

THE RESILIENCE OF THE FRENCH LEGAL SYSTEM TO A POTENTIAL "AUTHORITARIAN SHOCK"



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THE GREENS/EFA
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FOREWORD

Could France experience the same democratic decline as Hungary and Poland? In view of the rapid regression of these two European Union member countries from democracy to autocracy, and the worrying rise of the radical right in France, the question is legitimate. Academics have attempted to answer it by analysing our legal system in the face of a potential authoritarian shock.

Hungary is now a hybrid regime.

This is the irrevocable observation of the NGO Freedom House, which measures democratic regression around the world every year. Former democracies, not yet dictatorships, hybrid regimes play dangerously with the boundaries between legality and authoritarianism. And it is now within our European Union that one of these regimes is thriving, participating as much as any other member state in the decision-making processes that affect our daily lives.

In power for 12 years now, Viktor Orbán and his political party Fidesz have set about dismantling the independence of the judiciary, the plurality of the media and freedom of association. The result is a country in a state of collapse, where fundamental rights and the rule of law are constantly threatened by untimely reforms, embezzlement of public funds and the annihilation of counterpowers.

Poland is following the same path as its Hungarian counterpart. In recent years, successive governments under Jarosław Kaczyński have increased measures to destroy the independence of the judiciary and the freedom of the press, so much so that it is the most “autocratised” country in the world in the last 10 years.

Yet the fact that two EU member states are on the autocratic brink does not seem to mobilize either the crowds or the journalists.

Perhaps this is because our political imagination cannot conceive the installation of authoritarian power without a coup d'état and its spectacular images of military junta, battle tanks, ferocious repression of demonstrators, massive and arbitrary detention. In Hungary and Poland, there was no need for spectacular effects to sabotage democracy. These governments came to power through the

ballot box, in all legality. As soon as they were installed, they began a process of rapid and methodical dismantling of the rule of law by exploring the constitutional loopholes of the legal system. Today, the judiciary is subject to the executive, the political opposition is rendered inaudible, the independent media are financially suffocated and only the propaganda media remain, the fundamental rights of all, and more particularly of minorities, are violated.

The second reason for the general indifference may be found in our deep-rooted prejudices towards the former Soviet bloc countries.

Let us beware of our old condescending reflexes as Western Europeans towards our Central European neighbours. It is convenient and widespread to consider the latter as naturally more prone to authoritarianism, given their recent history and the youth of their democratic regime. This is obviously not true, as we only need to look at the long history of the struggles for freedom of the Hungarian and Polish peoples. And let us remember that before the current leaders came to power, Hungary and Poland were considered perfectly healthy democracies, with the necessary safeguards in place to prevent the seizure of power by one person or group, just like France.

Indeed, let us go back to France, which more often than not claims to be the country of human rights. But is this country really exemplary in terms of the rule of law? It is clear that public freedoms have been weakened over the last ten years. Without making any hazardous comparisons, we can draw up a non-exhaustive list of problematic elements. In order to respond to the terrorist attacks, and then to the health crisis, successive governments have instituted prolonged states of emergency, which have then been trivialized in the current legislative framework. The particularly violent police response to the Yellow Vests movement, the numerous legal actions against activists - notably environmentalists, the criminalisation of the associative world, the suppression of the Observatory of Secularism, the unpunished police violence against journalists and racialized people, the degrading treatment of exiles in border areas in defiance of international and European law, are all examples of the hardening of the French government against citizen movements. The misnamed “law for a global security preserving liberties”, promulgated in May 2021, has come to consolidate this authoritarian turn. Moreover, at the European level, France is spearheading a particularly liberticidal approach when it comes to the fight against terrorism and digital rights.

At the same time, the last elections have shown that the radical right is getting dangerously close to the doors of power. Marine Le Pen’s score in the second round of the 2022 presidential election is the highest ever achieved by the radical right in France. The candidate of the Rassemblement National has never hidden her ideological closeness to Viktor Orbán and her admiration for his work as Prime Minister. In the ranks of the French police and army, the radical right seems to be widely favoured in the votes as well as in certain public statements, which could

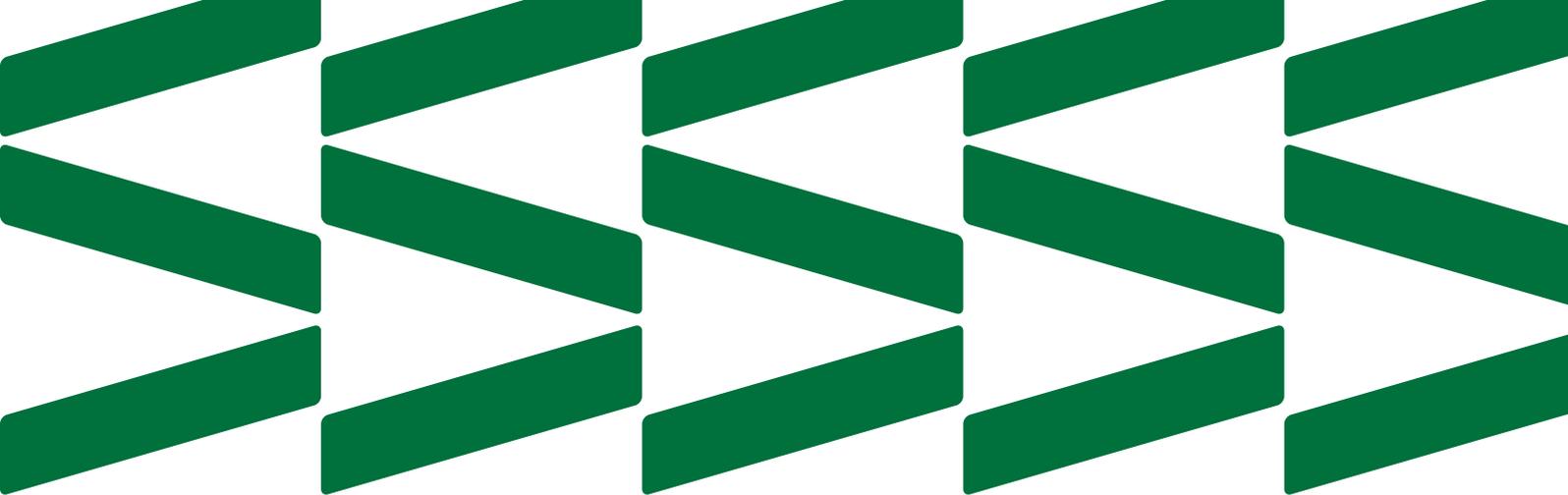
lead to fears of a massive adhesion of the armed wing of the State to the liberticidal policies of a newly elected authoritarian government. This raises the legitimate question: **our constitution and legal system are they sufficiently protected to withstand an authoritarian shock?**

This study aims to answer this question by analysing the flaws of the French constitutional system in the now plausible hypothesis of the future election of an autocrat at the head of the French state. In anticipation of future elections, there is a great need to identify these flaws, and to use the next 5 years to bridge them, before the hypothesis of the radical right in power becomes reality.

The research method developed by the authors of this study is unprecedented; it is inspired by the stress tests used by the European Central Bank to test the resistance of banks to potential economic shocks.

We would like to see this study replicated for every EU member state. The rise of the radical right and the attacks on fundamental freedoms are a reality throughout Europe; the rule of law is not an immutable asset and it is our duty to work to protect it.

Gwendoline Delbos-Corfield and Philippe Lamberts
Greens/EFA Members of the European Parliament



ABSTRACT

- 1.** The European Union has been facing a growing and deliberate questioning of the principles at the heart of the rule of law for almost a decade. In this context, and inspired by the banking supervision technique known as “stress testing”, the main objective of the present study is to submit the French legal system as a whole to a “stress test” in the hypothesis of an “authoritarian shock” in France.
- 2.** The dismantling of democracy and the rule of law in liberal democracies previously considered “consolidated” usually follows a standard scenario. This strategy has been implemented in both Hungary and Poland; two countries currently under the procedure of article 7(1) of the TEU.
- 3.** Launched for the first time in 2020, the annual report on the rule of law published by the European Commission provides a summary of the situation by Member State, as well as a cross-sectional situational overview. It contains useful indications concerning France. However, this report comprises a number of weaknesses and does not address the structural shortcomings that are the subject of this report.
- 4.** Heavily concentrated on the executive and in particular the President of the Republic, the French constitutional system allows in some cases for executive interference in the legislative domain. An authoritarian government could, to some extent, use these mechanisms to muzzle the parliamentary opposition.
- 5.** The independence of the judiciary is generally guaranteed in France. However, the status of the public prosecutor’s office does not shelter it from pressure. A certain number of guarantees of the independence of the State Council members - the supreme administrative jurisdiction of the Republic - result only from custom, without any textual basis. Finally, the statute of the members of the Constitutional Council does not guarantee them against all forms of political pressure.
- 6.** The French civil service statute contains a certain number of guarantees against the “politicisation of the civil service”, that is, the capacity of the holder(s) of political power to ensure the servility of administrative personnel, particularly within the senior civil service. However, the ways in which authority holders

might politically subjugate the public service are diverse. It could be a matter of mobilising certain facilities offered by the existing legal framework, or neutralizing the obstacles that this framework might conceal, or transforming this legal framework through legal or regulatory reforms

- 7.** In France, there are many independent administrative authorities with a key role and significant powers in important sectors. To guarantee their independence, the French legislator has established multiple organic guarantees concerning their status, the appointment of their members and the exercise of their mandate. Assurances of functional independence are also provided through their budget, the controls to which they are subject and their responsibility. However, these assurances have a number of limitations that could be exploited by an authoritarian government.
- 8.** Given the French tradition of placing the state above society and the various types of conflicts of interest between the senior administration, the political world, the business world and civil society, France seems particularly poorly placed to resist a process of dismantling countervailing powers that would be organised by a new authoritarian majority. Traditionally frail in France, civil society has been even more weakened in recent years, thus further enfeebling a system of non-institutional counter-powers whose ability to resist an “authoritarian shock” is therefore questionable. Three scopes will be used to support this thesis: the scope of media, that of civil society, and finally of university.

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DISMANTLING DEMOCRACY AND THE RULE OF LAW

MILESTONES

1. STARTING POINT: CITIZENS LOSE FAITH IN THEIR GOVERNMENT SYSTEM

Reasons: rising inequality, persisting unemployment, corruption...

Consequences: party crisis, increasingly populist positions.

2. CITIZENS VOTE TO BREAK WITH THE PREVIOUS SYSTEM

Consequences: the new party in place will multiply early “reforms” and ignore all criticism by presenting them as carrying out the “will of the people”.

3. THE NEW AUTOCRATS SEIZE POWER AND COUNTERPOWER

In particular: justice, police, regulation authorities...

4. THE PUBLIC SPHERE IS GRADUALLY DOMINATED BY THE RULING PARTY

In practice: elimination of alternative discourses through formal or informal repression of civil society, journalists, researchers and activists.

5. ELECTORAL RULES CHANGE IN FAVOUR OF THE ESTABLISHED POWER

For example: modification of the rules for acquiring the right to vote, remapping electoral constituencies, takeover of the authority (or authorities) in charge of the elections.

6. THE SYSTEM IS THEN CAPTURED GLOBALLY, WITH FEW OPTIONS LEFT FOR THE OPPOSITION

7. IF NECESSARY, THE ESTABLISHED POWER ORGANISES BIASED REFERENDUMS TO LEGITIMISE ITS ACTIONS

In case of internal resistance or external criticism, the ruling party will invoke the “will of the people” to bypass the last institutional obstacles.

8. PUBLIC FUNDS ARE « REDISTRIBUTED », AND FICTITIOUS ENEMIES AND SCAPEGOATS ARE REPORTED BEFORE THE NEXT ELECTION.

**FINISHING POINT:
THE POSSIBILITY OF A PEACEFUL CHANGE
OF POWER HAS BECOME ALMOST IMPOSSIBLE.**

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THE AUTOCRATIC STRESS TEST

THE FRENCH CASE

What are the vulnerabilities of the French legal system that a new authoritarian majority could exploit?

This study draws on the examples of Poland and Hungary. These two EU member states are perfect illustrations of these processes of **constitutional capture**, used by autocratic parties to consolidate their power by using the weaknesses of their legal system.

The purpose of this study is inspired by the banking supervision technique of stress testing. The authors subjected the French legal system to an autocratic stress test, identifying which vulnerabilities could be exploited by a new authoritarian political majority.

1. STRENGTHEN THE EXECUTIVE POWER IN THE FACE OF LEGISLATIVE POWER

- Via:
- Use of **ordinances** (Article 38 of the Constitution)
 - Call for **referendums** (Article 11 of the Constitution)
 - Use of **exceptional powers** (Article 16 of the Constitution)

2. ATTACK THE INDEPENDENCE OF THE JUDICIARY

- Via:
- For the **judicial order**: The Supreme Council of Magistracy and the Public Ministry
 - For the **administrative order**: The Council of State
 - For the **Constitutional Council**, the status of its members

3. INSTRUMENTALISE THE PUBLIC SERVICE

- Via:
- The **recruitment** of public agents
 - Their **status**: delimitation of the duty of obedience, career organization...

4. WEAKEN INDEPENDENT ADMINISTRATIVE AUTHORITIES (IAA) & INDEPENDENT PUBLIC AUTHORITIES (IPA)

- Via:
- Their guarantees of independence
 - The nomination of their members
 - Their budgetary autonomy

5. ANNIHILATE NON-INSTITUTIONAL COUNTERPOWERS

- Via the takeover of:
- Public and private media
 - Civil society and freedom of association
 - Intermediate bodies
 - University



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