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The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe

Bojan Bugarič¹

I. Introduction

The European Union is facing an unprecedented political crisis. This club of liberal and democratic countries has been confronted by a nationalist and populist backlash that threatens the core principles at the very heart of the EU.² Capitalizing on the European sovereign debt crisis, the backlash against refugees streaming in from the Middle East, public angst over the growing terror threat, and Brexit, previously fringe populist political parties are growing with alarming speed. Populists not only attack policies that are based on core institutional pillars of the European integration project, but quite often they also challenge the very foundations of the project as such.

Populism is an ideology or political movement that “considers society to be ultimately separated into two homogeneous and antagonistic groups, the pure people versus the corrupt elite, and which argues that politics should be an expression of the *volonte generale* of the people.”³ Populism seeks to speak in the name of the common people. Its distinctive features are the prioritization of popular sovereignty, direct democracy and a strong emphasis on anti-elitism. Beyond these shared common features, populism emerges in a variety of forms. While populism is hostile to elites, it is also vague and moralistic and as such quite easily instrumentalized by almost any type of ideology, both left and right. Hence, there exist several rather different varieties of populism: agrarian, socio-economic, xenophobic, reactionary, authoritarian, and progressive populism.⁴

Part of the blame for the populist upsurge falls on both center-right and center-left party leaders who have failed to respond effectively to the European debt crisis. This fact is often obscured by the current focus on the migrant crisis as the single most important contributor to the populist surge. As Vivien Schmidt correctly argues, it is “neo-liberalism gone too far”⁵ that is the major contributor to the anger fueling the rise of populism in Europe. There are also other rival theories attempting to explain the current rise of populism, which point to a variety of structural factors, ranging from the effects of globalization and global trade on income

¹ For their comments and suggestions, I would like to thank Francesca Bignami, Fernanda Nicola, Peter Lindseth, Philomila Tsoukala, and other participants of the the workshop.

² Desmond Dinan, Neil Nugent, and William Paterson, eds., *The European Union in Crisis* (London: Palgrave, 2017); James Kirchick, *The End of Europe: Dictators, Demagogues, and the Coming Dark Age* (New Haven: Yale University Press, 2017).

³ Cass Mudde, “The Populist Zeitgeist,” *Government and Opposition* 39, no. 4 (2004): 543.

⁴ Margaret Canovan, *Populism* (New York: Harcourt Brace Jovanovich, 1981); Noam Gidron and Bart Bonikowski, “Varieties of Populism: Literature Review and Research Agenda,” Working Paper Series, No.13-0004, Weatherhead Center for International Affairs, Harvard University, 2013, https://scholar.harvard.edu/files/gidron_bonikowski_populismlitreview_2013.pdf; Cass Mudde and Cristóbal Rovira Kaltwasser, “Populism,” in *The Oxford Handbook of Political Ideologies*, eds. Michael Freeden and Marc Stears (Oxford: Oxford University Press, 2013), 495-98.

⁵ Vivien Schmidt, “Missing Topic In #EUref: Neo-Liberalism Gone Too Far,” *Social Europe*, June 22, 2016, <https://www.socialeurope.eu/missing-topic-euref-neo-liberalism-gone-far>; see also Jurgen Habermas, “New” Perspectives for Europe, *Social Europe*, 22.10.2018, <https://www.socialeurope.eu/new-perspectives-for-europe>.

distribution,⁶ to a decline in the subjective social status of white men,⁷ and, last but not least, to culture—where populism is a reaction against progressive cultural change.⁸

Although the roots of populism are complex, austerity and neoliberal structural reforms are undoubtedly one of the most important underlying factors. The ruling parties' obsession with fiscal austerity, and with supply-side policies of privatization, deregulation, and liberalization, effectively triggered a "lost decade" of economic stagnation, rising unemployment, increasing poverty, and dwindling EU solidarity that paved the way for the poisonous ultra-nationalism now on the rise.⁹ All this has driven trust in the EU to an all-time low and fueled pathologies not seen since the 1930s, placing the European integration project on truly precarious ground. The new populist "Zeitgeist" is best described by Jan Zielonka, who argues that "under attack is not just the EU but also other symbols of the current order: liberal democracy and neo-liberal economics, migration and a multicultural society, historical 'truths' and political correctness, moderate political parties and mainstream media, cultural tolerance and religious neutrality."¹⁰ Moreover, while populism comes in many versions, what almost all populists in Europe share is the rejection of "people and institutions that have governed Europe in the last three decades."¹¹

In many countries, populist parties are the only ones to argue that there exists a real alternative. They protest against the "consensus at the centre"—between the centre-right and centre-left—around the idea that there is no alternative to neo-liberal globalization. In the eyes of populists, the European project is the embodiment of a ruthless process of globalization responsible for intolerable levels of inequality, declining trust in democracy, a rising danger of terrorism, and increasing fear of loss of one's "national" and "cultural" identity. Many major populist parties in Western Europe today are both anti-Eurozone and anti-European. On the left, only populists in Greece and Spain support both the euro and the European project. On the right, only two major populist parties (Germany's right-wing AfD and Italy's Five Star Movement) are not outright anti-European, but they are both against the euro.¹² The populists in the East have gone even farther in their confrontation with the EU. They frontally assault core EU values, contest the legitimacy of EU institutions and policies, and, at home, dismantle constitutional democracy.

⁶ Dani Rodrik, "Populism and the Economics of Globalization," *Journal of International Business Policy* (2018), https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf

⁷ Noam Gidron and Peter A. Hall, "The Politics of Social Status: Economic and Cultural Roots of the Populist Right," *British Journal of Sociology* 68, no. 1 (2017): 57-84.

⁸ Ronald F. Inglehart and Pippa Norris, "Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash," Faculty Research Working Paper Series, Harvard Kennedy School, August 2016, <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash>.

⁹ Barry Eichengreen, *The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era* (New York: Oxford University Press, 2018), 163.; Jason Beckfield, "European Integration and Income Inequality," *American Sociological Review* 71 (December 2006): 964-85; Jason Beckfield, *Unequal Europe: How Regional Integration Reshaped the Welfare State and Reversed the Egalitarian Turn* (Oxford University Press, forthcoming).

¹⁰ Jan Zielonka, *Counter-Revolution: Liberal Europe in Retreat* (New York: Oxford University Press, 2018), 2.

¹¹ Zielonka, *Counter-Revolution*, 3.

¹² Jeremy Ashkenas and Gregor Aisch, "European Populism in the Age of Donald Trump," *The New York Times*, December 5, 2016, <https://www.nytimes.com/interactive/2016/12/05/world/europe/populism-in-age-of-trump.html>.

The populist backlash in essence represents a delayed Polanyian response to the destructive forces of the unfettered logic of free markets.¹³ As Karl Polanyi demonstrated in his *Great Transformation*,¹⁴ when markets become “dis-embedded” from their societies and create severe social dislocations, people eventually revolt. Despite important differences between the new populist forces in Europe, they have “more in common than we think. They are all pro-welfare (for some people, at least), anti-globalization, and most interestingly, pro-state, and although they say it sotto voce on the right, anti-finance.”¹⁵ As Chantal Mouffe argues, populists are not against the European project as such, but only against “the neo-liberal incarnation of the European project.”¹⁶

Vindication of “the social”¹⁷ by the populist forces does not mean only a defense of social rights but also a demand for greater autonomy of Member States on cultural (identity) and economic issues.¹⁸ The populists do not seek to completely dismantle the EU. They do, however, demand that their national sovereignty be “restored” and oppose any further attempts toward an “ever closer union.” Much like in the 1930s, the protagonists of “the social” appear in different political forms, ranging from the extreme right to the extreme left on the political spectrum. While populist forces often pose legitimate political questions about the current state of democracy in Europe, their solutions tend to be controversial.¹⁹ Their visions of emancipating “the social” often bear an uncanny resemblance to illiberal and authoritarian ideals from the 1930s.

How did Europe get from the postwar ideal embodied in the Treaty of Rome that appeared to dislodge authoritarian nationalism to the situation where Member States feel threatened by the European project? Part II offers a brief overview of populism in the East, in particular the two most notorious cases of populist backlash, Poland and Hungary.

In Parts III and IV, I briefly examine how the EU deals with current populist backlash in cases where populists directly attack or undermine the authority of EU Law. In Part V, I argue that what is needed is a different approach. Instead of focusing only on legal or economic sanctions, the EU should look to alternative economic and social policies that would speak directly to the anxieties of populist voters.²⁰ The good news is that this trend can be reversed—but only if European leaders, together with the Member States, articulate a coherent alternative

¹³ Robert Kuttner, *Can Democracy Survive Global Capitalism?* (New York: W.W Norton & Company, 2018), xx-xxii.

¹⁴ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, 2nd ed. (Boston: Beacon Press, 2001).

¹⁵ Mark Blyth, “Global Trumpism: Why Trump’s Victory was 30 Years in the Making and Why It Won’t Stop Here,” *Foreign Affairs*, November 15, 2016, <https://www.foreignaffairs.com/articles/2016-11-15/global-trumpism>.

¹⁶ Chantal Mouffe, “In Defence of Left-Wing Populism,” *The Conversation*, April 29, 2016, <http://theconversation.com/in-defence-of-left-wing-populism-55869>; see also Chantal Mouffe, *For a Left Populism* (London: Verso, 2018).

¹⁷ For a similar concept of the social, see Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” in *The New Law and Economic Development: A Critical Appraisal*, eds. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2010), 19-73.

¹⁸ For a legal analysis of these issues see Gráinne de Búrca, “Is EU Supranational Governance a Challenge to Liberal Constitutionalism?,” *The University of Chicago Law Review* 85, no. 2 (March 2018): 337-68.

¹⁹ Cristóbal Rowira Kaltwasser, “The Response of Populism to Dahl’s Democratic Dilemmas,” *Political Studies* 62, no. 3 (2014): 470-87.

²⁰ For this point, see Fernanda Nicola, “Editorial. Another view of the Cathedral: What Does the Rule of Crisis Tell us About Democratizing the EU?,” *Maastricht Journal of European Law and Comparative Law* 25, no. 2 (2018): 133-38.

to the failed economic and social policies of the last decade. An economic policy that promotes growth, better jobs and wages, and social inclusion can stem the nationalist-populist tide.

II. The Populists at the Gate: The Hungarian and Polish Cases

In Europe, the main populist threat comes principally from the East. Fewer than fifteen years after accession to the European Union, Hungary, Poland, Slovakia, the Czech Republic, and Bulgaria have witnessed populists come to power. As a recent empirical study shows, the appeal of these populist parties has increased quite rapidly in the last two decades.²¹ Since 2000, when populist parties took an average of 9.2% of the national vote, their vote share has tripled, reaching 31.6% in 2017.²² An alarming finding of Freedom House's Nations in Transit Report²³ shows that for the first time since 1995, there are now more consolidated authoritarian regimes than consolidated democracies in the region. Hungary now has the lowest ranking in the Central European region. Poland's score reached its lowest point in the survey. Shortly after the global financial crisis in 2008, which served as a catalyst for change, alternative economic and political ideas emerged and spread through the region.²⁴ Neoliberal economic policies were gradually replaced with various statist models of development, combining economic protectionism with elements of leftist social welfare policies.²⁵ At the same time, political liberalism has been challenged by open flirtation with illiberal²⁶ and authoritarian forms of government.²⁷

Despite sharing many of the core elements of populism, not all populists in Eastern and Central Europe are the same.²⁸ Authoritarian populism has so far emerged only in Hungary and Poland, the two former front-runners of democratic transition. Authoritarian populism combines the key features of populism with essential ingredients of illiberalism: opposition to pluralism, the rule of law, and rights of minorities.²⁹ Other countries in the region have yet to go down that road. In Slovakia, the nominally left-wing (social-democratic) populist Robert Fico lost his absolute majority in 2016 elections and quickly toned down his populist rhetoric. Later, in February 2018, the murder of the investigative journalist Jan Kuciak triggered one of the largest demonstrations in Bratislava in the post-communist era, resulting in the resignation

²¹ Martin Eiermann, Yascha Mounk, and Limor Gultchin, "Report. European Populism: Trends, Threats, and Future Prospects," Institute for Global Change, 2017, <https://institute.global/insight/renewing-centre/european-populism-trends-threats-and-future-prospects>.

²² Eiermann, Mounk, and Gultchin, "Report. European Populism: Trends, Threats, and Future Prospects."

²³ Freedom House, "Nations in Transit 2017 Report. The False Promise of Populism," 2017, <https://freedomhouse.org/report/nations-transit/nations-transit-2017>.

²⁴ Tony Barber, "An Illiberal Streak Spreads Further Across Central Europe," Financial Times, December 8, 2015, <https://www.ft.com/content/e5f73e48-9cf4-11e5-b45d-4812f209f861>.

²⁵ Anne Applebaum, "Europe's New Right Sounds Like the Old Left," Financial Times, January 27, 2016, <https://www.ft.com/content/cffc9686-c393-11e5-808f-8231cd71622e>; Mitchell Orenstein, "Reassessing the Neo-Liberal Development Model in Central and Eastern Europe," in *Resilient Liberalism in Europe's Political Economy*, eds. Vivien Schmidt and Mark Thatcher (New York: Cambridge University Press, 2013), 374-402.

²⁶ Illiberal democracies are understood here, following Fareed Zakaria, as: "democratically elected regimes, often ones that have been reelected or reaffirmed through referenda [that] are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms." See Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76, no. 6 (1997): 22.

²⁷ Jan-Werner Müller, "Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Member States," *Foreign Affairs* 93, no. 2 (2014): 14-19.

²⁸ Anna Grzymala Busse, "Global Populisms and Their Impact," *Slavic Review* 76, no. S1 (August 2017): S3-S8.

²⁹ Bart Bonikowski, "Ethno-Nationalist Populism and the Mobilization of Collective Resentment," *The British Journal of Sociology* 68, no. S1 (2017): 190.

of Prime Minister Fico. Although his Smer-SD (Direction-Social Democracy), a national-populist political formation that employs left-leaning socialist rhetoric, still remains the most powerful party in the current governing coalition, the position of Smer-SD has been seriously weakened. As a result, in comparison with Hungary and Poland, “Slovakia in recent years has represented a less prominent case of the “illiberal turn,” rarely earning a mention in discussions of “democratic backsliding.”³⁰ Likewise, populists in the Czech Republic have not yet openly embraced illiberalism. The winner of the October 2017 elections in the Czech Republic was Andrej Babis, a billionaire populist impatient with the give-and-take of democratic politics, although not yet someone with a clear illiberal nationalist programme. His populism rhetoric is closer to the plutocratic version of populism espoused by figures like Donald Trump and the former Italian Prime minister Silvio Berlusconi, who promised to rid the country of corruption and run it like a business.³¹

In the Central European region, Hungary is the most visible example of authoritarian populism. Roughly a decade after Vladimir Putin steered his country toward “Putinism,”³² a new ideology aspiring to represent a Russian alternative to Western liberal order, Hungary followed in these footsteps. Hungary, a successful leader of transformation in the 1990s, had a current account deficit of €1.9 million in 2000, but €5.8 million by 2006; the country also became highly indebted and by 2009, its had debt reached 79% of GDP. Unemployment rose to 10% by 2010. Among the first countries in Europe, Hungary was bailed out by the International Monetary Fund (IMF) and the EU.³³ Because of the austerity measures introduced to reestablish financial order, a great part of the population suffered huge losses.³⁴ The crisis situation that characterized most of the country between 2008 and 2016 may be compared to waking up from a sweet dream to the gloomy reality for a great part of the population. All of the sudden, millions of people turned against following obediently Brussels. As Andrea Pirro explains, it was the deterioration of the Hungarian economy combined with the perception of undemocratic nature of the European architecture, which boosted Fidesz’s nationalism and Euroskepticism.³⁵

When Orbán came to power in 2010, he inherited a spiralling deficit and a €20 billion IMF bailout programme. The Fidesz agenda was to overturn neoliberal economic policies. The government reshaped the country’s taxation system, introducing, on the one hand, a flat-rate 16% income and imposing, on the other hand, crisis taxes on telecom, energy, media, and financial sectors on the other. The government also nationalised compulsory private pension

³⁰ Grigorij Meseznikov and Olg'a Gyarfašova, “Slovakia's Conflicting Camps,” *Journal of Democracy* 29, no. 3, (July 2018): 88.

³¹ Jiri Pehe, “Czech Democracy Under Pressure,” *Journal of Democracy* 29, no. 3 (July 2018): 71.

³² Putinism represents a mixture of economic statism, political authoritarianism and Russian Orthodox fundamentalism. Putin’s economic nationalism is strongly embedded in his “conservative revolution,” emphasizing the importance of Russian national “character” being at odds with traditional liberal values and principles. See Anne Applebaum, “Putinism: The Ideology,” LSE, February 2013, <http://www.lse.ac.uk/ideas/Assets/Documents/updates/LSE-IDEAS-Putinism-The-Ideology.pdf>.

³³ Kate Connolly and Ian Traynor, “Hungary Receives Rescue Package, with Strings Attached,” *The Guardian*, October 29, 2008, <https://www.theguardian.com/business/2008/oct/29/hungary-economy-imf-eu-world-bank>.

³⁴ As Claire Kilpatrick argues, “a key political priority of the newly elected Orbán government was to reduce public debt and deficit without resorting to typical austerity measures.” Even though the Orbán government used atypical deficit reduction measures, they still had dramatic effect on social rights. See Claire Kilpatrick, “Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry,” *Law* 2015/34, EUI Working Papers.

³⁵ Andrea L.P. Pirro, *The Populist Radical Right in Central and Eastern Europe: Ideology, Impact, and Electoral Performance* (New York: Routledge, 2015), 149.

funds, opening up a public revenue stream that has reduced the deficit. Since then, Orbán has forced utilities to reduce household bills and has required lossmaking banks to pay €3 billion in compensation to bank customers who took out foreign currency mortgages. Such populist measures helped his Fidesz party win another term in office in 2014.

Orbán has denounced the West as decadent and obsessed with money, and outlined a future Hungarian state—a “work based society.” Orbán called his approach, adopted after his 2010 election victory, the ‘Eastern winds’ approach to economic policy, to distinguish it from Western liberalism.³⁶ The key pillars of Orbán’s new economic policy were re-nationalisation of certain private companies, mostly in what he considered to be strategic sectors like oil (MOL), gas, utilities and banks, punitive taxation of foreign banks and insurance companies, and economic protectionism. The Orbán government’s ‘Eastern winds’ approach, while officially an economic policy, has from the beginning been heavily imbued with the implication of political and social transformation away from Western liberalism and individualism toward Eastern authoritarianism and collectivism. After Viktor Orbán's speech in Tusnádfürdő, it became more than clear that he wants to create an illiberal state, a different kind of constitutional order from liberal democracy.³⁷ The Orbán government has transformed Hungary into a semi-authoritarian regime that limits freedom of speech and assembly, curtails media pluralism, and undermines protection of minorities. Orbán has also curbed the independence of the courts, the civil service, and other institutions essential to the rule of law.³⁸

The novelty and irony of the Hungarian slide into authoritarianism is that it was achieved entirely through legal means. Due to its two-thirds majority in the Hungarian unicameral parliament (Diet), Fidesz faced few obstacles in achieving this “constitutional revolution.”³⁹ When there arose a need to change the rules of the game, the Hungarian parliament was able to simply amend the Constitution. In Hungary, the new populist government managed with relative ease to render the courts toothless by packing them with loyalists and curtailing their independence. The populists understood very well that by displacing the Constitutional Court, the core of the rule of law, they removed the major obstacle to the fulfillment of their aspirations. The once powerful and highly respected Court for the moment disappeared from the political scene.⁴⁰ After neutralizing the Constitutional Court, the populist government continued its legal “revolution” with attacks on lower (regular) courts: it lowered the judicial retirement age, allowing Orbán to remove most of the presidents of the courts and replace them with judges more to his liking.

At the moment, the Hungarian version of authoritarian populism represents the most problematic example of this trend in the region. The Fidesz government achieved a fundamental revision of the rules of the constitutional and political order in Hungary. In a scant eight years, it managed to transform Hungary from one of the success stories of the transition from socialism to democracy into a semi-authoritarian regime, where the new constitutional structure vests so

³⁶ “Orban and the Wind from the East,” *The Economist*, November 14, 2011, <https://www.economist.com/eastern-approaches/2011/11/14/orban-and-the-wind-from-the-east>.

³⁷ Kester Edy, “EU Urged to Monitor Hungary as Orban Hits at ‘Liberal Democracy’,” *Financial Times*, July 30, 2014, <https://www.ft.com/content/0574f7f2-17f3-11e4-b842-00144feabdc0>.

³⁸ Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppelle, “From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitution,” in *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, ed. Gábor Attila Tóth (Budapest: Central University Press, 2012), 268; Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppelle, “Disabling the Constitution,” *Journal of Democracy* 23, no. 3 (2012): 138-41.

³⁹ Kim Lane Scheppelle, “Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis,” *Transnational Law and Contemporary Problems* 23 (2014): 51-117.

⁴⁰ Bánkuti, Halmai, and Scheppelle, “Disabling the Constitution,” 140.

much power in the centralized executive that no real checks and balances exist to restrain this power. Despite the authoritarian turn, in 2018, Orbán secured his third successive election victory on the back of record turnout—and won another two-thirds majority which will allow Fidesz to change the Constitution again and further entrench its power.

In Poland, the new right-wing and populist Law and Justice (PiS) government has also set out to exploit a mix of ethnic nationalism and anti-capitalism reminiscent of that present in the interwar period, when authoritarianism—masquerading as democracy—prevailed in Admiral Miklós Horthy’s Hungary and Marshal Józef Piłsudski’s Poland. After winning the majority of votes in 2015 elections, Poland joined Hungary on its path to authoritarian populism.⁴¹

In Poland, the best economic performer in the region, it was primarily the poor, old and unemployed who helped to elect the new right-wing government. PiS promised a family allowance of \$130 a month per child, funded through a tax on banks and big business; a minimum wage; and a return to a retirement age of 60 for women and 65 for men. Despite the robust economic performance, the previous governing party, the neoliberal Civil Platform (PO) had left behind many regions like Silesia, as well as working people on so-called junk contracts earning less than \$200 a month. The millions of Poles in the small towns and poorer regions of “Polska B” “felt themselves to be marginalized and left behind by the bulldozer of economic liberalism. They were also, it’s important to add, alienated by the social liberalism, on issues such as abortion, gender, and sexual orientation, which came with the opening to Western Europe.”⁴² As Mitchell Orenstein and Bojan Bugarič observe, the new family allowance was huge boon for many:

For the many hundreds of thousands of working parents earning only 2,000–2,500 zlotys a month, this meant a sudden untaxed pay raise of twenty or even forty percent. Within a year, children living in extreme poverty declined by a third. Single mothers found themselves able to quit overly exploitative jobs and seek other options. Though such individual largesse comes at the expense of long-term projects like improving child-care networks and pre-schools, it is clearly a social policy that has helped many and proved tremendously popular.⁴³

Even economically liberal Financial Times reports that these policies have “also earned Poland the top spot in Oxfam’s latest index of social spending designed to reduce inequality.” Moreover, the Financial Times also argues that “[o]n the issues that voters care about, most voters agree with Law and Justice—and Law and Justice has delivered on those issues.”⁴⁴

Like in Hungary, the first institutional target of the new Polish government was the Constitutional Tribunal. As a result of a series of changes, the Constitutional Tribunal, “as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and

⁴¹ R. Daniel Kelemen, “Poland’s Constitutional Crisis: How the Law and Justice Party is Threatening Democracy,” *Foreign Affairs*, August 25, 2016, <https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis>.

⁴² Timothy Garton Ash, “Is Europe Disintegrating?,” *The New York Review of Books*, January 19, 2017, <https://www.nybooks.com/articles/2017/01/19/is-europe-disintegrating/>.

⁴³ Mitchell Orenstein and Bojan Bugarič, “Economic Causes (and Policies) of Populism in Eastern Europe,” *European Consortium for Political Research*, Hamburg, August 23, 2018, <https://ecpr.eu/MyEcpr/MyEvent.aspx?EventID=115>.

⁴⁴ James Shoter and Evon Huber, “Handouts Help Poland’s Voters Look Past EU Fight,” *The Financial Times*, October 18, 2018, <https://www.ft.com/content/4805fd6c-d119-11e8-a9f2-7574db66bcd5>.

parliamentary majority was born.”⁴⁵ After neutralizing the Constitutional Tribunal, the Polish government prepared three bills, recently adopted by the Sejm, which aim to control and capture the Supreme Court and the vast majority of other regular courts.⁴⁶ The new Law and Justice government also undermined Poland’s independent civil service and adopted new legislation seeking to bring the media under direct government control.⁴⁷

These legal and economic changes are part of a broader conservative political program founded upon a set of moral values that purportedly serve the protection of the Polish nation.⁴⁸ As Leszek Koczanowicz argues, PiS “aims not only to transform certain external conditions, but also to accomplish a comprehensive re-invention of mentality and radically re-direct the trajectory of social thinking.”⁴⁹ A combination of nationalism with social welfarism secures extremely high popularity of the ruling PiS party in Poland. According to Aleks Szczerbiak “many Poles feel that, while politicians have often promised to help the less well-off, Law and Justice is the first party to actually deliver on these pledges on such a scale.”⁵⁰

The new populism in Hungary and Poland differs from other populisms in Europe because it combines the elements of populism, ethno-nationalism and authoritarianism. While ethno-nationalism is present in most of Western European cases, it is the third element, authoritarianism, which sets the Hungarian and Polish type of populism apart from other European cases. Authoritarianism in the Hungarian and Polish context does not mean only the adoption of certain authoritarian values,⁵¹ such as stringent security and intolerance of multiculturalism and pluralism, but also a “style of governance that attempts to circumvent the rule of law and democratic norms in favor of centralized authority and limited political freedom.”⁵² Authoritarian populists in Hungary and Poland are explicitly anti-liberal but not necessarily anti-democratic.⁵³ They embrace the “form” of democracy and claim to speak for the people themselves, but, at the same time—by undermining its liberal constitutional foundations—they erode the substance of democracy and gradually transform it into various forms of illiberal and authoritarian regimes.⁵⁴

What differentiates Orbán and Kaczynski from other populists in Europe is the extent to which they oppose liberal democracy. They have gone much further in subverting liberal

⁴⁵ Wojciech Sadurski, “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding in Poland,” Sydney Law School Research Paper No.18/1 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491.

⁴⁶ Sadurski.

⁴⁷ Jan-Werner Müller, “The Problem with Poland,” *The New York Review of Books*, February 11, 2016, <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/>.

⁴⁸ Joanna Fomina and Jacek Kucharczyk, “Populism and Protest in Poland,” *Journal of Democracy* 27, no. 4 (2016): 61.

⁴⁹ Leszek Koczanowicz, “The Polish Case. Community and Democracy under the PiS,” *New Left Review* 102 (2016): 94.

⁵⁰ Aleks Szczerbiak, “Why is Poland’s Law and Justice Government so Popular?,” *The Polish Politics Blog*, October 26, 2017, <https://polishpoliticsblog.wordpress.com/2017/10/26/why-is-polands-law-and-justice-government-so-popular/>; see also Remi Adekoya, “Why Poland’s Law and Justice Party Remains so Popular?,” *Foreign Affairs*, November 3, 2017, <https://www.foreignaffairs.com/articles/central-europe/2017-11-03/why-polands-law-and-justice-party-remains-so-popular>.

⁵¹ Pippa Norris and Ronald Inglehart adopt such approach in defining authoritarian populism, see Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit and Authoritarian Populism* (New York: Cambridge University Press, 2018).

⁵² Bart Bonikowski, “Ethno-Nationalist Populism and the Mobilization of Collective Resentment,” *The British Journal of Sociology* 68, no. 1 (2017): 189-90.

⁵³ Anna Grzymala Busse, “Global Populisms and Their Impact,” S3.

⁵⁴ Müller, “Eastern Europe Goes South,” 15 **XX**.

democracy than most of the other populists in East-Central Europe. With a skillful invocation of conservative and authoritarian ideology, combined with the absence of a strong opposition, they mounted a successful crusade against liberalism. Irena Grudzinska-Gross writes about “the revival in Poland, Hungary and...some other countries of the region, of the very old conservative style of government, including the resurrection of the extreme right wing movements and, in Poland, of religious fundamentalism.”⁵⁵ Iván Szelényi and Tamás Csillag argue that this drift to illiberalism and authoritarianism has also a legitimating ideology, a traditionalist/neoconservative ideology, which emphasizes the value of patriotism, religion, and traditional family values. They maintain that a combination of political illiberalism, economic statism and conservative ideology represents the building blocks of a new type of order in post-communist world: A managed illiberal capitalism.⁵⁶ Because of these additional features, this form of populism has strong authoritarian inclination.

III. The EU to the Rescue?

Some observers argue that the existence of international organizations such as the European Union makes the backsliding currently underway in Poland and Hungary quite different from the “constitutional coups” of earlier eras.⁵⁷ One of the most crucial political questions facing Europe today is how well the EU is equipped, legally and politically, to defend democracy and the rule of law in its Member States. It is therefore necessary to examine how the EU is managing its first real attempts at safeguarding democracy within Member States. A political club of democratic regimes established primarily to promote peace and prosperity in postwar Europe, the EU must now confront Member States that are turning away from liberal democracy. EU law currently offers three legal options for dealing with cases such as those of Hungary and Poland.

The first is to invoke Article 7 of the Treaty on European Union (TEU), the so-called nuclear option, which lays out a procedure for determining whether a Member State has violated the values stated in Article 2 and, if so, allows for the suspension of certain rights. This provision was first introduced in the 1997 Treaty of Amsterdam (amending the 1992 Maastricht Treaty), which states that in cases where there has been a “serious and persistent breach” of the “principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,” the Council of the European Union can “suspend certain...rights...including the voting rights of the representative of the government of that Member State in the Council.” In December 2017, the European Commission launched Article 7 proceedings against Poland for breaching European common values and rule of law.⁵⁸ And most recently, in September 2018, the European Parliament has voted to trigger the EU’s most serious disciplinary procedure against Hungary, saying the country’s government poses a “systematic threat” to democracy and the rule of law. The vote was carried with the support of 448 MEPs, narrowly clearing the

⁵⁵ Irena Grudzinska-Gross, “The Backsliding,” *East European Politics and Societies and Cultures* 28, no. 4 (2014): 664.

⁵⁶ Tamás Csillag and Iván Szelényi, “Drifiting from Liberal Democracy: Traditionalists/Neoconservative Ideology of Managed Illiberal Democratic Capitalism in Post-Communist Europe,” *Intersections: East European Journal of Society and Politics* 1, no. 1 (2015): 1-27.

⁵⁷ Kim Lane Scheppele, “Constitutional Coups and Judicial Review.”

⁵⁸ For a more comprehensive overview of the EU legal approaches to Poland and Hungary, see Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU,” *Cambridge Yearbook of European Legal Studies*, 19 (2017): 3–47, and R. Daniel Kelemen and Kim Lane Scheppele, “Defending Democracy in EU Member States: Beyond Article 7 TEU,” this volume.

required two-thirds majority, after Hungary's prime minister, Viktor Orbán, was abandoned by many of his allies in the centre-right European People's Party (EPP). The crucial problem of Article 7 is that in order to employ the preventing mechanism, Article 7 requires a majority of four-fifths of the Council and assent of the European Parliament. The sanctioning mechanism, on the other hand, requires even higher threshold, i.e. unanimity in the Council and assent of the European Parliament. Hence, it is highly unlikely that Article 7 will ever be used against countries like Hungary or Poland.

The EU's second legal option for dealing with countries veering off the democratic path is detailed in Article 258 of the Treaty on the Functioning of the European Union (TFEU). Article 258 states that if the European Commission finds that a Member State has "failed to fulfil an obligation under the Treaties" and that State then fails to rectify the matter, the Commission "may bring the matter before the Court of Justice of the European Union [CJEU]." This is what has happened in the cases of Hungary and Poland.

To focus on Hungary, the Commission has brought several separate suits against Hungary under Article 258 TFEU. The most interesting case involved a provision in Hungary's Transitional Act on the implementation of the 2012 Constitution, which lowered the retirement age of judges from seventy to sixty-two. This provision would have forced 274 judges and public prosecutors into retirement in a short period of time. The Commission considered the rule to be a violation of the independence of the judiciary. For strategic reasons, it decided to utilize very narrow legal grounds to deal with the case: It relied exclusively on Council Directive 2000/78/EC on equal treatment in employment, which prohibits discrimination on grounds of age. In November 2012, the European Court of Justice (ECJ) ruled that the radical lowering of the retirement age for Hungarian judges constituted age discrimination and violated Council Directive 2000/78/EC.⁵⁹

Despite this legal victory, the retired judges were never comprehensively reinstated, and Fidesz loyalists basically stayed in place. As Jan-Werner Müller argues, in the end "Europe appeared impotent in getting at the real issue, which was political and had nothing to do with the discrimination [against] individuals."⁶⁰ Separate legal proceedings such as this discrimination suit may yield important legal victories, but they ultimately fail to address the broader institutional issues that threaten the foundations of the rule of law and liberal democracy in Hungary.

The final option in the EU's legal arsenal is the Rule of Law Framework. The Framework was adopted in 2014, mainly in response to the inability of the key EU actors to agree on invoking Article 7. Often called the "pre-Article 7 procedure," the Rule of Law Framework complements Article 7 by establishing a structured "preparatory" phase for taking Article 7 actions. The Commission first assesses whether there is a systemic threat to the rule of law in a specific country. It then sends a "rule-of-law opinion" to the Member State in question as a basis for dialogue to resolve the issue. If that Member State ignores the opinion, the Commission then issues a "rule-of-law recommendation" and monitors the country's follow-up. If it is ultimately unsatisfied with the country's response, the Commission may decide to activate Article 7.

⁵⁹ Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

⁶⁰ Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law Inside Member States," *European Law Journal* 21, no. 2 (March 2015): 148.

The Framework's greatest shortcoming is that it offers little in the way of viable sanctions that can be used before the activation of Article 7. When Poland was investigated under the Framework in 2016, Prime Minister Szydło made it clear that her government was not worried about the inquiry. Moreover, she did not shy away from expressing strong contempt toward Brussels' action, calling the investigation an "ideological threat" to Poland's national sovereignty.⁶¹

For now, it seems as though little can be expected from EU legal actions aimed at protecting the rule of law in Member States. Writing about "subnational authoritarianism," Daniel Kelemen argues that "legal levers alone are unlikely to safeguard democracy... So long as political leaders are willing to put partisan interests above democratic values, they may allow... autocracy to persist for decades within otherwise democratic political systems."⁶² This holds true at the supranational (EU) and national (Member State) levels as well. It will take bold political action on the part of other EU Member States to defend core EU values more effectively.

IV. From Legal to Economic Sanctions?

Article 7 would likely be far more effective if it included the possibility of economic sanctions, which would weigh heavily on a country such as Hungary that is heavily dependent on EU structural funds. In 2012, Orbán declared that Hungary "will not be a colony" of the EU. But he had no qualms about signing a six-year budget agreement with the EU that will provide nearly \$40 billion in aid for Hungary (whose annual GDP is \$125 billion) between 2014 and 2020. Poland also benefits substantially from EU aid. On October 5, 2014, the *New York Times* reported that Poland (whose 2013 GDP was \$518 billion), would receive a total of \$318 billion in EU aid between 2008 and 2020. This is more than two times the present-day value of the Marshall Plan. The annual average accorded to each Marshall Plan recipient for four years was \$2.5 billion. By 2020, Poland will be receiving \$26.5 billion per year.

These aid deals should be a great source of leverage for the EU. Yet studies suggest that economic sanctions seldom work.⁶³ In the case of the EU, a big reason why "economic sanctions have fallen short in the past is that not all countries have complied. Indeed, significant differences of domestic opinion in the imposing country often undermine sanctions as well."⁶⁴ Therefore, future attempts at imposing economic sanctions should be backed by a strong regional consensus. In light of current events, however, achieving consensus is no small task. Even the EU institutions themselves have not agreed on a common language for the Hungarian

⁶¹ Aleksandra Eriksson, "Poland Defies EU on Rule of Law," *EU Observer*, October 27, 2016, <https://euobserver.com/news/135698>. Afterwards, the Venice Commission—not an EU body, but a Council of Europe advisory group of constitutional experts—issued a draft opinion strongly criticizing the Polish government, and declaring that its actions "endanger not only the rule of law, but also the functioning of the democratic system." Council of Europe, Venice Commission, Opinion No. 833/2015, On Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (March 11-12, 2016). But Szydło told the Polish media that the Venice Commission findings were not legally binding on Poland. See Jan Cieski and Maia de la Baume, "Poland's 'Rule of Law in Danger'," *Politico*, February 2, 2016, <https://www.politico.eu/article/poland-kaczynski-szydlo-tribunal-constitution-crisis/>.

⁶² R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in a Democratic Union," *Government and Opposition* 52, no. 2 (April 2017): 211-38.

⁶³ Gary Clyde Hufbauer, Jeffrey Schott, Kimberly, Ann Elliott, and Barbara Oegg, *Economic Sanctions Reconsidered*, 3rd ed. (Washington, D.C.: Peterson Institute for International Economics, 2009).

⁶⁴ Kenneth Rogoff, "Do Economic Sanctions Work," *Project Syndicate*, January 2, 2015, www.project-syndicate.org/print/do-economic-sanctions-work-by-kenneth-rogoff-2015-1.

and Polish cases. The EU's flawed approach to Hungary has already damaged the Union's political legitimacy, while the Eurozone crisis, the migration crisis, Brexit, and Russia's occupation of Crimea and other parts of Ukraine have left the EU more politically divided than ever before. Needless to say, in such a fragile union, consensus on sanctions may remain elusive.

Like other international organizations, the EU is more likely to exert pressure on a Member State when foreign interests are at stake; it is less likely to intervene over matters of domestic policy and "the internal functioning of democracy, such as curtailment of press freedoms, corruption in public administration, and the centralization of power in the hands of the ruling party,"⁶⁵ in part because it is in the EU's interest to maintain stability and also because the issue of national sovereignty is delicate. While the EU has made massive encroachments on the fiscal sovereignty of Member States (with the Fiscal Compact, the European Stability Mechanism, and the "Six Pack" and "Two Pack" legislation), it is more reluctant to impinge on national sovereignty when it comes to sensitive social or political matters. This contrast between fiscal and sociopolitical measures reflects the limits of EU integration toward a stronger political union. EU institutions and elites seem to lack the same enthusiasm and political will for protecting fundamental values such as democracy and the rule of law as they displayed for dealing with the Eurozone crisis.

V. From Sanctions to Alternative Economic and Social Policies

Instead of focusing only on sanctions, European political leaders should articulate a coherent alternative to the failed neoliberal economic policies of the last decade. What counts this time are sensible economic, social and environmental policies promising to improve daily lives of European citizens. The EU needs to regain credibility by delivering simple and palpable benefits, such as good salaries, decent pensions, high-quality social services, and high environmental standards. In other words, it needs to improve what political theorists define as "output legitimacy."⁶⁶ Only an economic policy that promotes growth, better jobs, wages, and social inclusion can stem the nationalist tide. To prevent history from repeating itself, Europe must act now.

Since the beginning of the Eurozone crisis in 2009, governments across Europe have single-mindedly embraced fiscal austerity.⁶⁷ This has meant double-digit government spending cuts, and the elevation of the austerity paradigm spearheaded by German Chancellor Angela Merkel to an essentially 'unbreakable law.' The new Fiscal Compact, a treaty signed by all EU members except the United Kingdom and the Czech Republic, effectively outlaws the counter-cyclical economic policies espoused by Keynesianism, and establishes austerity and balanced budgets as the new fundamental principles of the EU constitutional order.⁶⁸ Lacking the

⁶⁵ Erin K. Jenne and Cass Mudde, "Hungary's Illiberal Turn: Can Outsiders Help?," *Journal of Democracy* 23, no. 3 (July 2012): 150.

⁶⁶ See Vivien Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput," *Political Studies* 61, no. 1 (2013): 2-22.

⁶⁷ In this section I use a few parts from B. Bugarić, M. Nahtigal, *The EU Fiscal Compact: Constitutionalization of Austerity and Preemption of Democracy in Europe* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194475

⁶⁸ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [hereinafter TSCG]. It was signed on March 2, 2012 and it entered into force on January 1, 2013, available at https://www.consilium.europa.eu/media/20399/st00tscg26_en12.pdf (not published in the OJEU). See Fintan O'Toole, "Treaty Seeks to Outlaw One Side of the Debate," *The Irish Times*, March, 6, 2012, <https://www.irishtimes.com/opinion/treaty-seeks-to-outlaw-one-side-of-the-debate-1.476193>.

unanimous support of all the Member States, the Fiscal Compact could not be adopted as an amendment to the EU treaties. Instead, it took the form of a separate inter-governmental treaty, requiring ratification by at least twelve Eurozone members (Article 14 TSCG) to take effect. The Fiscal Compact was only the last in a series of constitutional and legislative measures adopted by EU political leaders with the intent to “solve” the Eurozone crisis.⁶⁹ As most of the other measures initiated by the German-led, center-right coalition of political forces, the Fiscal Compact subscribed to a now-dominant economic “theory” of austerity which informs most of its rules. Namely, the main culprits for the euro crisis, according to this theory, are profligate governments and their public sectors. As a consequence, the only hope to discipline such “irresponsible” governments is to impose strict fiscal rules (balanced budgets) preventing the further increase of budget deficits and public debt.

The Fiscal Compact deviates from traditional EU values of democracy, institutional balance, and the equality of Member States.⁷⁰ It empowers European bureaucrats, judges, and bankers at the expense of European citizens. Instead of using an ordinary revision procedure for Treaty amendments (Article 48 of TEU) or enhanced cooperation as provided for in Article 20 TEU and in Articles 326 to 334 of the TFEU, the Fiscal Compact was adopted outside the EU law, as a separate international treaty. As a consequence, it could bypass the more democratic and transparent procedure provided for in the EU law, in particular the participation of the European Parliament and the national parliaments. Only Ireland put the Fiscal Compact to democratic debate, through a referendum, but it did so because of the requirements of the Irish constitution.⁷¹ As an international treaty, the Fiscal Compact also side-stepped the independent judicial review, separation of powers, and respect for fundamental rights of EU law.⁷² Furthermore, it entered into force when it was ratified only by twelve out of seventeen members of the Eurozone, which clearly deviates from the established consensual principles among the Member States. As Simon Hix, one of the leading experts on the EU political system, contends, any decision with significant redistributive consequences requires a strong sense of political legitimacy for the decision to be accepted by those to whom it applies. Given all of these flaws, therefore, it comes as no surprise that Hix concludes that the Fiscal Compact lacks the political legitimacy.⁷³ Agustín José Menéndez, a prominent EU legal scholar, goes even further and argues that the Fiscal Compact is unconstitutional: “By taking fundamental decisions on the way European competences are organized and executed outside EU treaties, Member States are opting out of Union law. They are therefore undermining the integrity of EU law.”⁷⁴

⁶⁹ See contributions in Part One of this volume for a complete account of the legislative and constitutional changes enacted in response to the euro crisis.

⁷⁰ Agustín Menéndez, “Editorial: A European Union in Constitutional Mutation?,” *European Law Journal* 20, no. 2 (March 2014): 127–41.

⁷¹ Irish voters approved the Compact, but, as many commentators suggested, with a gun to their heads. Namely, Recital 25 of the Fiscal Compact makes access to financial assistance from the European Stability Mechanism, which Ireland needed at that time, conditional on the ratification of the Compact. As Andy Storey argues, in the Irish case the EU elites did almost everything to avoid a referendum in Ireland, including deliberately rewording the original text of the Compact. See Andy Storey, “The Vampire Treaty and the Irish Referendum,” *Transnational Institute*, March 6, 2012, <https://www.tni.org/en/article/vampire-treaty-and-irish-referendum>.

⁷² Lukas Oberndorfer, “The Fiscal Compact Bypasses Democracy and the Rule of Law,” *Transnational Institute*, March 8, 2012, <https://www.tni.org/en/article/the-fiscal-compact-bypasses-democracy-and-the-rule-of-law>.

⁷³ “European Scrutiny Committee. Written Evidence Submitted by Simon Hix,” UK Parliament website, last visited November 7, 2018,

<https://publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1817/1817we02.htm>.

⁷⁴ Agustín José Menéndez, “The EU’s Unconstitutional Treaties,” *Politico*, June 27, 2012, <https://www.politico.eu/article/the-eus-unconstitutional-treaties/>.

Even more problematic are the substantive legal aspects of the Fiscal Compact. As recounted above, the Compact, in essence, entrenches a certain economic theory at the level of constitutional law. Thus, for the first time in the EU history, the EU constitution explicitly biases the content of decision-making in the direction of neoliberalism-liberal bias in the EU legal order, the new Austerity Union in the making does this in a more explicit and profound way, leaving almost no room for a discretionary fiscal policy to Member States.

While it is true that the Fiscal Compact mostly reproduces already existing provisions of EU law,⁷⁵ its importance should not be underestimated. The core provision of the Fiscal Compact (Article 3) contains a ‘structural budget deficit’ rule that requires that the country’s structural deficit not exceed 0.5 per cent of GDP. To elaborate: Article 3 stipulates that the budgetary position of the general government of a Contracting Party shall be balanced or in surplus. This is interpreted as the annual structural balance of the general government at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact (SGP),⁷⁶ with a lower limit of a structural deficit (a deficit calculated using a cyclically adjusted budget balance corrected for one-off and temporary measures) of 0.5 % of GDP at market prices, i.e. market price for sovereign debt). The aim of this “golden rule” of balanced budgets is to ensure stricter budgetary discipline among the EU governments. Another element of the Fiscal Compact is the so-called “debt brake” (“schuldenbremse”) contained in Article 4, modeled upon the German constitutional provision that requires the federal government to reduce its structural deficit to 0.35 % of GDP by 2016.⁷⁷ Under Article 4, Member States with government debt ratios in excess of 60% of GDP are to reduce their debt ratios in line with a numerical benchmark, which implies a decline of the amount by which their debt exceeds the threshold at a rate in the order of 1/20th per year over three years. Consequently, countries with a debt ratio exceeding 60% of GDP are subject to strict rules. The Fiscal Compact (following the ‘Six Pack’) makes it possible for the European Commission to open an excessive deficit procedure under Article 126 TFEU on the basis of the debt criterion. It also places compliance with its budgetary and other requirements under the jurisdiction of the European Court of Justice, which can fine countries up to 0.1 % of their GDP if they do not transpose correctly the

⁷⁵ The legislative “Six Pack” and “Two Pack” preceded the adoption of the Fiscal Compact and were designed to enhance the surveillance of Member States’ economic policies and to foster budgetary discipline. The Six Pack includes European Parliament and Council Regulation 1173/2011, On the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1; European Parliament and Council Regulation 1174/2011, On Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; European Parliament and Council Regulation 1175/2011, Amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12; European Parliament and Council Regulation 1176/2011, On the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Council Regulation 1177/2011, Amending Regulation (EC) No 1467/97 on Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33; Council Directive 2011/85/EU, On Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41. The Two Pack is composed of European Parliament and Council Regulation 472/2013, On the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability, 2013 O.J. (L 140) 1; European Parliament and Council Regulation 473/2013, On Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, 2013 O.J. (L 140) 11.

⁷⁶ For a descriptive account of the original SGP rules and the subsequent reforms (2005 to 2011), see Antonio Estella, *Legal Foundations of EU Economic Governance* (Cambridge: Cambridge, 2018), 134-57.

⁷⁷ No surprise then that one of the leading European legal journals, cynically referring to the statement of the CDU parliamentary leader Volker Kauder, entitled its editorial “The Fiscal Compact and the European Constitutions: Europe Speaking German,” Leonard Besselink and Jan-Herman Reestman “Editorial. The Fiscal Compact and the European Constitutions: ‘Europe Speaking German’,” *European Constitutional Law Review* 8 no. 2 (2012): 1.

balanced budget rules. This jurisdiction represents an unprecedented constitutional intrusion, since the European Court of Justice has never had the power to interpret national constitutions of the Member States; the ECJ will be asked to decide on intricate issues of national constitutional law, which directly implicates the will of the people contained in national constitutions.⁷⁸

The Member State signatories are required to implement the Fiscal Compact with new provisions “of binding force and permanent character,” preferably in their constitutions.⁷⁹ As a consequence, the economic theory of austerity will be constitutionalised on both the EU and national level; Keynesianism is ruled out precisely when it is most needed. Hence, the new Austerity Union will be almost impossible to change. The Fiscal Compact instrumentalizes national constitutional law for the benefit of the Union law “to a degree not seen before.”⁸⁰ As Menéndez critically argues, national constitutions leave no room for the transfer of sovereignty to mere inter-governmental processes, yet this has precisely what has been accomplished through the Fiscal Compact and the introduction of constitutional amendments via the Fiscal Compact. The very choice of form is, according to Menéndez, a breach of national constitutional law,⁸¹ and results in the amendment of the “pouvoir constituant” of the Member States.⁸²

Beyond the form, as Antonio Estella argues, the new rules of EU economic governance (Fiscal Compact, Six Pack and Two Pack.) represent “an unprecedented turn to rigidity in the history of the evolution of the SGP.”⁸³ The new rules restrict the fiscal policy of Member States even more so than the rules from before the euro crisis. The new rules strike “at the heart of the institutions of parliamentary democracy by dislocating as a matter of constitutional principle the budgetary autonomy of the Member States.”⁸⁴ To put even more pressure on Member States, access to financial assistance under European Stability Mechanism (ESM)⁸⁵ is conditional on prior ratification of the Fiscal Compact. After the European Court of Justice ruling in the Pringle case,⁸⁶ where the Court basically constitutionalised the principle of strict conditionality contained in the ESM Treaty, countries seeking financial assistance from the ESM will be subjected to even more explicit forms of fiscal retrenchment imposed through the Memoranda of Understanding which struggling Member States have to “negotiate” with the Troika made up of the European Commission, the International Monetary Fund, and the European Central Bank.⁸⁷

⁷⁸ Both Damian Chalmers and Agustín Menéndez are highly critical of this new role for the European Court of Justice. See Damian Chalmers, “The ECJ has Taken on Huge New Powers as ‘Enforcer of Last Week’s Treaty on Stability, Coordination and Governance. Yet its Record as a Judicial Institution Has Been Little Scrutinized,” LSE European Blog, March 7, 2012, <http://blogs.lse.ac.uk/euoppblog/2012/03/07/european-court-of-justice-enforcer/>.

⁷⁹ TSCG, art. 3, para. 2.

⁸⁰ Besselink and Reestman, “Editorial. The Fiscal Compact and the European Constitutions,” 5.

⁸¹ Menéndez, “The EU’s Unconstitutional Treaties.”

⁸² Loic Azoulai et al., “Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty,” Law 2012/09, EUI Working Papers, 12.

⁸³ Estella, *Legal Foundations of EU Economic Governance*, 170. For an overview of the implementation of Fiscal Compact see Matthias Ruffert, “The Future of the European Economic and Monetary Union: Issues of Constitutional Law,” this volume.

⁸⁴ Besselink and Reestman, “Editorial. The Fiscal Compact and the European Constitutions,” 1.

⁸⁵ ESM is the EU’s major bailout mechanism, which was established in a separate international treaty and signed by the nineteen members of the Eurozone.

⁸⁶ Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756.

⁸⁷ Estella, *Legal Foundations of EU Economic Governance*, 180.

The Fiscal Compact has brought not only a deep intrusion into the fiscal maneuvering room of the Member States. It is also too rigid and too restrictive in terms of its budgetary and fiscal rules. Although many of its rules are ambiguous, that does not solve the problem of rigidity of its main “targets,” i.e. rules on the allowed structural budget deficit and public debt. The European Macro Group—three European macroeconomic institutes: IMK from Düsseldorf, WIFO from Vienna and OFCD from Paris—prepared a joint study on the impact of austerity measures, reinforced by the Fiscal Compact. As the study shows,⁸⁸ few of the EU countries undergoing severe economic crisis are able to implement the rules without seriously undermining their prospects for future economic growth. Their detrimental effect can also be clearly seen from those countries which are used as role models for fiscal discipline. Switzerland, which first introduced the debt brake in 2003, today has indeed a very low debt-to-GDP ratio, but its levels of public investments are among the lowest in the developed world.⁸⁹ Germany, the main “exporter” of balanced budget rules and debt brakes also faces a critical lack of public investment in areas such as green energy and education.

It is no surprise that the EU’s Austerity Union has been criticized from many quarters. At the height of the euro crisis, authors like Wolfgang Streeck, Fritz Scharpf, and Perry Anderson described the situation in bailout countries as sovereignty “on paper,”⁹⁰ an “occupation regime by the “Troika” [of the European Commission, International Monetary Fund, and European Central Bank],⁹¹ and a Troika diktat regime “reminiscent of Austria in 1922, when the Entente, under League of Nations colors, posted a high commissioner to Vienna to run the economy.”⁹² Others have observed that both the management of the euro crisis and the Fiscal Compact have deepened the divide between the Union core and periphery in the Union. Damian Chalmers observes the differentiated impact of the Fiscal Compact on two different groups of countries: those few like Germany, Finland, Luxemburg, and Estonia who already have a balanced budget will not be particularly affected; and the overwhelming majority of others that will face very demanding requirements.⁹³ Needless to say, countries like Greece, Portugal, and Spain may in fact, in the end, achieve their required deficit and debt targets but the cost are already prohibitively high. Greece, for example, a country ranked 18th according to the UN Human Development Index in 2008, is today on the verge of a humanitarian crisis. Even such pro-EU figures as Jacques Delors have fiercely criticised the Fiscal Compact. In a speech in the European Parliament, Delors referred to the Fiscal Compact as a gas factory (“usine a gaz”).⁹⁴

The problem is that this myopic austerity focus rests on a misdiagnosis of the euro crisis, has backfired economically, and has triggered grave social and economic repercussions in indebted countries.⁹⁵ Nevertheless, austerity remains the virtually unchallenged “official” EU

⁸⁸ IMK, OFCE, and WIFO, “Fiscal Pact Deepens Euro Crisis—Joint Analysis of the Macro Group,” March 2012, 20-23, www.boeckler.de/pdf/p_imk_report_71e_2012.pdf.

⁸⁹ Adam Tooze, “Germany’s Unsustainable Growth; Austerity Now, Stagnation Later,” *Foreign Affairs*, September/October 2012, <https://www.foreignaffairs.com/articles/germany/2012-09-01/germany-s-unsustainable-growth>.

⁹⁰ Wolfgang Streeck, “Markets and Peoples: Democratic Capitalism and European Integration,” *New Left Review* 73 (January/February 2012): 63-71.

⁹¹ Fritz Scharpf, “Monetary Union, Fiscal Crisis, and the Preemption of Democracy,” LEQS Paper No. 36/2011, LSE Europe In Question Discussion Paper Series, May 2011.

⁹² Perry Anderson, “After the Event,” *New Left Review* 73 (January/February 2012): 49-61.

⁹³ Damian Chalmers, “The European Redistributive State and a European Law of Struggle,” *European Law Review* 18, no. 5 (2012): 678, 667-93.

⁹⁴ Georgi Gotev, “Delors Points the Finger at Europe’s ‘Killers,’” *Euroactive*, March 29, 2012, <https://www.euractiv.com/section/elections/news/delors-points-the-finger-at-europe-s-killers>.

⁹⁵ In an important study, three economists from the IMF argue that austerity policies can do more harm than good. Jonathan D. Ostry, Prakash Loungani, and Davide Furceri, “Neoliberalism Oversold?,” *Finance and*

economic doctrine. What Europe needs more than anything is a new anti-austerity coalition, focused on growth and social justice. Only a Europe willing to revert back to some basic Keynesian policies of economic stimulus, as the US government did at the outset of Barack Obama's presidency, combined with economic innovations that include much-needed investments in infrastructure, education, and social programs, can restore Europe to stability, and reverse its dangerous nationalist surge.

In order to achieve this objective, a fiscal and political Union might not be the best alternative. As Ashoka Mody convincingly explains, it is naïve to expect that only a further federalization of "incomplete" monetary Union could solve the accumulated problems of the Eurozone economies:

Today many hope that, spurred by French President Emmanuel Macron's call for euro area reform, Merkel will work on repairing the euro area's architecture. Such a hope is illusory. Merkel is all too aware that any sign of financial generosity toward Europe will embolden the rebels within the CDU. Other northern nations have made clear that they will oppose calls on their taxpayers (Rutte 2018, Finance Ministers 2018). No euro area nation state is willing to cede its national parliament's sovereignty on fiscal matters. Policy decisions will remain disengaged from politics. Hence, even if new financial arrangements are engineered, it will be impossible to achieve accountability in euro area governance. Political tensions will continue to build.⁹⁶

Instead of looking for "more Europe," Mody suggests, European leaders should shift their attention to domestic public rebellions.

For too long, euro area leaders have dismissed or denigrated the domestic public rebellions. This is a terrible mistake. However inchoate, and sometimes nationalistic and xenophobic, these rebellions have been, they convey an important message. In addition to the distress the euro directly inflicts, the single currency distracts European leaders' attention from where it ought to be directed: domestic priorities. Of special importance is strengthening human capital, a capability in which all southern euro area countries (and even some northern countries) are lagging behind world leaders. Investment in human capital is crucial to achieving greater equity and sense of fairness while helping to regain international competitiveness.

Put simply, European leaders must shift their efforts away from the ultimately impossible goal of making euro area governance more accountable and towards national domestic economic agendas that give hope to those who feel disenfranchised. If they fail to make this shift, domestic politics will continue to fragment, and as that happens, European politics will become ever more corrosive.⁹⁷

Development 53, no. 2 (June 2016): 38-41; see also Paul de Grauwe and Yuemei Ji, "The Legacy of Austerity in the Eurozone," CEPS Commentary, October 4, 2013.

⁹⁶ Ashoka Mody, "The Euro Area's Deepening Political Divide," Vox, March 21, 2018, <https://voxeu.org/article/euro-area-s-deepening-political-divide>. Mody's arguments have been further elaborated in his magisterial study Ashoka Mody, *Euro Tragedy: A Drama in Nine Acts* (New York: Oxford University Press, 2018). I would like to thank Peter Lindseth for this reference.

⁹⁷ Mody, "The Euro Area's Deepening Political Divide"; Mody, *Euro Tragedy*.

Barry Eichengreen offers another economic explanation on why only a re-nationalization of fiscal policy can stem the tide of European populism.⁹⁸ His core thesis is that the evidence for large cross-border spillovers of national fiscal policies is weak. At the same time, the core questions of fiscal policy—whom to tax, how to tax, and how much to tax—are one of the most sensitive political and social questions, which are quintessentially national prerogatives. When cross-country spillovers are small but national preferences differ, the best option is to leave the decision-making at the national level. He concludes: “For fiscal policy then, the appropriate reform is less Europe, not more Europe.”⁹⁹

Similarly, Vivien Schmidt notes that “the EU needs to give back to the member-states the flexibility they have had in the past to devise policies that work for them.”¹⁰⁰ To this end, a more bottom-up and flexible reinterpretation of the rules of Eurozone governance is required: “[T]he Eurozone already has an amazing architecture of economic coordination, reaching into all the Eurozone ministries of finance and country economic experts. Why not use that coordination to ensure that countries themselves determine what works for their very specific economic growth models and varieties of capitalism?”¹⁰¹ The existing framework of the European Semester,¹⁰² redesigned in this way, could help Member States to get back on the path of sustainable growth. The fiscal councils could be supplemented by new competitiveness councils to act more as industrial policy councils rather than structural adjustment hawks; in Schmidt’s words, “such a bottom-up approach is likely not only to promote better economic performance but also much more democratic legitimacy at the national level. This is because it would put responsibility for the country’s economics back in national government’s hands at the same time that it would encourage more legitimising deliberation at the EU level.”¹⁰³ But in order to be redesigned in the suggested way, the European Semester would require simultaneous changes of SGP rules as well. As Mark Dawson argues, the European Semester “was envisaged as a measure to buttress and strengthen the Eurozone economy in particular and

⁹⁸ Eichengreen, *The Populist Temptation*, 168-70. See also Barry Eichengreen, “The Euro’s Narrow Path,” Project Syndicate, September 11, 2017; Barry Eichengreen and Charles Wyplosz, “Minimal Conditions for the Survival of the Euro,” *Vox*, March 14, 2016, <https://voxeu.org/article/minimal-conditions-survival-euro>.

⁹⁹ Eichengreen, *The Populist Temptation*, 169. An important precondition for such re-nationalization of fiscal policy is that banks be prevented from holding dangerous numbers of government bonds. However, for a critique of this argument see Dani Rodrik, “Does Europe Really Need Fiscal and Political Union,” Project Syndicate, December 11, 2017, <https://www.project-syndicate.org/commentary/separating-private-and-public-finance-in-europe-by-dani-rodrik-2017-12>. See also Peter Lindseth, “The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance,” this volume, endorsing renationalization of fiscal policy.

¹⁰⁰ Vivien Schmidt, “How Should Progressives Respond to the EU’s Many Crises and Challenges to Democracy?,” *The Progressive Post*, April 3, 2017, <https://progressivepost.eu/progressives-respond-eus-many-crises-challenges-democracy/>.

¹⁰¹ Schmidt, “How Should Progressives Respond to the EU’s Many Crises and Challenges to Democracy?.”

¹⁰² The European Semester is a cycle of economic and fiscal policy coordination within the EU. It is part of the European Union’s economic governance framework. Its focus is on the six-month period from the beginning of each year, hence its name—the ‘semester.’ During the European Semester, the Member States align their budgetary and economic policies with the objectives and rules agreed at the EU level. The legal basis for European Semester is so-called Six Pack, European Parliament and Council Regulation 1175/2011. For a detailed analysis of the European Semester, see Philomila Tsoukala, “Post-Crisis Economic and Social Policy: Some Thoughts on Structural Reforms 2.0.,” this volume.

¹⁰³ Vivien Schmidt, “How Do Progressives Fight Back Against Populism,” *Social Europe*, April 4, 2017, <https://www.socialeurope.eu/author/vivien-schmidt>.

to recognise the need for heightened EU supervision of domestic budgets.”¹⁰⁴ As a result, it is deeply embedded in the balanced budget fundamentalism of the SGP.¹⁰⁵

However, none of these suggested reforms will work if the troubled countries remain overburdened by excessive debt and if they are left bereft of significant investment funds provided by banks or the state. For all this, the European Stability Mechanism is simply not enough. The EU needs to reinvent new forms of solidarity. As Schmidt suggests, new instruments such as Eurobonds, Europe-wide unemployment insurance, EU investment resources¹⁰⁶ and a EU self-generated budget are needed. The first step in this direction was made in 2015 through the establishment of the European Fund for Strategic Investments (EFSI), part of the Investment Plan for Europe (the so-called Juncker Plan).¹⁰⁷ EFSI is an initiative launched jointly by the European Investment Bank and the European Commission to help overcome the current investment gap in the EU. However, as a recent study of the political economist Cornel Ban shows,¹⁰⁸ most EFSI loans and guarantees so far have gone to countries in a relatively strong economic position, with the exception of Italy and Spain, which at the time were undergoing steep recessions. In other words, Italy, Spain, France, Germany, and Poland received most of the loans, whereas the Baltic countries, Hungary and Romania received dramatically less. As a result, “the countercyclical pattern looks quite patchy.”¹⁰⁹

One possible lesson to draw from this quite limited example of European “Keynesianism” is that the creation of a new anti-austerity coalition will not be an easy task. As Jeffrey Frieden and Stefanie Walter show, the outcome of the crisis has been quite unusual “because the costs of the crisis resolution have been borne almost exclusively by the debtor countries and taxpayers in the Eurozone.”¹¹⁰ The rift between the debtor and creditor states that emerged as the consequence of this outcome implicates “powerful national interests and equally powerful particularistic special interests.”¹¹¹ It is one thing to say that the survival of the Eurozone is in the interest of both groups of countries but quite another to persuade German, Dutch, Austrian and other mostly Northern European surplus countries to agree to a more debtor-friendly version of adjustment policies.

What the EU needs is not only more financial resources, but also new ideas about how to create more inclusive, diverse, and pluralistic European societies and economies. Here I agree with Aglietta, who argues:

Integration in the absence of a Europe-wide development strategy succeeded only in concentrating industrial activity in the regions where it was already strong, while the

¹⁰⁴ Mark Dawson, “New Governance and the Displacement of Social Europe: The case of the European Semester,” *European Constitutional Law Review* 14, no. 1 (2018): 196.

¹⁰⁵ For this point, see Dawson, “New Governance and the Displacement of Social Europe”; Francesco Costamagna, “National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal,” *European Law Journal* 24, no. 2-3 (May 2018): 163-90.

¹⁰⁶ For a critical assessment of the Juncker Plan (European Fund for Strategic Investments), see Cornel Ban, “Austerity Europe, Keynesian Europe: The Politics of Debt and Growth in Europe,” (Unpublished, 2017).

¹⁰⁷ European Parliament and Council Regulation 2015/1017, On the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013—the European Fund for Strategic Investments, 2015 O.J. (169) 1.

¹⁰⁸ Ban, “Austerity Europe, Keynesian Europe: The Politics of Debt and Growth in Europe.”

¹⁰⁹ Ban.

¹¹⁰ Jeffrey Frieden and Stefanie Walter, “Understanding the Political Economy of the Eurozone Crisis,” *Annual Review of Political Science* 20 (2017): 371–90.

¹¹¹ Frieden and Walter, “Understanding the Political Economy of the Eurozone Crisis,” 386.

periphery lost ground. To counter this slide into long-term stagnation will require a development project capable of relaunching innovation across the whole range of economic activities, driven by investment largely anchored at regional and local level, with a strong environmental component.¹¹²

If countless billions were found to prop up large European financial institutions, it is not implausible to think a small fraction of that sum could be devoted to such a development project. The future of the EU will be determined by the ability of European political forces and civil society to articulate and push forward alternative scenarios for such “possible Europes.”¹¹³

Unfortunately, the politically weakened European mainstream parties—the traditional standard bearers of the post-World War II “embedded liberalism” consensus — are now on the defense. Instead of offering novel progressive solutions, the mainstream seems extremely vulnerable to the populist challenge coming both from the extreme right and extreme left. Instead of surrendering to the populists’ false promises of quick fixes, the mainstream has to reinvent itself. It must respond to the social anxieties that are helping fuel nationalist populism. Populist leaders are promising better pensions, health care and more jobs, an agenda that is winning over the abandoned working class communities that were once a stronghold of the European social democratic and other progressive parties. Leaders of socially oriented, pro-liberal parties can reverse the nationalist trend by returning the EU to its initial role as the promoter of European solidarity and equality. Job training and ‘green’ growth are just some of the possible public investments in this direction. As the Greece’s humiliating defeat by the German-led austerity coalition illustrates, this will take a concerted, Europe-wide initiative.¹¹⁴ If European democrats of various political colours do not start offering a more compelling agenda, Europe is on a dangerous political path.

¹¹² Michel Aglietta, “The European Vortex,” *New Left Review* 75 (May/June 2012): 36.

¹¹³ Alain Supiot, “Possible Europes,” *New Left Review* 57 (May/June 2009): 57-65.

¹¹⁴ In summer 2015, the EU imposed harsh loan terms on Greece even though they were previously rejected by popular referendum.