



## **Illiberal Democracies: What can the European Union do in case a member state regularly and systematically breaches European values and regulations?**

Policy paper

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## Introduction

The Hungarian Europe Society organised two international workshops – the first one in Budapest on 24 April 2015, the second one on 2 June 2015 in Brussels - in order to bring together experts, scholars, politicians, NGO representatives and other stakeholders to discuss the state of democracy in the European Union in a period when populism, illiberalism, majoritarianism and nationalism have gained significant influence almost everywhere inside the community. And not to forget another “ism”, Euroscepticism; this political tendency has received much stronger representation recently at national and European levels in different ideological outfits and by different party formations. Moreover, important neighbouring countries to the European Union have introduced new models of non-democratic, authoritarian-type regimes which have become competitors to the European smart power concerning economic development, on the one hand, and efficiency related to decision-making processes, on the other.

In such a changing environment, our original concept was to focus on the pressing dilemma what European institutions and European political actors can do in case basic common European values are breached “from the inside”, hence, by member state governments. Certainly, when inviting speakers and composing high-level groups of people in order to have serious brain-storming on this theme, we all had in mind – and we also put it on paper – the negative development and frustrating practice that has unfolded in Hungary after the overwhelming victory of Viktor Orbán’s Fidesz party in 2010. Placing the unique Hungarian case into a broader all-European context, however, gave us a chance to grasp this phenomenon as part of a wider political change. We did not want to elaborate on the Hungarian crisis just by following the path of the internal Hungarian distorted political agenda characterised by painful intellectual polarisation in the domestic public discourse in the past decades. Still, our intention to organise two events in order to discuss old and new political and constitutional/legal options, tools and instruments the European institutions might use when blocking, mitigating, sanctioning, and, hopefully, bringing back into the club any member state which started to behave as an



“enfant terrible”, was highly inspired by the speech of the Hungarian Prime Minister held at Băile Tuşnad (Tusnádfürdő), Romania, at the end of July 2014. Here, Orbán declared his intention to build an illiberal state/democracy in Hungary. During the history of the European political and economic integration, none of the EU heads of state or government had ever expressed such contradicting views to fundamental European values.

As the policy paper describes, Orbán’s views about democracy and the peculiar Hungarian political development after 2010 made the democratic public, the international media and a big part of the mainstream European elites especially nervous. Not just because of the deterioration of the situation in one member state, but also because of its potential spill-over effect. A similar U-turn in any of the post-communist Central and Eastern European countries concerning the respect of democratic norms and institutions, the rule of law, human rights, freedom of expression, and further basic European values would count as a nightmare scenario for pro-European political and civil groups and individuals ten years after the “Big Bang enlargement” of the European Union and twenty-five years after the regime changes. As Jacques Rupnik and Jan Zielonka stated, “most of the new democracies are experiencing ‘democratic fatigue’ and some seem vulnerable to an authoritarian turn. The EU, seen as the guarantor of the post-1989 democratic changes, is experiencing an unprecedented economic, financial, and democratic crisis with the combined challenges of technocracy and populism.” Moreover, the strengthening of anti-European sentiments in public discourses has been expressed by the increasing support to populist parties in plenty of the older EU member states at national and European elections. The reasons why the populist “spectre” has gained a louder voice in the European political sphere are numerous and cannot be linked only to the (dis)functioning of the European Union. There are quite divergent views in the political science literature whether the advance of populist parties is significant enough to speak about a new era when the rules of the game have changed in the European Union, and, whether they represent a threat to the future of liberal democracies in Europe.



The pushing internal economic, political and institutional problems weighting onto the European Union, as well as the Russian aggression against Ukraine, often turned the attention of European elites away from the Hungarian case and created room for manoeuvre for the Orbán-government when dealing with conflicts with the representatives of the European institutions. In fact, the provocative measures introduced in Hungary have not received unanimous reaction from the political actors inside the European public sphere. Especially the European party family of Fidesz, the European People's Party, was reluctant to openly criticise its member organisation. Nevertheless, the interventions of the European Commission, the resolutions of the European Parliament and the analyses and critical statements of European and international organisations (government and civil), about the state of human rights and the rule of law in the country represent the dominant negative perception about the Hungarian political development. Still, the representatives of the European Union had almost no previous experience how to cope with an ongoing conflict situation with one of its member states regarding both the use of legal competences available at European level and the formation of an efficient political strategy vis-à-vis the swinging “peacock policy” of Prime Minister Orbán.

During the intensive debates at our two workshops participants tried to get closer to the core of the political problems sketched above. This paper summarises the main ideas and recommendations developed at our events and combines these thoughts with further expert views in the literature and public debates about the subject matter.



## **I. Illiberal democracies and the populist moment in the European Union**

How to define new political tendencies and models in and outside the European Union which challenge the mainstream liberal democratic order? The ideological positioning of political parties as well as the everyday practice of existing non-liberal regimes give material to experts focusing on the field for theoretical assumptions and clarifications. Although our ambition is not to solve the “how to call you” problem, the analytical separation of different political issues seems to be unavoidable. Therefore, first the state of democracy in the world will be discussed shortly. Then, big countries in the neighbourhood of the European Union which moved towards authoritarianism will be briefly investigated, followed by the analysis of populist parties challenging traditional liberalism inside the European Union. These topics are strongly interlinked as “[t]he EU is challenged by varying degrees of illiberalism and undemocratic practices in three regions: inside the EU by populist backsliding; in the candidate countries by stalled democratic progress; in its neighbourhood by alternative discourses of political power. These three spheres could be personified in the politics of Orbán-Erdoğan-Putin” argues Othon Anastasakis in his piece written in the framework of the project.

Twenty-five years after the collapse of communism in Central and Eastern Europe, it is evident that there is no linear development in the world towards global liberal democracy. The former dominant assumption about a “transition to democracy” following a dictatorship does not function as an overall paradigm any more. Researchers do not agree whether we should speak about the decline of democratic regimes in the world in general, but former optimism of the previous era is certainly over. Moreover, quite many newly born democratic regimes – not only in Europe, but also in other parts of the world – have gone through at least ups and downs, and often clear set-backs, concerning their functional relationship to universal democratic norms and liberal practices in the last twenty years. The continuous assistance of the benign democratic hegemonic power, the United States of America, seems crucial in the case of many countries on the globe to preserve their previous democratic



achievements. The same observation can be drawn concerning the civilizing role of fulfilling political and economic conditionality attributed to the European Union membership prospect, and, after joining the European integration, to the disciplinary impact of financial transfers from the EU budget at least to some of the beneficiaries.

### *Illiberal regimes*

In the meantime, two big neighbouring countries, Russia and Turkey moved towards authoritarian rule. Russia serves as a negative example of how democratic institutions have been emptied and liberal ideas marginalised, later criminalised, during a ten-year process. The leaders of the country lost the sympathy of the West, including that of the European Union: the former partnership was replaced by political rivalry in the shared neighbourhood and mutual economic sanctions as the consequence of Russia's aggression against Ukraine. Putin's Russia launched a propaganda war against its alleged enemies without any scruple concerning the methods in order to weaken its internal and external political opponents. According to an analysis published by the Modern Russia Institute cited by Jeremy Druker at our workshop, "[t]he Kremlin exploits the idea of freedom of information to inject disinformation into society. The effect is not to persuade (as in classic public diplomacy) or earn credibility but to sow confusion via conspiracy theories and proliferate falsehoods." When talking to the foreign liberal world, Russian manipulation efforts concentrate first on defining weak Western spots, and then it "successfully erodes the integrity of investigative and political journalism, producing a lack of faith in traditional media."

From our perspective, the following observation about Russia is striking when comparing its model with emerging populist tendencies inside the European Union: it is a non-ideological system. As Ivan Krastev claims, "Putin's Kremlin is doing its best to construct some collective identities and to exploit nationalist sentiments or Soviet nostalgia, but the insistence that you do not want to be lectured by the United States is not an ideology." The regime is



not really successful regarding its economic performance, either. One of the reasons why people are “ready to accept such zombie authoritarianism rather than opt for democratic change” is the possibility to leave their country, hence “the opening of borders can actually stabilize rather than destabilize the new authoritarian regimes” just like its non-ideological nature. Krastev argues that in a democratic epoch a strong ideological doctrine and closing the borders would harm the power of the Russian leaders as opposed to during stable periods under the Soviet times.

Just a couple of years ago, accession negotiations seemed to gain momentum with Turkey, the longest candidate country of the European Union. This time, however, the attractiveness of the European smart power – the EU’s “transformative capacity” - seems to diminish, and, in turn, the illiberal regime built under Recep Tayyip Erdoğan had enough internal support to shift its foreign policy orientation during the last decade: accession negotiations currently stand frozen. After coming into power in 2002, following an economic recession and building on the support of a worn-out segment of society that felt ‘othered’ by the previously ruling elite, according to Pelin Ayan Musil, the country turned into an electoral autocracy under Erdoğan, where elections are fraudulent and where protests are crushed. Moreover, the ruling party (AKP) created a tense polarisation between its traditionally religious electorate and the secular opposition. Nevertheless, as long as internal conflicts do not pull the party apart and the economy delivers – like it did in the past decade – the ruling elite will remain in power.

The malaise has spread over in Southeast Europe, as well. For example, “Macedonia has not been able to start accession talks not only on the grounds of the unsolved constitutional name of the country and Greece’s veto, but increasingly over undemocratic practices” (Anastasakis). Finally, in Eastern Europe and the South Caucasus, where the EU also seeks to tap into its transformative potential since the launch of the Eastern Partnership in 2009, authoritarianism still holds in Azerbaijan and Belarus, while democratization cannot be taken for granted in any of the other four states (Armenia, Georgia, Moldova and Ukraine) either. While politicians claiming commitment to



reforms continue their corrupt practices, society's fading faith in the democratizing European agenda is unfortunately also the responsibility of European actors and institutions. The Moldovan society's declining trust in the EU amidst the enduring political crisis stands as an example of the consequences of the EU's uncritical support for political forces who claim to be European but whose actions show otherwise. Similarly, European party families' blind endorsement of often corrupt and not necessarily democratic partners also brings European alliances and institutions into disrepute. Such an example was EPP President Wilfried Martens's warm congratulatory message to re-elected Armenian President Serzh Sargsyan in 2013, after OSCE ODIHR warned about serious shortcomings and violations at the elections and when mass protests against the alleged electoral fraud were just starting in Yerevan. As a consequence, liberal-minded people in the Eastern Partnership countries lose trust in these institutions, warned Krzysztof Bobiński at our workshop.

All in all, the political systems of Turkey, Russia or even Azerbaijan, are not full-fledged dictatorships like the old ones used to be before the big wave of democratisation in 1989 – they are hybrid regimes. Their leaders, who might be called modern dictators, have different methods to stabilise their power: “repression is used against ordinary citizens only as a last resort when the opportunities to survive through co-optation, censorship, and propaganda are exhausted” according to Guriev and Treisman.

Can such illiberal regimes outside the European Union be models to be copied by political movements and parties inside the European Union? Viktor Orbán expressed his admiration of these systems in his infamous speech in Băile Tuşnad especially because of their alleged efficiency. The Hungarian Prime Minister stated that whilst the Western democracies are having on-going debates, the East is working hard. His special relationship with the Russian president makes democratic politicians worry on both sides of the Atlantic, and deepening ties with Turkey has also been high on the Hungarian agenda, especially since 2013. At the same time, Russia has flourishing contacts with extremist and populist parties inside the European Union from the radical left-





wing ruling party in Greece, Syriza, to the extreme right-wing Jobbik in Hungary and the increasingly popular National Front in France.

### ***European populism***

Scholars make a distinction between extremists and populists. Sometimes, however, the differentiation is not evident: how to classify UKIP, which often used xenophobic rhetoric during the parliamentary election campaign in Britain in 2014, and how to evaluate Marine Le Pen's efforts to cut off the old anti-Semitic wing from its party, which started to move to the centre of the political scale? The mainstream political science literature speaks about democratic illiberalism and populist majoritarianism when introducing a terminology to grasp the essence of modern populism. We have left-wing, right-wing, and pure populists who might borrow host ideologies to better position themselves in the political arena. "Populism is best defined as a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people." This definition given by Cas Mudde has been widely used, also by the participants of our workshops. He adds: "While populism is essentially democratic, it is not liberal democratic. Principally, populism is a form of extreme majoritarianism. Given that constitutionalism limits both popular sovereignty and majority rule, populism is theoretically opposed to constitutionalism."

The academic debate about the fine-tuning of the definition is important for us when discussing whether populist political forces represent a threat or, at least, a challenge to the liberal order, or if their provisory appearance in politics can be described as part of a (necessary) internal curing process of liberal democracies. Jan-Werner Müller argues against the latter position when saying: "one could see the rise of populism not as the real end of the end of history in Fukuyama's sense, but as the beginning of a slow corrosion of Europe's democracies from within." For him, there is not much reason to separate



democracy from liberalism: “A political system with regular elections, but limits on media freedom, on election campaigning, and on autonomous activity by civil society, is not on the road to being an illiberal democracy; it is on the road to not being a democracy at all.” The approach of Cas Mudde comes from the opposite angle: “The argument that populism is anti-democratic is unconvincing, and might ultimately reinforce the populist position. Rather, liberal democrats should emphasize the illiberal aspects of populism, while emphasizing the importance of liberal aspects of the political culture and system. In essence, they have to explain that minority rights benefit not just the minorities, but also the majority — if only because at one time they could become a minority.”

Beyond the theoretical debate, the dilemma is whether we have (potential) different models of the modern democratic order, whether political liberalism and populism are indeed two faces of democracy, as Takis S. Pappas phrased it at one of our workshops. Concerning the perception of populists, the answer is yes: Corduener argues that “populist movements do not merely consider themselves deeply democratic, but even state that whilst they are democratic, the existing political order fails to uphold democratic values and norms. In this sense, populist ideology stands in a long debate in which various conceptions of democracy strive for supremacy.” But can the majoritarian perception of democracy still be treated as democratic when this concept does not simply express an ideological mindset, but it is combined with the practice of a systemic transformation pushed through by an illiberal regime?

The dispute between specialists might be linked to different geographic focuses. Having in mind the systemic changes introduced by the Orbán-government, the argument about the antagonism of democracy and illiberalism becomes quite convincing. Considering the positions and programs of populist parties under the conditions of a traditionally developed Western political culture with stable constitutional checks and balances, independent media and active civil society, just like in France, the United Kingdom, or the Netherlands as Kati Piri pointed out at our workshops, emerging populist groups seem less dangerous regarding the future of the whole political system. Moreover, “right-wing populist parties in Western Europe represent a clearly definable and



distinguishable party family” from the extreme right-wing groups, according to Timo Lochocki. “What they reject, however, are the elites of the other parties, but they do not reject the democratic system per se.” But again, in Greece, where “mainstream politics have been delegitimized, middle class is dislocated, social relations have decayed and many democratic practices are often abused in the parliament, in the media, in the trade unions, in the country’s self-determination and self-definition” (Anastasakis), the threat to liberal democracy can be taken more seriously – even if the strongest populist force, now in government, comes from the radical left. As Takis S. Pappas argued at our workshop, the coalition of Syriza and right-wing populist Independent Greeks show all three attributes he associates with populism or political illiberalism, as he puts it: 1) the leadership defines the political space along a single cleavage (“us and them”: the good Greeks and the bad EU, IMF); 2) it builds on political adversity and 3) majoritarianism, where state grab, attack on democratic institutions, rule by decree and rule over the media are all justified by the “moral majority.”

What has caused the recent strengthening of populist parties in Europe; why are former fringe parties “coming in from the cold” (Taggart - Szczerbiak)? The reasons seem to be mostly economic at first glance: “while some signs of euroscepticism and enlargement fatigue were evident even before the Eurozone crisis, which erupted in 2009, the latter contributed to the weakening of the European project from an economic and political point of view including the increase of illiberal voices,” argues Anastasakis. Other experts disagree and emphasise the significance of a shift on the political agenda of our new era: both immigration and European integration have been politicised and are now salient and polarising issues. Right-wing populist parties have become successful because they present “a ‘nationalism light’, which defines itself primarily against alleged intruders from the outside. In this way it is possible to discursively construct a supposedly protected national community, which many Europeans crave in a hyper-complex and globalized world”, writes Timo Lochocki in his analysis elaborated for our workshops. Moreover, their growing support by the voters is not connected to the economic crisis: “In blatant contradiction to an oft repeated argument, scientific studies prove unanimously



that right-wing populist parties can rely on substantial electoral success in good economic times. This is for two main reasons: on the one hand, it is because in economically good times established conservative parties are inclined to lean towards liberal social policies, which opens up a niche for right-wing populist parties, and secondly, the voters themselves give priority to socio-political topics (such as migration and integration) in economically good times.”

Without making a decision, who is (more) right, a third aspect should be mentioned when talking about the growing political space occupied by populists in today’s politics. This is political entrepreneurship. Here, we might just refer to the peculiar stories how some former liberal-minded political leaders and their factions “understood” the voice of the “Zeitgeist” and pushed their parties through ruthless manoeuvres into the populist camp. “What explains the decision of the leaders of the left-of-centre Pasok in Greece and right-of-centre Fidesz in Hungary to turn to populism rather than political liberalism, whether in its social democratic or its liberal conservative variant? The answer lies in the fact that, given the circumstances, populism was far more electorally rewarding than any other option available to them”, explains Takis S. Pappas. It is another important debate, whether such ideological changes have occurred on the basis of pure pragmatism or not. At this point it is enough to realise that polarisation has been sharpened inside the national political community and the “divide is the handiwork of creative leaders through a process of new symbolic production, let alone the fact that such a process entails the deliberate formation of novel social and political identities.” Former Greek Prime Minister Andreas Papandreu and Fidesz leader Viktor Orbán followed a simple pattern that is “the nature and logic of populism itself, especially its tendency to reduce all politics to a single dimension of conflict, its emphasis on deliberate polarization, and its quest for majoritarianism” as Pappas claims.

Most definitely, there are mistakes and failures of the European political elites which belong to the reasons of populist advance according to critical voices in the European public and expert discourses. Anastasakis, for example, says that the “sins by omission and Commission” led to the rise of reactionary political formations and strong Eurosceptic voices: not only the pragmatic



neglecting of the human rights issues inside and outside the European Union, but the dogmatic approach to crisis management has also contributed to the weakening of the pro-European liberal democratic forces. Lorenzo Marsili, another participant of our workshops, goes even further when declaring that the break-up of the talks with Greece in June 2015 proved “beyond any doubt that the current political structures of the Eurozone represent an existential threat to Europe and its ideal of democracy and justice.” This judgement surely does not fit all: the detailed analysis of the multi-level structure and the multi-player nature of collective political decision-making processes inside the European Union give us a colourful picture concerning divergent ideas and different political strategies about crisis management in the European arena. In spite of widely shared negative and nightmare scenarios about the future of the European Union, optimism is also heard. According to Mark Leonard from the European Council on Foreign Relations, “the European political story is far from over and I have a feeling that it will be more resilient and capable of correcting itself than many of its critics realize.”



## II. The Hungarian case

Why are the Fidesz-regime's and Viktor Orbán's politics so significant and why is the Hungarian development not just an obsession of some left-liberal intellectuals and "political losers" inside the country?

First of all, the Hungarian case is the first deliberate experiment to deconstruct a liberal democratic system inside the European Union by a member state's government, and the first attempt to create an "illiberal state" instead. In addition to the potential threats and challenges of populism, Euroscepticism and xenophobia, which also appear in many other EU member states, Hungary faces a political agenda partly already implemented by a political entrepreneur who perceives and portrays the country as a "laboratory", where, following a "revolution at the ballot boxes", a new political model is being constructed to demonstrate a new pattern for the whole of Europe. As Jan-Werner Müller puts it: "It is rather an understatement to say that a country like Hungary is experiencing what a European Commissioner once called one of a number of 'rule of law crises'. Rather, democracy as such is under attack."

Second, for first time in the European Union's history, the European institutions and the liberal democratic member states need to find solutions to cope with a member government – itself an element in the EU's multi-level set-up – which systematically and regularly breaches European norms and regulations. As history teaches, democratic regimes have been often reluctant to react swiftly and in an efficient manner to emerging new internal and external risks. For the European Union with its multi-player institutional structure, historic inertia, leadership weaknesses and current state of cohesiveness, it is especially difficult to find fast solutions to unprecedented constitutional, legal and political problems.

Third, the genesis and evolution of Fidesz stands as an extraordinary example. It was born at the beginning of the regime change as an alternative, liberal and radical youth movement. In the early 1990s, the party joined the Liberal International, but made its first ideological shift towards a more



conservative platform at the same time, whilst around the turn of the century it became a member organization of the European People's Party, where it still belongs despite its openly radical-fundamentalist political character. This process is important to illustrate that Fidesz did not emerge as an extreme fringe party that later successfully grasped a growing part of the electorate, which is the more classic story regarding populist parties. It moved from a mainstream liberal position – to use the traditional categories of political analysis - towards the very right side of the political spectrum. Hence the outcome: Fidesz cannot be labelled today as a pure populist party using ultra-conservative concepts just as a host ideology, but it has become a right-wing populist party per se during its more than two decades long march.

### *The conception of Viktor Orbán's illiberal state*

In July 2014, in his infamous speech in Băile Tuşnad (Tusnádfürdő), Hungarian Prime Minister Viktor Orbán announced his intention to build an illiberal state, and set various countries, such as Singapore, China, India, Russia and Turkey, as successful examples among which several exhibit authoritarian tendencies or open authoritarian rule. In this speech, which provoked significant uproar both domestically and internationally, Orbán argued that while his vision of an illiberal state does not reject the fundamental principles of liberalism, such as freedom, it does not make this ideology a central element of the organization of the state. The speech came in the context of the Orbán-government's ongoing "Eastern Opening", the policy aiming at strengthening economic and also diplomatic ties with countries of Eastern Europe, Asia and the Arab world regardless of the partners' internal modes of governance. For this reason, and given the Orbán-government's track record in dismantling democratic institutions domestically, this speech was widely considered as an open declaration of the abandonment of democracy.

The speech was even more worrisome as it came only a few months after the April 2014 parliamentary elections where the ruling party, in coalition with the Christian Democrats, managed to secure a two-third, that is, constitutional



majority in the National Assembly for the second time in an election that was characterized as free but not fair by the Organization for Security and Cooperation in Europe (OSCE). Against these developments, in an unprecedented step, the 2015 Nations in Transit report (published in June 2015 by Freedom House) downgraded Hungary from the status of a consolidated to that of a semi-consolidated democracy. This has never occurred in the past ten years to any of the ten states that acceded to the European Union in 2004.

Laying the foundations of the illiberal state had begun already during the previous electoral period, when the Orbán-government started to fundamentally and systematically reshape the Hungarian state, its legal system, institutions, economy and the public space. These developments show that Prime Minister Orbán's illiberal democracy stands in contrast with such ideals of liberal democracy as the moral equality of the individuals capable of rational self-determination, majoritarian decision-making restricted by the constitution, demarcation between public and private spheres, division of power to provide insurance against power-grab, political equality and political competition and freedom. These democratic values usually come in pair with free market economy and a level playing field for various actors of the economy. Ideally, the role of the government is restricted only to repairing market failures.

In an attempt to disentangle the notion of illiberal democracy, Benedek Jávor argued at one of our workshops that the subject of self-determination in the Orbánian illiberal state is the nation as a political community as opposed to the individual in a liberal democracy. According to Jávor, in the illiberal state, the nation is seen as a community holding specific moral values, having a distinct character and conception of the truth, which are expressed through the choices of the majority. In fact, the majority is equalled to the nation as a whole, which therefore can have a specific claim on leadership. While there might be people who disagree, in this illiberal conception they are alien to the nation and do not represent its real self. If these elements would get into power that would automatically mean that the nation finds itself in opposition. This, however, can only be a temporary mistake, since the nation (the majority) cannot be in opposition, that is, in a minority position. Consequently, in an illiberal state the





government appears as the representative of the nation and its true spirit. If the nation and its representatives hold the conception of truth, then limitations of power through democratic procedures seem an unnecessary and “unproductive cult of dissent”, therefore sidelining them is justifiable. This process and the thinking itself, of course, fundamentally go against the notion of liberal democracy.

### *Legal and institutional foundations*

The first term of the Orbán-government showed a real legislative dumping characterized by the general lack of social and political consultations. Draft laws were submitted by individual MPs which, according to the internal rules of the parliament, allowed for quicker decisions by avoiding parliamentary debate and any broader consultation. Similar was the faith of the country’s old and new constitution. Until 2012, the Constitution was amended 12 times in order to counter the Constitutional Court’s decisions which found certain legislative acts unconstitutional. In 2012, the so-called Fundamental Law, which was adopted without any prior consultation, multi-party support or even the intention to achieve it, came into force. Due to the rushed nature of these legislative processes, the adopted laws and regulations often had to be revised and modified. In the case of the Fundamental Law, five amendments have been issued, the last in September 2013.

According to Erik Uszkiewicz, a speaker at our workshop, the institutional reforms of the 2010-14 period show that the Orbán-government used two main methods to facilitate control over previously independent institutions: 1) it implemented structural/institutional changes via new legislation, and 2) it ensured indirect or even direct control by appointing loyalists. In the first case, the governmental majority passed legislation that either fully overturned the existing legislation regulating an institution in question or outright abolished the institution and established a new one in its place. In the second case, institutional takeover was ensured by appointing

people close to the ruling party for periods generally well exceeding the electoral terms.

While these trends raised concerns both internally and abroad, in several cases the government made just enough – essentially cosmetic – changes for the EU not to pursue criticism. It was only in a few instances that European institutions would act and establish the sustained violations of EU rules. These cases, however, only looked at individual infringements and were never interpreted in the broader context of internal developments. For this reason, the answers addressed the problem only partially.

For example, in 2011, in a move to restructure the office of the ombudsmen, the government terminated the term of the commissioner for data protection, András Jóri, and abolished the institution. Instead, it established a new authority nominating friendly executives. In April 2014, the European Court of Justice ruled that the untimely termination of the ombudsman's term violated the independence of the institution, but it could not restore the commissioner in his position and the new authority continued working untouched. Similarly, in 2012, András Baka, president of the Supreme Court, was removed before his term ended when the government reformed and renamed the court (now known as Curia). In this case, the European Court of Human Rights ruled in May 2014 that Baka's early removal violated the judge's rights, but he was not reinstated.

A further contested decision was the introduction of the mandatory retirement age of judges that practically beheaded the judiciary and allowed for the appointment of new ones. The European Court of Justice established sanctions against Hungary in this case, albeit it did so based on age discrimination, which largely missed the point of the government's actions. Moreover, this also could not reinstate the judges in their old positions as those were already filled by new appointees (*more on this case later*).

While in these cases, European institutions managed to establish violations, the rulings did not change the already established facts on the ground. All these practices of the government have undermined the independence and



impartiality of the given institutions, and its actions generally created a situation ensuring that the scene is dominated by loyalists. One participant of the debate in Budapest concluded that the really important positions by now are filled with cronies and friendly allies who provide a personal guarantee that even if there would be some independence on the institutional level, there is none in practice.

### *Controlling the Public Sphere*

In Gábor Polyák's view, who was a speaker at the Brussels workshop of the project, the 2010-11 media laws were Prime Minister Orbán's test case for the EU. He used the opportunity to assess whether the Union had the tools to react and if it was willing to undertake a political conflict with a member state. The new media legislation introduced in 2010 raised significant concerns as it "drastically curtailed the independence of public-service television and radio broadcasters, and established a new regulatory body with sweeping authority over broadcast media, print publications, and the internet" (Freedom House – 2011 Nations in Transit).

The lack of substantial reply from the EU was disappointing for democratic forces in Hungary and proved to be a learning experience for Prime Minister Orbán on how to deal with the European Union. He learnt that he does need to comply with certain rules, but if he finds the way, he can do it without changing the overall policy and the spirit of the planned reforms, argued Polyák. As Uszkiewicz puts it, "the 2010 media laws and the institutional framework these established are symbols of an era and also key instruments [...] in the political consolidation of this era." Indeed, by the time of the 2014 parliamentary elections, the government ensured its domination in and over the media across the country and therefore managed to dominate the – already highly distorted – public sphere. This led to the elections receiving the "free but not fair" label from the OSCE.

The main characteristics of the distorted public sphere under government-controlled media have been summed up by Uszkiewicz and the Mérték Media Monitor in a comprehensive manner highlighting six key elements: 1) state



media replaced public service media; 2) media is dominated by oligarchs close to the government who enjoy privileged positions when participating in tenders; 3) political and economic pressure is exercised on independent media; 4) the media system is politicized in a comprehensive and structural manner; 5) state advertising spending is concentrated and used to manipulate the advertising market, which is also politicized; and 6) government loyalists are appointed into key positions for extended times to ensure friendly oversight on the institutions (e.g. the head of the new Media Council). The case of the media market, as it stands today, is a telling example of state capture and the domination of the market.

### *Overtaking the Economy: Corruption and State Capture*

Establishing control over the state did not leave the economy untouched either. According to Transparency International's Corruption Perception Index, between 2010 and 2014 Hungary has become more corrupt (from 4.7 in 2010 to 5.4 in 2014). According to the 2013 Global Corruption Barometer, 62% of Hungarians thought that corruption had worsened in the preceding two years. Hungary's rating concerning corruption also dropped in Freedom House's Nations in Transit index (from 3.50 in 2011 to 3.75 in 2015). One of the main problems according to the 2015 report is the close interconnectedness of business and politics – in fact, this has been a returning criticism of Freedom House, which called the current state of affairs a continued process of state capture in its 2014 report.

Corruption was, of course, also present before the Orbán-regime established itself. According to Jávör, however, in the illiberal democracy corruption and state capture becomes systemic and gains an ideological justification: it is in the nature of the illiberal state to ensure that the economy is not left to those alien to the nation, and it concentrates economic power in the hands of those considered to be its true representatives working towards the common good of the nation. Jávör argues that it is due to this ideological explanation that the supporters of the illiberal state accepted state-led corruption.



The line between business and politics therefore has become blurry, and high-level corruption is dominated by the ruling party. The economic players are handpicked by the power holders, and in turn, they work to maintain the political regime. The system is maintained overwhelmingly through EU structural funds allocated through public procurement procedures, which have been used to build up a new oligarchy from the clientele of the illiberal state. An obvious beneficiary was Lajos Simicska, former budget secretary of Fidesz and college roommate of Viktor Orbán. According to the calculations of investigative journalism portal Direkt36, between 2010 and 2015, 88% of the revenues of Simicska's companies originated from EU funds. Despite the years-long success, however, his companies have not won a single tender since the very public fall-out between him and the Prime Minister in February 2015. In the meantime, a new type of "oligarchy" much more tied to the Prime Minister started to rise. Two obvious examples are Lőrinc Mészáros, mayor of the village where Orbán had grown up, and István Tiborcz, the Prime Minister's son-in-law. According to Direkt36's calculations, in 2010-2015, 94% of the revenues of Mészáros's companies came from EU tenders, while this rate was 99% in the case of Tiborcz.

Without this economic construction that materializes in state capture, the illiberal state cannot be maintained, argues Jávor. However, its extreme favouritism leads to a wasteful use of resources and to an ever-growing network of cronies, which can only be sustained as long as there are enough additional resources to expand. To politically sustain itself, the illiberal state has to either shift toward authoritarianism, or bring in external resources. In Hungary, both can be observed. The illiberal state shifts towards authoritarianism by dismantling democratic control, and it indeed seeks to bring additional financial resources through encouraging and facilitating investment from non-Western partners, mainly China and Russia.

While this open favouritism has been ongoing for years, it is only recently that the European Union and its institutions, e.g. OLAF, start to respond to the abuse and misuse of European taxpayers' money. Even though the reaction is far from timely, it opens up a new discourse about the nature of Orbán's illiberal

state. As opposed to a value-based discourse about democracy, which is more subjective and leaves room for interpretations, corruption is a quantifiable violation of EU regulations, and could therefore be tackled and punished in a more straightforward manner.

### ***Reactions across Europe***

Prime Minister Orbán's governmental measures and political manoeuvres as well as his ideological statements brought the Hungarian situation to the stage of European politics again and again. The increasing tension between the European institutions and the Hungarian government has resulted in the repeated emergence of the idea of linking the arbitrary steps of the Orbán-regime and the withdrawal or suspension of EU funds to Hungary as well as the suspension of the government's voting rights. It occurred, for example, when the Hungarian parliament passed the fourth amendment of the Fundamental Law in 2013 despite the objections of the President of the European Commission and the Secretary General of the Council of Europe. "Mr Barroso's objections, which were accompanied by a letter to Mr Orbán detailing his concerns, could have more serious ramifications since Brussels controls millions in development aid and could eventually strip Hungary of its EU voting rights", wrote the Financial Times during these critical days.

However, not all mainstream European political players agreed that the actions of the Hungarian government represent a serious challenge to the values of the common European project. For example, in 2015, the German Council on Foreign Relations (DGAP) published a report criticising the improper coverage of the Hungarian political developments in the German media and, in certain cases, excusing the Orbán-government from criticism. (One of the report's authors, Dániel Hegedűs, a member of the Hungarian Europe Society and a participant of the Budapest workshop, later published his "minority position". In this he argued that while the analysts set out to examine German media coverage about Hungarian developments, the report made claims about the regime as well, which the depth of the research could not have substantiated.)

More importantly, the long-lasting conflict has a clear partisan dimension. The Hungarian government often argues that there is an ongoing left-liberal attack at European level against the achievements of Hungary in the last five years because of ideological hatred, a desire for political revenge, Western double standards and raw economic interests (of multi-national companies), etc. These charges, however, can be easily reversed: it was the European People's Party, where Fidesz belongs, which has never expressed – at least officially – fundamental concerns about the actions and behaviour of the Orbán-regime. The debates about Hungary in the European Parliament showed a repetitive character: it was the EPP faction (although not monolithically) that defended its member organisation. As Hungarian Lajos Bokros, who sat with the European Conservatives and Reformists Group (ECR), is not an MEP anymore, ECR also joined the EPP after 2014. Many members of the EPP group, however, stopped speaking publicly in favour of Fidesz, abstained during the vote on resolutions about Hungary at the plenary sessions, whilst some of them, like Frank Engel or Viviane Reding, openly expressed their outcry.

Some leading politicians of member states belonging to the same party family also used strong words talking about different measures of the Hungarian government. Concerning bilateral relations, Prime Minister Orbán had to suffer from a relative isolation: there were only a few occasions when his colleagues, even from the EPP, visited Budapest. And when German Chancellor Angela Merkel arrived for a short talk in February 2015, at a joint press conference she answered a question saying she could not understand the use of the word illiberal in connection with the word democracy.

In general, the politicisation of the Hungarian dilemma had positive impacts, too. The issue has been dramatised and became much more salient in the media even accelerating the emergence of a more robust European public sphere (Römmele) and the crystallisation of the European party system. Moreover, the Europeanisation of the Hungarian case since the end of 2010, when the second package of restrictive media laws was introduced, has given moral support to the opponents of the aggressive 'Sturm und Drang' of the Orbán-regime back at the national level.

Additionally, there is a reasonable assumption that the voice of protest, the interventions of the representatives of the European Commission (and the Council of Europe), the “battles” at the plenary (sometimes with Prime Minister Orbán in person) and in the committees of the European Parliament, the individual infringement procedures, the opinions of governmental and non-governmental organisations – in general, the external pressure - have probably saved the country from an even worse political outcome in a period when Fidesz did not have to cope with wide and strong domestic resistance. The Hungarian ruling party was forced to change the media laws, the judiciary system, the regulations about the Hungarian National Bank, and the Hungarian Parliament practically withdrew the fourth amendment to the Hungarian Fundamental Law by passing the fifth amendment. “The fifth amendment of 26 September 2013 can be regarded as a response to international pressure. The Fundamental Law attracted harsh criticism from the Council of Europe, especially the Venice Commission for Democracy through Law, the European Union institutions, jointly by the former two institutions, the United States and international organisations”, as Petra Bárd, member of the Hungarian Europe Society stated in her analysis.



### **III. What can European institutions do in cases like the Hungarian one?**

The European Union was finally not able to block the whole systemic reconstruction under the illiberal Hungarian regime. Whether it was the consequence of insufficient legal competences at European level, or the lack of political will and cold pragmatism among the key European political actors, leading to half-hearted solutions - when the EU had to respond to the undemocratic developments in Hungary - is up for debate. It looks like the narrow vision and the cautious interpretation of the European Commission and the Council concerning their own competences also allowed for a false threat perception where even the violation of fundamental democratic principles (such as free and *fair* elections) could go unanswered.

Realising the inefficiency of reactions in the case of a (potential) systemic breach of European rules and their spirit in a member state, the European institutions have started to investigate what political and legal instruments are available to keep member states on the right track. During his hearing at the European Parliament in the fall of 2014, now First Vice President Frans Timmermans insisted that he was ready to use any instruments to defend European norms, which remain indisputable inside the community in the future. In November 2014, the Council of the European Union dealt with the same theme for the first time in its history.

As a result of the deliberation on the matter among the EU institutions, “following the Parliament’s initiative, the Commission has developed a Framework to Strengthen the Rule of Law to tackle the challenges identified to bring about a fully-functioning European area of justice. The Framework is intended towards a structured exchange with the Member State where there are clear indications of a systemic threat to the rule of law. This is to be done in accordance with the following principles: focusing on finding a solution through dialogue with the Member State concerned; ensuring an objective and thorough assessment of the situation; respecting the principle of equal treatment of



Member States; and indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanism”, a 2015 study of the European Parliament summarised.

In the current framework of the Treaty, as also discussed by Ambassador Imants Lieģis representing the Latvian Presidency of the Council of the EU at our workshop, to activate Article 7, four fifth of the member states need to agree, after obtaining the consent of the European Parliament, to act on the reasoned proposal made by the European Parliament, or by one third of the Member States, or by the Commission, and to invite the European Council to take steps. The agreement of the member states determines that there is a clear risk of serious breach of the shared values elaborated in Article 2 of the treaty by the member state in question. In a more advanced stage, upon the proposal of one third of the member states or the Commission, after obtaining the consent of the European Parliament, the European Council acting unanimously may determine the serious and persistent breach of Article 2 values, after inviting the member state in question to submit its observations. Should the breach of Article 2 values be determined, the Council can decide under qualified majority to suspend certain rights (including voting rights) of the member state. Nevertheless, Article 7 is currently perceived as the “nuclear option” and is challenged by many political actors at the European level.

In this context, when the application of the currently ultimate sanction is highly unlikely, the improvement of other already existing institutions and procedures is fundamentally important in order to exploit every other opportunity granted under the current Treaty and by existing frameworks to answer to and prevent serious breaches of the values and principles of the European Union. Their improvement has to be further advocated both on the European and national level. As Morten Kjaerum discussed at our workshop in Budapest, the Charter of Fundamental Rights has to be taken as a starting point when developing European strategies and legislation, and there are signs that it is happening. The monitoring of the implementation of European legislation at the national level remains essential in his view, and infringement procedures should not be dismissed either despite their apparent limitations, as illustrated by



concrete cases against Hungary. For it to work better, the Commission would require more and better information that can be provided both by watchdogs and civil society organizations, but also by the Fundamental Rights Agency (FRA), which has the tools to conduct in-depth investigations into the fundamental rights situation of member states. A stronger mandate for FRA could support this process. Detailed and well-researched annual reports prepared by the agency on all member states could become the heart of the rule of law cycle announced by the Council, and in the gravest cases special reports could be prepared to support the work of the Commission. This would, however, still not be enough, argues Kjaerum, unless already existing institutions meant to monitor the human rights situation on the domestic level are strengthened in parallel. Currently, these institutions are poorly funded, have weak mandates and often lack independence. In his view, EU-level and domestic institutions need to cooperate more, while horizontal cooperation should also be strengthened. These networks are now fragmented, uncoordinated and scattered.

While the cooperation of European and national actors would be essential, conflicts are often framed as a struggle between (national) democracy and (European) liberal values. In the current state of the European political union, “national governments can keep claiming democracy for themselves, or even openly advocate a model of ‘illiberal democracy’ against supposed mainstream European liberal democracy. In other words, such a conceptual division between liberalism and democracy suggests a picture according to which the EU tries to safeguard liberalism, whereas national governments, by contrast, assert proper democracy. This picture is misleading”, points out Jan-Werner Müller. One of his arguments in his paper written in the framework of this project is the following: “For one thing, democracy must mean the right to vote; less obviously, it has to come with a range of political rights and freedoms that enables the formation of political judgment. Unless one wants to say, then, that having elections is all that’s required for calling a country a democracy...” This would be, naturally, the populist majoritarian perception of democracy.

As Carlos Closa elaborated at our workshop, the institutions of the EU indeed have a strong normative reason and responsibility to intervene in a case a



member state breaches common European values and principles. This is the fact that in a community of law, which depends on mutual recognition and mutual trust, steps that undermine the common foundations affect not only the citizens of the given state but also all members of the community. Being affected therefore justifies actions. Similarly, Jan-Werner Müller also argued in many of his analyses why the European institutions and fellow member governments have the right to protest and to intervene when any of the member states breach shared European values.

While a normative justification is there, representatives of the European Commission have often argued that the lack of legal competences in many policy areas and under the current European institutional setup makes it hard or even impossible for them to act in an appropriate way when a member state offended shared European norms. The European Commission started infringement procedures as a mechanism against Hungary in many cases, as discussed before. One example that illustrates the limitations of the Commission was when “judges who reasonably expected that they could work until 70 were forced to retire at the age of 62 with immediate effect” in 2011, as Petra Bárd put it. The argument of age discrimination used by the European Commission in order to stop the unacceptable practice had little to do with the real political motivation of the Hungarian government, which wanted to exert tight control over the judiciary. It was a general policy: using the pretext of reorganization, “the Fidesz government was able to replace state officials who had taken office before Fidesz swept to power and who were not party loyalists” as Kim Lane Scheppele notes. Moreover, the European Commission closed the infringement procedure on forced retirement of Hungarian judges in 2013, after the Hungarian government formally accepted the views of the European Commission and the ruling of the European Court of Justice against Hungary. However, the judges, who were arbitrarily fired, did not get back their former high positions inside the judiciary system, and most of them opted for a financial compensation instead. In short, “[t]he infringement action on the judicial retirement age was a formal success from the standpoint of the Commission, but it accomplished nothing to limit the government’s control over the judiciary”, writes Scheppele. She concludes that “ordinary infringement actions are important, but they have so far

been too narrow to address the structural problems that persistently noncompliant states pose.”

Kim Lane Scheppelle has concentrated her research on the legal provisions and proposed a new approach arguing that the European Commission has actually much more room for intervention at the moment than common wisdom would suggest. In her contribution to the workshop held in Brussels, she focused on the role of the European Commission arguing that this institution is the enforcer of EU law and it has the capacity not to miss the point when dealing with ambiguous individual cases, but to grasp the whole pattern of actions introduced by the government in breach of European values and principles. Her new idea is “a simple extension of an old mechanism: the infringement procedure. The Commission could signal systemic breach of treaty obligations by a Member State by bundling a group of individual allegations together to argue before the Court of Justice of the European Union (CJEU) that the violation of EU law in a Member State is not minor or episodic, but systematic and serious”. This method would not simply bring together many cases in one, but the procedure “should be tied together with an overarching legal theory that makes the systemic violation clear and points to a systemic remedy.” The process might end with a decision about sanctions, for example, about the immediate suspension of EU funds to the member state, which was found guilty of systemic violation of European values – just like the foreign ministers of Germany, the Netherlands, Finland and Denmark suggested in a joint letter in 2013: “as a last resort, the suspension of EU funding should be possible”.

At the same workshop, Dimitry Kochenov presented another legal provision under the current treaty what he called “the article for the stupid.” Article 259 gives the opportunity to any member state to bring another member state to the court sewing its partner when not fulfilling its obligation under the current EU Treaty. Member states are bound together through the EU system: presumably, some member governments possess more political will starting a procedure against Hungary than the European Commission. After the allegations were made, according to Article 259, the European Commission might take the case over.



Some suggest, however, going beyond the institutions provided under the current Treaty. Jan-Werner Müller argues that “deciding whether a country is in danger of constitutional capture or damaging democracy [...] requires complex legal and political judgment”. According to him, we need a new approach and new instruments in order to be able to answer the question. “Technical-legal judgment of rule compliance in and of itself is insufficient; and philosophical consensus about values is simply not the issue (all governments continue to profess faith in democracy and the rule of law). But it’s also not just a matter of fundamental rights violations: these can be very serious, of course, but not all attacks on democracy immediately have to result in rights violations (which, at least in theory, can be dealt with by the European Court of Human Rights, even if that process takes time). Nor should one be fixated on the problem of corruption: again, this can clearly be very serious (and often is one result of constitutional capture) – but is in principle different from attacks on democracy, and, it is a challenge for which the Union has at least some effective instruments at its disposal.”

Concerning Müller’s proposal, we face the dilemma who – which institution – should be in charge to implement and evaluate a *comprehensive* investigation. Jean-Claude Juncker declared when he was elected to the position of the President of the European Commission by the European Parliament that the European Commission functions as a political body. The politicisation and partisan character of the institution might be even strengthened in the future following further institutional and electoral reforms at the European level. Instead of burdening the European Commission, which might face the charge that its position is essentially political, Jan-Werner Müller’s proposal “is to create an entirely new institution which could credibly act as a guardian of Europe’s *acquis normatif*. I suggest a ‘Copenhagen Commission’ (as a reminder of the ‘Copenhagen criteria’, flawed as they might have been), analogous to the Venice Commission” of the Council of Europe. In his paper, he elaborates in more details how a new body, when analysing the track record of a member state with its holistic approach and philosophical mission for “pluralism within common political parameters”, should supplement existing tools and instruments the European institutions already have at their disposal. It means, for example,



that the use of Article 7 of the Lisbon Treaty would still remain an option “as a form of deterrence”, since, as Kim Lane Scheppele argues, “Article 7 TEU is more of a quarantine mechanism for the healthy states to avoid being influenced by the violating state than it is a mechanism for restoring Member State compliance with EU values.”

Old and new concepts suggested by experts how to move ahead at European level in order to cope with systemic breaches of European Union norms and regulations can receive more attention and a chance of future implementation only if these ideas enjoy significant support by influential political actors who are ready to push them forward inside the European political arena. The ALDE Group in the European Parliament is one of the partisan blocks which has intensively criticised the Orbán-government’s steps in the last years. The liberals have realised the problems the European institutions face when they are supposed to act efficiently in this matter. In their eyes “the prospect of EU membership is a strong incentive for countries to make every effort to qualify as a model democracy. But the EU is not nearly as strict when it comes to countries that are already members of the EU. The EU has only a few weak instruments for making sure its members remain committed to democratic governance, the rule of law and fundamental rights, on top of that the member states have little appetite for binding rules in those areas.” The group has proposed what they call the “EU Democratic Governance Pact” arguing that “democratic governance, the rule of law and fundamental rights are not secondary to single market rules or budget discipline”. So the instruments of the new Democratic Governance Pact should function like the rules of the Stability and Growth Pact inside the Eurozone. The ALDE Group suggests five small steps to be implemented, which, altogether, would mean “one big step for European citizens”: 1) taking the Charter of Fundamental Rights into account as a legal tool for enforcement, 2) giving access to proper protection of human rights in relation to the acts and omissions of the EU, 3) respecting fundamental rights in all EU policies, 4) inventing a new EU Scoreboard for Democracy, Rule of Law and Fundamental Rights, and 5) establishing a European semester for Democratic Governance, Rule of Law and Fundamental Rights.



This proposal goes further in legal terms compared to previous ideas as it also suggests Treaty change through “the revision of Article 7 of the EU Treaty, adding an ‘application of Article 2 of the EU Treaty’ stage”. This would connect the declaration of the shared European values of member states directly to the “nuclear option” of the current treaty, and would ease its adoption “with different thresholds for the majorities provided.” As Jean-Marie Cavada, Member of the European Parliament argued at the workshop in Budapest, “we must not make a compromise”, and a member state should be heavily penalised if it violates common values; so the use of Article 7 cannot be foreseen just on the remote horizon: “it is not an atomic bomb, but an opportunity, an instrument” provided by the Treaty for use, if necessary.

The institutionalised political debate about our main dilemma, that is, what to do in case a member government contradicts the general consent concerning fundamental rights and the rule of law, cannot be complete without involving the representatives of the civil society. The Hungarian Europe Society has often formulated critical opinions about the worrying tendencies in Hungary and actively participated in the network of Hungarian and European NGOs to discuss how to achieve serious impact on the discourse and the decision-making process at the European level. As a fresh study, requested by the LIBE Committee of the European Parliament, has pointed out: “Civil society organisations should be empowered to monitor application of fundamental rights in Member States – in accordance with the Lisbon Treaty and the International Covenants, and report back to the Commission’s Vice-President for fundamental rights and the European Parliament.” Following this role model and our mission, we have invited representatives of like-minded civil organisations to our two workshops who actively participated in the discussions. In Budapest, Lorenzo Marsili from the European Alternatives pointed out that European citizens do not feel that the European Union would protect their rights, so it is important to prove that the EU is on their side. “We need courage to establish a wide-reaching, multi-level, well-articulated campaign on the necessity of a democratic pact for Europe that is not ashamed to unmask the hypocrisy of member states and can mobilise citizens”, he said.





## Conclusions

The consequences of the illiberal shift conducted by Hungarian Prime Minister Viktor Orbán since 2010 are still with us. In spring 2015, he just brought our theme – illiberal democracy, populism, nationalism, majoritarianism and Euroscepticism – back to the European political agenda once again. His very own initiative, which he later called a public debate, about the potential introduction of the death penalty in Hungary in May, as well as a “national consultation” linking immigration and terrorism through biased and leading questions created a new wave of upheaval and protest in the European political arena. To top it all, in the current situation, when a new wave of refugees and migrants arrives to Europe, the Hungarian government reacted with the idea of erecting a fence at Hungary’s border with Serbia.

Before Prime Minister Orbán launched these campaigns concerning immigration, terrorism and the capital punishment, it seemed that the Hungarian problem has lost its salience inside the European political space, especially after the supermajority of Fidesz evaporated in the Hungarian parliament following three defeats at by-elections in 2014 and 2015. The regime has become weaker and the political atmosphere has obviously changed in the country. It would be hard to introduce such fundamental changes anymore as the ruling party pushed through during its previous four years in government shocking the democratic community in Europe and in the United States.

Certainly, Prime Minister Orbán has not given up. For example, in the case of one of the biggest conflicts covered in detail by the international media, the war between the Hungarian government and the Hungarian civil society, still continues. There are good and bad NGOs according to the government. The so-called “political activists” supported by the Norwegian Fund or by George Soros’ Open Society Foundations, belong to the second category. Their sin, as Veronika Móra, leader of Ökotárs Foundation clearly elaborated, is that they have a voice in public affairs and do not simply deal with traditional activities in local communities or with charity. Recently, the task of attacking human rights



NGOs has been delegated to CÖF (Civil Összefogás Fórum/Civic Collaboration Forum), the movement loyal to Fidesz, which previously organised so-called peace marches (the term is reminiscent of the language used in the 1950s by another type of regime) against the alleged colonisation of Hungary by the European Union and the IMF. The proposals that NGOs should be registered once again in case they receive “foreign” grants (in the name of transparency) and that leaders of the civil groups should take financial responsibility with their private assets are still floating as potential disciplinary measures over the suspicious organisations.

The pragmatic explanation for the new campaigns is what Prime Minister Orbán learnt from Prime Minister David Cameron’s victory in Britain: he needs to embrace topics of a more extreme challenger of his party in order to win elections. A psychological unmasking of Prime Minister Orbán’s behaviour, however, would emphasise his radicalisation when he stubbornly insisted on his views totally unacceptable to the mainstream European political groups during the last plenary debate in the European Parliament in May 2015 on the situation in Hungary, where the potential reinstatement of capital punishment and the “national consultation” about immigration and terrorism were both on the table.

We still do not know how to call the Orbán-regime. A non-ideological mafia state (a predator state, a “Franken-state” a lá Frankenstein), or a mission-driven transcendent political movement with the objective of a new state foundation? Or, perhaps more scientifically, a hybrid system (between democracy and dictatorship) possessing (and prophesising) an illiberal, majoritarian populist view about democracy? If we call it illiberal, is the regime still democratic? The national elections in 2014 in Hungary were held ostensibly under the conditions of a pluralistic competition; however, the race was described “free, but not fair” by international observers, mostly because the mass media were under significant control of the ruling party. It sounds like a very academic debate, but the consequences of the definition are serious: can we accept the majoritarian perception of democracy as a democratic variant and an ideological challenge to the dominant position of liberal democracies? Or should we argue that the claim of populists saying that no one else represents the people

(the nation) but there is an anti-democratic postulation per se, so the regimes which are operated by populist political forces are not only illiberal, but also anti-democratic?

We do not know how stable and durable the Hungarian system will be. As of spring 2015, it seems to be more vulnerable than before. The fall of the popularity of the regime since its big successes at three elections – national, European, and local – in 2014, the ongoing internal – but very public – power struggles amongst the top cadres, the growing strength of the free portion of the media system, as well as the impact of street demonstrations on government decisions might expose the limits of Viktor Orbán’s power and show the light at the end of the tunnel...

The European Union has gone through a learning process relatively unprepared when it started to cope with the Hungarian crisis. The part of the problem, as Jan-Werner Müller claims in his analysis elaborated for our project, is that “there is - as of now - no clear legal or political actor charged with, so to speak, pushing a red button first in order to alarm others about a potential deterioration in democracy and the rule of law inside a Member State.” Certainly, the other side of the coin is the lack of any tested mechanism in such cases. The early warning signals to the European Union sent by the international media, civil society representatives and the domestic political opposition have not been able to block changes in Hungary. In general, the European institutions have to deal with the negative development *fait accomplis*.

Jan-Werner Müller suggested to create a new agent, a ‘Copenhagen Commission’ “with a mandate to offer comprehensive and consistent political judgments.” This proposal – together with some others – has already become part of the recommendations in the Tavares Report on the situation of fundamental rights in Hungary which was approved by the majority of the European Parliament two years ago. Since then, both the European Commission and the Council of the European Union published their ideas on the subject. During our workshop, some new and updated concepts have been presented in order to find legal solutions in the framework of the current Treaties and to avoid sclerotic behaviour of the European institutions when facing the systemic

breach of European values. These ideas need to have thorough political and legal assessment by a broad circle of stakeholders.

## **Recommendations**

The concrete actions of the European Union so far did not prevent further deterioration of democracy in Hungary, and did not give adequate responses to already implemented illiberal steps, as they remained limited in scope and could not bring remedy to violations. We can safely assume, however, that this level of reaction would not be sufficient should any such development start to unfold in any other EU member state, either. To be able to address such challenges is important not only to find a solution to the situation in Hungary, but also to prevent democratic setbacks in any other member state. The ability to act is necessary to protect the ideal of the European project – a “European promise.” As Rui Tavares put it at our workshop in Brussels, this promise is built around three elements: shared prosperity, fundamental rights for everybody and democracy based on public scrutiny. This promise has been around for centuries but its notion has been damaged and faded. Now it again has to be made more explicit and has to be reframed: “we need to build the European Union as a union of democratic values. In a proactive move, we need to build it, need to move towards it and fulfill it. It is a common European promise, meaning no country can fulfill it alone. It is a unitary promise, meaning if we lose it somewhere, it will spread.”

As a general principle, it would be essential to make the above outlined European promise understood in the wider public. The European project needs to be explained in order to empower citizens and increase the sense of ownership among them. The European Union’s input legitimacy has to be increased through the thus increased engagement of the citizens with the goal of making it more democratic as such. In a Europe-wide consultation and a dialogue with civil groups, new and fresh proposals should be discussed in order to stop illiberal and populist tendencies inside the European Union. In this



debate, naturally, all other aspects of representative and direct democracy at European level as well as the problems of the economic crisis and the ongoing institutional reforms would give a broader context to our theme.

It is in this spirit that the present section seeks to provide some recommendations mainly for the decision-makers in the institutions of the European Union, but also for other stakeholders to shape their approach in case a member state regularly and systematically breaches European values and regulations. During the past several years a multitude of ideas and proposals have been brought forth by experts and academics on how European institutions could and should step up against systematic violations. While treaty modification would not be necessary in most cases, they would undoubtedly require brave and revolutionary thinking by European politicians, and a bold and responsible stance on the side of the member states. The requirements and possibilities of the previously discussed proposals of a Copenhagen Commission by Jan-Werner Müller, the systemic infringement procedure by Kim Lane Scheppele, the so-called ‘article for the stupid’ by Dimitry Kochenov as well as the EU Democratic Governance Pact by the ALDE Group should be carefully analysed together with other concepts and need to be implemented in a proper way. Learning from the experiences of the Hungarian case, the response given should be comprehensive. Instead of looking at the individual violations and dealing with small particularities, the European Union should address problems at a systemic level, and what’s more, in a timely manner. Potential new mechanisms or institutions should not be set up to target Hungary specifically. Instead, they should have solid legal foundations that render them available in case any of the member states commit any similar violation.

We encourage the European institutions, especially the European Commission, to restart a process based on convincing commitment towards all-European values expressed in the letter of four foreign ministers – one of them was the current First Vice President of the Commission, Frans Timmermans. His speech at the plenary in the European Parliament in the presence of Viktor Orbán in February 2015 showed a similar strength and good-will. However, more action is needed: the European Commission should elaborate new



proposals without losing the political momentum again and again. Coalition-building is certainly necessary with those political groups and Members of the European Parliament who take the message of Article 2 of the Lisbon Treaty about European values seriously and are ready to participate at hard political confrontations with representatives of illiberal political ideas and practice if necessary.

As for the European People's Party, the worst case scenario in the future would be to continue supporting and defending without much hesitation such party politicians, who, in fact, do not share their principles and values just because of the logic of the mathematics of size; hence here the proportion amongst the different political groups inside the European Parliament matters most. Party President Joseph Daul declared in an interview that Orbán "is the 'enfant terrible' of the EPP family, but I like him and we always find solutions." This paternalistic and friendly attitude, however, did not prevent the Hungarian Prime Minister from any provocations in the past. In the meantime, the official support to Fidesz is probably combined with internal discontent with Orbán's performance: we do not know what really happened behind closed doors when, according to widely shared rumours, members of the EPP Group have strongly criticised Fidesz at the EPP's congress in Budapest in 2015. Whatever strong words were used by some MEPs recently, these voices could not stop the xenophobic anti-immigration campaign of the Hungarian government at home, either. Changing its political line – following Frank Engel's example: the Luxembourgian politician even attended our workshop in Brussels –, the European People's Party would have a decisive impact on the character of the political game between the European institutions and the Hungarian government by undermining most of the populist claims and radical anti-European ideological statements Fidesz made in the previous years.

Let us mention two top territories where measures need to be taken not only in terms of good public policy or better regulation, but from a broader high-political approach. The situation in the media sector and the phenomenon of corruption in Hungary should both be tackled on top of the European agenda. Concerning the media system, re-establishing access to balanced information in



the public sphere and empowering citizens to be able to make informed decisions about their political choices have to be the key objectives. In some cases, like the election of members to the national media regulatory authority, the Media Council, new European regulation is needed, as a former European Citizens Initiative argued in favour of the amendment of the audiovisual directive. In the last years, the government has completely reshaped the media market by supporting loyal organs through state advertising: this centralised redistribution of resources should be considered as state aid. As for the growing concerns about the growing scale of state capture and corruption, the misuse of EU transfers opens up new opportunities to act as the Hungarian practice directly violates common regulations. When the government itself, its cronies and other interest groups are involved in corruption affairs, representatives of NGOs should be involved in mapping these activities and bringing the scandals to the attention of the European institutions and more specifically to the attention of its anti-corruption institution, OLAF.

In general, pro-European political and civil forces believing in the norms and ideals of liberal democracy should reconsider their strategies against the populist challenge. The real dilemma is to be found on the ideological battlefield. “Opponents of populism should realize that for most (potential) supporters, they constitute a part of the corrupt elite. Consequently, vague and moralizing condemnations of populists, particularly when coordinated between different mainstream camps, will merely serve to confirm the populist message. Instead, populists should be confronted on the terms of the non-populists, based on evidence and rational argument, not hyperbole and moral condemnation,” as Cas Mudde stated. This is the political minimum on which various supporters of liberal democracy might still unite.

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