

# Democratic Backsliding and the Unravelling of the EU Legal Order

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The political world of the EU has often been accused of being a Potemkin village. It had a flag, a parliament and elections, but behind this façade the voters were not really engaged.<sup>1</sup> This has fueled a tendency to easily perceive existential crises for the Union. With no real European demos, EU political institutions were seen as hollow and commentators found it easy to predict that they would be swept away when faced with a serious political problem. However, the Union's legal situation was the opposite. Here a fairly modest institutional impression, namely a single international court sitting in Luxembourg, belied a deeply integrated, almost federal, legal order in which national courts across the Union applied EU law and rulings of the Court of Justice day in day out in the cases that came before them.

Academics studying European integration noted the particular prominence of the role of law in the building of the EU, going so far as to describe the process as one of 'integration through law' in a seminal study from the late 1980s.<sup>2</sup> And they had a point. Enforcement is usually the Achilles heel of international law. Often only states can make complaints of breaches of international obligations and adjudication of such complaints takes place in front of international tribunals whose rulings are difficult to enforce.

But EU law was different. The European Court ruled in the 1960s that EU law could be invoked by individuals in front of their national courts and that national judges had a duty to give effect to EU in their rulings (this is known as 'direct effect') and to set aside any national law that clashed with EU law (this is known as primacy).<sup>3</sup> National judges, for a number of reasons, went along with this and thereby transformed the nature of the European integration project.<sup>4</sup>

The acceptance of primacy and direct effect had a huge impact on the importance of EU law. Rather than being, as much international law is, a difficult to enforce declaration on paper, EU law was fully binding. This meant that the Union did not need to rely on the Commission to sue states

to hold them to their EU law obligations, it had hundreds of millions of citizens who could potentially enforce EU law against their governments. What is more, if a government defies a ruling of an international court it can be politically embarrassing, but defying the ruling of a national judge would cause a constitutional crisis. With national judges upholding EU law, governments found it very difficult not to comply with European obligations.

If the EU legislation was only been a non-binding recommendation rather than binding law, the Union would be a much less powerful political actor. Because its law was really law, member states and the wider world had to pay much more attention to the Union's decisions. Therefore, the legal integration provided by the caselaw of the Court of Justice gave, from the 1970s onwards, the Union strength and relevance which the degree of political integration did not then justify and which provided an important impetus to the political integration which followed in the 1990s and 2000s.

However, I will suggest that we may be witnessing the reversal of the previous situation where legal integration was the Union's strength and political integration its weakness. Recently the Union's political integration seems to have shown resilience and momentum while the legal integration, traditionally its strength, is eroding.

### **Political resilience**

Underestimating the resilience of the European integration project has been a fairly consistent theme of the past decade and a half, particularly amongst anglosphere writers. This is not just a matter of Brexiteer wishful thinking. Leftwing writers such as Paul Krugman in the US were convinced that the Eurozone crisis would bring down the single currency<sup>5</sup> while the migration crisis of 2015, Brexit a year later and then the initially limited and ineffective EU response early in the COVID crisis all brought forth statements that the Union was in a crisis it might not survive.<sup>6</sup>

In each case, however, the crisis passed. In fact, the Union usually emerged with significantly enhanced potential for collective action. Commentators who so regularly predicted the collapse of the Union (or indeed that a Brexit deal would focus on German carmakers rather than the integrity of the Single Market and would therefore be favourable to the UK) failed to accurately perceive the depth of the commitment of the European political elite to the project. Though EU leaders were often slow, in the end when faced with an existential threat to the Union, they have always been willing to take painful

steps to protect it.

In fact, one of the key stories of the past fifteen years has been the resilient nature and consistent enhancement of the Union's political capacity. The Eurozone crisis led to significant, if still inadequate monetary and fiscal integration, the Brexit crisis put paid to ambitions in any other states to exit the Union and the covid crisis opened the door to significant enhancement of the EU's budgetary capacity.

As Luuk Van Midelaar (a political philosopher and advisor to the former President of the European Council Herman van Rompuy), has eloquently described,<sup>7</sup> the form of integration provided by the Union is more extensive and more flexible than is often thought. Despite its lack of formal legal powers, he sees the European Council (the body that brings together all of the heads of government of EU members states in regular meetings) as key. As he rightly argues, if you regularly put 27 heads of government all of whom are worried about a particular topic in a room together, they will inevitably begin to coordinate their positions even if the Union lacks formal powers in a particular area.

I think the importance of this habit of coordination applies well beyond the European Council. For example, in the early days of the pandemic the Union was criticised by politicians and the public alike for its limited action despite the fact that it holds very limited powers in the area of public health. Although some saw this as yet another existential crisis, I saw it as evidence of how resilient the Union is likely to be.<sup>8</sup>

By providing a framework within which member states continually co-operate and co-ordinate with each other, EU membership has developed a habit of cooperation that has transformed the mentality of European politicians and civil servants. As I wrote at the time, that if a virus had swept the world in the 1960s, voters in the Netherlands would not have thought of comparing their government's actions with those taken in Spain and Irish civil servants would not have considered co-ordinating with their Finnish colleagues. In fact an Irish civil servant might have spent his or her whole career without meeting their Greek counterparts. By 2020 decades of interaction through EU structures had become accustomed to comparing their actions to those of their fellow member states and of co-ordinating with them. Indeed, the fact that the Union was slated for a failure to do more showed how deeply ingrained this habit of cooperation and coordination has become in European governance and how as sense of the Union as what in German is called a

‘*Schicksalsgemeinschaft*’, that is, a community that has a shared fate, has grown amongst EU citizens.

Even the anger shown by Spain and Italy when they accused their fellow member states of failing to help them in the early days of the pandemic shows how EU states now regard fellow members not as foreign countries but as part of a community that generates obligations of solidarity.

The consequences of these habits for political integration shouldn’t be over-stated. Feeling part of a *Schicksalsgemeinschaft* does not mean states are willing to give open ended financial support to each other or to give up national vetoes in sensitive areas. The EU is often restricted to getting the maximum agreement possible from twenty-seven states with different interests. But the Union’s structures and legislative powers across a range of areas do make this agreement easier to obtain. The breadth of EU law-making and decision-making activity produces an endless stream of deal-making. If countries come together to negotiate on one topic, each country is incentivised to dig in its heels and to get the very best deal for itself on that topic. But when, as in the case of the EU, countries know that when they are negotiating on one topic one day but will be negotiating on several other topics later down the line this encourages flexibility and compromise.

Because, for example, the EU will be legislating one week on financial services regulation and the next week on agricultural standards a state with a large agricultural sector and a small financial sector will generally refrain from making trouble on financial legislation even if they are not that keen on it to avoid alienating other states in the hope of cashing in this favour when agricultural matters come up later on.

The Union’s ability to pass binding legislation in a wider range of areas therefore exerts a strong pressure to maximise cooperation. However, this process depends on the ability of the Union to make decisions that are genuinely binding. If the decisions made by the Union are not actually enforced then the pressure to compromise to avoid being harmed by future decisions abates. The ability to make binding decisions depends significantly on the willingness of national courts to give effect to EU law and this willingness is increasingly shaky.

### **Legal unravelling**

As I have already noted, the EU achieved a high degree of legal sovereignty from early on in the integration process when the European Court of Justice

ruled in the mid-1960s that national judges were obliged to give effect to EU law in cases before them and to set aside any national law that conflicted with EU law. This gave European law a binding quality that most international law lacks and incentivised greater cooperation between member states.

In addition, during the 1970s the Court of Justice gave a series of rulings in cases like *Cassis de Dijon* which gave a very broad interpretation to the provisions of the EU Treaties on free movement of goods.<sup>9</sup> These rulings swept away a lot of national regulations in relation to goods thus incentivising member states to agree to new EU level legislation in this area.

Further cooperation incentives came with changes to the EU treaties in the 1980s and 1990s which introduced and expanded what was called of ‘qualified majority voting’ in the Council of Ministers. This meant that in many areas of EU competence, legislation could be passed without the agreement of all member states. This further encouraged states to refrain from making trouble on issues that are of secondary importance to them in order to build up favours that can be called in when issues that are of vital importance to them come up.

However, as I have already noted, if national judges cease to give effect to Union law, EU legislation loses much of its binding force and the fear that drives this maximisation of cooperation, namely the fear that the Union may damage your Member State’s interests through passing legislation that harms those interests, sharply decreases.

It is important to note that the acceptance of the primacy of EU law by national courts has never been absolute. The German Constitutional Court has consistently stated that if EU law transgressed the ‘core constitutional identity’ the German state, it would refuse to give such EU law primacy.<sup>10</sup>

However, a *modus vivendi* emerged and despite repeatedly expressing concerns that European integration was coming close to violating this constitutional core, until recently the Federal Constitutional Court had not refused primacy in a concrete case. This changed in 2020 when it refused to follow a European Court ruling that the ECB’s bond-buying programme was within its mandate.<sup>11</sup>

This was not unprecedented. Czech and Danish courts had previously refused primacy in narrow rulings on pensions and discrimination law.<sup>12</sup> But the influence of the German Constitutional Court made this a bigger blow.

Things might not have got out of hand. The German government made it clear it was unhappy with the ruling, and the German Court had asked for

factual assurances about the nature of the ECB's programme, which once given were accepted by the Karlsruhe judges.

However, the German ruling coincided with a broader clash between the EU and a number of member states particularly Poland and Hungary on the issue of judicial independence.

Poland has been at the receiving end of a number of European Court rulings that found a series of changes to the Polish judiciary violated the EU legal duty to respect judicial independence.<sup>13</sup>

With Poland defying some of these rulings a continuation of a *modus vivendi* in which national courts did their best to avoid clashes with the principle of primacy of EU law was unlikely. The Polish Constitutional Tribunal which had never recognised the theoretical primacy of EU law, issued a sweeping decision in October which declared broad areas of EU law unconstitutional and limited the ability of lower courts to uphold EU in cases before them.<sup>14</sup> The Romanian Constitutional Court has since joined the rebellion by refusing to give effect to a European ruling aiming to prevent systematic impunity for corruption offences.<sup>15</sup>

In short, the *modus vivendi* that sustained the primacy of EU law is proving increasingly unsustainable for two reasons. With more and more apex national courts breaking the previous taboo on refusing primacy in a concrete case, it becomes easier for other courts to do the same, particularly given that the influential German court has now done so. Second, the chances that these breaches can be successfully limited to isolated instances based on narrow facts that do not challenge the broader day to day acceptance of the primacy of Union law has been undermined by the intense conflict on judicial independence that has placed the Polish Constitutional Tribunal in direct and repeated conflict with the European Court of Justice.

### **What to do?**

A break down in the recognition of the primacy of EU law risks unravelling the major 'integration through law' that makes the Union so much more powerful than other international organisations. However, if the Union's political integration is proving increasingly robust, could this strengthened political cooperation take up the slack and prevent a loss of cohesion? I have my doubts. While Van Middelaar and others have shown that the European Council can provide the basis for extremely important political action, the Council does still rely on inter-governmental consensus. It only takes one

state to block any initiative and with Hungary's Viktor Orbán now re-elected on an anti-Brussels platform, the likelihood of Hungary disrupting key EU decisions must be high. Indeed, many key EU decisions require unanimous approval. This is a structural weakness in the EU system that is hard to remedy. Imagine the chaos that would ensue if the US federal budget or proposed sanctions on Russia had to be signed off by the governors of all fifty states? Yet in the EU both the EU budget and sanctions decisions need unanimous approval from all twenty-seven governments. The reality is that EU citizens don't feel the level of trust towards other states or loyalty to the Union to empower it to take key decisions of this nature without unanimous agreement.<sup>16</sup>

In addition, deal-making in the Council has only been so effective because it takes place in a context where the Union has strong legislative power to make binding decisions that can favour or damage states across a wide range of areas. If EU law begins to lose much of its binding force this agreement maximising influence will also begin to wane. None of this means that the Union will collapse, but it does risk severely undermining its effectiveness.

There are no easy solutions but member states must recognise the disintegration of the primacy of EU law as a severe threat to the effectiveness of the Union. As the Eurozone and Brexit crises have shown, when faced with an existential threat to the Union, the governments in the Council have been willing to take politically painful steps to protect the integration project.

In this case, defending the Union from what is an existential threat, albeit one that occurs in a gradual, drip-drip fashion, means imposing political costs on those states who have broken with the *modus vivendi* in a serious way. If Poland and Hungary refuse to respect primacy or the judicial independence which such primacy requires then they must be made to pay a price every time the Union (and particularly the Council of Ministers) deals with issues which are important to them from decisions on subsidies to regulations that might harm or help sectors of their economies. If they act to undermine the Union, they should not expect the Union's legislature to grant them any favours in everything from energy policy to financial regulation to agricultural standards. This may cause blowback and obstruction from these states but this price is worth paying to avoid a slow-motion disintegration of the EU legal order.

It will also be necessary to assemble as wide a coalition as possible in the Council behind such as policy. This means a laser-like focus on the issue of

judicial independence and primacy. Poland and Hungary have consistently argued that criticism of their attacks on judicial independence are actually motivated by their anti-gay, anti-trans and anti-migration policies. Indeed, Hungary's 'LGBT propaganda' law did produce more blowback for Victor Orbán than he has faced on almost any other issue.<sup>17</sup>

The author Edward Luce has warned of an 'incorrigible tendency to present the latest shift in liberal thinking as self-evident truth or as part of the forward march of some inevitable historical process'.<sup>18</sup> I have a preference for socially liberal, migration-positive societies, but with its limited democratic legitimacy the Union risks breaking its authority if it tries to make these desirable but generally recent and controversial characteristics a prerequisite of membership.

While it might be possible to block a non-member state with a discriminatory approach to sexual minorities or a hostility to migration from joining the Union, it may simply not be a viable approach to seek to require an existing member state to abandon such policies. The EU has limited democratic legitimacy. It does have the power to edge societies in a liberal direction by passing or enforcing laws in areas, such as employment discrimination in which it holds competence. It can also use its financial resources to fund progressive movements or through issuing non-binding guidance. But it does not have the legal or political power to prevent member states from being, broadly speaking, a cold house for gay people or migrants.

Where the Union has the right and indeed the duty to act is in relation to actions by member states that undermine key features of the EU legal order such as judicial independence.

Certainly, basic liberal democratic principles must be upheld in order to sustain the idea of the EU as a union of democracies but what is considered to be a basic principle will of necessity have to be limited if we are to avoid placing the political and legal authority of the Union under pressure that it cannot sustain.

For Ireland, our engagement with Europe has been part of a powerful story of liberalisation and prosperity. But we must be wary of thinking that this Irish story is a universal one that all EU states will follow. As the last ten years have taught Europeans, there is no 'end of history' where humans move slowly but irreversibly in a liberal direction.

That is not to say that the current situation in Poland and Hungary is sustainable. Both have violated key basic liberal democratic norms. But



successfully counteracting that threat will mean gathering as large as possible a coalition amongst member states to take sustained action against these violations.

EU membership can help embattled minorities in Hungary and Poland within its limited area of competence. There would also be certain steps such as criminalising homosexuality or adopting openly racist laws that are so extreme that they would preclude continued membership (although expelling a member is, according to the Court of Justice, legally impossible).<sup>19</sup> But if the broader the idea of ‘basic values’ is, the harder it will be to assemble a wide coalition in its defence so it is probably impossible for the Union to prevent existing member states from taking actions such as expressing a societal preference for heterosexual marriage or from taking steps to prevent their societies from becoming multicultural societies of immigration.

Heterosexist approaches have, after all, been dominant for all of European history. In 1999 not one member state had legislated to introduce gay marriage. Migration and multiculturalism have certainly enriched many EU states, mainly in western Europe, but they have also brought their own challenges and are far from universally popular. In the United States which is a much more robust and integrated structure than the European Union, the imposition of countrywide solutions on issues such as same-sex marriage and abortion by the Supreme Court has placed the authority of that court under real strain. The authority of the EU may not survive an attempt to make liberal approaches on these questions a *sine qua non* of EU membership.

Violations of judicial independence and the unravelling of the legal authority of the EU are fundamental threats to the Union. They undermine not only the authority of EU law but also the pressure to compromise in the political arena that makes the Union an effective political actor. The Union is a *Schicksalsgemeinschaft*, if it fails or loses coherence its member states will find themselves with much less ability to protect their interests and their values in the world. Counteracting these violations needs a sustained effort by a broad coalition, which is unachievable if social conservatives feel that defending the rule of law and legal authority of the Union is incompatible with their desired policies.

The Union should absolutely uphold its laws and do what it can, within the limits of its competence, to combat discrimination and stand up for the values of open societies. But if it fails to distinguish between violations that undermine the functioning of the EU system and desirable liberal goals it

may end up being unable to defend either and undermining efforts to defend the Union from a slow disintegration.

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Notes

- 1 See for example, R. Bellamy & D. Castiglione (2013), 'Three models of democracy, political community and representation in the EU', *Journal of European Public Policy*, 20:2, 206–223.
- 2 See M. Cappelletti, J. Weiler and M. Seccombe, *Integration through Law* (Berlin: de Gruyter, 1986).
- 3 See Case 2/62, *Van Gend en Loos* [1963] ECR 1 (direct effect) and Case 6/64, *Costa* [1964] ECR 585 (primacy).
- 4 See K. Alter *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).
- 5 Paul Krugman, 'The Economic Failure of the Euro', *National Public Radio*, 25 January 2011, <https://www.npr.org/2011/01/25/133112932/paul-krugman-the-economic-failure-of-the-euro?t=1649415793584>.
- 6 R. McCrea, 'EU Strengths Evident throughout Covid Crisis', *Irish Times*, 4 May 2020.
- 7 L. Van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Newcastle: Agenda Publishing, 2019).
- 8 See note 6 above.
- 9 Case 120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
- 10 *Gauweiler v Treaty of Lisbon* (2BvE 2/08).
- 11 Weiss.
- 12 Slovak Pensions, Judgment of 31 January 2012 (PI US 5/12), *Dansk Industri v The Estate Left by A*, Case no. 15/2014.
- 13 Case C-791/19 *Commission v Poland*.
- 14 *Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej*, K3/21.
- 15 'Romanian Constitutional Court Rejects Primacy of EU Law', *The Brussels Times*, 25 December 2021 <https://www.brusselstimes.com/199239/romania-constitutional-court-rejects-primacy-of-european-law>.
- 16 See more generally R. McCrea 'Forward or Back: The Future of European Integration and the Impossibility of the Status Quo', *European Law Journal* 23 (2017).
- 17 See Eszter Zalan, 'EU Leaders Confront Orbán on anti-LGBTQI Law', *EU Observer*, 25 June 2021, <https://euobserver.com/rule-of-law/152253>.
- 18 E. Luce, *The Retreat of Western Liberalism* (London: Abacus, 2018).
- 19 Case C-621/18, *Wightman and Others v Secretary of State for Exiting the European Union*.