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The EU response to the European Regression

A comparative analysis of the EU response to democratic backsliding in Poland and Hungary

Bachelor's project in European Studies with Political Science
Supervisor: Dr. Victoriya Fedorchak

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Abstract

Things looked great for the liberal democracy after the big EU-accession in 2004. Many of the former Soviet members, such as Poland and Hungary, underwent prosperous development. Despite this, the tendency of democratic backsliding has become a growing concern for the EU, violating the key principles and values of the union. Their late action made TEU Article 7 useless. At the same time, the EU confrontation have led to a conflict with Poland, Hungary. As a unanimous vote is usually required in the Council, Poland and Hungary managed to paralyze the EU to a great extent, for instance by vetoing the EU-budget and the Covid-19 Recovery Package. The EU has worked hard to utilize new and old means to stop the autocratic transition, but with little success.

By using a comparative study of the EU response to democratic backslide in Poland and Hungary it is possible to find similarities and differences between the two cases. This makes it possible to get a grasp of how effective the different responses have been and what could be improved. The most important finding in this study is that at what time the different responses were made had a huge impact of how well they worked or not. With Poland's deterioration only slowed and Hungary's apparently unaffected, the study also provides suggestions for improvements of the handling of the issue.

Sammendrag

Ting så lyst ut for det liberale demokratiet etter den store EU-tiltredelsen i 2004. Flere av de tidligere Sovjetmedlemmene, som blant annet Polen og Ungarn, undergikk en velstående utvikling. Til tross for dette har tendensen til demokratisk tilbakeslag blitt av stadig større bekymring for EU, ettersom dette strider med nøkkerverdier og prinsipper unionen baserer seg på. Unionens sene respons har ført til at TEU Artikkel 7 har blitt ubrukkelig. Samtidig har EU konfrontasjonen ført til en konflikt mellom Polen og Ungarn. Ettersom flere avstemninger i Rådet krevet enstemmighet, har Polen og Ungarn i stor grad klart å lamme unionen ved hjelp av bruke vetoene sine, blant annet i saker som omhandler EU budsjettet og Covid-19 Recovery Package. EU har jobbet hardt for å dra nytte av nye og gamle tiltak for å sette en stopper for den autokratiske overgangen, men med lite suksess.

Ved hjelp av en komparativ studie av EU responsen til demokratisk tilbakeslag i Polen og Ungarn er det mulig å identifisere likheter og ulikheter mellom de to tilfellene. Dette muliggjør det å få et inntrykk av hvor effektiv de ulike responsene har vært og hva som kunne vært forbedret. Det viktigste funnet studien gjør er at tidspunktet for de ulike responsene hadde stor innvirkning på hvor godt de fungerte eller ikke. Ettersom Polens tilbakeslag kun er noe bremsset og Ungarns tilbakeslag er tilsynelatende upåvirket, gir studien forslag til forbedringer på håndteringen av saken.

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List of Abbreviations

CEE: Central and Eastern Europe

DRF: Democracy, the Rule of Law and Fundamental Rights

ECR: European Conservatives and Reformists

EP: European Parliament

EPP: European People's Party group

EU: European Union

FIRC: Foreign Imposed Regime Change

MEP: Member of the European Parliament

PiS: Prawo i Sprawiedliwość (Law and Justice Party)

PO: Platforma Obywatelska (Civic Platform party)

TEU: The Treaty on European Union

1 Introduction

Article 7, often referred to as 'the nuclear option', was implemented to deal with breaches of the core values of the EU, mentioned in Article 2. Freedom, democracy, civil and human rights are among these values (The Treaty on European Union, 2012, Article 2). Use of the article could potentially escalate the tension between the targeted country and the union. It could also lead to far reaching and unexpected consequences. Therefore, the process consists of three steps with gradually bigger consequences should the situation not improve.

The first step is that “...*one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament...*” (The Treaty on European Union, 2012, Article 7-2). determine that there is a clear risk of breaching the core values. If so, the Council may give recommendations for improvements. While this is no sanction, it sends a powerful message. If no improvements are done, or the improvements done are unsatisfactory, the Council has the power to “*determine the existence of a serious and persistent breach*” (The Treaty on European Union, 2012, Article 7-2). However, this needs to be done with unanimity, which is where the stalemate we are witnessing today is occurring. Without unanimity, the Council is not able “*suspend certain of the rights... including the voting rights of the representative of the government of that Member state in the Council...*” (The Treaty on European Union, 2012, Article 7-3), which is the last and most intrusive mean in the process.

After the collapse of the Soviet Union, the countries making up the EU-extension in 2004 underwent political and economic changes, turning away from communism in favor of liberalism. Before they could become members, they had to solidify and consolidate these changes (Soffer, 2021, p. 1). However, shortly after the extension new extreme political parties arose within the new member states. Getting a stronger foothold within several of these states, unwanted changes away from liberalism began to occur (Soffer, 2021, p. 1). Poland and Hungary, undergoing the biggest changes, have both being accused of breaching several of the values in Article 2.

Poland early on, after receiving recommendations for improvements, took some steps in the right direction. However, these steps were nowhere near alleviating the concerns. As a result, the Council proceeded with step 2 for the first time in EU history. What causes a stalemate is

the Hungarian Prime Minister Semjén, stating that "*We shall defend Poland in the face of an unfair, fabricated political procedure*" (Semjén in Rettmann, 2017), meaning Hungary will veto any sanctions towards Poland in this matter. Facing accusations itself, Hungary is backed by Poland, thus creating some sort of 'horse thief alliance' the EU in power of Article 7 is unable to break. What we are left with is a stalemate, making up an enormous torn in the flesh for a crippled EU.

1.1 Research questions and sub-questions

The research question raised by the thesis is as following: *How effective is the EU response to democratic backslide in Poland and Hungary?* To be able to answer this, four sub-questions can be identified:

1. How did the EU respond to democratic backsliding in Poland and Hungary?
2. Were these responses effective?
3. What could the EU have done better?
4. What are the recommendations for improvement?

1.2 Literature review

Bermeo shows there is a declining durability among authoritarian regimes (Bermeo, 2016, p. 17). The trend is still present, though it has flattened out a great deal due to the consolidation of today's democracies. However, this trend does not necessarily mean regimes find democracies more and more attractive. Lührmann & Lindberg have done lots of research on democratic backsliding. They have found three significant spikes of autocratization in both democratic, as well as in authoritarian regimes. These spikes are more commonly referred to as *the three waves of autocratization*, and found place shortly after WW1, WW2 and the cold war (Lührmann & Lindberg, 2019).

Getting more and more data on backsliding, scholars have found some traits that seems to be the cause. For instance, Mettler & Lieberman presents four of these causes; political polarization, racism and nativism, economic inequality and excessive executive power (Mettler & Lieberman, 2020). Haggard and Kaufman came to similar results, though also stressing changes in the political arena and derogation of laws (Haggard & Kaufman, 2016). Bermeo found that "*the decline of coups means that de-democratization today tends to be incremental rather than sudden*" (Bermeo, 2016, p. 14). She thinks collapses are likely to occur, but the pace has changed considerably, giving us an opportunity to kill the changes

whilst in its crib. Knowing a few typical common denominators is, according to Bermeo, nowhere near enough to fully grasp the backslide-phenomenon. But do we have enough knowledge to treat the symptoms?

As democracies are built piece by piece, creating and consolidating new institutions, the erosion of democracies tends to happen the same way, dismantling or weakening the significance of the institutions. Therefore, typical symptoms are court packing, alternating law reforms, media restrictions, vote fraud accusations and freer reins of the government (Bermeo, 2016, p. 14). These symptoms are more likely to occur in regimes dealing with huge polarization and little will to share the power. In other words where relative gains (zero-sum-game) are preferred over absolute gains (non-zero-sum-game). Therefore, presidential democracies are more vulnerable to backsliding than other democracies (Houle, 2009, p. 604).

Before one can deal with backsliding one must realize that backsliding in most cases is a rational response “*to local and international incentives*” (Bermeo, 2016, p. 15), both current and historical. Bermeo finds it easy to explain each symptom above’s rationality. For instance, the free media resulted in increased scrutiny of elected executives. A rational response to this could be, as we have seen, restricting or buying up the media. Also, vote fraud is an understandable reaction when elections are the only way to have an influence. Putting so many resources into these elections it is natural the winners would like to enjoy as many of the benefits as they can. This could lead to an aggrandizement of the executive branch.

In addition, it is important to keep in mind that democracies sometimes face its own demons. As seen in both Poland and Hungary, most changes are, according to legislature, legitimate. Seeing these changes, it becomes very ambiguous to what degree they are democratic or not. The changes could be perceived as highly anti-democratic, especially by the opposition and other regimes, while the position considers them as changes to improve democracy (Bermeo, 2016, pp. 15-16). Though we have a pretty good idea of what a liberal democracy is, measuring these traits and institutions often can prove to be difficult. This, especially combined with the rationality argument above, complicates the situations and might eventually lead to huge conflicts similar to the ongoing conflict between the EU, Poland and Hungary.

Simply wanting an answer does not necessarily provide us with such. That is also the case with backsliding. In addition to identifying common denominators and theories as to why, scholars have done lots of research eager to fully grasp the concept. Often researched variables such as economic inequality, culture and history are able to give some indication on what can reverse backsliding but using these findings have proved to be rather difficult. FIRC, for instance, have shown to improve levels of democracy, but not in nondemocracies, where it has a negative impact (Downes & Montan, 2013, p. 118). Also, non-violent campaigns against the elite have shown to increase the probability of a positive change (Celestino & Gleditsch, 2013, pp. 394-396). Despite having some tools to fight backsliding, they are not always applicable. Using Poland and Hungary as examples, FIRC would seem to extreme, potentially escalating the conflict. Besides, as EU-members with self-autonomy, FIRC, especially imposed by the EU, could arguably be regarded as a violation of basic liberal tenets. Despite both countries being 'democratic', thus likely to respond well to FIRC, it is a huge risk to take. As for non-violent campaigns, the government in both countries are supported by the majority, lowering the chances of arising campaigns huge enough to make a difference. Should it still happen, changes for a civil war rise, potentially leading to a national crisis.

Though the literature gives some indication of what could reverse backsliding, it says little of how, especially for the cases in the Europe. As the EU has a very restricted room of maneuvering when dealing with crises such as democratic backsliding, the thesis will analyze their means and their effectiveness. It will also provide suggestions for improvements.

1.3 Methodology

Methodology provides us with tools to make the most expedient choices to prove or refute a claim or theory to the highest extent possible (Hellevik, 2002, p. 17). Key characteristics of a good methodological research are systematics, thoroughness and transparency (Johannesen, Tufte & Christoffersen, 2016, p. 25). One can distinguish between qualitative and quantitative studies. While qualitative studies are concerned with numbers, qualitative studies gather their data from texts, asking *how* and *why* rather than *how much* (Johannesen, Tufte & Christoffersen, 2016, pp. 95-96, 239).

It is common to separate between four design strategies for qualitative studies such as this. They are found through a two-dimensional mapping consisting of the number of cases

(single-case and multi-case study) and number of units researched (single-unit and multi-unit study) (Johannesen, Tufte & Christoffersen, 2016, p. 206). An advantage with multi-case studies is that one can control for other similar cases, looking at its similarities and differences. Once having found the type of study we can choose between several methods that bring their own unique attribution to the research. A popular method in qualitative studies is document analysis. This method is useful in cases where you have not gathered any data yourself, or simply want to compare your data to already existing research (Johannesen, Tufte of Christoffersen, 2016, pp. 96, 99).

This research consists of two cases of Poland and Hungary. The purpose of these cases is to map the situation, explaining how and why they suffered from backsliding. A comparative analysis of the EU response to these situation follows, enabling us to spot common hallmarks or considerable differences which could explain the post-response development of the two countries.

The study is built on document analysis and is based on the analysis of primary and secondary sources. The majority of the sources consists of secondary sources such as academic books and peer-reviewed articles, and is backed by primary sources like official reports, laws, treaties and news articles.

1.4 Structure of the dissertation

In the first section the thesis presents its definition of what democratic backsliding is and how it will be used throughout the paper, followed by a definition of democracy. Thereafter the thesis will give a brief explanation of the situation in Poland and Hungary, how and why they have backslid. Subsequently the EU response is presented and critically evaluated. Lastly the thesis puts forward some recommendations for improvements before concluding on the research question.

2 Theoretical chapter

2.1 Democracy

According to *The Economist Intelligence Unit* more than half of the countries in the world are either democratic to some degree or a so-called hybrid regime¹. But what is a democracy? The

¹ See figure 1.

term comes from the Greek words *demos* and *kratos*, meaning *people* and *rule* (Clay Jent, 2015, p. 242). While this is just the meaning of the word, it is too broad to use as a good definition as democracies come in different forms and characteristics. Thus, we separate the democracies into full or flawed democracies and hybrid regimes, a mixture of democratic and autocratic characteristics. Elections may also happen in authoritarian regimes where liberal democratic norms are heavily violated or disregarded.

| | No. of countries | % of countries | % of world population |
|-----------------------|------------------|----------------|-----------------------|
| Full democracies | 20 | 12.0 | 4.5 |
| Flawed democracies | 55 | 32.9 | 43.2 |
| Hybrid regimes | 39 | 23.4 | 16.7 |
| Authoritarian regimes | 53 | 31.7 | 35.6 |

Figure 1. *The distribution between democratic, autocratic and hybrid regimes in the world* (The Economist Intelligence Unit, 2018, p. 2).

Depending on a country’s score (a weighted average) on 60 variables within the 5 categories electoral process and pluralism, civil liberties, the functioning of government, political participation and political culture we can place a country in one of the four regimes mentioned above. On a scale from 0 to 10 countries scoring 8-10 are full democracies, countries scoring 6-7,9 flawed democracies and countries scoring 4-5,9 hybrid regimes. The countries scoring below 4 are considered authoritarian (The Economist Intelligence Unit, 2015, pp. 45-47). It is a change in this score we use to see if a democracy is consolidating, backsliding or maintaining status quo.

2.2 Democratic backsliding

Democratic backsliding is a term used to describe a decline in a country’s average democracy score (The Economist Intelligence Unit, 2015, p. 9). The term is often interchangeable with the terms autocratization or de-democratization, both meaning a process going from a democracy to an autocracy. However, this may lead to crucial misconceptions about a state’s situation as autocratization/de-democratization may happen fast and disruptive, while the term backslide refers to a much slower and less detectable process (Waldner & Lust, 2018, p. 94). Or as Levitsky and Ziblatt put it; when “democracies erode slowly, in barely visible steps” (Levitsky & Ziblatt, 2018, p. 3). A condition for democratic backsliding is that the country was democratic to begin with. With the similarity of being a process rather than a state in mind, democratic backsliding thus is the little brother of a democratic breakdown or collapse

(Bermeo, 2016, p. 14). The counterpart of democratic backsliding would be democratization, as this is the opposite process, going towards a (better and more stable) democracy.

There are several components explaining why democratic backsliding occurs. Gora & de Wilde mentions 3; “*rule of law backsliding, a deterioration of political discourse, or a decline in participation*” (Gora & de Wilde, 2020). As these components focus on different parts of the problem, they can coexist, explaining each their own part. However, scholars have yet to fully grasp the components’ significance. Partly because they are somewhat hard to measure and because of the topic’s complexity (Waldner & Lust, 2018, p. 95).

Discussing the EU response, primarily triggered by the deterioration of the rule of law, the thesis will focus on the first component presented above. The latter two will not be spent much time on as the EU response was not triggered by a cultural or normative disagreement, nor due to a decline in participation in the first place. For instance, the presidential election in Poland in 2020 which had a zero percent participation came much later than the initial reasons for why the EU invoked Article 7 (Garden, 2020).

3 Historical Context

3.1 Poland

After the fall of the communism, Poland had to look elsewhere for political and economic allies. With the wish of ‘returning to Europe’ growing stronger, the EU became an obvious choice, satisfying the needs of Poland to become a liberal democracy and to embrace capitalism (Szczerbiak, 2002, p. 1). Since the accession in 2004 Poland has had a remarkable upswing, considering both the political and economic aspects. The development was so great it was considered one of the most successful and stable CEE-countries (Mikuli, 2020, p. 294). This contributed to the election of Donald Tusk as the President of the European Council (Cianetti, Dawson & Hanley, 2018, p. 243).

Though the Polish macroeconomics was prosperous, and the country had high levels of employment, the feeling was quite the opposite among the Polish citizens. The Polish government in the 2011-2015 period, led by PO, did several attempts to soften the effects of the financial crisis by raising the retirement age whilst implementing laws making it easier to change laws and regulations affiliated with labor. Also, social benefits went down. This was

not well received, thus increasing the populist party PiS's popularity. As a result, PiS won the parliamentary election in 2015, becoming the first party in Polish democratic history to form a government without coalition, which they were able to continue after the election in 2019 (Zamęcki & Glied, 2020, p. 71).

The way the Polish constitution is formed gave PiS the ability to implement amendments without a constitutional majority (Sadurski, 2019, p. 293). Amendments in this setting is practically translated into ordinary laws. In addition, president Jarosław Kaczyński is the one with the *de facto* power, controlling the constitutional institutions as if they were puppets. Yet, the president has no political nor constitutional responsibility (Sadurski, 2019, p. 293). The poorly formed constitution combined with PiS having a majority in both the Sejm and the Senate in addition to having the president, gave the party a huge room for action without any constraints. This strongly affects the checks and balances in the country, weakening the traits and values of democracy (Jankovic, 2016, p. 59). Though the backsliding sped up under the PiS-government, it is worth mentioning it could be traced back to the previous PO-government. For instance, the PO-government made less room for the opposition, but still a lot more than its successor (Przybylski, 2018, p. 58).

Over the years, new laws have affected the judicial institution by imposing restriction against the judges, for instance by suppressing their freedom of expression and association. In addition, the Polish government can now appoint new judges, loyal to PiS, without any intervention. Furthermore, the freedom of assembly has been violated, fining peaceful protesters strongly disagreeing with the new policies (Amnesty, 2020). Also, the government is very little LGBTI-friendly, removing their rights of marriage and adoptions, as well as removing the LGBTI education in schools. In fact, the government is strongly against any sexual education, and want to restrict the rights of abortion (Amnesty, n.d). Following Hungary, Poland has become very anti-immigration, refusing to receive asylum applications whilst threatening the already established immigrants and refugees in a degrading manner. At the same time, the free press has been gagged, making it easier to spread anti-immigration propaganda (Przybylski, 2018, pp. 58-59).

Ever since 2015 Poland has been subject for international criticism. This started as a result of the insertion of the judges to the Tribunal, which led to a soft dialogue between Poland and the European Commission. After minor improvements, yet no satisfactory ones, the European

Commission initiated the process of Article 7 for the first time in EU-history (Bebel, 2018). However, any attempted sanctions would be vetoed by Orban, as mentioned in the introduction.

3.2 Hungary

As was the case with Poland, Hungary also had to look around for new connections and found the EU the most fitting. Though the EU required any new members to fight for democracy and suppress nationalist policies, Victor Orbán, the leader of the Fidesz party, has always been a supporter of illiberal democracies. After gaining majority in the National Assembly in 1998, in a coalition with two other parties, Orbán passed on several reforms that were well-received among many oppositional voters. Yet, Fidesz lost its majority in the 2002 election, which marked Fidesz's transition from a liberal to a nationalist party (Soffer, 2021, p. 4). Being an opposition party until 2012, Fidesz grew its popularity by "*espousing xenophobic and exclusionary policies and rhetoric*" (Soffer, 2021, p. 4). Once in power, Fidesz began dismantling the democratic institutions. The most serious violations were the restricting of the power of the judiciary, suppressing the freedom of the press and undermining the education system. Fidesz also changed the constitution for the party's own benefits to stay in power. Furthermore, it has weakened the checks and balances by considerably curtailing the power of the judiciary branch and changing the institutions for its own good. For instance, Fidesz passed on laws making them able to appoint new judges without the approval of the opposition. Later on, they expanded the number of judges in the Constitutional Court, filling the seats with Fidesz friendly judges (Soffer, 2021, pp. 1-2, 4). All these cases are more than enough to make the EU question the legitimacy of the Hungarian government.

Though the democratic development took a U-turn after the 2012 election, the situation worsened due to the refugee crisis. With countless amounts of refugees reaching the borders of Italy and Greece, the EU decided to bring in 160.000 refugees, relieving some of the pressure the two countries faced. Doing so, the EU needed to redistribute the refugees among its members. Therefore, nine countries were asked to shelter 15.000 refugees. Both Hungary and Poland, as well as two other countries among the nine, voted against this decision. As only a simple majority was needed to pass on the decision, the four countries had to comply. In line with Fidesz's earlier actions, Hungary started to build massive fences along the southern border. Furthermore, they spent approximately 250.000 USD on different kinds of commercials, including TV-adds, billboards and mass mails. These served as 'information

campaigns' but were also undermining and criticizing the EU. The growing tension between Hungary and the EU peaked when Hungary decided to change its constitution, making it illegal to accept or aid refugees (Soffer, 2021, pp. 3-4). This led to the EU initiating an infringement procedure, as Hungary, Poland and the Czech Republic fail to meet the obligations of the 2015 refugee decision. The European Court of Justice supported this and stated that the violations could lead to financial penalties (Sandford, 2020). Facing enormous pressure, Hungary has ignored this and kept on deporting refugees.

All together the anti-democratic development as well as the handling of the refugee crisis have caused huge international attention. Especially within the EU the dissatisfaction has grown considerably. Many called for action to deal with the Hungarian government, but any action was yet to be successful. In September 2018 the European Commission initiated Article 7 against Hungary for posing a “*systemic threat to the Union’s founding values*” (BBC, 2018), in which the European Parliament with an overwhelming majority supported. However, no actions could be taken as one would need a unanimous decision in the Council, where also Poland had a saying.

3.3 Legitimate authoritarian regimes?

It remains to be said that the changes implemented by the two governments are, at least among themselves, considered lawful, being approved by the legislature. In the Hungarian case, Fidesz gained enough votes to undisrupted change the constitution, while in the Polish case this was done through overtaking the control of the Tribunal. What is somewhat strange is the fact that these changes have been “*justified as attempts to improve democracy itself*” (Zamecki & Glied, 2020, p. 60). However, not everyone has the same view. For instance, the Tribunal has claimed the changes to be unconstitutional, something the government has disregarded, saying the Tribunal should follow the new legislature (Fomina & Kucharczyk, 2016, pp. 62-63).

By looking at polls in both countries we get a decent indication of the support of the governments. The Hungarian polls show how the Fidesz popularity has shifted slightly above and below the 50 % mark, with its extreme points being 39 and 56 % (2014-2021) (Politico, 2021a). With many other parties competing for the remaining 50 %, Fidesz undeniably represents the biggest population. However, in December 2020 all but two opposition parties created a new party: The *United Opposition*. These parties have just about the same

popularity, constantly fighting to be the biggest party. In Poland the situation is slightly different. PiS took over the lead from PO in 2013 but lost it again in 2014. After once again regaining the lead in 2015, PiS' popularity has shifted between 31 and 47 % (2015-2021) (Politico, 2021b). A few months prior to the creation of the United Opposition, the Polish *Civic Coalition* was formed. Consisting of fewer parties than the United Opposition it has yet to pass 30 % on the polls. As of today, the United Opposition has a marginal lead, 49 % versus Fidesz's 47 %. PiS is still the biggest party with its 35 %, but many parties could align and gain a huge lead. PiS and Fidesz could claim to be legitimate in their actions by being or by having used to be the biggest party in addition to having the political power. However, can a government claim to really be legitimate while overruling almost half of its population?

Letting the doubt come to good and agreeing the changes to be lawful and legitimate, one still see an authoritarian behavior. Levitsky & Ziblatt raise attention towards four indicators showing this behavior; disrespecting the rules of democracy, denying its political opponents' legitimacy, tolerating or encouraging violence and the will to curtail its opponents' rights, as well as the media (Levitsky & Ziblatt, 2018, pp. 23-24). With Poland and Hungary dismantling the checks and balances, controlling the media, disregarding human rights and leaving the political opponents with no real power, it has become quite clear that a transition from democracy to something more authoritarian has taken place in both of the countries. Members of the EP, such as Iratxe García claim that "*Hungary is becoming the first dictatorship in the European Union and we will not accept it*" (European Interest, 2020). Yet, according to the Global Democracy Index 2020, both Poland and Hungary are still categorized as *flawed democracies* (The Economist, 2021).

4 Comparative analysis of EU responses to backsliding in Poland and Hungary

4.1 Poland

Before triggering Article 7 the European Commission engaged in a soft dialogue with Poland, conveying their concerns about the situation. During their *Rule of Law framework* mission, they met representatives all of the legislative, executive and the judiciary branch, as well as legal practitioners, journalists and representatives of civil society (European Parliament, 2018, p. 3). For a period, the dialogue had positive results, but as PiS passed on 13 laws dismantling the checks and balances, the dialogue was insufficient to lower the European Commission

concerns. As a result, the European Commission issued a reasoned proposal to the European Council, stating that “*there is a clear risk of a serious breach of the rule of law by the Polish authorities*” (European Parliament, 2018, p. 39), thus engaging Article 7(1). In addition, the European Commission put forward a case to the European Court of Justice, regarding two Polish judicial reforms violating EU legislating. Proceeding with Article 7 the Council, with the support of the European Parliament, had two hearings with the Polish government. However, without the support of Hungary the Council were unable to reach a unanimous decision to strip Poland of certain membership rights.

While attempting to pass Article 7 through the European Council, the European Commission put forward several cases to the Court of Justice. 4 of these passed, ending in financial penalties. It was during these processes the EU discovered the problem to its full extent, and that the cases processed by the Court of Justice only made up a small fraction of all problem. In addition, they found this to be more of a systematic issue, difficult to solve through the judicial branch (European Commission, 2021). Still, putting up cases for the Court of Justice was more effective than Article 7, which resulted in a more comprehensive use of this method.

4.2 Hungary

Instead of sending delegates to investigate the Hungarian Rule of Law the European Parliament sent a proposal to the Council, asking them to initiate Article 7-1. The reason for this was their concerns related to a widespread field varying from the checks and balances to violations of freedoms such as expression and religion. In total the European Parliament listed 12 points of concern (Council of the European Union, 2018, p. 4).

Throughout the whole process, there has been an ongoing dialogue between the Council and the Hungarian government, trying to avoid any further escalation of Article 7. The dialogue has been of varying quality but has led to some improvements where Orbán has retracted several controversial measures (Meijers & van der Veer, 2019, p. 2). Unfortunately, these improvements were nowhere near enough to satisfy the Council, making up only a small fraction of the problems related to the democratic quality in Hungary.

With Poland using its veto right in the Council, the article was not put to its full use against Hungary neither. Together the two former Soviet states formed a horse thief alliance, with no

one turning its back on the other. Taking away what was supposed to be the EU's nuclear weapon, turning it into a rather symbolic response, they have so far successfully managed to cripple the union.

4.3 Internal changes within the EU

While the Article 7 process went on, the European Parliament adopted several resolutions regarding the situation in Poland. Seeing the tendencies in Hungary years earlier, the European Parliament proposed a resolution to the European Commission, trying to create an EU Pact for DRF. This pact aimed to define, elaborate, monitor and enforce the EU values and principles, surpassing both the member states' and the EU institutions' authority (European Parliament, 2019, Article 1). The resolution passed through in 2019. In 2020 the European Parliament adopted another resolution condemning both Poland and Hungary for the deterioration of the Rule of Law (Hungary Today, 2020).

In addition to doing measures related to the specific member states, the EU has also reviewed their normative role and taken action to make it easier to maintain their influence. Though the TEU gave clear answer on the EU values and principles, it left the union with only one tool to fight the violations – Article 7 – which has shown to be practically useless. As a result, the European Commission proposed a draft aiming to strengthen the rule of law within the union.

While working on the proposal the European Commission created a Eurobarometer survey which was sent out to all member states. They also sent delegates to participate on local meetings within member states. Their perhaps most important discovery was that 89 % meant it was important that the rule of law was respected in all member states within the union. Other important findings were 80 % supporting values and principles of the rule of law and 85 % stressing the importance of the free media and society (European Commission, 2019, p. 3). Based on these findings the European Commission could lay a new path for the union.

As mentioned, the lack of means to fight autocratization has been a huge issue. The European Commission identified three pillars in which could help fill this somewhat empty toolbox; *“promoting a rule of law culture, preventing rule of law problems from emerging or deepening, and how best to mount an effective common response when a significant problem has been identified”* (European Commission, 2019, p. 5). Though it is very clear what the EU-values are, the European Commission found that less than half of the EU citizens were

insufficiently informed about them and what they meant in practice. According to the European Commission this has contributed to the occurred differences in the rule of law in the member states. Their solution to this is “*proactive actions to promote the rule of law within the EU, both at professional level and in the general public at large*” (European Commission, 2019, p. 5). To prevent new or deepening problems, they point to the national judiciary, constitutional courts, ombudspersons and so on. It is their task to avoid negative development already at an early stage. The EU role will support these institutions by monitoring and identifying risk, as well as getting to know the member states deeper (European Commission, 2019, p. 9). The European Commission’s hope is that these two pillars will reduce the need for an EU response significantly, especially in regard to the *Rule of Law framework*. However, should they still be needed the European Commission plan to use the Court of Justice more actively, making more case laws. In addition, the European Commission will continue using their infringement procedures following these case laws. Unlike earlier, they will now aim to do this more strategically (European Commission, 2019, pp. 13-14).

Furthermore, the EU has since the failed attempt of using Article 7 worked on introducing conditionalities for receiving aid from the Structural Funds and the Cohesion Fund. This was initially controversial as other member states such as Romania and Bulgaria would be in danger of losing funds themselves. Still, it could be effective as Hungary receives 4 % of its GDP from EU funding and Poland a little under 3,5 % (European Union, 2020). After many attempts on adopting the proposal in a legal manner, they finally succeeded as late as in December 2020.

4.4 Similarities and differences – why?

The two cases share several similarities as well as differences. With PiS and Fidesz rejecting the standard values of left liberalism and acting thereafter, the governments have been accused of violating many of the same values, principles and EU-laws. Afterall, PiS was heavily inspired by Fidesz and its policies. This common deterioration of the rule of law have opened up for the EU to use the same tools in both cases. The EU tried establishing and maintaining a fruitful dialogue, but without notable success. As a result, Poland and Hungary faced Article 7, though dodging it by supporting each other in the Council. After securing themselves this stalemate with the union they kept backsliding. A little later the union condemned both governments for their actions, or lack of actions rather. Without any effective means to fight backsliding, the EU took aim at creating new means. With Poland

and Hungary receiving a great deal of funding, the EU tried making the funding conditional, which they eventually succeeded with. Other than this the EU worked on several projects aiming to improve the quality of democracy and its values. Though they were inspired by Poland and Hungary, these were meant for the union as a whole, and had more of a normative approach to the matter.

Though Poland and Hungary share many similarities, they also have huge differences. First of all, Hungary was backsliding for many years until the union eventually decided to act. Poland on the other hand, experienced opposition early on, even triggering Article 7 before Hungary. Poland was also put under an investigation under the Rule of Law framework, which Hungary never was. In addition, Hungary escaped resolutions from the European Parliament and cases put up for the Court of Justice far more easily than Poland. This might help explain why backsliding in Poland was slowed while backsliding in Hungary kept a steady pace.

Why do such similar cases have differences? Perhaps the best explanation to this lies in party politics (Meijers & van der Veer, 2019, p. 3). The Hungarian Fidesz-government has strong connections to the EPP, the biggest party in the European Parliament. By assisting with 12 seats, Fidesz have an increased influence on the European Parliament by affecting the EPP. On the other hand, PiS does not have the same leverage as they identify with ECR, a much smaller party, thereby making it harder to gain any leverage. By using their leverage, Fidesz have managed to escape resolutions far better than their Polish counterpart.

4.5 Criticism

Scholars such as Kelemen state the importance the EU has for defending democracy and its values (Kelemen, 2017). The EU has been criticized for being too passive in regard to the backsliding tendency in Europe, and especially for their handling of the Polish and Hungarian cases as the responses until now has yet to be proven effective. In addition, the little response given came quite late (Meijers & van der Veer, 2019, p. 4). After all Hungary has shown tendencies of backsliding for about 12 years and did not get its first proper response until 8 years had passed.

In addition to party politics as described above the ideological perception of what a democracy is and should be differs a lot among the member states. Countries backsliding and former authoritarian states have been rather quiet, not questioning the illiberal democracies in

Poland and Hungary. This is very clear in Hungary where Orbán openly supported Poland, as well as in other backsliding countries. In cases such as these, we see reluctance to act in fear of once becoming a target oneself. On the other hand, leaders and MEPs of consolidated democracies do their best trying to burst this bubble (Central European University, 2017). Research has shown improvements in democracies and decreasing support for authoritarian regimes when the reputational cost is too high (Kelemen, 2017).

4.6 Effectiveness

Regarding democratic backsliding there are primarily two ways to measure the effectiveness of the actions taken by the EU. The first is whether or not the responses have an impact or not on what it is meant to have an impact on. The other way to measure the effectiveness is whether or not we see a change in the overall democracy score.

First of all, the EU has been partly successful when dealing with Poland. It has been a lot easier to pass on resolutions and involve the Court of Justice here than in Hungary. In Poland's case it did to some extent work as Poland withdrew several controversial laws violating the EU values. Yet they have been quite the opposite in the Hungarian matter. With the strong support Fidesz has gotten from their fellow party members in the European Parliament it has been difficult doing anything constructive. Keeping in mind that resolutions and the Court of Justice were able to solve a small fraction of a rather systematic issue, these responses cannot be regarded as very effective. Even less effective is the use of Article 7, only serving as a symbolic reaction.

The idea of making conditions for EU funding and using this as leverage is a good idea. As a response to this Poland and Hungary have been using their vetoes to block the budget and the Covid Recovery Package, keeping the union as hostages. Not until December 2020 the European Council came to an agreement on the budget. However, the rest of the union had to make compromises in order to make it work, and was described as "*Not good, not bad. As good as possible* (Janez Janša in Bayer, 2020)" by the Slovenian Prime Minister. However, simultaneously the EU pulled through the *rule of law conditionality* (European Parliament, 2020). Happening so recent it is hard to tell what effects this will have, but this aroused new hope for the union.

Just as surprisingly, the proposal of *Strengthening the rule of law within the Union* was adopted, but not without costs. Huge political compromises had to be done beforehand, making the proposal far less effective than it was meant to be. With the rest of the means the EU had to fight backsliding proving far below satisfactory this still has to be considered a small victory. Now the union has more tools in its toolbox accompanied by a good plan to raise the attention of the EU values and what democracy should be. It would still be far stretched calling it a victory as we first need to see the results. That said, things are now looking better from the EU-perspective.

All things considered it is hard to see how the responses have stopped and/or reversed the backsliding. Somewhat more realistic is believing it has been slowed down, if anything. It is therefore not unsurprising to see how the democracy scores have continued falling. As seen in the figure below the backslide in Poland was slowed down once facing EU resistance. The same cannot be said for Hungary, which has kept a steady course. It is safe to assume this is due to the lack of resolutions and cases put forward to the Court of Justice.

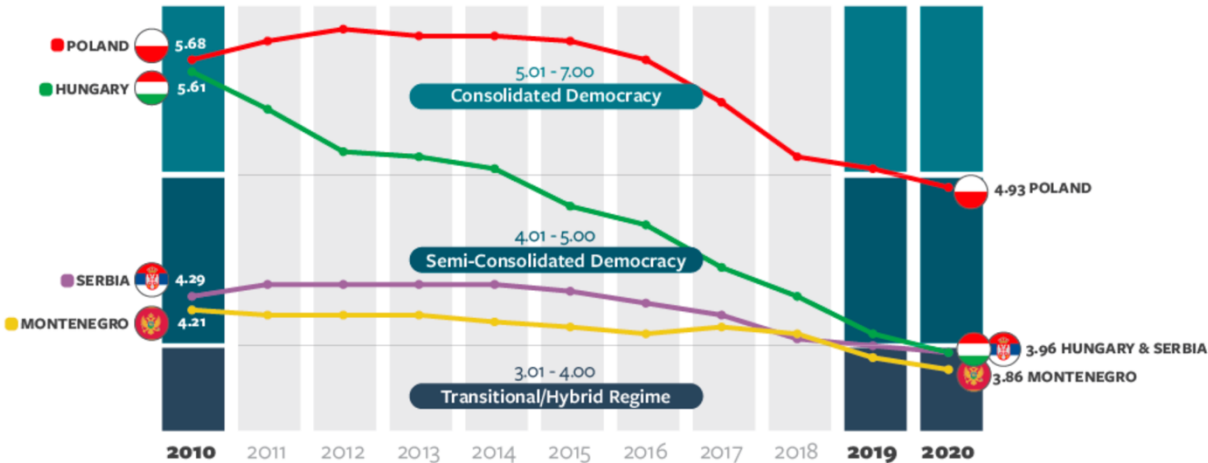


Figure 2: *The democratic score of Poland and Hungary, 2010-2020. 7 is the top score (Csaky, 2021).*

The trend of the rest of the backsliding EU members seems to be stabilizing after the European Commission initiated the Article 7 process against Poland, but deviation in both directions occur (Economist Intelligence Unit, n.d). This could be caused by the growing reputational cost of supporting or behaving like Poland and Hungary. To conclude, the different responses have had an impact, but not to the degree one hoped for.

5 Recommendations for improvements

The EU has been unable to put up a significant fight to stop democratic backsliding, though they have tried using Article 7, putting up cases for the Court of Justice and started looking at criteria for funding. Are there other ways to stop the tendency that violates the values in Article 2?

The first lesson the EU should have learnt by now is to start responding earlier. By involving itself earlier the EU could have sent a much stronger signal where it abstains from authoritarian tendencies. This could have slowed, if not stopped the development before it got out of hand. Hungary got free reins in almost 8 years until someone began to take action. Backsliding occurs slow and over time, making it harder to detect. It is also difficult to predict to which extent the issue will make up. Yet, the EU should have picked up on this a lot earlier and taken action. By not confronting Hungary, the EU indirectly sends out signals of indifference or acceptance of backsliding. Having a look at the bigger picture in Europe we can now see several countries dealing with backsliding to different degrees. Romania, Bulgaria, Ukraine and Latvia being amongst these, yet not as much as in Hungary and Poland. Letting the tendency grow within the union, making any effective response will be harder as more member states become more reluctant to implement changes or adopt resolutions. However, if the EU manages to solve the bigger issues Poland and Hungary make up, it would be easier to also take on the growing concerns in other countries by making no precedence for acceptance of illiberal democracies. In addition, by solving the issues in Poland and Hungary as quick as possible, they can use more resources on finding solutions for the rest of the union undergoing an authoritarian transition. That said, the EU did well in confronting Poland as soon as it did. Unfortunately, the EU had a lack of means as Hungary already were in a position where it would block the full use of Article 7.

Accepting the situation, the EU could consider changing Article 7, making it easier to use. For instance, they could propose changing paragraph 2 from *unanimity* to *two thirds*. This would make it harder to block when dealing with crises such as these. However, this comes with certain issues. The proposed two-thirds make it far too easy to use the *nuclear option*. Also, it would need less support, meaning a potentially huge proportion of member states will not be heard in a comprehensive and serious matter. Besides, the use of the article may lead to potentially far-reaching consequences. Thirdly, this change needs to be implemented. The obstacle is for obvious reasons getting a unanimous decision in the European Council or

finding a way around this. The same arguments against applies when attempting to create an additional article giving access to expel member states.

Except for these points as well as cutting funding, as mentioned above, there are really few effective ways the EU can respond. As also mentioned above, making it a huge reputational cost to support flawed, and especially illiberal democracies may help. This is a tool in which the EU has not taken full advantage of yet. The EU-denouncing of Poland and Hungary and the few statements from Merkel and the MEPs are anything but enough to cause a reputational cost great enough to turn the tide. More leaders need to come forward, and the EU could ask other democratic regions to do the same, increasing the pressure. Research indicates this should prevent any further worsening, and in the best case reverse it (Kelemen, 2017). While perhaps not getting the full recovery in Poland and Hungary due to reputational cost, it is highly likely to have an effect on the rest of the CEE-countries.

Whatever the response is, it is important to remember that the backsliding is a result of rational responses (Bermeo, 2016, p. 15. Poland and Hungary have been unwilling to receive 'help' from Europe as the EU-policy on backsliding is to *treat the symptoms* instead of the cause itself. It seems like the EU's best shot is to carry on with a *carrot rather than stick* mindset. If teaming up with Poland and Hungary, the EU could help resolve the issues causing the backslide in the first place. The EU should not punish them for being unable to come up with solutions themselves. Afterall, the EU is a brotherhood and should act accordingly. However, the EU should draw certain lines it should not cross when applying this method. If failing to do so, the union would risk becoming a puppet whilst trying to solve the issues. To avoid this, the EU should carry a big stick but use it gently.

6 Conclusion

After becoming aware of the democratic backslide in Poland and Hungary, the union approached the issue using dialogue. When things did not improve the EU saw no other option than to trigger Article 7. With Poland and Hungary protecting each other, unanimity in the Council was unattainable. The European Commission put several of the Polish cases up for the Court of Justice while the European Parliament passed on several resolutions against Poland. The EU struggled to handle Hungary the same way. Therefore, the EU began working

on other possibilities to address the issue such as the EU Pact for DRF, the strengthening of the rule of law in the union and conditional funding.

In theory, the initial means at hand should be enough to stop the deterioration. However, being as late to respond as the EU were, these tools became practically useless. Combining all the effort we only see the deterioration in Poland going slower while Hungary has kept its pace. On the other side, backsliding in the rest of Europe in general seems to have become somewhat stabilized.

The biggest mistake committed by the EU was to wait 8 years after identifying arising issues in Hungary before it acted. This made it possible for Poland to reach a level in which it would identify with and support the Hungarian government. By refraining to act earlier, the EU also indirectly made precedence for acceptance of authoritarian traits, which partly could explain backsliding in other member states.

There are two major recommendations for improvement. The first being willing to help Poland and Hungary solving the issues which have led to the deterioration. Scholars have stated that backsliding is the result of a rational response, thus solving the original issue could also solve the backsliding issue. Should this not work the EU should put more effort into increasing the reputational cost of supporting or refraining from condemning Poland's and Hungary's development.

All in all, the EU response has been rather weak. By not acting early enough they put themselves in a situation in which Poland and Hungary got the upper hand utilizing their vetoes. To the extent the EU has created new means, these are embossed by political compromises. Still, perceived as victories, they have yet to prove their efficiency as Poland and Hungary keep backsliding.

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