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The Law and Politics of Protecting Liberal Democracy

Prof. dr. John Morijn



Inaugural Lecture

24 June 2022

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On acceptance of the post of endowed professor of
law and politics in international relations

at the

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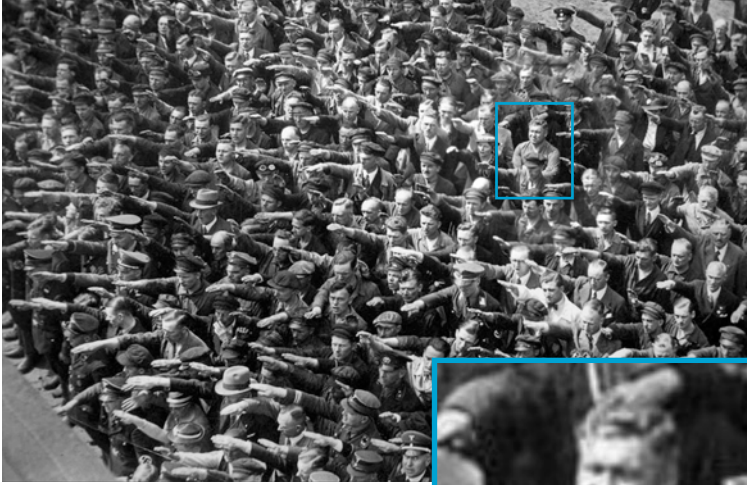
Foreword

Niewinni Czarodzieje / Innocent Sorcerers



Hamburg, 13 June 1936. The ship Horst Wessel is launched for sailing. Hundreds of people. They shout “Sieg Heil”. They raise straightened right arms. A society of fanatics. Drugged by a criminal ideology. A photo like many others? No. You just have to look closely. A man with pursed lips and arms crossed over his chest. Alone among the crowd. August Landmesser. A detail that changes everything.

*



What is liberal democracy? Free elections, free media, free courts. A system of rule by the majority constrained by the rights of minorities. The list of requirements goes on. The point is that our freedoms are protected by the law. In a country or society governed by the rule of law, legal norms are widely respected. This is what independent courts guard.

*

The right to an independent court is therefore a part of every person's freedom. Assaults on the justice system destroy this freedom. You cannot be just a little bit free. We are either free or enslaved. We must always fight for issues that matter to us. So long as we fight, we are winners. We must not calculate risks. We shall not step back. We cannot be afraid. Freedom starts where fear ends.

*

Some will say that these are clichés. Easy platitudes. They will shrug. Yes, the picture is very simple. Yet, that single action conveys more than a thousands words. For how else should we talk about and engage with principles? Some things are simply good or bad. Black or white. This is why I only repeat: values need to be defended. In their defence every price is worth paying. Even if we fight alone. For now.

*

Why me? Why you? That is not what matters. There is no need to pay attention to others. A detail can change everything. It is better to be a niewinny czarodziej - an innocent sorcerer. A hopeful contrarian. Maybe it is childish. But it is preferable to be one who acts on beliefs. One who believes that it is worth

fighting for values against those who destroy them. Innocent sorcerers change the world.

*

Why me? Why you? Someone once asked Władysław Bartoszewski the same questions. The Auschwitz survivor, former political prisoner and former Polish Minister of Foreign Affairs responded: “*Somebody* had to do it. *Somebody* was to react. *Somebody* needed to say no. *Somebody* was going to have to protest. I interrogated myself about all this. And I found the answer: if somebody, then why not *me*?”

Judge Igor Tuleya,
Warsaw District Court

Dear Members of the University Board,
Dear colleagues, friends and students,

When I first arrived in Groningen in August 2007, I could hardly believe my luck. I was assigned an unusual office – a room housing the private book collection of the late Professor André Donner. Donner had arrived in Groningen in 1979 as professor of constitutional law after working as the second president and later judge of the European Court of Justice (ECJ), the highest court of what is now the European Union (EU). While in Luxembourg, Professor Christiaan Timmermans – himself later a professor of European law here, and after that Deputy Director-General of the Commission legal service and a Luxembourg judge¹ – had been his legal secretary. Professor Donner’s fingerprints are all over EU and European human rights law, my two fields of interest. He presided over the ECJ both in *Van Gend en Loos*² in 1963 and *Costa v. ENEL*³ in 1964 – famous judgments about two foundational EU legal principles, direct effect and supremacy. Donner was later also briefly a judge at the European Court of Human Rights in Strasbourg. There he helped decide *Rees v. UK*⁴ in 1986, one of the first cases about rights of transgender persons. This is an issue that I now sometimes rule on in equal treatment cases as a Commissioner

1 It may be no coincidence that two of the three current Dutch judges, Court of Justice Judge Sacha Prechal and Judge Marc van der Woude, the president of the General Court, both took their law degree in Groningen.

2 Case C-26/62, *Van Gend en Loos*, 5 February 1963.

3 Case C-6/64, *Costa v. ENEL*, 17 July 1964.

4 European Court of Human Rights, *Rees v. United Kingdom*, Application no. 9532/81, 17 October 1986. In fact, this case is now still the first one mentioned on the Human Rights Court’s factsheet about gender identity (https://www.echr.coe.int/Documents/Fs_Gender_identity_ENG.pdf).

at the Netherlands Institute for Human Rights – and which gets you lots of Twitter friends.

Groningen, I soon discovered, more generally is a special working place for lawyers combining academics and practice. I remember Wednesday morning constitutional law department coffees as my colleagues, Professors Hans Engels and the late Alfons Dölle discussed, often passionately, what had happened in the Dutch Senate the previous day. They knew because they were both senators. The predecessor of my current department here, Transboundary Legal Studies, used to be home to the most consequential Dutch international lawyer of the last century – and now the only Groningen scholar starring in a Netflix series – the late Professor Bert Röling. Before coming to Groningen in 1949 he had been a judge at the Tokyo tribunal. Professor emerita Sylvia Wortmann, who just kindly introduced me, combined her Groningen professorship in civil law with her membership of the Dutch Council of State.

Standing on the shoulders of such giants who worked or still work to protect liberal democracy in theory and practice is both a huge privilege and a big responsibility. I am acutely aware of that as I am accepting the appointment by the Netherlands Association of International Affairs as an endowed professor of law and politics in international relations at this marvellous institution.

My lecture this afternoon is about the law and politics of protecting liberal democracy. It is in three parts. I will start by discussing the current challenge to liberal democracy in Europe. Then I will address the law in place to protect it and identify the most promising ways to improve the record. Finally, I will reflect on the politics needed to bridge the gap between binding law and current realities.

Let me present my three main arguments. First, the problem of deterioration of liberal democracy in EU Member States and, as a result, political EU institutions themselves, is much deeper and much more urgent than commonly understood. Opponents of liberal democracy in Europe have a clear gameplan. Its defenders do not – at least not yet. Second, existing binding norms and procedures offer many more possibilities to protect liberal democracy than currently used. The challenge is to employ only those tools that are effective to confront the specific challenge we face, and to enforce their outcomes more effectively – particularly ECJ judgments. Third and finally, we need more, not less politics to protect liberal democracy. But we cannot sit back and leave politics to politicians alone. Instead, we need more conscious and coordinated action from all of us, everyone in this room. Lawyers – legal academics, attorneys, legal advisers to governments and EU institutions – and national and EU-level politicians have an additional role and responsibility.

1 The challenge to liberal democracy

Dear Members of the University Board,

Just a decade ago, in 2012, the EU was awarded the Nobel Peace Prize. In its report⁵ the Nobel Committee gave as the main justification that for over 60 years the Union had contributed to advancement of peace, democracy and human rights. It highlighted that when Greece, Spain and Portugal had joined the European Communities in the 1980s, democracy had been a condition for their membership. It argued that the 2004 and 2007 accessions by Poland, Hungary and Bulgaria had strengthened democracy in these countries. This, according to the Committee, was proof that the EU had been successful in stabilising and transforming Europe from a continent of war to a continent of peace. At the time I thought of this as well-deserved.

Since 2012, however, the EU has competed for a different award. Judging by its record it went out of its way to win the political equivalent of a Razzie⁶, the Oscars-parody award. The award category the EU has consistently competed in is for best placed, best equipped, and best resourced international organisation to protect liberal democracy producing the worst performance.

5 Nobel Prize Committee, Press release Nobel Peace Prize 2012, at: <https://www.nobelprize.org/prizes/peace/2012/eu/facts/>

6 The official term is a Golden Raspberry Award, see: www.razzies.com/

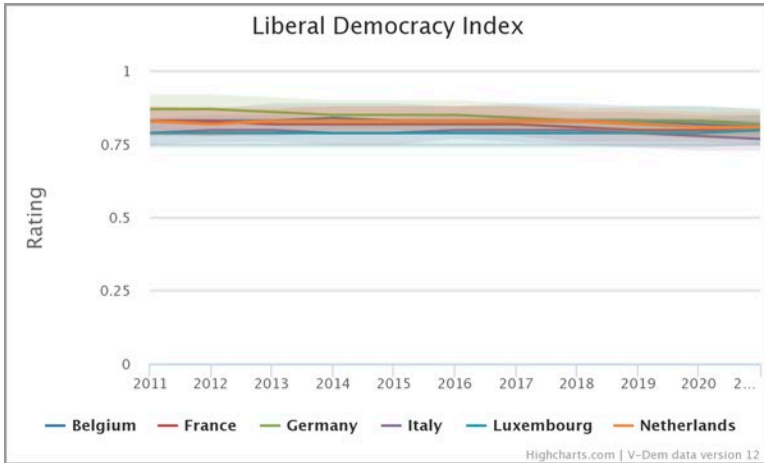
I refer here to the EU's political institutions – the Commission, the Council of Ministers (Council) and the European Parliament (EP) – not the ECJ. Let me explain what I base this harsh assessment on and how this has now created a “catch 2022” situation, as Dutch judge Lydia Heuveling van Beek recently put it.⁷

Various authoritative civil society organisations and academic institutions, such as Freedom House and Varieties of Democracy, measure how states perform in light of indicators of liberal democracy, such as judicial independence, media freedom, protection of civic space and freedom and fairness of elections. A country needs to score sufficiently well on each of these elements to be qualified as a liberal democracy. Most EU Members are liberal democracies, of course, since states need to be to become EU Members (Article 49 TEU). And it is normal there are fluctuations, and weaknesses to work on. Part of the point of being a Member State to the EU is that there are extra guarantees to prevent too great shifts.

7 Lydia Heuveling van Beek, Poland and the democratic rule of law: catch 2022?, *NJB Blog*, 22 April 2022, at: <https://www.njb.nl/blogs/poland-and-the-democratic-rule-of-law-catch-2022/>

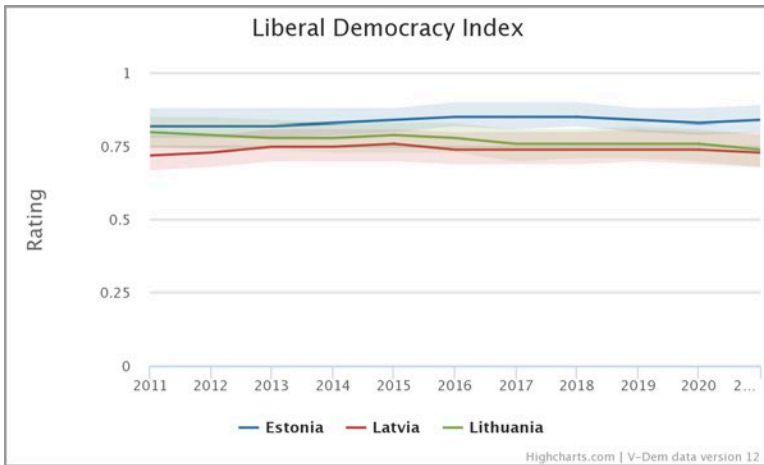
However, in several Member States we have been witnessing and continue to see a dramatic drop in democracy rankings.⁸ Since 2012, Hungary has stopped being a liberal democracy altogether. Poland has been in the top 3 of most rapidly backsliding countries – in the world. Clearly, the political EU institutions, despite the wealth of resources available to them, do not deliver on their objectives and obligations in this respect. Indeed, I would argue that without the ECJ, which has been extremely important in this area – I will return to that later – the picture would be much grimmer still.

8 Freedom House, *Nations in Transit 2022: From Democratic Decline to Authoritarian Aggression*, 2022, at: <https://freedomhouse.org/report/nations-transit/2022/from-democratic-decline-to-authoritarian-aggression> Freedom House describes its understanding of liberal democracy as follows: “The term liberal democracy entails more than just competitive elections and a basic respect for civil liberties. It refers to democracy in its most robust form—a system of self-government in which executive power is regulated by elected state institutions (parliaments), unelected state institutions (courts), and unelected nonstate institutions (civil society and the press); and in which the full array of individual and collective rights are observed and protected.” On these parameters it qualifies Hungary as a hybrid regime. See also *Varieties of Democracy (V-Dem) Institute, Democracy Report 2022: Autocratization Changing Nature*, 2022, at: https://v-dem.net/media/publications/dr_2022.pdf. See John Morijn, *De EU en de rechtsstatelijke crises in Hongarije en Polen – Urgentie vergt (gedifferentieerde) actie*, (2021) 3 *Nederlands Juristenblad* 203.



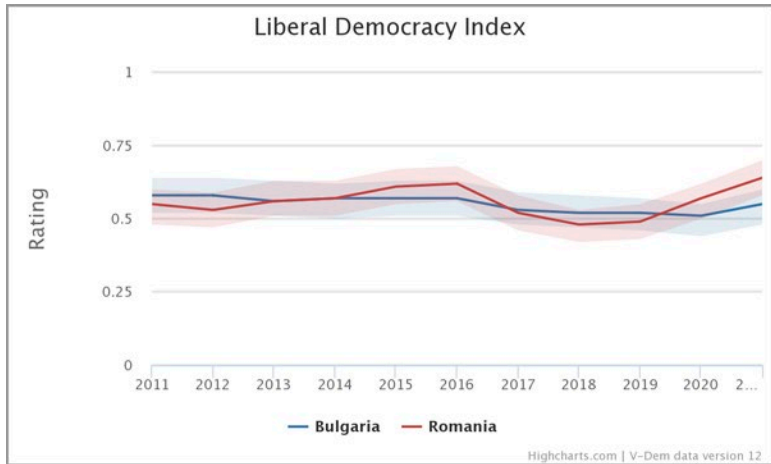
Founding Members EU

Source: V-Dem



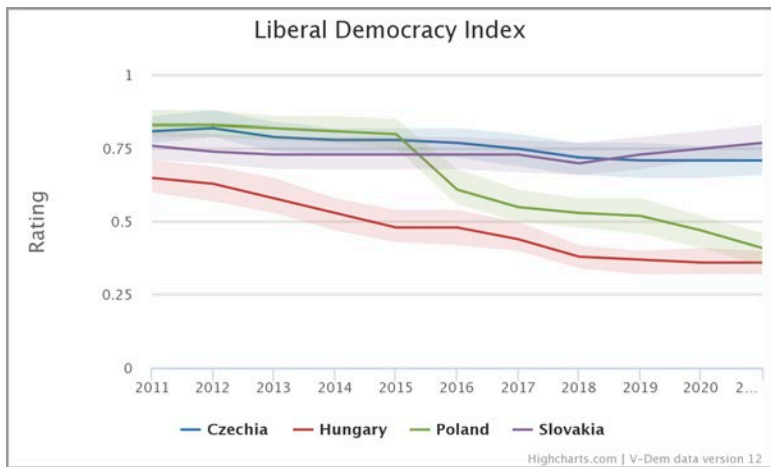
Baltic States

Source: V-Dem



Romania/Bulgaria

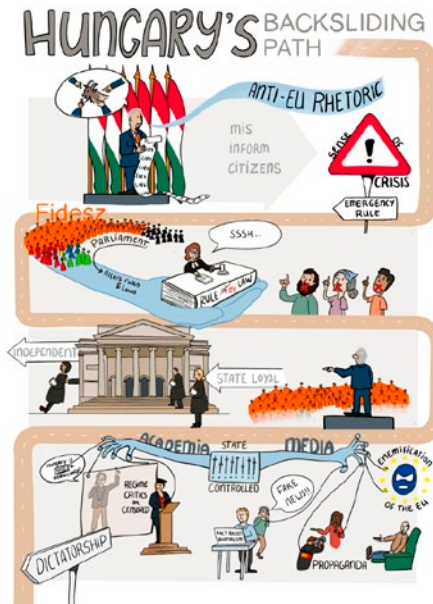
Source: V-Dem



Czechia, Slovakia, Hungary and Poland

Source: V-Dem

Let us take a more precise look at this worrying and rapidly developing phenomenon. Illiberals responsible for the nosedive in rankings specifically targets the liberal aspect of liberal democracy.⁹ They attempt to divorce the liberal component from democracy and move a state to the unstable and unsustainable oxymoron known as an “illiberal democracy”.¹⁰ This populist playbook follows a predictable logic and sequence. So how does it unfold?



Source: Bord & Stift (produced for Netherlands Helsinki Committee)

9 See Kim Lane Scheppele, Autocratic Legalism, (2018) 85 *The University of Chicago Law Review* 545.
 10 Jan-Werner Müller, The Problem with “Illiberal Democracy”, *Social Europe*, 27 January 2016, at: <https://socialeurope.eu/the-problem-with-illiberal-democracy>

The story always starts with elections won on an “us versus them” agenda, the “them” being a scapegoat of choice, such as migrants, LGBTIQ people, the EU or judges. Once in power, the constitution and legislation are changed without regard of minority interests. Institutions that are meant to check the legislature and executive on precisely that point, such as the judiciary, the central bank and ombuds institutions, are populated with political appointees. In Poland, the Council for the Judiciary was politically captured for that purpose. It is no longer recognised as independent by its European peers.¹¹ Other independent actors vital to a healthy liberal democracy, such as civil society, media and academics, are put under pressure in a variety of different ways. In Hungary a university was forced out and NGOs and independent media pressured. In the meantime, electoral rules, including equal airtime, are changed to tilt the political playing field and make it easier for the incumbent to win the next elections. Much of this is presented as justified by the will of the people and with the semblance of legality. Solutions are copy-pasted from other states, without copying along their context and spirit. This results in what the Princeton Professor Kim Lane Scheppele has called a Frankenstate, after Mary Shelley’s *Frankenstein*.

11 European Network for Councils of the Judiciary, ENCJ votes to expel Polish Council for the Judiciary (KRS), 28 October 2021, at: <https://www.encj.eu/node/605>



Merlo, C. (2018). *Frankenstate* [Illustration]
<http://www.curtmerlo.com>

The resulting backsliding is not just an isolated problem of, and in, specific Member States. A crucial aspect is that because Member States must work together problems spill over in two directions. First, national backsliding translates upwards to the composition of EU institutions. There are Members of European Parliament (MEPs) belonging to the Polish and Hungarian

illiberal governing parties. These governments are themselves represented in the Council and vote on legislative and political files. They also nominate their European Commissioners. In this way each EU institution now has illiberal spots. This in turn results in all of EU decision-making being partly, or sometimes – in the case of unanimity files – fully, hostage to the whims of illiberal forces. American Professor Dan Kelemen has described the result as the EU being stuck in an “authoritarian equilibrium” or “autocracy trap”.¹² He has also explained how to get out of this, namely, by breaking illiberal governments’ so-called “boundary control” – I will return to that later too, because it is crucial.

Second, democratic backsliding affects other Member States. Much of EU cooperation functions based on mutual recognition. This is a legal obligation by which you need to accept as legitimate decisions and requests of other Member States’ authorities virtually blindly. This method is crucial for efficient cooperation not only in the internal market, but also in the field of asylum policy and police and judicial cooperation, as my colleague Professor Jorrit Rijpma recently explained in his impressive inaugural lecture at the University of Leiden.¹³

12 R. Daniel Kelemen, Europe’s other democratic deficit: national authoritarianism in Europe’s democratic union’, (2017) 52(2) *Government and Opposition*, 211-238; R. Daniel Kelemen, The European Union’s authoritarian equilibrium, (2020) 27(3) *Journal of European Public Policy*, 481-499.

13 Jorrit Rijpma, Vrij verkeer, de Rechtsruimte en Schengen: Up or Out? (inaugural lecture) Leiden, 21 oktober 2021.

But what if the underlying justification for such cross-border cooperation, namely that all Member States are liberal democracies, is no longer a reality? For example, what to do in case of problems in the judiciary where the highest courts are partly or completely populated by persons who are not impartial and independent, because they were appointed by a Council of the Judiciary that is politically captured?

It is easy to view all of this as a worrying, yet somewhat remote abstraction. I know because this was my own case. That changed on 27 November 2019. I found myself in a courtroom in Warsaw. My former professor, Wojciech Sadurski, who had tweeted critically about the Polish governing party and Polish public tv for their actions had been sued for defamation by both. A law professor standing behind a lectern, I saw him facing a judge rather than students. Free speech NGOs characterised these actions against Sadurski as SLAPP-cases, strategic lawsuits against public participation.¹⁴ Their sole purpose is to scare and silence your opponent rather than to win. Being there opened my eyes.¹⁵ This was not the EU I had studied and taught

14 Article 19, Poland: Ruling Law and Justice party and public broadcaster tvp must drop SLAPP defamation lawsuits against law professor Sadurski, 25 November 2019, at: <https://www.article19.org/resources/poland-ruling-law-and-justice-party-and-public-broadcaster-tvp-must-drop-slapp-defamation-lawsuits-against-law-professor-sadurski/>

15 John Morijn, Supporting Wojciech Sadurski in a Warsaw courtroom, *Verfassungsblog*, 28 November 2019, at: <https://verfassungsblog.de/supporting-wojciech-sadurski-in-a-warsaw-courtroom/>

about. This was not my EU. As a professor I am to combine the perspectives of IL (international law) and IR (international relations). But to do so in an informed way, I find it is crucial to base my assessment on what happens IRL – in real life.



Wojciech Sadurski facing a judge in Warsaw on 27 November 2019

Since then, I have been to Warsaw, Luxembourg and Budapest many more times. To attend ECJ hearings about Polish judges harassed by their government. An example is Judge Paweł

Juszczyszyn, the first ever judge to be disciplined for asking a preliminary question – which was, in fact, his duty. To speak to and learn from journalists, academics, attorneys and human rights activists who push back against the pressure they face. Often at personal cost and risk. Professor Sadurski has so far won his cases. Many have been more affected. I know and cooperate with academics who can no longer live and work in their home countries even if these are EU Member States. I rely on the work of journalists who need to have every story checked before it goes out to minimise a risk of being sued in SLAPP cases. Their employers, independent media companies, reserve part of the budget for this.



The author with Polish judge Paweł Juszczyszyn

One person I particularly admire is Polish Judge Igor Tuleya. His immunity as a judge was lifted, he was suspended and had his salary cut following a decision by a chamber of the Polish Supreme Court that the ECJ (and European Court of Human Rights) have said is not a court and therefore cannot issue judgements. In the movie *Judges under Pressure* he explained his motivation:

“If I weren’t doing this, I would feel as though I ran away at the crucial moment. The energy I use up to mobilise, to force myself to act, comes at less of a cost than a sense of worthlessness I would otherwise feel the rest of my life.”

2 The law of protecting liberal democracy

Dear Members of the University Board,

By now you will have realised: the rule of law file is a major headache for the EU. After my description I would not blame you for thinking that, with so much at stake, the EU must lack tools and procedures to stop this, or at least slow it down. The answer is: no, there is no problem of too few instruments. On the contrary: the only problem with tools is that there are too many. It is



MEPassistant. (n.d.).

Types of headaches meme [Illustration]

<https://mepassistant.wordpress.com>

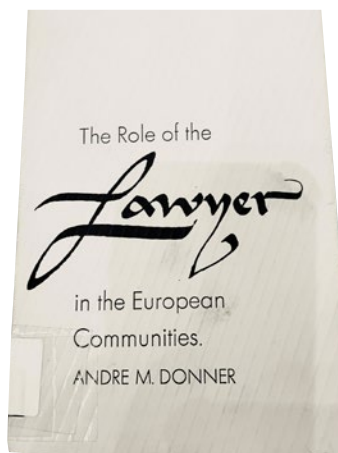
mainly a problem of spending too much time and energy on using the wrong ones, political and policy efforts that are not suitable to dent the populist playbook. But it is mostly a problem of using tools that *are* effective to confront illiberal national governments in a consistently “too little, too late”-fashion, and simply not using other potentially effective options that are available already. I will discuss these elements in turn.

In the EU setting many political and policy instruments have been developed to ensure that Member States comply with EU values (Article 2 TEU). The main procedure, the so-called Article 7 TEU procedure, enables a political conversation in the Council or European Council with Member States when it is determined that there is “a clear risk of a serious breach” (para 1) or that the state of play already constitutes a “serious and persistent breach” of EU values (para 2). The Commission triggered this for Poland in December 2017 and the EP for Hungary in September 2018. The ultimate effect could be suspension of voting rights of Member States, which would require unanimity minus one. At the time of development no-one contemplated that two Member States could be in hot water simultaneously and could therefore help each other by ensuring no unanimity minus one would ever be reached. That is why this instrument currently has no effect IRL.

There are many more policy tools. Examples are the Commission’s Annual Rule of Law Report and the Council’s rule of law dialogue. Professors Petra Bárd and Laurent Pech analysed all of them in a recent report.¹⁶ They show well that these tools and mechanisms each assume that Member States are liberal democracies. Since that is not the case discussion based on

¹⁶ Laurent Pech, Petra Bard, The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values, 21 February 2022, at: [https://www.europarl.europa.eu/thinktank/en/document/1POL_STU\(2022\)727551](https://www.europarl.europa.eu/thinktank/en/document/1POL_STU(2022)727551)

these tools often feels like a worked effort not to address the elephant in the room. Moreover, it facilitates a setting where illiberal regimes and liberal democracies are treated alike, where apples and oranges are compared, and oranges get to ask questions to the apples. I would personally add that the EP and Council also spend an enormous amount of time on negotiating non-binding Council conclusions and resolutions, and on commenting on each other's efforts.¹⁷ I have never seen a study into concrete follow-up of any of these. And frankly I am not volunteering to undertake it. The data I have shown confirms that it is highly unlikely that it has made any difference IRL in Poland or Hungary.



This diagnosis does not concern the ECJ. To professor Donner this may have been surprising. In a series of lectures he gave in Chicago in 1966 he observed:

“Concerning the Community’s judiciary, the Court of Justice, one cannot repeat too often that the most important thing about it is not what it has or has not done but simply that it exists. It may have ruled on a

¹⁷ John Morijn, Post-Lisbon civil rights protection by the EU’s political institutions, in: S. de Vries e.a. (eds.), *Civil rights and EU citizenship – Challenges at the crossroads of the European, national and private spheres*, Edward Elgar Publishing: Cheltenham (2018), pp. 14-42.

considerable number of cases ... but that number is certainly insignificant compared to the number of times the treaties have been observed and matters have been satisfactorily arranged to escape legal proceedings.”¹⁸

In fact, the ECJ has been the only EU institution that has lived up to its responsibilities. When it was asked to rule, it clarified key rule of law concepts, such as judicial independence.¹⁹ It has made clear the Disciplinary Chamber of the Polish Supreme Court is illegally composed and that therefore its output has no effect as a matter of Union law.²⁰ In October last year it imposed a record fine of 1 million euros/day on Poland for non-implementation of its ruling.²¹ This is important because cash is likelier to change the illiberal calculus. The ECJ has ruled on other aspects of the populist playbook too. It found Hungary violated Union law when it changed the conditions under which universities can operate, which was clearly meant to target only Central European University.²² It found Hungary violated Union law with regulation that

18 André M. Donner, *The Role of the Lawyer in the European Communities – The Rosenthal Lectures 1966*, Northwestern University Press/Edinburgh University Press: Edinburgh, 1968, p. 111.

19 Laurent Pech, Dimitry Kochenov, *Respect for the rule of law in the case law of the European Court of Justice: a casebook overview of key judgments since the Portuguese judges case*, SIEPS: 2021, at: <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>

20 Case C-204/21 R, *Commission v. Poland – Order of the Vice-President*, 14 July 2021.

21 Case C-204/21 R, *Commission v. Poland – Order of the Vice-President*, 27 October 2021.

22 Case C-66/18, *Commission v. Hungary (Higher Education)*, 6 October 2020.

made it harder and more exposing to financially support NGOs from abroad. This is crucial since those organisations are now one of the most reliable sources of independent information.²³

The Court can only act when approached. It is dependent on the Commission and Member States bringing so-called infringement cases (Articles 258/259 TFEU) and national judges asking it preliminary questions (Article 267 TFEU). However, particularly the Commission has a record of doing too little too late. It has not brought cases against Poland for politically capturing its Constitutional Tribunal or its Council of the Judiciary. It started the written procedure against Hungary for its enormous pressure Klubrádió that found its media license not extended but has been slow to bring it to the ECJ.²⁴ Moreover, it has not acted at all on similar harassment of other free media, such as Index (now Telex) and Tilos. It has only twice asked for a faster treatment of cases aimed at freezing the situation on the ground until a more detailed assessment can be made, so-called interim measures (Article 279 TFEU). It did not do so,

23 Case C-78/18, *Commission v. Hungary (Transparency of Associations)*, 18 June 2020.

24 European Commission, July 2021 Infringement package - Media freedom: Commission launches infringement procedure against Hungary for failing to comply with EU electronic communications rules, at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743 (letter of formal notice stage); European Commission, Media freedom: The Commission calls on Hungary to comply with EU electronic communications rules, 2 December 2021, at: <https://digital-strategy.ec.europa.eu/en/news/media-freedom-commission-calls-hungary-comply-eu-electronic-communications-rules> (reasoned opinion stage).

for example, in the case of Central European University that therefore moved to Vienna. And, crucially too, it rarely goes back to the ECJ when a judgment is not implemented (Article 260 TFEU), like with the Hungarian NGO-case. Such a case could lead to a financial penalty. Member States share the blame. They can bring each other before the ECJ in case the Commission does not (Article 259 TFEU). This has not so far happened. All of this is like constantly driving a Ferrari in second gear while the populists drive their Fiat in fifth.

There are also various existing legal avenues that have not even been used. I will call them the 3 p-s: parties, press and purse. For each it is important to distinguish what can be done immediately, and what could be done further with new legislation. At this juncture there is every reason to be sceptical that any new legislative proposal will get far. After all, it would be expecting for turkeys to vote for Christmas. Why would the Hungarian or Polish government be willing to support anything that is targeting their gameplan? Recent experiences with the rule of law conditionality regulation have taught us this exact lesson.²⁵

²⁵ Here the two Member States concerned were outvoted in an ordinary legislative procedure (which requires a qualified majority of Member States to agree), subsequently blocked agreement on the EU budget until there was a political deal for the legislation to be suspended until the ECJ had confirmed its legality even if EU law states explicitly that such a legal challenge has no suspensory effect (Article 278 TFEU). This effectively caused a delay of more than one and a half year. See Merijn Chamon, Alberto Alemanno, To save the rule of law, you must apparently break it, *Verfassungsblog*, 11 December 2020, at: <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>

So, first p, parties. In the EP politicians need to work together through European political parties and political groups. For both it is a requirement that they come from at least a quarter of Member States and have a minimum number of members (currently around twenty-five). To get party financing they need to register and make a pledge of allegiance to EU values.

Regulation 1141/2014²⁶ states that only a European political party that, as a whole, in its programme and activities complies and continues to comply with basic EU values is entitled to EU funding. In practice, this is a dead letter. EU institutions never asked for this to be checked, even if they have that competence. This means that we are currently funding Polish law and justice politicians in the EP with EU taxpayers' money. When the Commission invoked the Article 7 TEU procedure against Poland in 2017 it did not simultaneously trigger the option to ask for deregistering the political party housing these politicians. The same happened, or rather did not happen, when Parliament started the Article 7 procedure against Hungary.

Recently the Commission proposed reforms.²⁷ A key aspect is that to continue receiving EU funding, *each component* national political party making up a European Political Party (rather

26 John Morijn, Responding to “populist” politics at EU level: Regulation 1141/2014 and beyond, (2019) 17(2) *International Journal of Constitutional Law* 617, at: <https://academic.oup.com/icon/article/17/2/617/5523748>

27 Commission proposal, Regulation on the statute and funding of European political parties and European political foundations (recast), COM(2021)734, 25 November 2021.

than the whole political party) should respect EU basic values too. This would be a considerable improvement. But current rules should be sufficient for it to become less common and accepted for MEPs to rub elbows with politicians elected through national parties that undermine liberal democracy at home.

Second, protecting the press. EU institutions often claim they have no competences here. This is not correct.²⁸ I recently wrote an op-ed with my Polish colleague Professor Adam Bodnar, at the time also still the Polish Ombudsman – and, I should add, someone who has had an immense personal impact in slowing down developments when he held that office. We argued²⁹ that one legal way to act immediately for the Commission is to protect the active right to vote (Article 20(2)(b) TFEU and Article 39 Charter) more actively. It is a conventional interpretation in EU law to insist that rights should have substance. EU citizens in Poland and Hungary will not have an effective, meaningfully informed right to vote for elections covered by EU law, such as EP and municipal elections, without access to independent national media. Put simply: you cannot make a proper choice if

28 Meijers Committee, Promoting and safeguarding media pluralism through EU law, 20 October 2021, at: <https://www.commissie-meijers.nl/nl/comment/promoting-and-safeguarding-media-pluralism-through-eu-law/>

29 Adam Bodnar, John Morijn, How Europe can protect independent media in Hungary and Poland – press freedom is a prerequisite for free and fair elections, *Politico*, 18 May 2021, at: <https://www.politico.eu/article/europe-protect-independent-media-poland-hungary/>

you do not have access to a variety of independent views. Given how much media pluralism is under pressure in Hungary and Poland, it is hard to think of a more urgent issue to push back against the populist playbook of the governments there, particularly with the EP elections coming up in 2024. Without free media the next EU elections may well not be free and fair.

The Commission instead proposed and announced new legislation. It has put forward a proposal to protect journalists and human rights defenders against SLAPPS, abusive lawsuits.³⁰ This is potentially useful, but it is important not to forget the interconnected nature of the challenge. Better protection against the state from suing to silence you only gets you so far. Just look again at the picture of Wojciech Sadurski, but then focus on the judge and remember that there may be simultaneous moves to affect her independence and impartiality (see p. 23).

The final p is that of purse. Or, in Dutch, poen! Regulation 2020/2092, establishing a general regime of conditionality, is in force since 1 January 2021, and lays down the notion that EU Member States only get EU cash if they ensure rule of law compliance. If there is a risk that sound financial management is affected in a sufficiently direct way by problems with

³⁰ European Commission, Press release: Commission tackles abusive lawsuits against journalists and human rights defenders “SLAPPS”, 27 April 2022, at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2652

independence of the prosecutor or judges, the Commission can start an investigation. If it establishes the Member State concerned does not convincingly address issues, the Commission can put a proposal to the Council to stop EU funding until these issues are solved. In February the ECJ confirmed the legality of this instrument.³¹ The Commission has now triggered this procedure against Hungary. It is now essential that this instrument is made effective. I think we should count on any Council decision to be challenged before the ECJ once again, so that judges will again have to decide. If this instrument works, this can be a gamechanger. I would almost suggest the EU would deserve an Oscar.

There is a final, more long-term aspect about the law of protecting liberal democracy in Europe that is potentially crucial asset but is often overlooked. EU law will likely help speed up a return to liberal democracy after a change of national government, as Kim Lane Scheppele recently argued.³² Rather than putting a lot of energy in national legislative work to restore liberal democracy, for a national government it would just be a matter of fully accepting again what was always formally binding in terms of EU law but simply ignored.

31 Case C-156/21 *Hungary v. Parliament and Council* and Case 157/21 *Poland v. Parliament and Council*, 16 February 2022.

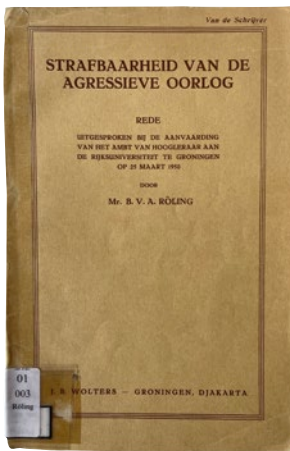
32 Kim Lane Scheppele, Escaping Orbán's constitutional prison – how European law can free a new Hungarian parliament, *Verfassungsblog*, 21 December 2021, at: <https://verfassungsblog.de/escaping-orbans-constitutional-prison/>

In other words: even in backsliding EU Member States EU law remains a hidden guarantee. The binding law to protect liberal democracy may help a much quicker bounce back after an authoritarian episode.

3 The politics of protecting liberal democracy

Dear Members of the university board,

I now come to the third and final part. To introduce it, I will make a brief detour. In his inaugural lecture in 1950, about the crime of aggression – a topic with unfortunate current resonance – Professor Röling remarked:



“Individual criminal responsibility for enormous events like war or peace is incredibly hard to establish. When what happened gradually moves further behind us, and an effort is made to see underlying causes in the correct light, individuals often disappear from the picture. They get reduced to being mere exponents of larger social forces.”³³

33 B.V.A. Röling, *Strafbaarheid van de agresieve oorlog* (oratie 25 maart 1950), J.B. Wolters: Groningen/Djakarta, 1950, p. 4. He added: “In our understanding of the defining moments of history the dead are given a larger role than the living. We may realise that the events possibly were too colossal to hold individuals to account”. The full original Dutch reads: “Individuele schuld voor zulk een enorm gebeuren als oorlog of vrede is daarbij zo uiterst moeilijk te bepalen. Als de gebeurtenissen verder achter ons liggen zodat we ze in het juiste licht zien kunnen, vervagen de individuen, die meer en meer het karakter krijgen van de exponenten van grote sociale krachten, zien we dat in de beslissende ogenblikken der geschiedenis de doden vaak een groter rol spelen dan de levenden, realiseren we dat er gebeurtenissen zijn wellicht te kolossaal om daarvoor individuen ter verantwoording te roepen.” The central claim of Professor Röling’s inaugural lecture was that viewing aggression as an international crime that could trigger state or individual responsibility was premature.

Röling was discussing the responsibility of individuals for acts of war. But his observation provides an entry-point for our reflection too. In most discussions of democratic backsliding the focus is on structures, norms, institutions, procedures and larger social forces. Individuals, and their role and responsibility, disappear from the picture. The conversation is in a passive voice. Yet, liberal democracy is not an out-of-body experience taken care of by others. It is an unstable construct that depends on identifiable individuals stepping up.³⁴ This is what I refer to as politics.

We need to distinguish different types of individuals with respective roles and responsibilities. The diagnosis by Ernst Hirsch Ballin, who as the Dutch Minister of Justice was one of the first politicians to put today's topic on the European political agenda, is commendable. He observed that nowadays citizens have too little sense of citizenship and political leaders provide too weak leadership.³⁵ I would add that there are also many lawyers without commitment to a duty of ensuring legal compliance. I will focus on these three groups. Their concerted effort would constitute an excellent start for developing a gameplan to protect liberal democracy better.

34 Princeton political theorist Jan-Werner Müller put this well recently when he wrote “democracy is not about trust; it’s about effort”; Jan-Werner Müller, *Democracy Rules*, Allen Lane: London, 2021 p. 185.

35 Ernst Hirsch Ballin, *Waakzaam burgerschap – vertrouwen in democratie en rechtsstaat herwinnen*, *Querido Facto*, 2022, p. 9.

First, citizenship. Every single one of us here is a citizen. We vote. We consume news. We rely on a diverse public debate. Yet, many of us show little vigilance in ensuring any of these things for ourselves. Critical eyes and ears, like the Hungarian Helsinki Committee, do their work for all of us. But they need support. The same goes for journalism: we all know that if something is free, we are the product. Still, some of the most important independent news platforms in Hungary, like Direkt36 (that broke the story that the government had used Pegasus, military-grade spyware, on opponents, which led to setting up an investigative committee in the EP) are now under pressure and struggling to crowdfund to survive. Protecting liberal democracy is political, but not party-political. No political agenda, left or right, can be sustainably achieved without it. It is then quite notable that so few citizens make this a central element of whom to vote for. Or try to investigate whom their MEPS cooperate with.³⁶ By being more active and

³⁶ My experience is that it is often not a lack of interest, but a lack of knowledge. For the 2019 EP elections, based on my research into how mainstream European political parties harbour illiberal forces, I developed a voting tracker with the NGO Liberties, Vote4Values. (See for some background: <https://www.liberties.eu/en/stories/vote-4-values-post-election-analysis/17246>). The methodology was very simple: I identified which Member States the EP itself had criticised for their rule of law record and linked that to relevant national governing parties. Then I calculated how many votes a European political party would lose if it chose not to collaborate with these illiberal politicians. The insight was that it is not numerically necessary to cooperate with illiberal forces to have an EP majority. In other words: some of the autocratic trap we have set for ourselves is a self-inflicted wound. The project generated considerable interest, led to many op-eds, but more importantly to many citizens approaching me to know more.

critical voters, paying beneficiaries of independent journalism and financial supporters of one or two causes we care about, we as citizens can all be immediate protectors of liberal democracy. This depends on no-one. It can be implemented immediately.

Then, lawyers. Mirosław Wyrzykowski, a former Polish Constitutional Tribunal judge and professor of law – and one of the most impressive lawyers I have ever met – recently described in a marvellous *Verfassungsblog* piece how developments in Poland had unfolded. He observed – and I paraphrase somewhat – “[good] lawyers are necessary to build constitutional

democracy. For [its] destruction, [mere] graduates of law faculties are enough ... regardless of their grades and titles ...”.³⁷ In his 1978 inaugural lecture Professor Timmermans also drew attention to the role of the lawyer, and made an observation that has remarkable relevance and resonance today:

“The lawyer, and particularly a practitioner of Community Law, loses his credibility if



³⁷ M. Wyrzykowski, The ghost of an authoritarian state stands at the door of your home, *Verfassungsblog*, 26 February 2020, at: <https://verfassungsblog.de/the-ghost-of-an-authoritarian-state-stands-at-the-door-of-your-home/>.

he would dismiss a binding argumentation because of political inconvenience. Of course, he will have to use his legal savvy and inventiveness to find realistic solutions, but these cannot violate the law. In case political decision-making ignores that, a lawyer cannot take responsibility for the result. At the very least, a lawyer will need to protest when pragmatists threaten to ignore Community Law”.³⁸

Apart from clarity of purpose and making sure that you are more than a graduate of just any law faculty – and I am now looking hard at all the Groningen law students – there are two further contributions specifically lawyers can and must make immediately. These are explaining existing concepts of liberal democracy and insisting on conceptual precision in discussions about democratic backsliding.

We, lawyers, need to get better at explaining the basics of liberal democracy. If I would pause for 30 seconds and ask each of you

³⁸ C.W.A. Timmermans, Het recht als multiplier in het Europese integratieproces – iets over bevoegdheidsverhoudingen tussen Gemeenschap en Lid-Staten (oratie 14 februari 1978), Kluwer: Deventer, 1978, pp. 3-4. The original Dutch reads: “De jurist, en zeker de beoefenaar van het Europese Gemeenschapsrecht verliest zijn geloofwaardigheid indien hij een juridisch dwingende argumentatie af zou wijzen vanwege de politieke onhaalbaarheid. Zeker, hij zal zijn juridisch vernuft en inventiviteit moeten richten op het vinden van realistische oplossingen, doch deze mogen het recht geen geweld aandoen. Gaat de politieke besluitvorming hieraan voorbij, dan zal de jurist het resultaat niet voor zijn rekening kunnen nemen... [De jurist zal] op zijn minst protest moeten aantekenen wanneer pragmatici het communautaire rechtssysteem aan hun laars dreigen te lappen.”

here to clarify to your neighbour precisely why it is important to have an independent and impartial court even if you sometimes disagree with its rulings, you will likely find yourself tongue-tied quickly. Indeed, putting forward the liberal democratic playbook is not easy. We must acknowledge that illiberals often own the framing. That is our own mistake. I was recently involved in a project to write short, non-technical answers to 25 frequently asked questions about the EU rule of law.³⁹ That was seriously hard. But we hear it is useful to journalists and politicians.

This brings me to the second point. Law as a craft and an art is a form of linguistic mathematics. Precision with language and consistency of terminology is a lawyer's bread and butter. One of the vexing issues with the roll-out of the populist playbook is that, even if basic concepts of liberal democracy gradually erode, there is often no language yet to convey new realities. For example, how do you describe a body where you would expect a court but that is not populated by independent and impartial individuals? How do you call such individuals who occupy the place where judges should be? And what do you call their output if it cannot be a judgment? To take another example, what do you call people going out to vote after political opponents

39 Democracy Reporting International and Meijers Committee, Rule of Law Frequently Asked Questions (FAQs): Debunking Common Myths, 16 March 2022, at: <https://democracy-reporting.org/en/office/global/publications/rule-of-law-faqs-debunking-common-myths>

had no equal chance to present their ideas, for example because public media is effectively a propaganda channel? It cannot be an election because that requires the voting and everything surrounding it is free and fair.

This is not an academic exercise. Qualifications are consequential. Now we often see false equivalences and category mistakes, like in the case where the captured Polish Constitutional Tribunal, de facto an extension of the Polish government, made a declaration about primacy of Union law and the ensuing discussion was often about how the German Federal Supreme Court had done something similar in one its judgments. We were comparing a non-court with a court, giving the first way too much credit and devaluing the second. New vocabulary is required to make sure that activities under the populist playbook are not whitewashed by describing them in terms that can apply to liberal democracy only. Negating the illiberal narrative, and finding the words to describe factually what happens, is a crucial effort lawyers should be instrumental in. Other professionals, like journalists, could benefit from it tremendously. I think this would help break the boundary control of illiberal regimes, because they could no longer pull their Frankenstate trick, nor benefit from the political credibility of liberal democratic terminology.

The final group of individuals you had probably expected me to discuss first: politicians. I fully agree with former politician Hirsch Ballin that “more is needed than periodic perfunctory speeches recalling the importance of EU values and procedures to respect them”⁴⁰ – and I don’t take it as a personal criticism after writing many such speeches for him during my time as a civil servant. Instead, the role and responsibility of politicians is deciding what instruments to use (and which ones to discontinue) and about whom to lend public support. I have already explained that EU institutions and Member States currently spend most of their time on the wrong tools. Only hard law instruments and budgetary conditionality are likely to change the illiberal calculus.

But this does not prevent creativity and leadership. For example, it could be useful to openly exclude Hungary and Poland from dialogue-based instruments such as the Annual Rule of Law Report and the Rule of Law Dialogue on the argument that a dialogue, as a good faith exchange of views, is only possible and useful between liberal democracies. The resulting isolation of the creation of a league of liberal democracies inside of the EU may have some political effect. Because, again, it may affect illiberals’ narrative and boundary control. It would also be a powerful sign for a European Commissioner to fly to Warsaw or

⁴⁰ Hirsch Ballin, above n. 35, p. 10.

Budapest and only talk to those under pressure, like judges or NGOs, and not the government. Finally, imagine that on the day the ECJ decided on a 1 million euro/day fine for Poland for refusing to dismantle its Disciplinary Chamber, Commission president Von der Leyen had immediately declared that that fine would be fully used to support independent and impartial judges in Poland. Nothing prevented her from doing this – only a lacking sense of urgency and determination.



The author with Wojciech Sadurski

Over the last years, I have often been asked whether it would not be better to remove Hungary and Poland from the EU. As a lawyer my answer must be that this is impossible within the current setting. As a scholar focused on persons who make a difference IRL my rejection of that notion is more fundamental.

Fellow EU citizens from Hungary and Poland, judges, activists, academics and journalists, and media platforms elsewhere that continue to put their plight in the spotlight, have done more than anyone to fight for the EU to remain true to its mission. How could we justify punishing *them* for something *their governments* do, and against which *we* have not sufficiently helped them push back?



Polish Judge Igor Tuleya with a RUG gift



The author with Judge Igor Tuleya

The stakes are high. And make no mistake, given the authoritarian equilibrium that we have allowed to develop within the EU, pushing harder for liberal democracy to be protected will mean things will have to get worse before they can get better. Illiberal governments will not give up without a fight. We should therefore prepare for a bumpy ride and more openly put non-negotiable principles of liberal democracy front and centre, even if it costs us money in the short term and delays progress on other files. Politics is also: first things first. With binding existing law and a forceful ECJ on our side and a clear gameplan for how to create a better playbook of our own to counter that of illiberal forces, our starting position is excellent. As a Groningen professor this will remain my focus.

Words of thanks

Dear colleagues, family, friends and students,

I am nearing the end here. But before I close with three famous words, I want to express thanks.

First, to my parents, Willemien and Willem. Ma en pa, who would have thought that one day we would together be the centre of attention in a place like this? I realise it is not always easy to understand why I am in Poland, Hungary or Luxembourg again. And again. But I know that, on a deeper level, you feel that it is the result of the three lessons you two taught to and nurtured in my brother Ton and me: humility, curiosity and empathy. Just know it is still the best compliment I can get when you tell me that my explanation was clear after seeing me on tv, hearing me on the radio or reading an interview with me in a newspaper.

Second, Lina. It is special to share this with you. In fact, you should be the one standing up here. Even Professor Röling would have been impressed to meet someone who has worked for the European Court of Human Rights, UN, OSCE, ICTY, ICC, OHCHR and OPCW. Your focus is on what happens IRL. I referred to this in a dedication in a recent chapter book chapter: “For Lina, my wife – and my daily inspiration for keeping an eye on

the ball in a world of human rights talk”.⁴¹ But since almost nobody reads academic books, today seems a good occasion to repeat that. In your honour, and because you would otherwise rightly criticise me for building my talk around three male professors, I want to mention six individuals who have inspired me when preparing this lecture: American Professor Kim Lane Scheppele, Hungarian Professor Petra Bárd, Bulgarian researcher and activist Radosveta Vassileva, Dutch MEP Sophie in 't Veld, Co-chair of the Hungarian Helsinki Committee Márta Pardavi and Polish Judge Monika Frąckowiac. Together, like you, they show that women are just more focused, courageous, and effective when protecting liberal democracy. Boys talk, girls do.

Finally, my students Tekla, Zuza, Anna and Elene. Last September, you organised the Our Rule of Law festival here, inviting judges, journalist and attorneys from Poland, to discuss developments with your peers. I told the university newspaper that it was the biggest compliment of my life that this was inspired by my teaching.⁴² Today you again put together a student event with an incredible line-up of experts. Preparing for my own lecture was more relaxed as a result,

⁴¹ See above n. 17.

⁴² Jonah Franke-Bowell, “Polish judges and journalists visit ug to fight for their threatened judiciary, *ukrant*, 21 September 2021, at: <https://ukrant.nl/polish-judges-and-journalists-visit-ug-to-fight-for-their-threatened-judiciary/?lang=en>

knowing this would not even be today's main event. Thank you for caring. Thank you for making my work here a little rock & roll. Seeing you in action, I know there is plenty to be optimistic about in the crucial effort of connecting the binding law of protecting liberal democracy to a more consequential politics.

Ik heb gezegd.



The author with – from left to right – his students Anna, Tekla, Elene and Zusa

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