

Danuta Hübner
Chair of the Committee on Constitutional Affairs
in the European Parliament

The Executive Training Seminar
Protecting Liberal Democracy in Illiberal Times:
A Focus on the European Union

European University Institute
17th November 2017, Florence

Liberal Democracy and its Discontents

At least since the end of the Cold War and the *annus mirabilis* 1989, a consensus seemed to have hold in Europe that liberal democracy is the default choice. The argument by Francis Fukuyama in his “The End of history” gave an intellectual imprimatur to such an understanding of what was to come. He wrote “*What we may be witnessing is not just the end of the Cold War , or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.*”

Well, to think of it now, it may seem that perhaps now we all pay for the *hubris* of that moment. As it turned out nothing is given for ever. Indeed, I feel tempted to say that after 1989, buoyed by Fukuyama and his many followers, we entered the era of complacency. We took *liberal* democracy for granted. But now, nearly 3 decades later, we see that not everybody equals democracy with its liberal version. And of course, the large swaths of the world prefer autocracy or authoritarian form of government.

In the transatlantic world, by and large, democracy is a preferred form of government, but not everywhere, necessarily in its comprehensive, liberal form. Everybody seems to accept the entrance point of democracy that is the rules of popular enfranchisement and election as means of selecting those who govern. But not everybody is willing to accept that *liberal* democracy is more than just *electoral* democracy. The whole “package” of *liberal* democracy that include the rule of law, freedom of speech and association, a multiparty system, strong and independent civil society and institutional checks and balances, are more and more openly questioned. And I would add today also the importance of the democracy culture which is lacking in case of the relative newcomers.

There are many sociological reasons for this lack of awareness of seeing the whole package. This is weakening of the universalizing impulse in political discourse, fragmenting of public space and “privatizing” of social concerns, depolitization of deliberative space. The main reason, though, certainly is the rise of populism, which came after years of blurred ideological lines between mainstream parties, based on, illusory but potent, idea of return to pre-political identities and anti-establishmentarian attitude. Fukuyama himself wrote in 2014, that the biggest problem for the democratically elected governments in some countries was not ideological but "their failure to provide the substance of what people want from government: personal security, shared economic growth and the basic public services."

Governments' legitimacy, based on liberal democracy is being questioned as inadequate in meeting the real challenges in society. It is to be said that the arguments of populists do not come from nowhere, they just act as a vacuum cleaner - they suck in all the legitimate grievances and discontents of people unhappy with the direction the world took in the last 30 years: crises, austerity policies, weakened welfare state, reduced social mobility, income stagnation for middle classes everywhere, inequalities, etc.

Liberal democracy in the populist discourse is being often conflated with liberal policies in the domestic context. "Liberal" got this noxious connotation with "elitist" and the liberal institutions like independent judiciary in some countries are treated like representatives of elitist interests, non-governmental organizations like enemies of the electoral democracy, because nobody elected them "to tell us what to do". Freedom of speech and association is perceived as superfluous luxury when compared to for example the increased social expenditures.

What is taking place is the emergence of a powerful counternarrative to that of the liberal democracy.

"Make America Great Again" – the slogan employed by Donald Trump in the US elections a year ago has its local analogues everywhere, even if not always formulated in such grandiose way. This nationalistic and populist sentiment feeds off the often real problems, and its genius is that it merges often disparate grievances into one coherent narratives. This is the local aspect.

But we also confront the larger, international issue. Those packaged narratives are being weaponized by the global challengers of democracy in every form, that is the authoritarian regimes like Russia and China, which present themselves as proponents and defenders of civilizational diversity in

which the ideals of liberal democracy are often treated as culturally incompatible to the native, traditional ones.

In this contest of narratives and counternarratives, there is actually one that will never emerge. There is no European counterpart to Trumpian Make America Great Again. Even saying “Make Europe Great Again” sounds silly. This kind of overblown slogans are not well suited to the European timbre of voice. Europe usually does not shout out its virtues aloud. Perhaps until now it was our virtue - this lack of capacity to show how great we are. But sometimes you may wonder, in the world of competing claims to rhetorical supremacy, perhaps the EU should be louder. And perhaps it should give the populists all over the run for their money? The Union tries to fend off the populist attacks piecemeal, so to speak, either in the domestic context, or in particular concentration on correcting procedures when it comes to particular countries run by the illiberal regimes.

As wrote Daniel Gros, a perceptive observer of European politics; “The EU can, and should improve its performance in many respects. However, it cannot change its fundamental nature. It is condemned to remain a bulwark of liberal democracy. It cannot match the promises of easy radical solutions offered by today’s populists on both the right and the left. Its insistence on rules and procedures does not appeal greatly to societies that feel threatened by forces outside their control, whether these take the form of globalisation or immigration.” We have not managed to convince the public at large that Europe makes globalization work for us.

Thus, what we really need is a more comprehensive strategy, combining the legal, political, as well as cultural aspects of the populist danger. It would be a great challenge indeed, for the EU was always strong on procedures, rules, regulations, projects, but less so on finding what was termed the “soul of Europe”. Now we are really in the fight for the soul with those who want to take it away from us.

The European Union is a community of values and community of reason. But now the time has come to make it as well a “community of hearts.” Sustainability of European integration depends on its formal laws, Treaties, institutions but increasingly on the commitment of us, European citizens to the European values. Maybe we should announce a pan European program for forming bonds of attachment to the Union that would withstand the populist assault.

This of course does not mean that we should follow in the populist footsteps and force into being a sort of European nationalist idea. If that was so, then the medicine would be worse than the illness. Nevertheless, it is

indispensable that we provide a convincing counternarrative. The bond of the principle of rule of law would be nevertheless the basis of this narrative. As Martin Luther said (supposedly!) "Here I stand. I can do no other".

Thus European Union must stand on firm principles and "can do no other". Let me now say more about it and then confront it with this cultural imperative of the challenge we face now.

First, it has to be said, that the principle of rule of law is a fundamental bond that makes the EU a community not only of values, but a community of understanding. The rule of law is a basic currency (even prior to Euro!), the basic structure of institutional language and the core of the EU's philosophical design as a multinational democracy. It is thus something that cannot be dispensed with.

Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence - of citizens, national authorities, private entities, market, as well as outside partners or competitors - their confidence in the legal systems of all Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law across the Union.

When we are faced with a situation where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU as an area of freedom, security and justice without internal frontiers. In such situations, the EU needs to act to protect the rule of law as a common value of the Union. But we have a problem here.

Experience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union. This is to a certain extent linked to the fact that in principle the Union has been created to solve problems emerging between member states and not within member states.

Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns. There is mechanism, very slow, but infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.

There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law. For these situations, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. But we see how painful politically it is even to talk about it, not to mention to reach out to it. The Commission is among the actors which are empowered by the Treaty to issue a reasoned proposal in order to activate those mechanisms. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the rule of law. Its scope is not confined to areas covered by EU law, but Article 7 empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. Nevertheless, the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 of the TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort.

Recent developments in some Member States have shown that these mechanisms are completely inadequate to quickly respond to threats to the rule of law in a Member State. But neither they are for slow reactions.

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments. Thus Framework to strengthen the Rule of Law has been instituted in March 2014 as a preliminary step towards the launching of the mechanisms of article 7 TEU. Big debate whether COM had the right to establish such a member. Its objective is to prevent the development of emerging systematic threats to the rule of law in a Member State to a "clear risk of a serious breach" under article 7 TEU, which in the most severe case can lead to the suspension of the voting rights of the Member State concerned in the Council.

Of course when using this Framework the Commission has been accused by Polish government to act outside its competences. The Rule of Law Framework provides for a three-stage process. The first stage is the Commission's assessment, during which the Commission collects and examines all relevant information pertaining to the situation and assesses

whether a systemic threat to the rule of law exists. If it finds the latter to be the case the Commission can send an opinion to the Member State concerned setting out its concern.

In a second stage, unless the matter has already been satisfactorily resolved in the meantime, the Commission will issue a "rule of law recommendation" addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.

In a third stage, the Commission will monitor the follow-up given by the Member State concerned to the recommendation addressed to it. This monitoring can be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation.

If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission should assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

But Europe has more mechanisms which are supposed to protect the values on which it is founded. Actually it enjoys three fold direct protection based on the Treaties. In addition to Article 7 and since the 1993 Copenhagen European Council, EU values form part of the accession criteria for candidates for EU membership (Article 49(1) TEU). Following their accession, member states must observe and promote the EU values. And thirdly, the Union also is committed to exporting its values outside its territory, with the values underlying the international relations of the EU (Articles 21, 3(5) and 8 of the TEU).

This protection benefits also from the complementary soft law mechanisms to uphold the rule of law, democracy and fundamental rights in member states which can be seen as complementing the mechanism established in Article 7. In addition to what I already mention - the March 2014 Framework to strengthen the rule of law, there is an EU justice scoreboard. It features as a non-binding tool where the shortcomings identified in member states do not trigger any sanctions but there is a mechanism of a sort of indirect sanctions. They stem from the integration of identified issues in country specific analyses and Economic Adjustment Programmes. Scoreboard is also expected to impact the allocation of regional development and social funds.

There is also a special mechanism for Bulgaria and Romania, called cooperation and verification mechanism related to evaluation of progress in the field of judicial reform, corruption and organized crime. Progress reports

have been published every six months without direct sanctions. Commission could nevertheless link progress to funding which actually happened at least once, in 2008.

There are also other monitoring mechanisms, notably reports. The annual Report on the application of the Charter of Fundamental Rights in member states, published since 2010. There is the EU Corruption Report since 2013, evaluating efforts in member states based on a large number of independent sources. These include civil society, specialized networks, services and agencies, as well as independent experts and networks of local research correspondents. There is also an EU Fundamental Rights Agency Annual Activity Report looking at member states. In addition, the EP asked Annual Report on the situation of Fundamental Rights in the EU since 1993.

All these reports deal with Fundamental Rights or rule of law but it is largely a horizontal focus and not on one member state. The Parliament has been for years an advocate of bringing all relevant instruments together under one roof of a Fundamental Law Mechanism. In its resolution voted on October 25th 2016 it called for an EU Pact on Democracy, Rule of Law and Fundamental Rights which could be based on an annual cycle of activities embedded into an inter institutional agreement.

Unfortunately, while we are very strict on Copenhagen criteria, once states becomes EU members we appear not to have an efficient instrument to see whether the rule of law and the independence of the judiciary still command respect.

Going back to the Article 7 it has been argued and there is evidence, and we can see it, that it is unusable due to the high thresholds needed for decision of the Council -under preventive arm the majority of four fifth is required for the Council to determine a clear risk of a serious breach and under sanction arm it is unanimity without the member state concerned. One can say that this an instrument designed as a political rather than a legal tool, based on the decisions of political institutions. Without any role of the ECJ. The instrument has never been triggered even though it has been available since 1999.

It has been considered in 2000 with Jörg Haider entry into the Austrian Government but eventually bilateral sanctions were imposed on Austria by 14 member states. It has been discussed in 2010 after the expulsions of the Roma from France but it was not triggered. In 2012 the Commission was threatening to use it in the context of the constitutional crisis in Romania but again, formal steps were not taken. A similar situation emerged in 2012 in the context of Hungary. In 2016 the rule of law Framework procedure was launched against Poland and is ongoing. The EP adopted in 2017 resolutions

launching the article 83 of its Rules of Procedures against Hungary and Poland which might lead to triggering the preventive arm of Article 7.

In each case where the Commission identified a concern about the rule of law within a member state, there has been a link with the EU law. This allowed, instead of reaching to Article 7, to trigger rely on the duty of loyal cooperation under Article 4(3) TEU and infringement procedure based on Article 258 and 259 TFEU.

This allowed the Commission instead of reaching for Art. 7 to trigger rely on the duty of loyal cooperation under Article 4(3) TEU and trigger an infringement procedure based on Art. 258 and 259 TFEU.

- In 2010, Commission launched an infringement procedure based on the breach of substantive safeguards enshrined in Free movement directive 2004/38
- In 2013 the Commission could base its infringement procedures against three pieces of Hungarian legislation on the basis of the breach of the Article 16 TFEU which requires independence of national data protection authorities, Article 130 TFEU and Art. 14 of ESCB statute which guarantees independence of national central bank
- In 2017 the Commission based its infringement procedure against Poland, based on Art. 157 TFEU on gender equality with regard to the organization of the courts, and on Art. 19(1) TEU in combination with Art. 47 of the Charter of Fundamental rights concerning the courts independence
- Similarly with regard to Hungarian NGO law, which aims to restrict foreign donation are contrary to principles of free movement of capital (Art. 63 TFEU), additionally Commission considered this to be a violation of freedom of association and protection of private life as enshrined in Charter of Fundamental Rights.

The Ideal vs. the Reality

What I presented here shows the distance between this more or less Weberian model of a bureaucracy and the real, political world. In the latter, the use of existing tools as well as the transition from one stage to another is definitely rather bumpy than smooth, and the interactions between the EU and states under the rule of law procedures are often marred by differing weight of particular countries, nature of the alliances, hurt pride, hubris, willed or unwilling confrontations and antagonistic feelings, euro skepticism of political elites and populism.

This model is also hampered by the structuration of the EU as still a community of nations and not a federal entity. And this is a hurdle that even the best model of enforcing the rule of law uniformly across the landscape of the EU cannot jump over, without consequences in the form of increasing political division within the EU.

Faced with this inescapable reality many EU member states tend to take a flexible approach to what's legal and what is illegal within EU framework. Sometimes the Commission, which under President Jean-Claude Juncker, sees itself as a "political commission" is accused by member states as launching procedures depending on political sympathies. Sometimes it is accused of being a bunch of bureaucrats with no right to control rule of law in sovereign member states. In the context of the equality of member states, President Juncker's famous saying "because it is France" will not be forgotten. Of course it is a recognition of reality of influence, distribution of power etc. in the current EU, but nevertheless the impression of unequal treatment of member states in the context of rule of law makes those who want to overthrow the EU as we know it, more bold in their drift toward "illiberal democracy". Because their pride had been challenged.

In addition, there is no fury greater than a prideful nation scorned. I think that sometimes this aspect in the whole concept of implementing the rule of law is being significantly underestimated as a factor in breeding resistance and forming the illiberal alliances. Actually what we need is a sort of close, micro-cultural analysis that would be able to differentiate between the levels of this resistance in order to make the rule of law procedures more tailored to particular national circumstances and thus prevent the formation of such alliances.

Taking as obvious examples the cases of Hungary and Poland, it is obvious that despite certain similarities, their trajectories of political development based on cultural factors and political traditions are quite dissimilar. The question thus becomes: should we take this into consideration and make a use of it, or is it just enough to put them into one basket and thus practically push them even farther into this alliance more of convenience than real common interests?

There are certain across the board proposals, that while may look clean and easy on paper, may actually prove quite divisive in the complex world of European politics. For example, Luxembourg's Foreign Minister Asselborn proposed that breaches of the rule of law should have immediate financial consequences for the countries in question. New regulations should be injected at the next Multiannual Financial Framework negotiations for the EU's seven-year budget, which will be adopted in 2020. European Structural Fund

payouts would be reduced in cases of countries deemed to flout the basic rule of law. Unfortunately, the general thrust of the proposal is clear, given that the main recipients of EU financial injections are Eastern European countries. While this idea might be further discussed during the work on the future MFF, it is not at all clear whether this would be legally possible and politically effective.

Countries such as Hungary will see it for what it is: a declaration of war. The Hungarian ambassador to Germany pointed out that his country is the only one in the EU to have been punished for flouting the bloc's budget rules. In March 2012, the EU temporarily suspended payment to Hungary of subsidies worth 500 million euros earmarked for economically depressed regions. To him and his country it is a proof that not all states are equal. And this, in turn, obviously raises the level of intransigence toward the EU in his already Eurosceptic government.

My point here is not to be an "advocatus diaboli", but just to point out that sometimes what looks like an easy, clean solution to a given problem may be just an instigation of a breakup that we would want, hopefully, to avoid. Perhaps the real question that we need to think about is whether we want to turn the nascent illiberal democracies back into real democracies and members of the EU in good standing, or would we be content to let them go. I am not sure where we are now in case of my home country.

For each of these options, different tools would have to be used. For the first option we need precise, calibrated, surgery –like instruments, like, for example, cultural micro-analysis that I spoke about before, building an active support of the existing civil society, sophisticated pressure on the governments in questions, etc. For the second, ax-like actions like reducing Structural Funds and cutting assistance in general would be enough. But would they be helpful?

Prof. Pech helpfully put on this twitter account before this meeting his article "Illiberalism Within: Rule of Law Backsliding in the EU" (written together with prof. Kim Lane Scheppeler), in which the authors assert that in case of Poland, the efforts of the European Commission with using the Rule of Law Framework were bound to fail given that it was based on "a questionable presumption that a discursive approach could produce positive results".

Well, I believe that the Polish government's arrogance of actions, its disrespect toward the EU and its institutions, its hollowing out the judiciary, crude attempts at defenestrating the public sphere of its freedoms, etc are facts of life. Still, I do hold the presumption, if I may say so, that the EU is inherently a pro-discursive organism, and if we substitute something different

for it, we will lose the EU's soul. There has been a search going on for the soul of Europe for some time now, but I think that its soul is exactly in this discursivity, openness to dialogue, even very exhausting, the willingness to converse, to deliberate , to talk.

Of course, we cannot be naïve. And I share the view of prof. Pech that the "would-be autocrats (should not be) free to undermine the rule of law as long as they agree to enter into dialogue with the Commission". Yes, it is true, that what can be presented as "constructive dialogue' can in fact be a façade of dialogue only, as professor Pech writes. That is why we should be well versed with the micro-cultural nuances of particular countries so that we can, first, spot the inconsistencies, the prevarications and the outright lies and, as a second step, be able to differentiate between them and the kind of verbal buffoonery that can be extinguished in real dialogue by arguments supported by sophisticated pressure on our part.

Illiberals are those who want to deprive us of this soul, to change our principles and our behavior. The best way to achieve that would be if we respond with the same sort of crudeness in words and belligerency in action. Then we would give them the satisfaction they desire.

I agree with prof. Pech that backsliding on the rule of law in one country, two countries or a group of countries is a decisive issue for the whole EU, for it affects everybody negatively through erosion of acceptable norms and corrupting intellectually the decision –making processes, as well as creating those "black holes' when it comes to observing the EU law. These are very dangerous things and we have to commit all our forces and resources to create sophisticated system of red lines that cannot be crossed without harm to a particular backslider or a group of them. Including, to say it clearly, the activation of art. 7 at the end of the road, if it proves necessary, having expired all the other options.

At the same time, we should remember the Okham's rule, and thus avoid a temptation of creating definitions that would hamper the potential for discursivity and the possibility of dialogue. Anyway, it is yet too early to call what is happening in the backsliding counties with such loaded notions like "stealth authoritarianism", democratic decay" or "authoritarian reversion" (as quoted in Prof. Pech's paper). Undoubtedly we can find, here and there, particular characteristics that could lead us on to prefer such a scholarly ambitious language, but it would be nevertheless lack enough precision to present them as a tested hypothesis that would hold its value in scholarly arena.

Taking for example “democratic decay” : it can be argued that the authoritarian tendencies and decisions on the part of the Polish government and its attempts at reversal of institutional arrangements in political sphere has actually liberated a hitherto hidden potential for the growth of the bottom-up democracy, organized either around the defense of the democratic values and the separation of powers (like, for example mass protests for free judiciary last July) or the growing civil society, including, for example, newly formed groups defending human rights, new women’s organizations, citizens movements for livable cities etc. In this case thus, a counter-argument can be put, that actually there is a rising wave of democracy in Poland.

Institutions and Values

In confronting the illiberal trend on the institutional level, the obvious hurdle is, as I noted before, that the EU is still community of nations and not a federal entity. But we still expect the federalist kind of response from a nationally-driven institutional arrangement.

Prof. Pech correctly points in his article the failings of this arrangement (supermajorities for enacting art. 7, lack of primary institutional responsibility for starting the process and ensuring its successful outcome, inaction of the European Council, prioritization of party politics within the European Parliament).

Within this landscape, we need certainly more coordination and more creative solutions to the dilemma of illiberalism within our midst.

Nevertheless, I would oppose putting this challenge in the stark terms of Ivan Krastev (quoted in prof. Pech’s paper, that we are soon be facing the choice between “Emmanuel Macron and Victor Orban” . I think that this is a well overblown rhetorical parabole. As far as I understand President Macron’s ideas for Europe, his main point is that the EU institutions are now too complex to be able to make effective decisions and implement urgent reforms. For those reforms to succeed, we need all the member countries to be on-board, fully engaged in looking for common solutions for making Europe more competitive, equal, with robust social dimension. The long-range problem is thus how to reengage the backsliders for this cause, not how to find the best tools to punish them for their misdeeds. I admit, it will not be easy. But if we believe in Europe, we have to retain and even increase the level of our optimism.

During the crisis, while fully seeing the scope of the threat to the EU, I nevertheless always maintained that we were not at the edge of the abyss, as many said. And now, when we are faced with the challenge of illiberalism, I think that instead of giving in to fear and temptation of speaking in rhetorical

parabolas, as well as advocating punitivist measures as the best answer to contain this phenomenon, we should approach it with the cool heads, creative minds and sophisticated analysis. History of European integration has been a history of change. Change in response to global environment, but also to our own unfinished businesses or other domestic challenges. But this time what is at stake is something else. It is not just about the next step in expanding the single market or even reform the European. I'd get, important as these issues are. This time it is about our foundation, our values. If we lose them we will be lost.

We are in difficult moment, but this is not an abyss. We have to commit ourselves to staying together, as a responsive, evolving community of nations and of citizens.

So let us see illiberalism as a bump in the road for the EU, not as the end of our common story. Europe in which Paris, Berlin, Rome, Brussels, but also Warsaw, Kraków, Prague, Brno, Budapest and Debrecen are vibrant centres of making one out of many.

E Pluribus Unum.

Thank you for your attention.