

Contribution to the Rule of Law debate at the 47th European Presidents' Conference

by Petra Bárdⁱ

1. STATE OF THE ART

After the regime change Hungary and Poland were the first “post-communist” countries to join the Council of Europe to abide by the European Convention on Human Rights in 1990. Hungary and Poland established official relations with NATO and the EU already in the early 1990s and became members in 1999 and 2004 respectively. The EU played an important role in the transformation of all the Eastern European states and in the context of their democratisation. The principle of conditionality was used to achieve this, coupled with the presumption that any democratic or Rule of Law ‘backsliding’ would not be possible once the transformation is in place. History proved this presumption wrong.

The shift came rather abruptly when in April 2010, in a free and fair election the center-right political parties Fidesz and the Christian-Democrats got 53% of the votes, which translated according to the election law then in force into more than two-thirds of the seats in the unicameral Hungarian Parliament. The ruling party eliminated – at least in the domestic setting – all sources of criticism by both the voters and by the state institutions, effectively disposing of any effective checks and balances. Poland followed the path of illiberalism when the Law and Justice party entered government in 2015. Should a discontent electorate now wish to correct deficiencies, it will be difficult for it to do so due to the novel rules of the national ballot, which fundamentally question the fairness of elections. Judicial oversight and most importantly the Hungarian Constitutional Court’s room for correcting the failures of a majoritarian government have been considerably impaired, along the powers of other *fora* designed to serve as checks on government powers. Distortions of the media and lack of public information lead to the impossibility of a meaningful public debate and weaken the chances of restoring deliberative democracy.

The country experienced a very serious departure from democratic principles and is going through the reversal of the rule of law in various fields. The tools employed and the outcome are very similar to the ones in Hungary, but certain elements of the Polish case also make it distinct, illustrating that there was no Central Eastern European, or even Visegrád pattern. For example, unlike Fidesz, the Polish government does not have a constitution-making or – amending majority, therefore – for the time being – it engages in rule of law backsliding by way of curbing ordinary laws, “trying to change the system through the back door”.

2. THE SITUATION IN HUNGARY AND POLAND IN LIGHT OF VALUES THE EU IS BASED ON

State capture took different forms, but all in all it resulted in contravening values the EU is based on; values enshrined in Article 2 of the Treaty on the European Union (TEU), of which democracy, the rule of law and fundamental rights are overarching. This process is well documented by renown international organisations, such as the Venice Commission or the OECD, but also as the Commissioned Reasoned Proposal from December 2017ⁱⁱ or the September 2018 European Parliamentary Resolutionⁱⁱⁱ show, triggering Article 7 procedures against Poland and Hungary show, but also as

the growing number of infringement cases with a rule of law element prove, Article 2 TEU values are no longer respected by these countries.

In Hungary, there has been a continuous decline for a decade now, but this year a point has been reached, where – according to the most recent Freedom House report – for the first time since the democratic transition in 1989/90, and for the first time in EU history an EU Member State was downgraded from free to a partly free country:

Hungary's status declined from Free to Partly Free due to sustained attacks on the country's democratic institutions by Prime Minister Viktor Orbán's Fidesz party, which has used its parliamentary supermajority to impose restrictions on or assert control over the opposition, the media, religious groups, academia, NGOs, the courts, asylum seekers, and the private sector since 2010.^{iv}

Freedom House assesses countries' political rights and civil liberties, and categorizes them as "free," "partly free" or "not free." By labelling it as "partly free", Hungary joined the group of countries such as Albania, Bolivia, Pakistan, Singapore, Ukraine and Zimbabwe. A previously unimaginable situation has arisen whereby the EU harbours a Member State, which would obviously not qualify for Union membership if it were to apply today. The European Union, as a community of law, to borrow this term from founding father Walter Hallstein,^v and a community based on the rule of law, failed big in addressing illiberal developments.

3. ATTEMPTS TO LEGITIMIZE RULE OF LAW BACKSLIDING

Governments in violation of the rule of law are well aware of the fact that they do not comply with obligations arising from EU integration and employ several techniques to legitimize backsliding.^{vi}

First, the invocation of national sovereignty often happens without any further justification. Polish capture of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and ordinary courts happened under the pretext that a so-called 'reform' of the judiciary was a matter for the Member States and the EU had no powers to interfere.

Another example from the same jurisdiction is the dispute related to the felling of trees in the Białowieża Forest,^{vii} a UNESCO World Heritage Site. Pending the judgment in the main proceedings, the Court of Justice ordered Poland to stop logging. The Polish response was an intensified logging of trees, and Poland even asked for removing the forest from the UNESCO World Heritage List. Reference to national sovereignty came without any convincing justification.

Second, a somewhat more sophisticated variation of the above 'because we said so' technique is the attempt to hide departures from the rule of law behind the veil of constitutional identity. It is of course a distorted understanding of constitutional identity,^{viii} or even an abuse of the concept. The Hungarian example is illustrative. When delivering its abstract constitutional interpretation in relation to European Council decision 2015/1601 on supporting Italy and Greece in the refugee crisis, the Hungarian Constitutional Court^{ix} invoked constitutional identity. However tautological this may sound, according to the court, 'constitutional identity equals the constitutional (self-)identity of Hungary'. Its content is to be determined on a case-by-case basis based on the interpretation of the constitution, its preamble, and the achievements of the Hungarian historical constitution. This definition is so vague that it can be considered as an attempt to grant a *carte blanche* type of derogation to the executive and the

legislative from Hungary's obligations under EU law. In 2018 the concept of constitutional identity was even embedded in the Hungarian constitution.

Third, the neo-McCarthyist labelling of virtually anyone still capable of formulating dissent as foreign agents is a technique long used, but in Hungary it was taken to a whole new level with the adoption of Lex CEU and Lex NGO, targeting a private university and foreign-funded civil society organizations that are independent of government funds and thereby fit to express government criticism. The explanations of the laws attempting to force the Central European University out of Hungary and to limit public space for NGOs respectively attempt to delegitimize these entities by claiming they pose national security threats to the country.

The security-infused moves demonstrate that the preservation of autocracy is more valuable in the eyes of the executive powers than not harming the key sectors of the national knowledge-economy. In the case of Lex CEU no further explanations were given as to how a leading academic entity could possibly be a threat to national sovereignty, while in the case of Lex NGO, a populist rhetoric was invoked, interlinking NGOs helping asylum seekers and the image of asylum seekers as potential terrorists.

The fourth technique the autocrats use to undermine the rule of law is disinformation or misinterpretation of the laws and policies of the government. Again Hungary took the lead in 2011 when they sent a wrong translation to Brussels of their controversial new constitution, the Fundamental Law, which looked more in conformity with EU laws and values than the actual text. The Polish and Hungarian responses to EU institutions invitation for a determination of a clear risk of a serious breach by these two Member States of values enshrined in the founding EU Treaties also contain factual mistakes and deliberate deceit.

4. ATTEMPTS TO LEGITIMISE EU INACTION

Now is not the time to remain silent. The EU should address the problems in the national setting.

One of the common counterarguments is that the people shall democratically change their government if it violates the rule of law, instead of primarily relying on the EU to interfere. But it is naïve to believe that in a state with distorted election laws, state captured supervisory authorities overseeing the elections, or a distorted media landscape, this is doable.

Another argument is pragmatic: if the EU pushes too much, too forcefully, the outcome may be providing these governments with additional ammunition for gaining popular support to leave the EU, which would probably be even worse for their citizens in terms of the future rule of law. So it is the good old Council of Europe argument: better keep them inside and have control than not to have any influence at all. This again, is a valid debate. Here the question is a matter of balance: is the benefit of keeping them in greater than the harm that may come from dismantling of EU values and potential proliferation of rule of law backsliding to other states.

A further counterargument is that the EU is lacking competence, since issues such as elections or judicial organisations are national matters. The EU however shall acknowledge that violation of the rule of law in any Member State is an EU matter. Beyond harming nationals of the given country, a state's departure from European consensus on rule of law standards will have EU-wide consequences. All EU citizens beyond the borders of the Member States concerned will to some extent suffer due to the given State's participation in the EU's decision-making mechanism. Rule of law

Systemic violations of Article 2 of the Treaty on European Union (TEU) values will undermine mutual trust-based instruments, for example in the terrains of EU criminal justice. In surrender cases, most recently the court Oberlandesgericht Karlsruhe abandoned the European Arrest Warrant model,^x and in practice returned to the traditions of extradition making use of diplomatic channels, and made surrender to Poland dependent on the German embassy being allowed to take part in the trial in Poland and visit the defendant in custody. Test cases were decided by Irish, Spanish and UK courts, and are pending also in front of Dutch courts.^{xi}

The ‘values crisis’ may not seem as urgent as the other crises of the European Union, but it has the most far-reaching implications for the European project because without common values, there are fewer reasons for the EU to exist.^{xii}

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iii 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)).

^v W. Hallstein, *Europäische Reden* (1979), pp. 343-344, in English see T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal* 37.5 (2014): 1311-1377, p. 1312-1313.

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- vii T.T. Konciewicz, The Białowieża case. A Tragedy in Six Acts, VerfBlog, 2018/5/17, <https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/>, DOI: <https://dx.doi.org/10.17176/20180518-112614>.
- viii G. Halmai: The Hungarian Constitutional Court and Constitutional Identity, VerfBlog, 2017/1/10, <https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.
- ix Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law.
- x OLG Karlsruhe Beschluß vom 7.1.2019, Ausl 301 AR 95/18, http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=26436, for an English language summary see M. Steinbeis, Brother's Keeper, VerfBlog, 2019/2/09, <https://verfassungsblog.de/brothers-keeper/>.
- xi P. Bárd, W. van Ballegooij, The Effect of CJEU Case Law Concerning the Rule of Law and Mutual Trust on National Systems, in: Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds), The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis, Hart, 2019 (in print).
- xii L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.
- xiii According to the original: "Was ich aber an ihm [Pablo Casals] besonders bewundere, ist seine charaktervolle Haltung nicht nur gegen die Unterdrücker seines Volkes, sondern auch gegen alle diejenigen Opportunisten, die immer bereit sind, mit dem Teufel zu paktieren. Er hat klar erkannt, dass die Welt mehr bedroht ist durch die, welche das Uebel dulden oder ihm Vorschub leisten, als durch die Uebeltäter selbst. Princeton N.J., 30. März 1953, Albert Einstein." Einstein Archive, The Hebrew University of Jerusalem