

A schoolbook case of eliminating dissent by an illiberal regime: rule of law backsliding and attacks against academic freedom

by Petra Bárd¹

The position of the rule of law in the EU legal system

The European Union (EU) is founded on a set of values including democracy, the rule of law, and fundamental rights enshrined in Article 2 of the Treaty on European Union (TEU). These values are not merely owned by the EU, but are common values shared by the EU and its Member States, which the latter agreed to adhere to and to promote when acceding to the EU and signing the Treaty of Lisbon, respectively.²

Member States are vetted for their compliance with European values *before* they accede to the Union.³ However, no similar mechanism exists to supervise and regularly monitor adherence to these foundational values *after* accession.⁴ This has been referred to as the “Copenhagen dilemma”.⁵

There are several arguments against EU interference into Member States’ matters, whenever the rule of law is violated.

One of the common counterarguments against EU action is that the people shall democratically change their government if it violates the rule of law, instead of primarily relying on the EU to intervene. But it is naïve to believe that this is doable in a State with distorted election laws, state captured supervisory authorities overseeing the elections, or a distorted media landscape.

Another counterargument is pragmatic: if the EU pushes too much, too forcefully, the outcome – rather than bringing these Member States in line with the rule of law – may be providing these governments with additional ammunition for gaining popular support to leave the EU, which would likely be even worse for their citizens in terms of the future rule of law. It is an argument well known from international organisations including the Council of Europe: better keep problem children of the international community inside than not to have any influence over them. This is a matter of balancing: is the benefit of keeping them in

¹ Member of the Hungarian Europe Society; Associate Professor at Eötvös Loránd University, School of Law, Budapest; and Visiting Faculty and Researcher at Central European University, Budapest.

Part of the research behind this paper has been prepared in the auspices of the EU’s Horizon 2020 research and innovation programme as part of RECONNECT project under Grant Agreement no. 770142. The usual disclaimer applies.

² Promotion of EU values is a new Lisbon Treaty requirement. See: Article 3(1) TEU – “The Union’s aim is to promote peace, its values and the well-being of its peoples.”

³ Article 49(1) TEU. The so-called “Copenhagen criteria” established in 1993 are meant to ensure that all new EU Member States are in line with the Union’s common principles before joining the EU.

⁴ The effectiveness of EU action *vis-à-vis* the Western Balkans could also be questioned. The Stabilization and Association Process served stabilization in post-conflict States in the Balkans, but less the consolidation of democracy. The EU attempts to refresh the region’s European perspective through, for example, the so-called new approach to accession negotiations, or the EU’s “fundamentals first” and “recalibrated fundamentals first” approaches also suffer from serious deficiencies. Vurmo G, ‘Western Balkans’ EU dream: Ambition must define a new process’ (2018) CEPS Policy Insights.

⁵ Plenary debate in the European Parliament on the political situation in Romania, 12 September 2012. Statement by Viviane Reding. Available: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120912+ITEM-011+DOC+XML+V0//EN>. See also: The EU and the Rule of Law: What Next? Speech of Viviane Reding delivered at the Centre for European Policy Studies (CEPS), Brussels, 4 September 2013. Available: http://europa.eu/rapid/press-release_SPEECH-13-677_hu.htm.

greater than the harm that may come from dismantling of EU values and potential proliferation of rule of law backsliding to other states?

A further counterargument against EU intervention is that the EU is lacking competence, since issues such as elections or judicial powers are national matters. But the EU must acknowledge that it does have powers to enforce its own values enshrined in Article 2 TEU, and it should not shy away from using them. With respect to the principle of conferral, the EU can intervene to protect its constitutional core, and what is more, it is also unequivocally obliged by the Treaties to act.

Violation of the rule of law in any Member State is an EU matter. A state's departure from European consensus on rule of law standards will ultimately hamper the exercise of individuals' rights EU-wide. All EU citizens beyond the borders of the Member States concerned will to some extent suffer due to the given state's participation in the EU's decision-making mechanism. Rule of law violations become contagious. Once the values of Article 2 TEU are not respected, the essential presumptions behind the core of the Union do not hold any more. Respect for the rule of law is essential for an investment-friendly environment and, in general, for the internal market to be functional. It is also vital for the effective cross-border judicial cooperation in criminal matters.⁶ Apart from these substantive problems, the principle of primacy would also be jeopardised. Member States would invoke various arguments in order to permit exemptions from the principle of primacy of EU law.⁷

The EU's rule of law repository

The EU possesses a number of instruments assessing Member States' compliance with the rule of law or its elements including the legally binding EU Charter of Fundamental Rights.⁸ For example, since 2012, these include the EU Justice Scoreboard⁹ which feeds into the EU yearly cycle of economic policy coordination, or "European semester", to foster structural reforms at the national level.¹⁰ Its aim is to identify shortcomings and good examples, and to foster structural reforms at national levels. The Scoreboard however has some major weaknesses: it is criticised for being "incapable of catching the most atrocious violations: it does not sufficiently detect internal linkages. Thus it examines individual elements but fails to supply a qualitative assessment of the whole."¹¹ The Scoreboard does not foresee any coercive

⁶ Bárd P, Carrera S, Guild E, Kochenov D (with thematic contribution by Marneffe W) (2016) An EU mechanism on Democracy, the Rule of Law and Fundamental Rights. CEPS Paper in Liberty and Security in Europe, 91. Available: <https://www.ceps.eu/system/files/LSE%20No%2091%20EU%20Mechanism%20for%20Democracy.pdf>.

⁷ Employing the theory of Dimitry Kochenov and its vocabulary, in the duality of the *gubernaculum-jurisdictio*, the lack of *jurisdictio* jeopardizes the *gubernaculum* of EU law. Kochenov D (2015) EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It? Yearbook of European Law, 34, 74–96.

⁸ Carrera S, Guild E, Hernanz N (with thematic contributions by Alcidi C *et al.*) (2013) The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU Towards an EU Copenhagen Mechanism. CEPS, November, 4–15, 42–57. Available: <https://www.ceps.eu/publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu>.

⁹ As to the EU Justice Scoreboard, see: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en

¹⁰ See: Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. Annual Growth Survey 2015, 28.11.2014, COM 902 final. For a study of the European semester method refer to 2013 CEPS Study.

¹¹ Scheppele KL (2013) The Rule of Law and the FrankenState: Why Governance Checklists Do Not Work. Governance, 26(4), 559–562. DOI: <https://doi.org/10.1111/gove.12049>.

action or sanctions/penalties in a situation where an EU Member State may be seen as performing poorly on the above-mentioned indicators.”¹² Other mechanisms, such as the EU Anti-Corruption Reporting Mechanism for Periodic Assessment (“EU Anti-corruption Report”) or the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania,¹³ involve important segments of the rule of law, but are limited in material and territorial scope.¹⁴ Additionally, these cannot be seen as supervisory mechanisms.

The only “hard law” with a solid Treaty-basis that can be invoked to enforce EU values is Article 7 TEU, which consists of a preventive arm and a corrective one. The scope of application of Article 7 TEU is remarkably broad, and has the clear advantage to other mechanisms that it also covers breaches in areas where Member States act autonomously. This provision also provides for more or less clear sanctions: if there is a “serious and persistent breach” by a Member State of Article 2 TEU principles, this Member State might be sanctioned, including suspension of voting rights inside the Council. Due to high political constraints, however, no Member State has yet officially been condemned for violating the EU’s foundational values under this provision (even though Article 7(1) TEU procedures have been started against Poland and Hungary¹⁵).

In response to the Copenhagen dilemma and the inoperability of Article 7 TEU, European institutions have called for reforms. The European Commission published a Communication in March 2014 on a New EU Framework to Strengthen the Rule of Law¹⁶ (EU Framework) for the purpose of enabling the Commission to find a solution with a given Member State in order to prevent the emergence of a systemic threat to the rule of law in that Member State that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU.¹⁷

While the EU Framework can be seen as a step in the right direction, it has numerous limitations. The monitoring dimension is rather weak in nature; launching a “rule of law opinion” or a “rule of law recommendation” as foreseen by the Framework are rather discretionary and the assessment is not carried out by entirely independent academic experts who would ensure the full impartiality of the findings.¹⁸ But the proof of the pudding is in the eating, and the Polish rule of law backsliding¹⁹ provided a chance for the Commission to test

¹² Bárd P, Carrera S, Guild E, Kochenov D (with thematic contribution by Marneffe W) (2016) An EU mechanism on Democracy, the Rule of Law and Fundamental Rights. CEPS Paper in Liberty and Security in Europe, 91, 8–9. Available: <https://www.ceps.eu/system/files/LSE%20No%2091%20EU%20Mechanism%20for%20Democracy.pdf>.

¹³ For the latest CVM, see: http://ec.europa.eu/cvm/progress_reports_en.htm.

¹⁴ Commission Decision, Establishing an EU Anti-corruption reporting mechanism for periodic assessment (“EU Anti-corruption Report”), 6.6.2011, C(2011) 3673 final.

¹⁵ European Commission, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final; European Parliament, Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, 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 (2017/2131(INL))

¹⁶ Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11.3.2014, COM (2014) 158 final.

¹⁷ The Communication States that “[t]he Framework will be activated when national “rule of law safeguards” do not seem capable of effectively addressing those threats”. *Ibid.*, 4.1.

¹⁸ For further criticism, see: Bárd P, Carrera S (2017) The Commission’s Decision on ‘Less EU’ in Safeguarding the Rule of Law: A play in four acts. CEPS Policy Insights, 8. Available: <https://www.ceps.eu/publications/commission’s-decision-‘less-eu’-safeguarding-rule-law-play-four-acts>.

¹⁹ Müller JW (2013) Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order. Transatlantic Academy, Washington, D.C., 3.

the EU Framework procedure – commonly known as the pre-Article 7 procedure.²⁰ The case proved its ineffectiveness. Since the Commission and Poland were not on the same page about foundational European values, instead of deliberation and discourse, the procedure *vis-à-vis* Poland has turned into a “dialogue of the deaf”,²¹ with the Polish Constitutional Tribunal entirely captured before the end of the process.²² In the overall assessment, the pre-Article 7 procedure thus failed.

As proven in the above assessment, Article 7 TEU is practically non-operational, whereas other EU-level instruments that evaluate and monitor – yet do not directly supervise – Article 2-related principles at the Member State level present a number of methodological and efficiency challenges.

But the EU has one more additional tool under current treaty law. It may initiate infringement proceedings in pursuance to Article 258 TFEU. Infringement proceedings are simultaneously narrower and broader than Article 7 procedures.²³ While the former must involve an EU law element, the latter may also cover matters falling outside the scope of EU law.²⁴ However, the infringement procedure may be employed to tackle any failure within EU law of whatever gravity, whereas the Article 7 TEU mechanism is there to address a “serious” or a “serious and persistent” breach of values enshrined in Article 2 TEU, including the rule of law. But infringement procedures are slouch, and wasting time while a Member State openly violates the rule of law contributes to more harm done by those in power. The considerable delay in rendering judgments in rule of law related cases may culminate into irreversible and severe harm of rule of law backsliding, which the final judgment rendered in the far future would not be able to remedy. Once the constitution is rewritten, institutions that were supposed to be checks on the those in power are weakened, and individuals loyal to the government are appointed to key positions, the term of which is then extended to overarch several election periods. Overall, it becomes extremely difficult to take a U-turn, re-establish constitutionalism, and even more challenging to have the new system interiorized by the people. In the case of Lex CEU, a piece of law that was adopted in order to chase the Central European University (CEU) out of Hungary. The CEU saga is a clear illustration of the consequences of slowness. By the time the case will be settled by the Court of Justice of the EU, the issue will be essentially mute, since CEU will already have moved out of the country.

²⁰ According to a press release of the European Commission, “[t]he College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission of the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this context.” Rule of law in Poland: Commission starts dialogue. Brussels, 13 January 2016. Available: http://europa.eu/rapid/press-release_WM-16-2030_en.htm. See also the Fact Sheet of the European Commission: College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers. Brussels, 13 January 2016. Available: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm.

²¹ Pech L, Scheppele KL (2017) Poland and the European Commission, Part I: A Dialogue of the Deaf? *Verfassungsblog*. Available: <https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>.

²² Pech L, Scheppele KL (2017) Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law. *Verfassungsblog*. Available: <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>.

²³ Poptcheva EM (2015) Member States and the rule of law. Dealing with a breach of EU values. *European Parliamentary Research Service*, PE 554.167.

²⁴ Kochenov D, Pech L (2015) Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality. *European Constitutional Law Review*, 11(3), 512-540. DOI: <https://doi.org/10.1017/S1574019615000358>.

An illustration: the CEU saga²⁵

The conflict in a nutshell and what it is behind

At the end of March 2017, the Hungarian government introduced a bill according to which foreign universities need to meet new criteria in order to be able to operate, or continue to operate, in Hungary. The law was adopted in a rush, amidst procedural irregularities.²⁶ The most demanding new condition is an international agreement between the government of Hungary and the government of the respective university's country of origin. It also, among other things, requires foreign universities wishing to operate in Hungary to conduct actual educational activities in their home country. (A few more requirements were introduced, but we will not get into all the details in this paper.) Universities that do not meet the new criteria will lose their license of operation. The law²⁷ was quickly named "Lex CEU" because most of these criteria affected one and only one institution: CEU.

The events that surrounded the bill's introduction made it clear that the changes in the regulations had served exclusively political motives. The government officials and Fidesz MPs accused CEU of being a "virtual", "fake", even a "non-existent" university. Simultaneously, it was labelled and consequently referenced as "Soros university" in the captured media, and suggested that CEU faculty somehow took part in an alleged conspiracy against Hungarian national interests.

One way to interpret the conflict between CEU and the Fidesz government is a culture war.²⁸ CEU is committed to the values of open and democratic societies, and respect for human rights and human dignity. Hungary's ruling party, Fidesz – once an ally of the driving forces of the regime change, and a dynamic and promising liberal movement in Hungary's transition to a democracy in the early '90s – over time became a conservative party, and adopted most of the ideological characteristics of the far-right. In their views, many of the scientific works by CEU students and faculty are about twisted gender-theories and other fashionable, pseudo-scientific liberal topics. But the ideological differences do not fully explain the attack.

It is worse than a culture war: in an already complex world that is often difficult to comprehend, the government is artificially creating existential risks through misinformation, disinformation, malinformation, or fake news. Via its populist rhetoric, it gives easy to understand answers to complex questions. People become incompetent in their own lives as the threat of insecurity is exacerbated by the loss of their cognitive sovereignty. As Professor Ignatieff, President and Rector of CEU, put it: "One of the things about a democracy that people forget is how important knowledge is. (...) If you don't have knowledge, then all you get to go on is tweets and Facebook, and rumours and fantasy and paranoia. (...) You need knowledge in order to make choices."²⁹ In lack of knowledge, voters base their choices on

²⁵ An earlier and less detailed version of this chapter appeared here: Bárd P (2019) To leave or not to leave? Viktor Orbán's war against George Soros and the CEU dilemma. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law. Available: <https://reconnect-europe.eu/blog/bard-orban-ceudilemma/>.

²⁶ For the details, see: Lattmann T (2017) Attack on the CEU in Hungary – Attack only on academic freedom? *International Law Reflections*, 2017/6/EN, 1–4. Available: https://www.academia.edu/32838023/International_Law_Reflections_2017_6_EN_-_Attack_on_the_CEU_in_Hungary_-_Attack_only_on_academic_freedom.

²⁷ For the compulsive lawyer readers: Lex CEU is technically a legal amendment, *i.e.* the Act XXV of 2017 on the Amendment of the Act CCIV of 2011 on the National Higher Education.

²⁸ Enyedi Zs (2018) Democratic Backsliding and Academic Freedom in Hungary. *Perspectives on Politics*, 16(4), 1067-1074. DOI: <https://doi.org/10.1017/S1537592718002165>.

²⁹ The quote is taken from a video made on CEU. Available: https://www.youtube.com/watch?v=FoMd_Bxn5rg&feature=youtu.be&fbclid=IwAR2uHR_3m4w5DbB1ndIBRbvYHfHT_eIB9_V9kaaXvfi7_X16dDYclajnDEg, 11:22.

emotions, call for a strong, charismatic leader, someone making decisions on behalf of the people that lose control over their own lives. Demands for more certainty and security lead to lack of limitation of state powers, a quasi-emergency situation. This is all opposing the state of a rule of law, where those in power are supposed to be bound by pre-defined rules. But the politics of resentment is beneficial to would-be autocrats.³⁰ Via its populist rhetoric, the government gives easy to understand answers to complex questions, and at the same time, it undermines educational and scientific institutions which could contribute to the empowerment of the people. Lowering the age of mandatory education and attacks on the Hungarian Academy of Sciences³¹ are part of this plan.

The long-standing tensions between Orbán – once a Soros grantee – and Soros escalated fast in 2015. Fidesz became fixated on the refugee crisis, and put the blame on international organisations for encouraging migrants to enter Europe. But Brussels or the UN are not good enough scapegoats. They needed a person with a face, preferably a well-known one. Soros, the mythical Jewish enemy, was soon created. The anti-Soros campaign was closely intertwined with favouring national sovereignty over further European integration, especially when it came to the enforcement of values the EU and Member States are supposed to share.

As was recently disclosed, the demonization of Soros was based primarily on falsehoods. Orbán's political advisors, Finkelstein and Birnbaum, worked hard on the demonization of Soros, which was – as Birnbaum disclosed in a recent interview – based on a pack of lies. Soros either remained silent, and then somehow gave the semblance of admitting the mischiefs he was said to have done, or started to counter the attacks, proving how powerful and influential he was. As Birnbaum put it, “Soros was a perfect enemy. (...) The perfect enemy is the one whom you can punch again and again, and does not punch back. (...) It was so obvious. It was the simplest of all product. All you had to do was to package and to market it.” Not just Soros himself was attacked, but many NGOs funded by Soros through Open Society Foundations became the target of the hate-mongering campaign claiming that these organisations – mainly human rights organisations – support illegal migration, and ultimately decided to close their operations in the Hungarian capital.³² CEU, also founded by Soros, could not escape its fate and now follows suit.

The last element of the conflict was that Hungary's authoritarian government also felt encouraged by developments in the United States. When President Trump came to power, PM Orbán interpreted this as “an authorisation from the highest secular place that we are free to put ourselves at the head of the line [so that] national interest will be at the forefront”.³³ Orbán also hoped to find an ally for his illiberal policies in the new US administration. But he miscalculated. America saw Lex CEU as an attack against an American university, and insisted that Hungary withdraw the law.

³⁰ Koncewicz TT (2017) Understanding the Politics of Resentment. Verfassungsblog. Available: <https://verfassungsblog.de/understanding-the-politics-of-resentment/>. DOI: <https://dx.doi.org/10.17176/20170929-135630>.

³¹ See, for example: The Hungarian government to suppress the independence of the Academy of Sciences. Hungarian Academy Staff Forum, 5 February 2019. Available: <https://adf2019.com/english/>.

³² Press release of the Open Society Foundations. The Open Society Foundations to Close International Operations in Budapest. 15 May 2018. Available: <https://www.opensocietyfoundations.org/press-releases/open-society-foundations-close-international-operations-budapest>.

³³ Viktor Orbán Misunderstands Donald Trump. Hungarian Spectrum, 23 January 2017. Available: <http://hungarianspectrum.org/2017/01/23/viktor-orban-misunderstands-donald-trump/>.

Lex CEU – a violation of the rule of law and academic freedom

As it was already mentioned above, Lex CEU incorporates a number of requirements. One of them obliges foreign universities operating in Hungary to provide educational activities on a campus where they had been accredited. In CEU's case, this is the US. In line with this provision, CEU signed a memorandum of understanding with Bard College, with whom it had maintained close relations for a long time, and agreed that CEU professors will also teach courses in New York.

A second requirement was however more difficult to fulfil and also more problematic from the viewpoint of academic freedom. Lex CEU was passed to make sure that foreign universities – and CEU is originally accredited in the US – will only be able to function in Hungary as of the 2018/19 academic year if the operation is backed up by an intergovernmental agreement between Hungary and the respective other country where its programs are accredited.

Legally speaking, this part of Lex CEU makes little sense. According to the law, in case of federal states, where the federal government is incapable to conclude an agreement – and the US is such a state –, the agreement must be signed by a state (like the state of Maryland, the state of New York) on the basis of a preliminary agreement first concluded between the federal government and the Hungarian government.³⁴ This however is a legal nonsense. There is no such a thing in international law as a “preliminary international agreement”. A document is either an international agreement or not, and the US government does not have the power to sign such a thing – whether preliminary or not.

Fidesz politicians point to an exchange of letters³⁵ where US Secretary of Education lectures the Hungarian Minister of Human Capacities about US constitutional law explaining that the US federal government is not the suitable entity to conclude agreements on matters of higher education. The Hungarian Minister thanked the US Secretary of Education for her kind explanation. Absurd as it is, this exchange of letters was acknowledged as a preliminary international agreement, on the basis of which an agreement was signed between the government of Maryland and Hungary to secure the continued operation of the Budapest-based McDaniel College. This is nothing but arbitrariness, and as such extremely dangerous. The Hungarian government may at any time acknowledge the obvious: namely that an exchange of letters is not an international agreement, and therefore, revoke the licence of the university. It only depends on the goodwill of those in power not to make this step. And whereas a relatively small and little known educational entity is unlikely to bother the government, CEU – which became the symbol of resistance in Hungary – would have been highly likely harassed further. The sheer possibility of having the licence revoked at any time may have had a chilling effect and led to self-restraint, if not self-censorship.

But we shall cross a bridge when we come to it, and we never came to it. CEU never had to face the dilemma whether a non-existing international agreement is an acceptable basis for the agreement concluded between the state of New York – where CEU is accredited – and the Hungarian government. Because the Hungarian government refused to sign the respective agreement with New York. This is so despite the fact that CEU satisfied all requirements within its control. And this shows how Lex CEU is in contravention of academic freedom and

³⁴ Section 76, paragraph (1), point a), of the Act CCIV of 2011 on the National Higher Education, as established by Section 2, paragraph (1), of Lex CEU.

³⁵ For a reference, see on the website of the Hungarian Government: The U.S. Secretary of Education raised no objections to the Act and denoted the negotiating partners. Cabinet Office of the Prime Minister/MTI, 22 June 2017. Available: <http://www.kormany.hu/en/ministry-of-human-resources/news/the-u-s-secretary-of-education-raised-no-objections-to-the-act-and-denoted-the-negotiating-partners>.

the rule of law. The continued operation of CEU in Hungary was at the mercy and the political discretion of two governments – one of which is openly hostile to the university. Shutting down a university – because this is what practically happened – is an unprecedented move in post-World War II Europe. It was legal in the sense that it was in accordance with a piece of law in force, but it was not legitimate in the sense that the law itself is in violation of the rule of law.

Lies and half-lies

Half-lies are more dangerous than lies, since statements with a seed of truth in them sound more credible and can mislead the public for long. In the following, let me call two half-true claims surrounding the CEU saga by their names and let me counter them.

Lie No. 1: as the Hungarian government emphasizes, it is “just” the US accredited programs that have to leave the country, but the rest of CEU can stay. Now, the university consists of two legal entities: CEU, accredited in the US, and Közép-Európai Egyetem (meaning Central European University in Hungarian), a private university accredited in Hungary. Both entities operate in Budapest. 2/3 of CEU’s programs are not accredited in Hungary. The Legal Studies Department would, for example, entirely cease to exist, since law programs’ Hungarian accreditation is impossible. Not that the Department does not meet the quality requirements, but because of the specific nature of the discipline: a legal studies program can only be accredited in Hungary if the law school offers undergraduate degrees, whereas CEU is a post-graduate university. In a university with an international student body, it does not make much sense to teach national substantive and procedural laws. All in all, depriving the university from the possibility of offering US degrees would have fatal consequences for CEU. It is impossible to split the two entities without inflicting major harm on the university.

Lie No. 2: CEU left Hungary voluntarily. On 3 December 2018, CEU announced to move all the US-accredited programs it offered to Vienna. But it wasn’t a voluntary move; CEU actually waited until the last moment and beyond. Recruitment of students and designing an academic year takes at least a year. Therefore, it was rational for CEU to secure its operation in a more welcoming country for the next academic year instead of waiting until the deadline expired for the signature of the international agreement with the state of New York, *i.e.* for the verdict of a hostile government, or ponderous, soft and slow European mechanisms monitoring and enforcing European values to be triggered.

The complicity of EU institutions

One of the lessons to be learnt is that time is on the side of those violating the rule of law. The original deadline for the conclusion of the international agreement was October 2017. But in October 2017, the government extended the deadline to comply with the law until January 2019. Since CEU already satisfied all requirements of Lex CEU within its control, the new rule could only be understood as a prolongation of the legal uncertainty. “It’s as if we’re being slowly strangled,” Professor Ignatieff said. “A solution is on the table, but every time we get within reach of a solution, the goalposts get moved.” Extending the deadline left CEU in a legal limbo, and at the same time, it greatly benefited the government, which could press on with its anti-Soros, anti-Brussels, anti-CEU rhetoric – vital tools in the campaign before the parliamentary elections in 2018, and continue to serve the government before the 2019 EP elections.

On the plus side, the extension provided enough time for legal mechanisms to be triggered at the EU level. The Commission started an infringement procedure in relation to the law, and decided to refer it to the Court of Justice of the European Union (CJEU) in December 2017,³⁶ but no judgment has been rendered since then, and neither has an interim measure been requested by the Commission. What is more, whereas the Hungarian Constitutional Court (HCC) could have invalidated the respective provisions, instead, they also offered more time to the government. Once a group of opposition MPs brought a constitutional challenge against the law, the HCC – in a rather unusual move – decided to form a special working group for the matter. Since the law clearly violates the Hungarian Constitution and two *amici curiae*, written by leading Hungarian constitutional scholars, have been submitted, which could have been copy-pasted into the judgment, this move can only be seen as a tool for prolonging the procedure in a highly sensitive political matter and granting time to a rogue government. Once it became too embarrassing not to have the judgment rendered, the HCC offered new excuses for remaining silent on the matter. Half a year after the Commission referred the infringement case to the CJEU, the HCC noted this, and decided to suspend the procedure in front of it “in the spirit of the European constitutional dialogue”.³⁷ This is an inexplicable move on legal grounds, because the legal bases for the attack against the law are different in front of the two *fora*. The HCC has many more grounds to invalidate the law, whereas the CJEU has to respect the principle of conferral and search for an EU law element. Therefore, the outcome of the infringement case does not necessarily affect the constitutional analysis. At the same time, this is also a very cynical move, since not long before suspending the case, the HCC was developing a constitutional identity argument against the Council’s relocation plan, where they were ignorant towards any dialogue between courts.³⁸ As Halmai put it, it was “nothing but national constitutional parochialism, which attempts to abandon the common European constitutional whole”³⁹ (footnote omitted). In other words, it was an abuse of the constitutional identity argument.⁴⁰ Now that an opposing approach is pleasing the government, the constitutional court justices decide to wait for the outcome of the infringement procedure by claiming they rely on a constitutional dialogue. The constitutional court justices conveniently make use of the slow pace of proceedings in front of the CJEU. In the CEU case, the delay in front of the CJEU thus hurts the rule of law twice: it feeds an abusive constitutional argument, and fails to prevent the forcing CEU out of Hungary.

³⁶ See the press release of the European Commission: Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law. Brussels, 7 December 2017. Available: http://europa.eu/rapid/press-release_IP-17-5004_en.htm.

³⁷ As to both cases, see the press release of the HCC: In the spirit of the European constitutional dialogue the Constitutional Court suspended its procedures in the cases related to the Act on national higher education and the “Act on NGOs”. 12 June 2018. Available: <https://hunconcourt.hu/kozlemany/in-the-spirit-of-the-european-constitutional-dialogue-the-constitutional-court-suspended-its-procedures-in-the-cases-related-to-the-act-on-national-higher-education-and-the-act-on-ngos/>.

³⁸ See: Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law.

³⁹ Halmai G (2018) Absolute Primacy of EU Law vs. Pluralism: the Role of Courts. Concluding Remarks. Available: https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf.

⁴⁰ Bárd P, Kochenov D (2018) Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, Working Paper No. 1. Available: https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf.

See also: Kelemen RD, Pech L (2018) Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, Working Paper No. 2. Available: <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

CEU's move to Vienna shall serve as a reminder about the vulnerability of democracies, and the inefficiency of domestic and European mechanisms to enforce the rule of law against illiberal forces. The blame lies primarily with Orbán, the Fidesz government, and people serving in captured institutions, such as the HCC. But let us not forget that chasing CEU out of the country happened in broad daylight, similarly to other steps in the destruction of values the EU Member States agreed to respect and promote. Paraphrasing Einstein's words: Europe is in greater peril from those who tolerate or encourage evil than from those who actually commit it.⁴¹ Encouraged by the inability of EU institutions to intervene, other countries may follow suit. And contrary to popular belief this is not just an Eastern European phenomenon. Populism and the epidemic of rule of law backsliding is spreading in all directions, and even Vienna is not necessarily the safest choice for CEU in the long-run.⁴²

I hope I am wrong.

⁴¹ According to the original: "Was ich aber an ihm [Pablo Casals] besonders bewundere, ist seine charaktervolle Haltung nicht nur gegen die Unterdrücker seines Volkes, sondern auch gegen alle diejenigen Opportunisten, die immer bereit sind, mit dem Teufel zu paktieren. Er hat klar erkannt, dass die Welt mehr bedroht ist durch die, welche das Uebel dulden oder ihm Vorschub leisten, als durch die Uebeltäter selbst. Princeton N.J., 30. März 1953, Albert Einstein." Einstein Archive, The Hebrew University of Jerusalem.

⁴² Kurier.at. CEU übersiedelt nach Wien: Strache kritisiert "Wanderuniversität". 4 December 2018. Available: <https://kurier.at/politik/inland/ceu-uebersiedelt-nach-wien-strache-kritisiert-wanderuniversitaet/400343932>.