



# The Dictator's Handbook

How to Overthrow Democracy

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1.

# Democracy on the Defensive – The Situation in 2022

Tero Lundstedt

**THE YEAR** 2022 started from a situation, where liberal democracy was threatened all over the world. The year continued with the attack on democratic Ukraine by the authoritarian Russian Federation. For democracy, the situation is worrying. The international and independent Freedom House organization measures the global state of democracy in their yearly Democracy Index. The last edition, called Democracy under Siege, showed how democracy has declined for the fifteenth year in a row. Some countries, such as Hungary, lost their status as a democracy altogether. Others, like the United States, experienced a considerable weakening of their democracy.

This is a startling discovery. Only 30 years before, Eastern Europe was able to overthrow one-party dictatorships in favor of multi-party democracy. The victorious march of liberal democracy was seen as self-evident. In a state of ideological euphoria, many commentators, with the most prominent being the American Francis Fukuyama<sup>1</sup>, declared Western liberal democracy to be proven to be the best and only ideology for the foundation of a healthy society. It was just a matter of time before it would be implemented throughout the world because there simply was no credible competing alternative. When any political dispute can be solved within liberal democracy, there is not even a need for new and alternative societal or economic systems. What has happened since that made this equation untrue and has led to the decline of democracy worldwide? How can the so-called non-liberal, or 'illiberal' democracy gain ground?

Liberal democracy turned out to be more fragile, and history to be more complicated, than what was assumed. Fukuyama has backtracked in his conclusions. In his book from 2018, he explains how identity politics and the need for groups of people to be noticed is behind Brexit and the success of undemocratic actors.<sup>2</sup> A similar equation seems to be repeated in countries that do not share many similarities. First, a party manages to win an election with populist means, then it is up to the actor and the environment they are acting in, whether they will attempt and will they succeed in making elections unnecessary in the future by embracing a non-liberal version of democracy.

However, I claim that in the context of Europe, Fukuyama's stance on the victory and inevitability of democracy still holds. The economy and the quality of life for people climb to their highest potential under democracy, so it is only logical that almost all authoritarian rulers seek to justify their rule with elections and a democratic mandate. The legitimacy of power, i.e., the acceptability or justification in the eyes of the people, still matters. There are only seven countries in the world – Afghanistan, Brunei, Saudi Arabia, Oman, United Arab Emirates, Qatar, and the Vatican – that do not define themselves as democracies. Because of this, the ideal of democracy remains in most of the world the only sustainable force that upholds cohesion in societies. For the same reason,

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<sup>1</sup> F. Fukuyama, *The End of History and the Last Man* (Simon & Schuster, 1992).

<sup>2</sup> The New Yorker, 'Francis Fukuyama Postpones the End of History', 3.9.2018.



illiberal democracies call themselves democracies, even though they weaken their country's democratic system with their actions.

## 1.1 The Differences between Liberal and Illiberal Democracies

**LIBERAL DEMOCRACY** means that power is held by representatives elected in fair and free multi-party elections, limited by a tripartite separation of powers, the general rule of law, and a constitution that protects individual freedoms. A tripartite separation of powers means that the executive, legislative and judicial powers are held by different bodies. The rule of law means that all public activity must be based on law and that authorities cannot act against the law or outside of it. Different kinds of oversight institutions exist, such as the Ombudsman and the Chancellor of Justice, and ultimately oversight is handled by an independent judiciary.

Freedom House, International Institute for Democracy and Electoral Assistance, as well as the Economist Intelligence Unit, all have presented a more detailed criteria for liberal democracy. The definitions used by these independent organizations are similar to each other. Freedom House has the most varied criteria. In terms of the democratic process, the criteria look at the realization of electoral secrecy, the reliability of vote counting, the prevalence of the right to vote, limits on the founding of a political party and other activities, and how the opposition is treated.

In addition, the criminalization and oversight of corruption, the tendering of public contracts and openness, the treatment of minorities, the independence of media, censorship by the state, religious freedom, the development of the educational curriculum for political means, freedom of speech, the right to assembly and other individual freedoms are considered. The last part of the criteria concerns the rule of law. In this section, it is assessed whether the state or another political actor puts pressure on the judicial system, whether a person is considered innocent until proven guilty, are trials fair and impartial, if the police are internally monitored, and are all people equal before the law. Finland is always at the top of these rankings, even though we have received small criticism for our political culture and involving citizens, lengthy legal processes, and the treatment of some minorities. On the other hand, Hungary was also considerably higher in the rankings before the year 2010, when the current regime gained power.

**It is unnecessary to consider whether Finland is a better democracy than Hungary right now. Instead, it is more fruitful to look at whether the safeguards of our democratic institutions are in a much better condition than what they were in Hungary before 2010.**

**ILLIBERAL DEMOCRACY** mimics liberal democracy, but the aforementioned criteria are entirely or partially not met. Usually, these countries have a single strong leader or leading party that rules through a system that looks democratic. Power is originally gained through fair elections, but then the illiberal actor starts active steps to limit the restrictions the constitution puts on their power or the continuation of it.

Elections tend to remain mostly free. Anyone can stand in them and become elected, but they are not fair. Depending on the depth of illiberalism, potential adversaries may be shut out of elections, the media may be harassed as propaganda for the reigning regime, state workers may be pressured to vote for the incumbent party or there may just simply be electoral fraud. The entire function of elections changes. They are not about choosing leaders, but about the justification for the continuation of the terms of office for those in power.

There is a lot of corruption in countries that consider themselves illiberal democracies or in countries simply opposed to liberal democracy. This is not a coincidence, because the democratic model for governance is known to reduce corruption.<sup>3</sup> Other factors that illiberal democracies have in common are the centralization of power, the forceful limiting of individual freedoms, tightening ethnic tensions, and a general increase in societal

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<sup>3</sup> I. Kolstad ja A. Wiig, Does democracy reduce corruption?, CMI Working Paper 4(2011).



division. The most important indicator for an illiberal democracy is the dismantling of the tripartite separation of powers. In liberal democracies, the parliament's legislative power, the government's executive power, and the judicial system's judicial power are balanced, so that none of the actors can use their powers without limits. In illiberal democracies, only one branch, usually the government, is lifted above the others, which allows for power to be concentrated and cemented.

Dictatorships have different levels. For example, Russia and Belarus have progressed to become authoritarian countries by most measures. On the other hand, Illiberal democracies, where democracy is weakening and there is a potential slide towards authoritarianism, include Turkey (democracy has been declining since the early 2000s), Serbia (democracy has been declining since the current regime took over in 2012), Poland (democracy has been declining since 2015 at the lead of Jaroslaw Kaczynski) and Hungary (democracy has been declining since 2010 at the lead of Viktor Orbán).

Orbán, who openly admires Russia, Turkey, and China, acts as a kind of promoter of illiberalism in the world. The independent Freedom House has described the crumbling of Hungarian democracy as 'the most dramatic in the EU ever'. In May of 2018, Orbán declared that Hungary was abandoning the expired notion of liberal democracy. In its place, he suggested a new Christian democracy that ensures the liberties and freedom of people, while maintaining family values and traditional marriage.<sup>4</sup> Kaczynski, the leader of the Law and Justice party of Poland, has said that he admires Orbán's model for governance in Hungary.

The rise of illiberal democracies can be traced back to the financial crisis of 2008. The crisis, which according to the common narrative, revealed weaknesses in the financial sector and clearly hit the West the hardest. This in turn weakened the unwavering belief that former socialist Eastern European countries used to have in the superiority of Western liberal democracy.

In 2010, Orbán's Fidesz party gained 53% of the votes in the Hungarian parliamentary elections. The country's electoral system caused them to gain a 2/3 majority in parliament, which allowed them to make changes to the constitution. In the last 11 years, Fidesz has used its power in an unscrupulous way to limit the independence of the judiciary and freedom of the press, among other things.

In Poland, the Law and Justice party has been in power since 2015 and the state of democracy in the country has weakened year after year. In Turkey, the attempted coup in 2016 was used as an excuse to change the constitution the next year and concentrate power to President Erdoğan. In Serbia, the ruling party has been in power since 2012 and elections have become increasingly less honest and the media less free, according to the Organization for Security and Cooperation in Europe (OSCE).

Growing populism in Western countries can also be a threat to democracy. Even though populists emphasize the importance of democracy almost without exceptions, and that they themselves speak with the voice of the true people, they are the ones who in power threaten the realization of the rule of law and the rights of minorities, as has happened in Hungary.

Illiberal democracies appear to be strong because the head of state or the ruling party can make significant decisions very quickly. In reality, they are fundamentally unstable, because they pursue the interests of a small group without a true democratic mandate. This leads to growing discontent in the majority of the population. This problem is increased by the fact that, unlike in democracies, this discontent cannot be expressed and leaders cannot be replaced in honest elections. Society lacks all possible corrective mechanisms.

Thus, illiberal democracy is fundamentally illegitimate in a democratic framework. Because of this, modern revolutions only work in one direction. A dictatorship or illiberal democracy can be overthrown by mass protest – as was the case with Serbian President Milošević in the year 2000 – while this is extremely rare in democratic regimes. Mass protests aimed at overthrowing the government are prevalent in illiberal democracies and especially in authoritarian regimes because of this. Russia in 2011–2012, Ukraine in 2013–2014, Hong Kong in 2019–2020, Belarus in 2020 and Kazakhstan in 2022 are examples of this. Big sums of the national budgets in

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<sup>4</sup> Deutsche Welle, 'Viktor Orban: Era of 'Liberal Democracy' is over', 18.5.2018.



these countries are used for ‘internal security’, which entails surveillance, censorship and special forces that are willing to use violent force against peaceful protesters. This also causes indirect additional costs due to the brain drain. **The fear authoritarian regimes have of their own people is indeed a clear indication of the superiority of democracy.**

## 1.2 Why Should Democracy Be Protected

**IF LIBERAL** democracy remains superior, why does it even need defending? Paradoxically, the weakness of democracy lies in its strength. When elections are free, fair, and open to everyone, it is possible that undemocratic actors can win and therefore strive to ensure the continuity of their power by chipping away at the framework of democratic institutions. This occurred at a rapid pace in Russia and Belarus in the 1990s, and at a slower pace during the last decade in Turkey, Serbia, Hungary, and Poland, among other countries. The democratic backsliding of American democracy is its own special question, but outside the scope of this report.

This report lists the steps that illiberal or undemocratic actors take as they begin dismantling democratic institutions. In this way, it is possible to identify alarming signals ahead of time in the goals or practices of parties acting in an exceptional manner. The coronavirus pandemic has shown that rule of law is not self-evident even in Western countries. It has worked as an important reminder of how essential it is to identify the potential vulnerability of the system in time.

Because of this, in chapter 4, the former President of the Finnish Supreme Court and current judge to the European Court of Human Rights Pauliine Koskelo examines the potential problems of a long-standing and entrenched democracy by conducting a stress test for the democratic institutions of Finland. These kinds of exercises are important to conduct in good times. Once authoritarians or other regimes purposefully undermining the rule of law take power, it is too late.

## 1.3 Rule of Law Cannot Be Built From Scratch

**BELARUS, RUSSIA,** Hungary, and Poland are examples of countries, where democracy was simultaneously adopted in the 1990s. The history of the countries shows that despite the differences between their institutions, undemocratic forces have sought to ensure the continuation of their power in very similar ways. Was there some kind of fundamental flaw in the constitutional order or the democratic system of these countries, as they were able to be broken so quickly? Or were the systems of liberal democracy based on the fundamentally naive belief of the supremacy of democracy, which assumes that even an authoritarian leader would be willing to give up their power in elections?

The root causes of problems that have risen later can be found in how quickly the democratic transition took place. Even though the goal was to lay a similar type of foundation in all countries, in retrospect it can be said that true liberal democracy and the rule of law that goes along with it can only be built over time. Fragile and improperly rooted societal institutions are vulnerable to a determined challenge by undemocratic actors. The comparison shows, without question, that the shorter the time that democracy has been the method to choose rulers, the easier it is to be suppressed.

In addition to a foundation, a consensus of the large majority of the people on all levels of society on the fact that democracy is the right solution for the country in question is needed. One driving factor is the country’s aspiration to become a member of the EU. I argue that the most important factor in the political development of Eastern European countries was whether a country pursued Western integration or not. The EU uses significant soft power through the benefits offered by membership.



**The so-called Copenhagen criteria<sup>5</sup> list the following conditions for membership for new prospective member states:**

**Stable institutions** that ensure democracy, rule of law, human rights and rights of minorities.

**A functioning market economy** and ability to comply with the market rules of the EU.

**The ability to effectively implement the EU acquis** and the acceptance of the Union's political as well as economic and monetary union objectives.

**EU-MEMBERSHIP HAS** proven to have brought a tremendous amount of prosperity to new Eastern member states, which lead to most of to develop a common desire to fulfill the criteria and become a member of the EU. The process was long, since judicial culture had become distorted during communism. For example, the courts had been subjugated by the needs of the dictatorship instead of a proper administration of justice. The situation was exacerbated by the rapid transition from a planned economy to a market economy, where the redistribution of assets demanded a significant amount of litigation.

In the countries where courts managed to remain independent, justice was carried out. By consistently striving towards EU-membership, many Eastern European countries developed by leaps and bounds and were ready to join the Union by the early 2000s. After this success, they began to prosper as a part of the European economic area and also partially due to Union subsidies.

However, without incentives offered by EU-membership, countries often went the way of Belarus and Russia, where the independence of the judiciary was overturned. Under these circumstances, the best networked – often the former bureaucrats of the Communist Party – were able to seize huge fortunes for themselves through lobbying and bribes. A new ruling class was born, the oligarchs. It is no coincidence that Belarusians and Russians have the lowest confidence in the impartiality of their courts. Next, I will go through the short period of democracy in Belarus and what one should learn from it.

## 1.4 The Brief Democracy Experiment in Belarus

**OF ALL** the 15 Soviet republics, Belarus was the least ready for independence. Its only history as a political unit was a few months in 1917 before it was annexed into the newly formed Soviet Union. After 75 years, the Soviet Union collapsed and Belarusians found themselves quite surprisingly in an independent country at the beginning of 1992. Šuškevič, the President of the Soviet Republic of Belarus, became the transitional president of the new state. He profiled himself as an advocate for democracy and a market economy, but the country's parliament, inundated by Soviet nostalgia, rejected the necessary economic reforms that other neighboring former Soviet republics were passing.

The Belarusians only got to experience democracy for such a brief period that it unfortunately never really had a real opportunity to determine the rules of the game in the country. In the first presidential elections in 1994, incumbent president Šuškevič faced a newcomer Aljaksandr Lukašenka, the president of a parliamentary committee investigating corruption, where he was promoted to from being the deputy director of a collective farm. In his election Lukašenka ruthlessly exploited his position, accusing Šuškevič of corruption. The accusations later proved to be false, but that was too late to affect the election result. Using a populist campaign Lukašenka was able to beat the defaced Šuškevič. Despite having a democratic mandate, the new president was no democrat and from the very beginning, it seemed that his goal was to transform the country into a dictatorship. This was easy to do quite rapidly because democracy did not really have time to take root in the country. According to the OSCE, the country has never had free elections after the consequential 1994 presidential elections.

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<sup>5</sup> The criteria were originally defined by the European Council in Copenhagen in 1993. Now they are included in the Treaty on the European Union (articles 6 and 49).





## 1.5 The End of Democracy in Belarus

**THE NEW** President started by attacking the constitution. A referendum was held in 1995, which resulted in a reform towards a more presidential system. The President was given very broad powers, including the ability to dissolve parliament. At the same time, in the spirit of Soviet nostalgia, Russian was made the second official language and the Soviet-era flag was reintroduced almost identically.

After gaining speed, the increasingly authoritarian President stepped up the pace. Immediately next year a new referendum was held, where the President's term was extended until 2001 and he was made *de facto* dictator. OSCE has condemned both referendums as not being free. The President was now able to appoint the Prime Minister and all other ministers, the top leadership of all state bodies, as well as the heads of all provinces, jurisdictions and cities. He was also able to change any job description at will. The President was also given power to appoint members to the lower house of parliament and a third of the members of the upper chamber, so that the parliament could not interfere with the enlightened dictator. He was also given full budgetary power and control of the state media.<sup>6</sup>

Rule of law and the independent judiciary became a thing of the past, when the President was also given powers to appoint the majority of the judges on the Supreme Court and all judges to lower courts. He has since often openly demanded certain punishments while trials have been ongoing. Prior to the referendum, a deal was made that the Belarusian parliament would have the last say on approving the changes. However, Lukašenka broke this deal immediately after the results of the referendum were announced. Not even waiting for the parliament to vote, the President declared the old parliament abolished and that a new parliament had been founded. Only loyalists were appointed in this new parliament. (D. Nohlen ja P. Stöver, *Elections in Europe: A Data Handbook* (2010) s. 237).

Also in 1996, the state forcibly closed the first privately owned media company. By 2001 almost all of the country's radio- and TV-stations were controlled by the government. Since the beginning, Belarus was completely dependent on the Russian economy and in 1999 the countries entered into a nominal state union. It seemed like Lukašenka never intended on complying with the steps for integration in the agreement, for then they would have had to share power with Yeltsin or Putin. The union agreement remained in the background and there was little to no integration in 20 years.

In 2004, Lukašenka was faced with the problem of presidential term limits. It was time for yet another referendum, which led to the removal of such limits. The referendum was illegal already in principle, because according to the Article 112 of the Belarusian constitution, matters relating to the President cannot be decided on through a referendum.<sup>7</sup> The constitutional amendment was successful though, because the dictatorially acting President had neutralized the opposition through censorship, appointed all other people in power and controlled the Supreme Court. The performance of dishonest elections went on, but the social contract of Belarus was slowly starting to unravel. The economic success of the country was increasingly dependent on Russia, which seemed like it was not able to recover from the crash following the financial crisis. Inflation was rampant and the aging economic model of Belarus was not able to maintain the strong economic growth of the early days of independence, which had given legitimacy to Lukašenka's dictatorship.

Fearing popular discontent, the state continued to persecute the country's civil society. In 2005, organizations promoting democracy were banned. Just before the 2006 election, a group of newspapers were shut down again. After the corrupt elections, the country faced its first small-scale uprising. Relying on their loyal security forces as well as on Russia, Lukašenka was able to remain in power. After this, the country was dubbed in the West, originally coined by the US Secretary of State Rice in 2005, 'Europe's last dictatorship'.

As the economy suffered, the state began censoring the internet more heavily and started putting pressure

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<sup>6</sup> M. Lenzi, 'Lost Civilization: the Thorough Repression of Civil Society in Belarus', *Democratizatsiya*, 10 (3) (2002), 401–424 s. 411.

<sup>7</sup> Y. Nechyparenka, 'Democratic Transition in Belarus: Cause(s) of Failure', *Institut Barcelona Estudis Internacionals*, 30.9.2020.



on the opposition even more than before. The number of political prisoners was also on the rise. In the aftermath of the 2010 presidential elections, a majority of the opposition candidates were arrested and over 700 peaceful demonstrators were beaten and imprisoned.<sup>8</sup> In the 2019 parliamentary elections, nearly all opposition candidates were excluded from the election by the authorities. Then came the momentous 2020 presidential election.

The President, having been in power for 26 years already, was worried about the growing dissatisfaction, so he decided to exclude all his challengers from the elections. The only real contender was the wife of one of the excluded candidates, Sviatlana Tsikhanouskaya, who Lukašenka belittled for her lack of experience and most likely because of her gender as well. However, the President was not able to foresee that the entire opposition and dissatisfied populace would rally behind the only opposition candidate. The real election results are not available, of course, but apparently the incumbent president had to resort to some extremely blatant distortion of the election result. According to official results, Lukašenka received 80.1% of the given votes. As unofficial exit polls predicted a victory for Tsikhanouskaya, this caused massive demonstrations.<sup>9</sup>

A few days later, the government responded with a violent crackdown leading the country into a state of crisis. Lukašenka was once again forced to rely on Russia, where he gained financial and political support for remaining in power. This time he took it too far. In the past couple of years, his political room to maneuver has shrunk. The regime is subject to Western sanctions, contempt of the people and increasing pressure from Russia.

Belarus has since been forced to work towards a state union under Russian terms. Symbolically, Lukašenka was publicly made to change his mind regarding the legal status of Crimea, which he declared to be a part of Russia in December of 2021.<sup>10</sup> Belarus has allowed Russia to use the land of Belarus in their invasion of Ukraine, which began in February of 2022, and have aided Russia in all other ways except sending their own forces to Ukraine.

## 1.6 Why Did the People Silently Accept the Dictatorship for So Long?

**ACCORDING TO** Samuel Huntington, there are two ways to assess the chances of democracy taking root in a country: by highlighting either the conditions for the birth of democracy, or the obstacles to its emergence. No conditions existing is also an obstacle.<sup>11</sup> Bunce and Wolchik have noted that the establishment of democracy demands, in addition to regular and fair elections, a well-developed civil society that is independent from the state, an opposition that can cooperate with each other, and usually also examples of neighboring countries that have successfully implemented democracy.<sup>12</sup> Belarus had very similar neighbors in the north and the west that embraced democracy – Poland, Latvia and Lithuania. However, it had much more similar neighbors in the east and south that did not succeed in this – Russia and Ukraine, which was a rather undemocratic country until 2014. Belarus gains points poorly in other categories as well: there were no regular honest elections, so the opposition was not able to practice cooperation. Civil society remained relatively free until 2005, but it only had a limited role in a country that had morphed into a dictatorship.

Youth political activity is a key to defending democracy. It has been found that after fraudulent elections, the youth are first to start protests and the last to end them as well.<sup>13</sup> Even though mass protests have declined since the summer of 2020, there is still a lot of young people involved, which is a worrying sign in the eyes of the administration.

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<sup>8</sup> V. Silitski ja A. Pikulik, *Nations in Transit 2011/Belarus* (Freedom House, 2011).

<sup>9</sup> BBC, 'Belarus Election: Exiled Leader Calls Weekend of 'Peaceful Rallies'' 14.8.2020.

<sup>10</sup> Al Jazeera, 'Belarus's Lukashenko Says Annexed Crimea is Legally Russian' 1.12.2021.

<sup>11</sup> S. Huntington, 'Democracy's Third Wave', *Journal of Democracy*, 2 (2) (1991), 12–34.

<sup>12</sup> V. Bunce ja S. Wolchik, 'Favorable Conditions and Electoral Revolutions', *Journal of Democracy*, 17 (4) (2006), 5–18.

<sup>13</sup> O. Nikolayenko, 'Youth Movements in Post-Communist Societies: a Model of Nonviolent Resistance', CDDRL Working Papers 114 (2009).



## 1.7 What Next?

**THE DUO** of fearful dictators are marching in the same path towards a threatening future. A referendum was held in the summer of 2020 in Russia at the initiative of Putin, where the President's terms were limited to two six-year terms, the same as in Finland. Conveniently, Putin's reign of over 20 years was 'reset' at the same time, so he can run in the next two elections (2024 and 2030) and therewith to remain President for 14 more years.

Lukašenka did not think of a very original solution. The Belarusian government released a plan to change the constitution at the end of December 2021. In the 27.2 referendum the President's terms were limited to two five-year terms. Conveniently, the current President's already over 27-year term was 'reset', so that he can run in the next two elections (2025 and 2030) and so to rule for another 13 years. At the same time, the constitution was amended so that in the future, Russia can open military bases and even place nuclear weapons in the country, if they get permission from Minsk.

So Putin and Lukašenka are planning on remaining on the stage possibly until the next decade – unless they have the urge to increase their terms again. Even though the formal obstacles of the constitution have been abolished, the presidents should keep in mind that no system can remain standing without the most basic legitimacy, that is, the approval and appreciation of the people.

The opposition is not alone able to take down the president in either country. The economies of the countries are in trouble and the support for the regimes is decreasing. In Russia, gross domestic product is not even close to what it was before the 2009 crash and economic growth has been very weak after the occupation of Crimea.<sup>14</sup> Putin's support has also been steadily declining since 2014.<sup>15</sup>

The economic development of Belarus tracks the development of Russia closely and has suffered from the same zero growth since 2014. Most of Belarus' exports are to Russia, which has also sold oil and gas to Belarus markedly under market price. In previous years Russia has, because of its own economic troubles, but also to pressure Lukašenka to increase integration, has started demanding a higher price from their energy exports, which is a constant point of contention between the countries. There are no reliable polls for the popularity of the President in Belarus, but hundreds of thousands of protesters in the streets of Minsk in the summer of 2020 are more telling than any poll ever.

Time will tell how the sanctions levied because of the war in Ukraine will affect the economies of the two countries. Even before, foreign businesses have avoided them for political risks and shortcomings in protections of private assets. The situation is only made worse by the law for nationalizing leased aircraft in March of 2022. Domestic money also flows out of the country for the same reason.

Combined with protests that may become more widespread in the future, an opposition rallied behind one person can be a real threat for a regime that seems invincible otherwise. Youth participation is key. The problem is, of course, that dictators realize this threat and due to this they seek to remove charismatic opposition figures from the game. The most popular opposition politician Boris Nemtsov was murdered in 2015. There was a murder attempt of Aleksei Navalnyi and since he has been sentenced to a long prison sentence. Tsikhanouskaya was driven to exile immediately after the 2020 election.

The longer Putin and Lukašenka are able to remain in power, the more difficult the inevitable change of power will become. Neither country has – at least yet – been able to choose a credible successor candidate and the ruling parties are completely draggled. If, after Putin and Lukašenka, there is an attempt to name some unknown figure from the United Russia -party or perhaps Lukašenka's son, mass protests are likely. At the same time, a dangerous power vacuum is formed at the top of the power hierarchy that an unpopular candidate cannot fill – at least if the economic situation continues poorly or gets even worse. In a clash like this, democracy has a good chance of prevailing.

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<sup>14</sup> <https://www.statista.com/statistics/263772/gross-domestic-product-gdp-in-russia/>.

<sup>15</sup> <https://www.cnn.com/2021/10/14/what-is-putins-greatest-worry-right-now-his-own-citizens.html>.



## 2.

# Development of Russian Democracy

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## 2.1 Introduction

**VLADIMIR PUTIN'S** war of conquest in Ukraine, which began in February of 2020, and the almost complete political isolation from the West that followed this became a turning point still in movement in the development of relations between Russia and the West after the break-up of the Soviet Union. 2022 is becoming a tragic culmination in the tenacity of the legacy of the cold war that can be seen in the mindset of the Russian political leadership 30 years after the break-up of the Soviet Union.

Russia's pre-war demands to the West did not contain anything new in terms of Russia's negative attitude towards NATO and especially its expansion into the territory of the former Soviet Union. This had been seen many times before over the years. A large-scale war and Putin's rough misconceptions about his army's offensive ability and the economic and political repercussions of it make real the complete disconnection between the dictatorial Russian decision-making mechanism and the expectations at the end of the Soviet Union. Then, it was felt that Western ideals were not just Western, but universal.

Putin's delusional war effort also shined a new light on the institutional difficulties and weaknesses that democracies have when facing authoritarian countries. Especially the EU's historical unity and reaction speed towards Putin's invasion has reinforced the broad historical image, where the political history of post-Cold-war Europe has proven the clear appeal of democracy. For an ever-increasing part of the former Soviet Union's sphere of influence, the choice between Western institutions – above all the EU and NATO – and Russia has been clear. Russia does not seem like an attractive choice.

At the same time, when Russia's economic and cultural power has slowly diminished in the area of the former Soviet Union,<sup>16</sup> the country has been unable to dampen the attraction of the West at its European borders. Military strength has remained as the only hallmark of Russia's status as a great power. However, invoking and using this power has only made the desire to cling to Western institutions stronger in the sphere of influence of the former Soviet Union.

Putin's war of aggression showed how the current political leadership of Russia sees the increased influence of the West as a threat to its own existence. This is because, even though the Kremlin has abandoned the Soviet Union politically, it has not been able to abandon the post-Soviet great power identity. There is a desire to still see Soviet times as a separate time of greatness, despite its nature of complete ideological blindness and failure. This attitude has more to do with the seeming weakness of democracy rather than the strengthening of authoritarianism. If a state of established political competition existed in Russia today, we would surely see actors declaring

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<sup>16</sup> A. Moshes ja A. Rácz (eds.) 'What has remained of the USSR: Exploring the erosion of the post-Soviet space,' FIIA Report 58 (February 2019), <https://www.fiia.fi/julkaisu/what-has-remained-of-the-ussr>.



the greatness of the Soviet Union and demanding a rematch with the West. This group would most likely not hold a political hegemony like Putin's regime, but would have to reconcile its positions with the greater majority that do not want to return to the 'greatness' and isolation from the rest of the world, which characterized the Soviet times. However, no parties that truly want to advance democracy have been formed in Russia after the Soviet Union.<sup>17</sup> Putin's reign has been about completing the developments that emerged in the 1990s at the expense of opportunities for democracy.

Democracy is not dependent on the mercy of individual politicians, but is often an inevitable development. Those competing for power wage a power struggle that ultimately fades when one actor manages to clear challengers from the playing field for a while. A functioning democracy and its processes are born, when all competing actors wake up and realize that they have to make a deal once all parties prove to be too unyielding. At this point, at the latest, the idea of giving priority to public opinion to reconcile the power struggle emerges. The question then rises of honest elections that all parties can approve of, which is when Adam Przeworski's definition of democracy of a 'system where parties lose elections' holds true.<sup>18</sup>

Cultural and historical models that explain Russian politics and society usually lean on the idea that because Russia does not have a tradition of democracy, it is unnecessary to wait for it to be a way to solve power struggles in the future. In this sense, the dictatorial model of Putin is more like the normal state of Russia rather than a deviation from it.<sup>19</sup>

There are many arguments for this hypothesis, but it remains problematic in many ways. Firstly, it does not consider history, because the age of democracies is considerably shorter than that of autocracies.<sup>20</sup> All current democracies have been dictatorial systems or as a part of such. Secondly, according to polls, support for democracy has been widespread among Russians since the Soviet Union, even though its definition has been different from Western ideas (see ahead). Thirdly, there are countries that are more democratic than modern Russia that have had an even stronger authoritarian legacy, such as Indonesia, Mongolia, Benin and many countries in Latin America.<sup>21</sup>

Russia's democratic potential, from the perspective of the citizens' informational and economic resources, is even better now than at the beginning of the 1990s, even though the views and officially stated ideals of the current Russian leadership have drifted further than ever from the ideals of the 1990s. It is telling that even though Putin's regime showed the democratic liberties of the 1993 constitution to be dead years before the 2020 change in law – which the authoritarian powers of the President gained through the changes in the constitution in 1993 allowed for – they have been retained in the new constitution as well.<sup>22</sup>

For modern autocrats, it is central to use formal democratic institutions to strengthen their dictatorial powers, so the Kremlin has not changed the two first chapters of the 1993 constitution, where the country is defined as a democracy. Changing them would have required an actual referendum and an inevitably slower operation than the lightning operation seen in 2020. The Kremlin did not want to go through with this seemingly because of the political risks that go with this, of which the most central risk being the rejection of the formal democratic framework of the constitution. The resulting constitution is an internally contradictory patchwork, where the new amendments are in stark contrast with the first two chapters.<sup>23</sup> It was most important to remove the contra-

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<sup>17</sup> H. Hale, *Why Not Parties in Russia? Democracy, Federalism, and the State* (Cambridge University Press 2010).

<sup>18</sup> A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press 1991).

<sup>19</sup> R. Pipes, 'Flight From Freedom-What Russians Think and Want,' *Foreign Affairs* 83 (2004) 9–15; S. Hedlund, *Russian Path Dependence: A People with a Troubled History* (Routledge 2005).

<sup>20</sup> 'Number of autocracies and democracies 1900–2018', *Varieties of Democracy Project* (2019), [https://ourworldindata.org/grapher/numbers-of-autocracies-and-democracies?country=~OWID\\_WRL](https://ourworldindata.org/grapher/numbers-of-autocracies-and-democracies?country=~OWID_WRL).

<sup>21</sup> V. Gel'man, *Authoritarian Russia: Analyzing Post-Soviet Regime Changes* (Pittsburgh University Press 2015) p. 21; D. Lussier, *Constraining Elites in Russia and Indonesia: Political Participation and Regime Survival* (Cambridge University Press 2016).

<sup>22</sup> 'Novyi tekst Konstitutsii RF s popravkami 2020', <http://duma.gov.ru/news/48953/>.

<sup>23</sup> Same.



diction between the liberal ethos of the constitution and the de facto autocracy of Putin and use a conservative frosting to sugarcoat the actual goal of the project – resetting Putin’s presidential terms.

Despite increased administrative difficulties, the Kremlin has not – at least before the war in Ukraine – feared the opposition’s ability to organize to demand literal compliance with the first two chapters of the constitution. It is an open question when the growing problems of the citizens can be organized under sufficient pressure, let alone as a sustainable democratic alternative to the authoritarian regime. In any case, the attack of February 2022 will be a historic turning point in Russia’s development, and the challenge it will bring to Putin is unprecedented. Even without the shock of war, the events seen in Kazakhstan in January 2022 showed that a stable and resource-rich dictatorial system can become very fragile in a very short time.

Even though waves of dissatisfaction are often followed by a relentless strike back by an authoritarian regime, their precondition for gaining non-violent public acceptance in the future is even more difficult. New protests, on the other hand, are even more likely when the opportunity arises. The path to liberation from autocracy is an inevitable, albeit uncertain, process that requires years or decades.

## 2.2 1990s – Missed Opportunities or Was There Anything to Miss?

**GUIDELINES FOR** the decline of Russian democracy and strengthened autocracy were set immediately at the turn of the 1980s and 1990s, when the countries liberated from under communist regimes faced the so-called ‘triple dilemma’. They had to simultaneously break free from an authoritarian and imperial model of government, build a market economy on top of a socialist planned economy, and transform single-party dictatorships into competitive democracies.<sup>24</sup> Russia’s main problem became the economy, where the dead end of the planned economy deepened the economic problems of its citizens. The deepening problems oriented Boris Yeltsin’s administration to focus solely on overcoming economic difficulties, rather than building a democracy and a more free model of government.

The end of the Soviet Union and the birth of a new Russia was a struggle fought in two stages, first between Mihail Gorbatsšov’s reform policy and the conservatives of the Soviet Communist Party and then between Gorbatsšov’s Soviet Union and the Russian Federation led by Boris Yeltsin. The weakness of the underdogs and the winner’s habit of forming a coalition that works on their conditions without regarding democratic legitimacy became, already then, a problem for the development of Russian democracy.

According to Vladimir Gel’man, Yeltsin’s regime had an opening for building democratic legitimacy to solve some of their overwhelming problems between October and November of 1991. At that time, a special constitutional commission – with the goal of drafting a new constitution for a soon to be independent Russia – proposed to a congress of parliamentarians (the predecessor of the parliament) a draft constitution to be considered. Had Yeltsin backed the draft of the commission, he could have used his influence to influence the congress to back the draft.

Instead, the congress approved Yeltsin’s much less democratic draft as the basis for the new constitution. It proposed a state of emergency until December of 1992, where regional elections would not be held, and when the President would be able to appoint the leaders of regions and biggest cities, except for in the former Soviet republics, centralizing the roles of Prime Minister and President to Yeltsin, the approval of presidential decrees despite parliamentary opposition, and the ability of the President to appoint and dismiss the government without the approval of parliament.<sup>25</sup> In other words, practically all the powers that Putin used to strengthen

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<sup>24</sup> C. Offe, ‘Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe’, *Social Research*, 58 (1991), No. 4, p. 865–892.

<sup>25</sup> Gel’man, *Authoritarian Russia*, s. 47.



his dictatorial role after Yeltsin. Deepening problems made Yeltsin believe that a state of emergency was necessary to solve them. This may have been influenced by, in the background, by the recent experience of defeating a coup and the seeming need to defeat forces still opposing him. Even though Russia's problems and challenges were undeniable, this was clearly an authoritarian solution that demonstrated a clear lack of trust towards a more democratic approach. In retrospect, Yeltsin's high popularity among the people only worsened the situation. While popularity gave his decision democratic legitimacy, it also lessened interest in building democratic institutions. The logic seemed to be that Yeltsin represents a new democratic Russia, so no agreement with dissenters is needed. In defense of Yeltsin, it can be said that many of his adversaries wanted something entirely different to a democratic Russia.

However, democracy is not about the quality of the players, but about the quality of the game. Even though Yeltsin's goal was to clear the political playing field only for the implementation of necessary economic reforms, it is generally naive to assume that the actor concentrating power to themselves would be willing to hand away that power after the exceptional period. In a democracy, control is dependent on the demands of the opposition. In Russia, however, the opposition was made as weak as possible from the very beginning, so that it would not stand in the way of implementing the desired policies.<sup>26</sup>

Yeltsin's dictatorial and forceful approach materialized in the constitutional reform process that began in 1992 and culminated in the bloody clash between the President and parliament in September-October of 1993. The pro-Yeltsin parliament felt that they had been betrayed after giving decision-making power to the president without gaining anything in return. Led by Vice President Aleksander Rutskoi, it began challenging the President.

Yeltsin relied on his popularity among the people and the fragmentation of the opposition blaming his adversaries for the problems the country was dealing with. He also used the weak politics of the parliament to strengthen his own position. Parliamentary sessions were televised and to a majority of Russians they either look like pointless rambling or like a shouting match of crazy people.<sup>27</sup> This is a clear similarity to the power of the television in Putin's time, where biased talk shows show the opposition as a group of marginal freaks and the President and his supporters as the only voice of reason.

In hindsight, the settling of scores between the Parliament and the President could have been an opportunity for the West to influence Yeltsin, who was dependent on the West, and demand that the Parliament be better taken into account in the reforms. At the same time, increasing polarization between the pro-Western President and anti-Western Parliament could have been reduced. An especially good moment for this was in December of 1992, when Yeltsin was supposed to give up his special powers and Parliament narrowly voted against the President's candidate for Prime Minister Jegor Gaidar. Instead of starting negotiations with parliament, he went into an even more open offensive by demanding a referendum of trust either in the President or Parliament.<sup>28</sup>

Yeltsin saw the President's far-reaching powers as necessary and sought to include his temporary emergency powers into the new constitution despite growing opposition from the parliament. In the spring of 1993, the Parliament lost the vote for Yeltsin's impeachment and the conflict escalated into a struggle for prestige. The Parliament demanded a referendum on the position of the President, politics and early Presidential elections.

The confident Yeltsin agreed to a referendum and was victorious. The Parliament believed this to be about the attitudes of the people, not about the position of Yeltsin or the Parliament.<sup>29</sup> Yeltsin, on the other hand, interpreted his victory to mean that Parliament was not needed. In September of 1993, he declared Parliament to be dissolved on television and ordered new parliamentary elections to be held in December. Just like in Belarus, this was a practice of instrumentalizing a referendum at the expense of competing in a democratic setting. Putin's reign as an authoritarian President is a direct continuation of Yeltsin's actions.

Parliament saw that Yeltsin had overstepped his authority and voted to impeach the President, naming

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<sup>26</sup> Same, p. 48–49.

<sup>27</sup> Same, p. 51–52.

<sup>28</sup> Same, p. 52.

<sup>29</sup> Same, p. 53.



Vice-President Rutskoi as President. Thus, Russia had ended up into a state of dual power. At the beginning of October defenders of the Parliament attempted to take over the Ostankino television station in Moscow, which Yeltsin responded by ordering the military to take over the House of Parliament.<sup>30</sup> Officially 146 people died in the takeover, unofficially several hundreds. Even though Yeltsin's popularity among the people was declining, it was clearly bigger than that of Parliament. The President used the asymmetric competitive situation by linking the vote on the constitution he was proposing to the parliamentary elections of December, where his most vocal critics (the communists and nationalists) were excluded from. Despite the success of the rowdy nationalist Vladimir Žirinovski and his 'liberal democratic' party, Yeltsin got his constitution. The battle between parliamentarism and presidentialism had ended.

Although Yeltsin's actions showed the weakness of democratic institutions and the reluctance the President had to agree on rules with other political actors, he was still dependent on the popular support of the people. As economic and social problems continued, the popularity of the President waned and he was unable to fully exercise the powers that the constitution he was able to pass granted him. The tragedy of Russian democracy became a lack of supply for worthy political contenders: as Yeltsin began to be less popular and in worse health, no credible challenger was found for the weakening President in the political field or civil society.

The feeling of inevitability allowed the President's administration to buy the fractured and unambitious opposition. Once again, we see a direct link to the strengthening of Putin's position fueled by rapid economic growth in the early 2000s. The weak opposition practically lost its entire mandate in relation to the popular President, when the growing standard of living of the people did not give almost any basis to question Putin's politics. For many who made a living off of politics, the only good option was to join the supporters of the President.

Yeltsin bought the loyalty of the leaders of critical areas through different kinds of tax incentives and special exemptions. The oligarchs who took over state property were integrated as part of a network loyal to the president by allowing them to direct a part of their proceeds directly to the President past official tax procedures. In exchange, the oligarchs were given more shares in sectors of the economy that the state owned.<sup>31</sup>

This arrangement watered down the possibility of an institutional defense of democratic competition in a decisive way. Presidential elections in 1996 would have, if they have been honest, almost certainly led to the victory of the candidate of the communists and nationalists Gennadi Zjuganov. Even though this may have weakened Russia's development of democracy, the true weakness of the state, dependence on Western creditors, and the relatively strong power of pro-Western actors would have likely forced Zjuganov to several compromises as he attempted a return to a more Soviet system. The election of Zjuganov would have also likely strengthened the role of the Parliament, as they began to resist the old-fashioned President.

A communist President forced to compromise could have also led to further disintegration of the communists and to the birth of a more modern left in Russia that does away with the ideals of the Soviet Union, as had happened in Central European countries.<sup>32</sup> The final result could have been like a double version of the 'mistake of democracy', as analyzed by Daniel Treisman<sup>33</sup> – Yeltsin, who took clearly authoritarian actions, would have lost the election to the openly authoritarian Zjuganov, who would have been too weak to implement his dictatorial ambitions. The end result would have been the acceptance of democratic insecurity as part of the Russian political process.

However, this did not happen. Yeltsin did not the 'mistake' occur and his belief in his own irreplaceability was victorious over all democratic risk-taking. Zjuganov was tarnished in a never-before-seen support of the oligarchs, the silence of the rest of the opposition was bought and other potentially dangerous political adversaries

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<sup>30</sup> Same, p. 54.

<sup>31</sup> Same, p. 57–59.

<sup>32</sup> J. Lassila ja R. Nizhnikau, 'Communist Parties in Russia, Ukraine and Moldova: Struggling with Popular Demands', FIIA Briefing Paper 248 (2018), <https://www.fia.fi/julkaisu/communist-parties-in-russia-ukraine-and-moldova>

<sup>33</sup> D. Treisman, 'Democracy by Mistake: How the Errors of Autocrats Trigger Transitions to Freer Government', *American Political Science Review*, Vol. 114, Issue 3, August 2020, p. 792–810.





were restricted from the media. In addition to an extremely biased media coverage, voters were intimidated and there was obvious cheating, which benefited Yeltsin. In the end, Yeltsin was able to raise his 5% support at the beginning of the campaign to a narrow win over Zjuganov in the second round. Although he paid a price for this in the form of a stroke and a heavy operation on his heart that he never recovered from.<sup>34</sup> In practice, the last chance for the democratization of Russia in the 1990s had been lost.

Despite the dishonest upper hand that Yeltsin had, an equally explaining factor in the loss of this chance was the weakness of the opposition. If Zjuganov had been even a little bit more charismatic and able to gain support for any other reason than the unpopularity of Yeltsin, the superior power of the President may not have been enough. After their loss, the communists were completely unable to challenge Yeltsin's victory.

## 2.3 The Legacy of the 1990s, the Contents of Democracy and the Fear of Power Struggles

**THE 1996** presidential election highlighted those elements of the political game that have been seen during Putin's time. These are the president's ability to harness public resources at his disposal and the weakness of opposition civil society to generate sufficient resistance for this kind of behavior.

The reform of the judicial system in the 1990s is good example. The basis of a functioning market economy and democracy is binding legislation for all, rather than the rule of law subject to the needs of the ruler. The reform was particularly demanding in Russia, because the legal culture controlled by the Communist Party was in many respects a continuation of the Tsarist tradition. In an environment, where a planned economy and one-party rule has moved out from the way of a privatized economy, rapidly surfaced disputes can only be resolved through independent legislation that protects the property of individuals and aids in the resolution of disputes instead of them being resolved outside the law.<sup>35</sup>

The problem was not so much the reform of the laws as the lack of a legal culture guaranteeing their functioning. The deep-rooted notion of the 'law of the ruler and the strongest' did not allow for a rapid increase in confidence in equal justice among Russians. Personal networks and the protection practices based on them (i.e., the mafia) were seen as a better way to resolve disputes than time-consuming political lobbying or relying on the courts.<sup>36</sup>

Functioning rule of law can only be built in interaction with the rest of society. It can not only take the form of top-down legal reforms, but also bottom-up internalization of laws. In the early 1990s, there were few alternatives because the necessary laws simply did not exist. Moreover, the establishment of autonomy of laws was hampered by the complete weakness of the state in the 1990s, which rather undermined Russian confidence in an already weak judiciary.

It takes time to build trust like this. Thus, it is paradoxical that under Putin, the conditions for citizens to accept and to adopt genuinely equal and independent legislation are better than under Yeltsin, who was officially committed to liberal democracy. This is reflected, on one hand, in the relatively high readiness of citizens to seek justice in many everyday disputes, and on the other, in their growing concerns in the arbitrary decisions of authorities.<sup>37</sup> At the same time, the laws authored under Putin have increasingly been contrary to the Western concept of the rule of law.

Putin's demand for a 'dictatorship of the law' in the early 2000s was a logical extension of the state of lawlessness in the 1990s, but given Russia's legal culture tradition, it focused on the need to use the law for the ruler to

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<sup>34</sup> Gel'man, *Authoritarian Russia*, p. 60–61.

<sup>35</sup> K. Hendley, 'Legal Development in Post-Soviet Russia', *Post-Soviet Affairs* (13,3) (1997), p. 228–251.

<sup>36</sup> Same.

<sup>37</sup> Karakter i struktura masovoj trevožnosti v Rossii', *Levada-tsentr* 21.4.2021, <https://www.levada.ru/2021/04/21/harakter-i-struktura-masovoj-trevozhnosti-v-rossii/>.



gain power rather than seek to establish equal justice. Just as in the consolidation of democracy, what matters is not the good or evil of individual actors, but the strength or weakness of those who resist. The weak confidence of Russian society in the independent judiciary has not created resistance to the president's ability to use laws to increase and maintain their power. The capacity of judges to resist pressure from higher authorities is weak and guidance for verdicts are actually expected before sentences are read. Civil society does not react to this approach, as it does not see anything particularly surprising in this.

The chaotic reality of the 1990s badly polluted the actual significance of democracy for the majority of Russians. Still, democracy was the only political idea that gained clear legitimacy after the collapse of the Soviet Union. Despite the authoritarian powers given to the President, the ideal of democracy defined the spirit of the 1993 Constitution. Although this idea was shaky and anything but institutionally established, democracy became the determinant and reference of a normal society for the majority of Russians. This was strongly reflected in Putin's consolidation of his position as an authoritarian and popular president in the first decade of the 21st century.

Responses to the World Values Survey's question by Russian respondents about the meaningfulness of the democratic system from the 1990s to the present show that citizens have internalized democracy as a synonym for Western consumer society, rather than a question of political rights or a change of power.

According to surveys, between 1994 and 1998, 45% of Russians considered the democratic system a good thing, up from 47% between 1999 and 2004. In the 2005–2009 survey, 64% already thought so, in 2010–2014 68% and in 2017–2020 67% of the respondents.<sup>38</sup> In other words, while democracy has actually weakened in Russia, the positive image of democracy by Russians has strengthened. This shows that for the majority of Russians, democracy has meant a society that responds to individual socio-economic needs rather than less relevant political and social rights.<sup>39</sup>

For a political system striving for authoritarian modernization, such a redefinition of democracy is like a gift from heaven. It makes it possible to justify an authoritarian system in the name of democracy, so that criticism from the outside can be effectively refuted by appealing to the real attitudes of the citizens. Putin's first two terms as president in 2000–2007 relied on a strong popular mandate in this regard. The opposition was allowed to act considerably freely compared to the present, as it was not seen as a threat due to its marginal support. At the same time, in many respects, Putin continued Yeltsin's positive position in the West and in Europe, even though with gradually more severe notes. However, the Kremlin did not yet experienced any fundamental threat from the West.

A similar indifference, linked to everyday experiences and needs, is seen in the attitude of Russians towards accepting autocracy. Year after year, Russians have been more positive about the World Values Survey's claim to 'having a strong leader who doesn't have to bother with congress or elections'. While in the 1994–98 survey 42% of Russians were positive about the statement, in the 2010–14 survey the figure had risen to 67%. In other words, the frustration with the state and uncertainty that had already begun in the 1990s began to show a longing for a 'strong hand'.

However, in the most recent survey, 2017–2020, acceptance of the claim collapsed and 48.7% considered the claim a bad thing.<sup>40</sup> The reason is that in 2017–2020, there has been a significant change in the attitudes of Russians towards the economic situation, Putin's system as well as Putin himself. The era of a strong leader that has lasted for twenty years has begun to be increasingly incapable of satisfying the needs of Russians. Democracy, with its political freedoms, is not a direct alternative to this change, but dissatisfaction with the current regime has still emerged. The change in attitudes and the inevitable fatigue caused by the unchanging situation and as

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<sup>38</sup> World Values Survey Data Analysis Tool, Waves 1990–2020, Russia, Question 'Political system: Having a democratic political system,' <https://www.worldvaluessurvey.org/WVSONline.jsp>.

<sup>39</sup> M. Fabrykant ja V. Magun, 'Dynamics of National Pride Attitudes in Post-Soviet Russia 1996–2015', *Nationalities Papers* (2019), 47: 1: p. 34–35.

<sup>40</sup> World Values Survey Data Analysis Tool, Waves 1990–2020, Russia, Question 'Political system: Having a strong leader,' <https://www.worldvaluessurvey.org/WVSONline.jsp>.



various problems continue and increase is the Achilles heel of authoritarian regimes. In a democracy, this natural law of citizen dissatisfaction is channeled into the need for parties and politicians to lose elections. There is no such possibility in autocracies and it is not voluntarily granted.

Against this dead end, public support for genuine democratic values often begins to rise, easily leading to a downward spiral. The growing longing for freedoms is forcing authoritarian regimes to tighten their grip, and further narrowing civil liberties are increasing their demand, which in turn makes the administration even more nervous. In a survey conducted by the Russian Academy of Sciences in 2014 and 2018 on the ideal future of citizens, the most important thing was social justice, which rose from 47 percent to 59 percent between 2014 and 18. At the same time, the proportion of Russians who wanted Russia's future to be based on human rights, democracy and individual freedoms increased from 27% to 37%.<sup>41</sup>

The growth of these 'Western values' at the expense of conservative values was especially noteworthy: the proportion of those who wanted to see Russia's future on the basis of traditional and religious values fell from 35% to 27%.<sup>42</sup> The trend in increasing criticism towards the Kremlin has increased as government repression has intensified. In 2021, citizens were concerned about both the fear of arbitrary action by authorities (58% of respondents, the highest proportion since the 1994 survey) and the return of mass persecution (52%, also the highest proportion in the history of the survey).<sup>43</sup> In 2021, for the first time, freedom of speech rose to the top three with 61% of the vote. In 2017, only 34% thought so.<sup>44</sup>

The demonization of the West in the Kremlin's years of television propaganda is becoming increasingly less efficient at molding the views of the public, not least due to the inevitable decline in the importance of television and the growing popularity of the Internet among the youth. In a survey conducted in 2021, 44% think the West should be seen as an ally and 29% as a competitor. 5% wanted to see the West as an enemy, 13% as a friend.<sup>45</sup> The war that began in February 2022 was a departure from this situation as propaganda and repression intensified to unprecedented proportions. The ability for the government to change the direction the country was going in before the war in the long term is weak as the economy plummets and citizens see a drop in their standard of living.

## 2.4 From Critical Attitudes to the Strength of Weakness in Action

**RUSSIA IS** hardly a special case in the sense that politics appears to be a fierce power struggle to a large number of Russians, and power struggles seem deeply harmful. This experience dates back to the traumatic legacy of the 1990s. The current political stalemate is reflected in the increasingly positive image of the Soviet Union, which, albeit for citizens, is more of a mythical picture of the social justice of the Soviet system than the Kremlin's geopolitical dreams.<sup>46</sup>

Certain key events or crises can be found in every country that have long characterized the country's political culture. The legacy of such crises will be particularly damaging, if a political actor can benefit from their crippling impact on the social and political participation of citizens. The problem with Russia's democratic development is that competing interest groups have been able to reconcile their power struggle without or without the support of the people. Lack of trust in citizens and the distrust of citizens towards the elite are mutually

<sup>41</sup> V. Hamraev, 'Blagopolutše dorože velitšija', Kommersant, 6.11.2018.

<sup>42</sup> Same.

<sup>43</sup> 'Harakter i struktura massovoj trevožnosti v Rossii', Levada-tsentr 21.4.2021, <https://www.levada.ru/2021/04/21/harakter-i-struktura-massovoj-trevožnosti-v-rossii/>.

<sup>44</sup> A. Levinson, 'Prava i svobody', Levada-tsentr 22.11.2021, <https://www.levada.ru/2021/11/22/prava-i-svobody-2/>.

<sup>45</sup> 'Meždunarodnyje otnošenije: avgust 2021', Levada-tsentr 8.9.2021, <https://www.levada.ru/2021/09/08/mezhdunarodnyje-otnošeniya-avgust-2021/>.

<sup>46</sup> 'Kakoj dolžna byt' Rossija v predstavlenii rossijan?' Levada-tsentr 10.9.2021, <https://www.levada.ru/2021/09/10/kakoj-dolžna-byt-rossiya-v-predstavlenii-rossijan/>.



reinforcing phenomena, further reinforced by the weakness and lack of real political parties.<sup>47</sup> When citizens have not seen parties as meaningful, they are vulnerable to political and economic corruption. With the help of parties, the interests of individual actors are pursued, instead of clear ideological goals according to the wishes of a certain group of voters.<sup>48</sup> This further deepens people's cynical attitudes towards parties and politics. There is no reason for people to see parties as relevant to the decisions that affect them, and accordingly, parties have not seen the real mobilization of people as useful.

Russia's tradition of social and political movements and the social participation of its citizens is exceptionally weak. For example, a comparison with Indonesia, which has a lower level of education and a severe authoritarian past, shows that Russian society is clearly more passive.<sup>49</sup>

The poor social participation of the Russians has manifested itself, for example, in the way in which the authorities are approached with different requests, rather than the citizens organizing themselves to change the actions of the authorities. The most prominent ritual of this practice has been the annual televised 'Putin's Direct Line,' in which the president is appealed to all kinds of public concerns and then he solves them in a live show. However, in Indonesia active organization to change the actions of the authorities has been typical and the country has overtaken Russia in its democratic rating.<sup>50</sup>

Russian social apathy is not explained solely by fear of repression, although its role is undeniably central. The well-known Russian sociologist Juri Levada saw passivity as the result of Homo Sovieticus, which refers to the 'skewed individuality' produced by the anti-individual tradition of the Soviet era, which still appears decades later.<sup>51</sup> Instead of activity and organization that improves the position of the individual, what is central to Homo Sovieticus is apathy that adapts to the environment and suspicion of everything outside of normal everyday life.

The accelerated autocratic development of the last 10 years shows societal changes that are increasingly contrary to the Kremlin's interests. Arguments about decades old Homo Sovieticus also need to be looked at through a critical perspective.<sup>52</sup>

The opposition's new approach to increasingly authoritarian rule can be seen in the growing importance of Aleksei Navalnyi, who was imprisoned in early 2021, as a leading figure in Russia's democratic opposition since the 2011–2012 demonstrations. Even though Navalnyi has been imprisoned and efforts have been made to destroy his network, what is more important is the generational change he represents that is shaping old ways of doing things. In his message, Navalnyi does not appeal to the 'lost opportunities for democracy' of the 1990s, but presents Putin's power as a corrupt continuation of the Yeltsin regime that goes against the true needs of the people. Under the prevailing circumstances, Navalnyi's opposition-populist tactics are exactly what the Russian opposition needs: against adaptation and action free from abstract political principles that identifies corruption as the central problem of Russian society and political power.

Navalny's challenges have been the threats on his life as well as the difficulty of potential allies. Several other members of the democratic opposition have criticized Navalny's populist style and openness to build alliances with all of Putin's opponents, from nationalists to communists. There is also widespread doubt among ordinary citizens about the meaningfulness or honesty of politics. Navalny's political ambition and courage may arouse sympathy, but citizens' widespread faith in his potential has been limited. On the other hand, 'greater' forces such as Western intelligence services are imagined to back him, or then he is imagined as a creation of the Kremlin with a role is to dismantle the unity of the opposition. The August 2020 assassination attempt broke down these

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<sup>47</sup> Hale 2010, Why Not Parties in Russia?.

<sup>48</sup> B. Magyar ja B.Madlovics , *The Anatomy of Post-Communist Regimes* (CEU Press 2020) <https://library.oapen.org/handle/20.500.12657/46598>.

<sup>49</sup> Lussier 2016, *Constraining Elites*.

<sup>50</sup> Same.

<sup>51</sup> G. Sharafutdinova, R.I.P 'Soviet Man': Scrapping Homo Sovieticus in the Spirit of Yuri Levada', *The Russia File Blog*, April 29.4.2019 <https://www.wilsoncenter.org/blog-post/rip-soviet-man-scrapping-homo-sovieticus-the-spirit-yuri-levada>.

<sup>52</sup> Same.



suspicions of conspiracy to some extent, but the majority of citizens still have reservations about Navalnyi. However, young people have a more positive attitude towards him than any other age group, which is a sign of a new way of thinking. The negative attitude of citizens towards politicians has been a key element in maintaining the Kremlin's authoritarian inevitability. On the other hand, Putin's sharp decline in confidence shows that when there does not seem to be viable means for economic growth, he is no longer shielded from the attitudes of the people. 59% of Russians trusted Putin in November 2017, but by 2021 the figure had dropped to 30%.<sup>53</sup> The war will, of course, change the situation in the short term, but Putin's ability to strengthen his position in the long term is, to say the least, challenging simply because of the onset of an economic crisis.

## 2.5 Conclusions

**THE VISIBLE** activation of civil society in various parts of Russia in recent years has been reflected in protests related to environmental problems and urban planning. The centrality of individual actors in politics, the lesser relevance of party ideologies and the weak role of political parties can allow for unforeseen organization of civil society. The current collapse of the economy and living standards is creating a dynamic that is difficult to predict.

In such cases, the limits previously imposed by the administration between what is allowed and what is not are no longer valid. The case of Sergei Furgal, who was elected governor of Habarovsk in 2018 from the party of Vladimir Žirinovski, loyal to the Kremlin, is an excellent example of this. Regardless of his party background, Furgal became a key protest candidate who won the election. In 2020, his dismissal due to his excessive local popularity once again triggered months of protests.

The uprisings in Belarus and Kazakhstan show that there can be victory over oppression and political apathy. This has not yet led to the victory of democracy in either country, but the signal is clear. Russia also has a long way to go from organizing local demonstrations to coordinating demonstrations at the national level or really challenging the autocratic regime. However, there are enough triggers for widespread dissatisfaction.

The example of Russia shows that perhaps the best indicator of the superiority of democracy as a political system is the repression and growing social dissatisfaction that can be seen in autocratic countries. Democracy is the only system where the government regularly receives immediate feedback from the people in the form of elections – and where bad leaders often lose their power as well. This social correction mechanism is completely absent from authoritarian systems.

In democracies, dissatisfied people can make a difference through free elections. Political participation of citizens is a counterweight to the concentration of power. At worst, the weakening of this counterweight can lead to the loss of the power to enact change even there, where it currently exists.

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<sup>53</sup> 'Odobrenije institutov, položenije del v strane, doverije politikam i elektoral'nyje rejtingi partij', Levada-tsen-tr 28.10.2021, <https://www.levada.ru/2021/10/28/odobrenie-institutov-polozhenie-del-v-strane-doverie-politikam-i-elektoralnye-rejtingi-partij/>.



3.

# The Challenge of Authoritarian Regime and the Dilemma of the EU: Poland and Hungary

Katalin Miklóssy

**A WORRYING** trend is emerging in many of the eastern Member States of the European Union that are openly challenging the Union's core values. It seems like Poland and Hungary are once again looked upon in the East, countries that also had a leading role during socialism when it came to experiments in the market economy, allowing entrepreneurship and liberalizing society. Poland and Hungary were also the fastest to adopt Western approaches in the transitional period after communism. Now Hungary and Poland lead the illiberal resistance in the EU. What went wrong in these countries, especially when it came to building rule of law? In order to answer this, we first need to define Western liberal rule of law through two questions:

**Are citizens equal before the law?** This essentially involves the independence of the judiciary, the right to vote and to stand as a candidate, the right to property, and the protection of persons belonging to minorities, i.e. human rights.

**Do citizens have similar freedoms?** For example, do they have access to comprehensive information about the world, is the media free and independent of those in power, what is taught in schools? Can citizens express their opinions and assemble freely? How freely can civil society operate?

**THIS ARTICLE** seeks to answer three questions. **First**, the reasons for the backsliding of democracy are explored. **Secondly**, the cornerstones of the current, seemingly sustainable systems, i.e. the key institutions and ways of operating are considered. **Thirdly**, an outline is made of future scenarios and what the European Union can do.

**We present three central arguments:**

1. Eastern European countries – such as Poland and Hungary – have historically had a very limited experience of democracy, and Western democratic exports did not take this into account enough in the 1990s. When the countries joined the EU, their democratic institutions were not very strong and membership has not helped to consolidate democracy. The backsliding of democracy we now see is a return to a more natural and self-imposed trajectory for these countries in light of their own history.
2. Since the EU has underestimated the undemocratic developments in Poland and Hungary for a long time, an authoritarian system – a one-party centralized system seeking total control of society – has had time to establish itself. For this reason, the victory of an individual parliamentary election by the democratic opposition would not yet guarantee a return to democracy. What is needed is a 'system change' similar to that of 1989, and several years or decades to rectify the situation – and only if the majority of the people want it.



3. The current situation is partly due to the fact that illiberal systems are resilient: in addition to strong, centralized power structures, they have considerable capacity for transformation. In the face of such systems, the EU is extremely slow and rigidly bureaucratic, as it is difficult to reach a consensus on necessary solutions. The EU lacks the tools to defend itself against the challenge of illiberalism.

### 3.1. Deterioration of the Rule of Law?

**WHY HAVE** the liberals of the communist times in Poland and Hungary turned against liberal democracy? The answer can be found on a map and in history.

#### The Long Tradition of a Strong Governance Model

**THE CONCEPT** of the rule of law has historically evolved from a perspective revolving around security. The geopolitical location of the countries of Eastern Europe has meant a constant threat from either the West, the South, or the East since the 16th century. Indeed, Eastern Europe ended up under the rule of either the Austro-Hungarian, Prussian, Ottoman or Russian empires until the end of the First World War.

In the second half of the 1800s, with the spread of nationalism, the idea of independence began to form in the East. Influenced by conservative jurists who piloted the German reunification process, they were considering how to get small German states to agree to a central government. The concept of 'Rechtstaat' was born, which meant the right of the state to govern its own territory through uniform legislation. In the way that the state was perceived in Eastern Europe, the rule of law was perceived as an equation of law + state, which means that the state has a functioning legal system. This primarily meant law and order. The main task of the state was to ensure that justice was served in relations between citizens. It did not mean protecting citizens from excessive action from the government.

Because of external threats, there was a belief in the East that only a strong central government would be able to defend the sovereignty of the state. Strength meant both the consistency and stability of government power. Consistency is achieved through a political continuum, which therefore caused the need to avoid liberals or the left coming into power. The Liberals were individualists seeking time-consuming compromises that could not be afforded during potential crises. The left, on the other hand, relied on the power of the people, which could challenge state power. In addition, both liberals and the left were internationally oriented political forces. Thus, it could be presumed that only the conservatives were the guarantors of independence, so their dominance had to be secured by various means. The facade of parliamentarism and a multi-party system were preserved, but the liberal and left-wing opposition were kept away from power.

**The stability** of the administration was upheld by neutralizing pressure from civil society. This meant controlling the judiciary, significantly restricting citizens' freedom of opinion and the media, and opposing the extension of the right to vote. When the countries of Eastern Europe became independent after the break-up of empires following 1918, both policymakers and citizens believed that independence was due to external factors and may not be built on a strong basis. Therefore, it had to be secured by the old means, through a model of centralized governance.

The societal structure of Eastern Europe helped to centralize power. Urbanization and industrialization were slow and born quite late, resulting in a small bourgeoisie class as well as a small industrial working population. Urban ideologies, such as liberalism and socialism, were thus not widely anchored in the populace. Similarly, in rural-prosperous societies, hierarchy, religiousness, traditions, and nationalism were deeply rooted and conservatism had strong support. The authoritarian tendency that characterized the interwar period changed after the Second World War into communist dictatorships. Ironically, this was a continuation of the conservative model of government – those in power only concentrated power even more, but on the basis of a different ideology.



The unlimited power of the ruling elite did not begin to be challenged until the 1980s – first in Poland and Hungary. At that time, the continuation of the centralized governance model in Eastern Europe had lasted for more than 200 years.

## The Mirage of a Democratic Transition

**IN THE** euphoria of the 1990s, the lack of a democratic tradition was not seen as an obstacle to the adoption of the Western model. The anti-communist revolutions and popular movements in Eastern Europe were seen as strong evidence for a desire to build democratic societies. However, this includes some slight overinterpretation. The Polish Solidarity Movement, often mentioned as the first democracy movement, was quite old-fashioned in many respects. It arose in response to an attempt by the communist leadership to drive down inefficient and oversized production facilities, such as the Gdańsk shipyards. Dockers belonging to the elite of the working-class workers became alarmed and began to riot.

The movement soon expanded to include society as a whole. It received strong support from the Catholic Church and the Polish Pope, from whom the movement reciprocally drew its conservative and nationalist core values. When the communist regime collapsed, the women's movement in particular bitterly stated that Solidarity was a project for men, and a tool used against equality, in order to drive women back into the home. In Hungary, there is national pride in how the transfer of power was peaceful and was done through negotiations. Communist Party leaders sat at a round table symbolizing equality with representatives of the opposition and relinquished power to a new freely elected parliament. The story is beautiful but incomplete. In fact, the opposition consisted of small circles of the societal elite, of which the vast majority of the people were ignorant.

Power changed in an elite way. Those who took part in the negotiations, raised to become guardians of the good of the people, first organized themselves into political parties gained the most media attention during the negotiations and so also won the first parliamentary elections. They then defined the steps to be taken in the transition to a democracy, including the creation of a relatively high electoral threshold of 5% to keep new parties away from power.

The transition period of the 1990s was chaotic, because in the comprehensive construction project of the new system, all aspects of society were reformed simultaneously and at a great speed – all without a deeper understanding of how democracy actually works. The West sought to assist in the process, but market economy perspectives were potentially overemphasized. Poland succeeded in the transition to a market economy as early as 1993, but this came at the cost of political stability and continually collapsing governments. Hungary was politically stable, but the first nationalist conservative government slowed down privatization and the development of the market economy in an effort to transfer former state-owned enterprises to national actors that lacked capital. This led to an economic collapse in 1995, after which the government, made up of the left and liberals, sold a number of state-owned companies to the largest bidders, mainly foreign investors.

Ironically, both of these national strategies backfired politically in the 2010s. Rapid market-driven, social change had dramatic effects from the perspective of ordinary people. The times of full employment under state socialism quickly turned into an unemployment rate of 10% without time to create a social safety net. Unemployment benefits and pension levels were inadequate, while you had to pay for health care and education, which had been free before. Sociologists have estimated that in Poland and Hungary, about a third of people were losers in this scenario, so that they were under or close to the minimum standard of living. This group included retirees, low-skilled workers, families with many children, and single parents.

At the same time, new national companies were unable to compete with capital-rich multinationals entering the Eastern market. This started to skew the structure of the economy, so that even in the 2020s, national industrial companies mainly serve the domestic market and foreign-owned companies focus on the international market. When Poland and Hungary joined the EU in 2004, a significant proportion of people in both countries were dissatisfied with societal development or their own place in it. Because all of this had happened in the name of





liberal democracy, liberalism became a curse word. People hoped for salvation from EU membership, as the EU promised to close the gap in living standards between East and West.

## The Effects of EU Membership

**THE TERMS** of EU membership were created in the 1993 Copenhagen Treaty, which recorded the Union's definition of democracy. The conditions were based on the existence of the basic structures of democracy: parliamentarism, a multi-party system, a legal system up to EU standards and a market economy, as well as conditions for civil society. Between 1993 and 2004, the EU did not pay attention to how democratic structures work in practice. Then, when the nominally democratized countries joined the Union, the debate on the nature of democracy ended there. After all, the countries had already been assessed as EU-eligible, as sufficiently democratic.

EU membership did not live up to expectations quickly enough and nationalism began to rise again. Between 2004 and 2007, there was a serious debate as to whether the Union should have two levels, with the old member states at the heart of power and the new member states on the outer periphery. For example, the Schengen area was opened for the countries that joined in 2004 only in 2007, which showed a lack of confidence in the new countries.

When the financial crisis began with the swindling by an old member state, Greece, the Eastern members became enraged, as their economic performance was monitored and economic decisions were often interfered with. Despite economic growth in the East, the living standards between them and the West remained. Migrant workers in the East received lower wages in the West and Western companies trampled on wage levels in the East. In addition, large international companies blackmailed themselves tax exemptions and reductions that domestic companies were not allowed to enjoy. Competition in the domestic market was distorted, but the EU banned state support for national companies.

Coming into the 2010s, the spirit was changing in the Eastern member states. The increase in inequality led to a strengthening of nostalgia. Liberalism was seen as overemphasizing individuality and self-interest, as well as causing a loss of social responsibility. The disadvantaged – the unemployed, pensioners, low-paid workers and the rural population – longed for community, tradition and a more stable societal model.

The left was unable to meet these wishes. In Poland, it has not been elected to parliament since 2015 and in Hungary it has declined into a state of competing minor parties. The left is made up of the successor parties of the former communist parties, so they are seen as complicit in the communist past and the deplorable current situation. The left also suffers from favoring liberals during the accelerated implementation of the market economy in the 1990s. Under social Darwinism at the time, the strong prospered and the weak were cared for only if it could be afforded.

There was a demand for strong nationalist leadership. The people longed for simple solutions and clear communication that even the uneducated will understand. The turning point was the refugee crisis of 2015, which the EU was unable to deal with and which radically changed perceptions of security in the Eastern member states. Even today, almost 80% of people in Eastern Europe oppose refugees and migrants from Africa and the Middle East. Nationalism grew out of this experience of insecurity and contradiction, seen as the need to defend national views against the EU.

## 3.2. Adaptive Illiberalism: The Doctrine of Sustainable Power

**THE ILLIBERALIST** system is built in Hungary and Poland according to the same recipe. Indeed, before joining power, Jaroslaw Kaczynski of Poland said he admired the model that Viktor Orbán had created in Hungary. In Hungary, the illiberals came to power in 2010, and in Poland five years later. In Hungary, the consolidation of the system has progressed further.



The new system is based on a simple recipe with many influences from the traditions of Eastern European political culture since the 19th century. It consists of three elements: the concentration of power, a flexible mechanism of control, and an ongoing learning process to calibrate the system to become increasingly sustainable under internal and external pressures.

## Consistent Construction of Centralized Power

**AUTHORITARIAN RULE** is always built first through the weakening of democratic checks. The first is the Constitution and the Constitutional Courts that interpret it. Constitutionality is the cornerstone of the idea of the rule of law. It ensures that laws passed in Parliament are in the spirit of the Constitution. The rule of law that the West represents is challenged in particular by the principle of majority rule, or majoritarian democracy, which undermines the principle of the tripartite division of power. According to it, the majority of the parliament elected by the people must have supreme power in all aspects of social life, including the control of the judiciary. This has been invoked in 2021 by the Polish Minister of Justice, Zbigniew Ziobro, in pursuit of judicial reform aimed at, among other things, overseeing the work of judges.

The majoritarian democracy perspective creates a strong position for the government, as it reduces the role and importance of the parliament. Decisions and new laws are pushed through by a simple majority of pro-government MPs. There is no need to care about the opposition. At the same time, the rights of minorities and the principles of human rights based on the individual can be ignored. Even civil liberties can be defined in the interests of the majority.

By appointing the public prosecutor control of the judiciary can be ensured. They are chosen based on a proposal from the Minister of Justice by a simple majority of the parliament. A public prosecutor loyal to the government guarantees that the ruling elite will be kept above the law. They will not be prosecuted even if there is valid evidence, such as when the EU Anti-Corruption Agency (OLAF) calls on national prosecutors to act.

As a result, Poland and Hungary have consistently refused to join the newly established EU Public Prosecutor's Office. It is telling that Fidesz, worried about the spring 2022 election, passed a law last autumn that would allow the prosecutor appointed by Fidesz to be replaced only by a 2/3 majority in parliament. A prerequisite for cementing power structures is making it more difficult for citizens to access information. The first step is the takeover of publicly funded media. Management is changed and those journalists who do not agree to mediate the state message will be fired. The public media does not criticize the government and never gives way to opposition opinions. The situation is comparable with media control during communism. At the same time, efforts have been made to influence the media coverage of privately funded media by setting up a media council to monitor media content on the basis of new, purpose-built regulations. For example, the media council may press to change the programming or deny frequencies to opposition radio stations. The last step is an attempt to control almost the entire media field. Such a company is visible in Hungary, where since 2018 the ownership of nearly 500 private media companies has been transferred to a centrally managed media foundation that feeds similar news to all its media. In Poland, it has been made more difficult for foreign-owned media companies critical of the government to operate.

Where market economy doctrines were prioritized during the democratic transition in the 1990s, since the mid-2010s, politics has increasingly defined the rules of the market economy. Problems with the rule of law materialized primarily through the consistent questioning of the protection of property rights. Companies have simply been taken over or their holdings forcibly hijacked. The domestic SME-sector in particular is vulnerable, but foreign investors and even large international companies have been targeted. There are many ways to do this. In Hungary, for example, certain activities were identified as a strategic area for national security to which EU competition law cannot be applied to. In this case, special production areas can be created where the business operations are managed centrally. International companies were pressured by new demands, special taxes,



or lobbying against corporate borrowing. It is still unclear how the Hungarian government put pressure on the above-mentioned 500 media companies to hand over their assets to a foundation run by the ruling elite.

Those who were disobedient were driven out of the market. Because the courts are not politically independent, entrepreneurs do not receive legal protection. The pressure is quite unpredictable and cannot be protected against by networking politically in the right way. Local authorities operating in the area of businesses are constantly losing their decision-making power in increasingly hierarchical power structures. It is difficult to predict who will have power in the business sector even a year from now. Lobbying also includes corruption, which is present throughout the state administration and in all parties. Regionally, corruption is rampant in rural areas and small towns, and its magnitude and intensity are decreased by the existence of independent media. There is less corruption in Poland than in Hungary, as the Law and Justice party has not succeeded in subjugating private media yet.

Corruption is almost impossible to eradicate from politics, because it is not transparent and rarely handled in the courts. The amount of corruption and where it occurs is constantly changing, but in general, illiberal elites are completely dependent on it, because only through corruption will they be able to maintain the support of loyal subjects, especially close to elections.

The problem of the rule of law also can also be witnessed in innovation policy. Dictatorial leaders fear educated people and therefore strive to strictly control the school system and the production of educational materials. Access to higher education is restricted and young people are directed towards vocational training. The relatively low level of education also keeps wage levels low and thus competitive in attracting large international companies. This results in brain drain, which has been an accelerating problem in Hungary since the rise of Fidesz. Poland is also suffering from the emigration of professionals due to low salaries.<sup>54</sup> The situation has led to a shortage of labor, which increases the need for migrant workers. Despite consistent and fierce anti-immigration practices in Poland and Hungary, the countries have increasingly resorted to Belarusian and Ukrainian migrant workers.

After the border conflict between Poland and Belarus that began in the autumn of 2021, instead of Belarusians, Poland has attracted labor from Georgia, while Hungary has attracted labor from Vietnam and Mongolia. The war in Ukraine in 2022 has changed the situation decisively: Poland and Hungary hope to be able to channel those fleeing from Ukraine into their labor markets. Illiberal governmental power relies on a consistent ideological basis. It is often argued that they are maintained only by the power of populism, but this explanation is too simplifying. In fact, the resilience of the Polish and Hungarian systems cannot be understood without the importance of strong and traditional national conservatism as one of the determinants of political culture. The underlying nationalism and conservatism behind the protection of sovereignty have appealed to the rural population, the less educated, and the older or religious population in particular. The role of ideology has also been promoted by changing the direction of cultural and educational policy.

## Administrative Flexibility

**THE STRUCTURES** of power mentioned above depend on the continuous changing of activities. A new nuance is a method copied from Russia used to keep the oligarchs aware of their actions. An impairment of the right to ownership means, in practice, that a person's wealth status is dependent on who is in power. A disobedient oligarch can lose their property quickly and without warning. Unpredictability leads to a strong service-mindedness of economic actors. They are always ready, if necessary, to invest in various state projects or to fund the ruling party's electoral fund.

A similar method is used in the public sector. Under administrative manual control, job descriptions or those

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<sup>54</sup> [https://scholars.unh.edu/cgi/viewcontent.cgi?article=1562&context=honors#:~:text=According%20to%20Strubhaar%20\(2000\)%20brain,2000%20educated%20emigration%20rose%20slowly.](https://scholars.unh.edu/cgi/viewcontent.cgi?article=1562&context=honors#:~:text=According%20to%20Strubhaar%20(2000)%20brain,2000%20educated%20emigration%20rose%20slowly.)



in charge of something are constantly changed or transferred between ministries or to completely new, more reliable administrative bodies. Personnel policy is able to provide politically appropriate leadership for different sectors, which in turn influences the selection of employees.

In the end, the permanence of the system is largely based on the fact that power closely monitors the climate of opinion of the common people. The system has built-in social sensitivity and a distribution policy based on it. One example of this are state-funded employment programs, which provide long-term unemployed and unskilled people with a minimum wage. In accordance with conservative values, efforts are made to support families with children. Closer to elections, social sensitivity will be emphasized and subsidies will be distributed generously, as in Poland in 2019 and Hungary in 2021.

The most distinctive feature of Eastern European political culture is the central role of lawyers in the leadership of the state. Their role stems from the same reason as the different kind of development of rule of law in the East – the need to protect state sovereignty from external pressure. It is assumed that the legal rationale weighs both in the international arena and in domestic politics. **Law is seen as an exact science, where solutions cannot be questioned.**

Until the 1990s, political science was only a minor in the law faculty, with the idea that only a lawyer could handle state affairs properly. Orbán and Kaczynski's inner circle and the majority of party leaders have a legal background. The rule of law has been weakened precisely by changes in the law. If a political practice encounters obstacles imposed by the law, the law is amended. A simple majority in parliament is used to create a flexible legislative process in which ad hoc laws that are incompatible with the legal framework or even with the constitution are produced without reasonable grounds and with an expedited schedule. That is why it is essential to bring the constitutional courts under control. Continuous calibration of legislation has played a key role in how illiberal systems have managed to navigate the legal jungle of the EU, formally obeying EU requirements but in reality only adhering to their own goals.

### 3.3. The EU's Room to Maneuver: The Challenges of Democratic Scrutiny

**THE EUROPEAN** Union woke up relatively late to the fact that the continuing developments in Hungary and Poland were not only a temporary departure from democracy but a threat to the Union's fundamental values that required action. As early as 2011, Hungary received the first warnings from the European Parliament about restricting media freedom and unilaterally enacting a new constitution. At that time, it was finally felt necessary to define more precisely what was meant by the rule of law.

In 2012, the use of Article 7 on the rule of law was considered against Hungary. This method, called the EU's nuclear weapon, would deprive an infringing Member State of the right to vote in the Union. However, the Commission was not ready to use the article. Since 2013, there has been a discussion on what means are available to punish and guide countries that knowingly violate Union values. There had yet to be a realization in the EU that a country that had applied to be a member through a difficult process could consistently act against the values of the Union. Then change came in 2015, when the Law and Justice Party came to power in Poland. This made the use of Article 7 impossible because unanimity was required for decision-making and now Poland supported Hungary. The EU's 'nuclear weapon' lost its credibility as Slovenia and Bulgaria have since begun following the Hungarian and Polish model.

The Rule of Law Mechanism was launched after delays in 2021. Having learned from past experiences, the new mechanism only requires a majority decision by member states. The underlying idea is that, in the future, EU aid will be linked to whether the rule of law is properly executed. As welcome as this reform is, it may come too late, given how illiberals have prepared to circumvent the regulations. The Eastern member states have a



long experience since their time as a part of the Eastern bloc on how to overcome conditions and requirements coming from outside.

## A Learning Organism

**SYSTEMS EVOLVING** into authoritarianism are highly innovative and rely on a fairly adaptive administration, where time is a key factor. 12 years in Hungary and seven years in Poland were enough for the ruling elite to learn to navigate the EU jungle of rules. Leaders have regularly exchanged EU experiences and refined common strategies ahead of summits or EU rule of law discussions. Over the years, three ways have been developed to face and water down constraints. The first has been the use of two ways of speaking, an old survival strategy with Moscow. The idea has been to use the concepts of outside power to imply that ideological expectations placed on them are obeyed. At the same time, at home, the opposite is said to the home audience. Such developments were quite shrouded until 2015, but have since become increasingly brazen and have started openly mocking the West as the 2020s started. EU terms are used when communicating with the EU and issues with the rule of law are answered using EU concepts, but they are deliberately misunderstood, using technical legal details.

Another equally effective tool has proved to be an innovative method of misusing EU subsidies, again through legal gimmicks. The competition rule required by the EU, which is the principle of aid distribution, is formally complied with. At the same time, however, care is taken to ensure that, although the competition may be open, candidates approved by those in power always win. The rule of law is intended to get rid of corruption, but the problem is that forms of corruption are very flexible. It is difficult for outsiders to identify how this kind of fine-tuning works in different subsidized areas and levels of hierarchy.

The third most important way is to take advantage of different kinds of opportunities. One such has been the Covid-19 pandemic, which has provided an opportunity to further centralize power. During the covid-crisis, when civil liberties have been restricted even in stronger democracies, the EU member states have closed down, emphasizing nationalism and the interests of the nation-states.

## 3.4. What the Future Looks Like: A Year of Change 2022

**2022 WILL** most likely be a time of political upheaval. The war in Ukraine can have far-reaching consequences. Eastern member states have unanimously supported Ukraine's EU membership, but at the same time they are net recipients of EU aid. Finland and other net contributors would instead bear the costs of Ukraine's accession. Poland and Hungary have also received hundreds of thousands of Ukrainian refugees without a complaint, even though since 2015 they have consistently opposed EU refugee policy. The western part of Ukraine belonged to Poland and Transcarpathia to Hungary until World War II, so the countries treat Ukrainians more favorably than refugees from the Middle East or Africa.

Yet a crack in relations between Hungary and Poland was created during the war. Prime Minister Orbán, who has moved closer to the Putin regime since the occupation of Crimea, has been reluctant to sever ties with Rosatom, which is financing and building a nuclear power plant in Hungary, and to a Russian-owned Investment Bank still operating in Budapest. Hungary has been actively blocking Ukraine's NATO membership since 2018, due to the Ukrainian Language Act, which significantly undermined the cultural rights of the Hungarian minority. The position has not changed even during the 2022 war in Ukraine.

The Hungarian government has also refused to supply the West with weapons through Hungary and the state media has faithfully mirrored Russian propaganda accusing Ukraine of escalating the crisis. This attitude turned Poland against Hungary, which could have an impact on the rule of law debate in the EU, where the countries have traditionally defended each other. However, Ukraine is a non-negotiable issue for Poland, due to both historically close relations and the Russian war of invasion, which old bad memories in Poland: Anti-Russianism has always been a key building block of Polish identity.



In Europe, Poland and Hungary are particularly affected by the relations between Germany and France. Germany's attitude towards Poland and Hungary will change. Merkel spoke extensively and critically about the rule of law, but was unwilling to do anything about it. German car companies in particular received special treatment in Poland and Hungary: because they employed hundreds of thousands of people, their hopes for pay levels, corporate tax levels, trade union downsizing and infrastructure projects were listened to carefully. German companies have succeeded in gaining excellent conditions for competition in illiberal democracies and have great lobbying power in both Germany and the EU. Companies have been pleased with authoritarian regimes because power does not change hands very often, so there is no need to constantly renegotiate the status and needs of companies. In the new governing coalition, liberals are interested to continue relations with economic interests at the top, while the Greens are calling for a human rights-centered focus. Foreign Minister Baerbock has proved to be a staunch advocate of the rule of law, while the social democrats have to balance between their coalition partners. The new German Chancellor, Olaf Scholz, visited Warsaw in December 2021, where he seemed rather cautious and consensual. At the same time as the Polish Prime Minister, Morawiecki, used harsh language about the EU Rule of Law Mechanism.

Emmanuel Macron seeks to fill the power vacuum left by Merkel. France will hold the EU presidency in the first half of 2022, and at the same time Macron will be fighting for the continuation of his presidency. This could be decisive from a Polish and Hungarian perspective. For years, Macron has taken a tougher stance on the rule of law, and in the run-up to the EU presidency, this line is likely to become more severe. France is also pursuing the so-called social equity agenda,<sup>55</sup> which may very well lead to a clash with Poland and Hungary. For years, Macron has opposed the fact that migrant workers in the eastern member states have received lower wages than French workers, causing tensions between the French unions and the government. If successful, the agenda could have dramatic consequences: migrant workers will return to their home countries, easing labor shortages but inevitably raising wage levels. This worsens the competitiveness of Eastern European companies, after which foreign companies can move forward to countries with lower labor costs.

Still, Macron's meeting with the Visegrad countries in December 2021 made it clear that there is also an understanding regarding tougher migration policy and border control. This fits in well with the traditionally reluctant refugee policy in Eastern Europe. Confrontation with the EU will grow and the rule of law debate will intensify for at least the next six months. The biggest question affecting all countries is how the Rule of Law Mechanism, which was created in January 2021 but has not yet been initiated, will be implemented. Among other things, there is a discussion on how much to dare to cut subsidies so that anti-EU sentiment does not rise among the population. Actions against Poland have been lighter because of its size and relative importance, and the country is well aware of this. Failure to use the Rule of Law Mechanism, on the other hand, would further erode the already deteriorating prestige of the EU in the eyes of the citizens of these countries and also of other EU citizens.

Poland and Hungary have prepared for a counterattack. Since 2018, Orbán has been working to bring together the two party families in the European Parliament – Identity and Democracy and European Conservatives and Reformists. If successful, it would change the balance of power in Parliament, forming the third largest group. Negotiations in Warsaw in December 2021 involved parties from nine different countries and an agreement was close.<sup>56</sup> The initiative collapsed into internal conflicts between the Italian parties of Lega Nord led by Matteo Salvini and the Brothers of Italy led by Georgia Melon. Even if the unification does not succeed in 2022, the groups are likely to intensify their cooperation in the future and thus have a greater impact on EU policies.

The political trend in Poland and Hungary is spreading in Eastern Europe. Of the EU member states, this is most evident in Slovenia and Bulgaria, but there are also signs in Croatia. Hungary applied for and received

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<sup>55</sup> <https://www.elysee.fr/en/emmanuel-macron/four-years-working-for-europe#moduleAnchor-171537>.

<sup>56</sup> <https://www.pap.pl/aktualnosci/news,1018978,jaroslaw-kaczynski-musimy-przygotowac-inna-propozycje-dla-eu-ropy.html>.



a portfolio from the European Commissioner for Enlargement and has since pushed for membership of the weak democracies in the Western Balkans, in particular Serbia and Northern Macedonia. The aim is to further strengthen the group of EU-critical countries.

The connection between the Visegrad countries (Poland, Hungary, the Czechia and Slovakia) is intensified whenever they experience a regional threat. The strength of the union is that, when the situation arises, its member states are able to put aside their differences and work towards a common goal. One example was the border crisis between Poland and Belarus in the autumn of 2021. Poland did not want to join the EU's Frontex because it did not trust it, so the Visegrad countries promised troops if necessary. There is also a strong consensus among these countries in their oppose to EU migration policy. However, attitudes towards Russia divide the alliance. Czechia and Slovakia have opposed sanctions against Russia, and Orbán is quite close to Vladimir Putin. Poland, on the other hand, sees Russia as a security threat and is more connected to the Baltic countries and Romania on this issue, who share the same concern.

There is hope for improvement in 2022. Hungary holds parliamentary elections in April and Orbán's 12-year rule is now being challenged by a united opposition. If the change of power succeeds, Hungary's EU policy and the direction of the rule of law in the country will change in a single swoop. In Poland, the Law and Justice Party leader Kaczynski is retiring, which will trigger a power struggle over the direction of the party. There have been signs of this recently. For example, the president, Andrzej Duda, who comes from this party, recently stood up to oppose a law restricting media freedom advocated by the Law and Justice Party. This was unprecedented.



## 4.

# Challenges to the Rule of Law and Its Institutions in Finland

Pauliine Koskelo

## 4.1 Elements of the Rule of Law

**IN RECENT** years, there has been frequent talk about the rule of law, especially in Europe. This is due to the rise of authoritarian rule across the continent, and in particular the infiltration of the rule of law crisis into the EU, contrary to the fundamental values explicitly recognized by the Union. The rule of law is a pretty term, but what is it really about? The differences between the rule of law states and rogue states are blatantly visible today to anyone who follows current events. However, the rule of law is a doctrinally multifaceted and complex structure. As a state of reality, it is even more challenging to understand. We can pretty easily identify countries where the rule of law is clearly absent, but on the other hand, there does not seem to be a perfect rule of law anywhere either. The project is always more or less unfinished.

The rule of law is a big structure where everything is connected to everything. The load-bearing structures and many details together create a whole. Creating and maintaining the rule of law is a project that requires a great deal from the community. The rule of law has been understood at different times with different emphases. In a narrow sense, it may have meant mainly the principle of legality and the prohibition of arbitrariness. For example, the title of Article 2 of the Finnish Constitution is ‘democracy and the rule of law’, where the latter refers to the principle of legality mentioned in subsection 3. It states that ‘the exercise of official authority shall be governed by law’ and that ‘all public activities shall be subject to the strict observance of the law’.

The tripartite division of power and the independence of the judiciary are also widely recognized as fundamental features of the rule of law. In the Finnish constitution, both of these had already been explicitly enshrined in the 1919 form of government (Section 2) as well as in the current Constitution (Section 3). Protecting the fundamental rights of the individual is a key feature of the rule of law. However, the content of fundamental rights has expanded over time. Where the Magna Carta’s achievement was, in particular, the protection of the physical freedom of the individual from arbitrariness, the fundamental rights of the modern-day broadly cover the individual’s personal and political freedoms as well as social rights. In addition, fundamental and human rights determine not only what the state is not allowed to do, but also the duty that the state has to act to protect human rights. These duties to act also apply to safeguarding the rights of the individual in interpersonal relations.

The central role of fundamental rights is also reflected in the Finnish Constitution, where the first article guarantees the inviolability of human dignity, the freedom and rights of the individual, and the promotion of justice in society. With history as a teacher and the horrors of totalitarianism in mind, there is a growing awareness in Europe of how closely the rule of law, democracy and human rights/fundamental rights belong together and are practically intertwined – at least if the wellbeing of all groups within the population is a priority. For





example, the Treaty establishing the Council of Europe more than 70 years ago expressed this view. Democracy, human rights and the rule of law form a triad that stays upright only on all its pillars. **This cohesion also results in a high degree of difficulty for the project.**

It is essential that the current concept of the rule of law is not only formal but also substantive. The principle of legality includes requirements relating to the quality of law, as the case-law of the European Court of Human Rights makes clear. The tripartite division of power also includes the idea that the basis for legislative power is democratic. Effective access to independent courts is a prerequisite for the rule of law for individuals. It is closely linked to their role in ultimately protecting fundamental and human rights. The role of the courts in the rule of law is central, but at the same time judicial power is always reactive in nature. The courts cannot take action on their own initiative.

At their core, democracy and the rule of law are characterized by a dynamic of forces and counter-forces: Each government operates under the watchful eye of political opponents and the possibility to challenge their power. The second counterweight is based on the activity and watchdog role of community members, the media and NGOs. The counter-forces of knowledge, ideas, debate and criticism are available to ever wider range of actors. Powerful, diverse, and independent organizations are still important watchdogs of power.

The courts, in turn, protect all those countermeasures. In individual cases, all the exercise of power is counterbalanced by the courts, access to which ultimately safeguards the rule of law – provided that the independence of the courts themselves is guaranteed. Where that independence has been taken away, the courts are no longer part of the legal security machinery, but become extensions of the administration, and eventually part of the repressive machinery. It is central to ensure that the state is for the benefit of its citizens and not the other way around, that public service is for the benefit of the community and not for its own good, and that society acts in an orderly manner and as fairly as possible for all its members. This is not a banality, and while it is hardly ever a perfect reality, it is still central. Democracy or the rule of law cannot guarantee the virtue of those who hold power, but they do ensure that the misuse of power is not without consequences.

The rule of law is not without its shortcomings and problems. It is essential that the self-healing of the system is secured through forces and counter-forces. Grievances do not remain in the dark, but come to light so that they can be addressed. The opposite of the rule of law is a society where people are ruled through fear and through obscuring and distorting important things.<sup>57</sup> These are very powerful tools that work better the more widely they spread. In order to understand the value of the rule of law, it is important to look at its opposites.

However, as has been said, it is not just that we have either, full rule of law or the opposite. It is more of a larger scale. There are slight flaws, weaknesses, structural defects, facades – but there are also ruins. It is a question of to which extent, how strongly and how consistently the principles and conditions of the rule of law are being safeguarded – or violated. When the ‘risks’ to the use of power of the rule of law and democracy wish to be undermined, it is always done by crumbling and eliminating countermeasures. The temptation of this direction can be attractive for a person in power. Ways, possibilities and scale vary. The means for it are diverse.

The disintegration of counter-forces is not done only through structural means, like interfering in legislation or organizations, but also through shaping expectations – rhetoric and propaganda defined by the denigration of the rule of law and of actors. This in itself is done to dig the ground out from under normal and necessary countermeasures. Doing damage to trust and appreciation of the rule of law are often part of the strategy, and at the same time one sign of danger.

The current Hungarian prime minister said ten years ago that the tripartite division of power, ‘checks and

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<sup>57</sup> When writing this, for example, the news came out that in Turkey the president fired the head of the statistics department after the institution published information that annual inflation had risen to more than 36% (which is also an underestimation according to some.). *Le Monde* 29.1.2022; ‘Turquie: pour répondre à la hausse des prix, Erdogan limoge le chef de l’agence des statistiques’. Another news piece from the same day from Turkey tells of new restrictions on the media, whose ‘destructive’ impact on society must be minimized, according to the government. *Frankfurter Allgemeine Zeitung* 29.1.2022; ‘Erdogan setzt auf noch mehr Zensur’.



balances,' represents intellectual mediocrity for him. The Slovenian Prime Minister has profiled himself by publicly ridiculing journalists. In Poland, there has been derogatory criticism from the ruling party towards judges in general as well as individual judges. The rhetoric of right-wing populists in France and Germany includes despising the prevailing institutions and their actors. In this respect, President Trump's reign in the United States was its own story as well.

## 4.2 Challenges of the Rule of Law

### The Importance of a Parliamentary Majority

**THE RULE** of law does not work or depend on mere general principles – not even when they are enshrined in the constitution. The norms governing the rule of law, as well as the functioning of democracy, are at the level of parliamentary law and thus depend on a simple majority in parliament. This is important to keep in mind.

There is no independent court in Finland that would review the constitutionality of parliamentary laws in general. This evaluation takes place in Parliament and is limited to the preliminary supervision of draft laws. This ultimately relates to what kind of majority is needed to pass a law.

The exercise of budgetary power also depends on the parliamentary majority. Functions essential to the rule of law do not derive from the 'holy spirit' but require well-organized and well-resourced institutions. For these reasons, the foundation of the rule of law and its sustainability does not depend solely on what is proclaimed in the constitution. The way both legislative and budgetary powers are exercised is crucial. A shell created by the constitution requires strong and stable content to make the whole system sustainable and functional. Society's common commitment to the rule of law is therefore key.

### The Functioning of Democracy

**THE VULNERABILITY** of democracy and the rule of law has recently been revealed to us in shocking ways in both Europe and the United States. The triad of democracy, the rule of law, and human rights lies in the fact that they can only be achieved together. But this does not guarantee their permanence. Modern autocrats have come to power through elections. This suggests that the erosion of the rule of law usually stems from problems in the functioning of democracy.

I cannot claim to be an expert in all the factors behind what happens when an elected administration begins to dismantle and eliminate the checks that are essential to democracy and the rule of law in order to break free from their constraints. At the end of that road may be the end of the rule of law and a facade of democracy. We know countries where the structures of democracy and the rule of law are formally there, but broken down in substance. It is clear that protecting the rule of law requires maintaining a functioning democracy. The practice of democracy is demanding and cumbersome. European reality shows that the unrooted nature of democratic practices is undoubtedly a factor that increases the vulnerability of democracy as well as that of the rule of law. However, old and well-established democracies are not immune to setbacks either, as we have also seen recently.

The excessive internal division of society is certainly one danger that makes it difficult and impairs the functioning of democracy and its ability to produce the results that citizens can expect. Conflicts are part of society, but if they become so deep that things can no longer be resolved through a democratic system, democracy itself will be threatened. Escalation in the tones of societal discourse and political debate is a dangerous phenomenon in this respect. Democracy is a shared matter and requires, despite differences in opinions and local communities or conflicts of interests, the ability and the desire to work constructively in the whole community, on which democracy depends on.

Democracy suffers if there are too many 'forgotten' or 'detached' people in society and communal trust is



broken. If the value and legitimacy of common, rule of law norms, institutions and the actors responsible for them are no longer recognized, democracy and the rule of law are in danger. Social media has increased opportunities for freedom of expression, for better but also for worse. The latest data from a global tech giant suggests that algorithm-driven social media is not controlled anymore by those who run it. The complexity of algorithms leads to a state where even within an organization, their operation is no longer understood or controlled.<sup>58</sup>

We also know that there are external forces that exploit new forms of communication to provoke internal divisions and contradictions in our societies, as well as to manipulate the informational environment, political processes, and even elections. This kind of disruptive work, aimed at undermining and diminishing the functioning of democracy, directed from places where the fear of democracy is a fundamental motive, is a significant risk.

Democracy can be in danger if we have too many people that even scientifically validated knowledge no longer reaches at all. Protests by ‘corona deniers’ have recently been seen across democracies in the middle of the so-called information society. It seems to them that the current situation is in their minds the opposite of the rule of law, where all democratically created institutions work together against them – except that freedom to protest has not yet been taken away.

In Finland, democracy is more than a century old and has a solid foundation. A few decades ago, the constitution was reformed by moving from a presidential system to a purer parliamentarism, and by modifying and supplementing fundamental rights to a more modern form. In international comparison, the level of Finnish democracy is high and stable.<sup>59</sup> Dependence on governing coalitions and the ability of different parties to cooperate may have contributed to the fact that the kind of division of society that has become a problem in some other democracies, has been largely avoided, at least for the time being.

However, a well-known trend is the clear declining trend in electoral turnout in recent decades. In parliamentary elections, about 86% of men and 84% of women exercised their right to vote in the 1960s, but in the 2010s less than 70% of men and just over 70% of women exercised their right to vote. In the 2019 parliamentary elections, the situation improved only slightly. The trend itself is similar to that in many peer countries, but turnout in Finland is much lower than in other Nordic countries, for example. There are many reasons why one may not exercise their right to vote. However, a situation in which the ‘non-voters party’ is by far the largest party is worrying, if this is caused by a lost or abandoned opportunity for participation in democratic decision-making. Who knows how and why we can get non-voters to wake up and act.

It is also increasingly common in Finland for political actors and also public officials to be threatened, slandered and despised. Although public confidence in public institutions and government has remained at an internationally good level, the phenomenon is worrying. Reasonable criticism and verbal violence are different things. Where the former is a normal part of social life, the latter can impair people’s ability to act in politics and in managing affairs of the public sector. The same applies to journalists and researchers who receive inappropriate treatment, and more generally to those who engage in societal debate. Democracy lives on questioning and on objective criticism and debate, but the escalation of the tone in the exchange of views could jeopardize participation which is essential for democracy.

## Good Governance

**THE LEGALITY** of administrative actions is one of the traditional cornerstones of the rule of law. However, formal legality is not enough. That is why the importance of both the quality of the law and good governance are now emphasized. The latter is also expressly stated in the Finnish Constitution, according to which Article 21 (2) provides that ‘the guarantees of good governance shall be safeguarded by law’. This includes, in particular, ensuring a just administration. The quality requirements of the law are of particular importance when the law interferes

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<sup>58</sup> Le Monde 26.10.2021; ‘Comment l’algorithme de Facebook échappe au contrôle de ses créateurs’.

<sup>59</sup> See for example: The Economist Intelligence Unit, ‘Democracy Index Report 2020’.



with fundamental or human rights. Most of them are not absolute, but in the public interest or in order to protect the rights of others, it is permissible and necessary to restrict them in different situations by law and in a proportional way. Punctuality and precision, as well as guarantees of legal certainty, are essential in order to ensure predictability, non-arbitrariness and a thorough weighing of conflicting interests and acceptable compromises. In criminal law, where the abuse of power can have particularly severe consequences, the requirements for the quality of the law are also particularly emphasized.

At present, the erosion of the rule of law does not necessarily mean that the authorities will act completely illegally, but it is often the case that authorities are entrusted with powers that do not meet the requirements for the quality of the law mentioned above. At the same time, if retrospective control and prevention mechanisms are inadequate or weakened, the facade of the rule of law may be standing, but the content is broken.

In the light of experiences from other countries, it is typical that legislation that is problematic, dangerous or even destructive in terms of the rule of law is covered by a shroud of acceptance by arguing that various repressive measures are based on a well-established legitimate aim, such as combating terrorism, violence or incitement of hatred. Assessing the 'quality' of a law therefore always requires very careful scrutiny.

In a state governed properly by the rule of law, it is a priority to ensure in advance that people's rights are upheld, which is done by investing in the quality of legislation and governance. In the Finnish administrative tradition, legal protection and legal certainty are also increased by the fact that politically elected ministers responsible for certain areas do not usually make or instruct individual administrative decisions in their field. The responsibilities of the ministries are mainly at the general level, in the strategic development of the administrative sector, in the preparation of legislation, in budgetary matters and in the general direction of the administration. The relevant administrative authorities in each area are independently responsible for the application of the law in individual cases. Particularly in the context of criminal proceedings and administrative sanctions, but also in many other areas, it is important that political guidance does not extend into decisions on what kind of action to take in individual cases.

In many countries, one persistent scourge is corruption in its various forms. Fortunately, this is not the case in Finland. Maintaining a high standard of administrative and judicial culture in this respect is an important prerequisite for the functioning of the rule of law. A strong principle of transparency is an essential guarantee of good governance and the rule of law. The tendency to hide things is typical where the rule of law is weak. In Finland, the constitution safeguards the principle of transparency as a fundamental right. Documents and other records held by the authorities shall be in the public domain unless their disclosure is specifically restricted by law for special reasons. Everyone has the right to be informed of a public document and record (Section 12 (2) of the Finnish Constitution). The restrictions on the principle of transparency are thus determined by the Parliamentary Act, the interpretation and application of which is subject to judicial review. If the commitment of political leadership to good governance, strong transparency and the rule of law is weakened or broken, the matters described above may be at stake.

## Effectiveness of Legal Protection

**THE LESS** the law and the administration protect people's rights, the more legal protection depends on access to justice and their ability to act as a remedy. On the other hand, the core functions of the courts also include the exercise of criminal law, which is at the heart of repressive power; the courts are responsible for ensuring that all repressive measures remain within the limits set by law and the rights of the individual.

The effectiveness of legal protection requires the independence and impartiality of the courts, but also much more. Good organization, good procedures, adequate resources and highly trained staff are needed. Securing these is dependent on ordinary legislation and budgetary power. Therefore, the ability of the courts to act as a legal security mechanism is also at risk if the political leadership's commitment to the rule of law slips. Political authorities, on the other hand, need the courts as machinery of repression – and even more, when repression is



used more. The erosion of the rule of law does not, therefore, mean a general ‘downsizing’ or weakening of the judiciary, but a selective and instrumental policy aimed at ensuring the functioning of the courts in line with the needs and aspirations of those in power and undermining them as a check to the use of power.

It is important to emphasize that judicial policy can be bad for the rule of law, even if it does not deliberately intend to violate those principles. The consequences can be negative, even if the motives do not directly reveal it. There are examples in Finland’s recent past where ‘semi-accidentally’ – because of a lack of thinking or due to lacking strength of will – actions have been taken that have been problematic, but this has been purposefully ignored, or that necessary reforms have not been carried out. Preserving the rule of law and avoiding dangers requires great vigilance – even when the values of the rule of law are not called into question. This is a difficult sport that requires strong will and strong skills.<sup>60</sup> Damage can be caused both by what is done and by what is left undone.

## 4.3 The Independence and Quality of Justice

### Independence and Impartiality

**THE INDEPENDENCE** and impartiality of the judiciary are among the most important pillars of the rule of law. It is up to the democratically elected parliament to legislate, but it is ultimately up to the courts to apply them, which must be independent of the sources of legislation and impartial in relation to the parties of the case. The requirements apply to both individual judges and courts as institutions.<sup>61</sup> The aim is to ensure that the law is applied independently by the courts, without external pressures and motives not applicable to the case. Without these basic characteristics, the courts will not be able to fulfill their role as a kind of counterweight necessary in a state governed by the rule of law. Instead of counteracting, the courts then become extensions of the administration and instruments of the politically controlled exercise of power.

The requirement of independence is generally anchored in the constitution. According to it, authority is exercised by independent courts, the highest courts being the Supreme Court and the Supreme Administrative Court (section 3 (3) of the Finnish Constitution). Legal protection as a fundamental right requires access to a court or other independent judicial body (section 21 of the Finnish Constitution). The right to tenure, which is a guarantee of a judge’s independence, is guaranteed at the level of the constitution (Section 103 of the Finnish Constitution). A judge may not lose their office except by court order. A judge may not be transferred without their consent unless the transfer is due to a reorganization of the judiciary. The compulsory retirement age is laid down by law, as is the obligation to resign due to incapacity for work. Permanent judges are permanently protected by the right to tenure. It applies to temporary judges only for the duration of the appointment.

Dismissal of judges may be done due to impeachable offenses or other serious offenses as defined in the Penal Code.<sup>62</sup> In addition, a judge may be issued a warning under the Civil Service Act as a disciplinary sanction for breach of official duties.<sup>63</sup> The above shows that the Constitution is weak in terms of guarantees for the independence of judges and, in particular, the judiciary. Many essential aspects are left to non-constitutional legislation.

It is also important to emphasize that the legal guarantees of independence are a necessary safeguard, but

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<sup>60</sup> I have previously written on the subject in Finnish e.g. In Erkki Rintala’s anniversary book ‘Isännän ääni’ entitled ‘Oikeusvaltion säröjä ja huolenaiheita’, Telantum 2015.

<sup>61</sup> This is now explicitly stated in Chapter 1 of the Judicial Code, which states that courts (Article 3 (2)) and judges (Article 6 (1)) are independent in the exercise of their judicial power.

<sup>62</sup> In 2008, the government proposed a significant extension of the power of judges to be removed from office (Governmental proposal 33/2008 vp). However, Parliament rejected the proposal in accordance with the opinion of the Constitutional Committee (Constitutional Committee of the Finnish Parliament 36/2008 vp).

<sup>63</sup> In an international comparison, the disciplinary system for judges in Finland is narrower than in several other countries.



that alone does not guarantee the practical independence of judges. In addition to the legal safeguard, it requires a strong professional ethics and legal culture.

## Structures and Procedures

**IN COURTS**, both the organization and the procedures are bound to the law. All matters within their competence must be dealt with in a statutory organization and in accordance with legal procedures. The courts do not have the autonomy to decide in which framework they operate, what matters they deal with or in what kind of composition or through what kind of procedure matters are decided.

This inevitably leads to, notwithstanding the independence of their decision-making function, that courts are bound by the organizational and procedural framework laid down in the law. The separation of ordinary courts, administrative courts and specialized courts into separate organizations is one way of both defining the framework for the functioning of courts and guiding the allocation of judicial resources. This, in turn, has an impact on the implementation of legal protection, and this impact can be very meaningful for the quality of legal protection.

The same applies to the regulation of processes and what kind of configurations are competent to make decisions. Legislation on them has a significant impact on the allocation of resources and how guarantees of the quality of legal protection are defined. Resources and processes determine the level and implementation of legal protection in different matters. Too much emphasis on one part of the machine means less emphasis somewhere else. The independence of the judiciary does not therefore mean that there is no room for a selective policy of legal protection. The 'sectoral division' of courts into general and administrative courts, enshrined in the Constitution, and the possibility of setting up special courts contribute to these possibilities. Separate 'compartments' created by legislation for different groups of subjects facilitate the allocation of limited resources as desired by the government. At the same time, the quality of legal protection can vary in a way that the courts themselves cannot help. This is when certain things get better treatment than others.

The regulation of court proceedings can also produce mixed results in terms of the quality of legal protection. Statutory procedures may be appropriate for their purpose, but they may also be too much or too little. There are already examples of this in Finland. The old, written appellate procedure was clearly not enough in terms of modern requirements for legal protection, but the necessary process reform in itself in the late 1990s was first carried out lightly and without any intention of committing the resources that the solution required. The consequences could only be bad, and they were, as processing times were unreasonably long. Repairs towards a more sensible direction take a lot of time. The process of correcting procedural differences that are difficult to justify between general law and administrative law has also been extremely slow and is still ongoing.

The independence of the judiciary alone is therefore not enough to ensure that the various needs of legal protection can be put into practice as intended. Matters, which are subject to parliamentary law and that define the organizational basis and procedures that are to be followed, greatly affect the effectiveness of legal protection. This applies both to legal protection in general and to its level in different kinds of cases. A lot of vigilance is necessary regarding how legislative power is exercised or not exercised in matters concerning the functioning of the courts.



## Human Resources

**THE RECRUITMENT** and appointment of courts is naturally central to both the independence of the judiciary and the quality of legal protection. The current system in Finland for appointing permanent judges is quite good. However, it is essentially dependent on ordinary parliamentary law and established practice. The Constitution only states that the power to appoint judges rests with the President of the Republic and that the procedure is laid down by law (section 102 of the Finnish Constitution).

It is essential that the appointment of judges does not depend on political ties or relations, but on professional merit. An important guarantee in this respect is that the application process is open and public and that appointments are prepared in non-governmental institutions. For this purpose, Finland has had a special Judicial Selection Committee since 2000, which is independent in its composition and operations.<sup>64</sup> The panel consists mainly of judges serving in different courts. In addition, it has representatives appointed by the Public Prosecutor's Office, the Finnish Bar Association and the faculties of law of the universities. The Board is chaired by a member of the Supreme Court.

The Committee is responsible for assessing the candidates on the basis of the opinions issued by the court in question and makes a proposal to the government as to who should be appointed to the open position. In the case of Chief Judges, the assessment and nomination of the Judicial Selection Committee are based on the opinions of the Supreme Court. Only one person is nominated for the position by the Committee at a time. Therefore, it is not a 'shortlist' of several leading candidates, leaving the final choice of the person to be nominated to the President to political bodies.

Members of higher courts and appointees presented to the President are carried out by the court in question. The Judicial Selection Committee does not handle these nominations. Although nomination cases are presented to the President from the Ministry of Justice, they proceed practically exactly in accordance with the position of the Judicial Selection Committee or the higher courts. Judge appointments are thus prepared and made without the influence of political parties.

However, as has been stated, this system, which has worked well so far, depends on ordinary parliamentary law and established practice. Should the commitment to the independence of judges and the rule of law at the political level erode, the appointment system could be one of the points of danger. Another kind of chronic problem is related to the fact that many courts in Finland have had to resort to a temporary judiciary for a long time. This is largely due to ongoing financial problems year after year. In particular, the largest courts with the most significant and important cases, such as the Helsinki District Court, the Court of Appeal and the Administrative Court, have been overly dependent on yearly funding, leading to temporary job postings. Such a long-standing problem does not meet the requirements of the rule of law. It is particularly unfortunate that even at the highest level of administrative law, the Supreme Administrative Court, the use of 'short-term judges' has been regularly used to manage resource needs. This fundamentally questionable situation is largely due to the fact that structures and policies have not been reformed in order for the highest level to be the actual instance of adjudication.

The professionalism of judicial staff, in addition to their independence, is crucial for the quality of judicial protection. This applies both to judges and to the rapporteurs and assistants involved in the preparation of cases. Judicial work is becoming more and more demanding, especially because the modern legal system is a layered and complex entity. The substantive and procedural challenges in applying the law are grand. It is also important to organize the professional training of judges in such a way that the system does not jeopardize, but actually supports and maintains the intellectual independence of judges.

The establishment of the Judicial Training Board (in 2017) was a step forward in this regard. This board, like the Judicial Selection Committee, is independent in its composition and operation.<sup>65</sup> Its task is to plan training

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<sup>64</sup> The provisions concerning the Judicial Selection Committee are currently in Chapter 20 of the Code of Judicial Procedure.

<sup>65</sup> The provisions concerning the Judicial Training Board are contained in Chapter 21 of the Code of Judicial Procedure.



in cooperation with the courts and now also with the National Courts Administration. The task covers the planning of court traineeships and the design and selection of trainees, as well as the preparation of retraining for judges. The legal basis for the Judicial Training Board is similar to that for the Judicial Selection Committee. The existence of both, their composition rules and their powers and duties depend on the ordinary law derived from Parliament. The Constitution does not explicitly guarantee their permanence.

Scarcity of resources is often the problem of courts, but undermining their independence can also be done by doing the opposite. ‘Court packing’, which means increasing the number of members of the court, especially the Supreme Court, and filling new positions with people representing policy desired by the government, is this kind of practice. This can be a way of circumventing the right of judges to remain in office by changing the ‘power relations’ within the court. At the same time, the success of such intentions naturally requires that the government in one way or another ensure that it has the opportunity to exercise decisive influence over the election and appointment of judges.

In Finland, the constitution does not specify the size of the higher courts. It only stipulates that the Supreme Court and the Supreme Administrative Court must have ‘the necessary number of members’ (Section 100 of the Finnish Constitution). The final composition shall be five members, unless otherwise provided by law. In addition, the Constitution allows the use of temporary judges also in the highest courts and does not explicitly name any restrictions.

## The Remuneration System for Judges

**REMUNERATION AND** other conditions of employment are also relevant to the independence of judges. This is not just about the level of pay, but about the fundamentals of the pay system, as pay changes can be used as a means of exerting pressure on political power to influence the way justice is dealt.

In Finland, the presidents and members of the highest courts have a so-called statutory salary. Remuneration is therefore based on an act by Parliament. The purpose of this system is to reduce the dependence of wage levels on the government. Salary adjustments are made in a procedure that requires changes to be made to the development of the remuneration of other senior government officials. The remuneration of lower court judges, on the other hand, is currently based on a system of collective bargaining, in which the state’s duty as an employer belongs to the government. The positions of chief judges of the lower courts are employer positions and their remuneration is determined by the Ministry of Justice.

The statutory salary contains that members of the higher courts do not have the right to strike. Judges subject to the system of collective bargaining have the right to strike in principle. However, using this right as they work in one of the state’s core functions is problematic and there is a high threshold in practice to using this right. For example, the Finnish Association of Judges has assumed that the remuneration of all judges should move to a statutory salary system in order to strengthen independence.<sup>66</sup> The Consultative Council of European Judges (CCJE) of the Council of Europe has considered that the remuneration of judges should be based on the law.<sup>67</sup>

## The Judiciary and Finance

**THE JUDICIARY’S** ability to perform depends to a large extent on the resources available and their allocation. Budgetary power lies with the government and parliament. The government is responsible for drafting the state budget. Parliament holds decision-making powers. The judiciary is also financially dependent on the annual

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<sup>66</sup> The issue was most recently clarified in the report of the Ministry of Justice OM 2020: 16 ‘Tuomioistuinten tuomarien ja lakimiesten palkkausjärjestelmän kehittäminen’ set up by a working group set up by the Ministry of Justice.

<sup>67</sup> CCJE Opinion No. 1 (2002) on standards concerning the independence of the judiciary and the irremovability of judges, paragraph 61.





budgetary process and its outcome. With regard to the financing of the judiciary, the Ministry of Justice is responsible for preparing the budget.

There are separate parts in the state budget for the appropriations of the Supreme Court and the Supreme Administrative Court. The resources for the higher courts are thus ultimately at the discretion of Parliament. There is one common part in the budget for the appropriations of the other courts. The budgetary statement includes an estimate of the distribution of that appropriation between the needs of the various courts.

The Ministry of Justice also had the task of distributing the resources allocated in the budget among the courts for a long time. Similarly, the Ministry of Justice was responsible for directing the performance of all courts. These central administrative functions of the courts were separated from the government and transferred to an independent judiciary administration only a couple of years ago. The National Courts Administration became operational in 2020.

In this regard, Finland cannot be proud of its achievements in creating institutions for the rule of law. It took a really long time to reform the judiciary and set up an independent judicial office separate from the ministry. The central role of the Ministry of Justice in the government's budget preparation for the financing of the judiciary remains unchanged. The task of the National Courts Administration is to prepare a proposal for the Ministry of Justice on the budget of the courts. In Finland, the insufficient level of basic funding for courts is a problem that seems to have become chronic. The establishment of the National Courts Administration will not eliminate this problem. In addition, the adequacy of the judiciary's own resources for joint tasks is a challenge.

A lack of resources undermines the capacity of the judiciary and the level of legal protection. Prolonged processing times in themselves reduce the importance and effectiveness of the provided solutions. It is telling that for 2022, the National Courts Administration said that it had proposed an increase of 19.5 million euros for the staffing costs of the judiciary, as well as additional funding of more than 11 million euros for ICT costs. The additional funding proposed by the Ministry of Justice totaled 10 million euros. In the government's budgetary negotiations, it was decided to propose an increase of only 4.5 million euros to the judiciary.<sup>68</sup>

At the scale of public finances, the shortfall in core funding does not come down to huge sums of money. All the more so, the continuing grievance from year to year and from government to government points to a contradiction between the rhetoric of the rule of law and politics in practice. It is not just a question of the resources of the courts, but also of the development of the judiciary and the compatibility of the given resources and need to develop. If the need for resources can be reduced through reform measures without compromising the level of legal protection, the situation is decisively different from the ongoing underfunding of the current system, which is a problem in Finland. In this respect, Finland unfortunately stands out from the other Nordic countries.

Practical vulnerabilities in the rule of law emerged in an amazing way in 2015, when the Ministry of Justice unexpectedly presented a plan for a reform in the management of performance goals of the judiciary. Its purpose was stated to be (i) to combine the objectives arising from the government program, the ministry, and the Courts Administration's core mission into a balanced whole; (ii) to support inter administrative goals; (iii) to combine operational and financial objectives and resources. This management of performance goals was presented as an 'instrument for managing interaction and the grey area between the government program, the ministry level and the Courts Administration level'. Strengthening of the management strategy was related to the connection with the objectives of the government program and to the 'political-administrative operating environment' that determines the strategy of the administrative sector.

In short, the plans did not include a trace that their authors had an understanding of the constitutional status of the courts and their role in upholding the rule of law.

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<sup>68</sup> Press release by the National Courts Administration on the state draft budget 27.9.2021.



**I had to remind the ministry of the following things, among others:**

- The courts are not ‘agencies of the Ministry of Justice’ but judicial bodies independent of executive power.
- There is no grey area between the ministry and the Courts Administration that can be changed by the government program, but only a dividing line according to the constitutional division of power.
- The courts are not part of the ‘political-administrative environment’ but, on the contrary, their constitutional function and functioning as judicial bodies are separate and independent from the political-administrative environment.
- The constitutional duty of the executive and legislative branches is to build and maintain a system of judicial power that has the operational capacity to provide members of society with legal protection that meets basic and human rights requirements. On the other hand, the instrumentalization of the judiciary for the political and strategic purposes of government is not a practice that goes along with the rule of law.
- The administration of justice by the courts is governed by law, and it happens within the limits set by the Constitution and the fundamental and human rights it guarantees.
- For example, the government program or strategies derived from it do not as such have a controlling effect on the operation of the courts.

**THE ATTEMPT** to make the courts, by the management of performance goals, an extension of the administration was clearly unconstitutional. This incomprehensible episode tells us that maintaining the rule of law can face even surprising challenges. At the same time, it shows how necessary it was to finally bring about a reform of the central administration of the courts.

These days central administrative functions concerning the management of performance goals, resource allocation and development of the courts have thus been separated from the Ministry of Justice to the Courts Administration, which is functionally independent.<sup>69</sup> The Board of the Administration is appointed by the government, but must be composed of members appointed by the various courts. The Board decides, among other things, on the budget proposals for the courts and the Courts Administration that are given to the Ministry of Justice, the distribution of appropriations to the courts in accordance with the approved state budget, as far as the budget is not allocated directly to the court, as well as the creation, abolition and transfer of judges outside of the highest courts. The Board also appoints the Executive Director of the Administration.

There are no constitutional guarantees for an independent central administration of courts. The existence, organizational basis and tasks of the National Courts Administration depends on the Parliament, and its resources depend on the budgetary authority of Parliament.

## Monitoring Fundamental and Human Rights

**ESSENTIAL FUNCTIONS** of the courts include taking fundamental and human rights into consideration when interpreting the law. Significant progress has been made in Finnish law in recent decades. The specificities and weaknesses of the constitutional review of national legislation have been addressed separately in a previous Libera publication, among other places.

The current system of control is characterized by the central role of the Parliament’s own body, the Constitutional Law Committee, in assessing the content and required majorities of the enactment of bills, and very limited powers are entrusted to independent courts. The latter is limited to giving priority to the Constitution in an individual case under consideration, if a provision of the law otherwise applicable would be manifestly in conflict with the Constitution (Section 106 of the Finnish Constitution). In the conversation around this issue, and especially in the statements of political actors, the current situation is often defended by presenting ex-ante and

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<sup>69</sup> The provisions concerning the National Courts Administration are in Chapter 19a of the Code of Judicial Procedure.



ex-post controls as alternatives and stating that ex-ante controls are better. Of course, it is not a question of developing ex-post controls as an alternative to ex-ante controls at the legislative stage. Statements like this are more of an attempt to avoid real debate and reflection.

The capacity of the Constitutional Law Committee depends, among other things, on the power relations in Parliament, the stability of the special operating culture required for this special task, the views of external ad hoc experts and the weight given to them in a process, where the public is only involved after the process. However, the vulnerabilities in the system do not yet appear to have increased interest in considering the need for reforms. The question of the external credibility of the system does not seem to be in question either. The current system also excludes Finland from regular international cooperation and dialogue between the courts responsible for constitutional review.

If the quality of draft laws with regard to fundamental and human rights deteriorates and the role of the Constitutional Law Committee in ex-ante control also deteriorates, the ex-post control that belongs to the courts will be emphasized. Then, its current limitations will also be emphasized. Courts can only intervene in clear situations of conflict and only on a case-by-case basis. There are no guarantees for remedial action in other similar cases.

## Europe

**THE MOST** acute concerns of the rule of law at the moment regarding Finland also concern the European Union. The efforts of the governments of certain Member States to dismantle the rule of law are not just a matter for those Member States. They are a problem for the EU as a whole and for all members, because a common rule of law requires an equal rule of law in every Member State. If the rule of law fails somewhere, there are no guarantees that EU law will be applied correctly. As the Union builds on its legal system, it erodes if the implementation and application of Union law cannot be relied on.

Furthermore, it is unsustainable for EU common funds to support governments that fundamentally violate commonly agreed fundamental principles of the Union. Enjoying the benefits despite the rejection of those commitments cannot be acceptable. This also undermines the very existence of the Union. Other serious grievances also follow. For example, a European arrest warrant is a necessary counterpart to keeping borders open – even for those who have committed serious crimes. If the arrest warrant is put into effect, even though there are no longer any guarantees of a fair trial in the country of destination, it will in a way become part of the violations of the rule of law that result from it. If, on the other hand, the execution of the arrest warrant is abandoned because the suspect is no longer guaranteed a fair trial, another problem arises: a Member State that refuses extradition may become a safe haven for quite serious offenders, except if it – departing from the purpose of the system – begins prosecuting for crimes that have been conducted in another Member State. Both scenarios are bad. The Union cannot act as it should if the rule of law is not met throughout the Union. The worst thing is that the Union is too ill-equipped to deal with these kinds of systematic violations of the rule of law. The tool kit to respond is insufficient. It does not include the possibility of expelling a Member State from the Union at all. The Member States committed to the rule of law are becoming trapped here. This is a grim and fatal situation. The only way out would be for the Member States committed to the rule of law to leave the Union themselves and establish a new, more secure community. This does not seem like a realistic vision.

It is to be hoped that a corrective movement – despite all the obstacles – would take place led by the people of the Member States in question. In the long term, however, the Union cannot continue without correcting the current shortcomings in its legal basis. The rule of law cannot exist in only some parts of the Union. In Poland, the Constitutional Court, which has been taken over by the government, recently made it clear that the equal application of Union law in Poland is no longer possible. A fundamental conflict is now openly on the table.

Some have equated this situation with the problem with last year's ruling by the German Federal Constitutional Court on the European Central Bank's PSPP program (= program for the purchase of public sector debt



securities). However, the comparison is not perfect, as the problem at the heart of the solutions is not the same. The Polish Constitutional Court rejects the principle of the primacy of Union law. The German Constitutional Court, on the other hand, has not ruled against the principle of primacy, but concerns the limits of the powers conferred on the Union and the monitoring of compliance with them, which, according to Karlsruhe, has not been adequately addressed by the European Court. According to the Poles, the European Court of Justice has done too much, while according to the Germans, it has done too little.

It should not be unusual for the limits and content of European Union law to be critically assessed. However, it is serious that this is happening in order to break away from the rule of law. Places breaking away from the rule of law within the EU are a deep problem. Surrender cannot be an option if the foundations of the Union are to be preserved.

## Summary

**THE ONGOING** war of aggression against Ukraine is a terrible tragedy for its victims, but at the same time it is also a story about the importance of democracy and the rule of law. The crisis caused by the pandemic has also highlighted the importance of the rule of law and good governance, even in Finland.

In Finland, the Constitution contains comprehensive fundamental rights. In other respects, it safeguards the rule of law only with few and general provisions. The independence of judges and courts and the basic structure of the judiciary are enshrined in the Constitution. However, guarantees of the independence of the courts, such as key organizational arrangements, depend on ordinary legislation and thus on a simple parliamentary majority. Similarly, the financing of the judiciary depends on the budgetary authority of the parliament. The real status and capacity of the essential institutions of the rule of law are therefore not immune to possible weakening if political power changes in a way that is detrimental to the rule of law. It would be good to find the will to strengthen the constitutional protection of the rule of law just in case. Experience shows that the rule of law can be harmed or sought to be harmed not only by 'devils' who know what they are doing, but also by 'fools' who do not realize what they are doing, or by 'mentally lazy people' who do not have the energy to think about where to go.



5.

# The Dictator's Checklist

Tero Lundstedt

**IN WESTERN** countries, authoritarian regimes are often underestimated, which is a mistake. Authoritarian systems, or systems aspiring to be authoritarian, are in fact very adaptable and inventive. They are able to anticipate threats to their power and to cooperate effectively with other dictatorial regimes to combat threats.

Democracies are different and each system has its own kind of institutional protection structures. However, there is one built-in weakness in every democracy: with elections that are free, fair and open to all, it is entirely possible that undemocratic political actors can win a majority. Moreover, democracies are based on the belief that actors of all kinds are willing to respect the framework of democratic institutions and are willing to risk losing their power in fair elections in the future.

Unfortunately, several examples from recent history in Europe show that it is naive to trust this. Based on the examples in this report, I will now present a fourteen-point 'Dictator's Checklist', following the steps of which almost any party or electoral bloc with a majority in parliament can strive to ensure the continuity and growth of its power. I pay special attention to Finland's possible weaknesses.

## 1. Reduce factors limiting political power, declare a state of emergency if necessary

**THE FIRST** task of one who wants to become a dictator is to reduce the factors that limit political power in order to shape society in the desired direction. In a liberal democracy, power is limited by the tripartite division of power, the general principle of legality, and a constitution that protects individual freedoms. The tripartite division of powers means that executive, legislative and judicial powers are vested in different bodies. The principle of legality means that all public activity must be based on the law, and that authorities must not act against the law or beyond the limits of the law. There are several different supervisory bodies, and ultimately supervision is up to the independent judiciary.

Constitutional change is the fastest and easiest way to build a dictatorship. This can be used to strip away the limits of the president's term of office (as was done in Belarus in 2004) or even all the limits to power. However, changing the constitution is often difficult, requiring super-majorities. It succeeds mainly in the most established dictatorships, such as Turkey (2017) and Russia (2020).

**THE HUNGARIAN** example is illustrative. After winning the 2010 parliamentary elections, Orbán's party Fidesz immediately embarked on efforts to amend the constitution, with the main goal of concentrating power and securing election victories.

However, amending the constitution was difficult and gained resistance from the EU, among others, so Fidesz came up with another way to bypass the constitutional constraints. In 2015, it declared an 'immigration emergency' under the refugee crisis. Emergency legislation gave the government emergency powers for six months. The declaration has been issued every six months since then and the state of emergency is still in place, despite the fact that almost no immigrants entered Hungary before the war in Ukraine. The state of emergency gives the government the right, among others, not to grant refugee status, in violation of the country's EU obligations.<sup>70</sup>

Legislation contrary to the rule of law is often sought to justify measures in response to a universally recognized legitimate aim, such as the fight against terrorism or the protection of national security.

In March 2020, Orbán did exactly what many political scientists had feared: emergency conditions were declared in Hungary, during which all power was concentrated on the prime minister. Although the exceptional conditions ended mainly in June 2020, during the emergency Orbán, among other things, denied the opposition their economic support. With the funds, he bought one of the last independent media houses in Hungary, and the rest were channeled into recovery from the pandemic.<sup>71</sup>

Immediately after the end of the emergency, the Supreme Medical Authority appointed by the government recommended the declaration of a 'medical emergency,' which took place in June 2020. Under the emergency legislation, the government continues to exercise wide emergency powers and prohibits, among other things, public gatherings of more than one person.<sup>72</sup>

The mandate lasts 90 days at a time and has been renewed by Parliament every three months until the beginning of 2022. According to researcher Gábor Mészáros, Hungary became a dictatorship in 2020, when Fidesz repeatedly acted in violation of the country's constitution on dubious grounds.<sup>73</sup>

In Finland, the constitution comprehensively protects fundamental rights and it has been difficult to change it. At the same time, however, the rule of law is only incompletely safeguarded. The guarantees and funding of the independence of the judiciary depend on ordinary legislation – that is, a simple parliamentary majority.

The constitution is not comprehensive in terms of guarantees for the independence of judges and especially that of courts. Much of the essentials are left to ordinary legislation. The system for appointing judges is good, but it also depends on ordinary law and established practice. The system could be one of the key places of danger, as reminded, among others, by the President of the Supreme Administrative Court, Kari Kuusiniemi.<sup>74</sup>

<sup>70</sup> G. Mészáros, Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception, Working Papers, MWP 2022/01 Max Weber Programme.

<sup>71</sup> Vox, 15.4.2020.

<sup>72</sup> K. Kovács, Hungary and the Pandemic: A Pretext for Expanding Power, Verfassungsblog 11.3.2021.

<sup>73</sup> Mészáros 2022.

<sup>74</sup> Helsingin Sanomat, 6.4.2021.



## 2. Attack Democratic Checks and Balances

**IF A CONSTITUTIONAL** change is not yet realistic, the next most effective way is to occupy the courts, especially the Constitutional Court. An independent judiciary ensures that those in power are also bound by the law. Citizens can depend on the courts if the state has acted unlawfully against them. The government, on the other hand, cannot influence court decisions.

An undemocratic actor often seeks to influence the composition of the courts. The judiciary can be made more loyal by increasing the number of judges and forcing previous judges to resign by lowering the retirement age. In Belarus, the President immediately secured himself the right to appoint almost all the country's judges.

In Poland, on the other hand, a 'Judicial Disciplinary Board' was established in 2017 within the Supreme Court, with the aim of 'improving the Polish judicial culture'. The members of the Board are appointed by the ruling party. In July 2021, the European Court of Justice ruled that the Disciplinary Board was not in line with EU law, but a body harnessed for political purposes to change judicial decisions.<sup>75</sup>

In any case, international institutions and agreements can become problems, and in addition to the EU, for example, the Council of Europe and the European Court of Human Rights may challenge the dictator. However, these processes are slow and can be further slowed down by a determined dictator. The exception to this is the rapid expulsion of Russia from the Council of Europe in March 2022.<sup>76</sup>

If there is a constitutional court in the target country, its occupation is mandatory. Constitutionalism is the cornerstone of the rule of law that ensures that laws passed in parliament are according to the constitution. If actors loyal to the government interpret the Constitution, the government's hands will be freed to make changes that are unconstitutional.

In Finland, the constitution does not specify the size of the higher courts, so increasing the number of judges would make it possible to make the composition of the courts more favorable. We also do not have an independent court to review the constitutionality of laws, but this too takes place in Parliament and is limited to ex-ante review.

## 3. Hijack the Prosecutor's Office and Politicize the Role of the Public Prosecutor

**IN ADDITION** to the courts, the prosecutor's office also plays a key role in dismantling the rule of law. The dictator should start from the top and ensure a loyal person to the role of the chief public prosecutor in the country. If this succeeds, the power elite will continue to be above the law, as the chief public prosecutor will not prosecute them. Fictitious charges can also be used to cut opposition members out of the election.

Corruption among the ruling elite will now grow rapidly to unprecedented proportions. For example, Hungary's ranking in the Transparency Index, which measures corruption, has stumbled into last place in the EU since 2010. Opposition leader Peter Marki-Zay has vowed to break up Hungary's corruption structure by dismissing political appointments made by Fidesz. Frightened by this, in November 2021, Fidesz enacted a law that would allow the prosecutor to be replaced in the future only by a 2/3 super-majority in parliament.<sup>77</sup> There are no special weaknesses in Finland in this matter. According to the Constitution, the public prosecutor is appointed by the President, and the deputy public prosecutor by the President at the proposal of the government.

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<sup>75</sup> Helsingin Sanomat, 23.10.2021.

<sup>76</sup> <https://yle.fi/uutiset/3-12043017/64-3-62609>.

<sup>77</sup> <https://www.bloomberg.com/news/articles/2021-11-09/orban-to-lock-in-prosecutor-ally-before-close-hungarian-election>.



#### **4. Make the Maximum Number of Political Appointments and Occupy Key Positions in Society With Loyalists**

**A CONSISTENT** destroyer of democracy strives to make as many political appointments as the system allows. Creating divisions in society is desirable. Compromise candidates will be discarded and only the candidates that create the most division will be accepted. The polarization of social institutions is reflected in the intensifying social debate. Social media reinforces the phenomenon and channels dissatisfaction. As a by-product of the actions outlined above, people's confidence in the institutions of democracy and the justice of the system is beginning to weaken, which is the intention. The counter-forces of the autocracy are invariably also attacked at the level of shaping opinions, and all watchdogs of power, starting from the independent media, are quickly on the line of fire of a dictator or an aspiring one. The denigration of the rule of law and democratic institutions and actors makes opposition petitions to defend democracy less effective.

#### **5. Use the Language of Democracy to Justify Actions That Undermine Democracy**

**THE PEOPLE** know what is right. A decent dictator appeals to the will of the people and, in particular, to the principle majority rule, which can undermine the division of power and challenge the Western notion of the rule of law. As the majority of parliament elected by the people must have supreme power in all aspects of social life, this includes the control of the judiciary. This logic has been pursued in Poland, among other places.

If Parliament is not yet fully under control, a popular leader will often try to bypass it with a referendum. There are several examples, but Lukašenka of Belarus has probably been the most diligent abuser of referendums. The most recent, fourth referendum, to extend his terms was held in February 2022. When the dictator is able to decide when and on what subject a referendum will be held, and when they control both the media field and the counting of votes, it is easy to confirm the outcome of the referendum in advance.

#### **6. 'Majority First', so Ignore the Rights of Minorities and Define Civil Liberties Through the Interests of the Majority**

**RELYING ON** the principle of majority rule, for example, the sexual orientation of a person can be made – following the Russian model – a political issue that must be controlled according to the position of the majority. Sexual minorities are always minorities. In Hungary, for example, in June 2021, a law restricting the rights of sexual minorities was enacted, which was widely condemned abroad.<sup>78</sup>

A reduction in human rights and civil liberties is always one of the first steps in starting to establish a dictatorship. This is repeated from country to country and from one example to another, and it is because democracy, human rights and the rule of law form a whole that can only be achieved together. Weakening one weakens the others at the same time. In addition, the persecution of minorities can once again create more social divisions and us vs them settings in society, which are often beneficial to the dictator.

#### **7. The System Must Look Democratic, so Elections Must Be Held, but Victory Must Be Certain**

**IN LIBERAL** democracies, members of parliament are elected in fair and free multi-party elections. As it is difficult to guarantee a fair election result in advance, a smart dictator will take active steps to ensure the dishonesty of the next election as soon as they come to power.

Effective means include excluding the most notable competitors from the election, harnessing the mainstream media as a propaganda tool, and putting pressure on state employees to vote for the ruling party. After winning elections in 2010, Fidesz immediately amended Hungary's electoral laws. Indeed, in the next

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<sup>78</sup> <https://www.libera.fi/2021/06/18/unkarin-demokratian-lipsuminen-on-otettava-varoittavana-esimerkkina/>.





parliamentary elections in 2014 and 2018, the party won the super-majority needed to amend the constitution. OSCE election observers considered the election unfair due to changes in the electoral law.<sup>79</sup> If nothing else helps, you can always resort to electoral fraud. Effective means include influencing candidates by threatening or obstructing their candidacy through legal or administrative terms. Media control can tarnish the opposition and favor ruling parties. Voters can be bribed, pressured or administratively denied the right to vote. However, the most effective way of all is to tamper with the votes. In ballot voting, votes can be removed or increased physically in the ballot box, in electronic voting this can be done virtually. However, you usually get caught conducting electoral fraud, which destroys the legitimacy gained from imitating democracy. Therefore, it should be the last resort.

## **8. Seal New Power Structures by Controlling Citizens' Access to Information and by Suppressing Freedom of Expression**

**IN EVERY** long-standing non-democracy, political elites have quickly succeeded in seizing full control of the media maintained by public funds. In a free society, civil society and the media actively monitor the use of political power. These countermeasures are ultimately protected by an independent judicial system. However, if the dictator has already overthrown the independence of the judiciary, these guard dogs will lose security against the abuse of power and the government may begin to silence critical voices. In Poland, for example, the Law and Justice Party immediately took over the management of the Polish Broadcasting Corporation.<sup>80</sup> In Finland, YLE would be a logical target. It would allow the ruling political bloc to seek to control the media space and, accordingly, prevent the opposition from gaining a voice in the state media.

It is also worthwhile for a novice dictator to try to take over as many private media companies as possible, as has been done successfully in Hungary. In 2019, in a single day, 476 previously privately owned media outlets in the country moved to a foundation close to the government.<sup>81</sup> In the World Press Freedom Index, Belarus, Russia and Turkey are among the worst 10% of countries in the world, while Hungary and Poland, along with Bulgaria, are the weakest performers in the EU.<sup>82</sup>

Finland is not a model country for freedom of expression either, as in the 21st century we have received as many as 18 damning convictions from the European Court of Human Rights for violating the article on freedom of speech in the European Convention on Human Rights.<sup>83</sup>

## **9. Strictly Supervise the School System, the Production of Learning Materials, and Teachers**

**ILLIBERAL STATES** tend to have a reserved position towards education. Dictatorial leaders fear educated people who are able to obtain information from outside the state media and think critically. Thus, a smart dictator also seeks to control the school system, especially universities. By editing teaching materials, one can try to unite the people behind, for example, a modified history, as has been the case in Russia over the past 10 years. The brain drain that inevitably results from the elimination of critical thinking is an ideologically uncomfortable thing for dictators, but they are willing to pay that price.

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<sup>79</sup> European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, 'Joint Opinion on the Act on the Elections of Members of Parliament of Hungary', Venice 14-16 2012.

<sup>80</sup> Helsingin Sanomat, 4.2.2016.

<sup>81</sup> 'Vaientaminen', Long Play 2.3.2019.

<sup>82</sup> <https://rsf.org/en/ranking>.

<sup>83</sup> Helsingin Sanomat, 3.5.2015.



## 10. Sustainable Autocracy Needs a Coherent Ideological Basis

**IT IS** often argued that illiberal systems are maintained only by the power of populism, but this is not true. Illiberalism requires a confrontation with liberal democracy and thus also some kind of ideology to lean on. Often the choice is conservatism or 'Christian democracy'. The Polish, Hungarian and Serbian systems, for example, rely on a long history of unwavering protection of national conservatism and sovereignty. Conservatism is very actively promoted in cultural and educational policy – just like in Russia.

## 11. Make Citizens Dependent on the State

**THE MOST** effective way to do this is to consistently weaken the protection of property rights. Efforts are made to take over or acquire significant shares of companies, even by force. Domestic companies in particular are vulnerable, but sometimes foreign investors and large international companies are also targeted. In Hungary, certain activities have been identified as a strategic area for national security to which EU competition law does not apply.

The goal is to make everyone fear for their property. Disobedient companies are driven out of the market. Because the courts are not politically independent, entrepreneurs do not receive legal protection from the efforts of the ruling elite. When elections do not act as pressure valves for dissatisfaction, the dictator must monitor the climate of public opinion and buy popularity. In systems seeking autocratic rule, systems that build dependencies are commonplace. Targets are easy to find, because illiberal states are often poorer than their neighbors. In Hungary and Poland, for example, about a third of people are permanently below the minimum living standard.

However, the short-sighted strategy of buying popularity can be a double-edged sword, as it may increase the resilience of different groups. People who struggle with economic survival are usually the most politically passive.

## 12. A Proper Sustainable Dictatorship Is Impossible Without Corruption

**ILLIBERAL ELITES** are dependent on corruption because it is able to maintain the support of loyal subjects. Large-scale corruption is only possible when the media is under control, so the consistently advancing dictator has remembered to take control of the people before this step. Everything always comes back to the control of the judiciary. Once the independence of the judiciary and the prosecution has been curtailed, corruption charges rarely end up in the courts. Due to the unprotected right of ownership, an unruly actor can lose everything quickly and without warning. As in Russia, such unpredictability leads to the submission of companies and oligarchs to the ruling party. They are required to regularly invest in various government projects or make election donations.

## 13. Undermine the Rule of Law Through Legislation and Get the Lawyers on Your Side

**IN ILLIBERAL** democracies, the rule of law is undermined by the legal professionals. Especially in Eastern European governance culture, it is important that the law is the basis for change. Vladimir Putin declared a 'dictatorship of the law' in Russia in his inaugural address in January 2000, which, however, did not mean equal justice but the capture of legislation by the ruler. The concept progressed and the second part of the phrase 'dictatorship of the law' could soon be dropped.

Lawyers are typically sought to be harnessed as obedient servants to an authoritarian actor. When politics encounters obstacles in existing laws, the dictator sees no need to correct the course of politics but to change the law. A simple parliamentary majority can produce legislation on an accelerated schedule that is not considered compatible with other laws, international obligations or even the Constitution. An example



of this would be the Russian Duma's quick and unanimous vote on the cooperation agreement with the People's Republics of Eastern Ukraine, which declared their independence on 22 February 2022. The vote was contrary to international law, among other reasons because of Ukraine's territorial integrity.

At this point, we have already progressed so far that it is difficult to prevent the final cementation of the dictatorship. All courts, including the Constitutional Court, are in the party's pocket, so it is free to legislate whatever laws it wants. For example, if the term of office is met, it may be necessary to move back to part 1 and amend the Constitution.

#### **14. Once the Homeland Is Secured, Be Prepared to Resist Pressure and Demands From the Outside. Especially Where There is EU, You Have a Problem**

**THE LAST** threat to the dictator comes from the outside. The EU actively promotes democracy and the rule of law, both in its membership criteria and in the terms of its trade agreements around the world. Its courts also monitor compliance with the conditions for membership in the member states. It is therefore self-evident that the relationship between dictators and the EU is difficult. Especially if the country is a member of the EU (Poland, Hungary) or aspires to do so (Turkey, Serbia, Northern Macedonia).

A dictator that has taken over an EU Member State can often be in a difficult situation. EU membership provides the means to buy loyalty and fund various populist programs, but at the same time the dictator's own activities are more and more at odds with the goals of the Union every year. However, an aspiring dictator can learn from the inspiring examples of Hungary and Poland. In Hungary, for 11 years, and in Poland for seven years, there has been time to refine various strategies to combat, water down or delay the implementation of EU requirements, while adhering to the dictator's own goals.

Indeed, the EU woke up relatively late to the need to intervene in the developments going on in Hungary and Poland. For a long time, the Union was unable to internalize the seriousness of the problem, even though Hungary received its first warnings from the European Parliament as early as 2011. The most meaningful way to punish a member state would be Article 7 of the Treaty on the European Union, which deprives a member state of the right to vote for a limited period. However, the delay in taking this action backfired in 2015. The use of Article 7 became impossible because it required consensus in decision-making and Poland was now an obstacle.

The new Rule of Law Mechanism was launched on the initiative of Finland in 2021, among other countries, and having learned from previous experiences, this could be invoked by a simple majority. However, the Commission wanted to wait for a ruling from the European Court of Justice. On 16 February 2022, the Court ruled that the rule of law mechanism was in line with EU law. In the future, therefore, the EU may freeze EU subsidies from countries that violate the rule of law. However, violations of the rule of law must have a direct link to the lawful and transparent use of the EU budget in order for the budgetary conditionality mechanism to apply.<sup>84</sup>

Right now, the Rule of Law Mechanism seems to be the most realistic way to address the behavior of Hungary and Poland. In many cases, they inevitably have links to the use of EU funds, and both countries are also dependent on these funds.

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<sup>84</sup> Helsingin Sanomat, 16.2.2022.



## **There are three ways for a dictator to fight and water down EU restrictions**

- 15.** Using two ways of speaking, an old familiar coping strategy from the Soviet era. The idea is to learn the concepts of the official 'liturgy' of external power, which are used to seem obedient to EU demands. At the same time, the opposite is said to the home audience. For example, accusations relating to the rule of law are answered using the EU's own terms, which are deliberately misunderstood, using technical legal details. Here too, obedient lawyers are of great help.
- 16.** An innovative method of misuse of EU subsidies. EU competition rules are used to distribute grants, which can be won by candidates suitable to those in power through corruption.
- 17.** Seize the moment. A decent dictator sees an opportunity in any crisis, of which the covid-19 pandemic is a great example. When individual rights are restricted even in the West, it is easier to further concentrate power and tighten social control everywhere.

**IN THE** first section, I went through the repeated states of emergency declared in Hungary since March 2020. The covid-waves come and go, but the power taken by an undemocratic actor often remains.



## In Conclusion

# How to Defend Democracy at Home and Abroad?

**THIS DICTATOR'S** handbook is intended for two target audiences. Anyone who wants to be a dictator, who believes that their ends (whatever they may be) justify their means, can take these consistent steps to make themselves and their close circle rich, and to remove all excessive tension from election night.

However, this handbook is even more relevant for democracies. The state exists for its citizens, and in public office one must work for the benefit of the community and not for their own good. Just as illiberal democracies can anticipate, for example, the actions of the EU when it comes to observing the functioning of democracy, history can teach us to anticipate how and where democracies will first weaken and then die. A functioning democracy is ultimately a compromise resulting from the power struggles of different societal goals. It will only last as long as all the parties involved in the elections, and who gain power in them, commit themselves to a peaceful and honest transfer of power on the basis of the next election result.

If a political actor does not commit themselves to a change of power, even a single parliamentary term can cause damage that is difficult to repair, as has been seen in Poland. The more elections an illiberal actor captures, the more difficult it is to return to a functioning democracy – as evidenced by the examples from Hungary, Turkey and Russia, among others. With regard to Finland, it is vital that we identify the potential weaknesses of our democratic institutions before undemocratic actors come to power. We need to find enough political will to strengthen the constitutional protection of the rule of law just in case.

In this report, we have identified how the independence and funding of the judiciary relies on ordinary legislation as Finland's main weakness. Similarly, the system for appointing judges is a potential place of danger. For example, the size of the highest courts is not defined in the Constitution, so increasing the number of judges would make it possible to make their composition more favorable. All of the above would be possible by a simple majority in Parliament. In addition, there is no independent court in Finland to review the constitutionality of laws, but this also takes place in Parliament and is limited to ex-ante supervision.

As far as the EU is concerned, the war in Ukraine that began in February 2022 has naturally changed the situation. Russia, an important neighbor at our border, has rapidly slipped into ever-worsening tyranny and state censorship. Individual liberties have largely been abolished in a state of war, while the country refuses to admit even being a war and has not declared a state of emergency.

Democracy in Ukraine, which has applied for Union membership, is faltering as an unprovoked attack attempts to overthrow the country's democratically elected government. Whatever the government may replace the current one, it cannot have the same democratic legitimacy as the currently extremely popular wartime president. Poland and Hungary have created a coalition within EU ranks as a clear opposition against Russian sanctions. Occupied by a sense of unity, criticism of the countries in the EU has receded. Of course, this will change as long as the war in Ukraine is somehow brought to an end. The democratic deficit in the EU Member States will certainly be brought back onto the table, not least because the Union has received applications for membership from Ukraine, Moldova and Georgia as a result of the crisis.



In the Hungarian parliamentary elections of April 2022, Orbán will be challenged by a united opposition. If the change of power succeeds, Hungary's EU policy and the development of the rule of law will change quickly. Equally, it can fail, exacerbating the plight of democracy.

In democracies, one should not just sit back and wait for the subjugated opposition to succeed in winning elections with unfair rules. On the contrary, we must be active in protecting our own institutions in case we have a bad day.

The EU uses significant soft power through its membership benefits. The so-called Copenhagen criteria<sup>85</sup> requires that the new member states have stable institutions that guarantee democracy, secure the rule of law and protect human rights and the rights of minorities. Actions taken by an EU Member State to dismantle the rule of law is not an internal matter but a problem shared automatically by all Member States. The common legal order of the EU requires an equal rule of law in every Member State, otherwise there are no guarantees of the legal application of European law. The Union will erode if the implementation and application of legislation cannot be relied on. It has been too ill-equipped against systematic violations of the rule of law.

In the long term, the Union cannot continue without correcting the current shortcomings in its legal basis. Thus, the EU must continue to demand the establishment of democracy and the rule of law not only in new member states but also in the old member states. As illiberal rulers are nothing without their ability to distribute funds, leveraging EU aid is a powerful tool.

Illiberal democracies will be disciplined through the Rule of Law Mechanism used on the basis of a majority. It is true that this solution could increase anti-EU sentiment in Poland and Hungary, with a total population of 48 million. At the same time, however, it will certainly increase the value of the EU in the eyes of the remaining 400 million EU citizens, especially in the net contributors of the North.

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<sup>85</sup> Treaty on the European Union, articles 6 and 49

