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GOVERNANCE AND THE “GREY ZONE” SYNDROME: BEST PRACTICES AND CONSEQUENCES OF FAILURE

by Anja Matwijk*^{*}

SUMMARY: 1. Introduction. – 2. Hybridity as State Failure. – 3. A Mixed Regime-Crime Typology. – 4. EU Democracy Crisis and Responses. – 5. An Exception to the Rule? The Case of Denmark. – 6. The Ethics Pillar. – 7. Some Takeaways and Conclusions.

1. Introduction

This year, for the first time in the 21st century, the prevailing form of governance in the region stretching from Central Europe to Central Asia is the hybrid regime, according to Freedom House and the 24th edition of its annual study and report, *Nations in Transit 2022: From Democratic Decline to Authoritarian Aggression*¹. Four democracies have fallen into this gray zone since the unbroken period of democratic decline began in 2004: Hungary, Montenegro, North Macedonia, and Serbia. Among the Member States of the European Union (EU), “Poland’s scores have fallen faster than those of any other country”². As a consequence, Poland belongs “among the latest countries at risk of entering the gray zone”³. As threats to the EU block, the internal challenges that Hungary and Poland pose reportedly create a need to “deploy all available tools”⁴. During the same period, three authoritarian regimes made democratic strides and joined the ranks of hybrid regimes: Moldova, Kosovo, and Armenia. In total, eleven countries are in the grey zone, as hybrid regimes. In turn, this means that the implied “middle ground” governance, which Thomas Carothers describes as a form “between full-fledged democracy and outright dictatorship”, is now “the region’s predominant political condition”⁵.

Ukraine is also among the twenty-nine nations that belong to the relevant region. Furthermore, the Ukraine-Russia war or, more to the point, Russia’s invasion of Ukraine, has been described as “a turning point for the security architecture in Europe”⁶. This is partly due to the effects on the Western Balkans that, so far, only have one EU Member

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¹ Writing in May of 2023, the 24th edition of the annual study and report is the latest one. It covers events and developments from 1 January to 31 December 2021. See Freedom House, *Nations in Transit 2022: From Democratic Decline to Authoritarian Aggression*, https://freedomhouse.org/sites/default/files/2022-04/NIT_2022_final_digital.pdf [hereinafter *Nations in Transit 2022*]. For information about Freedom House, see <https://freedomhouse.org/report/nations-transit>.

² Freedom House, *Nations in Transit 2022*, cit., p. 7.

³ *Ibidem*, p. 9.

⁴ *Ibidem*, p. 21.

⁵ *Ibidem*, p. 9.

⁶ J. LACHERT, *Western Balkans and the War in Ukraine*, in *Warsaw Institute*, 4 July 2022, <https://warsawinstitute.org/western-balkans-war-ukraine/>.

State, namely Croatia (since 2013) whereas several other countries “*remain in the sphere of influence*” of Russia – and do so in the wake of two decades of “*what Brussels has promised*” concerning EU accession and integration⁷. “*Russia has insisted on deep fraternal ties with Montenegro, North Macedonia, Serbia, and Republika Srpska—one of the two entities of Bosnia and Herzegovina—to build a sphere of influence across the region. Russia’s stance stems from its urge to maintain strategic ties with European countries—the Kremlin believes what it refers to as the “collective West” (NATO and EU nations) is seeking to curb Moscow’s grip on Central and Eastern Europe*”⁸.

For countries that observers view as “*locked in the Russia-West rivalry*”, the question of pro-Russia *versus* pro-West sentiments is complex⁹. However, to the extent that the assumption of negative waiting game effects is correct and, furthermore, intensified by membership applications “*without attaching strict conditions*” and requests for an EU fast-track procedure for Ukraine and the Republic of Moldova (Moldova) as candidate countries, the proposal of “*an ambitious Balkan agenda*” to counteract the frustration and perception of differential treatment may be the way forward¹⁰. A leap, in practice, to *delivering* on the stakes politically and economically (*cf.* full-fledged membership) is likely to make EU-oriented resentment evaporate somewhat and, with this, pave the path for a more unambiguous response *in favor of the West*. – An alternative solution could be

⁷ *Ibidem*.

⁸ *Ibidem*.

⁹ *Ibidem*.

¹⁰ The Warsaw Institute also mentions anger in North Macedonia because of “*Ukraine’s request for EU membership under a fast-track procedure*”. See *ibid*; INTERNATIONAL INSTITUTE FOR STRATEGI STUDIES, *The Effects of the War in Ukraine on the Western Balkans*, August 2022, <https://www.iiss.org/publications/strategic-comments/2022/the-effects-of-the-war-in-ukraine-on-the-western-balkans>. Note the EU’s 2020 revised methodology for enlargement as regards the Western Balkans and the 1993 Copenhagen criteria. This replaces so-called box ticking with a *raised bar* in terms of the value commitment while, at the same time, accentuating reciprocity and interdependency with four principles (*cf.* “*credibility*”, “*predictability*”, “*dynamism*” and “*political steer*”) and six thematic “*policy clusters*”, as well as bilateral conditions (“*regional cooperation*” and “*good neighborly relations*”). In the case of the fourth principle, the EU is aiming for “*stronger political steer(ing)*” and “*stronger monitoring*”. The 2020 revised methodology was partly a response to hybridity. However, by “*opening more chapters in one go*”, the methodology also allows an accelerated accession. See A. MATWIJKIW, B. MATWIJKIW, *Liberal Democracy: Absolutist EU Rule of Law Conditionality or a Pluralistic Bargaining Chip?*, in *Optime – Scientific Law Journal*, Vol. 13, Issue 2, 2021, pp. 59-74, 61-62. Furthermore, note that the fast-track issue was resolved with a compromise in the summer of 2023. More precisely, despite EU’s fast-track opinion and recognition of Ukraine and Moldova as candidate countries, this was not coupled with fast-track accession and integration although a few acceleration areas were accommodated. See M.R. SAHUQUILLO, *Brussels to Accelerate Ukraine’s Economic Integration but Fast-Track EU Membership Meets Resistance*, in *El País*, 2 February 2023, <https://english.elpais.com/international/2023-02-02/brussels-to-accelerate-ukraines-economic-integration-but-fast-track-eu-membership-meets-resistance.html>; ALJAZEERA, *European Commission Backs Ukraine for EU Candidate Status*, 17 June 2023, <https://www.aljazeera.com/news/2022/6/17/eu-to-give-fast-tracked-opinion-on-ukraine-membership-bid>; European Council, *Conclusions*, of 23 and 24 June 2022, EUCO 24/22. For the fast-track controversy about “*stringent requirements*” for Ukraine, Moldova and, furthermore, Georgia’s candidate status, see K. WOLCZUK, *Overcoming EU Accession Challenges in Eastern Europe: Avoiding Purgatory*, in *Carnegie Europe*, 28 June 2023, <https://carnegieeurope.eu/2023/06/28/overcoming-eu-accession-challenges-in-eastern-europe-avoiding-purgatory-pub-90039>. This article also highlights the Ukraine-Russia conflict as the decisive EU factor (*cf.* the statement “*Ukraine would not have been named a candidate if it were not for the war, but the Russian invasion and the importance of supporting it have changed everything*”). For “*Ukraine could be given a fast track to start negotiations*” partly as “*a signal to Russia*” while “*Balkan countries are frustrated about being neglected for so many years*”, see C. MALMSTRÖM, *The EU Should Fast-Track Negotiations for Ukraine’s Membership*, in *Peterson Institute for International Economics*, 24 February 2023, <https://www.piie.com/blogs/realtime-economics/eu-should-fast-track-negotiations-ukraines-membership>.

to maintain standards amidst chaos (*cf.* war) and uncertainty. Rather than risking *realpolitik* accusations on account of the competing (super)power goals in the geostrategic rivalry, the focus should perhaps be on the values and criteria that determine membership culturally, politically, and economically and that are the “glue” within the EU. After all, it only takes the failure of one country *cum* building-block to upset the international order. This is the lesson from World War II. And if cohesion is at stake, then the way forward must be through consistency. From the internal value perspective, which is “a European perspective” rooted in core values, sincerity and integrity depend on a country’s commitment, which is contingent upon consistency. Furthermore, from the external value perspective, trustworthiness and credibility depend on *their* consistency. If members of the in-group fail, conditions and recommendations for others become instances of empty political rhetoric; and hypocrisy ethically speaking. And while the perspective of countries that are in the process of making the transition to full-fledged EU membership status (here ignoring differences in how technically and formally advanced individual country-specific cases are) may be impacted by outside stakeholders, such as Russia’s attempt to (re)gain influence, the EU test still needs to be passed as a neighborhood lesson in unity (on the basis of shared values)¹¹. There is no way around this. Furthermore, it is a point which has a particular pull in circumstances where democracy arguably is becoming an increasingly precarious issue within the EU, as well as within the region stretching from Central Europe to Central Asia. Like the building-block argument for states, the erosion of one central value (*cf.* democracy) is likely to weaken and undermine the more comprehensive context in which other prescriptive value constants are defined. To adopt a common explanation from UN rule of law discourse, core values are perceived to be “*mutually reinforcing*”¹². If anything, this underscores the importance of consistency¹³. However, the fact that the EU – like the UN – operationalizes its value equation with the “*common global good*” in mind does not undo the status of the world-wide vision as a variable for the EU, meaning that the primacy of the *European project* stands even if “*projecting*” EU stakes is something that contributes to its interest-consolidation¹⁴.

The remainder of this article seeks to clarify, step by step, the soundness of opting for a less erratic course than the one the EU has currently chosen. This is to say: To aim for a win-win by extending a soft glove to Ukraine and Moldova may make sense for advocates of broad stakeholder theory, as applied to international law and international

¹¹ *European Neighbourhood Policy*, 27 July 2021. Note that the EU’s Neighbourhood Policy (ENP), as outlined in 2004 and in the context of the World Bank’s Europe and Central Asia (ECA) region, lists Turkey and the Western Balkans accession prospects as countries with accession prospects, whereas Ukraine, Belarus and Moldova are “*without accession prospects*”. See The World Bank Group, *The World Bank and the EU’s European Neighbourhood Policy*, 2004, <http://web.worldbank.org/archive/website00127D/WEB/OTHER/DE0128-2.HTM?OpenDocument>. For an analysis of the values and principles that form the basis for the ENP, *viz.*, “*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (including the rights of minorities), plus the principles of conditionality, differentiation and coherence*”, see generally S. POLI, *The European Neighbourhood Policy – Values and Principles*, Routledge, 2016.

¹² Declaration of the High-level Meeting of the General Assembly *on the Rule of Law at the National and International Levels*, at paras. 5 and 7, A/67/L.1, of 30 November 2012 (hereinafter *2012 Rule of Law Declaration*).

¹³ This can be extended to “*the emerging trend*” which stresses socioeconomic justice “*to (re)call values and principles of solidarity and rule of law together and as a new dimension of security to direct foreign affairs and cooperation*”. See *infra* note 88.

¹⁴ European Parliamentary Research Service (EPRS), *Protecting, promoting and projecting Europe’s values and interests in the world*, September 2020 (briefing submitted by Naja Bentzen).

relations¹⁵. However, critics of a too pragmatic response use the premises of stakeholder jurisprudence, a version of the broad outlook, to push ethics. More precisely, they attach enough significance to ethics to talk about the Ethics Pillar for analysis and assessment¹⁶. Broadly and typically, reality and morality are balanced as a requirement. However, stakeholder jurisprudence requires an outcome that tilts the weight-scales in the direction of proper ethics, not what most states agree on (*cf.* customary morality), not what is perceived to be right because it is popular or simply because it reflects a reciprocal stake; but what is right because it is based on principle *as opposed to* any pursuit that prioritizes advantages in the (re)distribution of power, resources, territory, or prestige as ends in themselves¹⁷. Prior to such a stakeholder application, though, some explanatory steps first need to be taken in order to understand more about the phenomenon of hybridity.

In the following two sections (*cf.* 1 and 3), hybridity will be examined and explained on premises that accommodate both a regime typology and expert comments and findings concerning human rights violations. The next step will be to clarify the contemporary relevancy of the hybrid regime discourse in the context of the EU. After this, prescriptions from the Ethics Pillar will be inserted, for the specific purpose of steering the principled approach towards the most pertinent hybridity features, facts, and findings. And finally, the last step provides some takeaways that will be summarized together with the conclusions.

2. Hybridity as State Failure

In a hybrid regime, “*the ‘game’ of democracy is still played, if unfairly*”¹⁸. As a *de jure* democracy, however, a hybrid regime’s average score between 3.01-4.00 is typically for the electoral process (*cf.* electoral democracy) in the presence of fragile democratic institutions and “*substantial challenges to the protection of political rights and civil liberties*”¹⁹. According to Kim Lane Scheppele, “*the rules of the game are themselves gamed*”²⁰. The meta-game is known as autocratic legalism, which is one of the main features of hybridity and which amounts to a “*toolbox of tricks*”²¹. Legal autocrats, so Scheppele explains, dismantle the constitutional system in a piecemeal fashion, that is, through legal reform. More precisely, while using new law (*cf.* reform) as a tool to consolidate power in the hands of the few, practitioners of autocratic legalism appeal to the government’s electoral legitimacy²². In turn, this is why democracy is pitted against

¹⁵ For one example of an application, *see generally* A. MATWIJKIW, B. MATWIJKIW, *Bahrain Anno 2017: Peace or Regime Change? The Ongoing Human Rights Dilemma and the Ethics Pillar as a Measurement*, in *Global Community YILJ*, Vol. 17, 2018, pp. 131-146.

¹⁶ *Ibidem*.

¹⁷ Freedom House, *2023 Summit for Democracy*, <https://freedomhouse.org/2023/summit-for-democracy/political-prisoners>. Note that “*any pursuit that prioritizes advantages in the (re)distribution of power, resources, territory, or prestige as ends in themselves*” is tantamount to amorality which, in turn, can be equated with *realpolitik*. *See* A. MATWIJKIW, B. MATWIJKIW, *Post-Conflict Justice: Legal Doctrine, General Jurisprudence, and Stakeholder Frameworks*, in M. CHERIF BASSIOUNI (ed.), *Global Trends: Law, Policy & Justice: Essays in Honour of Professor Giuliana Ziccardi Capaldo*, Oxford, 2013, pp. 349.

¹⁸ Freedom House, *Nations in Transit 2022*, *cit.*, p. 9.

¹⁹ *Ibidem*, pp. 10, 23. For the distinction between “*procedural or electoral democracy and liberal democracy*”, *see* M. WEEDERSTEIJN, *Democracies, Dictatorial Regimes, and Atrocities*, in B. HOLA *et al.* (eds.), *The Oxford Handbook of Atrocity Crimes*, 2022, p. 192.

²⁰ K.L. SCHEPPELE, *Autocratic Legalism*, *UNIVERSITY OF CHICAGO LAW REVIEW*, Vol. 85, Issue 2, 2018, pp. 545, 548, 560, 563, 569.

²¹ *Ibidem*, p. 556.

²² *Ibidem*, pp. 548 n7, 581, 583.

constitutionalism to the detriment of liberalism, that is, liberal values of toleration, pluralism and equality.²³ The outcome is “*brute majoritarianism*” as an instance of *realpolitik*²⁴. With Hungary as her archetypal case, Scheppele emphasizes that tools or techniques are often “borrowed” from predecessors in the game, such as Russia²⁵. On analysis, a front of normalcy co-exists with a reality of repression that is not overplayed. E.g., political opponents may be accused of “*illiberal political correctness*” or pressurized and punished in other subtle and sophisticated ways, without the use of force²⁶. The fact that a hybrid regime is politically compatible with some democratic openness reduces to yet another legitimacy (game) strategy, for the openness is a result of the pragmatic discovery that traditional authoritarian methods like annihilation of opponents and/or dissidents are not necessary (to remain in power)²⁷.

In the case of Hungary, the sacrifice of values and liberal democratic principles for “*the pursuit of a de facto monopoly on power*” is also highlighted by Freedom House²⁸. Obviously, the term “*pursuit*” may be interpreted to suggest that hybridity entails a process. The color of gray (hybridity) is a mixture of black (authoritarianism) and white (democracy), but will that also be the future color of the “flag of governance”? According to expert observers and commentators like Noah Buyon, there are two possible responses to the gray zone phenomenon. One is to treat hybridity as a necessary step towards full-fledged democracy and, for the same reason, welcome it. Another response opposes this normative embrace by rejecting the alleged transition paradigm. It follows that the grey zone is the destination. Certainly, Carothers is convinced that history can adjudicate between the two sides *cum* responses – in favor of hybridity (*cf.* the grey zone) as the destination²⁹. The grey zone has its own law of gravity, so the supporting argument is. Apparently, a kind of black hole effect applies, a point of no return³⁰. In other words, a hybrid regime *remains* a hybrid regime. Stuck between failure and success, a hybrid regime gravitates towards a practice of constancy (*as opposed to* a process of transition); and the implied reproduction of the *status quo* matches a *realpolitik* agenda.

While Scheppele’s account of the hybridity-autocratic legalism constellation allows for an evolutionary process, it is not based on any dialectical logic, and even less on predictive and prescriptively positive reasoning. A hybrid regime may develop in different directions. Empirically, “*we do not yet have a detailed map of how these experiments end*”³¹. One country may have “*a democratic rebirth later*”, another “*may fall into the abyss of authoritarianism*”³².

Irrespective of whether the phenomenon is temporary or permanent, the relevant regime type is one that warrants serious attention. Like Freedom House, Scheppele is of the conviction that hybridity entails a reality of dysfunctional institutions that “*do not deliver on the definitive components of liberal democracy*”³³. Liberal democracy is *not*

²³ In addition to the liberal values, Scheppele adds commitments to protection of rights, to checked power and to the defense of the rule of law. *See ibidem*, p. 562.

²⁴ *Ibidem*, pp. 548, 570, 579.

²⁵ *Ibidem*, pp. 549, 550-551, 553, 566. For other country-specific examples, *inter alia*, Italy, *see* G. MARTINICO, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective*, 2021.

²⁶ K.L. SCHEPPELE, *op. cit.*, pp. 567, 575, 577-578.

²⁷ *Ibidem*, p. 577.

²⁸ Freedom House, *Nations in Transit 2022*, *cit.*, p. 4.

²⁹ *Ibidem*, pp. 5, 9.

³⁰ The most well-understood black holes, stellar-mass black holes, form when a massive star reaches the end of its life and implodes, collapsing in on itself. Thus, implosion is the way the black hole is created.

³¹ K.L. SCHEPPELE, *op. cit.*, p. 556.

³² *Ibidem*.

³³ Freedom House, *Nations in Transit 2022*, *cit.*, p. 4.

the automatic “*default option*” for political legitimacy, as Jack Donnelly otherwise claims on behalf of the modern state³⁴. Furthermore, liberal democracy is *not* the global-ideological “*end point*” for governance, as Francis Fukuyama presupposes in his Hegel-inspired philosophy for the twentieth-first century³⁵.

Like failed state or so-called fragile state theory, the demarcation criteria for proper democracy rely on certain indicators, seven indicators in total to be exact³⁶. By using “*national democratic governance*”, “*electoral process*”, “*civil society*”, “*independent media*”, “*local democratic governance*”, “*judicial framework and independence*”, and “*corruption*”, Freedom House allocates numerical ratings that reflect the overall progress or deterioration from year to year. The ratings are done in consultation with expert advisers and regional reviewers, and they cover categories that broadly correspond to the institutional underpinnings of liberal democracy, such as elected state institutions (local and national governments), unelected state institutions (the judiciary and anticorruption authorities), and unelected nonstate institutions (the media and civil society). The numerical ratings are based on a scale of 1 to 7, with 1 representing the lowest and 7 the highest level of democracy. The scores provide a general assessment in the context of a comparative analysis that define five regime types: consolidated authoritarian regime, semi-consolidated authoritarian regime, hybrid regime, semi-consolidated democracy, and consolidated democracy³⁷. The latter translates into liberal democracy as the ideal *cum* “*most robust*” system at both the national and international level, again according to Freedom House³⁸.

In 2020, Freedom House introduced the Democracy Percentage, which is a translation of the Democracy Score to the 0-100 scale, with 0 representing the lowest and 100 the highest level of democracy³⁹. According to *Nations in Transit 2022*, no country in the region stretching from Central Europe to Central Asia can be rated within the highest score band. Therefore, a Democracy Score of 6.01-7.00, which is reserved for countries that embody the best practices of liberal democracy, was *not* allocated – and “*for the first time this century*”⁴⁰.

The highly diverse region’s democracy decline comes with “*significant stakes*” for the EU, *inter alia*, in “*Europe-Asia connectivity, the ‘vast energy resources’ of Central Asia*” and “*its significant market potential*” and, on account of its strategic geopolitical location, its “*role in broader regional security*”⁴¹. A concession to several reciprocal stakes implies, of course, that the issue of governance cannot be seen in isolation from international affairs and different domains that intersect in the democracy *versus* non-democracy equation, such as culture, economics and security⁴². Hybridity has internal and external consequences. In the light of this, it is not possible to trivialize hybridity which arguably constitutes a very “*minimal*” or, as some theorists may prefer, a nominal

³⁴ J. DONNELLY, *Universal Human Rights in Theory and Practice*, 3rd ed., 2013, p. 56.

³⁵ K.L. SCHEPPELE, *op. cit.*, pp. 559-560.

³⁶ Freedom House, *Nations in Transit 2022*, cit., p. 23.

³⁷ *Ibidem*, pp. 14-15, 23. Note that Scheppele, who adopts the same regime typology – and from Freedom House, mentions “*consolidated democracy*” as the social science conceptualization of the Western ideal (liberal and democracy constitutionalism). See K.L. SCHEPPELE, *op. cit.*, p. 560.

³⁸ Freedom House, *Nations in Transit 2022*, cit., p. 1. For agreement with liberal democracy as the ideal, see M. WEEDERSTEIJN, *op. cit.*, p. 192; J. DONNELLY, *op. cit.*, pp. 55, 71.

³⁹ Freedom House, *Nations in Transit, About the Report, 2023*, <https://freedomhouse.org/report/nations-transit>; ID., *Nations in Transit Methodology, 2023*, <https://freedomhouse.org/reports/nations-transit/nations-transit-methodology>.

⁴⁰ Freedom House, *Nations in Transit 2022*, cit., p. 6.

⁴¹ European External Action Service, *The Diplomatic Service of the European Union*, 25 March 2022.

⁴² Note that this article uses the term “*governance*” rather than *government* to accentuate the law-power process for authority and legitimacy of the ruler.

democracy because its deficiencies affect key factors separating effective democracy from ineffective democracy, namely state failure in the enforcement of the rule of law, checks and balances, and protections of the rights of all (*cf.* definitive components)⁴³. Analytically, this suggests that hybridity is a systemic phenomenon. Despite its ideological duality, it is possible to draw a parallel to grand corruption to the extent that dysfunctionality is an integrated and essential part of the system that should combat it. Democratic ineffectiveness may be a detriment to the collective interest of the stakeholder constituency that the government is supposed to represent and protect, i.e., the citizenship as such, but its failure through misuse of authority also helps to secure success for the responsible and higher and narrow circles of the system that benefit economically and socially as well as politically⁴⁴.

3. A Mixed Regime-Crime Typology

A tentative conclusion about state-sponsored terrorism seems inescapable, as covered by the UN’s 2012 Declaration on the Rule of Law at the national and International Levels⁴⁵. Notwithstanding, consequences are not equal. E.g., if the facts and findings from the 2022 Freedom House report are coupled with Maartje Weedersteijn’s crime probabilities on the basis of a comparison of the different regime types, consequences in terms of human rights violations can be distributed in accordance with a conventional model⁴⁶. In turn, this is to say that atrocity crimes are more likely in a consolidated authoritarian or dictatorial regime (*cf.* political tyranny), whereas they are less likely – on comparison – in a consolidated *cum* liberal democracy.

Concerning armed conflict, there is an analogy for the two regime poles, though. Compared to a semi-consolidated authoritarian regime and a hybrid regime, the occurrence of civil war is less likely for consolidated democracy and authoritarianism. This similarity is replaced with a difference in the case of war *per se*, where the consolidated poles repeat the pattern of a higher probability for a consolidated authoritarian regime. Given that aggression is “*foreseeable*” and, furthermore, that war is the most significant risk factor for atrocity crimes, the consolidated authoritarian regime comes with a high(er) security threat at the international level⁴⁷. It is no coincidence,

⁴³ A.C. ALEXANDER, C. WELZEL, *Measuring Effective Democracy: The Human Empowerment Approach*, in *Comparative Politics*, Vol. 43, Issue 3, 2011, pp. 271-289; Freedom House, *Nations in Transit 2022*, cit., p. 4.

⁴⁴ A. MATWIJKIW, B. MATWIJKIW, *The U.S. Homeland Security Enterprise, Transnational Organized Crime as Associated with Corruption, and International Cooperation: Setting the Stage for the Complexity of the Issues*, in H. OLASOLO, M. URUEÑA (eds.), *Las respuestas a la corrupción desde la política exterior de los estados latinoamericanos y desde los ejes de acción de las organizaciones de ámbito regional en América Latina*, 2023. Note that the wording “[d]emocratic ineffectiveness may be a detriment to the collective interest” reflects the possibility of trade-offs of values, e.g., welfare instead of freedom, that could be a popular preference.

⁴⁵ “We reiterate our strong and unequivocal condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security (...)” [Emphasis inserted]; UN General Assembly, *2012 Rule of Law Declaration*, cit., para. 26.

⁴⁶ M. WEEDERSTEIJN, *op. cit.*

⁴⁷ *Ibidem*, p. 197; Freedom House, *Nations in Transit 2022*, cit., pp. 4, 19.

Note that one of the Freedom House recommendations specifically prescribes a cautionary approach in the case of aggression, “(...) Care should be taken to exert pressure on authoritarian leaders without inadvertently strengthening the alliances between undemocratic rulers, or the alternative financial systems on which they often rely. In situations where authoritarians employ violence or aggression, pressure should be exerted while still preserving opportunities for de-escalation”. See *ibidem*, p. 20.

therefore, when Freedom House uses “*From democratic Decline to Authoritarian Aggression*” as the subtitle for its *Nations in Transit 2022* report⁴⁸.

In the light of the mixed regime and crime typology, a distinction between *jus cogens* crimes like genocide, war crimes, and crimes against humanity as well as violations of the “*most basic human rights*” that arguably correspond to these and, on the other hand, the category of other human rights violations that are “*less severe*” or serious (because they are not widespread and systematic) makes good sense⁴⁹. Certainly, Weedersteijn proceeds with a link between the hybrid regime and “*life integrity violations*” which do *not* translate into core international crimes. Interestingly enough, however, the same limit may be found in a consolidated authoritarian regime because political opponents have already been eliminated⁵⁰. Weedersteijn’s expert realizations that i) there are diverging views of the definition and scope of the violations or crimes a non-democracy *cum* dictatorial regime perpetrates, and that ii) a “*tautological*” tendency in quantitative statistics on liberal democracy manifests itself by virtue of having “*the protections of rights built into its definition*” lead her to accommodate synergies between quantitative and qualitative aspects⁵¹. By virtue of taking this step, a broad(er) crime terminology, which is infused with insights from interdisciplinary approaches, results⁵². Needless to say, this subtracts from the model’s conventionality, as based on scholarly consensus⁵³.

In addition, it is thought-provoking that mass atrocities occur relatively frequently in a semi-consolidated democracy. On comparison to other regime types, Weedersteijn points to an “*inverted U-shape*”⁵⁴. Her finding is not as unconventional as that of Stephen McLoughlin’s, though, for he introduces a myth *versus* fact challenge by changing the region – to Africa⁵⁵. “*Scholars have long regarded democracy as an important source of stability and protection from mass atrocities such as genocide, crimes against humanity and ethnic cleansing. But... a number of studies have identified regimes in democratic transition as containing the highest risk of political instability and mass atrocities*”⁵⁶.

Comparatively speaking, different outcomes are “*not inevitable from the outset*”, according to McLoughlin who also broadens the methodological criteria, from risk factors to “*risk mitigation*” and “*risk escalation*”⁵⁷.

While Weedersteijn – like Scheppele and McLoughlin – dismisses the black hole destination thesis for a hybrid regime, she also holds the general beliefs that i) there are no simple transition formula and ii) no simple *nexus* assumptions as regards human rights violations and regimes⁵⁸. That said, the negative test for a link between hybridity and atrocity crimes stands on her premises. Weedersteijn’s finding should perhaps have a mitigating effect on hybridity, but in circumstances where a concession is made to the unpredictable nature of dynamic phenomena, transitional human rights outcomes still appear to be less facilitated by political ideology than commonly assumed.

If anything, this accentuates the danger of hybridity as an in-between regime type, just as there are spillover effects for any regime that does not qualify as a consolidated

⁴⁸ *Supra* note 1.

⁴⁹ M. WEEDERSTEIJN, *op. cit.*, p. 189.

⁵⁰ *Ibidem*, p. 194.

⁵¹ *Ibidem*, p. 192.

⁵² *Ibidem*, pp. 190, 200.

⁵³ *Ibidem*, p. 187.

⁵⁴ *Ibidem*, p. 193.

⁵⁵ S. MCLOUGHLIN, *Understanding Mass Atrocity Prevention during Periods of Democratic Transition*, in *Politics and Governance*, Vol. 3, Issue 3, 2015, pp. 27-41.

⁵⁶ *Ibidem*, p. 27.

⁵⁷ *Ibidem*, pp. 29, 37, 39.

⁵⁸ M. WEEDERSTEIJN, *op. cit.*, p. 192.

liberal democracy by virtue of the fact that effective democracy, i.e., democracy that does not fail in practice, is the only meaningful test for legitimacy – if human rights protections are used as criteria. A performance-oriented model pays special attention to the consequences of failure, and for obvious reasons. That said, identifying the causes or, more generally, the hybrid-causality is a diagnostic indicator which may also contribute to prevention. With performance anchored in a conventional comprehension of liberal democracy, preferences for trade-offs that prioritize welfare are likely to complicate the response to the notion of the collective interest, especially if they are popular.

4. EU Democracy Crisis and Responses

In the case of a hybrid regime that is experiencing a consolidated authoritarian system’s aggression, the higher probability of a third-party mediated core crime *nexus* is introduced, as explained in the previous section. The country-specific example of Ukraine has been a platform for an international and progressive effort to call for *justice in conflict*, with the International Criminal Court’s (ICC) investigation of war crimes rather than await post-conflict management and measures⁵⁹. This is partly a reflection of the need for prevention and an effective rule of law lesson in “justice delayed is justice denied”. But it is also a de-legitimacy signal for Russia as a permanent member of the UN’s Security Council: that its post-2022 ranking as full-fledged authoritarianism presents an unparalleled post-World War II and post-Cold War setback which should be dealt with accordingly⁶⁰.

Although Ukraine is not a State Party to the ICC, the country accepted the jurisdiction of the ICC through declarations under Art. 12 of the Rome Statute⁶¹. Nevertheless, a democracy dilemma must be acknowledged on behalf of Ukraine. On the one hand, the country arguably is responding *democratically* on the basis of the best practice that “[p]eace, democracy and political stability following conflict and authoritarian rule are served when states and societies address past violations”⁶². On the other hand, EU skepticism towards Ukraine’s claim of 7 March 2023 that it has met the reform recommendations pertaining to democracy and anti-corruption raises a red flag, which Freedom House captures in the following statement: “*The failure of any hybrid regime to fully democratize should be a sobering fact for liberal democracy’s supporters*”⁶³.

⁵⁹ If successful, the ICC will proceed on the assumption that President Vladimir V. Putin and Maria A. Lvova-Belova have individual responsibility over the war crime of overseeing the unlawful abduction and deportation of children from Ukraine to Russia. See ICC, *Situation in Ukraine*, 2023, <https://www.icc-cpi.int/situations/ukraine>; H. AUSTIN, P. MCCAUSLAND, *ICC Issues Arrest Warrant for Putin over Alleged Ukraine War Crimes*, in *ABC News*, 17 March 2023, <https://www.nbcnews.com/news/world/arrest-warrant-putin-international-criminal-court-ukraine-war-crimes-rcna75471>.

⁶⁰ O. MATVIICHUK, *Peace and Justice*, in *RSA*, 24 February 2023.

⁶¹ B.A. WANIGASURIYA, *After All This Time, Why Has Ukraine Not Ratified the Rome Statute of the International Criminal Court?*, in *Justice in Conflict*, 14 March 2022, <https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court>.

⁶² INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE (IHRLI), *The Chicago Principles on Post-Conflict Justice*, 2007, p. 21.

⁶³ Freedom House, *Nations in Transit 2022*, cit., p. 5. Note that EU skepticism also should be viewed in the light of the fact that practices like grand corruption come with state capture effects. In 2021, Ukraine was asked to target its “*oligarchic structure (...) as well as impediments to free and fair competition*”. See European Court of Auditors, *Special Report 23/2021 Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results*, of 23 September 2021. For EU’s “realistic” response to Ukraine in 2023, see S. LYNCH, *Ukraine Wants to Join EU Within Two Years, PM says. Brussels says: ‘Not so fast,’*

According to the report, democratic efforts arguably prevented the Ukraine from “*slipping out of the hybrid regime category and into full-fledged authoritarianism*” but liberal values, norms, and institutions “*have yet to take hold*”⁶⁴. Unless a miracle occurred in less than one year, which is unlikely (*especially* in a time of war), Ukraine’s wish to join the EU is stronger than its evidence for successful *cum* effective hybridity transcendence.

Unfortunately, the politically sensitive question of principle *versus* power cannot be avoided if Ukraine becomes a premature EU member. The US-led Western pro-Ukraine alliance, which includes the EU, may see an advantage in giving the candidate country the benefit of the doubt. However, the price may be high. A premature membership would add to the democracy crisis within the EU.

Within the EU, the split over values between the liberal West and more conservative eastern countries, such as Hungary and Poland, has been described as a “*cultural battle*”⁶⁵. In one sense, the debate and dispute is superfluous. This is to say that *if* democracy is limited to liberal democracy, then illiberal democracy – which both Hungary and Poland view as the superior alternative to the dysfunctional *cum* failed Western “*liberal non-democracy*” – is precluded beforehand. To openly and publicly announce a commitment to the “*Illiberal State*”, as Hungary has done, is admittedly a bold step⁶⁶. It may suggest that the polarization effect for democracy, as a direct consequence of hybrid regimes with autocratic legalism go to the, *per* M. Cherif Bassiouni’s terminology, “*deep theory*” aspects of governance⁶⁷. Conceptually and prescriptively, the debate and dispute point to a value dissonance which can only be resolved effectively through persuasion. In Oleksandra Matviichuk’s opinion, President Putin works to persuade everybody that democracy, human rights, and the rule of law are “*fake values*”⁶⁸. In a speech to mark the one-year anniversary of the Ukraine-Russia conflict, she also called for the exclusion of Russia from the UN’s Security Council as a necessity for the international order’s stake in democracy. Our “*interconnected world*”, she stated, translates into shared stakes⁶⁹. On behalf of Ukraine, Matviichuk also acknowledged the post-conflict need “*to work hard with enlightenment and education*” – to help people practice values like democracy⁷⁰. Rather than a black-and-white picture, therefore, Matviichuk’s position accommodates the realization that *culturally applicable* values are lived values, i.e., values that are followed and implemented in an environment that is already susceptible (read: normatively persuaded). Best practices are not formal commitments. Instead, they presuppose a successful transition from theory to reality, which is exactly why they are called best practices. In terms of post-conflict justice, it holds that “[s]tates shall engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights, and support good governance”⁷¹. Setting aside the justice in conflict measure that consists in the ICC’s activity, institutional reform during war time may be a

in *Politico*, 30 January 2023, <https://www.politico.eu/article/ukraine-eu-membership-two-years-prime-minister-denys-shmyhal/>.

⁶⁴ *Ibidem*, p. 5.

⁶⁵ G. BACZYNSKA, R. EMMOTT, *Hungary Rejects EU Demand to Ditch 'Shameful' Anti-LGBT Law*, in *Reuters*, 7 July 2021, <https://www.reuters.com/world/europe/a-disgrace-hungary-must-ditch-anti-lgbt-law-eu-executive-says-2021-07-07/>.

⁶⁶ K.L. SCHEPPELE, *op. cit.*, p. 562.

⁶⁷ A. MATWIJKIW, B. MATWIJKIW, *A Modern Perspective on International Criminal Law: Accountability as a Meta-Right*, in L.N. SADAT, M.P. SCHARF (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni*, 2008, pp. 57, 68-69, 78.

⁶⁸ O. MATVIICHUK, *op. cit.*

⁶⁹ *Ibidem*

⁷⁰ *Ibidem*

⁷¹ IHRILI, *op. cit.*, p. 17.

case of engaging too early (read: with a likelihood of too little success). In all circumstances, the probability of increased anti-EU rhetoric as an outcome of “*turning a deaf ear and a blind eye*” to Ukraine and its lack of sufficient progress concerning pro-democracy and anti-corruption efforts could become a new platform for increased delegitimization of liberal democracy.

Freedom House ranks Ukraine as a hybrid regime. Worse still perhaps, Ukraine has been a so-called *flatline* hybrid regime (since 2004), thereby confirming the black hole constancy thesis⁷². Its history alone signals the need for caution unless, of course, the EU is content with gaining a geostrategic stake at the expense of Russia (*cf.* rivalry). In this case, EU’s soft power values cannot be expected to be prioritized in international relations⁷³. As a tool for foreign policy, democracy and the other mutually reinforcing values (human rights, rule of law) are geared towards positive collaboration in circumstances with geopolitical instability. It is a strategy of persuasion and attraction as opposed to coercion, e.g., military force, economic sanctions, etc. (*cf.* hard power). Its limit is precarious. *E.g.*, at what point does frustration and/or resentment translate into a loss of allies?

Matviichuk’s proposal to use education and enlightenment can be construed as an example of a soft power approach at the national level. It warrants mentioning in connection with the EU’s response to Member States *cum* democratic backsliders because it demonstrates how persuasion and attraction can fail within the cultural, ideological, and institutional community that fundamentally owes its existence to shared values. In the case of Poland and Hungary, the strategic and corrective response development spans infringement procedures (*cf.* art. 7 proceedings) and, as a consequence of the limited effects of these, economic measures along the lines of the carrot and stick method, meaning that disbursement of funds from the EU budget is linked with rule of law conditionality⁷⁴. The legality of the latter strategy to realign democratic backsliders with the European perspective became the object of Poland’s and Hungary’s joint filing of a complaint to the European Court of Justice (ECJ)⁷⁵. In 2022, the EU Court of Justice issued a ruling, that actions by Hungary and Poland against the rules on conditionality should be dismissed⁷⁶.

⁷² Freedom House, *Nations in Transit 2022*, cit., p. 9.

⁷³ Joseph Nye’s three pillars for soft power encompass political ideas *cum* ideals (*cf.* values), culture, and foreign policy. Within these, many sources of soft power can be listed. *See generally* J.S. NYE, *Soft Power. The Means to Success in World Politics*, 2004. Note also that “*For Nye, the basis of U.S. soft power was liberal democratic politics, free market economics, and fundamental values such as human rights—in essence, liberalism*”. *See* E. LI, *The Rise and Fall of Soft Power*, in *Foreign Policy*, 20 August 2018, <https://foreignpolicy.com/2018/08/20/the-rise-and-fall-of-soft-power/>.

⁷⁴ Infringement procedures against the two countries were initiated by the Commission and the European Parliament for “*clear risk of a serious breach by a Member State of the values referred to in article 2*” (art. 7 TEU), which are “*values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*” (art. 2 TEU). Arguably, the relevant art. 7 proceedings against Poland and Hungary have only “*limited effects*” as a measure. *See* M. MICHELOT, *The Article 7 Proceedings against Poland and Hungary: What Concrete Effects?*, in *Thinking Europe*, 6 May 2019, https://institutdelors.eu/en/publications/__trashed/.

⁷⁵ According to Freedom House, an argument for strictness may be a way out of hybridity: “*In the case of Hungary and the hybrid regimes of the Western Balkans, the European Union (EU) remains an imperfect but important bulwark against precipitous democratic. The EU may even be able to reverse some damage: its hard-won conditionality mechanism for the rule of law, which ties the bloc’s budgetary disbursements to member states’ respect for foundational EU values, could play a crucial role in shoring up Hungary’s democracy, though the European Commission must test this hypothesis by fully implementing it*”. *See* Freedom House, *Nations in Transit 2022*, cit., pp. 5-6.

⁷⁶ *Ibidem*, p. 13; Press Release of the European Parliament, *Rule of Law conditionality: MEPs call on the Commission to act immediately*, of 2 February 2022. For the ECJ’s 2023 ruling that the Polish Supreme

Clearly, the findings by Freedom House, that Hungary and Poland create a need to “*deploy all available tools*” is accurate⁷⁷. The threats to the EU block are serious because i) circle-concentric effects are a factor, i.e., hybridity rubs off on other countries by setting a bad but attractive example for some, and ii) “*it is relatively easy for bad actors to damage the structures that underpin a democracy*”, as the experiences of Hungary, Poland, and “*now Slovenia*” show⁷⁸. Scheppele agrees. While “*observers find it hard to see the danger until it is too late*”, it is “*not hard*” to pit democracy against constitutionalism at the detriment of liberalism⁷⁹. The strategy of state capture or, *per* Jan-Werner-Müller, constitutional capture (as a consequence of targeting checks and balances), is an integral part of the pursuit of power-maximization and -monopolization⁸⁰.

It is hard to see the danger until it is too late because the hybridity narrative pushes the democracy game to the extreme by virtue of extinguishing liberal rule of law features (including rights) *while promoting the belief cum persuasion* that what the majority wants (*cf.* what is popular), by definition, is democratic. Thus, the hybridity narrative has no distinction between electoral legitimacy *cum* majoritarianism and, on the other hand, majority intolerance (*cf.* political tyranny) (which is exactly why hybridity majoritarianism is described as brute majoritarianism)⁸¹. “*Prime Minister Orbán in Hungary may be perhaps the least hypocritical among the new legalistic autocrats because he has openly embraced the ‘illiberal state’, but President Putin in Russia, President Erdoğan in Turkey, Jarosław Kaczyński in Poland, and President Chávez in Venezuela share a family resemblance with Orbán and his embrace of constitutional forms and democratic legitimation to hide something more deeply illiberal. They, too, insist that the majorities—real or apparent—that brought them to power can justify anything that they do, that minority rights merely reflect illegitimate political correctness*”⁸².

Concerning deep theory discourse, illiberal means “non-liberal” but consistent with “*foundational values of liberalism*” according to the 2014 speech in which President Viktor Orbán made the controversial Illiberal State announcement and declaration⁸³.

In 2022, the EU condemned Hungary’s system in an interim report, describing it as a “*hybrid regime of electoral autocracy*” and listing the electoral system, the independence of the judiciary, privacy, freedom of expression, media pluralism, academic freedom, LGBTIQ rights and the protection of minorities and asylum seekers as specific

Court’s Disciplinary Chamber violated EU laws on “*effective judicial protection, judicial independence, and the rule of law*” and that the Extraordinary Review and Public Affairs Chamber of the Supreme Court has “*monopolistic control*” over enforcing EU judicial protection requirements in Poland, *see* A. OLOYEDE, *EU Court of Justice Finds Poland’s Court Reforms in Violation of EU Law*, in *American Society of International Law*, 8 June 2023, <https://www.asil.org/ILIB/eu-court-justice-finds-polands-court-reforms-violation-eu-law>.

⁷⁷ *Supra* note 4.

⁷⁸ Freedom House, *Nations in Transit 2022*, *cit.*, p. 8.

⁷⁹ “*(...) the true scope of state capture in a given country often comes to light only after a corrupt government is voted out*”. *See* Freedom House, *Nations in Transit 2022*, *cit.*, p. 7; K.L. SCHEPPELE, *op. cit.*, pp. 557, 571.

⁸⁰ *Ibidem*, pp. 570, 575.

⁸¹ *Ibidem*, pp. 548, 570-571, 579.

⁸² *Ibidem*, p. 562.

⁸³ Ideologically, the confusion that is clear: “[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead”. *See* C. TÓTH, *Full Text of Viktor Orbán’s Speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014*, in *The Budapest Beacon*, 29 July 2014, <http://perma.cc/2N4Q-5N35>.

concerns⁸⁴. Apart from a new push for European democracy as one of the 2023 EU priorities (*cf.* priority 6), the hybrid regime *versus* EU legitimacy remains a stalemate⁸⁵. It is noteworthy that anti-corruption constitutes yet another 2023 priority⁸⁶.

With these steps, EU skepticism towards Ukraine’s claim that the country has met the democracy and (anti-)corruption reform recommendations for its full-fledged membership has to be taken very seriously, at least if consistency matters. The fact that Hungary’s President expressed his support for China’s peace proposal for Ukraine (which does not condemn Russia’s invasion of Ukraine) in circumstances where Hungary is kept out of the war and does not deliver weapons to Ukraine has added new dimensions to Hungary’s collision course with the EU⁸⁷. The more the country defies the rest of the bloc, the more pro-Russia *versus* pro-West it will be perceived to be⁸⁸. The more pro-Russia Hungary will be perceived to be, the less likely a future and successful (governance) reunion is. Unlike Hungary, Ukraine’s image anno 2023 is unambiguously pro-West. In the case of Ukraine, the EU is putting its own image and reputation at stake since the following can be made to hold: the more politicized its amicable policy towards Ukraine can be said to be, the deeper the long-term (EU conditionality) damage is likely to be. – That’s what makes the EU’s current course erratic rather than sound.

But what about self-proclaimed democracies that have been going through decades of illiberal state rebranding without attracting much attention, let alone international condemnation? One of the Member States that belong in this category, namely Denmark, is now in the habit of changing its official narrative for the adoption of policies and laws in accordance with political convenience (*cf. realpolitik*).

5. An Exception to the Rule? The Case of Denmark

The risk of a waiting game that may alienate Ukraine is real, especially during war time. EU’s geostrategic concern may get the better of it for the same reason, meaning that it may grant Ukraine premature membership, thereby further adding to its own internal cultural battle. As compared with the Western Balkan states, a pro-Russia *versus* pro-West dilemma is entirely unlikely in the case of Ukraine. Thus, the EU may secure Ukraine’s advancement as a candidate country to prevent it from “falling into the wrong hands”, even if the country’s accession is not based on merit alone (*cf.* performance as based on the capacity to deliver on effective rights). Apart from the obvious subtraction from consistency, the strategy may backfire, especially if a plausible complaint for a lack

⁸⁴ Committee on Civil Liberties, Justice and Home Affairs, *On the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*, of 25 July 2022, Report-A9-0217/2022, (Interim Report submitted to the European Parliament by Gwendoline Delbos-Corfield). See also J. LIBOREIRO, S. ZSIROS, *Hungary Is No Longer a Full Democracy but an 'Electoral Autocracy,' MEPs Declare in New Report*, in *EuroNews*, 16 September 2022, <https://www.euronews.com/my-europe/2022/09/15/hungary-is-no-longer-a-full-democracy-but-an-electoral-autocracy-meps-declare-in-new-repor>.

⁸⁵ European Commission, *European Democracy Action Plan*, 2023.

⁸⁶ The legislative framework update for anti-corruption is as follows: art. 83, para. 1 TFEU, Q3 2023; and for democracy (*cf.* Defence of Democracy Package, including an Initiative on the Protection of the EU Democratic Sphere from Covert Foreign Influence. Legislative and non-legislative): art. 114 TFEU, Q2 2023.

⁸⁷ W. PRESUSSEN, *Orbán Backs China's Ukraine Peace Plan*, in *Politico*, 27 February 2023, <https://www.politico.eu/article/viktor-orban-hungary-ukraine-china-peace-plan-russia-invasion/>.

⁸⁸ V. GULYAS, *Hungary's Top Diplomat Visits Moscow in Defiance of E.U. Stance*, *TIME*, 11 April 2023, <https://time.com/6270359/hungary-szijarto-russia-visit/>.

of solidarity can be made on behalf of the Western Balkans. As it happens, the emerging trend to (re)call values and principles of solidarity and rule of law *together* and as a new dimension of security to direct foreign affairs and cooperation stresses socioeconomic justice, as illustrated by the European Pillar of Social Rights and the European Commission President von der Leyen's firm belief "*that the European Union has a special responsibility in assisting its partners in the region*"⁸⁹. Some commentators believe that "*it would be inappropriate to (...) apply the same principles of social solidarity to the EU level as (...) the state level*", thereby making the distinction between liberal democracy and so-called economic democracy ethically sharp and significant⁹⁰. In theory, the distinction between ethics, politics and economics may be analytically sound, whereas it proves untenable if and when the leap from the formal to the substantive and performance-oriented occurs, for should "high" or "low" international democracy scores be assigned to the EU in the event it rethinks its broad response to the Western Balkans?

Even if a conventional focus on security prompts the EU to prioritize Ukraine, the course would still be erratic on account of what is at stake. The Western Balkans may cease to be attracted to the "*welfare magnet*" (growth and prosperity through status as Member States) if they become sufficiently persuaded that Russia's point about fake values cannot be easily dismissed – in practice⁹¹. As witnesses to Poland and Hungary's situation, they may ask critical questions about country-specific comparisons viewed from the European perspective. Needless to say, the more pressure there is on *their* illiberalism to be transformed into *our* form of liberal democracy, the more controversial other deviations from value consistency will be. Certainly, this follows from "You should practice what you preach". Admittedly, this principle (of integrity) can be interpreted as an aspect of the Golden Rule. If so, it entails a general guideline (of treating others the way you wish them to treat you) which may generate practices that do *not* qualify as ethically substantiated norms. E.g., it is possible to deduce "a favor in return for a favor" and, with this, mutually beneficial corruption. To avoid such (counter-productive) outcomes, the basis for the prescriptive persuasion must be tied to an ethical rationale, in the case at hand, limits on appropriate treatment. E.g., in the context of liberalism, the Harm Principle and the Principle of Equal Freedom have traditionally been advanced for this purpose⁹².

Be that as it may, Denmark not only has a long record of illiberal *cum* rights restrictive measures for refugees and asylum-seekers which culminated in the 2019 "*paradigm shift*" (*cf.* law L 140) whereby the relevant category of stakeholders is effectively obstructed

⁸⁹ A. MATWIJKIW, B. MATWIJKIW, *A Look Behind the Legal Scene: Philosophical Stakeholder Responses to Fundamental Human Rights*, in T. RUSSO, A. ORIOLO, G. DALIA (eds.), *Solidarity and Rule of Law. The New Dimension of EU Security*, Berlin, 2023; European Commission, Statement by the President von der Leyen (following the EU-Western Balkans Zagreb Summit), 6 May 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_825. For a narrow *versus* broad stakeholder account of EU core values, including those that can be subsumed under the European Pillar of Social Rights that is expressly about delivering on effective rights, see A. MATWIJKIW, *EU Western Balkans Cooperation and Protection of Fundamental Human Rights: Philosophical Stakeholder Remarks [About Values]*, Keynote for the Jean Monnet EUWEB Module 2nd Edition's Inaugural Conference, Department of Legal Sciences (Law School), University of Salerno, Italy, 3 March 2021, <https://www.euweb.org/wp-content/uploads/2021/03/EUWEB-3-3-2021-SLIDES-Anja-Matwijken.pdf>.

⁹⁰ A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, Vol. 33, Issue 1, 2013, p. 229.

⁹¹ "*The EU may have lost its opportunity to use values (cf. recognition) as the gateway to the welfare magnet (cf. redistribution) despite the association of corruption and 'economic nationalism.'*" See A. MATWIJKIW, B. MATWIJKIW, *Liberal Democracy: Absolutist EU Rule of Law Conditionality or a Pluralistic Bargaining Chip?*, *cit.*, p. 69.

⁹² J. STUART MILL, *John Gray - On Liberty and Other Essays*, 2001, pp. 104-128.

from the legal path to citizenship; the country’s neoconservative “*value warriors*” also have (re)appeared with new cynicisms in Denmark anno 2023 – and after two decades of radical deteriorations of the humanitarian protection conditions, together with equally radical policies and laws to tighten the conditions for immigrants and foreigners in general. Populist and neoconservative value warriors have not been resting on their laurels (*cf.* past and exclusive ideology program). They have been busy with more rejections of the humanistic and inconvenient international standards that do not test positive to Danish interests or, when it comes to values, the presumption of majority support in favor of conserving Danishness *as opposed to* the way of the kind of people the Danes “*desire to avoid*”⁹³.

If Denmark stands to gain an advantage, an exception to the rule (of law) is apparently permissible. In fact, the former Prime Minister and current Minister of Foreign Affairs, Lars Løkke Rasmussen recently called for “*less preaching*” in the approach to values like democracy and human rights⁹⁴. He did this in connection with the repeal of the 2018 ban on the export of weapons to countries like Saudi Arabia and the United Arab Emirates, which he himself had introduced. Løkke Rasmussen described Denmark’s new practice as “*pragmatic realism*”⁹⁵. A professor of political science noted: “*this is easier than covering up the truth in value rhetoric*” as is often done in the case of democracy – *for them*⁹⁶. Pragmatic realism is *realpolitik*. However, an official concession is apparently not an embarrassment to a self-proclaimed liberal democracy like Denmark – unless the political opposition is accommodated as a critical voice⁹⁷. Concerning Løkke Rasmussen’s stance *per se*, it ironically mimics superpower politics while at the same time repeating his past neoconservative idea that a small state like Denmark *should not* focus on “*lofty ideals of democracy and human rights*” but instead focus on its own national interest⁹⁸.

Liberal democracy entails protection of the rights of persons belonging to minorities, as well as individual rights. Nevertheless, the 2023 statement on Denmark by the UN special rapporteur on the rights of indigenous people results in serious liberal deductions, with findings of structural discrimination and racism towards *Inuit* people whose encounter with the public and administrative authorities also translate into an overrepresentation of vulnerabilities, e.g., through forceful removals of children based on wrongful accusations⁹⁹. Denmark’s response has been a rejection of the accusations in

⁹³ T. GAMMELTOFT-HANSEN, *Refugee Policy as ‘Negative Nation Branding’: The Case of Denmark and the Nordics*, in *Danish Foreign Policy Yearbook*, 2017, p. 109. Note that the author focuses on Muslims of non-Western background as the kind of people the Danes “*desire to avoid*”.

⁹⁴ A. KESTLER, *Løkke vil lave udenrigspolitik efter B.S. Christiansens opskrift. Det er klogt*, in *Politiken*, 11 March 2023, <https://politiken.dk/debat/klummer/art9244765/L%C3%B8kke-vil-lave-udenrigspolitik-efter-B.S.-Christiansens-opskrift.-Det-er-klogt>; DK Radio News, *Program 1*, Mar. 11, 2023.

⁹⁵ DK Radio News, cit.

⁹⁶ *Ibidem*

⁹⁷ For criticisms of Denmark’s 2023 foreign policy course in the case of Saudi Arabia as a “*criminal tyranny*” with serious human rights violations, see S. RITZAU, *EL: Danmark stiller sig på forkert side med våbeneksport til Saudi-Arabien*, in *Jyllands-Posten*, 13 April 2023, <https://jyllands-posten.dk/politik/ECE15315369/el-danmark-stiller-sig-paa-forkert-side-med-vaabeneksport-til-saudi-arabien/>.

⁹⁸ According to the prime minister, Denmark should, as a small state, no longer aim to “*change the world’ or focus on lofty ideals of democracy and human rights; rather Denmark should prioritize its ‘national interest’ and make the country a secure and safe place for the Danes*”.

See A. MATWIJKIW, B. MATWIJKIW, *Illiberal versus Liberal State Branding and Public International Law: Denmark and the Approximation to Human(itarian) Rightlessness*, in *Global Community YILJ*, 2018, pp. 207, 219.

⁹⁹ UN Special Rapporteur on the Rights of Indigenous People, *Visit to Denmark and Greenland End of Visit Statement* (submitted by Francisco Cali-Tzay), 1-10 February 2023; UN News, *Rights expert urges*

the form of denial. Critically, this response to the practices may be seen as a logical extension of the legacy of Denmark's colonialism¹⁰⁰.

Prior to 2023, Denmark's third Universal Periodic Review (UPR) (in 2021) resulted in 288 recommendations that span a variety of human rights issues, including discrimination. Denmark accepted 202 of the recommendations concerning its record as a UN Member State¹⁰¹. Given the critical emphasis on ethnicity and religion, it is noteworthy that the report makes mentioning of the so-called *burqa* ban (*cf.* law L 219) which was introduced as a criminal law measure to promote “*respect for the community, values and cohesion of the Danish society and [which] is intended to promote social interaction and co-existence in Denmark*”¹⁰². According to the UN Human Rights Commission (UNHRC), however, serious deductions follow from Denmark's strategy in connection with the treatment of non-Western Muslim women. In 2018, the UNHRC decided that the restriction of religious pluralism constitutes a violation of fundamental human rights. The decision is not binding; but it does *not* follow from this that legitimacy is not adversely affected. The point here is *only* about democracy and consistency – as seen from the perspective of liberal democracy as the measurement and ideal.

If a legalistic resolution is insufficient, as Bassiouni claims it is, then it is not possible to resort to the argument that the margin of appreciation is applicable in one forum (European Court of Human Rights (ECtHR) that upheld the bans of the countries Denmark copied, namely France and Belgium), but not the other (UNHRC). – States have to consider the victims. Amnesty International expressly lists “*repeal of L219*” (*cf. burqa ban*)¹⁰³. And if and when law-making is used as a tool, then – according to philosophers like Bertrand Russell, it should first and foremost consider the most affected stakeholders – but the exact opposite happened because of the “*fetal defect*” of the constellation of representative democracy and law-making as a strategy to respond to a minority issue: majority rule¹⁰⁴. In the case of the Danish *burqa* ban and for that matter, the complementary “*handshake provision*” (*cf.* law L 80) that forces female candidates for citizenship to shake the hand of a male public official at the nationalization ceremony, the law-makers appealed to the popular demand for recognition of the right of the Danes to have (limits for) Danish tolerance in the Danish public space, thereby implicitly invoking electoral democracy¹⁰⁵. Like Poland and Hungary, Denmark used a majoritarian strategy.

Denmark and Greenland to examine colonial legacy's impact, 10 February 2023, <https://news.un.org/en/story/2023/02/1133382>.

¹⁰⁰ *Ibidem*; DK Radio News, *Program 1*, 11 February 2023. For Denmark and colonialism, see Aarhus University, Denmark, 2023, <https://nordics.info/show/artikel/the-colonialism-of-denmark-norway-and-its-legacies>.

¹⁰¹ UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Denmark*, of July 14, 2021, A/HRC/48/10/Add.1.

¹⁰² National report submitted in accordance with para. 5 of the Annex to Human Rights Council Resolution 16/21 Denmark, of 9 February 2021, A/HRC/WG.6/38/DNK/1.

¹⁰³ Amnesty International, *Denmark: Human rights must be ensured for all*, submission for the Universal Periodic Review, 38th session of the UPR Working Group, 2-4 May 2021, p. 10.

¹⁰⁴ According to Bertrand Russell, the constellation of representative democracy and law-making as a strategy to respond to a minority issue comes with a “*fatal defect*”, which is also an “*evil: majority rule*”. “*The best cure for this evil, so far as can be seen at present, lies in allowing self-government to every important group within a nation in all matters that affect that group much more than they affect the rest of the community*”. See A. MATWIJKIW, B. MATWIJKIW, *Denmark's Blanket Burqa Ban: A National(ist) Perspective*, in A. MATWIJKIW, A. ORIOLO (eds.), *Law Cultural Studies, and the “Burqa Ban” Trend: An Interdisciplinary Handbook*, pp. 381-382; B. RUSSELL, *Proposed Roads to Freedom: Socialism, Anarchism, and Syndicalism*, 1919, p. 86.

¹⁰⁵ A. MATWIJKIW, B. MATWIJKIW, *Denmark's Blanket Burqa Ban: A National(ist) Perspective*, cit., pp. 367, 373, 375.

Denmark’s status as a liberal democracy is not under attack in the discussion of illiberalism. However, the question is to what extent Denmark can be said to blur the distinction between principle and power? Furthermore, what are the consequences in the larger EU context? As already alluded to, if Ukraine becomes a premature EU member, then a further threat of democratic value inconsistency is introduced on behalf of the EU. Given that Freedom House lists Ukraine as a state with a risk factor for “*abusive majoritarianism*” (cf. the country’s “legislative turbo mode”), there is at least an ethical incentive to rethink EU’s attitude of amicability and flexibility towards some countries¹⁰⁶. This point is reinforced by Ukraine’s problematic record concerning the rights of ethnic minorities, which is an area of justice that is particularly delicate in the context of security and the impact of war. An overemphasis on the conventional geostrategic security imperative may overlook inconvenient truths about victimization causes and consequences. If EU Member States like Denmark can get away with discrimination and still keep their image intact, then candidate countries may begin to see conditionality as a formality.

The fact that Denmark anno 2023 has started to highlight what is right *versus* what is popular in connection with the government’s policymaking shows that the contemporary political developments disregard majority preferences if and when this is (comparatively more) politically expedient (than “what the majority wants is what is right”)¹⁰⁷. In this way, arbitrariness is increased, especially since right *versus* popular consists in the rulers’ business-oriented recalibration of advantages and disadvantages of interaction with authoritarian systems. The thicker the layers of (self-)deception are, the thinner the hybridity veneer becomes; and EU candidate countries like Ukraine may wonder about the difference between “us” and “them”.

Weedersteijn’s discovery of a tautological tendency in connection with liberal democracy may, of course, be used as an instrument with which to weaken the principle *versus* power contrast as far as this translates into principle/liberal democracy *versus* power/non-democracy (cf. might makes right). Critically, the point is that the might makes right maxim is (pre-)reserved for non-democracy. A liberal democracy, so it follows, can “have its cake and eat it”.

6. The Ethics Pillar

¹⁰⁶ Freedom House, *Nations in Transit 2022*, cit., p. 12.

¹⁰⁷ Examples include 2023 socioeconomic policy within in the areas of retirement and holidays. It is noteworthy that the Danish Social Democratic Party is commonly considered to be the “most populist” party. It also secured its electoral success in 2019 on a political campaign that promised a strict policy towards refugees, immigrants, and foreigners. It may have been concerns about inconsistent neoconservative value politics that led to the rejection that “Store Bededag” (Great Prayer Day) – cancelled in 2023 – qualifies as a Cristian holiday although it is “a special Danish holiday” tradition. See J. ANDERSEN, *Socialdemokratiet er blevet mere populistisk end både Enhedslisten og DF*, in *Politiken*, 29 March 2021, <https://politiken.dk/debat/debatindlaeg/art8150544/Socialdemokratiet-er-blevet-mere-populistisk-end-b%C3%A5de-Enhedslisten-og-DF>; D.R. HONORÉ *et al*, *Regeringens mest upopulære forslag er vedtaget: Store bededag er fortid*, in *TV2*, 28 February 2023, <https://nyheder.tv2.dk/politik/2023-02-28-regeringens-mest-upopulaere-forslag-er-vedtaget-store-bededag-er-fortid>; Beskæftigelsesministeriet, *Lovforslag om at afskaffe store bededag som helligdag sendt i ekstern høring*, 1 January 2023, <https://bm.dk/nyheder-presse/pressemeddelelser/2023/01/lovforslag-om-at-afskaffe-store-bededag-som-helligdag-sendt-i-ekstern-hoering/>; M. KAARE, *Mette Frederiksen vil afskaffe populære pension, men nu bliver hun bremset*, in *Jyllands-Posten*, 8 February 2023, <https://jyllands-posten.dk/politik/ECE14958389/mette-frederiksen-vil-afskaffe-populaer-pension-men-nu-bliver-hun-bremset/>.

The learning lesson is that the consequences of empirical facts and findings may lead to surprises in country-specific applications and comparisons concerning best practices. Alone the fact that some value inconsistencies tend to go relatively unnoticed testifies to the pathos effect of liberal democracy. Unlike Poland and Hungary, Denmark is popular within the EU. The democracy *versus* non-democracy debate and dispute does not affect Denmark, although it should on EU premises. Certainly, value inconsistencies that count as threats to the EU block objectively determine the “bad neighbour”. Commentators who counter-argue that some neighbours are worse than others have a valid point. They can support it with references to the mixed typology for regimes and the human rights violations that consolidated (liberal) democracies, hybrid regimes, etc. engage in. In the context of the EU, however, the negative extremes from the typology do not apply, thereby restricting “bad neighbour” talk to hybridity and semi-consolidated democracy. With Russia’s 2022 transition to consolidated authoritarianism, the bad regional example for both Hungary, Poland and Ukraine has arguably been set. If anything, this underscores the importance of value consistency, together with the problem that stems from a too close or uncritical link between regime types and the rational choice decision-making model, as also pointed out by Weedersteijn¹⁰⁸. More precisely, the cost of repression is assumed to be higher in a democracy (because it relies on constraining factors like accountability) but it proves too simplistic beyond the core international crimes (genocide, etc.)¹⁰⁹. Given that the model homes in on the measures that rulers rely on to remain in power, the rationalism-*realpolitik* constellation is inescapable¹¹⁰.

Since a hybrid regime is also a smart regime, the “openings” for dissent that help to maintain a consolidated democracy can be hybridity adjusted to secure a win-win outcome that pragmatically and realistically favor the interest of the rulers¹¹¹. The point is that the game of democracy may be played in numerous ways, and with continuous innovation in mind for the long haul. Upon scrutiny, it appears that it is the narrative that makes the difference. Brute majoritarianism may not be perceived as the “dark side” of democracy unless *their* propaganda is more effective¹¹².

A principled approach, so it seems, is a question of finding a shield against phenomena like the national interest, the state interest, and the interest of the dominant (ethnic, religious, etc.) in-group. After all, liberal democracy’s rule of law concept mixes protection of minorities with individual rights (in general) *and* majority rule – which opens the door to majority tyranny.

According to stakeholder jurisprudence as a version of stakeholder theory that is applied to law and international relations, any conflict (ideally) has to be resolved in favor of the principles that belong under the Ethics Pillar. These include the fair opportunity principle for human stakeholders whereby “*Stakeholders should not be discriminated against on the basis of characteristics which they cannot control through their own subjectivist and/or relativist choices (meaning that they depend on non-preferential factors to be able to acquire or un-acquire the relevant characteristics, if intervention is possible)*”. – They have a right to inclusion on the basis of humanity; the principle that “*Stakeholders should not be subjected to serious harm-infliction*”. – They have a right to

¹⁰⁸ M. WEEDERSTEIJN, *op. cit.*, pp. 188, 190, 194-198, 200.

¹⁰⁹ *Ibidem*, p. 200. Note that the choice of Danish rulers to do business with authoritarian systems is a way of supporting repression abroad. Consequently, the implied disregard for democracy and human rights may not be given as much weight as it should in value consistency considerations. Expressions that invite disregard, e.g., “*less preaching*”, as used by Minister of Foreign Affairs Løkke Rasmussen, give President Putin an advantage when he talks about “*fake values*”.

¹¹⁰ *Ibidem*, p. 188.

¹¹¹ *Ibidem*, p. 194.

¹¹² *Ibidem*, p. 194.

dignity; the principle that “*Stakeholders should be treated as ends in themselves, and not merely as means*”. – They have a right to respect; the principle that “*All stakeholders should be given consideration on the basis of important needs and/or interests*”. – They have a right to equality; and the principle of human stakeholder participation, “*Stakeholders whose subsistence/welfare and/or freedom is substantially affected by the outcomes of collective decisions, strategies or arrangements should participate directly or indirectly in the relevant decisions, strategies or arrangements*”. – They have a right to a rule of law as opposed to a rule of might¹¹³.

By virtue of accommodating Russell’s justice adjustment, i.e., the greater emphasis on the interests of the most affected stakeholders, the principle of human stakeholder participation disconnects popular participation and brute majoritarianism. In other words, the adjustment would discontinue or at least minimize the “dark side” of democracy.

The above-mentioned principles do not exhaust the ethics of stakeholder jurisprudence. E.g., the principle of special stakeholder responsibility for rights, whereby “*You should not use interpretations of law and politics as instruments to undermine stakes that objectively qualify as global values*” is a part of the Ethics Pillar¹¹⁴. This cannot but highlight basic needs, something which in turn implies that the Ethics Pillar contains some of the most central prescriptions in the context of human rights. Furthermore, stakeholder jurisprudence explicitly relies on values like respect in its credentials-checking of human rights *per se*. If the object of a right is provided for purely instrumentalist reasons, then it is not conceptually possible to infer that a right existed in the first instance¹¹⁵. In the case of group rights (e.g., peoples’ right to self-determination) and the interpretation of reciprocal stakes and (the legal principle of) mutual benefit, the respect component serves to prevent negotiation and bargaining on amoralist terms. Stakes must be settled in a manner that does not coerce the other, however willingly that same party appeared to consent to an outcome that secured reciprocal stakes that maximize *their* interest. Phenomena like colonialism and the contemporary consequences of its legacy illustrate the continuous need for a less naïve interpretation of coercion *versus* persuasion in circumstances that already evidence structurally determined inequities. A similar point applies to international relations if and when one or more superpowers interact with small(er) states. The use of the latter as pawns in *their* game – which is what some commentators see in the case of Ukraine – is as unprincipled as joining the EU to gain an advantage that is irrelevant for the EU’s European perspective – an irrelevancy which will follow if a candidate country’s intentions are focused on that same advantage – irrespective of any official rhetoric.

Furthermore, in the case of the core rights that are included in the EU’s conditionality namely, individual rights and the rights of persons belonging to minorities, the credentials-checking of stakeholder jurisprudence implies “all human rights” without in any way lowering the equal status of economic, social and cultural human rights in comparison to civil and political human rights. This step presupposes a rejection of the conventional approach to rights whereby considerations having to do with resources,

¹¹³ A. MATWIJKIW, B. MATWIJKIW, *A Look Behind the Legal Scene*, cit.; A. MATWIJKIW, B. MATWIJKIW, *Bahrain Anno 2017*, cit., pp. 135-136. Note that the assumption, that an emphasis on ethics as a component of the philosophical stakeholder jurisprudence position cannot resolve the split over democracy, still stands to avoid an analogy to Weedersteijn’s tautology. See *supra* note 51.

¹¹⁴ A. MATWIJKIW, B. MATWIJKIW, *The Emerging Ethics Evolution: The Evasive Connection Between Environmental Crimes, Philosophical Considerations of Public International Law, and the International Criminal Court’s 20th Anniversary*, in *Global Community YILJ*, Vol. 22, 2023, pp. 717-756.

¹¹⁵ A. MATWIJKIW, B. MATWIJKIW, *Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law*, in *Int’l Crim. L. Rev.*, Vol. 10, Issue 2, 2010, p. 161.

controlling choices over duties, remedies, etc. must be separated from the analytical criteria for rights-recognition¹¹⁶.

The Ethics Pillar paves the path for equal solidarity at both the national and international levels, and without separating these in circle-concentric terms and with implications for a distribution of consideration on the basis of closeness *versus* remoteness, meaning that “our own kind” can be found in all circles. By extension, the Ethic Pillar is an anti-dote to the “*claims of nationalistic cultural rights*” which Bassiouni connects with Western reluctance to respond to “*the hardship suffered by refugees fleeing wars, repressive regimes, economic exploitation, and poverty*”, thereby lamenting the humanitarian protection conditions in the most economically advanced countries¹¹⁷. According to Weedersteijn, an exclusive ideology may be a feature of several regime types, including democracy, but this is exactly why the so-called free state may not excel ethically unless norm-internalization – through education and enlightenment (here citing Matviichuk) – is made part of the process of (re)socialization for the rulers and the ruled alike¹¹⁸. As stressed by Scheppele, it is easy to establish an undemocratic power balance and distribution between (absolute) controllers and the controlled, especially in a culture that does not reward a “*high moral character*”¹¹⁹.

If the EU chooses a course or path that is more narrow than broad (*cf.* security), then they should be consistent *on that premise*. In terms of democracy, this entails maximum pluralism *and* value neutrality as regards (types of) democracy¹²⁰. This would end the EU split in one sense, of course, but the explanation for the value neutrality would repeat the *laissez-faire* philosophy the negation of which has otherwise become the centerpiece in the EU’s response to not-so-popular Member States (*cf.* Poland and Hungary). Together with conditionality and coherence, differentiation is one of the ENP principle; and the dynamic development pulls in the direction of treating differentiation as encompassing both integration and disintegration as possible variants¹²¹. If so, the applicability of the underpinning notion of legitimacy may become so flexible as to eventually satisfy a less union-fixated approach to security, with spillover effects for political ideology. Those who believe that “*Europe is first of all a Union of values*” – such as European Commission President von der Leyen – would have to commit, as a minimum, to self-critical exercises to revert the trend, ranging from legal opt-outs (in the case of Denmark, in the area of justice and home affairs) to double standards (*cf.* protection of fundamental human rights)¹²².

7. Some Takeaways and Conclusions

¹¹⁶ A. MATWIJKIW, *The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate: Norm-Integration and the Triple-Thesis ‘Argument’*, in *Int’l Crim. L. Rev.*, Vol. 20, 2020, pp. 759-783.

¹¹⁷ As cited in A. MATWIJKIW, B. MATWIJKIW, *A Look Behind the Legal Scene*, cit.

¹¹⁸ M. WEEDERSTEIJN, *op. cit.*, pp. 198-199.

¹¹⁹ IHRLI, *The Chicago Principles on Post-Conflict Justice*, cit., p. 39.

¹²⁰ Narrow stakeholder frameworks contrast liberalism and paternalism, thereby resorting to subjectivist and relativist criteria for ethical judgements.

¹²¹ S. POLI, *op. cit.*; B. LERUTH *et al.*, *THE ROUTLEDGE HANDBOOK OF DIFFERENTIATION IN THE EUROPEAN UNION*, 2022.

¹²² S. PETREQUIN, *Macron: EU Needs to Fight ‘Illiberal’ Values Inside Block*, in *AP News*, 25 June 2021, <https://apnews.com/article/europe-government-and-politics-5467b6be4d12a71764fa48788eb30740>; A. MATWIJKIW, B. MATWIJKIW, *Liberal Democracy*, cit., p. 70.

Who stands on principle in practice? This is a key question. Democracy is an ideology, but then so is ethics. On comparison, humanistic idealism is a progressive and transformative power that extinguishes pragmatic realism whenever possible because this comes without any (principled) breaking devices for convenience and effectiveness. An emphasis on ethics as a component of the philosophical stakeholder jurisprudence position cannot resolve the democracy *versus* non-democracy or, for that matter, the liberal *versus* illiberal democracy split¹²³; but a push for a (more) principled approach can at least minimize amoral consequences or effects from ideology and maximize the potential of humanistic idealism.

Causes matter too, albeit narrow stakeholder reasoning politically will anchor conflict in the welfare state (and partly because of its bureaucracy) whereas the broad(er) framework may resort to policies of socioeconomic redistribution on utilitarian premises, if need be. In all circumstances, the ideological clash cuts across politics and ethics. Hybridity, as found in the Western Balkans, Ukraine, etc. is not necessarily problematic in the external sense. On narrow premises, it would be dismissed if it is inflicted by third parties. In the context of the EU, it would be too cynical to argue that the relevancy of the hybrid regime or hybridity discourse is limited to respect for equal sovereignty, though. Voluntarism is the way into the union, but to remain inside, the Member States are bound by foundational values.

The terminology of stakeholders has gradually become a feature of EU policymaking. However, like the UN, the EU does not qualify this in narrow *versus* broad conceptualizations. Nevertheless, it makes a difference. Concerning ethics, the difference almost manifests itself along the same lines as the EU conditionality, with liberal democracy, human rights, and rule of law as broad measurements for assessment of what is right as opposed to popular and, on the other hand, a narrow approach to prescriptions which leaves values as stakeholder variables that are secondary in comparison to free market forces. On narrow premises, it is a certainty that economic freedom *cum* capitalism has an emancipatory potential, but the transition to civil/political freedom *cum* liberalism is not. This is to say: the transition from the marketplace to freedom does not occur with any historical and empirical necessity. E.g., if the EU opts for a socialized program, with greater emphasis on socioeconomic rights and measures, then a conclusion in favor of totalitarianism is inescapable, again according to a narrow outlook. Another way of putting the same point is to say that the welfare state *is* the (narrowly defined) illiberal state. A socialized program is not what the EU deems a failure, though. Notwithstanding, the EU’s rudimentary adoption of the stakeholder terminology is not sufficient to prove this.

Observers point to “*a trend towards increasing references to the terms ‘ethics’ and ‘morality’ in the context of European Union (EU) law*”¹²⁴. In specific subfields of the discipline, such as biomedical ethics, it is possible to find examples of scholarly discourse. But, a morally substantive and general framework has yet to be designed. Since the terminology of stakeholders is already an EU fixture, it would be logical to link the application to stakeholder theory and, if broad outlooks are recommended, to stakeholder jurisprudence. An additional source of support for this can be found in the research on regime types, crimes, and human rights violations. The interdisciplinary methodology is

¹²³ *Supra* note 113.

¹²⁴ M. FRISCHHUT, *The Ethical Spirit of EU Law*, Cham, 2019.

also something that resonates with stakeholder jurisprudence, which was developed as an outgrowth of business management¹²⁵.

With bureaucracy as a major issue in contemporary society¹²⁶, the broad approach to human rights recommends critical thinking exercises pertaining to the violations that may constitute a better approximation to those regime types that span the democracy spectrum. In the case of Denmark as a test case to explore the meaningfulness of different gradations for EU value consistency, several of the human rights controversies are connected with bureaucracy as an instrument of repression – and sometimes assisted by biased quantitative measures¹²⁷. If sufficiently repressive, bureaucracy can be interpreted as an analogy to traditional feudalism¹²⁸. Threats to freedom are a shared narrow/broad stakeholder concern, whereas structural weaknesses that transcend the establishment or protection of the free market are unique for stakeholder jurisprudence as a broad version. The oligarchs that proceed like amoral parasites in hybrid regimes and more consolidated types of authoritarianism have as little interest in (socialized) economic democracy as they do in liberal democracy. On narrow premises, however, they are likely to escape accountability for grand corruption¹²⁹. As regards effective rights, law is the sole constraining factor that narrow stakeholder theorists accommodate. Reliance on law alone, however, is likely to misfire since the hybridity game can be adjusted in accordance with the demand for pragmatic realism. Consequently, the vicious circle argument that follows from the accumulative and harmful spillovers from reinforcing values is almost bound to work in favor of the grey zone as the destination.

Meanwhile, the Western Balkans involved in the EU's 7th enlargement process, the so-called WB6 countries, have to make do with a place in the shadow. "*The European Union is not complete without the Western Balkans*", according to High Representative and Vice-President Joseph Borrell's statement of 8 February 2022¹³⁰. Hopefully, the facts that the EU has failed at tackling the democracy decline and crisis and that the regional hybridity trend is likely to continue will serve as wake-up calls at a not too remote point in the future. If the union is not first and foremost about identity, authenticity and integrity, as based on core values and the accountability/cooperation constellation, then the European project itself perhaps needs to be rethought. The European Commission's 2023 Work Programme, "*A Union Standing Firm and United*", lists "*cooperation with candidate countries in the Western Balkans, along with Ukraine, Moldova and Georgia, in view of their future accession to the Union*" as a policy that will be continued¹³¹. The

¹²⁵ See generally A. MATWIJKIW, B. MATWIJKIW, *From Business Management to Human Rights: The Adoption of Stakeholder Theory*, in *Journal of The Indiana Academy of the Social Sciences*, Vol. 13, 2010, pp. 46-59.

¹²⁶ Bassiouni's criticism of the UN makes impossible a separation of bureaucracy and *realpolitik*. Furthermore, since *realpolitik* has the ability to *co-opt* institutions of peace and justice (like the UN), the threat to humanistic values may be a serious one. See M. CHERIF BASSIOUNI, *Combating Impunity for International Crimes*, in *U. Colo. L. Rev.*, Vol. 21, 2000, p. 420.

¹²⁷ In the case of Inuit people and discrimination and racism in Denmark, the practice of forceful removal of children is not only based on wrongful accusations but also on "*Danish optic*" tests of parental competencies. Inuit people state that there is "*no toleration of our identity (...)*". See DR Radio News, *Program 1*, cit.

¹²⁸ E.g., Gammeltoft-Hansen mentions "*deliberately delayed or protracted processes to determine refugee status*" as examples of bureaucratic obstacles and indeed obstructions to justice. See T. GAMMELTOFT-HANSEN, *op. cit.*, p. 107.

¹²⁹ K.L. SCHEPPELE, *op. cit.*, p. 579.

¹³⁰ The Diplomatic Service of the European Union, Region: Western Balkans, 8 February 2022, https://www.eeas.europa.eu/eeas/western-balkans_en.

¹³¹ European Commission, *2023 Work Programme, A Union Standing Firm and United*, of 18 October 2022.

GOVERNANCE AND THE “GREY ZONE” SYNDROME: BEST PRACTICES AND
CONSEQUENCES OF FAILURE

Big But is: a policy continuation is likely to be exploited in the pro-West *versus* pro-Russia rivalry. Internally, the EU may see the accession situation as an instance of the “Damn you if you do and damn you if you don’t” predicament; and that is understandable. Nevertheless, “Standing Firm and United” sends the very signal about accountability that the EU itself probably would be wise to listen to. – It is good advice.

ABSTRACT

In 2022, a negative milestone was reached with the democracy data from Freedom House on the region stretching from Central Europe to Central Asia. The data identify hybridity, the so-called “grey zone”, as the regime trend. There are different paths to hybridity, but the main features are the same. The article captures these in a regime typology which also accommodates findings about human rights violations. To further contextualize the discussion, considerations concerning values and consistency are coupled with a principle versus power contrast. However, while best practices are equated with liberal democracy within the area of governance, consequences of failure cannot be limited to a question of substandard performance to cement the role of rulers as controllers. Rulers dispute, sometimes even mock legitimacy as based on democracy. An emphasis on ethics as a component of the philosophical stakeholder jurisprudence position cannot resolve the split; but a push for a (more) principled approach can at least minimize amoral effects from ideology and maximize the potential of humanistic idealism.

KEYWORDS

Ethics, Governance, Hybrid Regime, Liberal Democracy, Legitimacy.

GOVERNANCE E LA SINDROME DA “ZONA GRIGIA”:
BEST PRACTICES E CONSEGUENZE DEL FALLIMENTO

ABSTRACT

Nel 2022 è stato raggiunto un traguardo negativo per i dati di Freedom House sulla democrazia nella regione che si estende dall'Europa centrale all'Asia centrale. I dati identificano l'ibrido, la cosiddetta "zona grigia", come tendenza del regime. Ci sono diversi percorsi per l'ibridazione, ma le caratteristiche principali sono le stesse. L'articolo la inquadra in una tipologia di regime che accoglie anche le scoperte sulle violazioni dei diritti umani. Per contestualizzare ulteriormente la discussione, le considerazioni riguardanti i valori e la coerenza sono accoppiate con un contrasto tra principio e potere. Tuttavia, mentre le best practices sono equiparate alla democrazia liberale nell'ambito della governance, le conseguenze di un fallimento non possono essere limitate ad una questione di prestazioni scadenti volte a cementificare il ruolo dei governanti come controllori. I governanti contestano, a volte addirittura deridono, la legittimità in quanto basata sulla democrazia. Sarà data anche enfasi all'etica, come componente della posizione filosofica della giurisprudenza degli stakeholder incapace di risolvere la divisione prospettata. Tuttavia, una spinta per un approccio fondato (maggiormente) sui principi può almeno ridurre al minimo gli effetti amorali dell'ideologia e massimizzare il potenziale dell'idealismo umanistico.

KEYWORDS

Democrazia liberale, Etica, Governance, Legittimità, Regime ibrido,