**Short position paper for the House of Representatives of the Netherlands**

This “position paper” aims to briefly 1) outline the nature of the problem we are facing; 2) explain why this is a problem which the EU but also the Netherlands must prioritise and urgently tackle; and 3) clarify that the EU does have the power if not a legal obligation to do so.[[1]](#footnote-1)

**1) What is the problem we are facing?**

What are witnessing in Hungary and Poland is what Professor Scheppele and I have described as “rule of law backsliding”.

In light of the pattern of constitutional capture (an expression coined by [Professor Müller](http://onlinelibrary.wiley.com/doi/10.1111/eulj.12124/abstract)) which has materialised in these two countries and elsewhere, we have proposed to define rule of law backsliding as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”*.*

The notion of backsliding implies that a country **was once better, and then regressed**. A key feature of this process of weakening checks and balances is that it reflects a **deliberate strategy of a ruling party**, the (unadvertised) goal being to establish electoral autocracies (with elections possibly “free” but no longer “fair”) and the progressive solidification of de facto one-party states.

To hide and give a veneer of respectability to their enterprise, would-be autocrats have argued they are building “illiberal regimes” with some going as far as speaking and advocating “illiberal democracy” as an alternative to liberal democracy. To put it bluntly, this is a rhetorical ruse. To speak of “illiberal democracy” is not only deliberately misleading, it is conceptually misguided. As noted by Michael Meyer-Resende, Finn Heinrich and Nils Meyer-Ohlendorf, the concept is only used to provide “[a sense of philosophical sophistication to something that is better described as a power grab](http://democracy-reporting.org/dri_publications/false-frames-how-we-undermine-democracy-with-careless-language/)”.

This is why one should avoid using the label “illiberal democracy”. As [rightly observed by Professor Müller](https://www.nytimes.com/2018/04/05/opinion/hungary-viktor-orban-populism.html), accepting this label means giving “leaders like Mr. Orban a major rhetorical advantage: He is still left with the designation “democrat,” even as it is democracy itself — and not just liberalism — that is under attack in his country … Rights essential for democracy itself — especially rights to free speech, free assembly and free association — have been systematically attacked. As media pluralism disappears, citizens cannot get critical information to make up their minds about their government’s record. Unless one wants to say that a democracy remains a democracy as long as the government does not stuff the ballot boxes on Election Day, it is crucial to insist that democracy itself is being damaged.”

As it happens, while we have no obvious evidence of ballot box stuffing, we have already examples of unfair elections taking place in an EU country. In Hungary, it has already happened not once but twice. To quote from a report by the OSCE/ODIHR, Hungary’s last parliamentary elections

were characterized by a pervasive overlap between state and ruling party resources, undermining contestants’ ability to compete on an equal basis. Voters had a wide range of political options but intimidating and xenophobic rhetoric, media bias and opaque campaign financing constricted the space for genuine political debate, hindering voters’ ability to make a fully-informed choice.

It was therefore not surprising to see [Freedom House recently downgrade Hungary’s status](https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf) from “Free to Partly Free due to sustained attacks on the country’s democratic institutions by Prime Minister Viktor Orban’s Fidesz party, which has used its parliamentary supermajority to impose restrictions on or assert control over the opposition, the media, religious groups, academia, NGOs, the courts, asylum seekers, and the private sector since 2010.” Considering its current trajectory, one would expect Poland to soon follow suit.

Faced with “[the systematic disabling of checks and balances in constitutional orders by a new generation of elected but autocratic leaders](https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/)”, EU institutions have struggled to cope with this new and unexpected challenge as the assumption has long been that pre-accession checks would guarantee that no country would be admitted to the EU club unless it had already reached the stage of a sustainable democratic regime based on the rule of law, an accomplishment that appeared to preclude backsliding.

**2) Why is this the most pressing problem faced by the EU and why this should also be treated as a pressing matter by the Netherlands?**

As noted by the ECJ in December 2014,

[The] essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other …This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

Rule of law backsliding in Hungary and Poland (but one should note increasing evidence of a similar phenomenon in Romania and Bulgaria making an already bad situation worse) therefore does not merely affect the residents of these two countries, it also affects Dutch citizens and more broadly, everyone living in the EU through Hungary and Poland’s participation in the EU’s decision-making process. In other words, decision-making – including law-making – that is done in the name of the EU can be *contaminated* for all states if those states that seek to undermine EU principles are permitted to vote on official EU matters.

Rule of law backsliding in one EU country is also bound to contaminate EU law enforcement as the EU is based on the principles of mutual trust and mutual recognition of judicial decisions, which means that court decisions made in any EU Member State must be enforced by all of the others. Because there is no appeal from the highest courts of EU Member States to the European courts when the Member State court fails to apply EU law correctly, this can mean that politically motivated deviations from EU law can easily become the law in practice within a Member State as applied to the citizens of that Member State or to others, including nationals of other EU Member States. One can see the problem particularly sharply with regard to the recognition of requests for extradition under the European Arrest Warrant. Moreover, EU citizens who have the right of free movement within the EU may find themselves under the jurisdiction of any of the legal systems that operate within the EU and would therefore be subject to being judged by courts that have come under the political tutelage of a non-rule-of-law government.

The legal systems within the EU are fully interdependent so that a problem in one soon becomes a problem for all. And that is before one considers that the legitimacy and credibility of the EU are also undermined when it ceases to be able to guarantee internal compliance with the values it is legally bound to uphold and promote in its external relations.

It is difficult therefore not to agree with Frans Timmermans when he explained in December 2017 why the EU could not leave unanswered the Polish ruling party’s sustained and systemic attacks on the rule of law:

The Rule of Law is a necessary condition for effective cooperation between Member States … An issue with the rule of law in one Member State is of concern to all Member States.

Rule of law backsliding is not only an existential issue for the EU, it should be considered a direct threat to Dutch interests to the extent that it threatens the very functioning of the EU legal order/internal market. The Dutch Prime Minister expressed perfectly what it is at stake in a speech he made in March 2018:

Those who say that the rule of law is a national matter only, and that the EU should focus solely on the single market have it all wrong: the single market can flourish only if the rule of law applies in all member states, and if all businesses know their investments are safe and any disputes will be resolved by judges who are independent of the government in office. Erode the rule of law and you erode the single market. Erode the single market and you erode the Union. That’s why it’s vital for countries to do what they’ve agreed. A deal is a deal.

One should note in this respect that the very functioning of the whole EU legal system is increasingly directly threatened by the arbitrary (and unlawful as a matter of EU law) disciplinary proceedings initiated against Polish judges. As [noted in this Verfassungsblog post I recently co-authored](https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/), we have now examples of disciplinary proceedings initiated against Polish judges for “daring” to ask the ECJ questions about the compatibility of Poland’s new system of disciplinary system with EU law. Unbelievably, this judge [was then summoned by the disciplinary officer](https://www.iustitia.pl/en/2714-polish-disciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-ewa-maciejewska-who-sent-pre-judical-queries-to-luxembourg?fbclid=IwAR310pGd4yjcUzp7uGlr-GZLBHQjYb_42qc8V2o--KAt4nAmuOcK3mJmDqA) under the control of the Minister of Justice for potential abuse of the Article 267 procedure… This is a direct threat to the proper functioning of the preliminary ruling procedure, which the Court of Justice has rightly described as “the keystone of the EU judicial system” and one which could not function without independent national courts according to the same ECJ.

**3) Does the EU lack the authority to monitor and police compliance with the values laid down in Article 2 TEU?**

Because threats to the rule of law in one EU country threatens the functioning of the Union as a whole, EU institutions ought to prevent and eventually sanction what we have called rule of law backsliding. However, it is often argued however by Hungarian and Polish authorities that the EU lacks the competence to monitor and police compliance with the values laid down in Article 2 TEU, especially when it comes to national judicial matters.

To put it briefly and bluntly, this is nonsense. In the [words of Professor Hillion](http://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa):

As an objective of the Union, and as a cardinal aim of its institutional framework, respect for the values of Article 2 TEU in general, and of the rule of law in particular, entails obligations of conduct for the Member States. Following the principle of sincere cooperation enshrined in Article 4(3) TEU, they shall ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives. Such an obligation of cooperation is all the more significant since the European Court of Justice acknowledges it as a self-standing requirement, which applies irrespective of the nature of EU and Member States’ competence.

As stressed by the Court of Justice, the EU’s “legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded”. It follows that national authorities violating their own constitution in the name of the “people”, annihilating judicial independence under the guise of “reforming” their national judicial system or bullying civil society groups because they would not have no right to criticise allegedly more “democratically” legitimate “elected” authorities, etc., cannot seriously expect neighbouring countries and EU institutions to accept their “national sovereignty” claims when their actions directly breach the most fundamental provision of the EU Treaties. As the Dutch Prime Minister put it, “a deal is a deal” and by signing up to the EU Treaties, Hungarian and Polish authorities cannot then cherry-pick from the rulebook and establish regimes which are fundamentally incompatible with the foundations on which the EU system rest.

As regards the rule of law, there is in fact a **negative duty** on national authorities not to undermine judicial independence as well as a **positive obligation** to “ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection”.

In other words, every national government of every EU country is **under an EU law obligation** “to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.”

This means inter alia not to undermine as we are seeing in both Hungary and Poland the independence of national courts as undermining judicial independence not only violates the second subparagraph of Article 47 of the EU Charter of Fundamental Rights, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy, it also directly and plainly threatens the very functioning of the whole EU legal order and by definition, the very functioning of the EU’s internal market.

If the national authorities of a Member State are no longer engaged in good-faith compliance with the foundational principles of the EU, then it is primarily the Commission’s responsibility to attempt to bring that Member State into line. National governments acting in the Council should however also do their duties both politically and legally speaking. This means among other things systematically denouncing systemic attacks on the rule of law committed by their peers, supporting the Commission’s actions and eventually initiating infringement actions themselves should the Commission fail to do so.

END

1. N.B. This position paper summarises or directly borrows from the rule of law Q&A co-authored with Professor Kim Lane Scheppele and published by the *Verfassungsblog* in March 2018: <https://verfassungsblog.de/category/debates/protecting-the-rule-of-law-in-the-eu/> [↑](#footnote-ref-1)