

THE RULE OF LAW, DEMOCRACY AND FUNDAMENTAL RIGHTS – STATE OF THE ART

The rule of law, democracy and fundamental rights have a special place in EU law. They are all enshrined in Article 2 of the Treaty on the European Union (TEU) along some other values, on which European integration is based, such as human dignity, freedom, and equality. These are the values that capture the very essence of Europe as a peace project, based on solidarity, humanity, tolerance and pluralism. And these are the values that all Member States are expected to share and promised to respect and promote when signing the Treaty of Lisbon.⁸⁷ The rule of law, democracy and fundamental rights are singled out as the most important foundational elements that are also co-constitutive, and inherently interconnected. Once one of them is violated, harm to the other values is inevitable, too (Carrera et al., 2013). The rule of law without democracy is a contradiction, while democracy without the rule of law may easily lead to the dictatorship of the majority. Also, fundamental rights are closely interlinked with the other two values (Bárd et al., 2016). Take for example the relation between freedom of expression, the right to receive information and informed participation in a democracy. One can only make informed choices during elections, or meaningfully participate in public debates in the possession of knowledge about the facts (Bayer et al., 2019: 62).

Even though Article 2 TEU values had been taken for granted for a long time in the EU, a solid decline started a decade ago in Hungary and other Member States are now following suit. The EU is by now harboring Member States that are no constitutional democracies anymore. According to the Varieties of Democracy (V-Dem), Hungary is simply not a democracy any longer, while Freedom House stopped putting Hungary among the “free countries”. According

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⁸⁷ Cf. Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. Article 3(1) TEU: “1. The Union's aim is to promote peace, its values and the well-being of its peoples.”

to the Bertelsmann Stiftung's Transformation Index (BTI) Hungary was among those countries that had the most significant drops in rule of law matters. Also the World Justice Project's Rule of Law Index showed a devastating picture: Hungary and Poland declined the most of any country in the EU/EFTA/North-America region, and in 2020 Hungary reached its lows: it had the region's lowest scores for constraints on government powers, open government, fundamental rights, regulatory enforcement, civil justice, and the rule of law in general (*v-dem.net*; Freedom House; BTI, 2020; WJP Rule of Law Index). Hungary and Poland could not join the EU, were they to apply today.

Naturally, no state is immune to individual violations of Article 2 TEU values. But we must distinguish these sporadic instances from systemic rule of law decline. Hungary, and more recently Poland belong to the latter category. They introduced processes “through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power entrenching the long-term rule of the dominant party.” (Pech and Scheppele, 2017) Little wonder that these two countries are currently subjected to Article 7(1) TEU procedures designed to determine a clear risk of a serious breach of Article 2 TEU values.

Ruling by cheating

“Ruling by cheating” is the title of András Sajó's (2021) most recent book, where he claims that an illiberal democracy, or as he puts it, a plebiscitarian leader democracy, or “PLD, née Führer-Demokratie”⁸⁸ will do everything to conceal its true, authoritarian tendencies. Such a regime is necessarily based on a “theory of cheating” in its constitutional law, whether straightforward lies, deceit, fraud, tricks, etc. “Cheating” is defined as “pretending to observe a rule in order to depart from it, often reaping undeserved benefits from those cheated [...] In the act of cheating, the cheater – the plebiscitarian leader – (mis)represents himself as normobservant. The illiberal regimes relying on systemic cheating pretend to satisfy the requirements of the RoL [rule of law] by following specific rules that seem applicable, but they do so in disregard of the relevant standards or principles of the RoL. A regime that cheats in its

⁸⁸ Borrowing from Max Weber, PLD is considered to be an “authority and regime type with authoritarian traits, like charismatic leadership, generated by the internal logic of modern mass democracy per se.” (Körösi, 2019: 283 cited by Sajó, 2021: 5)

use of the law breaches a promise of ‘truth’ or authenticity that the underlying norms of the game will be observed.” (Sajó, 2021: 5) Cheating can be observed in relation to all European values, but in the following examples of cheating with regard to the rule of law and in relation to human rights will be singled out.

The semblance of the rule of law

Albeit illiberal governments do everything to do away with checks and balances constraining power, they claim to be adherent to European values. Being a rule of law violator is a great stigma, so value infringements have a veneer of legality. Relying on the above mentioned “theory of cheating”, they seem to be embedded in legal rules. Instead of admitting what is actually happening: changing laws and institutions with the sole aim of retaining power and money (*The Economist*, 2018),⁸⁹ illiberal governments make efforts to mix legality with the rule of law, and argue that everything they do is legal. Showing these veiled attempts to destroy the rule of law, systems are characterized by oxymorons such as constitutional populism (Blokker, 2019a, 2019b; Halmai, 2019) or abusive constitutionalism (Dixon and Landau, 2019). These terms illustrate that the rule of law is just a semblance, in these systems law does not serve as an opposition to arbitrary power, and these systems cannot be labelled as democracies based on the rule of law anymore. The constitutional court is compromised, the most experienced judges are removed from the top courts, the ombudsman system as we new it, ceases to exist, media pluralism is seriously jeopardized, academic freedom is curtailed, NGOs’ space is shrinking, human rights defenders are stigmatized, vulnerable minorities are scapegoated (for an early account of the Hungarian saga see Tóth, 2012), and even the thinnest understanding of the rule of law fails to be met (Schumpeter, 1950), since elections are not considered to be fair anymore by international observers (OSCE, 2018).

⁸⁹ Hungary is often labelled as a kleptocracy.

The semblance of human rights protection

Just like being a rule of law violator became a stigma, similarly, at least since the Shoah, the human rights paradigm became very powerful, and gained a strong legitimizing force in national politics. No government in any part of the world today would openly challenge it. Therefore state-mandated violations of human rights – just like rule of law decline – are disguised. Illiberals, instead of openly acknowledging rights infringements, try to argue for the need of limitation of fundamental rights in the interest of legitimate state aims, that are allegedly necessary and proportionate. Take for example the justifications for the need of punitiveness in the form of three strikes legislation (Hungarian Helsinki Committee, 2009), life imprisonment without the possibility of parole in the name of security (Lévay, 2016), or the prolonged states of emergencies since 2015 (Drinóczi, 2020), where the balance between freedom and security is allegedly to be struck differently than what we are used to in normal times. An alternative method to violate human rights is to pretend to have a conflict of rights, such as for example having a clearly homophobic law packaged as a children’s rights legislation fighting paedophilia (Polgári and Dombos, 2021).

Human rights violations happen all over the world, including democratic states, one may say. This is indeed true. What makes the illiberal Hungarian case unique is (i) the quantity and quality of these violations, (ii) that rights infringements are used to veil power and money grab, and (iii) human rights violations are rubber-stamped by captured institutions.

Ad (i) The greatness of a nation can be judged by how it treats its weakest members, or so they say. The Hungarian illiberal system heavily underperforms in this respect, to say the least. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, and identity politics in general. Emotionalism has a nationalistic connotation unifying an allegedly homogenous Hungarian nation along ethnic lines, and at the same time – by way of a negative definition – excluding from its members “others” including traditional unpopular minorities (for example suspects, convicts, LGBTIQ+ persons, the Roma, the poor) or anyone diverging from the “ordinary” (for example members of small churches). Hostility against minorities is partially embedded in Hungarian society, but is to a great extent is artificially created (Bárd, 2017).⁹⁰

⁹⁰ See for example the Hungarian anti-migrant billboard campaign and its consequences.

Ad (ii) Another characteristic that makes the Hungarian case unique is that minority bashing is used as a red herring to divert attention from power and money grab. Some of these red herrings do not harm any individual or group of society directly. An less harmful example was suggesting the reintroduction of the death penalty by the prime minister. There was immense and immediate international reaction and the idea was abandoned soon, without infringing upon anybody's human rights. Other red herrings however come at great costs for the minorities, and for society's decency and humanity, such as the recently adopted and above referenced homophobic law adopted under the disguise of children's rights (Polgári and Dombos, 2021).

Ad (iii) The last uniqueness of the Hungarian case is that human rights violations are rubber-stamped by captured institutions. The ombudsman system as we used to know it, ceased to exist. The data protection ombudsman's office has been scrapped entirely, and was replaced by an authority with a government-loyal head.⁹¹ The recent ombudspersons are rather passive, and the Equality Body was merged into this weak ombudsman's office. But it is the Constitutional Court that not only passively, but also proactively, by way of its interpretation becomes complicit in fundamental rights violations through the rise of abusive case law (Dixon and Landau, 2019). Take the criminalization of homelessness, which was not only constitutionally entrenched (which is itself unprecedented), but rubber stamped by the Constitutional Court (Lévay, 2021). Or take the regulation of life imprisonment without the possibility of parole, in clear violation of the European Convention on Human Rights.

The case was pending for a long time before the Constitutional Court, and there was a majority for declaring it unconstitutional, and quashing the law. But the Constitutional Court waited with the passing of the judgment until it was packed with people loyal to the government and ultimately it rubber stamped that law, too (Lévay, 2016). The Constitutional Court could have prevented a Strasbourg condemnation by declaring the law null and void, but failed to do so. And when the condemnation happened, the state amended the respective law in a manner that clearly violated the Strasbourg test, so Hungary was held to be in violation of the European Convention on Human Rights for a second time.⁹²

In sum: in lack of a strong Constitutional Court, an independent court, ombudsman system, and equality bodies, one is left with external *fora* to enforce values that the Member States and the

⁹¹ CJ, C-288/12, Commission v Hungary, 8 April 2014.

⁹² Case of Sándor Varga and Others v. Hungary, Applications nos. 39734/15 and 2 others, 17 June 2021.

EU were presumed to share. As I will argue in the next chapter, albeit the EU has the tools to enforce the values it is based on, these are heavily underused by the institutions. And even when they are used, the gist of the matter is execution of judgments, whereas there are more and more cases where enforcement is faulty, incomplete or non-existent (see e.g. Amnesty International Hungary, 2021: 8-9). So in the end, state capture and systemic human rights violations happen in broad daylight in the heart of Europe, and become normalized by the lack of efficient external responses.

Rule of law decline in a Member State is an EU matter

Violation of the rule of law in any Member State is an EU matter. The EU must intervene in such cases. True, problems identified primarily affect Hungarian citizens living in Hungary. Having this in mind, EU action would correspond to the expectations of citizens who had high hopes to join the West not only economically, but also in terms of the rule of law, democracy, and fundamental rights, when Hungary acceded to the European project in 2004. And let us not be fooled by the two third majority of the current governing party in the Hungarian parliament. Less than 50% of the votes are translated by the election laws – that had been changed over the past ten years to benefit the winner even more – into a supermajority in parliament. In addition, the election is said to be unfair by international observers (OSCE, 2018). Even though the current government's recurring theme is secession from the EU (for an English language summary see *dw.com*, 2021), Hungary is still one of the most-pro EU Member States and people believe in values enshrined in Article 2 TEU (European Commission, 2021).⁹³ But rule of law decline does not only affect Hungarians. A state's departure from European consensus on rule of law standards will have EU-wide consequences. If Members of the European Parliament EU delegates of the national government were voted in unfairly, this will delegitimize the EU's decision-making mechanism. Another problem is rule of law violations becoming contagious, in case EU institutions fail to respond to backsliding. Furthermore, once the values of Article 2 TEU are not respected, the essential presumptions behind the core of the Union do not hold any more. The single market, an investment-friendly environment or effective cross-border

⁹³ According to the most recent Eurobarometer survey, 68% are optimistic about the future of the EU, and 62% demand "more EU".

judicial cooperation in criminal matters are all in danger, if basic tenets of the rule of law, such as an impartial judiciary are not guaranteed.

It is not only existential for the EU to react to rule of law violations and other value deficiencies in the Member States, but the EU also possesses a sufficient number of tools to counter these problems. The Copenhagen dilemma (having strong scrutiny before accession, but no dissuasive responses after) exists on the one hand because these mechanisms have a scattered and patchwork nature and on the other because the powers which are entitled to use the tools they have available are unwilling to do so. In the following the main instruments will be listed that could be employed for a dissuasive responses against rule of law decline. (The list is far from exhaustive. For details see Pech et al., 2019).

EU tools to enforce Article 2 TEU values in the Member States

In this chapter some of the EU's tools will be listed that are capable of enforcing Article 2 TEU values. Monitoring and benchmarking instruments, platforms for discussion and debate, such as Article 7(1) TEU, the Commission's EU Justice Scoreboard, the Commission's Rule of Law Framework, the Commission's Annual Rule of Law Report, the Council's dialogues on the Rule of Law, the European Semester, will therefore not be discussed. Instead Article 7(2)-(3) TEU, infringement procedures, and conditionality will be presented.

Article 7(2)-(3) TEU

Article 7 TEU, which is designed to enforce Article 2 TEU values, has a preventive and a sanctioning prong. The preventive prong enshrined in Article 7(1) is a so-called *lex imperfecta*, meaning that it does not foresee any sanctions. Such proceedings are currently ongoing against Poland and Hungary.⁹⁴ It can only be regarded as a platform for a dialogue between EU

⁹⁴ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, 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 (2017/2131(INL)); European Commission (2017) Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final.

institutions and Member State governments, at the end of which potentially the Council may determine that there is a clear risk of a serious breach of Article 2 values in the national setting. This determination is all foreseen by the provision. Article 7(2)-(3) TEU in contrast, is designed to introduce sanctions by suspending certain rights of the problematic Member States, including – but not limited to –the respective government’s voting rights in the Council, in case of the existence of a serious and persistent breach of Article 2 TEU values. The scope of application of Article 7 TEU is broad and, unlike other tools, it is not limited to Member States’ actions when implementing EU law, but also covers breaches in areas where they act autonomously.⁹⁵

Infringement

Articles 258 and 260 TFEU provide for Commission-initiated infringement procedures. These are currently heavily underused in the enforcement of the rule of law.

In the face of the Commission’s silence, Member States that are friends of the rule of law could make use of Article 259 TFEU, which gives them the right to act in place of the Commission. The contours of such a first attempt are already visible (Morijn, 2020; for the details on Article 259 see Scheppele et al., 2020). The Commission could also bundle cases in the frame of infringement proceedings, and point to the systemic nature of various problems (Scheppele, 2016; Blauberger and Kelemen, 2017: 321). Another vital element that the Commission should put a greater emphasis on is enforcement of CJEU judgments. The decision in *Lex CEU*,⁹⁶ concerned a Hungarian piece of law, which allowed the government to arbitrarily refuse to grant a license to the Central European University to offer educational services in Hungary. The law in question which violated several pieces of European and international laws, is still in force, almost a year after the CJEU judgment had been rendered, and the government plans to amend the law are also dubious as to their EU law compliance (Inotai et al., 2021). Similarly, the

⁹⁵ Article 354 TFEU provides that the Member State subjected to the Article 7 TEU procedure is excluded from voting. A problem may arise with regard to multiple Member States simultaneously subject to various Article 7 TEU procedures. They might cooperate by vetoing Article 7 procedures. Another problem is that the voting threshold for the adoption of such sanctions is extremely high. Whereas the affected Member State is excluded from the voting, in all other respect qualified majority has been defined in line with Article 238(3)(b) of TFEU. In other words, the population threshold seems to be unaffected, i.e. the votes – that now exclude the votes from one Member State – still have to represent 65% of the population of the EU. For various readings of this provision see Kochenov, 2021: 143. Sooner or later the issue will need to be decided by the CJEU.

⁹⁶ Case C-66/18 *Commission v Hungary (Higher Education)*, 6 October 2020, EU:C:2020:792

judgment in *Lex NGO* (for an immediate analysis see Bárd et al., 2020),⁹⁷ about the stigmatization of civil society organizations has not been properly followed up either (Amnesty International Hungary, 2021: 8-9).

Conditionality

Finally, several studies show at the power of the purse as the single most effective legal response containing rule of law backsliding. Even without the Commission's recent "generalised deficiencies" law, in line with Regulation (EU) No 1303/2013 (Common Provisions Regulation, CPR),⁹⁸ the Commission could suspend European Structural and Investment Funds (ESIFs) where a Member State does not uphold the rule of law.⁹⁹

Instead of just making better use of the above tool, European institutions came up with a more general rule of law conditionality proposal.¹⁰⁰ The European Council and the German presidency watered down the original proposal and shifted the focus to the importance of the protection of the Union's financial interests from the protection of the rule of law. Rule of law breaches will now be sanctioned if they affect or seriously risk affecting the budget in a sufficiently direct way. Instead of the original plans of a reverse qualified majority to block the Commission, in the final version a qualified majority in the Council must support the Commission's decision for it to go into effect.

Hungary and Poland, the most likely candidates to be affected by the new rules, in a response to the adoption of this law, threatened to block the approval of the EU's seven-year budget, the Multiannual Financial Framework (MFF) and the Next Generation EU COVID-19 recovery fund (NGEU) (Valero, 2020; Herszenhorn and Bayer, 2020). Therefore, as a compromise, the final text was accompanied by application guidelines (for a criticism of this "unprecedented disregard for the rule of law," see Alemanno and Merijn, 2020; Scheppele et al., 2020b). But even this was not sufficient for Hungary and Poland, which attacked the Regulation before

⁹⁷ C-78/18 *Commission v Hungary* (transparency of associations), 18 June 2020, ECLI:EU:C:2020:476.

⁹⁸ See Article 142(1)(A).

⁹⁹ There have been few instances, where the instrument was triggered though. See Government of Romania, 2019: 146. See also the European Parliament resolution of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest (2019/2987(RSP)).

¹⁰⁰ For the final text see Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

the CJEU. The European Parliament emphasized that it is the duty of the Commission to ensure the application of the Treaties and other pieces of EU laws, and that the Commission must “abide by law, *dura lex sed lex*”,¹⁰¹ and threatened it in case it fails to apply the mechanism as of 1 January 2021. The Commission ascertained the European Parliament to apply the law, and is expected to launch proceedings making use of the new instrument soon.¹⁰²

Conclusions

As proven on the above pages, violations and in particular systemic attacks on the rule of law, democracy and fundamental rights in any of the Member States have direct consequences for the European idea, and more specifically for EU law. Therefore it is of existential importance for the EU to react and contain such problems. It has been argued that the EU has sufficient mechanisms to tackle the problem, and the solution is not in the invention and creation of more tools (Pech and Wójcik, 2018). Should existing mechanisms be used in a “promptly, forcefully and in a coordinated manner” (Pech et al., 2019), the EU could provide efficient responses to rule of law backsliding, or slow down the destruction, or at the very minimum put an end to the absurdity of financing governments building regimes in violation of EU values out of EU money.

¹⁰¹ European Parliament resolution of 16 December 2020 on the Multiannual Financial Framework 2021-2027, the InterInstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP), point 6.

¹⁰² See actions for annulment according to Article 263 TFEU. (Rogal, 2021). For an academic account of the reasons for which the Conditionality Regulation could be triggered see Scheppele et al., 2021.

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