



How to make the Dutch democratic constitutional state resilient?

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(1) This position paper is meant to serve as a background document for the debate on a “Resilient democratic constitutional state”, to take place on 9 April 2024, at the Dutch House of Representatives. It aims to answer the following three questions: (i) What lessons can the Netherlands learn from examples of the decay of democratic norms and the rule of law in other Member States? (ii) What role does the democratic constitutional state’s ethos play in guaranteeing the democratic constitutional state? (iii) How can the government and parliament strengthen the institutions of the democratic constitutional state and improve the legal protection of citizens?

I. Lessons learned from democratic decay in various EU Member States

(2) Hungary was the first Member State of the European Union to depart from the democratic path, posing significant concerns for democratic norms within the EU. Hungary’s transition from a consolidated Western-style liberal democracy to a non-democratic regime, categorized as a “hybrid regime of electoral autocracy”,ⁱ is a troubling development. It shows that democracy and the rule of law may decline anywhere. Hungary was the poster child of democratization after the Cold War. As early as 1990, it was the first post-Communist state to sign the Statute of the Council of Europe and, in 1992, it ratified the European Convention on Human Rights. In 1999, Hungary became one of the first former members of the Warsaw Pact – together with the Czech Republic and Poland – to join NATO. In the 1990s and 2000s, the assumption that the transition to democracy was irreversible was taken for granted. However, due to breaches of foundational EU values (such as democracy, the rule of law, and human rights) that began in 2010 and 2015, respectively, Hungary and Poland are both currently undergoing infringement and conditionality procedures, along with Article 7(1) TEU processes. Other Member States are also showing signs of violation of EU values. As such, this is far from being a Central Eastern European *Sonderweg*.ⁱⁱ One should never assume that liberal democracy will always be stable just because it has been so for the past few decades.

(3) Despite different historical paths and different dynamics, democratic decline follows a certain playbook, which varies little from country to country. This playbook is helpful when trying to identify a country’s first steps along the path of authoritarianism. Given the time constraints of the debate, I will list the main steps of democratic decay and decline in the rule of law in a very schematic manner. First, a significant portion of the population loses trust in their government. Second, this discontent triggers a crisis within the existing party system, often leading mainstream parties to shift towards extreme positions. Third, dissatisfied citizens vote for a party promising sweeping changes, electing a leader who criticizes the existing constitutional framework and claims to represent the will of the people. At this point, the constitutional and democratic resilience of a country comes under a stress test. Fourth, newly empowered autocrats move quickly to neutralize or take control of key institutions, such as security services, law enforcement, the judiciary, media, and NGOs. Fifth, autocrats use a stick-and-carrot method: to maintain popularity, they offer benefits to certain segments of the electorate, while also shrinking the space for civil society groups and intimidating journalists, academics, and artists. At the same time, autocrats resort to populist

fearmongering against all sorts of enemies: traditionally disadvantaged minorities and new enemies alike. Sixth, they manipulate voter preferences through media capture and change election laws to make it harder to replace the government, limiting voters' ability for peaceful resistance within the democratic framework once they realize the damage done.ⁱⁱⁱ

(4) Democratic decay and decline in the rule of law in any given Member State is a European matter: it affects both the European project and other Member States. When elections are undemocratic in one Member State, all EU citizens and residents suffer to some extent, due to the participation of the undemocratic state's representatives in the EU's lawmaking mechanisms. Once human rights and the rule of law have been violated, the essential presumptions behind the core of EU law principles – such as mutual trust behind mutual recognition – no longer hold. If there is no impartial judiciary to adjudicate cases concerning public procurements and the spending of EU money, for example, European taxpayers' contributions will be spent improperly. Last but not least, if violations of the rule of law go unheeded in one country and judgments of the highest European courts are disregarded with impunity, other states will follow suit. Poland's replication of Hungarian legal solutions of state capture, such as the early retirement of judges, is an obvious example. Other examples, such as the full or partial disregard of European court judgments, may be more subtle, but are nonetheless equally dangerous for the EU as a legal construct and as a community of values. Therefore, the Netherlands – and indeed all Member States – should be concerned about democratic resilience within the EU, whether domestically or abroad.

II. What role does the democratic constitutional state's ethos play in guaranteeing the democratic constitutional state?

(5) An authoritarian regime is “not based solely on the autocratic traits of the leader, but on social contexts and cultural configurations which shape the interactions of citizens”.^{iv} Therefore, a constitutional ethos, a rule of law culture, an institutional climate of democracy, the early education of young citizens in democratic values, and value-friendly informal norms certainly help maintain a liberal democracy.

(6) On the European continent, at least among the Member States of the EU, peace seems to be taken for granted. Generations of citizens, especially in the original Member States, are privileged enough not to have any memories of war or not to have any living relatives with memories of war. The horrors of World War II are fading away; the Yugoslav war was always too distant; and Putin's war against the Ukraine is also remote (even if it has strengthened European unity, or at least the unity of an EU26^v). Lacking direct memories of the horrors of armed conflicts and of dictatorial regimes, even if “life is better in democracies than in dictatorships, (...) living democracies must prove this continuously in practice”.^{vi} Ongoing validation of the advantages of democracy based on the rule of law requires perpetual experimentation, correction, and innovation to ensure its effective functioning. As an example of good practice, the Netherlands has traditionally organized rule of law debates based on the findings of the Commission's Annual Rule of Law Report seeking to strengthen democratic values and overcome challenges.^{vii}

(7) In addition to important debates on the ethos of political liberties, socio-economic aspects should also be considered. As Berlin notes, “What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?”^{viii} Where to turn in cases of institutional bias, how judicial review works, and what remedies are available are not necessarily issues on the agenda of families in need who are wrongfully suspected by state authorities of, for example, childcare benefit fraud. Political

rights, enforcement of one's rights, and access to justice are domains where it may be worth addressing the inequalities that exist.

(8) In acknowledging the importance of a constitutional ethos, all too often I hear my colleagues from established democracies advancing statements such as, "This could never happen in our country. We have a solid democratic / rule of law tradition." It is high time to abandon this naïveté. History has taught us that democratic decline can happen very fast, however strong one might believe one's democratic culture to be. As the Venice Commission put it, in an opinion which made several suggestions regarding the Dutch justice system, "Experience from other countries has shown that in a polarised political context, informal norms sustaining the rule of law offer little resistance against powerful forces"^{ix} determined to destroy liberal democracy from within. Therefore, I strongly recommend adopting a precautionary logic: wherever possible, principles, customs, and good practices should be embedded into laws or the constitution to give them an additional protective layer.

III. How can the government and parliament strengthen the institutions of the democratic constitutional state and improve the legal protection of citizens?

(9) While a democratic culture is important, authoritarian drift happens first and foremost via legal means. This underlines the importance of strengthening checks and balances – both within the political triad, and outside it. Within the traditional branches, strengthening the judiciary seems to be an important self-defence technique among democracies. Not only because – as Hamilton once noted – the judiciary is the least dangerous branch, lacking armies and spending power, but also because without an independent judiciary, there is no power to enforce the laws and interpret them in conformity with the constitution and with EU law. Beyond the political triad, it is crucial to strengthen all entities that ensure the minimum prerequisites of democracy and the rule of law (i.e. free and fair elections by informed citizens), such as election boards and media authorities. Those that carry out a democratic watchdog function, such as the press and civil society, should also be buttressed, along with academic integrity and artistic freedom. Due to the interconnectedness of values, any decline in democracy or the rule of law will necessarily trigger a deterioration in human rights too.^x Therefore, beyond the judiciary, any institution entrusted with the protection of individual rights or equality should be reinforced.

(10) Second, the old problem that preoccupied many thinkers about the tools required to buttress liberal democracies should be reinvestigated. These tools range from traditional forms of militant democracy (as developed by Loewenstein), including banning parties and associations when these entities endanger the constitutional order, to rethinking constitutional amendment or entrenching certain crucial constitutional provisions. An idea worth further consideration in the Netherlands would be the implementation of constitutional review, drawing from international examples. This could involve rethinking the concept of "legislative supremacy" and addressing the absence of judicial review concerning laws and treaties in comparison to the Constitution.^{xi} Academic and public debates should preferably be organized before the political decision is made about the details of such review: Should it apply to civil and political rights only or extend to second and third generations of human rights too? How would such a move affect the monist approach to international law? etc.

(11) The third and bitter lesson is that later will be too late; in other words, time matters. This was made very clear by the slow European responses to backsliding in Hungary and Poland. Dialogue within the so-called rule of law framework about the independence of the Polish Constitutional Tribunal, for example, fell on deaf ears: the court was captured even

before the procedure came to an end.^{xiii} Another noteworthy case is the Lex CEU saga. While Hungary lost the infringement case after adopting a law targeting the Central European University, by the time the Luxembourg judgment^{xiii} had been delivered, the case was essentially moot: the university had already moved from Budapest to Vienna. Once the damage is done, authoritarianism is difficult to undo peacefully. Just look at Poland now: while the new government is trying to restore the rule of law, non-judges (i.e. persons that have been appointed in an illegal manner) are contending that their right to irremovability is being violated.^{xiv} Authoritarianism does not only impact individual rights, it also jeopardizes the rule of law by creating a legal mess that undermines legal transparency and foreseeability.

(12) Fourth, in addition to making the national legal system more resilient to democratic decline, the political branches could strengthen the second layer of militant democracy i.e. the country's adherence to international law. The Dutch Constitution is often praised for its strong adherence to international law, with international treaties seamlessly integrated into the Dutch legal system.^{xv,xvi} International organizations, institutions, and procedures cannot in and of themselves halt backsliding, but they do slow down the process and help protect individual rights. Here, it is important to emphasize timely enforcement, particularly as concerns Luxembourg and Strasbourg decisions. The principle of solidarity suggests that the government should follow Strasbourg decisions when they go against other governments but concern solutions similar to those in force in the Netherlands. In these cases, the lawmaker should make the necessary changes to ensure that national law complies with the Strasbourg case-law before an actual case arises in the Dutch context.

(13) Fifth, national governments and parliaments can also proactively strengthen international mechanisms to protect such values and urge EU institutions to act. Despite the importance of democratic values for the European project, the European Union failed to step up to persuasively condemn backsliding in its own Member States. EU institutions did trigger the preventive arm of Article 7 TEU against Poland and then Hungary, showing the political gravity of the situation, but Article 7(1) lacks a sanctioning mechanism or other legal consequence. As such, it is inefficient, lacks a dissuasive force, and is thus ill-suited. Other procedures of rule of law enforcement, such as infringement procedures, are heavily underused^{xvii} or are currently being tested. On the international scene, the Netherlands already plays a vital role in pushing the EU towards more rule of law enforcement. It is noteworthy that the Dutch Parliament seriously considered suing Poland over violations of values, particularly when the Commission was unwilling to utilize infringement procedures effectively.^{xviii} It could continue to exert pressure on EU institutions by intervening, with the help of other Member States, on the side of the Commission to get rid of the unanimity requirement in infringement procedures, a requirement often used as a tool of blackmail. Alternatively, it could lobby in favour of creative, but perfectly legal, democracy-enhancing and democracy-preserving ideas, such as the Meijers Committee's proposal to postpone the presidency of illiberal states^{xix} or Morijn's proposal to suspend funds to party families whose parties contradict the essence of European integration (i.e. the values enshrined in Article 2 TEU).^{xx}

(14) As the Netherlands embraces the power of international and European law to fortify its democratic resilience, let us not forget that the strength of each Member State's democracy is intertwined with the collective well-being of Europe. There exists a shared responsibility that transcends borders and unites us in safeguarding democratic principles for the generations to come.

- ⁱ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), para. 2.
- ⁱⁱ Cf. Sajó: ‘Illiberal regimes ‘are built from the imperfections of ‘consolidated’ democracies. [...]’ András Sajó, ‘Is the West Really That Different?’ (*EUROPP*, 21 October 2021) <<https://blogs.lse.ac.uk/europpblog/2021/10/21/is-the-west-really-that-different/>> accessed 4 April 2024.
- ⁱⁱⁱ Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.
- ^{iv} András Bozóki and Zoltán Fleck, *Embedded Autocracy. Hungary in the European Union* (Rowman & Littlefield 2024, in print); Edit Zgut, ‘Informal Exercise of Power: Undermining Democracy Under the EU’s Radar in Hungary and Poland’ (2022) 14 *Hague Journal on the Rule of Law* 287.
- ^v ‘EU Threatens to Silence Hungary If It Blocks Ukrainian Funds’ (*POLITICO*, 26 January 2024) <<https://www.politico.eu/article/eu-threatens-silence-hungary-orban-if-blocks-ukrainian-aid-funds-article-7/>> accessed 4 April 2024.
- ^{vi} Bozóki and Fleck (n iv).
- ^{vii} See most recently the debate in the Senate (Eerste Kamer) of the Dutch Parliament on the 30 January 2024. <https://www.eerstekamer.nl/commissievergadering/20240130_euza_en_j_v> accessed 4 April 2024.
- ^{viii} Isaiah Berlin, ‘Two Concepts of Liberty’ in Henry Hardy (ed), Isaiah Berlin, *Liberty* (2nd edn, Oxford University Press/Oxford 2002) 171.
- ^{ix} Venice Commission, The Netherlands - Joint opinion of the Venice Commission and Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legal safeguards of the independence of the judiciary from the executive power, adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023), CDL-AD(2023)029-e, para. 10.
- ^x Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1 MIT Press paperback ed., 4. printing, MIT Press 2001); Sergio Carrera, Elspeth Guild and Nicholas Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU Towards an EU Copenhagen Mechanism* (Center for European Policy Studies 2013) <<https://www.ceps.eu/download/publication/?id=8230&pdf=Fundamental%20Rights%20DemocracyandRoL.pdf>> accessed 4 April 2024..
- ^{xi} Cf. Article 120 of the Constitution of the Netherlands.
- ^{xii} Petra Bárd and Adam Bodnar, ‘The End of an Era. The Polish Constitutional Court’s Judgment on the Primacy of EU Law and Its Effects on Mutual Trust’ (2021) 2021 CEPS Policy Insights 1; Laurent Pech and Kim Scheppele, ‘Poland and the European Commission, Part I: A Dialogue of the Deaf?’ [2017] *Verfassungsblog: On Matters Constitutional* <https://intr2dok.vifa-recht.de/receive/mir_mods_00000724> accessed 4 April 2024.
- ^{xiii} CJEU, C-66/18, *Commission v Hungary (Enseignement supérieur)*, ECLI:EU:C:2020:792
- ^{xiv} Alicja Ptak, ‘Polish Government Approves Changes to Remove Political Influence over Judicial Council’ (*Notes From Poland*, 21 February 2024) <<https://notesfrompoland.com/2024/02/21/polish-government-approves-changes-to-remove-political-influence-over-judicial-council/>> accessed 4 April 2024.
- ^{xv} See Jasper Krommendijk’s upcoming inaugural lecture on *The effectiveness of human rights in a multilevel legal order under threat?*, forthcoming in 2024.
- ^{xvi} And this can be partially attributed to the Netherland’s monist approach and the prohibition of constitutional review, so the above mentioned idea of rethinking these might come at a price to the detriment of international law.
- ^{xvii} R. Daniel Kelemen, Tomasso Pavone, ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’ (2023) 75(4) *World Politics* 779.
- ^{xviii} On 1 December 2020, the Dutch Parliament’s Second Chamber adopted by a 70 % majority a motion to launch an Article 259 TEU procedure against Poland. The Parliament “calls on the government to investigate and to make necessary arrangements to bring Poland before the Court of Justice for failure to fulfil an obligation under the Treaties (Article 259 TFEU), preferably in cooperation with like-minded Member States, and to inform the Second Chamber of the Parliament by 1 February 2021 at the latest.” As cited and translated by John Morijn, ‘A Momentous Day for the Rule of Law’ (*VerfBlog*, Dezember 2020) <<https://verfassungsblog.de/a-momentous-day-for-the-rule-of-law/>> accessed 4 April 2024..
- ^{xix} Meijers Committee, ‘Comment on the Exercise and Order of the Presidency of the Council of the EU, CM2305’ <<https://www.commissie-meijers.nl/wp-content/uploads/2023/05/230519-Meijers-Committee-comment-on-the-EU-Presidency-.pdf>> accessed 4 April 2024.
- ^{xx} John Morijn, ‘Responding to “Populist” Politics at EU Level: Regulation 1141/2014 and Beyond’ (2019) 17 *International Journal of Constitutional Law* 617.