

Autocratic Legalism and the Measures of Democracy

– The cases of Hungary and Poland

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It is widely recognized that autocratization performed through classical coups belongs to the 20th century. Today, democracies are primarily demolished through a deliberate and incremental process working within the law. Kim Lane Scheppele has coined this phenomenon ‘autocratic legalism’ - a governing technique, which often goes unnoticed and unrecorded, hiding backsliding in judicial robes. At the same time, with the increase in global democracy monitoring, many stakeholders and decision-makers have come to rely on statistical measurements when deciding on remedies to protect democracy. But what happens, if indices are unable to account for democratic setbacks because the instruments employed cannot capture this more subtle type of autocratization? Autocratic legalism, we argue, constitutes a form of capture of already consolidated democracies, which makes it harder to categorize regimes but also much more challenging for authorities like the EU to monitor, criticize, and eventually sanction violations of basic democratic principles. By exemplifying the workings of autocratic legalism in Hungary and Poland and discuss the (in)ability of indices like Polity5, Freedom House, and Varieties of Democracy to capture this technique, we suggest ways in which analytical sensitivity to autocratic legalism can make it easier for institutions like the EU to protect democracy.

Keywords: Autocratic legalism; Democracy measurements; Autocratization, Hungary; Poland; European Union

Introduction

Measurements like Polity5, Freedom House, and Varieties of Democracy (V-Dem) have become important contributors to the discussion of countries' degree of democracy but also as inputs for when a democratic decline needs to be addressed. While there is agreement on the need to monitor and measure democracy, an intense conceptual and methodological discussion has over the years resulted in a diversity of indices. Indices are particularly employed by NGOs and research institutions but also used by decision-makers, like in the European Commission's Strategic Foresight Report of the European Union (EU)¹. While the use of indices as part of political actions is an important issue, it is much less debated². The need to engage in such a discussion is especially relevant in light of what Larry Diamond has termed a global democratic regression³. This global regression is often also referred to as a third wave of autocratization⁴. This wave predominately takes the form of democratic backsliding, which is the *incremental* erosion of democratic features⁵. When this happens *within the confines of the law*, it has recently been referred to as autocratic legalism – a term coined by Kim Lane Scheppele⁶. Autocratic legalism poses new challenges to the measurements of democracy, as it is substantially different from classical autocratization⁷. Where the latter is characterized by blatant violence and often happens in non-consolidated democracies, autocratic legalism often takes place within a legal framework adopted by an, at least formally, legitimate majority that then use the law to undercut central democratic institutions. As Scheppele describes it “[s]ome constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both”⁸. A good example was when the Polish right-wing government (PiS) implemented substantial judicial reforms⁹. If one

only looks at the formal maneuvering, all this happened within the law, as reforms were adopted by the parliament majority. But it was in fact “*unlawful under EU standards according to the European Court of Justice*”¹⁰ and has contributed to the erosion of the Polish democracy. Despite the serious character of these events, the legalist tools orchestrating them make it very difficult to track within most democracy indices. In practical terms, this means it will be difficult for any authorities tasked with upholding basic democratic principles, like the EU, to monitor and sanction on the ground. When, in example, the EU in their Rule of Law Reports consults with Freedom House, do they then build on information that is actually capable of grasping (the severity of) democratic backsliding?¹¹ Drawing on the measurement literature but focusing on the political use of indices, we seek to examine why autocratic legalism poses a specific problem for not only classical measurement tools but also for actors like the EU when faced with backsliding. The question we raise in this article is whether current measurements are able to capture the features of modern day autocratization and if not, how it effects those actors employing the measurements for their political actions? The present article has three main objectives. The first is to exemplify the working of autocratic legalism in Poland and Hungary in order to demonstrate how it works as a governance technique. Secondly, the paper will ask which of the three well-renown democracy indices of Polity5, Freedom House, and V-Dem are best at capturing autocratic legalism. Finally, we will address the challenges autocratic legalism poses for an institution like the EU, where the need to act on democratic pushbacks internally in the Union has been building up over the past decade.

The field of democratic measurements

What is the best definition of democracy and how can it most accurately be measured?

These are the main questions occupying the literature on democratic measurements and despite being discussed since the middle of the last century, no clear answer exists¹².

The *conceptual* strand of the literature has primarily focussed on the theoretical groundings of democracy measures¹³. Part of the strand discusses how to translate the theoretical conceptualisations into observable attributes¹⁴. The *methodological* strand focuses on how to quantify attributes into indices¹⁵. It also discusses whether and to what extent a numerical score can reflect a country's reality¹⁶. Ultimately, both strands deal with the process of how to categorise countries in accordance with their political system and how to capture changes. Common for them is that they assume some kind of nominal observance of changes across time and space. This article, on the other hand, is concerned with the quantitative operationalization of autocratic legalism and the *application aspect* of indices. Most studies taking the application approach are focused on the implications it has for empirical findings and not, as here, for political purposes¹⁷. Indeed, many studies even posit that it is not problematic to have a plurality of measurements as long as there is agreement on the use of the indices. The argument is that democracies take many forms and by having indices that weigh different aspects, we do not risk a failed one-size-fit-all scenario but can instead choose the index best suited for the purpose at hand¹⁸. This, however, treats indices as neutral factors without historical and geographical sensitivities or political implications. Instead, we align with the research that focuses on the *politicalness* of indices. Sarah Bush for instance shows how democracy ratings of countries can only gain influence when they are combined with state power and Diego Giannone stresses the importance of acknowledging measurements as important political tools¹⁹. Adding to this literature, we discuss indices' ability to account for autocratic legalism and what consequences it has for initiating political actions when leading indices differ in their attentiveness to this type

of autocratization. Asked differently, how can the EU engage in actions against problematic changes in member states, if the indices they rely on are not capable of detecting changes of autocratic legalism?

Undeniably, if indices cannot detect autocratic legalism and therefore rate countries more favourably than they should, it may help to uphold a smokescreen, but it also incapacitates the EU from acting in time and with authority in cases of severe backsliding. In fact, acting too late may inflict on the EU's ability to preserve its perceived status as a true rule of law community. As will be shown in this article, a lack of consensus on when a country is democratically challenged makes it difficult for the EU to "*...step confidently and vocally into the role of promoter and maintainer of democracy*"²⁰. This may be caused by the increasing difficulty to detect backsliding because autocratic legalism and its democratic window dressing have become the order of the day²¹. Consequently, if a country is deemed autocratic by one index but not by another, political action can become not only difficult but also easily so politicized that both the Commission but in particular Heads of State and Government in the Council tend to prefer inaction – even when action is objectively needed. This is a serious issue in the EU where binding law and financial solidarity precondition not only trust, openness, and absence of corruption but also joint minimal agreement on when a country has moved away from legally agreed-on rule of law and democratic standards.

Autocratic legalism as a governance technique

Most people would probably have only good things to say about legalism. Intuitively when something is legalist, it is legal and thus the opposite of illegal. According to dictionary.com, legalism means "*... strict adherence to law or prescription*"²². This in most cases completely unproblematic but legalism can also, following Armen

Mazmanyan, imply *“a code of conduct that is based on rules and commands that must be followed regardless of their origin, moral, and political status, and the outcome”*, which means that it prioritizes ‘form’ over substance or *“...the letter of the law over its spirit”*²³. This means that a ruler may launch legalist reforms with majority backing that follow the strict letter of the law and thus on the surface seems both legitimate and democratic, while in reality deliberately using the law to distort the spirit of the constitutional system and concentrate power in the executive branch²⁴. This process of autocratic legalism describes how *“electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda”*²⁵. Put differently, when *“autocrats push their illiberal measures with electoral backing and use constitutional or legal methods to accomplish their aims, they can hide their autocratic designs in the pluralism of legitimate legal forms”*²⁶. This mainly takes place in countries that used to be consolidated democracies, setting it apart from the type of backsliding found in countries that have been non-democratic all along. Over the past decade, Hungary and Poland have come to represent examples of EU countries where leaders have employed autocratic legalism as a governing technique to transform their societies in a way that likely would make them disqualify for membership of the EU, had they applied today.

In Hungary, autocratic legalism has taken an extreme but also lucid form, as the government cleverly used its majority to produce bulks of laws and reforms, which consolidated Prime Minister Viktor Orbán’s personal power²⁷. One of Orbán’s first initiatives was to place party-loyal judges in the Constitutional Court²⁸. This was only made possible by changing the constitution - something that the government has done nine times in their own favour²⁹. It made it possible to argue that most of the subsequent legislative acts, gradually undermining democracy, happened legally or at least within an adopted legalist framework and within the norms of the constitution. With this

technique the government “...*deliberately manipulates the meaning of the law for political ends*”³⁰. This is in fact a ‘constitutional coup d’état’³¹. In example, by packing political actions in legal lingo and constantly amending bureaucratic rules and deadlines, the severe attacks on critical NGOs were turned into a technical legal issue. It will though be difficult to capture this for most indices and monitoring institutions like the EU, as it would not alert any of the traditional alarm bells. Attacks on critical NGOs have for instance been a common feature since 2013 but it was not until the much more visible Lex NGO that the EU acted on it³². The picture is the same for the Hungarian government’s long fight against free speech and independent media. Unlike classical forms of autocratization, media outlets is not shut down and journalists are not imprisoned. Rather, by replacing government critical editors and journalists with government-friendly ones, the news outlets were in reality closed and replaced from within. Index.hu and Origio are a very good example of this³³. Together with changes to publication licenses and rules of advertisements, 90% of critical media in Hungary have been closed. These changes have nonetheless hardly been detectable in ratings and resulted in weak or little-to-no responses from the EU.

If we turn to Poland, we are likewise dealing with a rapidly autocratizing country³⁴. Wojciech Sadurski has described how Poland under the past 6 years’ PiS rule has transformed through changes in legal statues and court reforms³⁵. The PiS government has, according to Sadurski, engineered fundamental “*constitutional changes without having an electorate mandate to do so*”³⁶. By using a simple majority, amendments were made possible by being dressed up in law and legalese language and confirmed by the politically captured Constitutional Tribunal. PiS’ simple majority lowered the retirement age of judges to get rid of those that were not loyal to the government, turning the Constitutional Court into a ‘fake court’, as Laurent Pech has

put it³⁷. Despite attempts by the remaining independent judges to block the process, the court was gradually transformed into a government-loyal body. The Supreme Court was initially successful in haltering similar reforms, not least by appealing to the European Court of Justice and the Human Rights Court in Strasbourg, but independent judges were gradually replaced by PiS-loyalists as their terms came to a natural termination. In 2019, the European Court ruled that the Polish judicial reforms were illegal, in particular its recruitment of government-loyal judges and the instalment of a disciplinary chamber in the Supreme Court³⁸. One year later, the European Court of Human Rights called the Constitutional Court reforms unlawful³⁹. Neither of these cases prompted the EU leaders and the Commission to act. In fact, reactions from the EU have been weak and timid throughout⁴⁰.

Despite the differences of operation, both regimes continued to go to great length to make their illiberal agenda - formally - operate within the law. Where the Hungarian government has made use of its supermajority, the Polish government has relied on other legalist tools. Concretely, PiS has started to more actively marginalize both Parliament and Senate and instead use the captured Constitutional Court, the prosecutor's office, public media, and cherry-picked judicial institutions to get its policies adopted. For example, when the government was unsuccessful in changing the abortion law in parliament, they instead referred it to the Constitutional Court, which de facto banned abortion in a ruling from October 2020⁴¹. Most recently, PiS has used the Constitutional Court to challenge the supremacy of EU law⁴². The legalist changes in Poland and Hungary have gone deep despite being gradual. Where András Bozóki and Dániel Hegedűs in 2018 defined Hungary as the only hybrid regime in the EU, today one would have to also include Poland⁴³. The illiberal ambitions of both countries have

also resulted in the launch of a new joint ‘Rule of Law Institute’, pointing to an entirely different understanding of law and legal theory. As Zselyke Csaky puts it:

“Fidesz and PiS have...clearly staked out a position beyond the pale of Europe’s legal norms, challenging the European Union’s rule-of-law enforcement mechanism as “political” and arguing that there is no commonly agreed definition of the rule of law”⁴⁴.

This attempt to create an alternative and more national legal way of reasoning - referring to ‘constitutional identity’⁴⁵ - counters the conventional European line while at the same time staying within a formalist legal framework. This may be possible to see discursively but it is hard to capture in the type of empirical statistical accounts that classical indices make use of. As Matthijs Bogaards writes about Hungary, then the strategies at work have made it difficult to categorize regimes but have also challenged how to deal with the issues⁴⁶. Autocratic legalism hence makes it increasingly difficult for institutions like the EU to quickly employ normal channels of critique and dispute settlement, as they are tasked to do as guardians of the treaties. As autocratic legalism challenges our classical ways of detecting autocratization, it in turn impact on the EU’s rule of law conundrum when it comes to putting flesh on the bones of its new rule of law mechanism⁴⁷. In the next section, we dig further into the details of how our three selected indices actually break down and operationalize data. The question we ask is whether and to what degree they are able to detect autocratic legalism, which in order to ‘create an illusion of legitimacy...follow the letter of the law’⁴⁸?

Can autocratic legalism be measured?

Democracy is a ‘latent concept’, which means that we need to rely on both observable indicators and indirect proxies for measurement⁴⁹. Several different institutes aim to provide stakeholders and decision-makers with reliable measures of democracy. Many

decisions, from the setting of goals in democracy promotion projects to evaluating country performances, rely on the data produced by democracy indices. In a European context, measures of democracy have also provided an empirical backing when discussing, if a member state's democratic status should cause alarm. The European Commission relied, for instance, on consultation and data from Freedom House for their work on Rule of Law reports and political strategy publications⁵⁰. Indices are hence actively used to initiate and fuel discussion on whether, how, and when to respond to countries who are moving down a path of autocratization. The reference to these measures for the purpose of political decision-making poses new demands to the indices. As Munck wrote back in 2009, “*measuring democracy has ceased to be solely an academic matter*”⁵¹. When the act of measuring democracy is no longer just for the purpose of academic debate but increasingly carries political consequences, it becomes even more problematic, if or when indices are inattentive to and unable to account for the gradual democratic degradation of autocratic legalism. The following is an examination of the three most frequently relied on and referred to democracy measurements - Polity5, Freedom House, and V-Dem - to evaluate whether they are capable of accounting for autocratic legalism⁵².

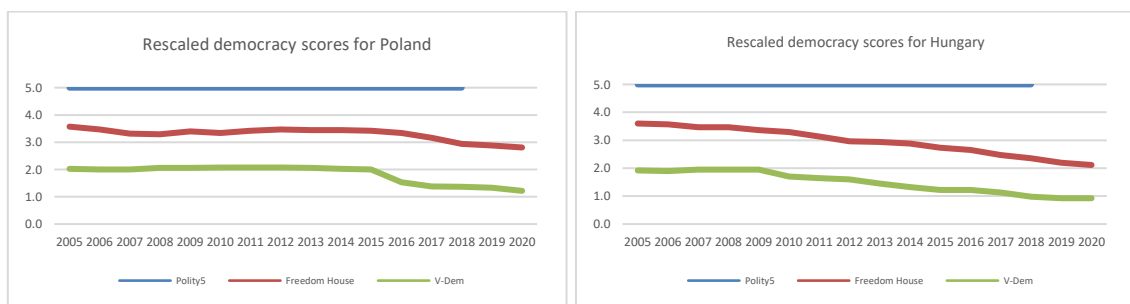


Figure 1: Overview of scores for Hungary and Poland 2005-2020 (for Polity5 data is only available until 2018). Own rescaled scores (0 = lowest, 5 = highest) based on the datasets from Polity5⁵³, Freedom House⁵⁴, and V-Dem⁵⁵.

The Polity5 project was one of the first attempts to measure democracy on a global scale and over time. It consists of one binary scale for democracy and one for autocracy, informed by five components: The competitiveness of executive recruitment, openness of executive recruitment, constraints on the chief executive, regulation of participation⁵⁶, and competitiveness of participation. This means that a country “*gets points for being democratic...as well as autocratic*”⁵⁷. The two scales are combined into an overall score, which subtracts the autocracy score from the democracy score providing a combined scale from most autocratic to most democratic, called the polity score. Another very cited measurement is **Freedom House** who besides the well-known *Freedom in the World index* also produces the *Nations in Transit index* (NIT) that zooms in on the democratization progress and setbacks in a smaller group of 29 Central European and Central Asian countries⁵⁸. The NIT’s focal point is the health of democratic institutions in a broad sense, focusing both on fundamental institutions such as government, parliament, and judiciary as well as civil society institutions and media. Countries’ levels of democracy are rated from one to seven, from an average score of seven different indicators: National democratic governance, electoral governance, civil society, independent media, judicial framework and independence, local democratic governance, and corruption. On each sub-component, countries are likewise rated from one to seven, and it is an average of the scores on these indicators, which constitute the overall democracy score. From this overall democracy score, five categories of regime types are reported on a continuum: Consolidated democracies, Semi-consolidated democracies, Transitional or hybrid regimes, Semi-consolidated authoritarian regimes, and Consolidated authoritarian regimes. The third measurement we look at is **V-Dem**, which sees democracy as a multidimensional concept and produces several indices, which feed into each other. Low-level indices are combined into mid-level indices,

which are then aggregated into high-level indices, referred to as democracy indices⁵⁹. Of relevance to the present article is the *Liberal Democracy Index*, but it importantly builds on the *Electoral Democracy Index* because V-Dem treats the electoral dimension as a foundational element for its other indices. Based on countries' scores on these, they are then categorized as either Closed Autocracy, Electoral Autocracy, Electoral Democracy, and Liberal Democracy⁶⁰. This methodology is the midpoint of a straight average and a strict multiplication aggregation formula. This means that the highest level of liberal democracy can only be achieved when there is a high-level of both electoral democracy and liberal constitutionalism⁶¹. As outlined, the indices are quite diverse in their fashion of measuring, resulting in different strengths and weaknesses. Below we evaluate how these differences fare in terms of accounting for autocratic legalism.

The matter of definitional foundations

Polity5 measures 'institutionalized' autocracy and democracy. Autocracy is defined as a sharp restriction or suppression of competitive political participation and few institutional constraints on the executive. Democracy is framed as free and fair competitive political participation through defined institutions and procedures, institutionalized constraints on the executive, and the guarantee of civil liberties. This limits the index in comparison to the other two. Freedom House's conception of democracy covers both governmental and non-governmental elements of democracy, moving beyond the strictly institutional understanding seen in Polity5. Freedom House's indicators like civil society and independent media and judiciary reflect a strength regarding accounting for autocratic legalist features, since these typical are the first victims of autocratic legalism – as opposed to classical autocratization that remove

the executive power through coups and capture the electoral system out-right. For measuring countries, V-Dem relies on a multidimensional definition based on seven principles: electoral, liberal, majoritarian, consensual, participatory, deliberative, and egalitarian. This allows V-Dem to base the measurement on the extent to which countries both fulfill Dahl's conception of Polyarchy (freedom of association, clean elections, freedom of expression, contested elections, and universal suffrage) as well as a liberal component of equality before the law and individual liberties, judicial constraints on the executive and legislative constraints on the executive⁶². Such a definitional richness, but also clear definitional guidelines, is vital for capturing autocratic legalism, as will be elaborated subsequently.

The matter of components and the treatment of them

Polity5 operates with the assumption that rule of law, systems of checks and balances, freedom of the press, and other aspects – as they frame it – of plural democracy “...are means to, or specific manifestations of” institutionalized democracy⁶³. These aspects are therefore not coded for. This reflects an important problem regarding the index' usefulness in accounting for autocratic legalism, as the actual practice of backsliding usually, and certainly in the cases of Hungary and Poland, applies to these ‘other aspects’ of democracy. This exclusion makes it difficult to “*recognize the manifold empirical manifestation of a conceptual attribute*”⁶⁴, which is problematic when having to account for changes made *through* legal measures with an electoral backing and packed into legalese constitutional formalism. In particular, Hungary managed for a long time to uphold the illusion that elections were free and fair and both Hungary and Poland were able to pretend for a long time that nothing outside the scope of the law was taking place. This superficial appearance of democracy and legality, as Scheppele

describes it, will not be detected without more fine-tuned measurements. In other words, Polity5 operates with a selection of components that, simply put, are not capable of capturing the ‘constitutional breakdown’ by which legalistic autocrats challenge democracy by launching “*legal reforms that remove the checks on executive power*”⁶⁵. Polity5 manages only to capture the window-dressed illusion of institutional democracy, missing the red flags of autocratic legalism.

Freedom House codes for a more extensive democracy understanding but falls short on its aggregation principles. Countries are categorized based on a simple average of the scores on the subcomponents, meaning it does not include threshold values at sub-component level. Consequently, a country can score extremely low on the legal and political environment of civil society or judicial independence and still be categorized as a consolidated democracy as long as it scores high on other central democratic components, e.g. the electoral process. This is quite problematic because it may obscure central instances of backsliding in some categories by increases in or status quo of scores in other categories, easily overlooking dimensions of autocratic legalism and ultimately distorting the picture completely.

V-Dem are not marked by the same limitations, as the subcomponents are based on their own subcomponents, making it possible to narrow down on any exact component one should wish to examine. This reflects an important strength when it comes to accounting for autocratic legalism, because it is typically, especially the initial phase, reflected within limited and isolated indicators, rather than in the broader categories. This is one of the main differences between V-Dem, on the one hand, and Polity5 and Freedom House, on the other. This concretely means that V-Dem has the advantage of being able to capture *marginal*, but crucial, changes.

The matter of measurement sensitivity

Like with its definitional issues, Polity5 is also not sensitive enough in its measurement methods because it measures significantly fewer components and has issues of redundancy, where some of the attributes actually only “*grasp one aspect of democracy*”⁶⁶. Consequently, it will be close to impossible for this index to identify patterns of autocratic legalism and conveying red flags to monitoring institutions like the EU. For Freedom House, the problem is not only issues of aggregation of components, but also that the most democratic category, consolidated democracies, is twice as broad, numerically, as the other four categories. This is a curious strategy, given that Freedom House do in fact subdivide the consolidated democracy category into two sub-categories in their written report but not in their overall categorization. If a numerical change of one takes place within the range of the score 6.5-5.5, this would, in all other cases, lead to a change in categorization, but this is not apparent with the consolidated democracy category. It further entails that the scale is not symmetrical around what would logically be the middle category of transitional or hybrid regimes. This reflects a serious problem for the measurement of gradual legal formalist degradation, like we have witnessed in Hungary and Poland, where in the first many years, changes were veiled by legalist tools, allowing the countries to stay within the category of consolidated democracy even when other indices downgraded them to hybrid regimes. V-Dem offers more measurement sensitivity in large due to their Bayesian item response techniques. This allows them to actively take account of new information, making it possible to change countries’ scores based on fewer but critical observations⁶⁷. Sensitivity is also secured by building their categorization scores on the overall scale of polyarchy and liberal components as well as threshold values on specific important components such as transparent law enforcement and access to

justice. This makes it quite clear when a country falls below the threshold of a given category and the multiple and fine-tuned indicators makes it easier to measure nuances and subtle year-to-year variations. This is important when wanting to account for the incremental nature of backsliding and when the adoption of laws by ‘democratic’ majorities might not seem overly problematic. While the individual piece of legislation may not be a violation in itself but, as Scheppele puts it, over successive years “*some combinations of these forms and rules prove toxic to the continued maintenance of the liberal forms of constitutional democracy*”⁶⁸. Consequently, V-Dem’s sensitivity to marginal changes and thresholds values can give clear indications for when a country is marked by autocratic legalism. However, it can of course be discussed how these threshold values are decided upon and whether they offer the best indicator for when something falls above or below specific values. There seem to be an agreement in the literature that thresholds values and justification for cut-off points are often atheoretical⁶⁹. For this to be improved, more works needs to be done on the theoretical motivation for the choice of thresholds values and cut-off points.

Summarizing the indices’ ability to capture autocratic legalism

In comparing the indices, V-Dem stands apart as the most fine-meshed index, highlighting it as the best in accounting for autocratic legalism. Like the National Research Council found in 2008, then Polity5 and Freedom House are simply not “*...accurate and consistent enough to track modest or short-term movements of countries toward or away from greater levels of democracy*”⁷⁰. The challenges Polity5 is facing, are especially definitional and conceptual – problems which have been raised before in the literature⁷¹. Polity5 has been criticized for not capturing the underlying concept of democracy proficiently, an argument we also alluded to when pointing out that liberal elements are not scored. Another problem is the lack of *de facto* elements,

making Polity5 “...blind to democratic erosion that does not affect the constitutional order”⁷². Where *de jure* elements account for the institutional and constitutional set-up, *de facto* elements are ‘real world’ practices and outcomes of the system, like packing the courts with loyalists or buying up critical media outlets⁷³. It is thus hardly puzzling that Polity5 still classifies both Hungary and Poland as full democracies. For Freedom House, the challenges are mainly one of methodology, also presented elsewhere in the literature⁷⁴. One challenge is Freedom House’s ‘aggregation rule’, which weigh all aspects the same way. This risks drowning out alarming negative trends in one indicator by positive changes or status-quo in others. Another is the differences in the size of the categories. The twice as broad category of consolidated democracy makes it much less sensitive to changes in the score. Constructing the index through a simple average is in effect allowing countries with big democratic weaknesses on one indicator to still be categorized as consolidated democracies. Consequently, Freedom House is incapable of detecting more fine-grained changes in the quality of democracy, meaning that more subtle legalistic changes with albeit huge democratic implications will go unnoticed for a long(er) time. In addition, unlike V-Dem neither Polity5 nor Freedom House provide confidence intervals, making it difficult to identify measurement noise in the measurements⁷⁵. Though we find that V-Dem has been far better at accounting for autocratic legalism, at least one problem is still very much present. Due to the high sensitivity of the measurement, there can be a risk of classifying any kind of setback as instances of autocratization. Especially in the case of autocratic legalism, the need for heightened awareness on minor and not always visible related changes, it is important to differentiate between one-of changes and changes with larger transformative effects. This raises the broader question of how to distinguish between real autocratization and seemingly random and inconsistent “flutter” in levels of democracy. Isolated changes in

indicators, like the lowering of the retirement age for judges or singular instances of academic censorship, are not always indicators of big transitions. One must avoid ‘the paradigm of backsliding’, where all positive changes are seen as progress and every setback as a clear and continuous regression⁷⁶. An explicit outline of how the index teases out prolific subcomponents uncovering the first sequences of autocratization without of course translating isolated one-off events into larger trends would be welcomed.

Autocratic legalism is subtle and incremental with small attacks taking place in different areas and mostly within the law rather than by one big deathblow. Nancy Bermeo calls this “*a death by a thousand cuts*”⁷⁷. This also stresses that most legalist autocratic changes and ‘reforms’ are based on a democratic mandate but with the strategic purpose of distorting democratic values such as constitutionalism, pluralism, and political competition⁷⁸. In addition, because legalistic autocrats employ the game of window dressing, it is possible for them to disguise their actions by maintaining classical democratic practices like elections or citizen participation in the political process. They might even allow losing a local election now and then as long as they make sure electoral rules protect them from losing the majority. The same goes for the courts, which may keep on handing down decisions with references to formal constitutional provisions while gradually being packed with hand-picked loyalists. As a result, many autocratic elements can have taken root in the different categories monitored before it surfaces as a deliberate and real threat. V-Dem’s measurement makes it possible to evaluate change in every single sub-level component of democracy, increasing the sensitivity towards the gradual dismantling of democracy happening within the law and the constitutional framework. Neither Polity5 nor Freedom House have to the same extent been able to grasp the subtle and incremental but nevertheless clear deterioration of democratic governance that we have witnessed in Hungary and

Poland. In line with Stephan Haggard and Robert Kaufman's large-N study on backsliding, we conclude that V-Dem is best at identifying incremental erosion of autocratic legalism⁷⁹.

The European Union and its rule of law conundrum

What does of this mean for the real-life monitoring of backsliding countries? The EU has traditionally had a monitoring and sanctioning function when it comes to the democratic development of acceding member states. In order to become a full-fledged member of the EU, a country first has to qualify to become a 'candidate country' and then fulfil some clearly targeted objectives before finally acquiring membership. The European Commission – the Union's executive arm - has been tasked with a supervisory role and it has often been argued that the membership goal in itself has been instrumental in transforming former European autocracies into well-functioning democracies as seen with Greece, Portugal, and Spain⁸⁰. When the EU in 2004 welcomed eight former communist countries, these countries worked tediously to align themselves to the strict rulebook of the EU. Not least the democratic standards like an independent judiciary, free press, and anti-corruption measures⁸¹. Interestingly, despite these rather strict accession conditionalities, known as the Copenhagen Criteria and not least art. 2 in the Lisbon Treaty, the EU never acquired, or even attempted to acquire, agreed-on measures sanctioning or monitoring member states' democratic development after they gained membership. Only very recently and after intense pressure from many different sides has the issue of the EU's lacking rule of law and democracy instruments been put on the table and is now increasingly seen as a joint European challenge. It is not that the EU has no tools available but apart from the ordinary treaty infringement procedures the EU has appeared unprepared when facing gradual backsliding by its own

member states. As we argue here, the biggest challenge has however been *the lacking agreement* – also among Heads of State and governments - on criteria when facing actual on the ground destruction of democracy within the Union itself. Coupled with autocratic legalism's working within a majoritarian constitutional framework and with a 'electoral backing', it may be difficult for the EU to pinpoint democratic setbacks empirically. Another problem has been that the European Commission has not - so far - put forth any specific measure or defining instruments and criteria from which their work takes its point of departure. This reflects a problem in its own right, as it leaves up to discussion and doubt which thresholds of democracy are relevant to the Union. It moreover hinders strict and stringent enforcement of the EU's own standard of democracy as spelled out in the art. 2. Recently, the EU has introduced yearly 'Rule of Law Reports' and a new so-called 'rule of law – mechanism' attached to the EU budget and Recovery Fund, which is intended to withhold money transfers to member states, which due to their rule of law problems threaten the EU budget. In several of these reports and discussions, Freedom House has been consulted or referred to on matters of democracy⁸². As we argued above, however, Freedom House is not fully capable of accounting for autocratic legalism. The use of Freedom House may therefore give the EU an inaccurate picture of the state of democracy in member states like Hungary and Poland. To put it differently, when the law is used to undermine democracy, it becomes very hard to categorize the backsliding process of the regime methodologically and thus to register the digression in those measurement schemes we normally rely on. When Commission President von der Leyen solely refers to Freedom House in talking about democratic trends, it is not surprising that no serious actions has been initiated against Hungary and Poland since Freedom House, as we have shown, is not alert enough when it comes to changes caused by autocratic legalism⁸³.

Conclusion

Autocratization is the process of regime change towards autocracy through the ‘decline of democratic regime attributes’⁸⁴. Where this process previously was driven by coups and brutal measure, the backsliding of former consolidated democracies is nowadays mostly marked by an incremental legalist process using the law and the constitutional system based on an electoral majority⁸⁵. We have referred to this type of backlash as a deliberately governance technique of autocratic legalism, hiding gradual degradation in legalese language and judicial robes. It is like a shark that stays just below the surface of the dark water and not until it is dangerously close to its target will the shark fin alert of its presence. This unnerving character of autocratic legalism requires, like never before, that those monitoring and measuring these developments are actually capable of capturing it. In this article, we examined three of the most frequently used indices and their ability to account for autocratic legalism. Though they all have some issues related to their conceptual logic and measurement methodology, we find that V-Dem comes closest to an ideal instrument capable of tracking what we should be looking for. It is nuanced and fine-meshed to a level, where it can capture the early and often overlooked signs of autocratic legalism. This is further demonstrated by the fact that V-Dem was the first of the three indices to warn about the serious democratic backsliding taking place in Hungary and Poland. In comparison, Polity5 still classifies both countries as full democracies, while Freedom House has not (yet) downgraded the countries to a category of authoritarianism. We went on to discuss, why it is important that democracy measurements can capture autocratic legalism, especially in a densely regulated context like the EU, where everything is legalized and all political acts packed in legal language. In such a setting, autocratic power grapping using the law is a risk, which is especially hard to track. In addition, as we have described, there is at present no

agreement in the EU on which specific elements may trigger a pecuniary sanction, which comes down to a lacking genuine consensus on what a well-functioning democracy actually entails. By relying on democracy measurements that are not equipped to capture autocratic legalism, political actions risk being inadequate or, worse still, not initiated. Being able to capture autocratic legalism is in short important for initiating and fueling debates on the state of democracy (or lack hereof) but also to help create momentum for political action towards the perpetrators.

Notes

- 1 European Commission, Strategic Foresight Report.
- 2 See Giannone, “Political and ideological aspects”; Hudson, “How to measure democracy”; Roberts and Tellez, “Freedom House’s Scarlet Letter”.
- 3 Diamond, “Democratic regression”.
- 4 Lührmann and Lindberg, “A third wave of autocratization”.
- 5 Bermeo, “On Democratic Backsliding”
- 6 Scheppele, “Autocratic Legalism”.
- 7 We mainly use the term autocratic legalism to follow the same typology employed in Scheppele’s original definition. When sometimes referring to ‘backsliding’ or ‘new type of autocratization’ it is mainly due to linguistic nuance.
- 8 Scheppele, “Autocratic Legalism”, 547.
- 9 Pech, “A Court of Justice Protecting”.
- 10 Sadurski, “The Disciplinary Chamber”, 1.
- 11 European Commission, *Rule of Law Report*.
- 12 For seminal works through the ages see for instance Cutright, “National Political Development”; Jackman, “On the relation”; Neubauer, “Some Conditions”; Smith, “Socio-Economic Development”; Lipset, “Some Social”; Vanhanen, *Democratization*; Coppedge and Reinicke, “Measuring Polyarchy”; Bollen, “Issues in the Comparative”; Arat, *Democracy and human rights*; Alvarez et al., “Classifying political regimes”; and Diamond and Morlino, “The Quality of Democracy”.
- 13 Coppedge et al., “Conceptualizing and Measuring Democracy”; Coppedge, “Commentary: Democracy and Dimensions”; Przeworski, “Minimalist Conception”.

- 14 Pickel et al., “Measuring the Quality”; Bühlmann, Müller, and Weßels, “The democracy barometer”.
- 15 Vanhanen, *Prospects of Democracy*; Møller and Skaaning, “Regime Types”; Munck, *Measuring Democracy*, Giebler et al., “Why Choice Matters”; Coppedge et al., “Conceptualizing and Measuring Democracy”; and Bogaards, “Where to draw the line?”
- 16 Bollen, “Issues in the Comparative Measurement”; Coppedge, “Commentary: Democracy and Dimensions”; Völkel, “Complex Politics”; Munck and Verkuilen, “Conceptualizing and measuring democracy”.
- 17 Casper and Tufis, “Correlation Versus Interchangeability”; Giebler et al., “Why Choice Matters”.
- 18 Crasnow, “The Measure of Democracy”.
- 19 Bush, “The Politics of Rating”; Giannone, “Political and ideological aspects”.
- 20 Birdwell et al., “Democracy in Europe”.
- 21 Lührmann et al., “Regimes of the World”.
- 22 Dictionary.com, “Legalism”.
- 23 Mazmanyán, “On legalism”, 232
- 24 Mazmanyán, “On legalism”; Matczak, “The Clash of Powers”.
- 25 Scheppele, “Autocratic Legalism”, 548.
- 26 Scheppele, “Autocratic Legalism”, 547-548.
- 27 Buzogány, “Illiberal democracy”.
- 28 Sadurski, *Poland’s Constitutional Breakdown*.
- 29 Polgári and Dombos, “A New Chapter”.
- 30 Mazmanyán, “On legalism”, 232.
- 31 Agh, “The Triple Crisis”.
- 32 Rohlfing, “Methods of Shrinking”; Bard, “The Hungarian ‘Lex NGO’”
- 33 Wind, *The tribalization of Europe*.
- 34 Alizada et.al, *Autocratization Turns Viral*.
- 35 Sadurski, *Poland’s constitutional breakdown*.
- 36 Ibid., 16
- 37 Pech, “Dealing with ‘Fake Judges’”.
- 38 Judgment of the Court of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18.
- 39 Case of Xero Flot w Polsce sp. Z o.o. v. Poland.
- 40 Kelemen, “The European Union’s Authoritarian”.
- 41 Pichlak, “Abortion, Constitution”.
- 42 The decision by the Polish Constitutional Court was postponed in May 2021.
- 43 Bozóki, and Hegedűs, “An externally constrained”.

- 44 Csaky, "The Antidemocratic Turn", 3.
- 45 Kelemen and Pech, "Working Paper: Why autocrats".
- 46 Bogaards, "De-democratization in Hungary".
- 47 The rule-of-law conditionality mechanism is a new tool designed to protect EU funds from being misused by EU governments who are found to have failed to respect the principle of the rule of law.
- 48 Mazmanyanyan, "On legalism", 236.
- 49 Crasnow, "The Measure of Democracy".
- 50 European Commission, *Rule of Law Report*; European Political Strategy Centre, *Strong Europe, Better World*.
- 51 Munck, *Measuring Democracy*, 1.
- 52 Boese, "How (not) to measure".
- 53 Center for Systemic Peace. "Polity5 Annual Time-Series, 1946-2018".
- 54 Freedom House. "NIT Scores 2005-2020".
- 55 Varieties of Democracy. "V-Dem Dataset Version 11".
- 56 The component 'Regulation of participation' is only scored on the autocracy scale.
- 57 Bogaards, "Where to draw", 695.
- 58 Freedom House, *Freedom in the World*.
- 59 Coppedge et al., "The Methodology".
- 60 Coppedge et al., *Varieties of Democracy*, 266.
- 61 Coppedge et al., "The Methodology".
- 62 Coppedge et al., *Varieties of Democracy*, 42-43; Dahl, *Polyarchy*.
- 63 Gurr and Marshall, *Polity5: Political Regime*, 14-15.
- 64 Munck and Verkuilen, "Conceptualizing and measuring democracy", 24.
- 65 Scheppele, "Autocratic Legalism", 547.
- 66 Munck and Verkuilen, "Conceptualizing and measuring democracy", 14.
- 67 Boese, "How (not) to measure".
- 68 Scheppele, "Autocratic Legalism", 548.
- 69 See Clark et al., "Principles of Comparative"; Tomini and Wagemann, "Varieties of contemporary"; and Pelke and Croissant, "Conceptualizing and Measuring Autocratization".
- 70 National Research Council, *Improving Democracy Assistance*.
- 71 See Boese, "How (not) to measure"; Munck and Verkuilen, "Conceptualizing and measuring democracy".
- 72 Pelke and Croissant, "Conceptualizing and Measuring Autocratization".
- 73 Foldvari, "De Facto Versus de Jure".

- 74 See Munck and Verkuilen, “Conceptualizing and measuring democracy”; Munck, *Measure Democracy*.
- 75 Pelke and Croissant, “Conceptualizing and Measuring Autocratization”, 12.
- 76 Cianetti and Hanley, “The End of the Backsliding”, 66-80; Tomini, “Don’t think of a wave”; and Cassani and Tomini, “Reversing regimes and concepts”.
- 77 Bermeo, “On Democratic Backsliding”.
- 78 See Pech and Scheppele, “Illiberalism within”; Sadurski, *Poland’s constitutional breakdown*; and Kelemen, “Europe’s Other Democratic Deficit”.
- 79 Haggard and Kaufman, “Backsliding”.
- 80 Schimmelfennig and Scholtz, “Legacies and Leverage”.
- 81 Schimmelfennig, “The Community Trap”; Moravcsik and Vachudova, “National Interest”; and Schimmelfennig and Sedelmeier, “Governance by conditionality”.
- 82 European Commission, *Rule of Law Report*; Speech by President von der Leyen; European Political Strategy Centre, *Strong Europe, Better World*.
- 83 Speech by European Commission President Ursula von der Leyen.
- 84 Lührmann and Lindberg, “A third wave”, 1095.
- 85 Cianetti and Hanley, “The End of the Backsliding”.

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Declaration of interest statement

The authors report there are no competing interests to declare.

Figure list

Figure 1. Overview of scores for Hungary and Poland 2005-2020

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