

# Shaking the Foundations: Democratic Backsliding within the European Union

By Aimee Feeney

The European Union has long presented itself as a bastion of democracy. From articulating its commitment to democracy, human rights and the rule of law as its founding principles<sup>1</sup> to the creation of initiatives such as the European Endowment for Democracy aimed at “...sending a clear message of solidarity to the peoples of the Neighbourhood...that their democratic aspirations and their fight for human rights will be heard and supported by the European Union<sup>2</sup>”, the EU has projected this image since its inception. However, you don’t need to scratch very far below the surface for the foundations of this idea of the EU as a democratic ‘champion’ to become noticeably shaky.

While 11 of the 28 EU Member States have been characterised as “full democracies” by the 2017 Democracy Index (of which there are only 19 in the world), the remaining 17 have been labelled “flawed democracies”<sup>3</sup>. Particularly among the Member States located in Eastern Europe, there has been a notable degree of democratic backsliding since the Democracy Index began in 2006, with a number of countries seeing a marked reduction in civil and political liberties over the years<sup>4</sup>. Poland, Hungary and Romania are now ranked 53rd, 56th and 64th respectively out of the 167 countries included in the report. This begs the question: how can the EU continue to promote an image of itself as a ‘champion’ of democracy to the outside world, and more importantly, adhere to its own founding principles, if its member states continue to violate them with relative impunity?

This essay seeks to address this question, with particular reference to the risk that recent democratic backsliding in Poland and Hungary poses to the future of the European Union. By

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<sup>1</sup> Office for the Official Publications of the European Communities (1992). Treaty on the European Union, pg. 3

<sup>2</sup> European Commission (2003). Press Release on European Endowment for Democracy-additional support for democratic change

<sup>3</sup> The Economist Intelligence Unit (2018). Democracy Index 2017: Free Speech Under Attack, pg. 5-9

<sup>4</sup> Ibid, pg. 30

highlighting this and presenting potential policy responses to this problem, this essay will make the case that unless the European Union makes concentrated efforts to address this issue, it is likely to continue to threaten the foundations, and ultimately the future, of the EU itself.

### *The Fall of the Wall and Democratisation in Europe*

The fall of the Berlin Wall in 1989 remains one of the defining moments in recent history. As it fell, countries that had been under Soviet control for decades, and in some cases Nazi occupation prior to that, were finally free to govern themselves. Granted this new freedom, there was a mass wave of democratisation in the former Soviet states, with many countries holding free and fair multi party elections for the first time in their history. Francis Fukuyama heralded this as the ‘end of history’. When the Soviet Union disintegrated he saw this as definitive proof that Western liberal democracy had emerged victoriously “...as the final form of human government”<sup>5</sup>. And for a time at least, his hubris seemed to be validated.

Not only did former Soviet satellite states pursue Western liberal democracy through the implementation of the rule of law, creation of democratic institutions and multi-party elections but many also desired to be part of the wider international Western liberal order. This was significantly noticeable in their desire to join the European Union. As part of the accession process, they were required to meet a variety of conditions known as the Copenhagen Criteria which hinge on three fundamental aspects: political criteria; economic criteria; and the ability to take on the responsibilities of membership.<sup>6</sup> The first of these, the political criteria, states that the joining country should have “...stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>7</sup>

In 2004, and again in 2007, a number of former Soviet states in Eastern Europe were deemed to have met these criteria and acceded to European Union membership status. Among the

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<sup>5</sup> [https://www.embl.de/aboutus/science\\_society/discussion/discussion\\_2006/ref1-22june06.pdf](https://www.embl.de/aboutus/science_society/discussion/discussion_2006/ref1-22june06.pdf)

<sup>6</sup> [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en)

<sup>7</sup> Ibid

first wave of countries to join was Hungary and Poland in 2004. These accessions were heralded as successes by both the joining countries and the EU itself. The new member states saw it as a “...promise of Europe wide stability and eventual enrichment”<sup>8</sup> with supporters of European integration and the EU seeing it as a further victory for liberal democracy with Helmut Kohl pronouncing that “...the message is there will never again be war in Europe”<sup>9</sup>

Yet as the events of the past 15 years or so highlight, the path to democracy does not necessarily always run smooth.

### *Curtailing Civil Liberties in Hungary*

The path from Soviet control to democracy was one that began in Hungary prior to the fall of the Berlin Wall in 1989. Throughout the 1980s, Hungary had been able to secure limited political liberalisation from Moscow. Most notably, in 1988, the Hungarian Parliament adopted a ‘democracy’ package which included freedom of assembly, association and the press<sup>10</sup>. This was followed by the country’s first free, multi-party elections in 1990.

One of the parties involved in this election, winning 92 of the 386 available seats and making them the largest opposition party, was the newly formed Fidesz party<sup>11</sup>. Among its founding members was current Hungarian Prime Minister Viktor Orban. Fidesz initially started its life as a youth liberal party, with membership capped at 35 years of age. However, within two years, Fidesz underwent a significant transformation as Orban saw a chance to increase his political power. As the ruling centre-right government rapidly lost popularity due to their failure to manage the economic collapse taking place in Hungary, Orban moved the party to the right to fill the void left behind and Fidesz was rebranded as a centre-right conservative party<sup>12</sup>. While Fidesz’s popularity would ebb and flow for the next 18 years, securing a

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<sup>8</sup> <http://news.bbc.co.uk/1/hi/world/europe/3675241.stm>

<sup>9</sup> *Ibid*

<sup>10</sup> Bozoki, A. (2011), ‘The Hungarian Shock: Transition from Democracy’, *Institute for Human Sciences*. Available at <http://www.iwm.at/transit/transit-online/the-hungarian-shock/> [Accessed on 22nd August 2018]

<sup>11</sup> [http://archive.ipu.org/parline/reports/arc/2141\\_90.htm](http://archive.ipu.org/parline/reports/arc/2141_90.htm)

<sup>12</sup> <https://www.ft.com/content/dda50a3e-0095-11e8-9650-9c0ad2d7c5b5>

two-thirds majority in the 2010 elections<sup>13</sup> under the leadership of Orbán, would pave the way for Fidesz to steadily dismantle the democratic institutions and freedoms that had only relatively recently been built in Hungary.

Throughout their last 8 years in power, Fidesz under Orbán has made numerous changes to the Hungarian Constitution in order to retain their position in the Hungarian Parliament, eroding the rule of law that was in place. Many of these changes have been designed to limit the powers of the Hungarian Constitutional Court and their ability to check the powers of parliament. One provision removes the right of the Constitutional Court to strike laws that are already contained within the Constitution while another lowers the retirement age for judges, making it easier to remove those who might oppose the will of the parliamentary majority<sup>14</sup>.

This has been matched by the erosion of civil liberties and human rights across the country. Following the ‘migrant crisis’ of 2015, Hungary has taken an increasingly hard line towards migrants and asylum seekers in the country. Hungary has been steadily increasing its police presence and border security with multiple reports that Hungarian authorities are violently returning migrants to neighbouring Serbia and “...denying or providing extremely limited access to human rights monitors and NGOs providing legal aid [for migrants]”<sup>15</sup>.

Moreover, there have been numerous attempts to clamp down on domestic civil society through the restriction of freedom of expression and association. This has been most notable in the 2017 government crusade to shut down the Central European University in Budapest. Founded by Hungarian American George Soros, the University was created to “...promote liberal society and open society in post-Communist Eastern Europe”<sup>16</sup>. However, Orbán has accused Soros of supporting unprecedented mass migration to Europe which he sees as threatening the stability of Hungarian society and way of life. This vilification of Soros has extended to the passing of the so-called ‘Stop Soros’ Law which has made it an offence for

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<sup>13</sup> Fidh (2010), *Hungary: Democracy Under Threat. Six Years of Attacks Against the Rule of Law*, pg. 4.

<sup>14</sup> <https://www.bbc.co.uk/news/world-europe-21748878>

<sup>15</sup> <https://www.amnesty.org/en/countries/europe-and-central-asia/hungary/report-hungary/>

<sup>16</sup> [https://www.independent.co.uk/news/long\\_reads/democracy-is-on-the-brink-in-hungary-so-why-is-no-one-talking-about-it-a7883876.html](https://www.independent.co.uk/news/long_reads/democracy-is-on-the-brink-in-hungary-so-why-is-no-one-talking-about-it-a7883876.html)

anyone to “...work for or with non-governmental organisations that are involved in helping or campaigning for asylum seekers”<sup>17</sup>.

These are just a few examples of the democratic backsliding that has occurred in Hungary in the last 8 years and it seems highly unlikely that Orbán is done yet. Nor does he have any desire to hide his intentions. In a speech made in 2014, he praised Russia and Turkey and stated that he wished to pursue ‘illiberal democracy’ in Hungary<sup>18</sup>. The decisive victory for Fidesz in the elections in April of this year has merely given Orbán the popular backing that he needs to continue his roll back of democracy and human rights across the country largely unopposed.

### *Dismantling the Rule of Law in Poland*

The picture looks alarmingly similar in Poland. Like Hungary, Poland began to make initial steps towards democratic rule throughout the 1980’s. High levels of unemployment in Communist Poland led to the formation of the independent trade union known as Solidarity. Despite intense persecution and being outlawed throughout most of the 1980’s, Solidarity won Poland’s first partially free and fair elections in 1989 and party member Lech Wałęsa became the president in 1990<sup>19</sup>.

Throughout the 1990s and early 2000s, Poland made significant strides towards becoming a full liberal democracy and was often heralded as the poster child for democratic transition in Europe. The highly publicised rewriting of the Constitution in 1997 guaranteed the rights of ethnic and national minorities and prohibited political organisations that spread racial hatred<sup>20</sup>.

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<sup>17</sup> <https://www.bbc.co.uk/news/world-europe-44546030>

<sup>18</sup> <https://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>

<sup>19</sup> <https://www.rferl.org/a/1060898.html>

<sup>20</sup> Łodziński, S. (1999), ‘The Protection of National Minorities in Poland’, *Helsinki Foundation for Human Rights*.

However, the erosion of the rule of law and democratic backsliding appears significantly more rapid in Poland than it has been in Hungary and can largely be traced to the Law and Justice Party (PiS) winning the election in the Polish Senate in 2015. In the 2014 Democracy Index, Poland was ranked 40th on the list of global democracies and has slipped 13 places on the index in 4 years whilst Hungary has slipped 5<sup>21</sup>.

Since the election of the PiS party in 2015, under party leader Jaroslaw Kaczynski, a raft of measures similar to those that took place in Hungary have passed through the Senate, aimed largely at increasing the power of the Senate (under PiS control) and eroding the independence of the judiciary. This has included lowering the retirement age of judges and giving the Justice Minister the power to make judicial appointments and remove judges from ordinary courts<sup>22</sup>. These measures also bring the National Council of the Judiciary, a formerly independent body that nominated judges and reviewed ethical complaints against them, under full parliamentary control. These measures reflect a complete disregard for the rule of law in Poland and a desire by the ruling party in the Senate to erode the democratic institutions in the country.

*Where there's a will, there's a way: Responding to Democratic Backsliding in the European Union*

The EU's response to this persistent democratic backsliding in Hungary and Poland (and indeed in other member states) has been noticeably lacklustre. This is not necessarily because the EU lacks the capabilities to deter these countries from flouting the principles of democracy and the rule of law but largely because they seem to lack the political will to do so. In fact written into the founding document of the EU as we know it, the Treaty of Maastricht, is Article 7 which gives the European Union recourse if a member state breaches the fundamental principles of "respect for human dignity, freedom, democracy, equality and the rule of law" as laid out in Article 2 of the same treaty<sup>23</sup>. Article 7 allows four-fifths of the

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<sup>21</sup> The Economist Intelligence Unit (2014), *Democracy Index 2014: Democracy and Its Discontents*. Available at <https://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf> [Accessed on 22nd August 2018]

<sup>22</sup> <https://www.hrw.org/news/2017/12/11/fresh-assault-rule-law-poland>

<sup>23</sup> <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W33n5tJKjrc>

European Council to declare a Member State in breach of Article 2 and the Council has the power to strip the member state of rights derived from the Treaty following a unanimous vote (in which the member state in question is not allowed to participate).

However, while this so-called ‘nuclear’ option has been in place since 1993, it was only last year that the first clause of Article 7 was triggered against a member state for the first time. The target was Poland. This gives Poland a formal warning that they are violating fundamental rights. If they do not alter their behaviour accordingly, the second clause may be triggered which in practice would impose sanctions on Poland and suspend their voting rights<sup>24</sup>. While this is a major step for the European Union in taking a stand against the rise of illiberal democracies across Europe, it may prove problematic to enact as it will need to get the support of other illiberal democracies, including Hungary, to enact sanctions. It seems exceptionally unlikely that this will happen.

Furthermore, this one off limited show of strength is unlikely to offset the will of Orban, Kaczynski and other illiberal leaders. The response of the European Union to flagrant disregard for the fundamental principles of the organisation need to be consistently and coherently applied to any and all EU member states that are seen to be in breach of Article 2. Article 7 cannot only be triggered in one case and will need to be applied more routinely and consistently in order to have any real value.

As either an alternative or in combination with Article 7, the European Union does have other tools at its disposal that could potentially encourage ‘rebellious’ member states to tow the line. Potentially the most fast acting of these would be applying conditionality to the distribution of EU resources. For example, EU member states often make requests to the Commission and other organs of the EU for resources and other benefits, such as requests to host the headquarters of a European agency or readjustment of European Union funds<sup>25</sup>. Therefore, if the European Union were to attach adherence to the fundamental principles as a condition for access to these resources, it may be able to deter member states from democratic backsliding further, or indeed in the first place.

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<sup>24</sup> <http://www.euronews.com/2017/12/20/what-is-article-7-and-why-was-it-triggered-against-poland->

<sup>25</sup> <https://www.greeneuropeanjournal.eu/the-rule-of-law-challenge-in-europe-from-hungary-to-poland/>

While this may work quite effectively in the cases of Hungary and Poland as they receive significantly more funds from the EU than they contribute<sup>26</sup>, this course of action would not be without risk. Particularly following the 2016 Brexit vote, the EU has faced increasing hostility and accusations that it is an overly powerful bureaucratic organisation which meddles in the internal affairs of its member states<sup>27</sup>. Using access to resources as political leverage against sovereign, democratically elected governments may increasingly be seen as an infringement on state sovereignty and could be used as fuel by Eurosceptic political parties and politicians to make the case for leaving the EU altogether. However, on the other hand, if the EU does not act, there is a real risk that the EU will be unable to adhere to its own principles and will fracture completely.

### *Conclusion*

As this essay highlights, the problem of democratic backsliding in the member states of the European Union has been fermenting for years and the solution is unlikely to be fast acting. However, more states within the Union, including Romania and the Czech Republic, are showing increasing disdain for the fundamental EU principles of democracy and the rule of the law. If the EU is unwilling to take a firm stand against this, then these countries and their leaders are likely to continue down the path to illiberal democracy with impunity and there will be few consequences for those that choose to follow. The EU is facing a number of external challenges (an increasingly hostile Trump presidency to name but one), yet if it fails to deal with democratic backsliding from its member states, the greatest threat to its survival may come from within.

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<sup>26</sup> <https://inews.co.uk/news/charts/much-uk-pays-eu-much-get-back/>

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<https://www.theguardian.com/world/2018/jun/26/eu-hearing-puts-poland-in-dock-over-judicial-changes>