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The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union[☆]

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ABSTRACT

When the European Union was founded, it was assumed that all Member States admitted as consolidated democracies would maintain their constitutional commitments. In recent years, Hungary and Poland have challenged this premise as elected autocratic governments in those countries have captured independent institutions and threatened long-term democracy. The judiciaries of these countries have been hard hit. In this paper, we trace what has happened to the judiciaries in Hungary and Poland, showing how first the constitutional courts and then the ordinary judiciary have been brought under the control of political forces so that there is no longer a separation of law and politics. We also explore why the European Union has so far not been able to stop this process. In the end, the European judiciary, particularly the Court of Justice, is attempting a rescue of national judiciaries, but the results are so far unclear.

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1. Introduction

By the time of the “big bang” accession in 2004, when ten new Member States entered the European Union, it seemed that the fate of East-Central Europe was settled. From that time forward, the westward states of post-communist Europe were certified as democracies in good standing, ready for membership in the most exclusive club in the world. At the time, political scientists spoke of “consolidated democracies” (Linz and Stepan, 1996), defined as countries in which democracy was the “only game in town” because there were no realistic alternatives. A country whose democracy was consolidated would stay a democracy forever. Or so the experts thought.

Before the first decade was out on the big bang accession, however, it became painfully clear that a consolidated democracy could come unraveled. Hungary’s constitutional system began imploding shortly after 2010 so that by 2015, Freedom House lowered its assessment of Hungary from a consolidated to semi-consolidated democracy (Freedom House, 2015), the

[☆] The events we describe in this chapter are fast moving. The chapter is current as of July 2018 and events after that date could not be taken into account here.

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first time a consolidated democracy had officially fallen from grace. Shortly thereafter, Poland began a short, sharp slide toward autocracy, with Freedom House reducing its overall democracy score for 2018 to a level where Poland just barely hung onto consolidated democratic status (Freedom House, 2018). Since that score appeared, things have not improved. When it came to democratic consolidation, it turned out that what went up could also go down.

What happened? In both Hungary and Poland, parties with autocratically inclined leaders were voted into power with unprecedented majorities. The Fidesz party in Hungary won two-thirds of the parliamentary seats in the 2010 election, giving the party a constitutional majority, which it has largely retained to the present day.¹ The Law and Justice party (PiS in its Polish acronym) in Poland won an absolute majority of seats in the lower house of Parliament in 2015, governing as a single party alone for the first time in the country's modern democratic history, while simultaneously capturing the presidency and the upper house of the parliament. In both cases, the elections could be seen as ordinary rotations of parties away from those that had already been in power for too long (Scheppele, 2018). But in both cases, these pivotal elections, which gave full legislative and executive power to a single party, spelled the beginning of the end of consolidated democracy in East-Central Europe.

It was each country's bad luck that the leaders of these successful parties – Viktor Orbán in Hungary and Jarosław Kaczyński in Poland – lied about their revolutionary ambitions before they were elected. Had these leaders been honest about their autocratic plans, it is unclear whether either could have won. Once in office, however, both Orbán and Kaczyński began attacking key independent public institutions in order to eliminate them as veto points. The first institutions to be attacked were the constitutional judiciaries which were poised to hold Orbán and Kaczyński to account under the constitutions they inherited. Once the constitutional courts were neutralized, the ordinary judiciaries were dismembered when they held out the possibility for individuals and opposition groups to challenge through law what these new autocratic governments were doing. Judicial independence, once quite strong in both Poland and Hungary, is now a thing of the past.

Perhaps no one was more surprised at democratic backsliding in East-Central Europe than the leaders of EU institutions, who – along with the academic consensus – had believed that consolidated democracy was irreversible. They had had faith that national institutions in general – and judiciaries in particular – could contain any values-based threat that might arise. The EU had carried out a thorough check of countries on their way in the door but made no provision for ongoing monitoring of the democratic health of Member States once they were admitted. Consolidated democracies were supposed to stay consolidated, so there seemed to be no need for monitoring mechanisms. At EU level, however, the deconsolidation of democratic governments not only posed a threat of contagion, as we have already seen with the uptake of autocratic tactics now in Poland, but deconsolidation also threatened the operation of the EU as such. The Member State judiciaries are the institutions through which EU law is enforced throughout the Union. If they are disabled, the Member States are not the only ones to suffer, but the whole EU suffers too because its writ does not run throughout the EU if the national courts do not ensure uniform compliance with EU law.

It did not help that the European Union believed it had few tools to prevent democratic backsliding because the EU was designed to protect Member States from an overreaching Union instead of protecting the Union from failing Member States. Treaty change requires unanimous agreement among the Member States; even ordinary legislation cannot be passed without qualified majority approval of the Member States. Without the Member States supporting in force what the EU does, the EU can do very little. And the Member States do not contemplate being seriously sanctioned themselves. In the basic design of the EU, Member States largely protected themselves from sanction from the center. Member States can quit (hence, Brexit) but they cannot be thrown out.

The primary sanctions mechanism for values-based non-compliance with EU law is a political process identified in Article 7 of the Treaty on European Union (TEU) that requires supermajority agreement of the other Member States to identify a *risk* of non-compliance. It requires a *unanimous* judgment of all other Member States except the offender to determine that EU values have *in fact* been breached. With even one other fellow-traveler state supporting an offender, Article 7 TEU has been thought impossible to use for levying sanctions. Now the EU has two. As we will see, the other legal process for ensuring the uniform enforcement of EU law, the infringement procedure, allows the European Commission to bring Member States to the European Court of Justice if the Member State violates EU law. But infringement procedures to date have been used for relatively technical violations – nothing so big as a threat to European values or the deconsolidation of a democratic state.

The attack on national judiciaries is the most important element in the EU's democratic backsliding story because, with disabled judiciaries, no one can be assured of fair treatment once they challenge the government. If courts will not neutrally enforce the law – whether national or EU law – then it becomes impossible for those inside or outside the state to counter the autocratic state through legal means. For that reason, we will concentrate in this article on the methods and results of the attacks on the judiciaries in Hungary and Poland, focusing on the interventions that the European Union attempted to make as the judiciaries were politically captured. First we will explain what happened in Hungary and then we will turn to Poland. We will conclude by explaining why the European Union has been so powerless (so far) to arrest the capture of the courts and what it could still do now.

¹ For two years between its second and third consecutive elections, Fidesz lost its two-thirds majority in two by-elections but sometimes managed to pass laws requiring “relative” two-thirds majorities (two-thirds of those present and voting). Constitutional amendments require an “absolute” two-thirds (two-thirds of all MPs).

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