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Europe's authoritarian cancer: diagnosis, prognosis, and treatment

Generally, accurate diagnosis should precede treatment. To respond to the rule of law crisis facing the EU, we first need to understand it. This chapter explains why and how autocracy is spreading within the European Union (EU), why its spread poses such a threat to the Union, and what can be done to contain and reverse it. It is not a tale for the faint of heart. For Europhiles, it makes for painful reading to recognise that the EU has failed to defend its professed values of rule of law and democracy. Fortunately, the autocratic cancer plaguing the EU is not incurable. Remedies are within reach, if only EU leaders would choose to apply them.

Europe's political cancer

A cancer is spreading in Europe's body politic, the cancer of autocracy. The cancer originated in Budapest in the early 2010s. With rapid, intensive treatment, it might have been contained there and cured, but alas, it was left untreated, and it metastasised. By now it has spread to other sites, with large tumours in Warsaw and cancerous cells detected in Ljubljana. The cancer has even travelled beyond national capitals to the European Union's vital organs – the Commission, Council, and Parliament. This cancer is eating away at the rule of law and at democracy itself in affected EU member states. It also threatens the institutional foundations of the European Union and its very *raison d'être*.

This chapter of the *Progressive Yearbook* offers a diagnosis and a suggested course of treatment. I focus not on the ultimate aetiology of this disease, but rather on why and how the EU has tolerated and inadvertently facilitated its spread. The question of why aspiring autocrats have emerged in several European countries and why substantial portions of their populations support them is of course vital. But many analysts have already explored the process of democratic backsliding, and as the existence of a global “democratic recession”¹

¹ Diamond, L. (2015) 'Facing Up to the Democratic Recession', *Journal of Democracy*, vol. 26, no. 1, January, pp. 141-55 (www.journalofdemocracy.org/articles/facing-up-to-the-democratic-recession/).

makes clear, it is not a phenomenon unique to the EU. What is more striking and worrisome for EU specialists is that this backsliding is happening – and being tolerated – inside a union that professes a fundamental commitment to democratic norms. After explaining why the EU has tolerated and even facilitated the spread of autocracy, I then explore how this trend might be reversed.

The remedy does not lie with the creation of new tools. Quite the contrary, the EU has had the necessary tools to treat this disease all along, and the focus on creating new tools has served mostly as an excuse for failing to deploy existing ones. All that must be done is for European leaders to apply their powerful cocktail of treatments. Unfortunately, experience has shown that most European leaders will not address the autocracy crisis out of any sense of moral imperative. They are only likely to act when they have the political incentives to do so. How to generate those political incentives is perhaps the most vexing problem facing the EU today.

Diagnosis

Proper diagnosis must precede effective treatment. Unfortunately, many observers have misdiagnosed the nature of the EU's so-called 'rule of law crisis'. Before we can zero in on the malady, let us first dispense with the most common misdiagnosis. Some wrongly suggest that the crisis stems from the election of right-wing populist governments that embrace 'illiberal democracy' (a term coined by the pundit Fareed Zakaria in a 1997 essay in *Foreign Affairs* magazine).² According to this view, these regimes are democratic, in that they hold free and fair elections, but they reject liberal values and institutions. They are locked in what amounts to a culture war with Brussels over issues such as immigrant and LGBTQ rights. This narrative is not only incorrect, it is also extremely damaging. Depicting the EU's conflict with these regimes as part of some sort of culture war fundamentally mischaracterises the nature of the crisis and does them a huge favour.

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These governments are happy to be labelled illiberal democracies, and they are keen to keep the focus on their conflicts with the EU over ideologically loaded policy questions in order to distract attention from their more fundamental goal. The true goal of Orbán's Fidesz and Kaczyński's PiS is to create single party dominated electoral autocracies that maintain a veneer of democracy – also known as competitive authoritarian regimes. This is a regime type familiar to political scientists. As Steven Levitsky and Lucan Way put it in their seminal 2002 article, "In competitive authoritarian regimes, formal democratic institutions are widely viewed as

2 Zakaria, F. (1997) 'The rise of illiberal democracy', *Foreign Affairs*, Nov/Dec (www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy).

the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy [...]. Although elections are regularly held and are generally free of massive fraud, incumbents routinely abuse state resources, deny the opposition adequate media coverage, harass opposition candidates and their supporters, and in some cases manipulate electoral results".³ What the concept of competitive authoritarianism gets right – and the concept of 'illiberal democracy' gets so fundamentally wrong – is that at their base these regimes are not democratic. As Jan-Werner Müller⁴ and others have pointed out, 'illiberal democracy' is a contradiction in terms because one can only have free and fair elections if liberal institutions such as the rule of law and judicial independence and liberal values such as freedom of speech, association, assembly, and the press – along with the political rights of minorities – prevail.

To be clear, it would be wrong to claim that these regimes are outright dictatorships like that found in North Korea or violent authoritarian regimes like that found in Russia or Belarus. They rely on softer techniques, but they are nonetheless already autocratic (in the case of Hungary) or rapidly moving in that direction (in the case of Poland and others).

Thus, the real cancer plaguing the EU is an autocracy crisis. The so-called 'rule of law crisis' is really just an element of this broader autocracy crisis. Governments seeking to consolidate single party autocratic rule need to subvert the rule of law and the independent judiciary in order to tilt the electoral playing field decisively in their favour. These regimes predictably seek to establish political control over their own judiciaries, and because they cannot control the entire EU judiciary, they challenge its authority and ignore rulings of the European Court of Justice (ECJ). Thus, while the EU does very much face a rule of law crisis, attacks on judicial independence and the EU legal order must be understood as part of a broader strategy that some regimes are pursuing to consolidate electoral authoritarian rule.

In some respects the focus on the 'rule of law crisis' is used as a euphemism for the underlying autocracy crisis – a euphemism favoured because EU leaders feel more confident in defending the rule of law than they do in defending democracy itself.

Why do EU leaders refuse to recognise the crisis they face as one of democratic backsliding? There are three principal reasons, one stemming from self-doubt, one from cynicism, and one from necessity. Various EU leaders may be motivated by one or more of these reasons, but none will admit it so publicly, for reasons that quickly become obvious.

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3 Levitsky, S. and Way, L. (2002) 'The rise of competitive authoritarianism', *Journal of Democracy*, 13, No. 2, p. 52.

4 Müller, J-W. (2016) 'The problem with illiberal democracy', *Social Europe*, January (<https://socialeurope.eu/the-problem-with-illiberal-democracy>).

First, there are the self-doubters: some EU leaders fear that the EU lacks the democratic legitimacy necessary to challenge the democratic credentials of its member states. After all, scholars have spent years criticising the EU for its own so-called democratic deficit, noting that its executive (the European Commission) is unelected, that the European Parliament suffers from low turnout and low voter interest, and that the Council operates behind a veil of secrecy. If the EU's democratic credentials are suspect, they ask, is it really in the position to question those of its member states?

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Second, there are the cynics: as I discuss more below, some EU leaders such as Germany's Angela Merkel have actively protected backsliding governments to advance their economic and/or party-political interests.⁵ Democratic leaders who shield pet autocrats from censure will hardly admit as much. While they might acknowledge certain concerning trends with regard to the rule of law, they will never label their allies as elected autocrats for to do so would be to admit their complicity.

Finally, legally minded leaders might note a rather sticky problem in admitting that there are autocratic leaders present in the European Council: as John Cotter has pointed out, Article 10(1) of the Treaty on European Union (TEU) requires that: "The functioning of the Union shall be founded on representative democracy", while Article 10(2) provides: "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens".⁶ If EU leaders were to admit that in fact the European Council has been operating in violation of Article 10 because some of its members are autocrats who are not democratically accountable, then arguably every act adopted by the EU in recent years would be subject to challenge. Why, after all, should democratic member state governments be bound by decisions made at the EU level with input from autocratic regimes? As a result of all these concerns, for EU leaders, autocracy is a bit like Lord Voldemort in Harry Potter's world – it is that which must not be named.

Prognosis

Just how threatening to the EU is the autocracy crisis? If left untreated, the prognosis is dire.

The existence of authoritarian enclaves within democratic unions is a common phenomenon around the world. As political scientists have documented, otherwise democratic federations such as the United States, Mexico, and Argentina have, at various times, pro-

5 Matthijs, M. and Kelemen, R. D. (2021) 'The other side of Angela Merkel', *Foreign Policy*, July (<https://foreignpolicy.com/2021/07/09/angela-merkel-german-chancellor-europe-trade-euro-refugees-crisis/>).

6 Cotter, J. (2020) 'The last chance saloon', *Verfassungsblog*, 19 May (<https://verfassungsblog.de/the-last-chance-saloon/>).

vided comfortable homes for autocratic regimes at the member state level.⁷ This phenomenon is dangerous for all such political systems – both because their very presence tends to undermine the democratic norms that hold the system together and because the local autocrats may actively attempt to infiltrate and undermine federal level democratic institutions. That being said, many democratic unions have survived the existence of such enclaves and managed – sometimes after many decades – to see democracy restored at the state level. In the US for instance, autocratic single party regimes (run by the Democratic Party) persisted in several Southern states for nearly a century after the Civil War. Democracy was only eventually restored to these states after the passage of the Civil Rights Act and Voting Rights Act. Does this suggest that we should also expect the EU to survive the current crisis of democratic backsliding?

Unfortunately, there are several reasons to believe that the emergence of authoritarian member governments poses an even greater threat to the EU's quasi-federal Union than it has posed to actual federal states.

First, states have far stronger and more numerous bonds holding them together than does the European Union. They also exercise a monopoly on the legitimate use of force. They can back up their legal mandates with force, if necessary, when confronted with defiance by constituent units of their unions. States also collect taxes and typically have even greater fiscal power over their members than the EU has. And states have more robust administrations, such that they have federal officials who can implement their policies at a local level.

By contrast, the EU wields no force and cannot compel its members to do anything. It has a tiny administration, and is almost completely reliant on its member states to carry out its policies. While the EU does have real fiscal leverage, it does not compare to that of actual federations. Ultimately, the EU is – as the European Commission's first president Walter Hallstein famously described the (then) European Economic Community – "a community based on the rule of law (*Rechtsgemeinschaft*)". EU law may be 'binding' but ultimately the entire edifice relies on sincere cooperation and voluntary compliance of its member states and their judiciaries. In essence, the nascent autocrats in Budapest and Warsaw have decided to call the EU's bluff – defying the Commission and the Court of Justice to test just how 'binding' EU laws really are.

Second, while autocratic member states in federal systems around the world routinely try to wield influence in federal level institutions, their capacity to do so is limited by the majority decision-making rules that prevail. In other words, so long as representatives of democratic

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7 Gibson, E. (2005) 'Boundary control: subnational authoritarianism in democratic countries', *World Politics*, 58, No. 1, October, pp. 101-32.

states maintain a majority and the autocratic regimes remain in the minority, the extent of damage they can do to the federal union as a whole may be limited. The situation is far more problematic in the EU given the prevalence of unanimity decision-making in many domains. In essence, wherever unanimity prevails, even one autocratic regime can threaten to hold the entire Union hostage. This is not a mere theoretical possibility, we have already seen this danger manifest. Consider for instance developments in the run-up to the passage of the new multiannual financial framework (MFF) and the EU recovery fund. In essence, the Hungarian and Polish regimes threatened to hold the entire EU budget hostage if their receipt of EU funds were tied more strictly to satisfying conditions pertaining to the rule of law.

Third and finally, some of the political dynamics in fully fledged federal systems that eventually encourage central leaders to intervene to restore democracy in authoritarian enclaves seem to be absent in the EU's half-baked union. Instead, as I have described in detail elsewhere, the EU appears to be trapped in an 'authoritarian equilibrium'.⁸ This autocracy trap is underpinned by three main factors. First, the EU's half-baked system of party politics creates perverse incentives for democratic leaders to protect autocrats, and more generally the ingrained reluctance of national leaders in the Council to interfere in one another's domestic politics shields national autocrats from EU intervention. Second, funding and investment from the EU – which has been handed out without democratic strings attached – has helped finance these regimes. Third, the free movement of persons in the EU facilitates the exit of dissatisfied citizens from backsliding regimes. Given the absence of voting rights protections under EU law, these regimes can then make it very difficult for these emigrants to vote in national elections. Taken together, these dynamics deplete the opposition and thereby help these regimes endure.

Considering all of these factors, the prognosis for the EU's autocracy crisis, *if left untreated*, is bleak. We can expect the PiS regime in Warsaw to soon consolidate an electoral autocracy on the Orbán model. Others – such as Janez Janša in Slovenia – may follow suit. The fracturing of the EU legal order we have witnessed over the past few years will accelerate. Autocratic regimes will extinguish what remains of the independent judiciary domestically, and their kangaroo courts will continue to deny the supremacy of EU law and the authority of ECJ rulings. In response, the norm of mutual trust between national legal systems will break down. More and more national courts in democratic EU member states will refuse to recognise judgements made by captured courts in autocratic states, and this will inevitably disrupt the functioning of the EU's single market as rulings in commercial disputes in these countries will not be respected. While these countries will remain EU member states, they will become legal black holes – de facto ceasing to be part of the EU legal order. The metastasis will now not only travel between national capitals, but to the organs of the Union. Autocratic regimes will poison EU institutions by placing their lackeys in positions of power. Indeed, this is already happening. Consider the fate of EU enlargement policy under Orbán's minion, enlargement commissioner Olivér Várhelyi.

8 Kelemen, R. D. (2020) 'The European Union's authoritarian equilibrium', *Journal of European Public Policy*, 27:3, 481-99.

To win her confirmation vote in the European Parliament and become European Commission president, Ursula von der Leyen needed to secure the backing of MEPs from Orbán's Fidesz party. To win Orbán's backing, she not only offered him assurances she would take a conciliatory approach to rule of law issues,⁹ she also promised to make his appointee the commissioner for enlargement. Predictably, Orbán named a loyal servant of his autocratic regime to the position. Orbán's man in Brussels, Olivér Várhelyi, has used his position to downplay traditional EU concerns over democracy and the rule of law in the enlargement process in hopes of speeding up the accession of Serbia – a country led by another Russian-allied aspiring autocrat in the Orbán mould – President Aleksandar Vučić.¹⁰ Other EU institutions have likewise been infiltrated. The party groups in the European Parliament are plagued by the phenomenon of 'pet autocrats'¹¹ – in which Europarties that profess commitments to democracy shield some member parties with strong autocratic tendencies. Indeed, until Orbán's Fidesz was finally pushed out of the EPP last year, it had been an integral member of the supposedly 'centre-right' bloc for many years. Fidesz MEPs played key leadership roles in the bloc: for instance, until 2019 – just a year before he was arrested while climbing down a drainpipe attempting to escape a police raid on a drug-fuelled nude orgy in Brussels that was being held in violation of quarantine rules – Orbán's close ally József Szájer had been the vice-president of the EPP. The Council too is of course a haven for actual and aspiring autocrats; consider for instance that in the second half of 2021, a period when the governments of Poland and Hungary were engaged in rapid backsliding on the rule of law and democracy, the Slovenian government led by right-wing aspiring autocrat and Orbán ally Janez Janša held the rotating Council Presidency. From that perch, Janša was able to block the holding of hearings on the open Article 7 procedures against Poland and Hungary, something members of the Greens/EFA, Renew, and Socialist & Democrat groups in the European Parliament complained about in a letter in late November 2021.¹²

In short, without determined actions by EU leaders, it is quite likely that the cancer of autocracy will spread to more member states, that these regimes will poison EU institutions, that they will spark an unravelling of the legal order that holds the Union together and that – perhaps most importantly – they will make a mockery of the EU's claim to be a union of democracies built on the rule of law, thus calling into question its very *raison d'être*. Of course, none of these means the EU would entirely collapse or cease to exist. More likely, this cancer would turn the EU into a kind of zombie polity: a loose

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9 Rettman, A. (2019) 'Von der Leyen signals soft touch on migrants, rule of law', *EU Observer*, 19 July (<https://euobserver.com/news/145504>).

10 Wanat, Z. and Bayer, L. (2021) 'Olivér Várhelyi: Europe's under-fire gatekeeper', *Politico Europe*, 5 October (www.politico.eu/article/oliver-varhelyi-eu-commissioner-enlargement-western-balkans-serbia-human-rights-democracy-rule-of-law/).

11 Kelemen, R. D. (2018) 'Europe's pet autocrats', *Aspen Review*, No. 2 (www.aspen.review/article/2018/europes-pet-autocrats/).

12 Letter from MEPs to Slovenian Council Presidency, 25 November 2021 (<https://twitter.com/TheProgressives/status/1464189266708377600>).

trade bloc whose treaties and regulations are viewed more as recommendations than as laws, whose members view each other (rightly) with suspicion, and whose momentum towards ever closer union shifts firmly into reverse gear.

Treatment

Fortunately, the autocratic cancer plaguing the EU is not incurable. Remedies are within reach, if only EU leaders would choose to apply them. It has often been argued – even by the most well-meaning defenders of democracy and the rule of law in the EU, that the Union simply cannot do more because it lacks the necessary tools to do so. This is a damaging myth. The EU has always had in its possession the necessary tools to steer backsliding member states back towards democracy – or at least to strongly discourage any others from following their lead. Unfortunately, EU leaders have refused to apply these tools for political and economic reasons that I elaborate below. As Laurent Pech of Middlesex University has put it, EU leaders repeatedly engage in a “rule of law instrument creation cycle” – reacting to new episodes of backsliding by calling for the creation of new tools, rather than using tools it already has. As a result, the EU has an ever better stocked toolbox, the contents of which have barely been used.

Over the past decade, the EU has not only failed to address democratic backsliding, it has facilitated it

So, what can the EU do? First, like any good doctor, the EU must uphold the first tenet of the Hippocratic oath – *primum non nocere* (first, do no harm). In the EU context, this means, it must stop funding autocracies. Over the past decade, the EU has not only failed to address democratic backsliding, it has facilitated it. Indeed, for all its talk about democracy promotion, the EU has become one of the most generous funders of autocratisation in the world. According to the Varieties of Democracy (V-Dem) Institute, the leading institution that rates regime types, the two most rapidly autocratising countries in the world between 2010 and 2020

were Poland and Hungary. Between the two of them, these countries received well over €100 billion in EU structural and investment funds during this period. EU funds not only support these countries’ economies while their governments flout EU rules, but EU funds are also used to support the clientelistic networks that support these regimes. In Hungary in particular, the scale of corruption using EU funds is egregious. Thus, the regimes ruling these countries have financed their dismantling of democracy with EU funds. This can and must stop. In fact, under the regulations of EU Structural and Investment Funds, the EU has always had the authority to suspend the funding of member states that lack independent judiciaries (as these are needed for the management and control systems required to oversee the expenditure of those funds).¹³ In addition, the EU has other new tools that it

¹³ Kelemen, R. D. and Scheppele, K. (2018) ‘How to stop funding autocracy in the EU’, *Verfassungsblog*, 10 September (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>).

has created recently in part to justify its failure to use its existing tools (as described above). So, under the Rule of Law Conditionality Regulation (Regulation (EU) 2020/2092), the EU has even broader authority to suspend funds to states where systemic rule of law breaches seriously risk affecting the sound financial management of the Union or the protection of the financial interests of the Union. The European Commission could have triggered this regulation already a year ago, and Kim Scheppele, John Morijn and I have drafted a notification under the Regulation that the Commission can send to the government of Hungary.¹⁴ A similar case could easily be made for Poland. For the time being, however, the Commission has refused to do so. Finally, the Commission can withhold funds from these regimes under the Covid Recovery funds. Fortunately, for the time being, they have refused to approve the Recovery funds submitted by the regimes in Warsaw and Budapest citing rule of law concerns, so this funding remains on hold. Predictably, these regimes have threatened to wield their vetoes wherever possible and to undermine the functioning of the EU if their funds are withheld. The EU must not give in to extortion and must not continue to fund autocrats. Their threats and bluster are attempts to distract from just how dependent on EU funds they are and how much leverage the EU really has over them, if only it chooses to wield it.

Second, the European Commission must return to its traditional role as the Guardian of the Treaties when it comes to rule of law. Above all, the Commission must bring far more infringement procedures and bring them more aggressively – seeking interim measures and penalty payments for non-compliance. Over the past decade, the Commission (first under Barroso, then under Juncker, and now under von der Leyen) has done everything possible to avoid bringing infringements against member states on rule of law issues (and more generally). The Commission has engaged in protracted and pointless dialogue with these regimes, and they have used all these delays simply to accelerate their democratic backsliding. Under mounting pressure from the European Parliament for its appeasement of autocrats, the Commission has finally accelerated its use of infringements on rule of law matters in the past year. However, far more remains to be done. Quite simply, rogue regimes take calls for dialogue as a sign of weakness. They will only respond to lawsuits (Article 258 cases) backed by demands for penalty payments in case of non-compliance (Article 260 cases) that must be collected via deductions from their EU funds if the regimes resist payment.

Third, in addition to using the power of the purse and the gavel, EU leaders must use the power of the political pulpit to denounce these regimes. Too many of Europe's leaders have been silent about the promotion of autocracy by their peers. German Chancellor Angela Merkel, for instance, never had a negative word to say about Viktor Orbán. National leaders who actually value democracy must stand up to denounce and politically ostracise any autocratic leaders, pressing them to restore and respect pluralistic democracy. Likewise, at an institutional level, Europarties and their party groups in the European Parliament should eject and politically isolate their pet autocrats. Democratic parties must draw cordons sani-

14 Scheppele, K., Kelemen, R. D. and Morijn, J. (2021) 'The EU Commission has to cut funding to Hungary: the legal case', Study Prepared for the Greens/EFA Group in the European Parliament, 7 July (https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf).

taires to exclude parties and governments that undermine democracy and democratic values. Finally, the EU must do more to protect EU citizens' voting rights and to safeguard free and fair elections within the Union. Without that, elected autocrats (that is, those elected in unfair elections) can infiltrate the Parliament and Council, poisoning the Union from within. Over the long term, strengthening the EU's role in this regard would require new legislation. More immediately, European leaders could pressure groups such as the Organization for Security and Cooperation in Europe (OSCE) and its Office for Democratic Institutions and Human Rights (ODIHR) to conduct full-scale election monitoring missions in EU member states to prevent electoral fraud.

The cancer of autocracy is unlikely to go into remission on its own. EU leaders have in their grasp a number of powerful remedies. Unfortunately, they have consistently refused to apply them. Instead, partisan politics, economic interests, norms of non-intervention, and failure to appreciate the seriousness of the disease have together led EU leaders to embrace a fatal mixture of passivity, fecklessness, and appeasement. If leaders continue to pursue this doomed strategy, then the cancer of autocracy will continue to metastasise and poison the Union.