

## SYMPOSIUM ON THOMAS FRANCK'S "EMERGING RIGHT TO DEMOCRATIC GOVERNANCE" AT 25

### THE RIGHT TO DEMOCRACY IN A POPULIST ERA

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Thomas Franck's "[emerging](#)" right to democracy seems to be entering turbulent times, as the current global democratic recession has undermined the optimism of the 1990s.<sup>1</sup> The greatest paradox of the current populist wave is that democracy is being subverted by leaders promising more, not less, democracy—but it is a democracy of a different kind. Populists embrace the "form" of democracy and claim to speak for the people themselves. At the same time, however, by undermining its liberal constitutional foundations, they erode the substance of democracy, and gradually transform it into various forms of illiberal and authoritarian regimes.

This essay examines the situation in Europe, where the European Union is facing a unique historical situation: the political club of liberal democratic regimes, established to promote peace and prosperity after World War II, is facing the prospect that two of its members, Hungary and Poland, are sliding into illiberal authoritarianism. This raises the question of how well the European Union is equipped, legally and politically, to defend democracy and the rule of law in its member states. The Hungarian and Polish cases show that the Union has quite limited powers in this regard. The irony is that conditionality, so powerful a force before the countries of Central and Eastern Europe joined the Union, lost much of its bite once those countries actually became member states.

#### *The Populist Assault on European Values*

The European Union has been confronted by a nationalist and populist backlash that threatens the core principles at its very heart, including democracy, the rule of law, and human rights. During the last decade, the Union has been struggling with a multiplicity of crises, including the euro-zone crisis, Brexit, waves of migration, and the electoral surge of previously fringe populist political parties.

The main populist threat comes principally from the East. Less than fifteen years after accession to the European Union, Hungary, Poland, Slovakia, the Czech Republic, and Bulgaria have seen populists come to power. As a recent [empirical study](#) shows, the appeal of these populist parties has increased quite rapidly in the last two decades.<sup>2</sup> Since 2000, when populist parties garnered an average of 9.2 percent of the national vote, their vote share has tripled, reaching 31.6 percent in 2017. An alarming finding is that for the first time since 1995, there are now more consolidated authoritarian regimes than consolidated democracies in the region. Hungary now has the [lowest democratic ranking](#) in the Central European region.<sup>3</sup>

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<sup>1</sup> See Thomas Franck, [The Emerging Right to Democratic Governance](#), 86 AJIL 46 (1992).

<sup>2</sup> Martin Eiermann et al., [European Populism: Trends, Threats, and Future Prospects](#), INST. GLOBAL CHANGE (Dec. 29, 2017).

<sup>3</sup> Freedom House, [Nations in Transit Report: The False Promise of Populism](#) (2017).

What differentiates Hungary's Viktor Orbán and Poland's Jaroslaw Kaczyński from other populists in Europe is the extent to which they oppose and have sought to undermine liberal democracy. The populists' disdain for the rule of law has manifested itself most forcefully in the form of attacks against the courts. The populists understood very well that by displacing the constitutional courts, the core institutions of the rule of law, they removed the major obstacle to the fulfillment of their aspirations. After neutralizing the constitutional courts, the populists continued their legal "revolution" with attacks on the ordinary courts. Their tactics were clever. By lowering the judicial retirement age, Orbán first removed most of the presidents of the courts and replaced them with judges more to his liking. Similarly, the Polish government prepared three bills, recently adopted by the Sejm (the lower house of parliament), to control and capture the Supreme Court and the vast majority of other regular courts.

At the same time as they mounted their attack on the judiciary, the populist governments in both countries engineered a radical transformation of the public media into a government mouthpiece. Orbán's government also changed the election law, captured the Election Commission, and gerrymandered electoral districts in favor of his party. Together with the media takeover, these changes led many observers to characterize the April 2018 election, won by Orbán, as formally free but not fair. Similarly, in a new law adopted in December 2017, the Polish government introduced a series of changes, leading to a complete erosion of integrity of the National Electoral Commission.

Rather than attacking civil rights and liberties directly, both governments have used an [indirect legalistic approach](#), adopting problematic measures "concealed under the mask of law,"<sup>4</sup> in order to advance their versions of "autocratic legalism."<sup>5</sup> Even if Hungary and Poland are not yet authoritarian regimes, the combined effects of these attacks on the pillars of liberal democracy show strong signs of a slide into authoritarianism.

#### *Right to Democracy in the EU: Article 2 of the Treaty on European Union*

How is the European Union faring in its first real attempts at safeguarding democracy within the member states? In 1997, anticipating the eastward enlargement in the late 1990s, the member states constitutionalized a right to democracy in Article 2 of the [Treaty on European Union](#) (TEU). The article enumerates key European "fundamental values," including democracy, the rule of law, and respect for human rights. But this article does not itself specify enforcement mechanisms.

EU law currently offers [three legal options](#) for dealing with cases such as those of Hungary and Poland.<sup>6</sup> The first is to invoke TEU Article 7, the so-called nuclear option, which lays out a procedure for determining whether a member state has violated the values stated in Article 2 and providing for the suspension of certain rights in the event of a violation. This provision was first introduced in the 1997 Treaty of Amsterdam (amending the 1992 Maastricht Treaty), and states that in cases where there has been a "serious and persistent breach" of the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," the Council of the European Union can "suspend certain ... rights ... including the voting rights of the representative of the government of that Member State in the Council."<sup>7</sup>

Although Hungary has clearly violated Article 2, the institutions of the European Union have yet to use Article 7 to sanction Hungary. The European Parliament contemplated doing so on several occasions, but a call to trigger TEU Article 7(1) never materialized. Orbán and his Fidesz party belong to the European People's Party (EPP), a

<sup>4</sup> Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1685 (2015).

<sup>5</sup> Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEM. 37 (2015).

<sup>6</sup> For a comprehensive overview of the EU legal approaches to Poland and Hungary, see Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEG. STUD. 3 (2017).

<sup>7</sup> [Consolidated Version of the Treaty on European Union](#) art. 7, Dec. 13, 2007, 2012 O.J. (C 326) 1.

coalition of center-right European political parties that constitutes the single largest bloc in the European Parliament. The EPP seems reluctant to vote against a government headed by one of its own members. Quite surprisingly, however, in December 2017 the European Commission triggered Article 7 proceedings against Poland for breaching European common values and rule of law.<sup>8</sup> It would require a four-fifths majority in the European Council to activate Article 7(1), the first of a three-step process that could lead to Poland being stripped of its voting rights. The chances of Poland being [stripped of its voting rights are slim](#), as all of the other EU member countries would need to agree and Hungary, for one, has long said it would veto such a step.

The EU's second legal option for dealing with countries veering off the democratic path is detailed in Article 258 of the Treaty on the Functioning of the European Union (TFEU). Article 258 states that if the European Commission finds that a member state has "failed to fulfil an obligation under the Treaties" and that state then fails to rectify the matter, the Commission "may bring the matter before the Court of Justice of the European Union [CJEU]."

Using Article 258, the Commission initiated several separate suits against Hungary and Poland on relatively narrow legal grounds. The most interesting case involved a provision in Hungary's Transitional Act on the implementation of the 2012 Constitution, which lowered the retirement age of judges from 70 to 62. This provision would have forced 274 judges and public prosecutors into retirement in a short period of time. The Commission considered the law to be a violation of the independence of the judiciary.

The most problematic aspect of this new provision was that the judges forced to retire included most of the country's court presidents, who assign cases. Although the 2012 Constitution includes other provisions that are even more troubling in terms of judicial independence, the Commission decided to utilize very narrow legal grounds to deal with the case: It relied exclusively on Council Directive 2000/78/EC on equal treatment in employment, which prohibits discrimination on grounds of age. In November 2012, [the CJEU ruled](#) that the radical lowering of the retirement age for Hungarian judges constituted age discrimination and violated Council Directive 2000/78/EC.<sup>9</sup>

Despite this legal victory, Hungary's government did not comprehensively reinstate the retired judges, and Fidesz loyalists basically stayed in place. As [Jan-Werner Müller](#) argues, in the end "Europe appeared impotent in getting at the real issue, which was political and had nothing to do with the discrimination [against] individuals."<sup>10</sup> Distinct legal proceedings such as the discrimination suit may yield important legal victories, but they ultimately fail to address the broader institutional issues that threaten the foundations of the rule of law and liberal democracy in Hungary.

The final option in the EU's legal arsenal is the Rule of Law Framework. The framework was adopted in 2014, mainly in response to the inability of the key EU actors to agree about when to invoke Article 7. Often called the "pre-Article 7 procedure," the Rule of Law Framework complements Article 7 by establishing a structured "preparatory" phase for taking Article 7 actions. The Commission first assesses whether there is a systemic threat to the rule of law in a specific country. It then sends a "rule-of-law opinion" to the member state in question as a basis for dialogue to resolve the issue. If that member state ignores the opinion, the Commission then issues a "rule-of-law recommendation" and monitors the country's follow-up. If ultimately unsatisfied with the country's response, the Commission may decide to activate Article 7.

After Poland followed the political path paved by Hungary, the European Commission launched in 2016 an official inquiry into Poland's possible violations of EU standards, using the newly adopted Rule of Law

<sup>8</sup> The Commission acted quickly against Poland because its ruling party (Law and Justice-PiS) is allied with the more marginal European Conservatives and Reformists (ERC) party.

<sup>9</sup> Case C-286/12, [Commission v. Hung](#), ECLI:EU:C:2012:687 (Nov. 6, 2012).

<sup>10</sup> Jan-Werner Müller, [Should the EU Protect Democracy and the Rule of Law Inside Member States?](#), 21 EUR. L.J. 148 (2015).

Framework and its three-stage process designed to address potential systemic threats to the rule of law within member states. The Framework's greatest shortcoming is that it offers little in the way of viable sanctions that can be used before the activation of Article 7. When the Commission investigated Poland under the Framework in 2016, Prime Minister Szydło made it clear that her government was not worried about the inquiry. Moreover, she did not shy away from expressing strong contempt toward Brussels's action, calling the investigation an "ideological threat" to Poland's national sovereignty.

### *From Legal to Economic Sanctions?*

One of the problems with the Rule of Law Framework and TEU Article 7 is that they only allow the European Union to issue recommendations or to suspend voting rights in the Council, with no steps in between. Mere recommendations can be ignored, while suspending voting rights can be risky. In the case of Hungary and Poland, the nuclear option could easily alienate both populist governments from the Union, pushing them further into Russia's sphere of influence.

Article 7 would likely be far more effective if it included the possibility of economic sanctions, which would weigh heavily on countries such as Hungary and Poland that are heavily dependent on EU structural funds. Under the current six-year budget agreement with the European Union, Hungary (whose annual GDP is US \$125 billion) will receive nearly US \$40 billion in aid between 2014 and 2020. Poland also benefits substantially from EU assistance. Poland (whose 2013 GDP was US \$518 billion) is [projected](#) to receive a total of US \$318 billion in EU aid between 2008 and 2020.<sup>11</sup> This is more than two times the present-day value of the Marshall Plan.

This aid should be a great source of leverage for the European Union. Yet [studies suggest](#) that economic sanctions seldom work.<sup>12</sup> In the case of the Union, a [big reason](#) why "economic sanctions have fallen short in the past is that not all countries have complied. Indeed, significant differences of domestic opinion in the imposing country often undermine sanctions as well."<sup>13</sup> Therefore, future attempts at imposing economic sanctions must be backed by a strong regional consensus. In light of current events, however, achieving consensus is no small task. Even the EU institutions themselves have not agreed on a common language to describe the Hungarian and Polish cases. The EU's flawed approach to Hungary has already damaged the Union's political legitimacy, while the Eurozone crisis, the migration crisis, the threat of "Brexit," and Russia's occupation of Crimea and other parts of Ukraine have left the Union more politically divided than ever before. Needless to say, in such a fragile union, consensus on sanctions may remain elusive.

[Like other international organizations](#), the European Union is more likely to exert pressure on a member state when trade or commercial interests are at stake; it is less likely to intervene over sensitive matters of domestic policy, even if the issue implicates the internal functioning of democracy.<sup>14</sup> The EU's interest is in maintaining stability, and EU institutions and elites seem to lack the enthusiasm and political will for protecting fundamental values such as democracy and the rule of law. This contrasts with the relative unity and drive that they displayed when dealing with the [Eurozone crisis](#).<sup>15</sup>

Nevertheless, despite its failure to prevent the drift toward authoritarianism in Hungary and Poland, the European Union is not completely powerless when it comes to defending the rule of law in its member states. During [Romania's](#) 2012 constitutional crisis, for example, the Union quickly threatened the country with serious

<sup>11</sup> Rick Lyman, *With Robust Economy, Poland Navigates Around Eastern Europe's Strains*, N.Y. TIMES (Oct. 4, 2014).

<sup>12</sup> GARY CLYDE HUFBAUER ET AL., [ECONOMIC SANCTIONS RECONSIDERED](#) (3d ed. 2009).

<sup>13</sup> Kenneth Rogoff, *Do Economic Sanctions Work?*, PROJECT SYNDICATE (Jan. 2, 2015).

<sup>14</sup> Erin K. Jenne & Cass Mudde, *Can Outsiders Help?*, 23 J. DEM. 150 (2012).

<sup>15</sup> For a similar argument, see ERIC A. POSNER, [THE TWILIGHT OF HUMAN RIGHTS LAW](#) 106 (2014).

penalties, including blocking its accession to the Schengen free-movement zone. This pressure from the Union succeeded in getting Romania's Prime Minister, Victor Ponta, to back down from his attacks on the Constitutional Court and from his campaign to impeach his rival, President Traian Băsescu.<sup>16</sup> Of course, Ponta's government was much less hegemonic than Orbán's or Szydło's, and the Union had more leverage with Romania. Timing seems to be critical too. If the Union acts early, before an illiberal government consolidates power, the chances of preventing a slide into autocracy are much greater.

For now, it seems as though little can be expected from EU legal actions aimed at protecting the rule of law in member states. Writing about "subnational authoritarianism," [Daniel Kelemen](#) argues that "legal levers alone are unlikely to safeguard democracy. ... So long as political leaders are willing to put partisan interests above democratic values, they may allow ... autocracy to persist for decades within otherwise democratic political systems."<sup>17</sup> It will take bold political action on the part of other EU member states to defend core EU values more effectively.

### *Conclusion*

While a legal right to democracy is important, democratic political parties and social movements with credible political ideas and programs ultimately offer the best hope for the survival of constitutional democracy. The role of law and legal rights is less of an essential bulwark against democratic backsliding than is traditionally presumed in the legal literature. As [Aziz Huq and Tom Ginsburg](#) argue, "The near-term prospect of constitutional liberal democracy hence depends less on our institutions than on the qualities of political leadership and popular resistance."<sup>18</sup>

The good news is that the populist trend can be reversed—but only if European leaders, together with the member states, articulate a coherent alternative to the failed economic policies of the last decade and speak directly to the anxieties of populist voters. An economic policy that promotes growth, better jobs and wages, and social inclusion can stem the nationalist tide. Unfortunately, the politically weakened European mainstream parties—the traditional standard bearers of the postwar consensus on "embedded liberalism"—are now on the defensive. Populist leaders are promising better pensions, health care, and more jobs, an agenda that is winning over the abandoned working class communities that were once a stronghold of the European social democratic and other progressive parties. Leaders of the mainstream parties can reverse the nationalist trend by returning the European Union to its initial role as a promoter of European solidarity and equality, specifically through job training, "green" growth and other public investments. If European democrats of various political stripes don't start offering a more compelling agenda, Europe is on a dangerous political path. And no international right to democracy will save it.

<sup>16</sup> R. Daniel Kelemen & Mitchell A. Orenstein, [Europe's Autocracy Problem: Polish Democracy Final Days?](#), FOREIGN AFF. (Jan. 7, 2016).

<sup>17</sup> R. Daniel Kelemen, [Europe's Other Democratic Deficit: National Authoritarianism in a Democratic Union](#), 52 GOV'T & OPPOSITION 211 (2017).

<sup>18</sup> See Aziz Huq & Tom Ginsburg, [How to Lose a Constitutional Democracy](#), 65 UCLA L. REV. 4 (2018).