advantages in this situation. Therefore, the slowness and inefficiency of the Italian judiciary can be considered a "structural weakness" of the established Italian democracy.

There is a second structural weakness that is represented by the existence and the strength of organized crime thanks to the complicity of too many politicians in at least four Southern regions.

In a way, organized crime — mafia, camorra, and "ndrangheta" — affects the socio-economic life of millions of Italians. No doubt it also put pressures on the politicians and influences their behavior. Political corruption, to be kept separate from organized crime, also constitutes something of a structural weakness. In fact, it does not only permeate political life and bureaucratic activities, but it is also a component of day-to-day socio-economic life responsible for at least a portion of the present Italian economic difficulties. Corruption does not "oil" otherwise inefficient decision-making procedures. It deprives the country of a significant amount of resources.

Also, because it has never been "regenerated" by rotation in governmental offices, the Italian party system collapsed in 1992-1994. Since then, a political and institutional transition has gone on in which old parties have disappeared and new, fragile, and unstable parties have been created, but, above all the Constitution and the institutions of the Italian parliamentary democracy have been repeatedly challenged (and, in a way, have been somewhat delegitimized). Probably the most important and threatening phenomenon that has marked the transition is represented by the conflict of the private interests of the media tycoon Silvio Berlusconi with his public role as prime minister. Italian democracy has been wounded, though not in an irredeemable way, by this unsolved conflict. Moreover, a significant democratic weakness has made its appearance: the lack of pluralism and, generally speaking, of true competition in the media system, especially in the field of television. The power of the media tycoon has effectively produced a situation of duopoly. Since the circulation of information, even more so of delicate political information, constitutes the lynch pin of democratic regimes, there is no doubt that the structure of ownership and the organization of the overall media system does not offer Italian citizens enough information of acceptable quality. Indeed, criticisms and suggestions have been frequently sent to the Italian authorities by the European Commission.

All this said, my overall assessment is highly problematic. First of all, I would argue that the weaknesses I have identified can be defined "structural" because they have characterized Italian democracy for some or for too long a time. But they are most certainly not inherent to (other) established democracies. Second, I would stress that Italian institutions and the Constitution have proved to be quite strong and resilient. They have offered and continue to offer a viable framework in which concrete and tough electoral competitions take place and produce significant outcomes of all types, but all democratically legitimate. Third, then, it is the overall quality of the Italian political class that represents a handicap for positive changes. Finally, I would add that many a weakness and an inconvenience of established democracies have to do with the citizens themselves, in this case with Italian citizens. If they are not interested in politics, not informed about politics, not willing to participate, not obstinate enough to try to be efficacious, then their democracy will be of poor quality. Perhaps the truly structural weakness of Italian democracy derives from a widely diffused anti-political sentiment, cultivated by some politicians and fully exploited in the February 2013 elections by the Five Star Movement. Anti-political sentiments put serious limits on sustained political participation and repeatedly offer great opportunities to populist leaders. They represent a serious constraint on the proper functioning of the democratic regime.

Five

Between Democracy and Authoritarianism: The "Hybrid" Nature of Post-Soviet Political Transformations

Kateryna Pishchikova

Photo: Commonwealth of Independent States leaders including
Belarusian President Alexander Lukashenko and Russian President
Vladimir Putin gather in Moscow's Kremlin on May 15, 2012.
© Corbis

A s the famous opening line of Tolstoy's *Anna Karenina* goes, "happy families are all alike; every unhappy family is unhappy in its own way." There is not a single democratic success story among the 12 Soviet successor states, and each of them presents a distinct set of challenges as well as opportunities. A wide array of explanations exists as to why different post-communist countries — from Russia to Ukraine to Belarus — followed such different trajectories since 1989. Indeed, it is difficult to strike a balance between accounting for different historical contexts and theorizing similarities in institutional arrangements and patterns of political transformation in these countries.

This chapter contributes to this body of political analysis by looking at post-communist countries stuck halfway between democracy and authoritarianism as "hybrid" regimes. "Hybridity" in this context is defined as a condition where liberal and illiberal norms, institutions, and actors coexist, interact, and even clash in a way that precludes democratic consolidation.[52] Looking at a number of post-communist countries through the lens of a normative definition of hybridity may prove a useful addition to earlier more descriptive understandings of this regime category. In particular, it may add comparative quality to the concept in view of recent political transformations in the Middle East. Hybrid regime is a broad category within which degrees and types of hybridity vary, yet it is increasingly clear that it has come to represent a distinct set of regimes around the world, rather than just a temporary or "transitional" form. Hybrid regimes are not static internally; quite the opposite, internal tensions are likely to produce significant dynamism at different points in time. Yet, hybridity is a persistent feature of stalled democratization projects.

This chapter will focus on transformation experiences of Soviet successor states that represent a rich selection of hybrid regimes. First, several core assumptions of democratization studies

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[52] This definition is adopted from R. Belloni "Hybrid Peace Governance: Its Emergence and Significance," *Global Governance*, 2012, vol.18:1.

Hybridity is a persistent feature of stalled democratization projects.

will be outlined that help us understand the rise of a "hybrid" regime category and think about possibilities of eventual democratic consolidation in those regimes. Then examples from a number of post-Soviet states will be offered in order to itemize two crucial dimensions of democratization — effective and accountable institutions and civic participation, as well as links between these two dimensions. Whether we optimistically label some post-Soviet countries as unconsolidated democracies, implying that they only lack an extra push along the democratization path, or as competitive authoritarian regimes, meaning that the reality of regular multiparty elections does not bring them any closer to democracy, the question of what exactly can make a difference in these countries' political transformation is key. An outlining of the implications for engagement with hybrid regimes will conclude the chapter.

The "Secret Ingredient" of Democratization

So what are the key factors that lead to the creation of democratic societies, no matter how different they may be among themselves and lack in hybrid regimes?

Historically, studies on the issue of what constitutes democracy's core ingredients have been divided into two broad schools of thought: the institutionalist approach versus the "pre-conditions" school. The former school, its internal diversity notwithstanding, would argue that democracy is first and foremost defined by a set of institutions, such as governments elected through free and fair elections, voting rights and the right to stand for elections, and freedom of speech and association. Hybridity is therefore described as either malfunctioning or total absence of a particular institution. For example, Larry Diamond develops a typology of hybrid regimes

on the basis of their use (or rather misuse) of elections. Guillermo O'Donnell, on the other hand, argues that what is missing from non-consolidated democracies across the board is the rule of law, including public accountability and control of corruption. These authors do not privilege one institution over another, yet they do not look beyond the level of institutions when describing regime hybridity.

The "pre-conditions" school, on the other hand, argues that all of the above are the necessary, but not sufficient, requirements for democratization to happen. It therefore focuses on deeper structural factors that should complement the more formal procedural aspects of democracy. Originally, the "pre-conditions" school was famously represented by the modernization argument that saw democracy as a by-product of industrialization and economic growth[53] as well as by the literature on political culture,[54] which viewed structural factors as "preconditions" for democracy and, therefore, questioned the viability of democracy (and the possibility of democratic transition) in countries that did have the right structural conditions in place. With respect to political transformation in the European post-communist space, this argument has been more recently taken up by the "path dependency" studies that argue that both institutional and cultural legacies of the past represent the most influential factor in explaining long-term success or failure of democratization.[55] The "pre-conditions" camp has produced relatively convincing retrospective analysis of how, for example, democratic civic and political culture that comes from previous experiences with democratic institutions (path dependency) may explain divergent successes with democratization. It says less about how such culture may evolve in other contexts thanks to rising levels of education

or exposure to different political models through travel, especially among the growing middle class. What are the factors that could increase both competition and participation in the system and, therefore, contribute to democratization?

It is not surprising, then, that the two schools have had distinctly different empirical and analytical foci — with the former mostly focused on transitions away from the dictatorial rule and institutional reforms and the latter mostly concerned with the consolidation of democracy and the factors that determine democracy's resilience and durability. Yet, as the current debate seems to be converging around the issue of whether and how political transformation can be turned into successful democratization over the long term, scholars from both camps tend to recognize the importance of "new" institutions as well as "old" structures.

How do we know if and when a political transformation ends up leading to democracy? How do we know a consolidated democracy when we see one? A democracy is believed to be consolidated when "democratic forms are transformed into democratic substance,"[56] meaning that the democratic rules of the game are internalized both by elites and the population. It also means that any political contest is between proponents of different policies and never against the set of democratic rules themselves. This means that to be complete, consolidation should take place along multiple dimensions and on multiple levels. Becoming a democracy cannot be seen as conforming to a certain template, as that would go against the empirical evidence of the variety of democracies around the world and their constantly evolving nature. Neither should we assume that democracy is a point of no-return and is completely secure from any future rise of illiberal or undemocratic tendencies.

Moreover, while we find it quite easy to recognize established democracies and to point out the core of their political culture, it is difficult, or maybe even impossible, to know when political transformation

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[53] S. M. Lipset, *Political Man* (Baltimore: Johns Hopkins University Press, 1981); W.W. Rostow, *The Process of Economic Growth* (Oxford: Clarendon Press, 1962).

[54] G. A. Almond and S. Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press, 1963).

[55] G. Ekiert, J. Kubik and M. A. Vachudova, "Democracy in the post-communist world: An unending quest?" *East European Politics and Societies* 21:1 (2007), pp. 7-30.

[56] T. Carothers, "The End of Transition Paradigm," *Journal of Democracy* (2002).

has reached the stage of a consolidated democracy. In a way, we can only know it after we see a country withstanding a significant rise of illiberalism or a serious assault on its democratic institutions either from political parties or "bad" civil society groups that promote extremism or seek to curtail mechanisms of democratic accountability. In this sense, democratic consolidation is about a qualitatively different nature of state-society relations and not about scoring well on a particular dimension. Below, these relations are unpacked and challenges that are distinct for the kind of hybrid regimes that emerged as a result of "protracted" or stalled democratization in some post-Soviet states are discussed.

The Rise and Staying Power of Post-Communist Regime Hybridity

As mentioned above, each post-Soviet country faces distinct challenges. Some, like Russia or Azerbaijan, are rich in natural resources, and this has proven to be both a source of incredible wealth and a barrier to reforms. Others, like Ukraine, enjoy the benefits of having kept a considerable portion of Soviet industrial and scientific heritage and holding a strategic geopolitical position. Several states, like Moldova, Azerbaijan, and Georgia have sizable parts of their territories hostage to so-called frozen conflicts. Important differences notwithstanding, it is nonetheless possible to identify common illiberal elements that persist in these countries as well as mechanisms through which the hybrid condition becomes entrenched over time.

A lot has been said about the "election bias" in our thinking about democratic transitions. In fact, Huntington's "two turnover test" — stating that democracy is likely to become irreversible once the country's leadership was changed twice in free and fair elections — does not seem to hold in the post-Soviet space. This is vividly illustrated by Ukraine's experience — a country that, in the words of the former ambassador of the United States to Ukraine Steven Pifer, was the best placed for success out of

> *Democratic consolidation is about a qualitatively different nature of state-society relations and not about scoring well on a particular dimension.*

the 12 former Soviet Socialist Republics.[57] Since its independence, Ukraine had four different democratically elected presidents, one of whom was brought into power in late 2004 through the Orange Revolution, an event that was seen as a showcase for successful democratization in the region. But it is not just the Orange Revolution that qualifies Ukraine on the "elections test." An arguably more significant election took place in 1994, when the incumbent Present Leonid Kravchyuk stepped down as a result of free and fair elections, thus avoiding the Belarusian scenario of early power capture by an authoritarian leader. Yet, Ukraine's sixth parliamentary election in October 2012 was unanimously judged by independent observers as a step backwards, and its democracy is not receiving high marks even on standard scores. Freedom House has consistently labeled Ukraine as a "transitional or hybrid democracy" in its *Nations in Transit* reports and as "partly free" on its *Freedom in the World* ranking. Moreover, its most recent 2012 country report documents a clear deterioration on a number of counts: from independent media and national democratic governance to corruption and most notably, independent judicial institutions. These scores might not do justice to the complexities of political transformation but they do illustrate quite clearly the challenge of moving beyond some form of unfinished democratization and toward a more comprehensive democratic consolidation.

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[57] Three Baltic Soviet Socialist Republics proclaimed their independence before 1991 and have followed transformation trajectories much closer to other East European states than the other former Soviet Republics.

Throughout the former Soviet Union, political leadership was no match to the complex task of state building and democratization, quite the opposite. In a sobering account by Serhiy Kudelia, self-interested political elites "undermined the construction of a modern state by strengthening informal levers of control to pursue their own political or economic agendas. The imperatives of institution-building were subordinated to the personal interests of accumulation and perpetuation of political power and financial wealth."[58] Indeed, one common and persistent feature of all post-Soviet states is the oligarchic capture of economic and political power. Talking of today's Russia as a rich country full of poor people, Stephen Holmes underlines: "the roots of post-communist popular discontent lie less in deplorable habits of dependency than in accurate perceptions of betrayal."[59] Corruption increased six-fold since Vladimir Putin's rise to power.[60] In Ukraine, according to Transparency International reports and quite the contrary to expectations at home and abroad, corruption under the Orange Revolution leader President Yushchenko reached levels similar to those before the Revolution, devaluing the symbolic capital that he held at the beginning of his term. Distributing high-level appointments to his extended family and meddling with courts added to the overall disillusionment with his leadership.[61]

In this context, politics continues to be a zero-sum game, where the stakes of losing the next election are high and the temptation to consolidate power by manipulating institutions is perceived as a matter of survival rather than of extra benefits. No wonder that most of the recent scholarship on the region focuses primarily on the dynamics of rent distribution among elites, clan and kinship politics, and the meaning of turf wars in non-transparent and corrupt economies. It seems that for those societies to break free from their hybrid condition,

the rule of law and an even playing field have to be perceived by elites as more beneficial than clan-based politics. Lack of strategic vision by the leadership and unhealthy state-society relations is a persistent feature of hybrid regimes, which undermines the functioning of their institutions.

The failures to break away from the condition of hybridity have an impact beyond the political sphere. As no leader is prepared to take the responsibility and invest resources in large-scale economic restructuring, not only are important reforms being delayed, but the costs of running an inefficient economy continue to rise and the risks of economic collapse in the face of either internal or external shocks are ever higher. Clientilistic politics also seem to go hand-in-hand with protracted or "frozen" conflicts, such as the Transnistria conflict in Moldova, the Nagorno-Karabakh conflict between Armenia and Azerbaijan, and the secessionist regions of Abkhazia and South Ossetia in Georgia. Such no-man's lands located outside of state oversight and with ambiguous international status are highly lucrative as black market and transnational crime transit zones. As long as institutions remain captured by self-interested elites, the nation-building project and sovereignty of those countries remain compromised.

Interestingly, the boldest reforms in some post-Soviet states were carried out by charismatic leaders seeking to centralize power and to rechart existing rent distribution patterns among elites, such as President Leonid Kuchma's privatization reforms in Ukraine in mid-1990s. In fact, the Rose Revolution

It seems that for those societies to break free from their hybrid condition, the rule of law and an even playing field have to be perceived by elites as more beneficial than clan-based politics.

[58] S. Kudelia, "The Sources of Continuity and Change of Ukraine's Incomplete State," *Communist and Post-Communist Studies* 45 (2012), pp. 417.

[59] S. Holmes, "Fragments of a Defunct State," *London Review of Books* 34:1 (2012).

[60] L. Harding, *Mafia State: How One Reporter Became An Enemy of the Brutal New Russia* (London: Guardian, 2011).

[61] Kudelia, p. 425

in Georgia in 2003 and the Orange Revolution in Ukraine in 2004 were partially provoked by societal pushback against such power centralization and corruption. Ironically, the same thing could be said about Georgian President Mikheil Saakashvili's defeat in the 2012 Parliamentary election. Saakashvili's modernization agenda in the mid-2000s came at the cost of accountability. The onetime "color" revolution hero continued to claim legitimacy on the basis of reform successes, notably in fighting corruption and petty crime and in market liberalization. Yet, popular discontent with his rule shows that the population was not ready to sacrifice so much accountability.

Are there mechanisms to transform what seems to be a persistent capture by corrupt elites? Pushback from their respective societies is often envisioned along two lines: on one hand, the elites can be forced to take population's demands for accountability seriously, and on the other, active civil society may pave the way for new (and hopefully different) leadership that takes democratic rules of the game more seriously. These kinds of developments depend on active citizenship and a considerable shift in each nation's political culture.

The evidence on participation and political culture in the former Soviet Union tends to be disappointing. It has become common knowledge that those countries are characterized by low participation, civic apathy, and low levels of trust, both interpersonally and in public institutions, which are partially attributed to communist legacies and partially to the prevalence of survival values due to socio-economic hardships. This tendency has been, at least until recently, believed to be consistent across the post-communist region. In his widely read book published a decade ago, Mark Howard, in fact, stated with some confidence that "we are unlikely to see dramatic changes in the pattern of nonparticipation throughout post-communist Europe."[62] A recent study drawing on bigger and more comprehensive data sets, including the comparison between post-communist and non-post-communist countries, largely confirms Howard's finding of "a large and temporally resilient post-communist deficit in civic participation."[63]

Most of this literature draws on such data as levels of organizational membership because it is believed that citizens tend to acquire crucial civic skills through voluntary organizations. Indeed, after compulsory membership in Communist Party-led civic organizations was abolished, their membership dropped dramatically while suspicion toward any form of "voluntary" collective action remained. Even though the numbers of newly formed civil society organizations were staggering throughout the 1990s, on a closer look, only a tiny percentage of those represented genuinely active organizations with links to their communities and a consistent agenda. Many were simply "briefcase" NGOs created for siphoning off different types of funding that became available. Even though the quality of work done by some, arguably few, NGOs is high, their impact on policymaking is limited and their links with the society are virtually non-existent. The "NGO-ization" of civil society support by most foreign donors is partially responsible for such distorted patterns of NGO oversupply yet underperformance vis-à-vis citizens' demands and needs.

Should we be looking elsewhere for signs of civic participation? First of all, some civil society organizations may be evolving in important ways. For example, Tarrow and Petrova show that in some East European countries, while individual

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[62] M. M. Howard, *The Weakness of Civil Society in Post-communist Europe* (Cambridge: Cambridge University Press, 2003), pp. 158.

[63] G. Pop-Eleches and J. A. Tucker, "Associated with the Past? Communist Legacies and Civic Participation in Post-Communist Countries," *East European Politics and Societies* 27:1 (2013).

Backlash Against Democracy

November 2003, Georgia — Rose Revolution — protests lead to the resignation of President Eduard Shevardnadze and election of President Mikhail Saakashvili.

April 2004, Uzbekistan — Open Society Institute denied registration by the government.

September 2004, Russia —The direct election of governors for Russia's 89 regions is ended; they will instead be appointed by the Kremlin. The legislature will be elected exclusively by party lists rather than 50 percent from party lists and 50 percent from individual member districts.

November 2004 - January 2005, Ukraine — Orange Revolution — protests lead to re-run of election and victory of pro-Western Viktor Yushchenko as president.

March - April 2005, Kyrgyzstan — Tulip Revolution — protests lead to overthrow of President Askar Akayev and a new government.

May 2005, Uzbekistan — Government troops open fire on crowd of protestors in Andijan. Estimates of dead range from government figure of 187 to several thousand. President Islam Karimov orders U.S. military base closed after criticism from the United States and other countries.

January 2006, Russia — Law tightly regulating NGOs signed by President Vladimir Putin.

April 2010, Kyrgyzstan — Violent protests cause President Kurmanbek Bakiyev to flee, transitional government established.

December 2010, Armenia — Government denies broadcast license to independent television station for 13th time since taking it off the air in 2002, despite European Court of Human Rights judgment that these denials were unlawful.

December 2010, Belarus — Bloody crackdown on protestors against Alexander Lukashenko's re-election. Presidential candidates and journalists arrested.

July 2011, Belarus — Dozens arrested for clapping in groups in Minsk in a creative form of anti-government protest.

October 2011, Belarus — Law prohibiting foreign funding of civil society and political organizations.

December 2011, Russia — Flawed parliamentary elections spur largest anti-government protests in Russia in more than a decade, continuing over several months.

December 2011, Kazakhstan — At least 16 people killed in clashes with police after months of unrest among oil workers in Zhanaozen.

June 2012, Russia — Law sharply increasing fines for unsanctioned demonstrations, including increasing fine by a factor of more than 120 for participation in a protest that harms people or property.

July 2012, Russia — Law requiring NGOs who receive foreign funding to register as "foreign agents." Libel recriminalized several months after it was decriminalized under an initiative of President Dmitry Medvedev.

August 2012, Russia — Three members of punk music group Pussy Riot convicted of "hooliganism motivated by religious hatred" for performing anti-Putin song in Moscow cathedral. Sentenced to two years in prison.

September 2012, Georgia — Mass protests over videos of sexual abuse in prisons. Dozens of protestors arrested on charges of disobeying police orders.

September 2012, Russia — USAID ordered to shut down its operations in Russia. Definition of treason broadened to include acts that undermine "constitutional order, sovereignty, and territorial and state integrity."

November 2012, Azerbaijan — Maximum fine for organizing or participating in unsanctioned public gatherings increased from $640 to $10,000.

February 2013, Russia — Law regulating volunteer activities drafted and under consideration.

March/April 2013, Russia — Official raids on the offices of domestic and international NGOs.

participation in organizations remains low, coalition and network formation around single issues by civic groups may be growing. Recent evidence from Ukraine, Georgia, and Moldova shows an increase in small-scale local initiatives, such as neighborhood associations that are set up to manage apartment blocks or garage owners' associations that try to manage the transition from the Soviet-style garage cooperatives to new forms of corporate ownership. In general, the most vibrant and sustainable civic initiatives in these countries seem to be those centered around specific societal concerns, such as conscript abuses in the army, the rights of war veterans or of ex-Chernobyl rescue team members, the dire situation of orphans and cumbersome adoption rules, and so on. Recently, there have also been some striking examples of volunteer activism, such as, for example, the mobilization of thousands of volunteers in Russia as a response to massive fires in the summer of 2010 and to floods in 2012. Enraged by the state's inadequate response, citizens organized not only to help the victims but also to ensure the flow of correct information about the disasters in order to counter the attempts of Soviet-style cover-up and propaganda by the regime. These examples may be an indication of a qualitative shift in the nature and role of civil society organizations in the region.

In addition, the first decade of the 2000s has been marked by a wave of street protests — from electoral mobilization, including the famous color revolutions, to more localized protests that used similar mobilization techniques. The color revolutions are better understood as contestation phases in regime cycles where the elite brings down the incumbent by mobilizing popular discontent of the incumbent, rather than real revolutions.[64] Still, these can be seen as important signs of a possible cultural shift in the population. Overall, the socio-economic profile of most people who participate in such protests increasingly corresponds to the group that experienced the most changes in their life opportunities in recent years — young to middle-age urban professionals. Value shifts even within one group may have profound consequences. Whether and how the energy driven by new values and new experiences will work to improve state institutions in those countries remains an open question.

The waves of color revolutions provoked significant reactions from autocrats in the region, as a number of leaders have tried to "tighten the screws" in order to prevent similar uprisings from happening in their own countries.

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[64] H. Hale, "Regime Cycles: Democracy, Autocracy, and Revolution in Post-Soviet Eurasia," *World Politics* 58:1 (2005).

Autocratic leaders have employed not only crude repression measures but also, quite interestingly, a number of soft subversion and cooptation techniques, of which Russian "counter-revolutionary" political technologies represent the most significant example. A lot has been written about the state's tacit support for illiberal groups, such as ultra-right-wing movements. The Kremlin has also invested considerable resources in creating and supporting pro-regime "civic" initiatives, of which the youth movement "Nashi" is the most notorious example but which extends much beyond just one organization.[65] The best example is the recent sequence of protests for and against the "Anti-Magnitsky Act" Law that puts a ban on the adoption of Russian children by U.S. families. The manifestation against this outrageous piece of legislation dubbed the "March Against Scoundrels" in Moscow on January 13 was one of the largest since mass anti-regime protests started in December 2011. The Kremlin took action within a few weeks by endorsing and allegedly sponsoring a counter manifestation (promptly dubbed by the opposition as the "March of the Scoundrels") promoted by conservative women's and nationalist groups and joined by a number of organizations dependent on state funding and thus unable to refuse the request for "mandatory voluntary" participation in the event. Needless to say, such events are capitalized on by the Kremlin for propaganda purposes. More subtle forms of cooptation or depoliticization of citizen activism remind us that the illiberal elements in hybrid regimes are not necessarily easy to recognize or to eradicate. It also shows us that these are not evenly distributed between different spheres or types of actors. Civil society actors can be illiberal whereas autocratic leadership may contain more liberal leaning figures ready to endorse the reform should the personal costs of doing so becomes less significant.

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[65] There have been allegations, which are difficult either to prove or to discard, that Kremlin has been making efforts at penetrating increasingly influential Russian "blogosphere" in its attempt to dilute the protest mood.

> *More subtle forms of cooptation or depoliticization of citizen activism remind us that the illiberal elements in hybrid regimes are not necessarily easy to recognize or to eradicate.*

Recognizing Hybridity, Overcoming Hybridity

This chapter restates the well-known argument that political transformation should not be understood as a linear progression toward democracy. When speaking of hybridity, however, there is a risk of seeing it mainly in terms of deviation from a certain institutional model. I argue instead that the concept of hybridity has to take into account the complexities of state-society relations and should be understood in normative terms as a condition where liberal and illiberal norms, institutions, and actors coexist, interact, and even clash.

Paying more attention to the hybridity of state-society relations that arises from political transformation is a more useful lens for studying countries experiencing political change for a number of reasons. It recognizes that illiberal elements do not simply fade away as regime change occurs and provides insights into their resilience. We are therefore forced to focus not only on the initial moments of transition but also on medium- and long-term developments. Old patterns of power distribution become increasingly difficult to eradicate the longer they persist after the regime break-up. Also, the less public engagement there is over crucial reforms (or lack thereof) at the initial stages of transition, the more probable is the rise in disillusionment and disengagement of citizens at later stages.

Thinking of Soviet successor states as hybrid can prove useful in identifying constituencies for change, both within state institutions and among

The Arab Revolts and Liberal Order

Richard Youngs

It is difficult to pass judgment on the health of democracy within the international order without assessment of the Arab revolts. Despite the stirring images of courageous, sophisticated, and articulate protestors running great personal risk for a less-repressed future, the essential meaning of the region's reforms is still profoundly contested. Some insist that the reform momentum that has gathered since 2011 constitutes a major fillip to core liberal values. In contrast, skeptics warn that authoritarian dynamics remain entrenched and that where change has occurred, it actually presages deeper illiberalism.

No single reading of the Arab Spring is yet possible. Some trends in the Middle East and North Africa (MENA) since 2011 clearly add ballast to central liberal features of the current international order. Others detract from its vitality. Still others may best be interpreted on a different metric altogether: concerns over whether on-going changes in the MENA region reinforce or menace "the Western liberal order" are incongruous to many debates in the region that are today couched in entirely different terms.

Democracy has gained a foothold in some parts of the Arab world but has not spread smoothly across the region. Democratic reform has not progressed in many parts of the region. For all the optimism, two years on from Tunisia's revolution only 4 out of the 19 MENA states have ejected their autocratic leaders. And none of these has made unsullied progress toward well-embedded and quality democracy. Egypt struggles to shake off authoritarian dynamics, Libya to construct core state capacities, Yemen to move beyond the tutelage of the supposedly ousted regime, and star-performer, Tunisia, to embed its gains in a new, broadly agreed constitution. Other states exhibit fierce resilience to change, from Algeria to the Gulf monarchies, from partially reforming Jordan and Morocco, to imploded Syria and increasingly autocratic Iraq.

The issue is not one of democracy not being apt for the region. Rather, familiar problems persist with authoritarian regimes being fiendishly difficult to dislodge. Skeptics have attributed a whole host of problems to incipient political liberalization in MENA states, but more often than not these are problems that result not from democracy per se but from authoritarianism's legacy. The genie that has been released irreversibly from the bottle is that of irreverent social mobilization. But, concomitant institutional change lags behind. Events in the Middle East and North Africa reinforce a central point made in this report, namely that the consolidation framework may be of more limited explanatory utility than previously believed and hybridity more likely to endure.

A second question is whether those states that have reformed are headed toward more illiberal forms of democracy. This will be a defining debate for the region. Many see Egypt's Muslim Brotherhood leading the charge toward what is often referred to as "Islamist democracy." Its attempt to incorporate illiberal clauses on minority and women's rights into the new constitution seems to confirm such a trend. However, the advent of illiberal democracy is by no means certain at present. President Mohamed Morsi has explicitly rejected the idea that there is a specifically Islamist form of democracy. In Tunisia, the Ennahda party expressly did not press for sharia rules to be constitutionally enshrined. While Islamists may use theological references still, it is not clear if they seek fundamentally different institutional structures of the type that might be said to constitute a wholesale, alternative model of democracy. Some analysts insist that Islamist parties may be popular but that societies have modernized at a deep sociological level in way that has

"liberalized" the very understanding of religiosity. Citizens in the region may say they seek an Arab and not a liberal democracy, but debates can become confused. Liberalism is conflated with secularism and, in turn, godlessness. People often seem to see sharia as a path to social justice and greater fairness in public life, combined with more conservative notions of personal morals. With so much individual agitation and empowerment in today's MENA, it is difficult to imagine that significant state restriction of rights and women's enhanced political roles would be passively or enthusiastically accepted. A battle ensues over what an apparent preference for conservative values implies for institutional rules. The liberal-illiberal spectrum struggles to account for many of the subtleties that today color political debates in the Arab world.

In line with other cases studies in our report, in the MENA region, debates rage over contested notions of citizenship, meaning that processes of change are more open-ended than implied by the standard transitions paradigm; they are more redolent of constructivist identity-formation dynamics. While Islamist parties are emerging as key players, there is arguably a danger of over-interpreting the region through the lens of religion. Many of the impediments to democratic deepening are to do with autocratic power retrenchment, city-countryside divisions, rentier political economies, and fractured civic organization. Social movements in the region have provided an inspiring model to civic groups in the West and elsewhere. While this provides grounds for genuine optimism, the Arab revolts provide equally striking lessons in authoritarian resilience.

private actors and civil society. For democratization to be successful, a number of crucial relationships have to be recharted, including the ways in which new leaders can enter onto political scene in what is often a closed system run by elite networks. While most of existing freedom and democracy rankings tend to give marks on the quality of institutions and government's policies, little systematic effort is being made to map the degree and nature of the citizen's disconnect from both institutions and elites. Moreover, only limited discussion is dedicated to different forms of societal pushback and their impact, therefore the potential for further democratization is overlooked.

One of the important success factors in East Central Europe has been the prospect of EU Membership.

While it is unavailable to Soviet successor states (at least for now), the broader process of Europeanization could still be implemented. And if implemented in a sustained and coherent manner, it can make a difference by gradually locking increasing numbers of stakeholders into long-term relationships with European societies and socializing them into appreciating liberal democratic norms and institutions. Whether such socialization and emphasis on effective citizenship will prove sufficient for overcoming the condition of hybridity remains an open question, but it is worth trying.

The Rise and Fall of a Color Revolution: The Case of Georgia

Six

Anna Dolidze

Photo: Relatives of inmates demand to see their family members in an anti-torture protest outside a Tbilisi prison on September 21, 2012. © Corbis

*I*nside the Prison that Beat the President: How Georgia's Saakashvili Lost His Election"[66] read the headline of *TIME*'s story on Georgia's parliamentary elections of October 1, 2012. The title reflects a widespread account of the recent political earthquake in the Caucasus. A controversial video of torture and rape in a Georgian prison went viral on YouTube two weeks before the election. Several thousand protestors quickly gathered in front of Tbilisi State University, protesting prisoner torture and demanding the resignation of relevant public officials. The nine-day protest contributed to the peaceful and electoral ouster of President Mikheil Saakashvili's United National Movement (UNM) from power after an eight-year-rule. Saakashvili remains in office until the presidential elections planned for October 2013. The winning coalition Georgian Dream has appointed new Cabinet of Ministers and elected the new Prime Minister Bizina Ivanishvili. In this article, I complicate this interpretation by arguing that the prison protest, electrified by the visualization of the horrendous acts of torture, was not spontaneous, but rather the culmination of years of growing public dissatisfaction with the politics of punishment administered by the UNM-led government.

Sociologist Loïc Wacquant writes about the "penalization of poverty" as an instrument associated with the rise of a neoliberal state. Wacquant explains "that the generalized increase of carceral populations in advanced societies is due to the growing use of the penal system as an instrument for managing social insecurity and containing the social disorders created at the bottom of the of the class structure by neo-liberal policies of economic deregulation and social-welfare retrenchment."[67] Therefore, for Wacquant, the rising popularity and fascination with law enforcement systems, courts, and prisons is part and parcel of the rise of a state dominated by neo-

liberal economic ideology. This paradigm is very useful in explaining the governance trajectory of the UNM.

Georgia's Rose Revolution of 2003, the original color revolution where protests overturned a post-Soviet regime, was a symbol of promise for liberal democratic transformation. On February 4, 2004, during a speech at Johns Hopkins University, President Saakashvili explained that "in November, the Georgian population united to protect the principles of liberal democracy."[68] Saakashvili and the UNM were perceived as an ideal force that could take the country out of economic stagnation, rampant corruption, and arbitrary rule. Promising speedy transformation and economic development, and armed with a vocabulary attractive to Georgia's Western partners, Saakashvili had overwhelming approval both domestically and abroad.

UNM confronted the Herculean task of tackling the challenges of "triple transition" that are discussed elsewhere in this report — institution building and strengthening, economic restructuring, and state building, the last of which included in Georgia's unique case consolidating the country's territorial integrity. These tasks were inherently intertwined, forming a Gordian Knot that the government had to disentangle; this had not been done in any satisfactory way by previous post-Soviet governments that ruled in Georgia after 1991. The

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[66] S. Shuster, *TIME* (October 2, 2012), http://world.time.com/2012/10/02/inside-the-prison-that-beat-a-president-how-georgias-saakashvili-lost-his-election/

[67] L. Wacquant, "The Penalization of Poverty and the Rise of Neo-liberalism," *European Journal of Criminal Policy and Research* 9 (2001), pp. 401-402; For the complete list of Wacquant's works, see www.loicwacquant.net/.

[68] Speech of Mikheil Saakashvili at Johns Hopkins University (February 4, 2004), http://president.gov.ge/ge/PressOffice/News/SpeechesAndStatements?p=2779&i=1 (accessed on February 15, 2013)

protracted nature of these problems added to the overall cost of dealing with them more than ten years after Georgia proclaimed its independence.

UNM did fulfill some of its promises of state building and economic development. However, UNM's choice to embrace neo-liberal economic policies was mirrored in its resort to criminal punishment as a primary tool for tackling the challenges associated with economic development. The fact that the issue of arrest and punishment galvanized the very first and the last significant public protests against UNM has symbolic significance. The very first instance was when the UNM government used force and crowd control measures to disband a public demonstration related to the arrest and pre-trial detention of two prominent Georgian wrestlers in May 2005.

In response to grievances related to the persistence of poverty, the lack of tangible socio-economic advancements, and the pains of reform in some areas, the Saakashvili-led government turned the paradigm of "penalization of poverty" into its core development policy. Criminal punishment as an instrument for responding to the fallouts of neo-liberal reforms supplanted the deliverables that the UNM was unable or unwilling to provide. As a critical mass of Georgians were exposed to the dark side of the criminal justice system either directly or indirectly, the horrors of prison experiences depicted in the torture video began to resonate with a wider public.

"We believe in the government that will serve its people. Our sacred principle is that state power is embedded in its citizens and nobody is above the law," the newly elected Saakashvili proclaimed early

> *The Saakashvili-led government turned the paradigm of "penalization of poverty" into its core development policy.*

in 2004. Ironically, one of the photos of the nine-day protest movement that ousted Saakashvili's party shows a young protester holding a poster with the slogan "people should not be afraid of their government, governments should be afraid of their people." The protest that ended the UNM rule drew on the same calls for government accountability that had brought the party to power in 2003.

The Promise of the Rose Revolution

On February 25, 1921, the 11th Red Army occupied the Democratic Republic of Georgia, ending the three-year-old Menshevik government. The army abolished the Constitution and Georgia was integrated into to the Union of the Soviet Socialist Republics. After 70 years of Soviet rule, Georgia was the first among Soviet republics to organize free multi-party parliamentary elections in October 1990. Georgia's Declaration of Independence of April 9, 1991, announced the reinstatement of the sovereignty lost as a result of the annexation in 1921.

In the 1990s, Georgia underwent a significant decline of state authority, severe economic downfall, two secessionist conflicts, and a civil war. Following a *coup d'état,* Georgia's first elected president, Zviad Gamsakhurdia, fled to the North Caucasus. A military junta invited former Soviet Secretary of State Eduard Shevadrnadze to lead the country. Organized crime groups supplanted the state law enforcement in delivering security and in return extracted rent from the population. Christoph Stefes indicates that "coalitions of local and regional officials and crime groups successfully captured key economic sectors and undermined the formation of formal state and market institutions."[69] The Parliament adopted a new constitution on August 24, 1995.

In its early stages, the Shevardnadze government put in place basic state institutions, established diplomatic relations with other countries, concentrated on monopolizing violence, and integrated Georgia into international institutions.

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[69] Christoph Stefes, *Understanding Post-Soviet Transitions*, Basingstoke/New York: Palgrave Macmillan, 35 (2006).

However, at a later stage, the country was characterized by pervasive corruption, rampant unemployment, and deteriorating infrastructure. In addition, the country was still grappling with the consequences of having experienced two secessionist conflicts in Abkhazia and South Ossetia. According to the United Nations Human Development Index, which measures health, education, longevity, and other important development factors, Georgia occupied 87th place in the world in 2003. While Georgia's citizens enjoyed free media and had the opportunity to exercise freedom of expression through other forms such as protests, the government remained unresponsive to public demands.

Allegations of vote rigging in parliamentary elections sparked an outpouring of public discontent in November 2003. The protests culminated in the resignation of Eduard Shevardnadze on November 23, 2003. The Rose Revolution established an interim government, led by Parliament Speaker Nino Burjanadze. As a result of the presidential and parliamentary elections in January and March 2004, the United National Movement of Georgia became the dominant political party, while its leader Mikheil Saakashvili was elected as president with a landslide victory.

The Rose Revolution inspired hope in Georgians and in observers alike. As Tinatin Khidasheli, a lawyer and Saakashvili supporter, put it at the time, "President Mikheil Saakashvili won a mandate to repair the divide between the government and citizens alienated from their leaders and to promote human rights from the highest political position." Columbia University-educated Saakashvili focused on Georgia's Westernization and, armed with the vocabulary of assuring Georgia's transformation into a Western style liberal democracy, was in the words of the *Guardian* "a darling of Washington and Brussels."[70]

The National Movement's Challenges

Establishing effective control over Georgia's territory was the new government's primary concern. UNM succeeded in bringing Adjara, an autonomous republic previously run by a local autocratic leader under de facto jurisdiction. Stabilizing relations with the two secessionist republics, Abkhazia and South Ossetia, proved to be difficult, however. Russian strategic interests in these regions date back to when Georgia was a colony of the Russian empire and involve the ethnic policies implemented by the Soviet Union in Georgia. "Peaceful unification" with Abkhazia and South Ossetia were Saakashvili's main political aspirations. In a televised interview in the summer of 2006, Minister of Defense Irakli Okruashvili promised that Georgians would celebrate next New Year's holiday in the capital of South Ossetia. However, relations with Russia gradually deteriorated, resulting in a military confrontation over South Ossetia in August 2008 and in Russia's formal recognition of the two secessionist republics. The conflict with Russia dealt a blow to Georgia's economy. Formerly Georgia's largest trade partner, Russia began to prohibit the import of Georgian products, contributing to Georgia's trade deficit. Moreover, Georgia's foreign investment and tourism related income suffered as well.

Deteriorating relations with Russia were partially related to Georgia's strong push for Euroatlantic integration. "We will pursue our goal of becoming full members of the North Atlantic Treaty Organization and the European Union," indicated Saakashvili in a letter to *The New York Times* in 2004. The Georgian government regarded NATO membership as a safeguard against the potential of Russian aggression. After the Bucharest Summit in April 2008, Georgia and Ukraine

Deteriorating relations with Russia were partially related to Georgia's strong push for Euroatlantic integration.

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[70] *The Guardian*, "Georgia: petals drop off the rose revolution" (September 30, 2012), http://www.guardian.co.uk/commentis-free/2012/sep/30/georgia-rose-wilted.

were denied the Membership Action Plans that the Bush administration had lobbied its partners for, yet they were offered a special promise of future membership in NATO. Russian General Yuri Baluyevsky responded that if Georgia joins NATO, "Russia will take steps aimed at ensuring its interests along its borders, and these will not only be military steps, but also steps of a different nature." Georgia has continued to take part in the International Security Assistance Force in Afghanistan, making up the largest member troop contributions among non-NATO members, while subsequent NATO summits have reaffirmed Georgia's road to membership and established the NATO-Georgia Commission to supervise the process.

During his inaugural address on January 2004, Saakashvili had the banner of the European Union raised alongside the Georgian flag and declared "[the European] flag is Georgia's flag as well, as far as it embodies our civilization, our culture, the essence of our history and perspective, and our vision for the future of Georgia.… Georgia is not just a European country, but one of the most ancient European countries.… Our steady course is toward European integration."[71] The EU-Georgia Cooperation Council approved the Georgia-European Union Action Plan within the European Neighborhood Policy in 2006. The EU and Georgia are negotiating an Association Agreement, a Deep and Comprehensive Free Trade Agreement, and an agreement that will potentially liberalize visa access to the EU for the Georgian citizens.

Building effective state-institutions capable of implementing rapid reforms was proclaimed as a government priority. The parliamentary majority justified the constitutional reforms, passed in February 2004, with the need to establish a strong and viable executive branch in order to implement swift reforms. However, by strengthening the executive branch, the Constitutional amendments weakened the supervisory powers of the parliament and the judiciary.

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[71] M. Müller, "Public Opinion Toward the European Union in Georgia," *Post-Soviet Affairs* 64 (2011), pp. 64-92.

UNM took strong steps against corruption at all levels of Georgia's government and streamlined the administrative apparatus. Enhanced budgetary revenues, facilitated by the relative efficiency of tax administration as well as income from a rapid privatization program, were one of the government's initial accomplishments. Police reform became a priority. The Ministry of the Interior underwent major restructuring. Georgia's traffic police, fully rejuvenated and equipped with state-of-the-art resources, stood out as an example of effective transformation. However, the ideology of small and efficient state apparatus required drastic austerity measures. For instance, in the process of rapid police reform, a total of 16,022 employees were dismissed from the Ministry of Interior in the summer of 2004. The government implemented similar steps in all areas, including education and health.

Significantly, this drastic downsizing of the state apparatus took place in an environment in which virtually no unemployment assistance was available. The flow of newly unemployed people added to an already high jobless population. Even official statistical data by the Georgian Statistical Services Agency, whose definition of employment has been criticized as too expansive as it includes the performance of unpaid labor, shows that the official unemployment rate reached its peak of 16.3 percent in 2009. The measures left thousands of individuals, who were subjected to these austerity measures and carried the burden of economic reform, without any social security support and grim prospects of reemployment.

Moreover, UNM took active steps toward labor market flexibilization. Parliament adopted the new Labor Code in June 2006, significantly restricting labor protection. Among other changes, it granted employers the right to abolish employment contracts at any time without any need for substantiation, and removed labor protection for vulnerable groups, including pregnant women and nursing mothers. The European Commission's Progress Report for Georgia, prepared as part of the European Neighborhood Policy, indicated that the 2006 Labor Code was not in line with the ILO

Belarus: The European Stranger

Pavol Demeš

The socio-political transformation of post-communist Central and Eastern European (CEE) countries provides a wealth of experience and a knowledge base for those who are dealing with the theory and practice of democracy. Voluminous books and articles written about our region over the last two decades contain pieces on heroic and inspirational struggles for freedom, but also pieces about profound failures of efforts aiming at establishing democratic, rules-based societies.

The former Eastern bloc country where domestic struggles for democracy and Western democracy assistance have failed to the most glaring degree is Belarus. Belarus is the only country that was excluded from the Council of Europe due to the gross violation of human rights violations conducted by the head of state Alexander Lukashenko and his regime. It is the only country whose president, foreign minister, and over 200 top officials cannot land at any airport in the European Union because they are included on the EU's visa ban list due to anti-democratic behavior. And lastly, it is the only EU-neighboring country where opponents of the ruling regime, including a minister of interior, have been kidnapped and killed, and where presidential candidates protesting against rigged elections have been imprisoned and brutally tortured.

A grandmaster in bluffing, Lukashenko has performed a skillful balance between Russia and the EU, and built a stable, fear-based system, which was recently labeled "Jurassic Park" by the well-known Belarusian sociologist Andrei Vardomatsky. Vardomatsky, of course, is in exile, along with hundreds of other Belarusians who raised a critical voice against the political situation in their country.

Belarus' autocrat has repeatedly proved wrong those democracy practitioners and theoreticians, both domestic and international (of whom I was one), who predicted his departure on various occasions. In his almost 19 years of rule, Lukashenko has already outlived several European and U.S. presidents, ministers, and commissioners, with their tough rhetoric concerning his land. Why has Belarus, a country of 10 million souls with relatively high levels of education, a shared history, and borders with two new EU member states — Poland and Lithuania — evolved into this European stranger? Why have significant efforts on behalf of the West aimed at overcoming Lukashenko's unprecedented abuse of power, and his country's self-isolation, so far failed? There are domestic and international reasons.

Lukashenko, step by step, modified the political system in Belarus in such a way that it is now entirely under his personal control. Not surprisingly, his international relations techniques have been heavily influenced by his domestic habits. He wants to be the master who dictates the rules of the game at home and abroad. He expelled all international organizations dealing even remotely with democracy and a human rights agenda from Minsk. The OSCE and all foreign foundations were among them. Although he cannot kidnap or eliminate diplomats, he discredits or expels them periodically from his land if they "misbehave." It is therefore not surprising that lessons learned from assisting democratic transitions in other CEE countries have so far mostly failed in Belarus.

One might assume that the situation in Belarus is hopeless. And it is true that the country's judiciary, political opposition, civil society, media, academia, and church are either fully under the government's control or otherwise scared silent. This is particularly the case since the screws were tightened on the population subsequent to the massive protests against the manipulated

presidential elections of December 2010, when Lukashenko himself got scared. It is also true that the West, given the situation both inside and outside Belarus, does not have the effective tools and strategy to help the country become a standard and responsive European state. Lukashenko and his loyalists know very well what could happen to them if Belarus' citizens were to gain basic freedoms.

The good news is that Belarus is not an abandoned island, particularly in this digital age. Belorussian freedom fighters, be they at home or in exile, are more than ever able to get their message out and form links with like-minded people around the world. Transatlantic solidarity, consistency, and value-based positions are the key elements for developing proper and effective policy toward this country. Those who want to assist Belarus in its transformation to an open country must use long-term and unconventional approaches. All donor agency representatives are targeted by the regime. Naturally, they are also often banned from entering the country. Therefore, a very important issue is to carefully monitor and guard information and activist networks as the safety of assisted individuals and groups is at stake. In most cases, receiving foreign aid in Belarus is illegal and can lead to confiscation of resources or property, job loss, expulsion from school, or even imprisonment.

I have been involved in democracy promotion work for over 20 years and must admit that Belarusians have inspired me the most. I have met dozens of enormously brave politicians, civic activists, journalists, artists, men, and women, who despite having withstood inhuman treatment and humiliation and all the odds against them, still struggle and believe in their motherland. They, not the oppressive and isolated regime, are the future of a European Belarus.

Being born in Czechoslovakia, and personally knowing Vaclav Havel, I believe in the concept of the power of the powerless and the power of solidarity. And I know for sure that in the end, it is the power-abusers, including Alexander Lukashenko, who are truly fragile, and truly terrified.

standards and contradicted EU standards, and directly requested revision of the Code.

The government's economic policies focused on rapid privatization and market liberalization. In one of his first public addresses in English, Saakashvili proclaimed that "Economically, we have initiated a privatization effort that would make Milton Friedman proud, selling everything the government had no business owning in the first place. Why, in the 21st century, should a government own hotels? It should not, and our government no longer does. Moreover, we are completely overhauling our tax code, replacing it with a people-friendly, pro-growth system that relies on a simple flat tax." UNM's insistence on small government shows in President Saakashvili's speech on October 6, 2009, in which he introduced the Economic Freedom Act, "Our experience shows that there would not

be a place where something good could happen if government was present."

This approach was not independent of the dominant school of international economic thought. Since 1992, Georgia has been a part of global financial institutions. Georgia's international financing and borrowing capability was greatly augmented after Georgia joined the World Bank in 1992 and the International Development Association in 1993. Georgia also became a member of the World Trade Organization in 2000.

The government's economic policies focused on rapid privatization and market liberalization.

The international financial institutions positively assessed Georgia's advancements in the economic realm. The World Bank's and International Finance Corporation's Doing Business rankings, which mainly focus on countries' path to economic liberalization, recognized Georgia the "top reformer" alongside Ghana and Kenya in 2008 for, *inter alia*, strengthening investor protections, adopting a new insolvency law, speeding up approvals for construction permits, and simplified procedures for registering property. Similarly, the Heritage Foundation, a conservative U.S. think tank, ranked Georgia 34th among 184 countries in its "World Freedom Index" ahead of France, Belgium, and Spain. In 2003, when UNM came to power, Georgia was 113th.

Georgia's GDP rose steadily after the Rose Revolution, averaging 10 percent growth in the first four years. However, the growth did not immediately translate into the gains for the wider population. The impact of income inequality on the transition to democracy has been widely discussed. In Georgia's case, economic inequality deepened during the Saakashvili years. According to World Bank data, the Gini Index of income inequality for Georgia was 40.37 out of 100 in 2003 and grew more unequal to 41.34 in 2008. Nor did Georgia's growth prove immune from processes affecting global markets. Georgia' official agency for investment indicates that Georgia's GDP growth suffered from the global economic crisis, lowering to 6.4 percent in 2010 from a height of 12 percent in 2007.

Periodic opinion polls conducted by the National Democratic Institute illustrate the Georgian citizens' experience of social-economic security. Issues such as unemployment, poverty, pensions, and affordable healthcare topped their list of concerns in 2009-10.[72] In the 2010 survey, 70 percent of those polled responded that they do not consider themselves employed.[73] When asked what issues they would like political candidates to focus on, the two priority issues where jobs (70 percent) and poverty (43 percent).[74] Other opinion polls, including those conducted by the International Republican Institute, confirm the urgency of these social-economic issues.

Punitive Regulation of Poverty

Data from the annual Global Competitiveness Report of the World Economic Forum illustrates the disjuncture between the degree of economic liberalization and the justice system in Georgia. In the latest report, Georgia is ranked second out of 144 countries for the number of days required to open a business and ninth when it comes to "burden of government regulation." However, it comes in 95th place with regard to "judicial independence" and 131st place when it comes to "property rights."

Georgia's move to punitive regulation as an instrument of development policy was evident from the early days of the Saakashvili administration, as the criminal justice system transformed into an official engine for revenue generation. Law enforcement arrested many officials of the previous regime, expropriated their property and in some cases dropped charges as soon as substantial funds or assets, worth millions of dollars in total, were handed over. In some cases, the defendants transferred revenues to two quasi-public funds, established under the Ministry of Defense and the Ministry of Interior. The trend continued throughout the years of UNM rule. To take one example, lawyer Giorgi Kavlashvili reports that the attorney general's office had requested his client,

Georgia's move to punitive regulation as an instrument of development policy was evident from the early days of the Saakashvili administration.

[72] L. Navarro, I.T. Woodward, and NDI Georgia, "Public attitudes toward elections in Georgia: Results of a April 2010 survey carried out for NDI by CRRC," National Democratic Institute, http://www.ndi.org/files/Georgia_Public_Opinion_0410.pdf.

[73] Ibid.

[74] Ibid.

businessman Ilya Kokaia, to purchase a specific building for $3 million and to contribute $2 million to the Municipal Development Fund of Kakheti region in exchange for dropping charges against his daughter, who was in detention at the time.

As the confiscation of property can be an effective source for generating budget revenue, guarantees need to be in place to make sure that the law enforcement community does act as "bounty hunters."[75] Georgia lacks such guarantees. According to Irakly Areshidze, the confiscation of property and the demand for ransom money to be paid back to the state was a racketeering policy run by state agencies, "the government was terrorizing its own citizens...this tactic was not very different from [that used by] a mobster."

In 2006, the president unveiled a new and harsh "zero tolerance" policy on crime. According to the official statement of the Ministry of Justice, the policy was aimed at "transforming the public's attitude toward crime, decreasing the crime rate to a minimum, and eradicating impunity by reacting to every single crime, including minor [ones]..."[76] The policy entailed introduction of mandatory prison sentencing even on minor crimes. "No probationary sentences! Everybody will go to prison!" exclaimed Saakashvili during his state of the union address to the parliament in 2006. The policy led to a sharp increase in criminal cases, in which acquittals were virtually unknown with more than 99 percent of criminal cases brought to court ending with a conviction. As a result, Georgia's prison population has tripled since 2004 — an unprecedented growth rate. In 2011, it stood at 24,111.[77] This gave Georgia the fourth highest per capita prison population out of 221 prison systems in the world.[78] This growth can only be matched by the near tripling of the U.S. prison population rate from 1980-96, which criminologists have explained mainly by the changes in sentencing policies.[79] Prison legislation further commercialized the serving of sentences. Prisoners had to pay for accessing basic services, including sanitary products and meetings with relatives.

Incarceration rates do not include thousands of individuals, including juveniles, who experienced the criminal justice system through two additional modes of punishment: probationary sentence and administrative detention. Parliament lowered the age for criminal responsibility from 14 to 12, making it possible for 12 year olds to be subject to prison sentences. Through toughened sanctions, including a possibility of a 90 day administrative detention for even minor misdemeanors, thousands of Georgia's residents experienced criminal punishment.

The newly adopted institution of "plea bargaining," loosely tailored on the U.S. model, turned into an additional revenue generating tool. In 2009, more than half of criminal cases were concluded with a plea-bargaining agreement, with defendants agreeing to plead guilty and pay "damages," thus avoiding a jail sentence. Just in the first eight months of 2009, the agreements contributed about $55 million dollars to the Georgian treasury. The fear of torture in prisons contributed to the defendants' willingness to enter into plea bargaining agreements. Tamar Chugoshvili of the Georgian Young Lawyers Association[80] has stated, "many defendants [in remand custody] end up in Prison No. 8 in Gldani, which is notorious for problems of ill-treatment, and this contributes to the high number of defendants who wish to enter a plea bargain."[81]

[75] G. Slade, "Georgia's War on Crime: Creating Security in a Post-Revolutionary Environment," *21 European Security* (2012).

[76] Ministry of Justice of Georgia, "Zero Tolerance Policy," http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=658&info_id=3479.

[77] Civil.ge, "Georgia's Prison Population More than Halved," (February 28, 2013), http://www.civil.ge/eng/article.php?id=25801.

[78] R. Walmsley, World Prison Population List (9th ed.), International Center for Prison Studies (May 2011), http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf

[79] M. Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends, p. 6,* Washington, DC: The Sentencing Project (2003). http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf

[80] The author was the president of the Georgian Young Lawyers' Association from 2004-06.

[81] European Union–Georgia Civil Society Seminar on Human Rights, Tbilisi, June 21-22, 2012, minutes available from the author.

As their grievances grew, the Georgian public increasingly turned to a repertoire of protest measures to confront the UNM-led government. The government's crackdown on peaceful demonstrations on November 7, 2007, was the first instance when law enforcement put down peaceful protests with a level of brutality that was widely noted internationally. Public protest was triggered "by accusations of corruption, protectionism, and the proposed liquidation of a political opponent."[82] Approximately 10,000 people gathered at Tbilisi's central square, the largest public protest since the Rose Revolution. Alleging usurpation of power and corruption, the public demanded Saakashvili's resignation. Police response was brutal. Using excessive force and illegal crowd control equipment, police disbanded the demonstration, leaving hundreds of people injured. On the same day, hundreds of armed officers raided and closed the Imedi TV station after it had broadcast the violent dispersal of the demonstration. The declaration of a nationwide emergency followed.

On May 26, 2011, the Georgian government again brutally cracked down on peaceful demonstrators. The crackdown killed four people and left many people injured. Photos of the crackdown, widely circulated online, depicted dozens of unarmed protestors chased, shot at, and beaten by SWAT teams even as they begged for help. At least 37 people underwent urgent medical care in hospitals. Around 40 individuals were convicted of participation in the demonstration and were only released from prison as "political prisoners" when the government changed in 2013. The Press Freedom Index by Reporters without Borders dropped Georgia's ranking in 2001, "for the violent dispersal of an opposition demonstration in May and the persistent harassment of journalists and bloggers suspected of sympathizing with Russia."

Just a glance at the increased sanctions for peaceful demonstration is enough to illustrate how the Georgian government responded to the

> *As their grievances grew, the Georgian public increasingly turned to a repertoire of protest measures to confront the UNM-led government.*

expression of grievances through criminal justice. On December 29, 2006, reacting to a number of earlier high profile protests, parliament adopted amendments expanding the list of buildings and territories in the vicinity of which demonstrations and protest gatherings were prohibited. Again in July 2011, Parliament passed significant restrictions, prohibiting holding demonstrations that would intentionally create difficulties for transport movement. Sanctions for violating these provisions significantly increased as well. Newly amended legislation imposed a 10-fold increase in fine amounts and a possibility of administrative detention of up to 90 days.

Conclusion

Young protesters gathered in front of Tbilisi State University on September 25, 2012, held a large banner, proclaiming "The System Must be Destroyed." Angered by the politics of punishment, which the youth had grown to associate with the promise of democracy and freedom, young protesters chanted the lyrics from a popular hip hop song, "Democracy is slacking/judges, take off your bloody gowns/we will not be duped by the TV anymore/take back your charter of freedom." On the surface, Georgia's Rose Revolution possessed the required potential for liberal democratic transformation: a Western educated elite, equipped with liberal democratic ideas and unequivocal political and economic support from North America and Europe. During the initial years in power, the Saakashvili government inspired hope for successful liberal democratic transformation. However, the government's wholesale embrace of neo-liberal economic policies was compounded

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[82] L. Fuller, "One Year After the Crackdown Georgian Opposition Remains Angry but Weak," Radio Free Europe/Radio Liberty (November 7, 2008), http://www.rferl.org/content/One_Year_After_Crackdown_Georgian_Opposition_Remains_Angry__But_Weak/1339405.html

by the use of criminal justice as an instrument for dealing with socio-economic insecurity and quelling public discontent. By resorting to criminal punishment and incarceration, the government gradually disconnected from the very people who enthusiastically brought it into power.

On October 1, 2012, Georgians entrusted the Georgian Dream (GD) coalition with leading the country's government. The coalition faces a number of serious challenges related to the "triple transition," including facilitating economic development, reforming the skewed law enforcement system, stabilizing relations with Russia, and responding to grievances of individuals who suffered from the Saakashvili government. In this very difficult process, new policymakers need to maintain the achievements of Saakashvili's administration, such as effective technical institutions and nationwide university entrance exams, but avoid its pitfalls.

Indeed, Georgia has embarked on the path of self-correction. Almost half of the prison population (in total 7,985 inmates) has been released over the past few months, mostly due to the broad amnesty passed by the GD parliament; finding themselves between two competing political parties — GD in power and UNM in opposition — the judiciary has been exercising more freedom. Ministers,

in particular those overseeing law enforcement, have become more open in the provision of public information and in their engagement with the media. And parliament has already started working on new legislation reviving the country's failing anti-trust agency, which had been seriously undermined by UNM rule. However, echoing one of the themes raised in this report, the true litmus test for the new government will be how it continues to engage with the public, including the media, critics, and political opponents. Strengthening and valuing various forms of democratic participation, including public deliberations, consultations, and information exchange, will help Georgia's new government to govern based on a continuous dialogue with its constituency and avoid a renewed formation of the disconnect that ultimately undermined the United National Movement's legacy.

The true litmus test for the new government will be how it continues to engage with the public, including the media, critics, and political opponents.

Seven

The Rise and Fall of Hungarian Constitutionalism

Gábor Halmai

Photo: Young demonstrators block the entrance of the parliament building as Hungary's ruling party FIDESZ is set to push through changes to the constitution in Budapest on March 11, 2013. The banner reads "Home is where you have rights." © BERNADETT SZABO/Reuters/Corbis

This chapter will examine the elements and possible reasons for Hungary's recent transformation from a liberal democratic system to an illiberal one, and explain both the unique and shared features of this change. It will begin by assessing the characteristics of the Hungarian transition to constitutional democracy, and the constitutional backsliding that has taken place since 2010.

A Hungarian "Rule of Law Revolution"

After 1989, Hungary had to achieve an independent nation-state, a civil society with a private economy, and democratic political structure the so-called "triple transition at the same time."[83] These challenges render post-communist regime change in Central and Eastern Europe distinct from "single transitions" from a quasi-democratic or authoritarian regime to democracy, as happened in the middle of the 1970s in Southern Europe (Greece 1975, Portugal 1976, and Spain 1978), or in South Africa with the making of the interim Constitution in 1993 and the final one in 1996. Moreover, the nature of those revolutions themselves was different. Comparing the East Central European revolutions of 1989, which he witnessed in Warsaw, Budapest, Berlin, and Prague, Timothy Garton Ash coined the term "refolution" for the events of Warsaw and Budapest, because they were in essence reforms from above in response to the pressure for revolution from below (though he uses "revolution" freely for what happened in Berlin, Prague, and Bucharest).[84] The changes in Poland and Hungary were not triggered by mass demonstrations like in the former German Democratic Republic, Czechoslovakia, and Romania, and reforms of revolutionary importance interrupted the continuity of the previous regime's legitimacy without any impact on the continuity of legality. The forces that helped liberate the society, the church, and the labor unions in Poland were not present in Hungary so a reformist elite led the

changes. However, if we take into account Hannah Arendt's definition of revolution, we can argue that the results of events in Hungary were actually revolutionary, in the sense that their aim was to create a *constitutio libertatis*, that is, to establish a political space of public freedom in which people, as free and equal citizens, would take their common concerns into their own hands.[85]

If we compare the constitution-making processes of the East Central European countries, all were finished in the 1990s except Hungary. The earliest, even premature closures happened in Bulgaria and Romania, resulting in significant legitimation problems. In these countries, the first freely elected parliaments had been elected as sovereign constituent assemblies, like the French ones in 1789-1791 and in 1945, or the Weimar Assembly in 1918. In the Czech and the Slovak Republics, the democratically elected normal legislature closed the process in 1992 after the collapse of the federal state. The last one was Poland, enacting its new constitution in 1997.

In Hungary, formally, the legal, but in reality, illegitimate communist legislature enacted the comprehensive modifications of the old constitution after peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition. Similar "post-sovereign"[86] or "pacted"[87] constitution-making happened in Spain in the 1970s and in South Africa in the 1990s.

The democratic opposition founded an umbrella organization called the Opposition Round Table in March 1989 largely in response to the new

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[83] J. Elster, C. Offe and U. K. Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1998).

[84] T. Garton Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin, and Prague* (New York: Vintage, 1990).

[85] H. Arendt, *On Revolution* (The Viking Press, 1963). Of course, the 1989 transition had no "absolute," no sovereignty, in the way that Arendt thought the French Revolution had gone wrong.

[86] "The multi stage, democratic model with a round table or multi party negotiations as its center piece, involving two constitutions, with a free election in between, with important role for legality and its enforcement through a constitutional court." A. Arato, "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?" *South African Journal of Human Rights* 26 (2010), pp. 19. First published in Hungarian: Arató András, "Sikeres kezdet után részleges kudarc — merre tovább? Posztszuverén alkot-mányozás Magyarországon," *Fundamentum* 3 (2009).

[87] The term is used by M. Rosenfeld, *The Identity of the Constitutional Subject*, Taylor & Francis, 2009.

constitution written by the Hungarian Socialist Worker's Party (Magyar Szocialista Munkáspárt - MSZMP), which had been submitted to the Parliament. The opposition was afraid that those in power would create the "new" constitutional framework themselves. During the National Round Table talks, which started in mid-June, the Opposition Round Table initially considered the adoption of the new constitutional order to be the task of the new Parliament to be set up after the Parliamentary elections. But various factors led them to give up the idea of a brand new constitution adopted even by the democratically elected new Parliament. One was the fact that the opposition could not be sure that the MSZMP would not win an absolute majority against its rivals, who were far less known among the voters. But several signs indicated that they could not exclude, even in case of a relative win, the MSZMP's ability to form a government. Of course, the MSZMP could not be sure of its success, either.

The negotiations-based drafting seems to suggest why the "old-new" constitution birthed by the transition primarily follows the model of a consensual democracy, which is widely accepted in the continental European systems. A system of government that assumes the presence of more than two parties in the Parliament and coalition governance at the same time meant that the parties knowingly rejected the semi- or full presidential regime that was preferred by the MSZMP (and which is applied in many post-communist countries even today), as well as British-style two-party parliamentarism. When compared to Western European solutions, the decision-making process set up in 1989-90 has another distinctive characteristic that obviously could be explained by the legacy of the 40-year long totalitarian regime: it is not only based on the consensus among the coalition parties, but in some cases it requires the involvement of the opposition, and it significantly strengthens the checks on the governmental powers. The most important among these are the acts requiring a two-thirds majority, and hence the support of the opposition. The extremely broad powers of the Constitutional Court,

when compared to other European countries, and the complicated system of parliamentary commissioners, can also be traced back to the idea of limiting the executive.

In the second democratic term (1994-1998), the two new governing parties — the Hungarian Socialist Party (MSZP), successor of MSZMP with an absolute majority of the seats alone, together with its liberal coalition partner (SZDSZ) — held more than two-thirds of the seats in parliament, reviving the threat that the governing parties could monopolize the making of the constitution. This danger, however, was warded off by the governing coalition itself with their self-restraining gesture. They decided that the parliamentary committee set up to draft the constitution could only adopt a resolution if it were supported by five out of the six parties. In principle, this policy could have guaranteed the consensual drafting of a new, up-to-date basic law. But in the summer of 1996, the new draft of the constitution did not get a two-thirds majority of the votes in the Parliament because a part of the MSZP did not support it.

In the parliamentary period of 1998-2002, it seemed that the government would have gladly restricted the constitutional institutions of the consensus-based exercise of governmental powers, and above all the Parliament's means to control the executive. For instance, the first government led by FIDESZ (the Alliance of Young Democrats) decreased the frequency of the plenary sessions to every third week, and prevented the establishment of every ad-hoc investigating committee of the Parliament. However, they did not have either the courage or the necessary support to carry out the required constitutional amendments.

The Hungarian "constitution-making" of 1989 was criticized by many authors. Bruce A. Ackerman states in his 1992 book that the constitutional guarantees of a liberal rule of law state can be established only if a new constitution is adopted, and the possibility to adopt a new basic law fades as the time passes.[88]

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[88] B. Ackerman, *The Future of Liberal Revolution* (New Haven, Yale University Press: 1992).

The Constitutional Court led by László Sólyom expressly followed an activist approach in the interpretation of the Constitution, as laid down in the concept of the "invisible constitution" and elaborated in his concurring opinion to the decision on the death penalty:

> "The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore this coherent system will probably not conflict with the new constitution to be adopted or with future constitutions."[89]

Sólyom and many academics argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court made a new constitution unnecessary.

This constitutional system, without the second step of a post-sovereign constitution-making process, namely a final constitution, seemed to work for more than 20 years, until the parliamentary elections in April 2010. Then the center-right government of FIDESZ, with its tiny Christian democratic coalition partner, received more than 50 percent of the votes, and due to the disproportional election system, was able to take two-thirds of the seats in parliament. With this overwhelming majority, they were able to enact a new constitution without the support of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional paradigm. How was the stage set for FIDESZ to win such a high percentage of the votes, and thereby change the entire constitutional setting without much resistance from the side of the citizens?

FIDESZ's first term in power between 1998-2002 was followed by eight years of the Socialist-liberal coalition government of MSZP and SZDSZ. This period was characterized by corruption and the economic and moral failures of the governing parties. The catalyzing event was Prime Minister Ferenc Gyurcsány's speech to his Socialist Party fraction members, made in May 2006, weeks after his governing coalition won parliamentary elections and broadcast from a tape by the Hungarian Public Radio on September 17, 2006. He admitted that his party had made a mess of Hungary's economy, and that "We lied morning, noon, and night." Thanks to this, the governing coalition suffered large setbacks in that October's nationwide municipal elections, but the prime minister refused to resign. Since the opposition was unable to dismiss the government both in the parliament and on the streets, they initiated national referenda on issues related to the budget and the government's program on certain reforms concerning healthcare and the higher education system. According to the constitution, these questions cannot be subject of a referendum, but the majority of the Constitutional Court approved them. With a more than 80 percent success rate, the referenda held in 2008 finally destroyed the popular legitimacy of the governing parties. Even though the Socialist Party decided to replace Gyurcsány with Gordon Bajnai (another Socialist politician) by a vote of confidence in 2009, it was too late.

Before the 2010 elections, the majority of voters were already dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.[90] While an undertow of right-wing extremism operated throughout the 1990s, it has gained a great deal of public political traction in the last five years. A new political party, Jobbik, won 15 percent of the vote in the European parliamentary election in 2009 and 17 percent of the vote in the parliamentary elections in April 2010, campaigning on a platform of Euroskepticism, anti-cosmopolitanism, and Hungarian nationalism. FIDESZ capitalized on citizens' dissatisfaction, claiming that there was no

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[89] Decison 23/1990. (XII. 31.) AB

[90] In 2009, 51 percent of the Hungarians disagreed with the statement that they are better off since the transition, and only 30 percent of them claimed improvements. (In Poland 14 percent and in the Czech Republic 23 percent said they were worse off, and 70 and 75 percent, respectively, perceived improvement.). *Eurobarometer*, 2009.

real transition in 1989-90, but rather the previous nomenclature just converted its lost political power to an economic one, exemplified by the two last prime ministers of the Socialist Party who both became rich after the transition through to the privatization process.

This populism of FIDESZ was directed against all elites, including those who had designed the 1989 constitutional system (of which FIDESZ was part too), claiming that it was time for a new revolution. That is why they characterized the results of the 2010 elections as a "revolution of the ballot boxes." Party leader Victor Orbán's intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, Orbán predicted that there was "a real chance that politics in Hungary will no longer be defined by a dualist power space. . . . Instead, a large governing party will emerge in the center of the political stage [that] will be able formulate national policy, not through constant debates, but through a natural representation of interests."[91]

The "Constitutional Counter-Revolution"

Orbán's vision for a new constitutional order — one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values — has now been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and a set of super-majority laws perfectly fulfill this plan: it does not realize checks and balances, and does not guarantee fundamental rights. Therefore the new Hungary (no longer even officially a Republic) cannot be deemed as a state governed by the rule of law. The new constitutional system does not comply with standards of democratic constitutionalism as well as the basic principles set forth in Article 2 of the Treaty on the European Union.

The new constitutional order of the Fundamental Law and a set of super-majority laws perfectly fulfill this plan: it does not realize checks and balances, and does not guarantee fundamental rights.

It is true that the new constitution *appears* to still contain the key features of constitutional constraint imposed by checked and balanced powers. But those constraints are largely illusory, because key veto points have been abolished or seriously weakened. Appointments to key offices such as Constitutional Court judgeships, ombudsmen, the head of the State Audit Office, and the public prosecutor no longer require minority party input. Independent boards regulating crucial institutions necessary for democracy, like the election commission and the media board, no longer ensure multiparty representation. The Constitutional Court itself has been packed and weakened because its jurisdiction has been limited. The constitutional reforms have seriously undermined the independence of the ordinary judiciary. Loyalists to the current government who occupy crucial positions can also be appointed for extraordinarily long terms of 6, 9, and 12 years respectively, thus maintaining the current government's control over any foreseeable future government.

The decline in the level of protection for fundamental rights is significantly influenced not only by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law, but also by the substantive provisions of the Fundamental Law pertaining to fundamental rights.

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[91] Viktor Orbán's speech in Kötcse, later partially published at http://nagyitas.hu under the title "Megőrizni a létezés magyar minőségét" ("Preserve the quality of Hungarian existence").

The Fundamental Law, Its Amendments, and Super-Majority Laws

The Fundamental Law

This new constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on April 18, 2011, and entered into force on January 1, 2012.[1]

Here are some of the flaws that could permit exceptions to the European requirements of liberal democracy, constitutionalism and the protection of fundamental rights, and, which, thus, in the course of their application, conflict with Hungary's international obligations.

1. An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts. Its lengthy preamble, entitled "National Avowal," defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: "We, the members of the Hungarian Nation … hereby proclaim the following." There is no place in this community for the other nationalities living within the territory of the Hungarian state (roughly 8 percent of the population). At the same time, there is a place in it for the Hungarians living beyond the country's borders. This preamble furthermore characterizes the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognize themselves as belonging to it.

2. The text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations toward the community. Certain provisions of the Fundamental Law pertaining to fundamental rights intervene in questions of marriage and the family, the prohibition on same-sex marriage, and the protection of embryonic and fetal life, prescribing ideologically based normative value preferences in private relationships.

3. A change to the review power of the Constitutional Court makes it far less capable than before of performing its tasks related to the protection of fundamental rights. The composition of the Constitutional Court took place prior to the entry into force of the Fundamental Law, which has further impeded it in fulfilling its function as protector of fundamental rights.

4. The new Fundamental Law regulates some issues that would have to be decided by the governing majority, while it assigns others to laws requiring a two-thirds supermajority. This makes it possible for the current government, enjoying such a majority, to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of the relevant two-thirds majorities.

The Transitional Provisions to the Fundamental Law

Before January 1, 2012, when the new constitution became law, the Hungarian Parliament prepared a blizzard of super-majority laws, changing the shape of virtually every political institution

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[1] For the "official" English translation of the Fundamental Law, see: http://www.kormany.hu/download/7/99/30000/THE%20 FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf

in Hungary and making the guarantee of constitutional rights less secure. These included laws on the freedom of information, the Constitutional Court, the prosecution, the national minorities, the protection of families, the independence of the judiciary, the status of churches, and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called "Transitional Provisions to the Fundamental Law" with a claimed constitutional status, which partly supplemented the new constitution even before it went into effect. This bypassed the formal constitutional amendment procedure. Many of the provisions were not really transitional, and were inconsistent with sections of the Fundamental Law itself, and with the international agreements that bind Hungary:

1. *The Provisions legally enable the president of the National Judicial Office and public prosecutor to name the specific court that will hear any particular civil or criminal case — even if the court specified is different from the court that would have jurisdiction under normal circumstances.*

2. *The Provisions extend restrictions in the power of the Constitutional Court, making them permanent. The court may never review any law enacted when the national debt exceeded one half of the GDP, even when the debt eventually falls below the target level.*

3. *The Provisions list accusations against communist party officials during the Soviet period, extending the statute of limitations for these crimes, and branding the former communist party a "criminal organization."*

The Fourth Amendment to the Fundamental Law

At the end of 2012 the Parliament amended the Fundamental Law, and also passed a new super-majority law on election procedures, introducing a new system of voter registration. The most important change is the abolition of the system of automatic voter registration. Hungarian citizens are no longer automatically entitled to vote but must reregister every four years.

In the very end of 2012 and the beginning of 2013, the Constitutional Court ruled that those parts of the Transitional Provisions that are not transitory in nature, including mandatory voter registration, cannot be deemed as part of the constitution, and are therefore invalid.[2] This ruling made it possible for the Court to review the substance of the law on voter registration, and find it unconstitutional.[3]

In reaction, on March 11, 2013, Parliament voted on the fourth amendment to the Fundamental Law, which has moved many statutory provisions into the constitution despite Constitutional Court rulings striking them down and despite the European Union, the Council of Europe, and the U.S. government urging reconsideration. These moves reopen serious doubts about the state of liberal constitutionalism in Hungary. One part of the long amendment simply elevates the annulled non-transitional parts of the Transitional Provisions into the main text of the Fundamental Law. Other clauses deal with the consequences of a previous Constitutional Court annulment. The legislature is authorized to set conditions for state support in higher education, for instance to require graduates of state universities to remain in the country for a certain period of time after graduation. (Without a prior Constitutional Court decision, the amendment also limits the autonomy of universities by allowing the government to supervise their financial management.) Both the legislature and local governments are authorized to criminalize homelessness.

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[2] Decision 45/2012. (XII. 29.)
[3] Decision 1/2013. (I. 5.).

Finally, there is a set of amendments related to the power of the Constitutional Court itself, as a direct or indirect reaction to recent unwelcome decisions of the judges. As an indirect reaction to the recent readiness of the Court to review the substance of constitutional amendments, expressed in the decision on the unconstitutionality of the non-transitory elements of the Transitional Provisions, the new text of the Fundamental Law, while allowing the review of the procedural aspects of an amendment, specifically excludes any substantive review. But the most alarming one annuls all Court decisions prior to when the Fundamental Law entered into force in 2012.

Conclusions

The "pacted" or "post-sovereign" constitution-making in Hungary was designed as a two-step process, the first step being an interim constitution, followed by a final constitution sometime after the first democratic elections. The 1989 Hungarian text had no rules or procedures for the final constitution-making except an amendment rule giving this power to two-thirds of a mono-cameral parliament, a rule very much at the mercy of an electoral system that turned out to be highly disproportional.

The unique characteristic of the 1989 Hungarian constitution was that a non-legitimate interim document, together with the activist interpretation by the powerful Constitutional Court, provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Still this situation needed a second closing step: a final, fully legitimate new constitution, which failed. Therefore, the most important lesson to learn for countries now transitioning to democracy, like those of the Arab Spring, is that if they choose the post-sovereign model of constitution-making, they have to end the process with a final constitution, because the window of opportunity will be closed after some years of the transition.

> *The unique characteristic of the 1989 Hungarian constitution was that a non-legitimate interim document, together with the activist interpretation by the powerful Constitutional Court, provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights.*

In 2010, FIDESZ used its power to enact a new constitution, without any consensus or negotiation, but not with the intention to entrench constitutionalism, but rather to constitutionally entrench its political preferences by weakening checks and balances on its power and guarantees of rights. FIDESZ called its constitutional imposition a revolution, though the voters were not told during the elections that they were voting for comprehensive constitutional change.

The question for the future is will constitutionalism be re-established, or will the country slide even further back into an authoritarian system. There are several possible external and internal agencies for constitutional reform.

The Council of Europe (CoE) and the European Union (EU) can help in the reintroduction of constitutionalism, since according to Article 2 of the Treaty on European Union, the Union is based on common values, like democracy, rule of law, and fundamental rights. Article 3 of the Statutes of CoE also requires that a country accepts the *"principles of the rule of law, and the enjoyment by all persons […] of human rights and fundamental freedoms"* as a member. But this rather political enforcement

mechanism has never been applied in practice. The EU actions taken against Austria in the "Haider Affair" in 2000 were unilateral measures by the member states, and this experience left the member states and the Union institutions extremely reluctant to use similar mechanisms.

This means that if a country does not comply with the values of the European rule of law, and insists on its own understanding of democracy — one amounting, for instance, to a deeply illiberal democracy, like Hungary after its new constitutional order was introduced — and does not want to leave the Union voluntarily, then an illiberal EU state it will remain, since there is no procedure for ejecting a member state. At the very least, a mechanism to enforce the Copenhagen criteria for member states would be advisable. Jan-Werner Müller's contribution to this volume further discusses the EU's role in safeguarding democracy in member states.

The most powerful internal institutions to protect the rule of law are usually constitutional courts or other bodies entitled to review the constitutionality of legislative acts. In some countries, these bodies also review amendments to the constitution, in case they violate either explicit "eternal provisions" (like that of the German *Grundgesetz*) or in their absence violate the basic principles of the constitutional order. However, the Hungarian Constitutional Court now explicitly forbids the substantive review of both the Fundamental Law and its amendments.

To achieve the goal of reestablishing constitutionalism, the role of the citizenry is crucial. For this however, the values of the constitutional state would have to be more deeply embedded into the Hungarian political culture. Despite the curtailment of the liberal democratic institutions, the current governing party is still the country's most popular, and the opposition parties and movements have no real chance of reaching the two-thirds majority required for changing the constitution.

This sliding constitutionalism in Hungary following the 2010 elections, and especially following the new

Fundamental Law came into force, constitutes a new, hybrid regime. What happened is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way liberal democracy is functioning. Hungarian democracy has taken on significant illiberal elements. A constitutional state embodied in the Constitutional Court, ombudsman, judicial, or media councils still exists, but its control power is strongly limited. Also, fundamental rights are listed in the new Fundamental Law, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary and Constitutional Court. As in full-fledged constitutional democracies, Hungary will again hold formally competitive elections with competing parties, next scheduled for 2014. However, the more disproportional election system and the introduction of gerrymandering heavily favors the governing party. Still, we cannot say that the outcome of this election is certain. In this respect, the hybridity of Hungarian regime does not make it similar to the "managed democracy" of Vladimir Putin's Russia, where the results of parliamentary and presidential elections cannot be deemed uncertain.

Although the "illiberal turn" in Hungary reveals a lot of unique national characteristics and path dependencies, it is certainly possible for this kind of deviation to happen in other liberal democracies as well. And even though external agents, particularly the legal and political institutions of the Council of Europe and the European Union, can be instrumental to enforce the compliance of European countries with European values, the reestablishment of a liberal democracy in Hungary can only be a consequence of actions taken by internal actors both on the institutional and the behavioral level. This means Hungary needs a new constitution-making majority, supported by the Hungarian people and willing and able to protect the values of liberal constitutional democracy.

Brussels as a Supranational Guardian of Liberal Order

Eight

Jan-Werner Müller

*C*ould there be a dictatorship *inside* the European Union? If such a specter appeared, should Brussels somehow step in to shore up democracy? Or would this constitute an illegitimate form of meddling in the domestic affairs of countries that, after all, have delegated only specific powers to the European Union — and *not* empowered Brussels to be a policeman for liberal democracy across the European continent, or even just to lecture Europeans from Lapland to Lampedusa on how popular rule is correctly understood? All these are no longer theoretical questions: recent developments in Hungary and Romania — some of which are analyzed in detail in Gábor Halmai's chapter — have put such challenges squarely on the agenda of European politics, even if concerns about a possible slide toward illiberal democracy in both countries have been largely overshadowed by the euro crisis.

This chapter argues that it is legitimate for Brussels to interfere in individual member states for the purpose of protecting liberal democracy. Four common concerns about such interventions are misplaced:

- First, the criticism that they are hypocritical because the Union is itself not democratic and therefore in no position credibly to act as the guardian of democracy on the continent;

- Second, the worry that there is no single, fully agreed upon model of European liberal democracy that could be used as a template to decide whether countries are departing from shared "European standards";

- Third, the concern that such interventions themselves are in and of themselves paternalistic and, ultimately, illiberal; and

- Finally, the charge that only smaller, relatively powerless member states would ever be subject to interference from Brussels (in a sense, then, this criticism also comes down to a suspicion of hypocrisy).

These are reasonable enough concerns. But one can counter them and in the process develop a set of criteria as to when and how European intervention is justified. In fact, the real problem arises not at a relatively abstract theoretical level, but when it comes to policy instruments and concrete political strategies. To say it outright: as of now, the EU has no convincing tool kit to deal with situations that probably not many Eurocrats — or, for that matter, European elites more broadly — ever foresaw. Brussels, as well as national capitals, seemed to have assumed that the consolidation of liberal democracies in the run-up to EU accession was irreversible. Once inside the club, so the rather complacent reasoning seemed to go, young democracies would count their blessings and never look back (or, for that matter, sideways and forward) to illiberal forms of statecraft. To be sure, the repertoire of legal and political instruments the EU has at its disposal at the moment to exert pressure on member states might occasionally work — but it can also appear arbitrary and opportunistic. The proposal here is to extend this repertoire as well as to create a new kind of democracy watchdog — tentatively called the "Copenhagen Commission" — that can raise a Europe-wide alarm about deteriorations in the rule of law and democracy.

Four Worries

The first commonly heard charge against the EU protecting democracy is that the Union itself is not democratic — hence Brussels is fundamentally hypocritical in speaking out for and in the name of values to which it itself does not adhere. This charge misses the point that the Union derives its legitimacy not from being a continent-wide democracy; rather it is legitimate because national parliaments have freely voted to bind their polities and follow European rules. In the euro crisis, this logic of self-binding is clearly under attack — investors have not found this model credible. But with the single market, it has worked well for decades: nobody is complaining about the fact that Brussels is taking member state governments to court for violating competition rules, for instance.

Moreover, one of the goals of European enlargement to the East was to consolidate liberal

democracies (or, in the case of Bulgaria and, in particular, Romania, complete the transition to liberal democracy in the first place). Governments of the region in turn sought to lock themselves into Europe so as to prevent "backsliding"; it was like Ulysses binding himself to the mast in order to resist the siren songs of illiberal and antidemocratic demagogues in the future. Hence neither Hungarian Prime Minister Viktor Orbán nor Romanian Prime Minister Victor Ponta are right to accuse Brussels of some form of Euro-colonialism. Orbán, for instance, compared the EU to Turks, Habsburgs, and Russians — former oppressors of the freedom-loving Magyars. In fact, the supposed oppressors are only reminding the Hungarians and Romanians of what they wanted when they joined the Union in 2004 and 2007, respectively.

One might still object that the parallel between interventions to safeguard the single market and interventions to protect democracy is misplaced. Is regulating the purity of beer or the length of cucumbers not a categorically different matter than the shape and form of national political institutions? Is European integration not predicated on the fact that member states remain both "masters of the treaties" and, in many clearly demarcated areas, masters of their own political fate? After all, the Lisbon Treaty itself enshrines the very principle that the Union ought to respect the national identities of the member states. And European leaders regularly trumpet European "diversity" not just as a fact, but as a distinct European value.

Praise for "diversity" inadvertently bolsters a second major concern about EU interventions, namely that there are in fact no shared European standards of liberal democracy and that hence all efforts to protect democracy in Europe are arbitrary. In short, there is indeed a single market, but no single model of democracy in the EU. This is where a more historical argument comes in. The whole direction of political development in post-war Europe has been toward delegating power to unelected

institutions, constitutional courts in particular.[92] And that development was based on specific lessons that Europeans — rightly or wrongly — drew from the political catastrophes of midcentury: in particular, never again should a parliament abdicate in favor of a Hitler or a Marshal Pétain, the leader of Vichy France, without any checks (and balances). Distrust of unrestrained popular sovereignty, or even unconstrained parliamentary sovereignty (what a German constitutional lawyer once called "parliamentary absolutism") are, so to speak, in the very DNA of post-war European politics.

Of course, history is not destiny and its supposed lessons do not automatically generate legitimacy. But it seems a reasonable presumption that radical, sudden departures from this in large parts anti-majoritarian model require special justifications. This thought applies to Hungary, for instance, where the constitutional court and, in general, the independent institutions to which Hungary committed after 1989 are being systematically weakened. But it does not apply straightforwardly to a country like Britain, with its long-standing traditions of political self-restraint and where de facto constraints on — in theory unlimited — parliamentary sovereignty have had a by and large more informal character.

Still, one might point out that, while European nation-states arrived at similar templates for what I have elsewhere called "constrained democracy," they ultimately did so themselves — and attempts by Brussels now to preserve these arrangements for them are per se illiberal and paternalistic. Put simply, we should not help peoples who cannot help themselves, and we should not protect peoples from their own governments, short of extreme circumstances (above all, genocide). This overlooks that we (Europeans) are all already in this together, so to speak. *All* European citizens have an interest in not being faced with an illiberal member state in the EU, since that state will make decisions in the European Council and therefore, at least in an indirect way, govern the lives of all citizens. Strictly

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[92] I have made this argument at greater length in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (London: Yale University Press, 2011).

speaking, there are no purely internal affairs for EU member states; all EU citizens are affected by developments in a particular member state, as long as that country's executive remains in the Council and keeps voting on European law. This fact of interdependence has been brought home to Europeans by the euro crisis, but it has mostly been interpreted in financial and economic terms. Yet there is *political* interdependence, too.

So the intuitively plausible classical-liberal notion that we should not intervene in countries to promote political principles in which local people appear to have no interest or that they seem willing to abandon cannot be applied directly to the EU. Of course, if a member state wishes to disentangle itself from the other member states (and thus other European citizens), so be it. But that decision in itself has to be made in some sort of recognizably democratic way. A full-fledged dictatorship should leave the EU, no matter what; but a democratic state that wants to leave still has an interest in democratic institutions staying intact, and therefore in Brussels reinforcing such institutions even in cases where the ultimate, *democratic* decision is one for exit.

All very well in theory, critics might say — but what about the danger that calls for intervention become the stuff of symbolic politics, or the danger that only *small* member states will ever be picked on? This is a common interpretation of what happened when EU states imposed bilateral sanctions on Austria, after the party of far-right populist leader Jörg Haider had entered the government in early 2000. Leaders like Jacques Chirac — unable to do much about Jean-Marie Le Pen's National Front at home — could moralize about small countries at no cost internationally and attack domestic opponents at the same time. Meanwhile, nobody ever dared to touch Berlusconi's Italy, no matter how much political bunga-bunga was going on. Powerful member states — and especially founding member states of the EU — appear to be above the law. This is a serious concern not about the justification of EU interventions as such, but about the prospect that in practice there will always be double standards.

However, it would be a mistake to conclude from a comparison between the cases of Italy, Austria, Hungary, and Romania that only weaker new member states get picked on. For there are important differences here that also point us to coherent criteria as to what makes EU interventions legitimate. The problem with the "Haider Affair" was partly that sanctions were imposed *before* the new government had taken any significant action. To be sure, one can try to justify sanctions as essentially warning shots. But in Austria, they appeared more like expressions of displeasure with Haider's past pronouncements (on Hitler's employment policies, for instance) than as principled objections to what the new government actually sought to do. This is a marked contrast with the cases of Hungary and Romania in particular. In both countries, governments had a clear track record; what they were doing also had a *systematically* illiberal character and could not be excused as a one-off mistake.

Second, there is a crucial difference between Berlusconi's Italy and the two states further east. True, the *Cavaliere* also tried to remove checks and balances and would have wanted to stay in power more or less permanently (and thereby also out of prison…). But the opposition, despite its generally sorry state, remained just strong enough to resist a comprehensive refashioning of the political system; the media was in fact not completely dominated by Berlusconi's own media empire; Berlusconi lost popular referenda, in particular one on constitutional changes in 2006; and, most important, the judiciary kept putting up a fight, while successive Italian presidents — perhaps most importantly Giorgio Napolitano —were willing to interfere with at least some of the *Cavaliere's* plans. In short, there were reasonable grounds for thinking that the situation would over time

self-correct through internal political (and legal) struggles. Here outside intervention could easily seem illegitimate. It could look like Brussels picking a winner in a domestic fight for power. All this of course amounts to nothing more than a point long familiar from John Stuart Mill's writings in the middle of the 19th century: ideally peoples struggle for freedom and democracies (and to preserve their democracies) themselves. As Mill put it, "the only test … of a peoples having become fit for popular institutions is that they… are willing to brave labor and danger for their liberation."[93]

Now, the responses fashioned to four eminently reasonable concerns also indirectly yield a set of criteria as to when there is a presumption in favor of EU interventions being legitimate. First, a member state government needs to have a track record of violating liberal-democratic principles. That track record should also show a government's conduct to have a systematic character. One-off violations might be deeply problematic, but they should be seen in context. In other words, there is a place — in fact, a need — for political judgment here. Second, intervention is about enforcing commitments that were entered into voluntarily in the past. If there is reasonable hope that such commitments can mostly be enforced internally, intervention should wait. Third, there is no single, rigid template for understanding democracy in a European context. However, there are shared understandings that have evolved historically. Sudden departures from them put the burden of justification on the governments deciding in favor of such departures.

Something else, less tangible, matters, though: the tone and nuances of political language and leaders' rhetoric. And this point goes both ways. On one hand, criticism from the outside should never be suspect just because it comes from the outside — EU citizens share one political space and ought to make it their business what others in that space do. On the other hand, neither European politicians nor European intellectuals should generalize about, for instance, "the Hungarians," as opposed to a

particular government. Brussels should never treat member states as if they were like children who are a bit slow in getting liberal democracy. The EU as lived experience can be very different from the textbook account of "transitions to democracy," where peace, prosperity, and political happiness reign ever after.

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The Missing Tool-Kit

Legitimacy and having appropriate policy instruments at hand is not the same thing. True, there is Article 7 of the Treaty on European Union, which allows for the suspension of membership rights for states persistently violating basic European values. The idea for such an article had in fact been pushed by two paragons of Western European democracy, Italy and Austria, in the run-up to enlargement, out of fear what those uncouth Eastern Europeans might do (the irony being that sanctions — though not under Article 7 — were of course first applied against Austria in 2000).[94] But nowadays Article 7 is widely considered a "nuclear option." In other words, it is deemed unusable. Countries seem simply too scared that sanctions might also be applied against them one day. In any case, the very idea of sanctions goes against what might be called a whole EU ethos of respectful compromise, mutual accommodation,

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[93] Quoted by M. Walzer, *Just and Unjust Wars* (New York Basic Books, 1992), p. 88.

[94] W. Sadurski, "Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider," *Columbia Journal of European Law*, vol. 16 (2009), pp. 385-426.

and deference toward national understandings of political values.

As an alternative to going "nuclear," legal scholars have proposed that national courts, drawing on the jurisprudence of the European Court of Justice, should protect the fundamental *European* rights of member state nationals who, after all, also hold the status of EU citizens (something of which most Europeans are blissfully unaware, alas).[95] As long as member state institutions can perform the function of guaranteeing what these scholars have called "the essence" of fundamental rights of EU citizens, as set out in the "Charter of Fundamental Rights of the European Union," which protects EU citizens against abuses by EU institutions and which legal theorists consider in turn indispensable for European citizenship, there is no role for either national courts or the European Court in protecting the specific status of men and women as *Union citizens.* But if such institutions are hijacked by an illiberal government, Union citizens can turn to national courts and, ultimately, the European Court of Justice, to safeguard what the Court itself has called the "substance" of Union citizenship.

This is a clever thought: the aim is not merely to bring in the European Court, but to strengthen *national* liberal checks and balances in times of political crisis. Yet the thought is too clever by half in the eyes of observers who fear that the reasoning outlined above would open the door to a comprehensive review of all aspects of national legal systems by the European Court, thus upsetting the delicate balance between the Court and national constitutional courts and effectively making the EU into a federal state. Other critics hold that, even if this danger can be avoided, such a legalistic response to an essentially political challenge will not do.

But then what would a properly political response look like? It has often been said that the euro crisis has brought about the politicization of Europe, and that it is now time for the Europeanization of

politics. People have woken up to the fact that what happens elsewhere in Europe has a direct impact on their lives. Brussels is not just some technocratic machine that produces decisions best for all. What we need is a European party system, so that different options for Europe's future can be debated across the continent. Did we not already see signs of such a truly democratic future when Orbán, in January 2012, appeared in the European Parliament and openly debated his government's record?

Alas, a less desirable effect of such a Europeanization of politics has now become apparent. The conservative European People's Party firmly closed ranks around Orbán. On the other side of the political spectrum, Martin Schulz, president of the European Parliament and one of Orbán's most outspoken critics, has defended his fellow Social Democrat Ponta, at least initially. So at least for now, if in doubt, party politics is likely to trump an imperative of impartially protecting European standards.

Toward Effective Democracy-Protection in the EU

How could the EU deal with challenges to liberal democracy more effectively? First of all, Article 7 ought to be left in place, but also ought to be extended. There might be situations where democracy is not just slowly undermined or partially dismantled, but where the entire edifice of democratic institutions is blown up, so to speak (think of a military coup). However, in such an extreme case, the Union ought actually to have the option of expelling a member state completely. As is well known, under the current Treaty states may decide to leave voluntarily, but there is no legal mechanism for actually removing a country from the Union (instead, there is only the possibility of suspending the membership rights of a country). Put more abstractly, a polity either has means to intervene internally or the right to expel one of its parts (in the way that international organizations do). At the moment, the Union has neither. Hence, as the EU is likely to change the Treaty as a result of the euro crisis, an extension of Article 7 should be part of any new settlement.

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[95] A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, and M. Smrkolj, "Reverse Solange — Protecting the Essence of Fundamental Rights against EU Member States," *Common Market Law Review*, vol. 49 (2012), pp. 489-520.

The Copenhagen Criteria

From the European Union's official glossary:

Any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. Relevant criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

To join the EU, a new member state must meet three criteria:

- *political: stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities;*

- *economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; and*

- *acceptance of the Community acquis: ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union.*

For the European Council to decide to open negotiations, the political criterion must be satisfied.

Any country that wishes to join the Union must meet the accession criteria. The pre-accession strategy and accession negotiations provide the necessary framework and instruments.

A difficulty with the existing harsher sanctions envisaged in Article 7 is, of course, that it requires agreement among all member states. So short of dramatic deteriorations in the rule of law and democracy, the EU ought to have tools available that exert pressure on member states, but whose employment does not require a lengthy process of finding agreement among all governments. One suggestion is that the Commission begins to monitor the state of the rule of law in all member states. It is important that such monitoring is done uniformly in all countries. While there are, of course, precedents in singling out individual countries for surveillance (Romania, Bulgaria), it simply sends the wrong signal — namely, one of prejudice and discrimination — to target only some countries.

However, one might question whether the Commission can really be a credible agent of legal-political judgment. To be sure, the Commission is acquiring new powers in supervising and potentially changing the budgets of eurozone member states. But many proposals to increase the legitimacy of the Commission (seen as a necessary complement to such newly acquired authority) contain the suggestion purposefully to *politicize* the Commission. Ideas to elect the president directly or to make the Commissioners into a kind of politically uniform cabinet government all would render the body more partisan. And such partisanship makes the Commission much less credible as an agent of legal-political judgment.[96]

An alternative to the Commission undertaking such a task itself would be to delegate it to another institution, such as the Fundamental Rights Agency, or perhaps yet another institution that could credibly act as a guardian of what one might call Europe's *acquis normatif*. One could think of something like a "Copenhagen Commission," as a reminder of the "Copenhagen criteria" to judge whether a country was democratic enough to begin the process of accession to the EU, and analogous to the Venice Commission, though with an even

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[96] There is also the less obvious point that every harsh criticism of a newer member state can be seen to fall back on the Commission itself — did they fail to look more carefully before giving the green light for admission? See in this context Tom Gallagher, *Romania and the European Union: How the Weak Vanquished the Strong* (Manchester: Manchester University Press, 2009).

The European Union, Rise of Postcolonial Powers and Liberal World Order

Mark Leonard

One of the big stories of the last 60 years has been the creation of a European-inspired legal order in the shell of a U.S. security order.

While the United States kept the peace, it is Europeans who were behind the creation of a World Trade Organization that can override national sovereignty to prevent protectionism. And it is Europeans who have pushed for institutionalized answers to global problems from climate change to genocide. One might say that if the United States were the sheriff of the liberal order, the European Union was its constitutional court, bringing legitimacy to the inroads it made in national sovereignty.

In spite of its internal tensions and contradictions, the creation of the EU is the biggest innovation in the exercise of political power since the creation of the nation state 500 years ago. It has shown how citizens can enjoy living in small states that are close to their citizens and at the same time enjoy the protection and economies of scale that you get from having a market with 500 million consumers and policies to tackle continental sized problems from organized crime to climate change. More importantly, the EU has shown that there is a different way of thinking about security. Rather than relying on a balance of power and non-interference in each other's affairs, the EU model of security is based on deep economic, political, and, above all, legal interdependence. Law Courts have replaced armies as the way to deal with disputes. The end of the cold war, and the U.S. security order, allowed Europeans to promote a liberal order on the world stage as well. This was built in four very different ways:

1. enlargement of the EU itself from 6 to 28 members,

2. socialization of the EU's neighbors by attaching political conditions to trade, investment, and aid,

3. Europe's push to create global institutions such as the WTO and ICC, which enshrine a post-Westphalian way of working,

4. A "regional domino effect," which has inspired every other region in the world — from Africa and the Middle East to Asia and Latin America — to integrate.

In a world characterized by chaos and disorder, the European Union, for all its difficulties in developing a response to the euro crisis, remains the one structure that can take decisions beyond national borders. The United Nations is as dysfunctional now as it has ever been. And the G20 — with its unwieldy membership that shares few common interests — can barely tackle financial regulation, let alone climate change, failed states, and nuclear proliferation.

Today, however, the political contradictions within the EU system are on full display. It is precisely the novelty of developing a structure that is not a sovereign state but rather a political community bound together by common laws that is under pressure from the markets. If the EU manages to get through the crisis intact, it could yet emerge stronger.

But it will also have to contend with a different external environment. 1989 not only opened the door for the end of the cold war and the creation of this new liberal order. It made possible a surge in globalization and a shift in economic power from West to East (and the shifts in the military balance that rising powers could afford). This in turn sowed the seeds for a multipolar world of

> *ideas that has pushed back against European attitudes toward sovereignty, human rights, and intervention, which struggle to gain ground in international court of public opinion. The Western liberal order has faced threats over the last few years — but mainly asymmetrical ones from populist states like Cuba and Venezuela, non-state actors like Al-Qaeda, and excluded powers like China and Russia, all of which have acted as spoilers. But they did not amount to a conventional threat to the Western order.*
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> *The big change is the rise of "post-colonial superpowers." The rising powers of the 21st century — China, India and Brazil — are all relatively new states forged by movements of national liberation. This has a dramatic impact on their attitude to sovereignty and global interdependence. For them, their experience of globalization has been bound up with a new sense of nationhood. While globalization is destroying sovereignty in the West, for these new former colonies, it is creating sovereignty on a scale never experienced before. The surge in their economic power is therefore leading to a fundamental questioning of the post-Westphalian liberal order.*
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> *Many of the Western assumptions about how liberal the current order is — and how to preserve the liberal norms — are now being tested. First, it seems that integrating rising powers into global institutions has tended to hollow out their liberal elements at least as much as it has acted to "socialize" the rising powers. Secondly, there does not seem to be much unity at the level of interests or norms between "democratic powers." Thirdly, the global institutions seem gridlocked and less able to enshrine a liberal agenda than regional groupings. In the place of the struggling post-cold war liberal ordering agenda, there is not a common Western project but rather contrasting projects of trying to stem (relative decline).*
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> *People have asked if the liberal order can survive in a post-American world. But I think there is an equally important question about whether, even if the order can survive the end of U.S. hegemony, could it survive the marginalization of the EU's legal order. In other words, even if the liberal order can survive U.S. decline, will it still be liberal if the EU unravels?*

stronger emphasis on democracy and the overall quality of a political system — an agency, in other words, with a mandate to offer comprehensive and consistent political judgments.[97]

However, the real question is, of course: *and then what?* What if a country seems systematically to undermine the rule of law and restrict democracy? My suggestion is that an agency ought to be empowered to investigate the situation and then trigger a mechanism that sends a clear signal (not just words), but far short of the measures envisaged in Article 7. Following the advice of what I have termed the Copenhagen Commission, the European Commission should be required to cut subsidies for infrastructure projects (which make a significant difference in the poorer member states),

for instance, or impose significant fines. Especially the former might prove to be effective, if the EU budget as such were to be significantly increased in future years (a measure also included in many proposals to tackle the euro crisis).[98]

At the same time, all the existing tools remain at the disposal of the relevant actors. Member states could vote on Article 7; the Commission could take a member state to the European Court for infringement of the treaties; the Court could protect the substance of EU citizenship; and politicians could have a serious word with one of their peers in another member state, if they felt that the State

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[97] I am indebted to Rui Tavares for discussions on this point.

[98] Of course, this brings up a perennial problem with sanctions: they hurt populations and not the people in government. This danger is acute if one thinks of cutting EU cohesion funds. Such cuts would clearly affect mostly those who are already poor.

in question is leaving the broad European road of liberal democracy.

None of this means that some of the pluralist principles and practices in the EU, which proponents of "diversity" as a major European value tend to laud, have become irrelevant (or were a fiction all along). All the main actors of democracy defense can retain something like a margin of appreciation to account for national idiosyncrasies.

They can in the first instance suggest to an offending government to take seriously the idea of informal peer review and try to negotiate disputes away, etc. However, it cannot be pluralism all the way down. As one political community, the EU has outer and *inner* boundaries. Where liberal democracy and the rule of law cease to function, there Europe ends.

Human Rights, International Law and the Transatlantic Rift

Nine

Seyla Benhabib

Photo: Egyptians gather in Tahrir Square to call for the resignation
of President Hosni Mubarak, February 9, 2011. © Joel Carillet

A cornerstone of the international order established in the wake of World War II, with the founding of the United Nations (1945) and the Universal Declaration of Human Rights (1948), is the dual commitment to *free and equal state sovereignty* and *the universality of human rights*. These commitments stand in tension with one another, and they give rise to some of the deepest unresolved conflicts of our world.

This chapter begins by examining the international human rights regime of the post-1948 period and its paradoxes. It then considers the case of "U.S. exceptionalism" vis-à-vis international law and focuses on the emergence of transnational legal sites, particularly under the influence of the European Court of Human Rights. I argue that the spread of the human rights regime exacerbates the "democratic disconnect" even as, by pushing the practice of democratic citizenship beyond borders through transnational legal sites, it deepens democratic commitments. The key to mediating the "democratic disconnect" with transnational rights activism are "democratic iterations."

The Post-1948 Human Rights Regime

The "human rights regime" refers to the collection of public treaties, covenants, and documents, along with the institutions and organizations that are entrusted to measure, evaluate, and judge compliance with them, as well as to norms of international customary law, such as *jus cogens* norms, that bind states even in the absence of formal treaties.[99] States that are the supposed guarantors of these rights are not infrequently their greatest violators. Equally, states often choose to disregard human rights standards when these conflict with their own interests. Yet while the strategic power interests of individual states remain key to explaining much of their behavior, it is also the case that alliances, international institutions, and regimes provide the larger context within which states behave. This is increasingly so in our world, since individual states are less and less able

to accomplish economic, security, communication, health, and transportation objectives without cooperation. As Gunther Hellmann notes in his contribution to this study, multilateral, post-Westphalian cooperation strategies are not options; they are crucial to the survival of the state system.

The best known of these agreements that have been signed by a majority of the world's states are as follows:

- The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on December 9, 1948;

- The 1951 Convention on Refugees (which entered into force in 1954);

- The International Covenant on Civil and Political Rights (ICCPR), signed in 1966 and entered into force in 1976, with 167 being party to it as of 2013;

- The International Covenant on Economic, Social and Cultural Rights (ICESCR), entered into force the same year and with 160 member parties as of 2013;

- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed in 1979 and entered into force in 1981, with 99 signatories and 187 state parties as of 2013;

- The International Convention on the Elimination of All Forms of Racial Discrimination, entry into force on March 12, 1969, with 86 signatories and 175 parties as of 2013; and

- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with 78 signatories and 153 state parties as of 2013.

What, then, is the status of such international covenants vis-à-vis the constitutional norms of liberal democracies? Liberal democracies are

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[99] The scope of *jus cogens* norms are contested, but they prohibit wars of aggression, genocide, slavery, torture, and possibly the violation of some personal and political rights. Their source is said to be customary international law and they are non-derogable.

distinguished from populist-majoritarian and from corporatist forms precisely by their robust constitutional protection of human rights and by their adherence to these international standards. International law permits states signing on to the various treaties an escape hatch via placing reservations, understandings, and declarations on various articles, but what range of variation or deviation in their interpretation or implementation is compatible with respecting such covenants?

Transatlantic Controversies over International Law: A Case of U.S. Exceptionalism?

In the last three decades, disagreements over the status of international law and of transnational legal treaties with respect to the sovereignty claims of liberal democracies have led to acrimonious theoretical and political debates. Deep divergences have emerged among democracies normally considered allies. While Europe — under the impact of the cumulative jurisprudence of the European Court of Justice, the European Court of Human Rights, and strong constitutional courts such as the German *Bundesverfassungsgericht* (the German Constitutional Court) — has moved toward a cosmopolitan order of strong rights-protection and harmonization of domestic laws with the UDHR and other international treaties, a strong isolationist current has become visible in the U.S. Supreme Court.

At least two different questions have emerged in jurisprudential circles across the Atlantic. First, what is the status of "foreign law," including the law of other nations and international treaties, in constitutional and statutory adjudication? Second, can recent developments in legal doctrine and practice be seen as leading toward "global constitutionalism," with or without a world-state? *Global constitutionalists* point to increasing cooperation among constitutional court justices across the globe, their learning from one another, and their citing one another with more frequency. Even some scholars who find prospects of global constitutionalism exaggerated nonetheless argue

While Europe has moved toward a cosmopolitan order of strong rights-protection and harmonization of domestic laws with the UDHR and other international treaties, a strong isolationist current has become visible in the U.S. Supreme Court.

that there is increasing convergence around a "law for all nations."[100]

The recent jurisprudence of the U.S. Supreme Court, as well as the politics of the United States vis-à-vis international law, has been something of a puzzle for many and a source of deep dismay for others. Given the tireless efforts of Eleanor Roosevelt in the formulation and passage of the UDHR, and past and present United States governments' public, even if never quite unequivocal, commitment to promoting international human rights in world affairs, it is surprising to see the vehemence with which this issue has divided the current Court. In a highly controversial decision that struck down the death penalty for juvenile delinquents, Justice Anthony Kennedy cited the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, among other documents. [Roper v. Simmons (2005)] In his dissenting opinion, Justice Antonin Scalia thundered: "The basic premise of the court's argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand… To invoke alien law when it agrees with one's own thinking,

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[100] J. Waldron, "Partly Laws Common to all Mankind: Foreign Law in American Courts," Storrs Lectures, Yale University (New Haven, CT: Yale University Press, 2012).

and ignore it otherwise, is not reasoned decision-making, but sophistry."

Chief Justice John Roberts, too, considers citing of foreign law a dilution of sovereignty. During his confirmation hearings, Roberts said: "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no senate accountable to the people confirmed that judge. And yet he is playing a role in shaping the law that binds the people in this country."[101]

The matter of the citation of foreign law, whether the law of other nations or international human rights law and treaties, has become a U.S. political *scandalon*. A group of scholars, intellectuals and policymakers "who view the emerging international legal order and system of global governance with consternation"[102] have coalesced as the "new sovereigntists." Others, however, view this as yet another instance of "U.S. exceptionalism" at best, or the brazen disregard by a "rogue superpower" of international law, at worst. [103]

Historical scholarship suggests that this was not always so. The U.S. constitutional jurisprudence on the status of the international human rights norms and treaties is quite ambivalent, with cosmopolitan versus isolationist interpretations being equally present. For the Founding Fathers, international customary law and treaties with other nations unquestionably constituted the law of the land. Between 1789 and 1860, the Supreme Court never applied an U.S. law in the face of a conflicting treaty obligation. The "Charming Betsy" presumption prevailed: "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." [6US. 64, 118 (1804)].[104]

Nonetheless, some long-standing features within the U.S. political system, as well as growing "sovereigntism" within the Court, encourage it to assume an "exemptionalist" (Michael Ignatieff) posture toward international law. Southern law-makers saw in the UDHR an instrument to condemn former slave-holding states for genocide; consequently, the Genocide Convention of 1948 was not ratified by the United States until mid-1980s.[105] In the 1950s these issues were revived through the efforts of Senator John Bricker, a conservative Republican from Ohio. The Bricker Amendment declared that no treaty could be made by the United States that conflicted with the Constitution, that was self-executing without the passage of separate enabling legislation through Congress, and it limited the president's power to enter into executive agreements with foreign powers. Although the Bricker Amendment was blocked through the intervention of President Dwight D. Eisenhower and failed in the Senate by a single vote in 1954, the United States never ratified the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women, and most recently, The Convention on the Rights of Persons with Disabilities (December 2012). The United States attached non-self-executing declarations to the International Covenant on Civil and Political Rights; the Convention on the Elimination of all Forms of Racial Discrimination; and the Convention against Torture.

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[101] A. Liptak, "U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations," *The New York Times* (September 18, 2008).

[102] M. Goodhart and S.B. Tanichev, "The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty," 55 *International Quarterly Studies* 4 (2011) p. 1047.

[103] See the important volume, M. Ignatieff, *American Exceptionalism and Human Rights*, (Princeton and Oxford: Princeton University Press, 2005).

[104] In fact, one of the oddest statutes of U.S. Law, The Alien Tort Claims Act, named by Judge Friendly "a legal Lohengrin" [*IIT v. Vencap, Ltd.*, 519 F.2nd 1001, 1015 (C.A. 2 1975)], and under which foreign residents in the United States can bring charges of international human rights violations against individuals as well as corporations for crimes committed abroad, derives from this period. In *Esther Kiobel v. Royal Dutch Petroleum* [No. 10-1491] which is before the U.S. Supreme Court currently, the Nigerian plaintiffs are seeking monetary damages for a brutal campaign in the 1990s by three oil companies and the military dictatorship in Nigeria to silence protesters against environmental damage.

[105] M. Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), p. 131.

What Difference Does International Human Rights Law Make to the Functioning of Democracies?

The skeptical objection to the growing influence of the international human rights regime is often coupled with the suspicion that international organizations are not democratic at all.[106] It is argued that constitutional liberal democracies such as the United States, the United Kingdom, Canada, Australia, and others already provide sufficient guarantees for the protection of human rights as well as civil and political rights through constitutional and statutory laws. Why should one need additional guarantees by international human rights covenants, evaluated and judged by UN-based human rights organizations, often populated by countries that themselves have no creditable human rights records?

> *The skeptical objection to the growing influence of the international human rights regime is often coupled with the suspicion that international organizations are not democratic at all.*

Liberal internationalist scholars counter such skepticism by pointing out that participation in multilateral institutions can add to the quality of domestic democracy by curbing the power of special interest groups, enabling the protection of minority rights and enhancing the quality of democratic deliberation.[107] Just as constitutional democracy means that peoples accept certain limits on their sovereignty so as to govern themselves democratically over the long-term rather than on the basis of periodic majoritarian elections, so multilateral institutions and regimes can be seen as creating institutional and normative limitations on democratic majorities that enable better cooperation on a global scale.

Although there is continuing controversy over whether the ratification of various human rights treaties changes states' behavior, most agree that: "Treaties create additional political resources for pro-rights coalitions under these circumstances. They resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the specific rights at stake, but also believe they must take a stand on rule-governed political behavior in general."[108] As they do so, democracy is deepened and strengthened within affected states as well as beyond them.

This Rule of Law culture is being expanded globally by the increasing international cooperation among constitutional court judges, as well as by legal treaty organizations encompassing numerous states and transnational legal sites are emerging.

Transnational Legal Sites

Transnational legal sites are institutional and informal fora in which participants from divergent legal jurisdictions and traditions deliberate with one another about public and private international law. Three such new fora, enabled by the world-wide growth of the international human rights regime, can be identified.

- First, through the emergence of transnational courts such as the ICC, the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, and international tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, judicial conversations

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[106] R.A. Dahl, "Can International Organizations be Democratic? A Skeptic's View," I. Shapiro and C. Hacker-Cordon, eds., *Democracy's Edges* (Cambridge, UK: Cambridge University Press, 1999), pp. 19-36. Dahl does accept that "international organizations can help to expand human rights and the rule of law." Ibid., p. 32.

[107] R.O. Koehane, S. Macedo, and A. Moravscik, "Democracy Enhancing Multilaterism," *International Organization* 63 (Winter 2009), pp. 1-31.

[108] B. Simmons, "Civil Rights in International Law: Compliance with Aspects of the 'International Bill of Rights,' *Indiana Journal of Global Legal Studies*, vol. 16, No. 2 (Summer 2009), pp. 437-481, here p.445.

about the interpretation and reach of human rights become institutionalized transnationally. Anne-Marie Slaughter has called such dialogues "transjudicial communication."[109]

- Second, NGOs and INGOs such as Amnesty International, Human Rights Watch, and Médecins Sans Frontières, play an active role in raising consciousness about human rights violations across the globe. They aid in "naming and shaming" governments, officials, and other organizations. They contribute to transnational judicial conversations by filing *amicus curae* (friends of the court) briefs, by pushing high-profile human right violations cases to be adjudicated and by bearing witness and providing testimony.

- Third, much civil society activism — such as those for women's rights; the environment; indigenous peoples' cultural and economic rights; the rights of migrants and refugees; global justice; and the rights of gay, lesbian, and transgender peoples —are all inter- and transnational movements. They not only learn from one another, adopt each others' tactics and strategies, and build transnational coalitions, they also serve as living crucibles for the interpretation and expansion of international human rights norms.

One of the most interesting examples of such positive contributions to human rights practices is provided by the influence of the European Court of Human Rights (ECtHR) on the 47 countries over which it has jurisdiction under the European Covenant for the Protection of Human Rights and Fundamental Freedoms. The Court's docket is filled with cases from the Russian Federation and the Turkish Republic, leading some commentators to note that the ECtHR serves as a kind of secondary constitutional court, giving to citizens of member countries direct recourse in the event of the violations of their human rights.

The Leyla Sahin Case

Consider, for example, the case of *Leyla Sahin v. Turkey,* ruled on November 10, 2005, and which concerned the defendant's right to attend university classes while wearing the *hijab*. Since Turkey is a member of the Council of Europe, it has to be compliant with the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

Leyla Sahin, born in 1973 in Turkey, had lived in Vienna since 1999 because she had decided to pursue her medical studies in Vienna University instead of at home. In 1997, as a fifth year student at the Faculty of Medicine at Bursa University, she had enrolled at the Cerrahpasa Faculty of Medicine in Istanbul. In the Spring of 1998, in accordance with a circular of the Vice-Chancellor of Istanbul University that forbade the wearing of the *hijab* on the part of women and of having beards on the part of male students, she was denied access to an examination on oncology, lectures in neurology, and other exams and classes. When she requested to the Istanbul Administrative Court that this circular be set aside because it violated her rights under the Turkish Constitution, the Court affirmed the prerogative of the Vice-Chancellor to pass such a regulation in order to maintain "public order" and denied her appeal.

The Grand Chamber of the ECtHR found (Case of Leyla Sahin v. Turkey; Application No 44774/98) that while Istanbul University regulations restricting the wearing of the Islamic headscarf and measures taken thereupon had interfered with the applicant's right to manifest her religion, it also held that such interference was prescribed by law and pursued one of the aims set out in paragraph 2 of Article 9 of the Convention, namely: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others."[110]

The decision surveyed the laws and regulations concerning the wearing of the *hijab* in the 47

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[109] A. Slaughter, "A Typology of Transjudicial Communication," 29 *University of Richmond Law Review* (1994-5), p. 123.

[110] http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm

Civil and Human Rights in North Africa after the Arab Spring

Ruth Hanau Santini

Unlike in the liberal democratic tradition, in the Arab Islamic world, rights were originally attached to individuals according to their confession, and only became citizenship rights with the formation of modern states. In most Arab countries, the debate revolving around the standard categories of citizenship rights has been framed under other labels, from human rights, democracy, to human dignity. In the mainstream Islamic constitutional tradition, sovereignty lies with God, and humans, God's servants on earth, can only enjoy residual sovereignty.

This reading carries with it a number of tensions and possible contradictions once it is countered by universalist claims of human rights. The 2010-11 revolutions have brought to surface these inherent tensions and the ensuing social conflicts, especially once Islamist parties have gained power.

The two countries that have invested more into constitutional processes have been Tunisia and Egypt. Tunisia has produced two constitutional drafts (June 2012 and December 2012) and a final constitution will be elaborated by April 2013. Egypt has put its first full-fledged constitutional draft (beyond amendments brought about by the SCAF in the aftermath of the revolution) to referendum in December 2012. Despite similar timing, the two processes have been significantly different. The Tunisian one was more consensual and representative of society as whole since its inception, whereas the Egyptian one has been characterized by a messier approach and only a marginal concern to include all sectors of society.

While it is early to judge what has changed in terms of citizenship rights, since much will depend on their implementation, we can ascertain some initial trends. An underlying determining feature is the reference to shari'a as source of legislation. The Tunisian Constitution drafts seem to have avoided this reference, while reaffirming that Islam is the country's official religion (the same wording as the 1959 constitution). The Egyptian constitution, on the other hand, has reaffirmed its 1980 amended constitution identifying shari'a as the principal source of legislation, but widening and deepening its application by explicitly recognizing the role of Al Azhar as source of interpretation. Looking in particular at civil rights, three issues are widely perceived as a litmus test of the democratic trajectory of these transition processes: women's rights, freedom of religion, and freedom of expression.

In Egypt, the state's responsibility to guarantee equality between men and women, a basic tenet of all Egyptian constitutions since 1923, was removed from the new text. This is all the more striking given a context where the identification of rights and freedoms has expanded since the revolution. Women as a specific group are only mentioned in Article 10, when the family is identified as the basis of the moral foundations of society. There, women are recognized only in terms of their domestic role within a family, "founded on religion, morality, and patriotism."

In Tunisia, which has a tradition of constitutionalism dating back to 1861 and a Code of Personal Status from 1956 that recognized and promoted the equality between men and women (and that has historically been recognized by Ennahda), the first draft espoused a notion of "complementary gender roles" between men and women, which caused a great uproar and was later removed. In the December 2012 article 5, gender equality is now fully acknowledged and the state bears responsibility for its application (article 7 and article 37).

The mobilization against the previous article was a widespread one, whereas in Egypt no similar mass mobilization occurred against the limited role recognized to women in the constitutional charter. The reaction to popular demonstrations against the drafting of specific articles was met with very different responses: the Tunisian government backed down and reformulated these articles, while in Egypt, the Muslim Brotherhood justified the changes as representing the majority of the society. These new constitutional texts were shaped by new elites' preferences within a social context characterized by little knowledge and support for the concept of minority rights. The residual sovereignty attributed to men in the Islamic constitutional tradition helps explain the procedural understanding of democracy, where the defining democratic criteria is a procedural one, namely free and fair elections.

As far as freedom of expression is concerned, both countries have only partially allowed for the opening up of the media landscape, failing to endorse laws protecting journalists. In Tunisia, the Ennahda-led government has fully acknowledged in its constitutional drafts the freedom of expression and the media (article 28 of the 2012 December draft), but it has refrained from implementing two Decrees (115 and 166) guaranteeing the complete freedom of expression to journalists. Also, in 2012, political violence against journalists increased. As far as freedom of religion is concerned, both countries have included anti-blasphemy provisions, something that was alien to Tunisia and that now paves the way for the criminalization of offenses against religion (article 3). In Egypt, freedom of expression is guaranteed (articles 45 and 46) as well as media freedom (articles 48 and 49) but the state control of the media landscape, both direct (political appointments of directors of the main newspapers) and economic (most media outlets are completely or partially state-owned), empties the constitutional rhetoric of actual meaning.

The picture is mixed and in flux and should not be looked at only through political or religious lenses. Neither Ennahda nor the Egyptian Muslim Brotherhood represented the backbone of their countries' revolutions or have evolved a revolutionary platform since. With different degrees of inclusiveness and opening to political society, they are navigating their countries and reflecting and partially influencing deep-rooted social and cultural dynamics that were already in place. Far from having a vision of a "new society," their conservative attitude explains what they push for and what they try to resist. The contested nature of citizenship rights, however, is a battle that will need to be waged by many more segments of North African societies, and not just self-referential elites, within a pluralistic vision of society where conservatism, and patriarchal logics rather than religious ideologies, are still widely accepted tenets of how these countries should be organized.

member countries of the Council of Europe, and came to the conclusion that there was *no established standard across countries in this regard*. In evaluating the actions of the Republic of Turkey, the Court invoked the now-famous criterion of "margin of appreciation," which takes into consideration the member countries' arguments about what they consider to be necessary for maintaining "public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others" in a democratic society, but failed to clarify how or why exactly these values

would have been endangered by women wearing the Muslim *hijab* in institutions of higher learning.

The European Court of Human Rights did not resolve the Leyla Sahin case in a manner those who see the wearing of the *hijab* as a fundamental human right would have wished. A cosmopolitan interpretation of Article 9 of the ICCPR would have permitted a different outcome than the Court's subordination of women's political agency and their freedom to manifest their religion to the unquestioned norms of "public safety." Nevertheless, Judge Françoise Tulkens' dissent

brought to light the Court's hidden assumptions. "While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism … Not all women who wear the headscarf are fundamentalists… What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to." In clarifying the difference between Muslim women's human and civil rights to practice and manifest their religious beliefs and their political beliefs, which do not simply follow from wearing the *hijab,* the dissent contributed to the advancement of public conversation about how Muslim practices could be integrated into liberal democratic societies. In Turkey itself, the Leyla Sahin decision was met with disappointment and, in 2008, the ruling AKP Party (Justice and Development) tried to pass legislation decriminalizing the wearing of the hijab but was overruled by the Turkish Constitutional Court on grounds that this violated the constitutional principle of "laiklik" (secularism). Nevertheless, the hijab is now viewed less and less as an act of political identification but increasingly as an individual manifestation of religious belief.

Transnational Legal Sites and Democratic Iterations

Transnational legal sites enable the spread of what I call "democratic iterations," that is, complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society. Such contextualization, in addition to being subject to the various legal traditions of different countries, attains democratic legitimacy only to the extent that it is carried out through the interaction of legal and political institutions within the free public spaces of civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of Western paternalism often associated with them. They

become vernacular and enable jurisgenerativity[111] — that is the law's capacity to create a normative universe of meaning that can often escape the provenance of formal lawmaking. The law's normativity does not consist in its grounds of formal validity, i.e. in legality alone, though this is crucial. The law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making, by encouraging new forms of subjectivity to engage with the public sphere, and by interjecting existing relations of power with anticipations of justice to come. Democratic iterations and jurisgenerativity engender practices of solidarity, coalition-building, and resistance across borders that may help counteract the "democratic disconnect."

From Transatlantic Rift to Fateful Convergence? International Law after September 11, 2001

Nonetheless, the historical record of the international human rights regimes is not one of rights expansion alone. The rise of populist majoritarian democracies of the left (Venezuela) as well as of the right (Cf. Gabor Halmai, "The Case of Hungary") and of Islamist non-liberal democracies such as contemporary Egypt, show that liberalism and democracy are essential allies but that they become antagonists when democracies are tempted by majoritarianism. Equally, in Western constitutional democracies, socio-economic rights are under growing attack in a climate of fiscal austerity and crises generated by sovereign debt.

The historical record of the international human rights regimes is not one of rights expansion alone.

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[111] See R.Cover, "Foreword: Nomos and Narrative," The Supreme Court 1982 Term, *Harvard Law Review* 97, no. 4 (1983/84), pp. 4-68.

Most importantly, since September 11, 2001, violations of international law by the United States have abounded: the treatment of prisoners in Guantánamo, Abu Ghraib, and Bagram Air Force Base; the use of torture or so-called "enhanced interrogation techniques;" secret renditions of prisoners by the CIA; and increasingly, "targeted killings" and "collateral" civilian casualties, resulting from drone attacks in Afghanistan, Pakistan, and Somalia are all associated with gross human rights violations.

In the second Bush administration, the Supreme Court imposed some limits on military detentions and trial through the Boumediene [Boumediene v. Bush, 476 F. 3d 981 (2010)], Hamdan [Hamdan v. Rumsfeld, 548 U.S. 557 (2006)], Hamdi [Hamdi v. Rumsfeld, 542 U.S. 507 (2004)], and Rasul [Rasul v. Bush, 542 U.S. 466 (2004)] decisions. Congress supported the universal application of the treaty ban on cruel, inhuman, and degrading treatment. The Obama administration has tried to correct course over many of these issues through what Harold Koh, former legal adviser to the State Department under Hillary Clinton, has called a strategy of "engage, translate, and leverage," and by ending such blanket justifications as "the global war on terror" to justify executive actions.[112] Nevertheless, the fact that Guantánamo remains open, that drone attacks and "targeted killings" — even of U.S. citizens — continue, means that hypocrisy and arbitrariness in the application of international human rights law haunts U.S. foreign policy.

While the United States is dealing with the legacy of two unfinished wars that has left its commitment to international human rights law in tatters, some European countries, often under pressure from the United States, and under the cover of "the war on terror," have been less than principled in protecting international human rights by cooperating in "extraordinary renditions." In some European countries, the security threat posed by world-wide Islamist and Jihadist groups has also morphed

into a "cultural war" against Islam and Muslim migrants. Not only laws concerning the wearing of the hijab and the burkah, but the Mohammed caricature controversy, the forbidding of the building of minarets in Switzerland, disparaging statements about Islam as a religion by German theologians and even the late pope, and most recently, the gunning down of over 70 migrant and non-migrant youth in a socialist summer camp by Anders Breivik in Norway in July 2011 and his Islamophobic manifesto called "2083: A European Declaration of Independence," indicate that there are continuing problems of cultural intolerance regarding Islam in Europe.

The transatlantic rift is real, but judged by recent events, negative as well as positive, it may be growing smaller. Although significant doctrinal and jurisprudential differences remain between U.S. and European courts and jurists concerning the place of international human rights treaties and the law of other nations, there has also been an unfortunate convergence in the violation of international human rights — be they of religious and ethnic minorities; migrants; refugees and asylum seekers; and those subject to secret detentions and extraordinary renditions. These violations, in turn, prompt the transnational forces of global civil society, including NGOs and INGOs, to oppose rights-retrenching governments and movements.

As our report shows, human rights activism does not always translate into desirable democratic domestic outcomes as in the cases of women's rights; civil and political rights of religious and ethnic minorities; and rights of migrants and asylum seekers. Nevertheless, mobilizing for transnational human rights increases pressures on governments to be transparent in their actions and to meet international standards of compliance. Equally significantly, such activism galvanizes the citizenry, and renders them more articulate and transnationally aware. Even in non-democratic regimes, such rights activism contributes both to enhanced demands on government performance as well as to citizens' mobilization, as we see through the militant activism of both secular and religious women in the Arab Spring, for example. The

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[112] Both points were made by Harold Koh, in a talk entitled "Critical Legal Issues Facing the United States," on January 9, 2013, at the Center for Strategic and International Studies in Washington, DC.

challenge to contemporary liberal democracies is to encourage such iterations across borders to multiply, thereby creating sites for enhancing human rights law through *jurisgenerativity*.[113]

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[113] See K. Sikkink, *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics* (New York and London: W.W. Norton & Company, 2011).

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Liberal Foreign Policy and World Order Renewal

Gunther Hellmann

Photo: Foreign Ministers Koichiro Gemba (Japan), Guido
Westerwelle (Germany), Antonio Patriota (Brazil), and Ranjan
Mathai (India) of the G4 of aspiring permanent Security Council
members at the beginning of their meeting on Security Council
reform at the United Nations on September 25, 2012. © Corbis

*T*he crisis of liberal democracy in North America and Europe has two sides: a domestic one and an international one. This chapter will focus on the international side or, to be more precise, on the foreign policy of liberal democracies, mainly in North America and Europe. More specifically, it focuses on one dimension that has for a long time been considered central to both liberal foreign policy and the establishment and flourishing of a liberal world order — the political aim for and the successful establishment of rule-based institutionalized cooperation. Well into the 21st century, the history of liberal internationalism and international institutionalization could have been written in terms of a success story. Two variants of multilateral institutionalization made up this order: an inclusive or universalistic one essentially encompassing the UN system, and an exclusive one which aligned the liberal democracies of North America and Western Europe (and later on also Central Europe) in a dense network of political, economic and security cooperation (NATO, EU, OECD).

Many have argued that both parts of this liberal order are now facing increasing pressures. This chapter will show why the crisis of liberal order is, to a significant degree, the result of a crisis in liberal foreign policy, especially a declining commitment to multilateralism among the democracies of North America and Europe. A compressed history of the rise of liberal internationalism would highlight its beginnings in the late 1940s and 50s, the decades-long habituation to its operation under bipolar conditions, the sudden and apparent triumph in 1989-90 and its almost hegemonic expansion in the decade thereafter. However, today this success story seems to have come to an abrupt end with the catalytic fusion of three parallel developments: 1) the increasing disillusionment with military interventions primarily by the United States, Canada, and European states (beginning with Yugoslavia and ending with Iraq, Afghanistan, and even Libya), which in many ways seemed to mark the pinnacle of the complementarity of the inclusive and exclusive parts of the post WWII order; 2) the steady rise of and increasing coordination among

a diverse group of democratic and authoritarian great powers, the BRICS, which — even if they only form a heterogeneous coalition of often competing powers — are united in opposing some essential elements of the "Western" version of a liberal world order;[114] and 3) the confluence of economic crisis and domestic political blockage in Europe and North America, which accelerated what is again being called "the decline of the West" – almost a century after the first publication of Oswald Spengler's gloomy projection with the same title. The upshot of this is multilateral exhaustion and fatigue in both Europe and North America. Ironically, it also compounds what critically unites the BRICS, the renaissance of state sovereigntists against what is perceived to be hegemonic Western interventionism.

The problem is that multilateral fatigue and state sovereigntists are on the rise at a time when state-transcending global problems are proliferating. As the recently published study "Global Trends 2030" also points out, minilateral intergovernmentalism at the global level will not suffice to address these problems.[115] However, nor are there easy fixes to overcome multilateral fatigue via a new wave of international institutionalization, either inclusionary or exclusionary. Among others, this is due to the fact that the fundamental instincts and preferences for liberal world order solutions — to the extent that such solutions are actually pondered — diverge even between as well as within North America and Europe. However, even though the current picture might look bleak, there are a number of possible avenues to help at least start a more concerted process of institutional imagination

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[114] Z. Laïdi, "BRICS: Sovereignty, Power and Weakness," *International Politics* 49: 5 (2012), pp. 614-632.

[115] See "Global Trends 2030: Alternative Worlds," published by the U.S. National Intelligence Council (December 16, 2012), available at http://www.dni.gov/index.php/about/organization/national-intelligence-council-global-trends (December 16, 2012), esp. pp. 51-61. The study predicts that "the current, largely Western dominance of global structures…will have been transformed by 2030 to be more in line with the changing hierarchy of new economic players." Yet even if this were to happen, the report argues, it remains "unclear" to what degree the new or reformed institutions "will have tackled growing global challenges" given "the difficult tradeoff…between legitimacy and efficiency" (p. 58).

and deliberation among liberal democracies about the need and prospects of world order renewal.

Liberal World Order and Liberal Foreign Policy

The notion of "liberal world order" is notoriously vague — and at the same time extremely powerful politically. It is vague because it carries a multitude of meanings that sometimes even contradict one another. At the most general level, John Ikenberry has identified at least three historical versions of "liberal international order":

- First, the Wilsonian system, emphasizing "Westphalian sovereignty" defined mainly in terms of "an international legal order affirming state independence and non-intervention";

- Second, "Cold War liberal internationalism," which "modified Westphalian sovereignty" in the context of an "hierarchical order" where the United States provided "public goods, rule-based and patron-client relations, and voice opportunities"; and

- Third, the current, transitional "post-hegemonic" liberal order with "increasingly intrusive and interdependent economic and security regimes" in which "various groupings of leading states occupy governing institutions."[116]

Note that the characteristics of these *liberal* orders do not only differ, but sometimes even contradict one another, such as the strong norm against intervention in the early 20th century and the increasingly widespread call for "humanitarian interventions" in the context of a global

The notion of "liberal world order" is notoriously vague — and at the same time extremely powerful politically.

"Responsibility to Protect" in cases such as Libya or Syria today. In defining the "liberal" qualifier, others have listed different distinctive features or have pointed to a wide range of "practices of liberal ordering" against the background of three "institutionalized ideas of liberal world order" such as internationalism, imperialism, and integration.[117]

References to "the liberal world order" are extremely powerful politically because the very reference creates or stabilizes a political image with far-reaching political consequences. It rallies those who associate mostly positive images with "liberalism" as much as it mobilizes critics for whom "liberalism" is a dirty word. In other words, "liberal world order" is politically powerful, even if (or precisely because) the meaning of the concept is vague. Vagueness serves as an umbrella to shield what is cherished or despised. In this sense, an approach that concentrated on reconstructing the different meanings of liberal world order would probably identify a multitude of "liberal orders" with quite different emphases.

We have emphasized these complexities and tensions among and within liberalism and democracy throughout this report. This chapter will focus on one line of tensions surrounding the notion of liberal internationalism: the tension between two institutional forms of international cooperation, multilateralism and minilateralism, which are often accompanied by one of two organizational expressions of international institutionalization, inclusive or exclusive international organizations. Here the focus is on the field of international security. *Genuine multilateralism* is an essential feature of international forms of cooperation, which deserve the label "liberal." Building on the work by John Ruggie, multilateralism and minilateralism can be viewed as distinct organizing principles of inter-

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[116] G.J. Ikenberry, "Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order," *Perspectives on Politics*, 7:1 (March 2009), pp. 71-87.

[117] T. Dunne and T. Flockhart, eds., *Liberal World Orders*, forthcoming.

state cooperation.[118] Multilateralism is not merely the "practice of coordinating national policies in groups of three or more states,"[119] i.e. a form of diplomatic interaction that applies equally to dense institutional settings as well as ad-hoc coordination among great powers. Rather, it is a distinct and "generic" form of interstate collaboration based on "'generalized' principles of conduct," such as the indivisibility of certain goods (eg. peace), non-discrimination (as in trade agreements), or diffuse reciprocity, i.e. arrangements in which participants focus less on immediate and direct benefits in the form of specific quid-pro-quos than on roughly equivalent benefits in the aggregate and over time.[120] An illustration of such features in the realm of international security would be a collective security system that is essentially "a permanent potential alliance 'against the *unknown* enemy' (…) on behalf of the *unknown* victim."[121] To be sure, such a fully developed collective security system has never been realized, but a broad range of institutions or organizations with different scopes of multilateralism have existed or continue to exist in the field of trade (eg. WTO) or security (eg. UN, NATO). Their benefits are obvious: to the extent that they create binding ties, they reduce transaction costs and increase mutual reliability and trust. They are especially valuable for smaller states because the leverage that stronger powers can bring to bear in bilateral/minilateral settings is attenuated. Their costs are equally clear — mainly the loss of autonomy and possibly also sovereignty.

The primary purpose of developing the distinction between multilateralism and minilateralism is to relate an organizing principle of liberal *order* to (ideal-typical) practices of liberal *foreign policy*. International order (defined as a contingent arrangement of rules and institutions governing the relations among states and peoples) is inherently fluid. The conceptual counter-point to international order is not "anarchy," "chaos," or "instability" but *foreign policy agency*: states shape international order via foreign policy, and their policies are shaped by any given order.

The conventional narrative of the post-World War II order, which sees the United States as having left the most visible mark on the global arrangement of rules and institutions, may illustrate the relationship between order and foreign policy. What used to be an international order largely shaped by the traditional power politics of Europe's great powers now seemed worthy to be labeled "liberal". This order, in turn, shaped the foreign policies of all states, including the United States. For instance, the Federal Republic of Germany, the successor of the Nazi rogue state, was enabled to radically transform its foreign policy not least because the liberal features characterizing the Western (European) order provided both a safe environment and additional material incentives for developing a foreign policy that emphasized integration and restraint. Thus, liberal order depended primarily, though not exclusively, on liberal foreign policy.

Another distinction is between a foreign policy that emphasizes the overall value and benefits of state autonomy and influence maximization in contrast to a foreign policy that emphasizes the overall value and benefits of mutually binding international arrangements, possibly even in juridified fashion.[122] The former cherishes minilateral, bilateral, or unilateral foreign policy practices, whereas the

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[118] J.G. Ruggie, "Multilateralism: The Anatomy of an Institutional Form," *International Organization*, Vol. 64, No. 3 (1992), pp. 561-598. "Minilateralism" is not Ruggie's term. It was actually coined by Moises Naim (Minilateralism. The Magic Number to Get Real International Action, July/August 2009, available at http://www.foreignpolicy.com/articles/2009/06/18/minilateralism (December 10, 2012)) and is meant to describe a framework of cooperation that gets together the "smallest possible number of countries needed to have the largest possible impact on solving a particular problem." The institutional form alluded to here is similar in its organizing principles to "bilateralism" as developed conceptually by Ruggie.

[119] This is the definition preferred by R. Keohane, "Multilateralism: An Agenda for Research," *International Journal*, Vol. 45 (Autumn 1990), p. 731.

[120] Ruggie, pp. 571-572.

[121] Ibid., p. 569, quoting A. Salter, *Security*, London: Macmillan 1939, p.155; first emphasis Salter's, second Ruggie's.

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[122] On different understandings of juridification, see L.C. Blichner and A. Molander, "Mapping Juridification," *European Law Journal*, 14: 1 (2008), pp. 36-54; on the evolution of juridification in international politics, see M. List and B. Zangl, "Verrechtlichung internationaler Politik," *Die neuen Internationalen Beziehungen. Forschungsstand und Perspektiven in Deutschland*, ed. by G. Hellmann, K.D. Wolf and M. Zürn, Baden-Baden: Nomos Verlagsgesellschaft 2003, pp. 361-399.

China's Changing International Role

Martin Jacques

In the West, the Chinese model of governance is not seen as an alternative to the Western liberal political order. But as China overtakes the United States to become the largest economy and, over the next two decades, pulls well ahead — some forecasts predict that it will be twice the size of the U.S. economy by 2030 — then growing attention will be paid to the Chinese system of governance. The strengths of Chinese governance are its ability to think strategically, its infrastructural prowess, and the impressive competence of its government. While the Western tradition emphasizes democracy, the Chinese attach equivalent importance to state competence, which is closely linked to the idea of meritocracy. Given that state competence is a major weakness, and a seriously neglected issue, in the West, it would not be difficult to imagine this aspect of Chinese governance coming to influence Western thinking in the future. Given the deep roots of Western democracy and the absence of it in the Chinese tradition, however, the overall influence of Chinese governance in the West will remain very limited.

The situation is rather different in the developing world. There is an underlying affinity between China and the developing world because, unlike the West, they share, in broad terms, a similar stage of development. And China is indubitably the outstanding example of a developing country, having grown at around 10 percent a year for over 30 years and lifted around 600 million out of poverty. These achievements have brought China considerable prestige in the developing world. Combined with China's extensive trading and financial relations with many developing countries — which in the main are viewed very positively — this has fostered an increasingly close relationship between China and the developing world. As a consequence, there is great interest in many developing countries in how China is governed, in the competence of its state, and what they might learn from it.

For its part, China does not see itself as a model for others. Unlike the West, or indeed the Soviet Union, it does not proselytize about its own arrangements or seek to persuade other nations to copy it. The underlying reasons for this mentality lie in the fact that China has for many centuries regarded itself to be separate and distinct from others. In view of its deep historical roots, it seems highly unlikely that this attitude will change. It is noteworthy that recent debates about a so-called China model have been conducted largely outside rather than inside China and by foreigners rather than Chinese.

Since the beginning of the reform period in 1978, China's attitude toward the international system has been shaped by the overwhelming priority it has attached to its own economic growth and the reduction in poverty. To this end, it was seen as essential that China obtain access to foreign markets and gain admission to the World Trade Organization. Adaptation to and acquiescence in the existing international economic order thus informed the Chinese strategy. There has, so far at least, been no substantial change in this underlying approach.

But will this continue to be the case as China becomes a great global power? As many have observed, the present international system has served China well, having played a crucial and indispensable role in its economic transformation. It is still very much a developing country — around half the population still lives in the countryside — and is acutely aware, given its huge dependence on both exports and imports, of the importance of maintaining good relations with the

> *rest of the world. The Chinese leadership is extremely cautious and not given to acting in a rash fashion.*
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> *China is the world's largest exporter and will shortly be the world's largest importer. In 2009 and 2010, two Chinese banks, the China Development Bank and the China Export-Import Bank, lent more to the developing world than the World Bank. It is already a financial powerhouse. Within the next two decades, the renminbi will replace the dollar as the world's major currency. This is bound to transform the fundamental architecture of the international economic and financial system. Either the International Monetary System adjusts to the reality of Chinese power, together with that of other developing countries like India, by becoming something very different from what it is now or it will, in time, be replaced. The prospects for the World Bank remaining the main source of aid and lending for the developing world are zero.*
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> *In short, the present U.S.-inspired international economic system will not survive the relative decline of the United States, even though certain features of it may persist. The Chinese, for their part, will proceed very cautiously and avoid anything that might be seen as provocative or unnecessarily divisive. In all likelihood, they will seek a consensual process of reform. Be that as it may, China's increasingly dominant economic power will ultimately result in a very different international economic order from the present one. The same can be said of the international system more generally, but that is another story.*

latter values multilateral strategies. Nazi Germany and the "Bonn Republic" again serve as excellent real world examples to illustrate both types.[123]

Liberal Foreign Policy and the Rise and Decline of Multilateralism

The current crisis of liberal order is to a significant degree the result of a crisis in liberal foreign policy. Today, illiberal foreign policy practices have much more sway globally in structuring international cooperation and, therefore, world order. Warfare, is, fortunately, not part of the regular foreign policy repertoire of most powers. However, the renaissance of state sovereigntism is a particularly worrying sign. While it is particularly noticeable

among the "rising" BRICS, it has also gained ground among the liberal democracies of North America and Europe. It is *not* that bilateral and/or minilateral cooperation is problematic per se, but rather that bilateral*ism* and minilateral*ism* have gained prominence in international cooperation as *preferred organizing principles* of international relations, thereby increasing the stress on those features of genuinely multilateral institutions such as indivisibility, non-discrimination, and diffuse reciprocity, which provided for a significant measure of transparency and predictability in recent decades and which a minilateralist system lacks.

The rise of minilateralism and the decline of multilateralism correspond with the rise of exclusive and informal international institutions on one hand and the decline of inclusive and formal international institutions on the other. However, inclusivity does not imply multilateralism, and exclusivity not minilateralism. For instance, although NATO and the UN represent opposite organizational forms, with one being very exclusive whereas the other is universal, both are based on

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[123] Ruggie rightly and repeatedly returns to the preference of the Nazi regime for "bilateralist" arrangements as an illustration of the counter-point to "multilateralism." For a more detailed discussion of the ideal-typical distinctions of (il)liberal foreign policy (practices) with illustrations of the German case, see also R. Baumann, V. Rittberger, and W. Wagner, "Macht und Machtpolitik. Neorealistische Außenpolitiktheorie und Prognosen über die deutsche Außenpolitik nach der Vereinigung," *Zeitschrift für Internationale Beziehungen* 6: 2 (1999), pp. 245-286, and G. Hellmann, "'... um diesen deutschen Weg zu Ende gehen zu können.' Die Renaissance machtpolitischer Selbstbehauptung in der zweiten Amtszeit der Regierung Schröder-Fischer," C. Egle and R. Zohlnhöfer, eds., *Ende des rot-grünen Projektes. Eine Bilanz der Regierung Schröder* 2002-2005 (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), pp. 453-479.

specific, if different, multilateral principles.[124] Similarly, both inclusive and exclusive international institutions can exhibit minilateralist organizing principles. Examples are some of the thematic UN conferences that turn out largely declaratory and non-binding resolutions or more exclusive institutional arrangements like the G20. These differences notwithstanding, there are certain proclivities — and the argument made here implies that we are observing a rise in exclusivity, informality, and minilateralism and this spells trouble for world order.

Well into the 21st century, two variants of multilateralism stood out as characteristic of the order created after World War II: an inclusive or universalist one, which was essentially made up of the UN system,[125] and an exclusive one, which aligned the liberal democracies of North America and Western Europe (and later on also Central Europe) in a dense network of political, economic, and security cooperation (NATO, EU, OECD). The UN Charter was meant to constitutionalize universal obligations related to peace and security.[126] The treaties founding the (predecessors of the) EU and NATO were meant to enshrine more specific liberal principles. Both the inclusive and global as well as the exclusive and regional institutions were crucially shaped by Western democracies, most prominently the United States. The emphasis on the universalist nature of the United Nations could be seen as an expression of the respect for the pluralist nature of different forms of rule (or "sovereignty") whereas institutions based on the propagation of particular liberal values (such as the EU and NATO) were an expression

of the exclusive alignment among the states in the transatlantic space.

For much of the time after World War II, the inclusive and exclusive forms of institutionalization served the interests of the liberal democracies in North America and Europe quite well — and in a complementary fashion. Close cooperation and even integration based on shared values and interests could proceed in the context of the EU (and its predecessors) and NATO. Moreover, the institutional core of the transatlantic relationship was nicely supplemented by the IMF, the World Bank and the World Trade Organization, which enshrined multilateral principles in financial and economic matters. Although the bipolar Cold War world limited the role of the UN Security Council, with the three permanent Western powers encountering numerous veto positions by the Soviet Union and China, it still allowed for a semblance of an international legal framework. Thus, a rules-based order had taken shape that not only served the interests of Western liberal democracies, it was also based in significant segments on multilateral organizing principles and could be described in terms of values that were dear to the liberal democracies of North America and Europe.

In the past decade or so, this complementarity of global/inclusive and regional/exclusive organizations to the benefit of liberal democracies in North America and Europe unraveled. After an initial post-1990 boost, when the ascendance of "the West" culminated in an impressive global expansion, tensions increased not only among these liberal democracies and within the respective institutions but also between the latter. Securing mandates for the EU or NATO from the UN turned out to be much more difficult than it was in the 1990s. Moreover, as the rising prominence of "coalitions of the willing" from Iraq to Mali among EU and NATO partners shows, even the most closely knit exclusive institutions espousing liberal values have come under strain.

Thus, multilateralism has been significantly weakened while minilateralism is thriving. This trend is problematic to the extent that the spread

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[124] On NATO, see Steve Weber, "Shaping the Postwar Balance of Power: Multilateralism in NATO," *International Organization*, 46:3 (1992), pp. 633-680.

[125] CSCE/OSCE, ie. the "Conference…" (or, respectively, "Organization…") for "… Security and Cooperation in Europe" are institutions that are certainly not universal in a strict sense since membership was (and is) concentrated on the "northern" hemisphere. Nevertheless they do (and did) not exhibit the more rigidly exclusionary or even aggressive elements of military alliances because they essentially included all the states in a certain regional context that were interested in actually participating in the respective multilateral arrangement.

[126] M. Doyle, "Dialectics of a Global Constitution: The Struggle over the UN Charter," in: *European Journal of International Relations*, 18: 4 (2012), pp. 601-624.

A Proposal for Track II Initiatives for Reforming the Global Security Architecture

UN reform in general, and Security Council reform in particular, are tricky and complicated. Many bright minds and creative practitioners have worked on this issue for many years — with modest success at best. However, the Security Council continues to be the single most important, and the only globally legitimate institution in the realm of peace and security. President Obama was right, therefore, when he pleaded during his first election campaign that "reform" is "urgently needed" if the global community is "to keep pace with the fast-moving threats we face." More significantly, the UNSC is likely to become ever more important for a) managing the competition between "Western" liberal democracies, "non-Western" liberal democracies, and authoritarian great powers and b) for dealing with regional conflicts with escalatory potentials (such as Syria or Iran), which may be perceived in terms of larger geopolitical rivalries or competition for status and prestige. One of the many complicating issues regarding UN reform is that liberal democracies belong to those members of the UN that most fiercely fight for competing reform proposals. Four of the most ambitious UN member states — Brazil, Germany, India and Japan (also called the G4) — stand against a group of states ("Uniting for Consensus"), which includes, among others, Italy, Spain, Canada, Mexico, Argentina, and South Korea. Although it is difficult to see how the more immediate differences between these states might be overcome in the foreseeable future, the broader picture and the more long-term strategic outlook might render some forms of collaboration more realistic.

Building on existing informal coordination processes among the foreign ministries of nine North American, European, and Asian democracies would help. Since 2008, policy planning directors from these foreign ministries have met three times for informal exchanges.[1] While this has been a very informal and low-key setting and whereas "like-mindedness," obviously, does not automatically imply identity of interests, reports from these meetings seem to indicate that a consensus could more easily be established on key issues of global peace and security among this group of states with a history of (more or less intense) collaboration. One way to build on these commonalities would be to initiate a process of multinational study groups from some of these countries (and possibly also from additional liberal democracies, such as India and Brazil) with the task of developing alternative visions for the institutional architecture of global security. The initiative could come from either the foreign ministries or well-connected think tanks in the respective countries. In any case, the idea would be to form thematic multinational study groups involving experts from both inside and outside government (eg. diplomats, knowledgeable members of parliament, foreign affairs experts from think tanks, and the academic community). Given the delicate nature of issues, such as UNSC reform, the foreign ministries may want to play a low-key role. Yet they might be open for new ideas generated in an exchange among experts from a multitude of national and professional backgrounds. Among others, the agenda of such study groups might include issues such as the value of expanding or contracting the role of particular international institutions; the balance between inclusivity and exclusivity, multilateralism and minilateralism; the commonalities and differences in outlook on these issues among the liberal democracies involved in such exchanges, etc. Given the fact that this would be a low-key and informal coordination mechanism among specialists tasked to "think big," possible hurdles relating to national sensitivities about certain topics should be surmountable. The "Chatham House Rule" or similar mechanisms intended to preserve confidentiality could provide additional reassurance.

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[1] The countries included the United States, Canada, Australia, Japan, South Korea, Italy, France, Germany, and the U.K.; for more detail see Jain, op.cit. and the discussion surrounding the presentation of his paper at the Council on Foreign Relations, http://www.cfr.org/democracy-promotion/advocating-liberal-world-order-strategy-aligning-worlds-like-minded-capable-democracies/p29842 (February 12, 2013).

of minilateral frameworks undermines existing institutions in terms of both legitimacy and effectiveness by encouraging ever more extensive "forum shopping." This refers to a state's choice of that forum in which it expects to achieve the most favorable outcome based on its often short-term preferences.[127] Other things being equal, this tendency privileges exclusive institutions at the expense of inclusive ones. North American and European democracies had their fair share in this practice during the last two decades — just remember the preference for NATO over the UN during the Kosovo war, or the preference for a "coalition of the willing" over the UN (or even NATO) in the 2003 Iraq war. The ironic result of forum shopping is that an "institutionally thick world" where forum shopping spreads not only fails to deliver valuable diffuse reciprocity but even "begins to resemble the neorealist depiction of anarchy."[128]

To be sure, multilateral fatigue among North American and European liberal democracies is also the result of disenchantment with recent experiences with malfunctioning multilateral institutions, both in the UN (eg. Syria) and with the EU and NATO. Unsurprisingly, therefore, there is a widespread tendency among those democracies to pursue *Realpolitik* strategies similar to the BRICS. In the United States' case, for instance, this has been the emphasis on an exclusive regrouping among liberal democracies (such as a "Concert of Democracies," or, variations that begin with "Alliance," "Union," or "League"). Often, this has been postulated as an alternative to the UN *if* "reform" fails. Sometimes such a democratic realignment has been suggested *because* it was already taken for granted that the UN cannot be

reformed.[129] An increasingly critical attitude vis-à-vis multilateralism is even detectable among a traditional champion of multilateral cooperation, Germany. For instance, critics charge that the institutional rules and practices of the EU are currently being rewritten more in line with German national interests than with a consolidation of a democratically accountable system of European rule. Thus, current trends in Europe and North America do not look very promising as far as new initiatives for global institutional reform are concerned. Nevertheless, the stakes of the old guardians of "liberal order" are much higher than those of the newcomers. Moreover, there are a few tentative signs that these liberal democracies may, after all, be ready to rethink what their responsibilities and stakes may entail.

> *The stakes of the old guardians of "liberal order" are much higher than those of the newcomers.*

Readjusting the Balance between Inclusivity and Exclusivity, Multilateralism and Minilateralism

The tension between a more restrained, pluralist, and inclusive route toward institutional reform that may entail efficiency costs, and a more assertively "liberal" alternative that focuses on some core liberal values at the expense of legitimacy (eg. humanitarian interventions as in Kosovo) will continue to circumscribe the strategic horizon of possibilities for any type of multilateral reform initiative. To say that "the UN" does not work is often simply an expression of frustration that one has not gotten his/her way. In the field of peace and security, the UN nevertheless remains the only international institution with the most convincing claim to universal legitimacy. At the same time

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[127] M. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade," International Organization, 61: 4 (2007), pp. 735-61.

[128] D. Drezner, "Two Challenges to Institutionalism," A.S. Alexandroff, ed., *Can the World Be Governed? Possibilities for Effective Multilateralism* (Waterloo, ON: The Centre for International Governance Innovation, 2008), pp. 139-159, here 151.

[129] See The Princeton Project on National Security, *Forging a World of Liberty under Law. U.S. National Security in the 21st Century*, G. J. Ikenberry and A. Slaughter, Co-Directors, Princeton University (September 27, 2006), available at http://www.princeton.edu/~ppns/report/FinalReport.pdf, esp. p. 7.

there is no reason why minilateral efforts among "like-minded" liberal democracies[130] could not be tailored to complement and strengthen inclusive institutional frameworks such as the UN. In this sense inclusive and exclusive frameworks are not mutually exclusive. There is an increasing need to think about alternative strategies for readjusting the balance between them (see box on p. 109).

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[130] A. Jain, *Like-Minded and Capable Democracies. A New Framework for Advancing a Liberal World Order*, Council on Foreign Relations Working Paper, January 2013.

Eleven

Reconnecting Democracy

Photo: An Egyptian walks past posters of Egyptian satirist Bassem
Youssef outside a theatre in Cairo on January 22, 2013. © KHALED
DESOUKI/AFP/Getty Images

We have investigated democracy's current malaise across several of its different strands. We have uncovered the reasons behind gridlock in the United States and executive predominance in Canada. We have examined the eruption of civic discontent across Europe, assessing what this means for the EU's democratic legitimacy and for the precarious liberties of some of the continent's newer democracies. We have considered the factors that have left an increasing number of states lying just beyond the traditional transatlantic community, beached in a hybrid world between democracy and authoritarianism. Finally, we have made the link between these forms of democratic disconnect and international trends, exploring how far the global human rights regime can help re-energize liberal norms, and examining the extent to which the foreign policies of established democracies can and should underpin the liberal features of the international order.

Each area included in our report is itself the subject of extensive academic and policy debate. We hope that the distinctive added-value of our report lies in its wide comparative perspective, though further study, for example, of Latin America, Africa, and the Middle East, is sorely needed. Central to our thesis is that common features and challenges cut across different regions and policy levels. We believe it is not coincidental that North American democracy is under scrutiny just at the moment when Europe is bedeviled by a profound legitimacy crisis, when many hopeful transitions have atrophied or corroded back toward semi-authoritarianism, and when citizens' demands at the domestic level find an echo in claims for better rights protection internationally. Something systemic is afoot; democracy's challenges express themselves in contrasting ways and in different parts of the world, but these different lexicons spring from underlying dynamics that are eminently comparable. Again and again, one finds a wide gulf between declared values and the real world of politics, and between citizens and the leaders who are meant to represent them.

> *Again and again, one finds a wide gulf between declared values and the real world of politics, and between citizens and the leaders who are meant to represent them.*

Throughout this report, we have noted the profound interdependence of challenges, crises, and dysfunctionalities generated at the local, regional, transnational, and global levels. Unlike a very influential strand in the democracy literature, however, we do not believe that "global democracy" is a sufficient or imminently feasible solution. In our view, such appeals to democracy beyond the level of the state can only metaphorically transpose to the global level practices such as citizenship, deliberative fora, and representative institutions. Despite optimism about web-based technologies delivering "digital democracy" or enabling a global parliament, we remain convinced that it is more feasible to encourage the building of a variety of transnational, regional, and supranational democratic networks and practices before moving up to the global level.

Undoubtedly, the problem of "scale" has always been a daunting challenge for democracies. Democracy originated in the Greek city-states of antiquity, was revitalized by the Italian city-states of the Renaissance, and entered into a long-lasting and successful marriage with the new national states of Europe and North and South America, as well as some of those emerging after de-colonization. The understanding of democracy evolved at the same time that the political frame within which it was contained altered. But the political nation or the nation-state still remains the most prevalent form in which democracies are housed. Though, as the experience of the European Union shows, new forms of transnational and supranational polities, with as yet unexplored forms of subsidiarity

and federalism, are in the offing. Democratizing global governance continues to be a desirable goal. Nonetheless, it is the citizens, residents, and stakeholders of contemporary democracies who must find their own way toward these new formations.

The preceding chapters of this report lead to a critical conclusion: in our view, the core virtues of the liberal-democratic model merit increased, not diminished, support. Liberal democracies are being more severely tested than they have been in many years, and tested in new ways; yet we find that there is also greater potential for their positive transformation. It is at the nexus between democratic problems and democratic potential that we locate our report. After careful study of the different dimensions of the democratic disconnect, we conclude here with some lessons and observations and with some concrete suggestions to help revitalize democracy.

We group our findings at two levels: first, broad observations that may help to shape thinking about democracy today; and second, a series of policy ideas that arise out of the analysis in the various parts of the report.

Observations

Overcoming Institutional Inertia: Aging Democracies Need Modernization

In the United States, outdated constitutional arrangements permit the states to control key elements of the national electoral system. This encourages partisan attack on the equal right of citizens to vote and participate in the political life of their country. For the sake of partisan advantage and the protection of sitting representatives, the democratic process itself is distorted, which contributes to the gridlock and polarization plaguing Washington. Political elites battle fruitlessly over contradictory solutions to the nation's many problems, while most citizens yearn for effective government and practical responses to the country's challenges. A broader and fairer representation of the public's will in Congress would greatly improve the operation of

U.S. democracy. In Canada, a deeply ingrained institutional conservatism inhibits reform. The single-winner plurality or first-past-the-post voting system tends to produce powerful executives; it often leads as well to the systemic under-representation of significant regions of the country in the councils of the federal government. An appointed and democratically unrepresentative Senate or upper house of Parliament adds to the problem; as a patronage body, whose members are appointed by the prime minister, it cannot effectively voice the concerns of the federal units or the citizens in national policy making debates. Despite lengthy and substantial policy discussion, neither the electoral system nor the Senate has been reformed.

Lessons from the Euro Crises: Legitimacy is Granted by the Input of Citizens; "Output" Legitimacy is Not Enough

Vibrant democratic, deliberative process is required, not simply as a means to better, more authoritative policy, but as an end in itself. Inevitably, since democracy entails the making of choices by citizens, it leaves open the ultimate direction of many policies. But, however frustrating that may be, short cuts and top-down, pseudo-solutions are not a sustainable answer.

The lesson that must be drawn from the crises in the eurozone is that elites cannot by themselves steer the EU into a calm harbor of democratic legitimacy. While firm economic decisions and even a degree of fiscal rectitude may be essential in the short term for tempering crises, any major leap forward in economic union must not pre-empt democratic debate over the EU's core

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socio-economic priorities and the justice of the new politics of redistribution. Democratizing the EU cannot be reduced to the parliamentary imprimatur of pre-determined economic choices. Socio-economic choices ought not to be constitutionalized and removed from the agenda of politics; they must remain contested issues around which healthy democratic struggles can unfold. Citizens, politicians, and decision-makers must resist the new tyranny of global markets over democratic choices. The route to effective democratic accountability at the European level cannot be through technocratic quick-fixes.

> *Socio-economic choices ought not to be constitutionalized and removed from the agenda of politics; they must remain contested issues around which healthy democratic struggles can unfold.*

Popular Sovereignty is both Enabled and Constrained by Constitutionalism

Elections and representative government are not enough. Democracies function within a system of rules and institutions — constitutions, laws and statutes, independent courts, and charters of rights and freedoms — that channel popular will. But this system also imposes limits on that will, which democrats recognize as necessary in a free society. The right to free expression, freedom of the press, the right to vote, the fair treatment of minorities, due process, and equal treatment under the law must all be protected, even, from time to time, *against* the will of an aroused public or its representatives. We spoke earlier in the report of the need to balance and reconcile the tensions that arise in liberal-democratic political systems. Democracies do not always get that balance right,

and minorities, individual citizens, and democracy itself can suffer as a result. We have seen evidence of this in this report, not simply in countries such as Hungary or Georgia, which have strayed far from liberal-democratic norms and practices, but also in more muted form in long-established democratic countries such as Italy and the United States. Constitutional protection should be designed to support the structure and functioning of the liberal-democratic system, rather than to pre-determine the policy choices that properly fall within the ambit of a society's ongoing conversation with itself.

Democratic transformations and transitions in the contemporary world occur against the background of a wealth of previous experience and lessons learned — not always well — about the interdependence of strong rights-protection, an independent judiciary, and constitutional reforms. The European Convention of Human Rights (1953), the American Convention on Human Rights (1969), the African Charter on Human and People's Rights (1979), and other international covenants provide transitional and emerging democracies with constraints as well as aspirational goals in equilibrating liberalism and democracy. It is clear that such transnational rights covenants cannot, by themselves, prevent democratic backsliding or block the emergence of illiberal democracies, but they can help, and awareness of their contents and functioning must be encouraged through wide dissemination. The EU itself, both as an example and as a magnet for membership, has been perhaps the most powerful agent for the expansion of liberal democracy since World War II, although its capacity to support democracy preservation is currently being challenged.

Hybrid Regimes Persist between Liberal Democracy and Authoritarianism

It is common to think of democratization as involving the victory of liberal aspirations over the illiberal legacies of previously authoritarian regimes. Yet, an increasingly widespread phenomenon of regime "hybridity" demonstrates that co-habitation of liberal and illiberal norms, actors, and institutions can be protracted and

indeed, represents a distinct regime type. It is important to understand this governmental form and its implications; there is clearly different forms of hybridity, some more liberal than others. For those keen to extend democracy's reach, there is a need to develop a strategy for dealing with these regimes. The challenges of repairing the "democratic disconnect" that are evident in Western democracies today are not irrelevant to "hybrid regimes." Forging a delicate but vital balance between institutions and citizens is not a luxury that should come at later stages of democratization. Quite the opposite, it should be at the core of all stages of political transformation.

Liberal Policies in the Domestic and the International Realm need to be Compatible

The domestic and the international are sometimes construed as two spheres that ought to be treated separately, including in normative terms. For liberal democracies, the justification of power politics internationally is more problematic than for autocratic regimes. One area in which this is most obvious is the principle of the rule of law domestically, which also implies respect for and expansion of international law. Predatory power politics contradict the principles of a liberal foreign policy. A pluralist version of liberalism

> *The challenges of repairing the "democratic disconnect" that are evident in Western democracies today are not irrelevant to "hybrid regimes." Forging a delicate but vital balance between institutions and citizens should be at the core of all stages of political transformation.*

that privileges the principle of state sovereignty in combination with a minimalist conception of international juridification can conflict with a universalist notion that advocates global constitutionalism in the international realm. In this report, we have argued, however, that the expansion of international law in general and juridified international spaces in particular need not undermine the liberty of peoples to decide their political fate within established political communities. Therefore, one of the central tasks of liberal democratic foreign policy is to contribute to this process of international juridification.

A global order that is justifiable in terms of liberal norms and values depends on agents that maintain and expand the liberal core. The liberal democracies of North America, Europe, and other regions are the obvious candidates for acting as responsible stakeholders of such a global order. This will require the need to strike a balance between the demands for effective policies that satisfy global needs as well as national interests on one hand and the necessity for legitimacy on the other. Multilateralism entails a higher probability for providing legitimacy; minilateralism may prove to be more effective. Both are needed. However, recent trends in the foreign policy of all major powers, including the liberal democracies of North America and Europe, show an increasing preference for minilateralism. This needs to be rebalanced.

Policy Ideas

Improving Citizen Access to and Participation in the U.S. Political System

While a full-scale democratic reform agenda would cover a wide range of issues — such as the role of the Electoral College in presidential elections, the financing of political campaigns, and the use of the filibuster in the Senate — this report, consistent with its focus on citizenship, makes recommendations designed to open up the political system to fairer and fuller citizen participation. The U.S. Constitution delegates the administration of elections to individual states. This leads to wide variations in the voting process. A series of

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electoral debacles, such as the convoluted "butterfly ballot" and the "hanging chads" in Florida in the 2000 presidential election, demonstrate that the United States is falling far behind its Canadian and European peers in democratic procedures. President Barack Obama's recently announced Presidential Commission on Election Administration, focused on reducing long line ups at the polls, is a step in the right direction, but it is not enough. Making voter registration fair and user friendly, and ridding the system of vote-suppression techniques are badly needed initiatives. More generally, federal and state legislation plus adequate resources are required to bring the "mechanics" of voting up to contemporary standards.

Redistricting Reform in the United States

Gerrymandering has been a blight on U.S. politics since the early days of the republic, returning to the limelight after every decennial census when state legislatures redraw congressional and state legislative districts. As often as not, partisan redistricting produces districts that have little to do with democratic representation and a lot to do with the interest of political elites, reducing political competition, and creating geographical spaces destructive of coherent citizen mobilization and coalition-forming. As in most other established democracies and in California since 2012, redistricting ought to be done by independent electoral commissions.

Representational Reform in Canada

Given the deficiencies of the plurality or first-past-the-post voting system in Canada, measures should

be supported that increase the proportionality of the electoral process, such as an element of proportional representation, to address the unrepresentative outcomes of the system, which pose particular challenges in a highly regionalized, bi-national country.

EU Citizen Summits

Effective citizenship must be far more actively promoted at the European level. The EU can play a unique role in reimagining the meaning of democracy beyond the nation-state. Years of official commitments to a European political space have produced disappointingly little so far. Many EU initiatives now exist to involve citizens in the Union and create pan-European civic networks. These are worthy and extremely important but tend to function in relation to relatively narrowly defined areas of policy. Most have the declared aim of improving the Union's image with citizens. The 2013 Year of the European Citizen is, for instance, limited. Given the current accountability-sapping developments in EU economic policies, this initiative risks becoming a parody of itself. Existing initiatives rarely have the aim of galvanizing genuinely critical debate. There is thus a mismatch: critical citizenship has erupted within nation-states, deeply hostile to current EU policies, but this is not connected tightly or productively to official deliberations between national governments. This disconnect could be narrowed by the holding of Citizen Summits, organized in parallel to official EU summits. These should engage critically on the high-politics decisions affecting the future of the Union. They should be autonomous, but facilitated by the EU institutions and governments.

Democracy Promotion in Hybrid Regimes

Engagement with "hybrid" regimes could prove more effective if it moves away from a narrow institutionalist framework to broader conceptions of citizenship and rights. Embracing active rights-protected citizenship should become a priority in hybrid regimes as much as in established democracies. This in essence would entail shifting the focus from privileging links with governments

or opposition leaders to direct engagement with different groups in public, private, and civic realms. It would imply a long-term focus on facilitating the conditions for protection and effective exercise of rights — civil, social, political, and cultural. The condition of "hybridity" limits the space for effective democracy promotion. However, we believe that enhancing long-term links with different stakeholders in the society and empowering them should eventually help overcome it.

EU Engagement with the Eastern Partnership Countries

For post-Soviet hybrid regimes specifically, the European Union remains one key actor that has both geopolitical stakes in the region and the power to make a difference. As the bigger goals of signing Association Agreements and even giving a possible membership perspective to some of these states remain open, the EU could make a difference by boosting its engagement in specific policy areas. One of the initiatives launched at the 2013 EU-Ukraine Summit is a dialogue between Ukraine and the EU on issues related to business climate. A series of joint forums, exchange programs, and initiatives that reach out directly to societal actors could be developed further within the Eastern Partnership framework, which covers six Soviet successor states, Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine. To be successful, these initiatives have to be designed and managed jointly by EU and non-EU partners, operate on a city or regional level, and have long-term planning horizons.

EU as Guardian of Liberal Order within Europe

Brussels should never treat member states as if they were like children, but if a country seems systematically to undermine the rule of law and restrict democracy, the EU has a responsibility to act. In these cases, an agency ought to be empowered to investigate the situation and then trigger a mechanism that sends a clear signal, but far short of the measures envisaged in Article 7 of the Lisbon Treaty. The European

Commission should be required to cut subsidies for infrastructure projects, for instance, or impose significant fines. At the same time, all the existing tools remain at the disposal of the relevant actors: member states could vote on Article 7; the Commission could take a member state to the European Court for infringement of the treaties; the Court could protect the substance of EU citizenship; and politicians could have a serious word with one of their peers in another member state, regardless of party affiliation, if they felt that the state in question is leaving the broad European road of liberal democracy.

Laboratories for Democracy

Democratic deliberation depends on the mobilization of citizens as stakeholders. Regular meetings of citizens, activists, and policymakers on both sides of the Atlantic to brainstorm about successful "best practices" in promoting democratic citizenship could serve that function. Public foundations and non-profits with experience in transatlantic networking could lead in instituting such "experimental democracy laboratories."

Transnational Legal Academies

Since legal developments are at the forefront of both EU and global trends, the institutionalization of transnational legal academies is desirable. In particular, we recommend founding a Legal Academy of Islamic, European, and North American Law. Women's rights, rights of non-Muslim minorities, blasphemy laws, freedom of expression, etc. are all at the center of the clash between the Islamic tradition and Western societies. One of the main tasks of the Academy would be to identify resources and practices in all traditions toward an overlapping consensus on these matters.

Rebalancing Modes of International Collaboration

The legitimacy and effectiveness of international institutions depends on inclusive as well as exclusive frameworks of international collaboration,

such as the UN and G20, respectively. The liberal democracies of North America and Europe have shown in the past that both have to go together in order to reconcile the inherent tensions between effectiveness and legitimacy. In the field of international/global security, one of the key challenges is to rebalance the emphasis between informal and exclusive networks of collaboration (such as the occasional exchange pursued during the last four years among the heads of the policy planning staffs of the foreign ministries of nine liberal democracies to coordinate their medium to long-term policies that was mentioned earlier) and formal international institutions such as the United Nations Security Council.

Track II Initiatives for Reforming the Global Security Architecture

One concrete project for the liberal democracies of North America, Europe, and other regions could be to initiate a joint medium-term exchange of ideas about an overhaul of the overarching security architecture of the international order, including a reform of the UN Security Council. UN reform is doubtlessly a tricky and extremely difficult task. However, in the field of peace and security, there is simply no other institution bestowed with the necessary legitimacy for binding (and, therefore, also effective) decisions. Since UN reform is a

highly sensitive topic even among close liberal-democratic allies, the respective planning staffs might want to pursue a semi-official route to generate new ideas by tasking selected think tanks in North America, Europe, and Asia to form joint study groups in order to come up with concrete proposals for how divisions and bottlenecks might be overcome.

In sum, we have chosen to document the achievements of the messy world of liberal democracies, as well as its dysfunctionalities, in an attempt to identify new modalities of democratic hope that can dissolve the current disconnect. We have sought to imagine ways of reconnecting society and the polity, the economic and the political, the local and the cosmopolitan, the spontaneous and the rule-bound, the ideal and the practicable. Cosmopolitan citizenship need not mean citizenship of the globe, despite its heart-warming sound. Cosmopolitan citizenship means the ever-widening circles of sympathy, concern, involvement, and activism in transnational networks and projects. Such citizenship is not only compatible with the local and the national but even vitalizes and reinvigorates it. Here, we believe, resides the hope for reconnecting the wiring of democracy's disconnected circuits.

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