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How the EU can better protect the rule of law in its member states



The EU is in the process of adopting a new regulation to help protect the rule of law in member states. Drawing on the cases of Hungary and Poland, [Nanette Neuwahl](#) and [Charles Kovacs](#) argue that the proposed regulation would be a valuable addition, but that a somewhat revised litigation strategy of the European Commission could also help defend EU values.

Since 2010, the EU has been confronted with the question of what to do when a member state moves, through free elections and without coercion, towards authoritarian rule and systemic breaches of the very values underlying the EU. The root causes of this problem have been in the extension of the EU into Eastern Europe and in the history and culture of the new member states.

Eight Central European countries joined the EU in 2004, accepting all the *acquis* instantly. The newcomers were much poorer than the other member states and had very different cultures and histories. Unlike Western Europe, most of the new member states had long lacked sovereignty, even while retaining a strong sense of their nationhood, culture and languages. It was anticipated that their economic handicap would gradually disappear, while their institutional and political development was not expected to conflict with their commitments under the Treaty of European Union (TEU), as they were free and the experience of 40-50 years of Communist rule was presumed to have immunised central Europe against backsliding into authoritarianism.

Those hopes seemed well placed until 2010, when in Hungary, Viktor Orban's populist party, Fidesz, won two-thirds of the seats in Parliament and thus the ability to amend the Constitution and to enact all sensitive legislation that required a two-thirds majority. In short order, his regime promulgated a new constitution which greatly weakened checks and balances between the branches of the government. In 2011, the Media Act expanded the government's powers over the media, while in 2012 the electoral law was amended to greatly favour the ruling party. In subsequent years, the government continued to centralise power, and filled nominally independent institutions including the Prosecution Service, the Media Authority and the National Bank with sympathisers.

After retaining its two-thirds majority in the 2014 General Election, Fidesz adopted a more belligerent nationalistic tone, assuring the electorate of its resolve to defend Hungarian and Christian values and cultures. This achieved credibility during the 2015 refugee crisis when hundreds of thousands of mostly Middle Eastern people passed through Hungary, heading for Western Europe. Orban responded by erecting a patrolled fence along the Serbian border and vowing not to accept any refugee quotas under EU plans to relieve Italy and Greece. This appeared popular given Hungary's history of 400 years of wars against the Ottoman Empire. There followed widely publicised campaigns against George Soros and the Central European University, foreign financed NGOs, and Brussels, all perceived as threats to Hungarian sovereignty and values.

Simultaneously, Orban gained increased control of the print media through generously paid purchases made by sympathisers. By October 2017, these owned almost all of Hungary's main newspapers and magazines. Meanwhile, corruption benefiting oligarchs allied with the government became pervasive, organised and centralised. Thus, without coercion and with little opposition, Hungary has gradually moved towards authoritarianism.



Polish Prime Minister Mateusz Morawiecki with Hungarian Prime Minister Viktor Orbán and Belgian Prime Minister Sophie Wilmès, Credit: [European Union](#)

The EU viewed these developments with concern but did not act. This was in marked contrast to its treatment of Poland, where from 2015, through 13 laws, the government undermined the independence of the country's justice system. Although unlike Hungary, Poland was rated as a "free country" by Freedom House, with political rights and civil liberties intact, on 20 December 2017, the European Commission initiated Article 7 proceedings against Poland for breaching European values. In Hungary's case, the Commission decided to abstain from acting, arguably because it needed the approval of the Parliament's EPP group, of which Fidesz was a member, to complete its legislative programme. It remained for the European Parliament to trigger the Article 7 process, in September 2018.

It is common ground that the Article 7 procedure is slow and unwieldy and leads to sanctions only if the offending Member State has no allies in the European Council. Since then, four corrective 'recommendations' were issued by the EU against Poland. After three meetings, Poland made changes in some of the offending laws, without however impairing its increased control over the judiciary. Two meetings took place with Hungary, but these proved occasions for Hungary's justice minister to officially record a strong objection to the substance and validity of all charges.

In the Polish 2019 general election, the governing Law and Justice party won another four-year term, albeit with a reduced majority. Since then, the publicly owned media has become more hostile to opposition parties and NGOs, while the government has started to adopt tactics mimicking those of Fidesz.

Meanwhile in Hungary, in late 2018 the regime further increased its control of the media, as the pro-Fidesz owners of more than 400 publications and several important web sites donated all of these to KESMA (the Central European Press and Media Foundation), governed also by Fidesz sympathisers. The centralisation of the content of those news outlets led to a steady drumbeat of anti-EU messages and interviews, with ministers charging that the Article 7 proceedings were Brussels' revenge, orchestrated by George Soros, against Hungary's resistance to the EU's pro-immigrant policies. Although in the 2019 municipal elections, Fidesz lost several cities including Budapest, the next general election is not due until 2022, and under the current Electoral Law, it will be almost impossible for opposition parties to win.

In response to this situation, the European Parliament concluded in a resolution on 16 January 2020, that "the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1)" and that "failure by the Council to make effective use of Article 7 continues to undermine the integrity of common European values, mutual trust and the credibility of the European Union as a whole." Today, Freedom House deems that Hungary has left the category of democracies after interfering with education and the arts (2019) and most recently, adopting emergency laws allowing the government to rule by decree (2020).

Legal action against aspects of democratic backsliding is currently not very effective. Firstly, courts, even when independent, are reluctant to intervene in the actions of democratically elected governments, and secondly, member states in principle have discretion in prescribing remedies for a breach of EU law. Declaratory judgments by courts, though important, may not solve the actual problems.

The EU is now refining its instruments for the protection of European values. The latest innovation is the proposed regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law. This allows administrative action to be taken through a constructive interaction between the Commission, the Council and the Parliament. The latter delegate power to the Commission to take administrative action on the basis of the recommendations of a panel of independent experts.

The instrument has several distinct advantages. The delegation of power avoids the impression of a unilateral power grab by the Commission and makes it less necessary to trigger the high profile and potentially unwieldy procedure under Article 7. The application of this instrument will encourage reflection on what constitutes an actionable, systematic breach of fundamental values. It will also help prevent divisions from appearing between Member States in favour of and against defending EU values. While Hungary, Poland and Austria are probably among the latter, France, Germany and Luxembourg are possibly among the former.

The effectiveness of the EU is at stake and the recognition of its very *raison d'être*. If the EU does not lead the way, it risks being looked upon unfavourably both by those who do not want it to intervene, as well as by those who want it to do so resolutely.

For more information, see the author's accompanying paper in the [Journal of European Integration](#)

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Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.

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