

Judith Sargentini

Rule of Law in European Member States: a shared responsibility

Leiden Europa Lecture



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Rule of Law in European Member States: a shared responsibility

Leiden Europa Lecture delivered by

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former member of the European Parliament

at Leiden University on

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Preface

Mrs. Sargentini,

Mr. Mayor,

Dear colleagues, students and friends, ladies and gentlemen,

Good afternoon and welcome to Leiden. I am glad that you have all gathered here today in the nice setting of the *Lorentzaal* of the Faculty of Law of the University in Leiden, for the 9th Europa lecture of the Europa Institute.

Today is Europe day. On the 9th of May, the European Union traditionally commemorates the statement made by the French foreign minister Robert Schuman on 9 May 1950 in which he famously proposed to place French and German production of coal and steel under one common High Authority. This Schuman Declaration, which would lead to the creation of the European Coal and Steel Community one year later, marked the first step in the European integration process.

In the Declaration, Schuman already predicted that Europe would not be made all at once, or according to a single plan. Rather, “it will be built step by step, through concrete achievements which first create a de facto solidarity.” And he stressed that “the coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany”.

Almost sixty years later, it is fair to say the European Union has to a significant extent achieved to bring peace and prosperity. At the same time, a lot of challenges remain. To mention but a few, Brexit, or the new institutional cycle which the EU is about to start.

The idea of the lecture series is precisely to let a distinguished speaker reflect on contemporary issues of Union law or

significant developments in the European Union. Previously, illustrious people such as Herman van Rompuy, the first President of the European Council; Margrethe Vestager, European Commissioner for Competition law; or Jeroen Dijsselbloem, the first president of the Euro Group, came to Leiden to deliver the Europa Lecture.

Today, we are happy and honoured that Mrs. Judith Sargentini, a long-standing Member of the European Parliament for the European Green Party, has accepted our invitation to deliver the 9th Europa lecture of the Europa Institute.

It is a great pleasure to receive our first speaker from the European Parliament, the only Institution that is directly elected by the European citizens. In a fortnight, the Dutch – together with the British – will be the first to go to the ballot to elect their representatives to Strasbourg. Much is at stake in these elections. No less than the soul of Europe in the words of one of the Spitzenkandidaten.

Ms. Sargentini will not run for a new term in office. This puts her in the perfect position to look back at her work in Parliament and share with us some broader reflections on the future of Europe. One could say it is a little unfortunate that the topic of *the Europa Lecture* once again centers around a European crisis. Europe has had its share over the past years. At the same time, I like to think that the title of today’s lecture - *the Rule of Law as a shared responsibility* - also carries some optimism.

The topic is in any case closely linked to much of the research carried out at Leiden Law School, in particular the Europa Institute, where one of our core research themes looks at the way in which the EU can safeguard its fundamental values in the face of challenges and adversity.

As to our speaker. Ms. Sargentini studied Modern History at the University of Amsterdam, specializing in totalitarian systems and the democratization of Europe. [How forward

looking]. Her political career started in 1999 in the Amsterdam City Council, where she was the Chair of the Green Left part from 2006-2009. In addition, she worked for various NGOs in the field of development cooperation. In 2009 she entered the European Parliament as leader of the Dutch Green Left.

In Parliament she became a widely respected Member of the Committee on Civil Liberties, Justice and Home Affairs, and alternate for the Committee on Development. She was involved in the Parliament's election observation missions, its Intergroup on LGBTI rights and a range of cross-party working groups including on Fair Trade and Poverty Related Diseases. She was the Rapporteur on legislative proposals on the trade in conflict minerals and on rules to counter money laundering and fraud. In that last file, she successfully advocated for the public listing of beneficial owners of all EU companies and trusts.

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More recently, Ms. Sargentini acted as the Parliament's rapporteur to examine the opening of Article 7 proceedings against Hungary. Her report concluded that indeed there was – in fact, there continues to be – a serious risk of a breach of the EU's fundamental values in Victor Orban's Hungary. These findings were widely supported by the members of the House, who adopted the report by a large majority. The targeted media campaigns against her - and other prominent Europeans - illustrate the severity of the situation.

For me personally, it is a great pleasure to have you here today. I have come to know you as of the most approachable MEPs. You have on many an occasion been willing to meet with our students, and when doing so have challenged and encouraged them.

Without much further ado, Ms. Sargentini, the floor is yours.

Europa Institute, May 2019

Stefaan Van den Bogaert and Jorrit Rijpma

JUDITH SARGENTINI

Honourable ladies and gentlemen, Mr Mayor,
Thank you very much for inviting me to hold this Europa lecture. I'm honoured to speak about the rule of law on this special day, and at this special place: the "Stronghold of Freedom".

Today is Europe Day, and while we are here in Leiden, 27 EU heads of state are gathered in the medieval town of Sibiu in Romania. They will discuss the strategic agenda for the Union in the upcoming years. I am curious but also concerned about the outcome of this meeting.

Concerned, because while I am convinced that crucial topics such as the economy, migration, climate change and foreign policy will be on the agenda, I fear that they will shy away from discussing the very foundation of the EU's existence: the rule of law in the Member States.

What does it mean for the EU, for us, when the rule of law is no longer guaranteed amongst its members?

It means that we have Member States contributing to European policies and making European laws that apply throughout the EU that do not respect the rule of law as the basis for these policies and laws. It means that a functioning economy is threatened by a lack of legal certainty for business. But above all, it means that we as European citizens do not have fundamental rights to fair and equal treatment guaranteed within the Union.

Before I turn to the Rule of Law in Hungary I would like to share some experience I have with another Member State in democratic difficulties. The Member State that is hosting today's European summit: Romania.

And I want to talk about this new step in judicial cooperation:
the European Public Prosecutor, EPPO

After the decision in 2017 to create a European public prosecutors office, the EPPO, it is now time to make it operational. This new body will be able to prosecute fraud and corruption with EU funds, which is an important grievance of European citizens. I am part of the three headed negotiation team of the European Parliament that needs to find an agreement with Council – the Member States – on who should head the EPPO. You may have heard the name of the candidate that the European Parliament has selected as the most suitable person for the position: Ms Laura Codruța Kövesi. Ms Kövesi is Romanian and was until recently the chief anti-corruption prosecutor of that country. She was appointed by a previous government but fired by the current one. She was too successful in her fight against corruption. Ms Kövesi was going after important political figures of the current government and became too threatening for them.

Yet she applied for the European job and a very distinctive selection committee, selected her as the most qualified amongst a short list of three¹. The European Parliament organised a public hearing with the three shortlisted candidates and casted the most votes for Ms Kövesi, agreeing with the selection committee.

Our Ministers in the Council lead their ambassadors deal with the matter. These ambassadors did not organise a hearing, nor did they invite the selection committee to explain its arguments for the selection.

After merely a paper exercise, they decided to deviate from the proposal by the selection committee and concluded that a French judge, Mr Bohnert, was their preferred candidate. And So - possibly with political hand outs from France - Ms Kövesi was by-passed.

What was the role of the Romanian government in this appointment process? They are not formally sitting at the negotiation table, but they influence the process by threatening Laura Kövesi. First, she was almost unable to join the

parliament hearing because – of course by sheer accident – she was summoned for an investigation on a corruption claim. That blew over, but some weeks later she was again indicted, forbidden to leave Romania and not allowed to speak to the press. A week later, the High Court of Romania intervened and lifted the sanctions. It is good to see that the correction mechanism worked.

However, the damage is done. The fact that Ms Kövesi was obstructed by her own government, is now held against her by the Council that requires the candidate to ‘*establish good working relations with national judiciary authorities*’.² Which for at least one Member State that is an impossibility.

And from the Parliaments side, it has become even more important to continue support for Ms Kövesi, otherwise it would show that a Member State can get away with blackmail and oppression. That is not how the EU should work.

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But what is more worrying, is that the other Member States hold on to their candidate and have failed to collectively denounce the treatment of Ms Kövesi by Romania. This situation is all too familiar: Member States looking the other way when the rule of law is undermined.

And on that note, let me now turn to the situation in another EU Member State:

Hungary

On September 12, 2018, the European Parliament decided that rule of law and democracy in Hungary is in such a worrying state that the Union has to take immediate action.³ In an unprecedented move, Parliament triggered the so-called Article 7 procedure of the EU Treaty.⁴ A procedure that can ultimately lead to significant sanctions such as Hungary losing its say when new Union laws are being made. A Member State of the EU put under scrutiny for not complying with the core values of the EU, and hence the conditions of its membership, is not a light matter to take. But how did we get to this point?

Where are we now with this Article 7 procedure? And what does the future hold for the EU and its values?

Just last week, May 1 and 2, Hungarian Prime Minister Orbán celebrated the 15th anniversary of Hungary’s membership to the Union by inviting the Italian minister for Internal affairs, Matteo Salvini, to inspect the fence at the border with Serbia.

There are two detention centres for asylum seekers right at that border fence. I have visited one of them. Thirteen times - and counting - since the summer the European Court of Human Rights had to issue interim measures to force the Hungarian authorities to not starve asylum seekers in those detention centres, to simply feed them. Neither the fence nor the camps are something to be proud of.

When becoming part of the EU, countries accept the conditions of the membership, the Copenhagen criteria. Part of the conditions are the Unions core values of that all Member States share and which we can find in Article 2 of the Treaty:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

What is happening in Hungary?

Different methods are employed to concentrate power in Orbán and his allies, and to keep the public largely ignorant of the corruption that is taking place in the country. Having friends and family buying media outlets or in convenient top positions, using negative rhetoric in public fora, scapegoating minorities in the country, creating a hostile environment for civil society these all fit Orbán’s blue print for what he calls the “illiberal

democracy” that he is building. In many instances, the mere suggestion of a law or policy creates a form of self-censorship and leads to a chilling effect on society: targeted persons and organisations pre-emptively change their behavior out of fear of sanctions by the authorities or the community they live in.

What are we talking about here? What is a chilling effect?

Let me here at the university of Leiden, elaborate on the fate of the Central European University, the CEU. The university has been functioning in Budapest to everyone’s satisfaction until in 2017 the Hungarian government decided to change the law. The change was intended to harm the CEU. In a nutshell, in order to comply with this new law a Treaty was negotiated with the US State of New York. But the Hungarian government, as the final step in the procedure, refused to ratify it. While being in legal limbo for more than a year, the rector of CEU, Michael Ignatieff, was forced to announce in December last year that the university will move to Vienna. A university that educates the critical thinking leaders of the future is a threat to the Orbán government. In his view academic freedom feeds debate, feeds protest, feeds opposition.

While the Hungarian government has been bulldozing over the Union’s values, what has the EU done to intervene?

The European Commission used a piecemeal approach. Several infringement proceedings in different fields, from the independence of the judiciary to complying with asylum legislation, were pursued. But the Commission was never bold enough to take the next step of the earlier mentioned ‘Article 7 procedure’: the most far-reaching sanctions procedure in case a Member State of the Union does not respect the fundamental values referred to in that Article 2 of the Treaty. In fact, the Commission did not even dare to start the so-called ‘Rule of Law Framework’⁵ - the pre-stage of an Article 7 procedure - which it did use in the case of Poland.⁶ The Rule of Law Framework is a rather recent method of intensified dialogue between the Commission and the Member State in order to restore the rule of law in that Member State.

The European Commission rightly pursues infringement proceedings when there are violations of Union law, but in this specific case when you take all the developments together - a build-up of events over the years - a picture emerges of a systematic threat to the Rule of Law. This calls for a tougher approach which the Commission failed to use. Add to this the silence from European governments, and you will see the Hungarian government was provided with plenty of space to further restrict the rule of law, democracy and fundamental rights in Hungary.

The underlying problem here is the political balance of power in the big European political families and the failure of politicians to confront their own family members. Even if fundamental values of the Union are at stake. It is difficult to overlook that the Commissioners, in large majority politicians of the two big European political families, acted more forcefully in the case of Poland where the ruling party is not a member of any of the two families than in the case of Hungary where Fidesz is a member of the European People’s Party (EPP, of which CDA and CDU are a member). The Romanian government is part of the other big European political family the Party of European Socialists (PES, a/o PvdA and SPD). But not all is lost. We start to see some cracks in the taboo to confront your own political family members when fundamental problems occur. I’ll get to that.

Member States shied away from addressing the issues. Parliament on the other hand, since 2010, debated and adopted resolutions over the years on the situation in Hungary.⁷ It called on Hungary, it appealed to the Commission, it urged the other Member States but without the desired effects. The party politics I just mentioned obstructed a move forward.

While the Commission opened up yet another set of infringement proceedings⁸ Parliament in May 2017 decided to investigate whether a systematic threat to the values of the Treaty exists in Hungary.⁹ Many EPP Members of Parliament abstained making it possible for this decision to pass. They

were seen as rebelling against their own party by doing so. But it opened the way for the report that I was tasked to write.

In September 2018 the report was put to the vote, requiring a two-third majority of the European Parliament. The two-third majority was not a given. It was only possible with members of the EPP, the largest political group in the Parliament breaking that taboo of voting against one of their political family members.

In the lead up to the vote, Commission President Juncker – who is a member of the EPP himself – declared voting in favour of the report if he were to be a MEP. Orbán behind closed-door EPP-meetings and in the plenary debate on the report did not give an inch to appease his own political family, for instance by allowing the Central European University to continue teaching in Budapest. Manfred Weber, leader of the EPP group and candidate to be the next Commission president, the ‘Spitzenkandidat’ was forced to declare that he would vote for my report. A majority of EPP-members, could no longer cover up for their member party which was clearly and systematically tearing down the rule of law in Hungary. In the public arena of the European Parliament, they drew a red line to their family member and enabled a two-third majority to trigger the Union’s heaviest corrective rule of law procedure.

Since the vote, several EPP member parties requested the expulsion of Fidesz from their family. For the moment they decided on a temporary suspension. And more rule of law family issues reached a tipping point: the Socialists froze relationships with their Romanian member party and the leader of the liberal group Guy Verhofstadt called to expel their Romanian member party from their group. Although that has not yet happened.

I think I am allowed to conclude that my report, and the Europe wide attention given to it, has brought this about. Close to the European elections political groups see an urgent need

to publicly demonstrate they do not allow undemocratic forces in their midst. Fidesz has become a liability for the EPP.

Is the same change of attitude visible amongst the national governments? In line with Article 7 it is for the governments in the Council now to discuss the situation in Hungary and issue recommendations on how to improve the situation so that the values of the EU are upheld. To issue recommendations, 21 Member States need to agree and Parliament needs to give consent. Until this date little has happened in the Council. Rather than going after the core of the problem, Council is hiding behind superficial, procedural acts. In the meantime we can observe a further deterioration of the situation in Hungary:

- One of the last remaining independent Hungarian news channels, Hir TV, was bought by a friend of Orbán. More than four hundred media outlets have been merged into a single holding controlled by board members affiliated to Fidesz. This merger is exempted from the national competition authority and the national media authority thus further vaporizing the press freedom in the country. Since last year Hungary dropped 14 places on the press freedom index, now ranking 84 out of 180.¹⁰
- Civil society organisations are imposed a hefty 25% tax when they carry out immigration-supporting activities like organising schooling for refugees, providing legal aid for asylum seekers, or going to the European Court of Human Rights to demand food for asylum seekers in detention.
- Homelessness, or sleeping rough has become a crime.
- In December 2018 the Hungarian Parliament adopted new laws that allow for longer work-overtime, dubbed by the opposition as the “slave law”.
- And new administrative courts that have jurisdiction on politically sensitive matters like elections, corruption and the right to demonstrate where set up.

Protesters against the laws were forcefully removed by the police without any media attention. Imagine a big demonstration by Dutch opposition parties together with unions and civil society for several days. The police intervenes. Then imagine that leaders of the opposition hold a sit in at the studios of the public broadcaster. Private security drags them out. And yet, the eight-o'clock news fails to mention any of it. This is what happened in Hungary just before Christmas.

So why is there such a little sense of urgency among the Member States?

Just like serious trouble inside an extended family, Member States are uncomfortable to speak up when a family member misbehaves. Rather than engaging in a serious conversation about the misbehavior of an uncle or a cousin, governments are beating around the bush with legalistic excuses such as: “the issue identified here and there is not part of secondary EU legislation”.

But ultimately, a Member State that descends into a state that no longer respects the basic foundations of the Union, cannot be stopped by ignoring the issue and looking the other way.

When I was appointed to lead the report on Hungary for the European Parliament, I carefully chose not to limit myself to this legalistic approach. I took guidance from the European Commission that already back in 2003 stated that – I quote – *‘The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously.’* It continues to say: *‘Article 7 thus gives the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law’*¹¹. - end of quote.

So indeed, my report does not limit itself to the Treaty. It includes concerns about Hungarian legislation and practices that are not directly linked to EU secondary law. This makes Member States in the Council reluctant. It is unknown territory. But including that in their analysis is the crucial next step they need to take in Council. They can no longer hide behind infringement procedures by the Commission or Court decisions linked to individual laws incompatible with EU law. They will have to confront that uncle or cousin with the core of their misbehaviour: the systemic erosion of the rule of law. This is the kind of political courage that the leaders gathered in Sibiu today would need to show.

It was good news that the European Court of Justice ruled on the retirement age of judges of the Polish Constitutional court. However, our ministers might take that signal as sign that they don't have to act as long as Commission and Court can still make a move.

European elections

When Parliament determined a serious breach by Hungary of the values on which the Union is founded, a reaction I often heard was: “The Hungarians support Orbán. The direction he is taking, reflects the democratic will of the people”.

I am very aware that Fidesz won three elections in a row. But the narrow concept of majoritarian democracy is not in line with Article 2 of the Treaty that Hungary freely signed up to. *‘Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’* requires political authority to be clearly defined, limited, and distributed by law.

The majoritarian interpretation of democracy by Prime Minister Orbán no longer distinguishes between himself, his government, his nation and his people. Orbán, former Polish Prime minister Beata Szydło and more recently Romanian Prime Minister Viorica Dancila all treat criticism on their governments and policies as an attack on the people.

This interpretation of democracy is incompatible with EU values. Yet in many Member States political parties that are registered for the elections that take place in two weeks from now, share this view. In Hungary, Poland and Romania, but also in this country.

The leader of the anti-European party 'Forum voor Democratie' has announced his party will form an alliance with the Polish ruling party in the European Parliament. He has called Orbán a "hero". He claims that we are being "undermined by our universities", and called on people to publicly report teachers with opposing political opinions.

This must be a room of people that does go to vote. Come May 23, please use your vote wisely. Let us together make sure that we have political representatives that respect the rule of law and contribute to upholding that rule of law whenever it is under threat in our Union. Let us send a message to the leaders to push them one step further in breaking the awkward silence on our rule of law at the table in Sibiu, Romania. Vote for Rule of Law!

Thank you.

Notes

1. Among the eleven persons, namely, six men and five women, proposed by the Commission, there is one former member of the Court of Justice, one former member of the Court of Auditors, one former national member of Eurojust, five high-level prosecutors, two members of national supreme courts and one lawyer of recognised competence.“
2. <https://www.consilium.europa.eu/en/press/press-releases/2019/04/04/update-on-the-appointment-of-the-first-eu-chief-prosecutor/>
3. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN>
4. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M007>
5. http://europa.eu/rapid/press-release_IP-14-237_en.htm
6. http://europa.eu/rapid/press-release_WM-16-2030_en.htm
7. See for further details: J. Sargentini, A. Dimitrovs, The European Parliament’s Role: Towards New Copenhagen Criteria for Existing Member States?, JCMS 2016 Volume 54, Number 5, pp. 1085-1092 <https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.12403>
8. http://europa.eu/rapid/press-release_IP-17-5004_en.htm
9. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0216+0+DOC+XML+V0//EN>
10. <https://rsf.org/en/ranking-table?sort=asc&order=Countries%20%26%20regions>
11. (COM(2003)606)



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