The EU Cannot Save Us

Why Poland and Hungary need resilience, not future-oriented reforms of EU enforcement mechanisms

Tímea Drinóczi

07.07.2021 doi: 10.17176/20210708-015942-0

Many EU and comparative constitutional law scholars have condemned the Polish and Hungarian governments and urged the EU to address the democratic decay and the rule of law deterioration in Poland and Hungary. When the EU fails to deliver, they harshly criticize them and put forward reform proposals. In substance, I agree with much of that. Nevertheless, I would put forward two arguments. The first is that we should be realistic about what we expect these reforms could achieve. The second is that constitutionalists should stop urging the EU to crack down on Poland and Hungary. Instead, they should focus on helping the resilient factors within these countries.

A prominent example of the mentioned is a recently published fascinating article by Laurent Pech, Patryk Wachowiec, and Dariusz Mazur. In that article, the authors use expressions like Soviet-type justice system and authoritarianism, and they express their final verdict: "The Commission and Council's oscillation between procrastination and dereliction of duties is not merely seriously endangering the functioning of the EU legal order, it has also led to unprecedented and irreparable damage made to the rule of law in Poland with multiple Polish judges and prosecutors having to sacrifice their careers and family life to defend the (EU) rule of law." They summarize their assessment of the situation, ie, the past five years of the demise of the rule of law in Poland, like this: it is an "existential threat to the EU; "dialogue with *bad faith* actors who are *deliberately* undermining the rule of law does not work", "authoritarian-minded national authorities have indeed learned they can beat the EU by creating new irreversible facts on the ground while pretending to be interested in further "dialogue"".

I would challenge neither this view nor their assessment of the situation at all. The phenomenon they have analyzed with respect to Poland and Hungary is precisely what we described as illiberal constitutionalism and illiberal legality and pushing the limits game– which also features a more than distressing deterioration of the rule of law including judicial independence issues.

It is clear that the Authors make recommendations based on the Polish experiences for the future. What is not clear for me, though, is whether they still believe that both the Polish (and Hungarian) "irreparable" damage could be redone if the EU follows their advice (eg, "as regards the ongoing Article 7(1) proceedings in respect of Poland and Hungary, the Council ought to organise regular, structured and more transparent hearings as well as adopt concrete recommendations with specific deadlines to be met."). If they think so, they seem to be still (maybe naively or cautiously) optimistic, especially in light of their overall assessment I cited above. It seems that they still try to find ways in which the EU could engage with Poland (and Hungary) more constructively, resulting in ameliorating the situation.

They also proposed that the "Commission must review both how it politically and legally reacts to deliberate attacks on the rule of law", "Commission must adopt a *holistic/systemic* enforcement approach to address the *cumulative* impact of the usually coordinated attacks for instance on national courts and the chilling effect which follows from the targeting of the most vocal and independent judges and prosecutors", "as far as the Council is concerned, it would be good to see most pro-rule of law national governments within

it actively seeking to maximise Article 7(1) TEU's potential."

No reason for even cautious optimism

It can be that I have misunderstood their "cautiously optimistic" position, but even if it is the case, I still feel that we need to be more realistic and cautious here. Even if their recommendations make much sense and should be considered if not even implemented, I would be more pessimistic about the success of the measures proposed for the following reasons.

The EU leaders and the leaders of Hungary and Poland live in different realities. They are using different languages – metaphorically speaking. It just follows that what the EU can do is not reverse the changes, not even to improve the already lost judicial independence or increase compliance with the rule of law and human rights commitments. Revising procedures, strengthening the protection of the values of the EU, and trying to make them more enforceable are for the future, for autocratic leaders to be. On the other hand, I do not see how these new political and legal mechanisms could help if these autocratic leaders to be do follow the Polish (and Hungarian) example: gradually transforming their systems through (formal and) informal constitutional changes, based on democratic legitimacy won in (initially) fair and competitive and free election(s), abusively invoking national sovereignty arguments (or their constitutional identity) at both political and legal level, maintaining their support with right-wing populistic rhetoric, always being one step ahead of the reactions to their wrongdoings.

Political measures coming from the EU would be counterproductive. These would be communicated as attacks from Brussels and would trigger more severe defense using national sovereignty or constitutional identity narratives (as it happened in the EU-Polish „dialogue" on the judicial reform).

Legal measures would be ineffective, too: the „value-oriented" EU law infringement procedures will not make these governments rectify their infringements but could result in the same political response: non-compliance and pushing the limits even further.

A more effective way constitutionalists could contribute to the fight against the even more illiberalization and autocratization of Hungary and Poland would be to help the resilient factors within these countries so that Hungarians and Poles could help themselves. For that, a more Western-oriented identity and value-orientation of the voters should prevail in the next election, even if society, to a certain extent, has gotten used to or even welcomes the governments' illiberal visions. There seems to be a powerful discontent about the Polish abortion decision and the Hungarian anti-LGBTQ law, which brought people to the streets. Donald Tusk returns to Polish politics, and Hungarian opposition is more than less united, regardless of how Fidesz tries to divide them with the anti-LGBTQ law and others.

We have to see where it will lead us, whether the changes in the political arena and demonstration of critical views would be enough to bring changes in the next election. Until then, we indeed need brave domestic judges who make sacrifices. The CJEU could only facilitate this process by giving a hand to (Polish and) Hungarian judge(s) who initiated preliminary ruling procedures, just as Petra Bárd hopes. Facilitate. Not help or rescue Polish and Hungarian judges that send preliminary ruling requests to the CJEU from persecution. The threat is not only coming from the political branches of government but from within, from the judiciary itself. Also in Hungary, a strong message has been sent to judges by their peers: they can be subjects to disciplinary procedures, like the judge Csaba Vasvári that requested an opinion in IS case, or they can be declared incompetent, which eventually entailed the termination of the service relationship of Gabriella Szabó as a judge.

That being said, we should also be realistic: reformed mechanisms of the EU could be only helpful against any future would-be followers of the example of Hungary and Poland, as long as they are caught "red-handed" during their very first actions against EU values and principles – the determination of which is not only challenging but tricky, too.

As a Hungarian, I can talk only about Hungary now: with where the interference to judicial indepen-

dence seems to culminate, I am afraid that we are a lost cause, especially if the people do not vote out the current governing powers 2022.

ABOUT THE AUTHOR

Tímea Drinóczi

Tímea Drinóczi is a professor at Mykolas Romeris University, Lithuania, and a research affiliate at both the CEU Democracy Institute, Hungary, and the Federal University of Minas Gerais, Brazil.

SUGGESTED CITATION

Drinóczi, Tímea: The EU Cannot Save Us: Why Poland and Hungary need resilience, not future-oriented reforms of EU enforcement mechanisms, Verfassungsblog, 07.07.2021, doi: 10.17176/20210708-015942-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210708-015942-0.