

# EU responses to rule of law backsliding in the Member States – the Hungarian case<sup>1</sup>

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## EU responses to rule of law backsliding

The European Union is founded on a set of common legal principles such as democracy, the rule of law, and fundamental rights enshrined in Article 2 of the Treaty on European Union (TEU). Future member states are filtered for their compliance with these values before they accede to the Union,<sup>3</sup> nevertheless no similar method exists to supervise adherence to these foundational principles after accession. This has been referred to as the ‘Copenhagen dilemma’.

History and recent events have proven that the Copenhagen dilemma is currently a very vivid one in the EU. Whereas there are several EU-level instruments for evaluating and monitoring EU values at the Member-State level,<sup>4</sup> these mechanisms constitute a scattered and patchwork set of Member States’ EU surveillance systems as regards their obligations enshrined in Article 2 TEU and the Charter of Fundamental Rights.<sup>5</sup>

The only “hard law” with a treaty basis is Article 7 TEU. Article 7 consists of a preventive arm (determining a clear risk of a breach), and a corrective arm (determining a serious and persistent breach). It also provides for sanctions: if there is a serious and persistent breach by a Member State of the values referred to in Article 2, this Member State might be sanctioned and even be suspended from voting at the Council level. However, Article 7 has never been activated in practice due to a number of political and legal obstacles.

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<sup>3</sup> “Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect”. European Parliament (2012), Plenary debate on the political situation in Romania, statement by Viviane Reding, 12 September 2012. See also Viviane Reding, “The EU and the Rule of Law: What Next?”, speech delivered at CEPS, 4 September 2013.

<sup>4</sup> These include, for instance, the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania, the EU Justice Scoreboard, the EU Anti-Corruption Report, as well as the European Semester, Annual Reports on Fundamental Rights published periodically by the European Commission, the European Parliament and the Fundamental Rights Agency (FRA), Commission infringement procedures (Articles 258 and 259 of the Treaty on the Functioning of the European Union, TFEU), peer reviews in accordance with Article 70 TFEU, and European Parliament resolutions.

<sup>5</sup> Petra Bárd, Sergio Carrera, Elspeth Guild, Dimitry Kochenov, *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels: Center for European Policy Studies (CEPS), 2016.

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## The Commission's Pre-Article 7 procedure

In response to the Copenhagen dilemma, 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 Law.<sup>6</sup> According to this document, the purpose of the EU Framework is to enable 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.<sup>7</sup> In those cases where there are clear indications that there is a ‘systematic threat’ to the rule of law in one Member State, the EU Framework allows for a formal ‘structured exchange’ between the Commission and the given Member State.

While the EU Framework to Strengthen the Rule of Law can be seen as a step in the right direction, it has a number of limitations. The monitoring dimension is rather weak in nature; launching a ‘rule of law opinion’ or a ‘rule of law recommendation’ are rather discretionary; the assessment is not carried out by entirely independent academic experts who would ensure the full impartiality of the findings.<sup>8</sup> But the proof of the pudding is in the eating and the Polish rule of law backsliding<sup>9</sup> provided a chance for the Commission to test the EU Framework procedure – commonly known as the pre-Article 7 procedure.<sup>10</sup> The case proved the ineffectiveness of the procedure.

The application of the pre-Article 7 EU Framework procedure in the Polish case raised numerous questions. First, the triggering of the EU Rule of Law Framework against one Member State, i.e. Poland, but not another, namely Hungary – where constitutional capture happened much earlier – called into question the objectivity and impartiality of the EU rule of law system, and the principle of equal treatment of all Member States.<sup>11</sup>

Second, the actual use of the EU Rule of Law Framework vis-à-vis Poland also raised numerous questions concerning the procedure's effectiveness. Upholding and promoting

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<sup>6</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014.

<sup>7</sup> Ibid., p. 7. The Communication states, “The Framework will be activated when national ‘rule of law safeguards’ do not seem capable of effectively addressing those threats.”

<sup>8</sup> For further criticism see Petra Bárd, Sergio Carrera, The Commission's Decision on ‘Less EU’ in Safeguarding the Rule of Law: A play in four acts, CEPS Policy Insights, 2017/08, March 2017, <https://www.ceps.eu/publications/commission's-decision-'less-eu'-safeguarding-rule-law-play-four-acts>.

<sup>9</sup> Jan-Werner Müller, ‘Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order’ (2013) Working Paper No. 3 (Washington, DC: Transatlantic Academy).

<sup>10</sup> [http://ec.europa.eu/news/2016/01/20160113\\_en.htm](http://ec.europa.eu/news/2016/01/20160113_en.htm) where it is stated that “The 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.” See also [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)

<sup>11</sup> For immediate criticism, see D. Kochenov, The Commission vs. Poland: The Sovereign State Is Winning 1-0, 25 January 2016, <http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/>; G. Gotev, Tavares: Discussing rule of law in Poland separately from Hungary will lead ‘nowhere’, 13 January 2016, <http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead>.

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European values may follow a “‘sunshine policy’, which engages and involves rather than paralyses and excludes”<sup>12</sup> – but only if the Member State in question is playing by the rules, i.e. if it accepts the validity of European norms and values and the power of European institutions to supervise these. 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”.<sup>13</sup> The Commission extended the deadlines given to Poland numerous times so as to give time to comply with its recommendations on the independence of the Polish Constitutional Tribunal, until the Polish government entirely captured this institution.<sup>14</sup> In the overall assessment, the pre-Article 7 procedure thus failed.

### The Council’s response

The Commission’s above initiative was examined by the Council Legal Service (CLS) in an Opinion issued in May 2014.<sup>15</sup> It concluded that the Commission’s initiative was not compatible with the principle of conferral, meaning that in the Council’s eyes even the diluted, discursive and inefficient procedure attempting to remedying rule of law violations was according to the CLS beyond the powers of the EU.<sup>16</sup>

The General Affairs Council of 16 December 2014 in its Conclusions<sup>17</sup> instead committed itself to establishing an even softer dialogue among all EU Member States to promote and safeguard the rule of law “in the framework of the Treaties”. The Council agreed that this dialogue will take place once a year in the Council General Affairs configuration, and consideration will be given to launching debates on thematic subject areas.

### The European Parliament’s stance

The European Parliament initiated a Legislative Own-Initiative Report on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights (hereafter, “EU Rule of Law mechanism”). Building on several past EP resolutions,<sup>18</sup> but mainly on the Resolution of 10 June 2015 on the situation in Hungary,<sup>19</sup> the Legislative Own-Initiative Report was

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<sup>12</sup> G.N. Toggenburg and J. Grimheden, ‘The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers’, in: C. Closa and D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, 147-171.

<sup>13</sup> Kim Lane Scheppelle, Laurent Pech, Poland and the European Commission, Part I: A Dialogue of the Deaf?, 3 January 2017, <http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>

<sup>14</sup> Kim Lane Scheppelle, Laurent Pech, Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law, *VerfBlog*, 2017/1/06, <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>

<sup>15</sup> Council of the EU, Commission’s Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014.

<sup>16</sup> For criticism see Dimitry Kochenov and Laurent Pech (2015), *Upholding the Rule of Law in the EU: On the Commission’s Pre-Article 7 Procedure as a Timid Step towards the Right Direction*, EUI Working Papers, RSCAS 2015/24, Florence, page 11.

<sup>17</sup> [www.consilium.europa.eu/en/meetings/gac/2014/12/16](http://www.consilium.europa.eu/en/meetings/gac/2014/12/16).

<sup>18</sup> See, for example, European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012), European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law

<sup>19</sup> P8\_TA-PROV(2015)0227, paragraph 12.

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initiated based on the attempts to establish an EU mechanism on democracy, the rule of law and fundamental rights in order to present recommendations to the Commission as regards an EU mechanism as a tool for compliance with and enforcement of the Charter of Fundamental Rights and the Treaties, relying on common and objective indicators.

In its Resolution adopted in a Plenary session on September 8, 2015,<sup>20</sup> the Parliament called on the Commission to draft an internal strategy on the rule of law “accompanied by a clear and detailed new mechanism”. The tools mentioned include the establishment of a scoreboard on the basis of common and objective indicators by which democracy, the rule of law and fundamental rights will be measured; constant monitoring, based on the established scoreboard and a system of annual country assessment; empowering the Fundamental Rights Agency to monitor the rule of law situation in Member States; issuing a formal warning if the indicators show that Member States are violating the rule of law or fundamental rights; and improvement of coordination between the EU institutions and agencies, Member States, the Council of Europe, the United Nations and civil society organizations.<sup>21</sup> The European Parliament in October 2016 passed a Resolution calling upon the Commission to initiate legislation on a comprehensive rule of law, democracy, and fundamental rights Scoreboard.<sup>22</sup> The European Parliament’s legislative initiative report<sup>23</sup> called the Commission to submit by September 2017 a proposal for the conclusion of a Union Pact for democracy, the rule of law and fundamental rights (EU Pact for DRF).

The Commission follow up<sup>24</sup> to the European Parliament’s Resolution has however blatantly rejected the ideas and recommendations tabled by the latter institution. On its face, the Commission welcomes the idea of dealing with the rule of law, but pretty much dislikes anything about the way the Parliament has moved forward with its own initiative. The Commission failed to give any convincing reasons or a specific added value or cost of non-Europe assessment backing up its disapproval of the European Parliament’s initiative.<sup>25</sup> One can only hope that the Commission did not ultimately kill the Resolution, but a meaningful debate about the setting up of a systemic, regular, objective rule of law scoreboard and a

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<sup>20</sup> P8\_TA-PROV(2015)0286

<sup>21</sup> P8\_TA-PROV(2015)0286, paragraph 10.

<sup>22</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409; W. van Ballegooij, T. Evas, An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in ‘t Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, ‘Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights’; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, ‘Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights’.

<sup>23</sup> The Resolution got overwhelming support: the legislative initiative was passed by 405 votes to 171, with 39 abstentions. European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409.

<sup>24</sup> Commission response to text adopted in plenary, SP(2017)16, 17 February 2017.

<sup>25</sup> For further criticism see Petra Bárd, Sergio Carrera, The Commission’s Decision on ‘Less EU’ in Safeguarding the Rule of Law: A play in four acts, CEPS Policy Insights, 2017/08, March 2017, <https://www.ceps.eu/publications/commission’s-decision-‘less-eu’-safeguarding-rule-law-play-four-acts>.

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corresponding enforcement mechanism will be set up sooner or later.

## The Hungarian case of constitutional capture

In April 2010, in a free and fair election the center-right political parties Fidesz Hungarian Civic Union (Fidesz) and the Christian-Democratic People's Party (KDNP)<sup>26</sup> got 53% of the votes, which translated according to the election law<sup>27</sup> then in force into more than two-thirds of the seats in the Hungarian Parliament. This is when a systemic deconstruction of the rule of law started.

The ruling party was famous for not tolerating any kind of internal dissent,<sup>28</sup> and after forming the second Fidesz government in 2010 it eliminated – at least in the domestic setting – all potentialities of criticism by both the voters and by the state institutions, which might have materialized in the form of effective checks and balances. Many put the blame on Viktor Orbán, the leading Fidesz founder and current Prime Minister. As Former Fidesz MP István Hegedűs explains, over time “he has become more and more radical. The lesson he always drew from failures and election defeats was that he had not been strong or rough enough. He did not accept that he had made mistakes, but thought his enemies had been too strong and that he should have done more against them, (...) So when he got a chance to destroy them after 2010, he started to do it.”<sup>29</sup>

The tools of deconstructing the rule of law were mainly legal, coming from the constitutional law domain. This is somewhat counterintuitive, as the mentioned branch of law is mainly preoccupied with how to control those in power so that they do not abuse power. Therefore it is worth to have a closer look at what exactly happened.

### Separation of powers

On the basis of the alleged will of the Hungarian people, Fidesz engaged in major constitutional reconstructions right after forming a government. The new constitution entitled Fundamental Law has soon been adopted and the document served as the basis of deconstructing the rule of law.<sup>30</sup> The Fundamental Law – in conjunction with the respective

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<sup>26</sup> The cooperation between Fidesz and KDNP shall not be regarded as a coalition, rather as a party alliance created already before the elections. According to their self-perception their relation is similar to the party alliance between CDU and CSU in the Federal Republic of Germany. See <http://kdnpu.hu/news/megerositette-egyuttmukoedeset-a-fidesz-es-a-kdnpu-fotok-szerzodes>. KDNP is a tiny party that would probably not get into Parliament on its own. The insignificance of KDNP allows me to abbreviate for the sake of brevity: whenever the term “Fidesz government” is used the Fidesz–KDNP political alliance is meant, unless otherwise indicated.

<sup>27</sup> Act C of 1997 on the Election Procedure.

<sup>28</sup> István Hegedűs locates the beginning for eliminating dissent in January 1991 already. See György Petőcz (ed.): *Csak a narancs volt*, Budapest: Irodalom, 2001, 146.

<sup>29</sup> <http://www.irishtimes.com/news/world/europe/hungary-s-orban-on-revenge-mission-against-his-enemies-1.3060792>

<sup>30</sup> European Commission for Democracy Through Law (Venice Commission), Opinion on the new Constitution of Hungary, adopted at its 87th Plenary Session, Venice, 17–18 June 2011, especially paras 11–12.

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parliamentary acts – were abused with aim of realizing short term political or financial profits. They were used as tools in deconstructing checks on the government that equals in Hungary the majoritarian unicameral Parliament. Instead of general norms, laws are therefore tailored to individual persons’ or groups’ interests. The Fundamental Law and the cardinal laws – supermajority acts of Parliament the adoption and modification of which can happen by two-third of the votes cast – make sure that Fidesz interests continue to be served beyond a government change – unless of course the new government also receives a two-third majority in Parliament, an unlikely scenario, partly due to the weakness of opposition parties, partly due to the new election rules.

A new act on elections<sup>31</sup> instead of a two-step election procedure introduced a one-step system; and changed the rules of compensation so that it benefits the winner. Constitutional changes of extending citizenship to Hungarians living outside the country around the borders in conjunction with the gerrymandered districts add up to an election system benefiting those in power.

The independence of the ordinary judiciary has been compromised in numerous ways. By introducing new age limits for retirement with immediate effect, 27% of Supreme Court judges<sup>32</sup> and more than 50 % of appeal court presidents were removed,<sup>33</sup> and the positions were filled by lawyers loyal to the government. Then-President of the Supreme Court was 59 years old at the material time when he was removed from office via a different means. He was elected for six years in the summer of 2009, but in the meanwhile in December 2011 a cardinal law on the structure and operation of the judiciary was passed.<sup>34</sup> According to a new rule it introduced<sup>35</sup> only persons with five years judicial experience in the national judiciary qualify as President of the Supreme Court, a requirement not met by the then President who was therefore removed with immediate effect after the entry into force of the law. The 16 years he spent as the Hungarian judge on the European Court of Human Rights did not qualify him under the new law to serve his mandate.<sup>36</sup>

At the same time the system of judicial self-government was replaced by a novel institution called the National Judicial Office (NJO). Its President elected by two-thirds majority of Parliament has comprehensive powers to employ, promote, sanction judges and relocate

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<sup>31</sup> Act XXXVI of 2013 on Electoral Procedure.

<sup>32</sup> Lelassult a Kúria a nyugdíjazások miatt, 29 March 2013, <http://www.nepszava.hu/articles/article.php?id=633844>.

<sup>33</sup> Kim Lane Scheppele, Testimony U.S. Commission on Security and Cooperation in Europe Hearing on “The Trajectory of Democracy – Why Hungary Matters” Capitol Visitor Center, Room SVC 210 (Senate Side) March 19, 2013 at 3 pm, <http://lapa.princeton.edu/hosteddocs/hungary/Scheppele%20Testimony%20Helsinki%20Commission%2019March13.pdf>, 8.

<sup>34</sup> Act CLXI of 2011 on the structure and operation of the judiciary.

<sup>35</sup> Article 114 Section (1).

<sup>36</sup> This controversy resulted in finding Hungary to be in violation of the ECHR in *Baka v. Hungary*, Application no. 20261/12, 23 June 2016.

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cases. The Venice Commission, the EU and the US State Department all raised concerns over the NJO and especially its President's powers.<sup>37</sup>

Since 2010 the power and independence of the HCC have been diminished. The Fundamental Law extended the number of judges on the HCC from 11 to 15 and changed their mandate from 9 years to 12 years.<sup>38</sup> The majority of the justices are nominees of the current government and their mandates are overarching several future parliamentary elections. The HCC was deprived of its power to review *actio popularis* petitions, i.e. requests that anyone could file irrespectively of whether they or anyone else had a related case or controversy. The Fourth Amendment to the Fundamental Law deprived the HCC from the right to declare a constitutional amendment unconstitutional on substantive grounds,<sup>39</sup> and overruling a previous HCC decision it also repealed all previous HCC decisions.<sup>40</sup>

The ombudsman system with one general and several specialized parliamentary representatives for various human rights ceased to exist, but the portfolios were kept and assigned to deputy ombudspersons. The only specialized ombudsman whose position ceased to exist entirely was the one responsible for data protection. His office was shifted directly into the government in the form of the Hungarian National Authority for Data Protection and Freedom of Information. The premature abolition of the office before the expiry of the data protection ombudsman's mandate with special regard to the independence of the institution was subject to review by the ECJ and Hungary was found to be in violation of EU law.<sup>41</sup>

In an attempt to create a body of civil servants and government officials loyal to the government, the respective law was changed enabling employers to terminate the employment relationship of public servants with the effect of only 2 months, without a just cause.<sup>42</sup> The HCC invalidated the law and according to the reintroduced provisions,<sup>43</sup> employers are obliged to give a realistic and lawful reason for dismissal, but still loss of trust

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<sup>37</sup> Venice Commission, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, op. cit. note **Error! Bookmark not defined.**; Tavares Report, op. cit. note **Error! Bookmark not defined.**; U.S. Secretary of State Hillary Clinton expressed concerns about Hungary in a letter addressed to the Hungarian Prime Minister on 23 December 2011, the original is available at [http://www.seemo.org/hungary/files/Clinton\\_letter\\_to\\_Orban.pdf](http://www.seemo.org/hungary/files/Clinton_letter_to_Orban.pdf).

<sup>38</sup> Article 24 Section (8) FL.

<sup>39</sup> According to newly inserted Article 24 Section (5) "The Constitutional Court may only review the conformity of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements of the Fundamental Law pertaining to the adoption of the Fundamental Law or its amendments."

<sup>40</sup> The Fourth Amendment also inserted Point 5 into the Closing Provisions declaring that "Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed," in contravention of a previous HCC decision declaring that "the principal statements expressed in the Constitutional Court's decisions based on the previous Constitution shall remain applicable as appropriate also in the decisions interpreting the Fundamental Law." HCC Decision 22/2012. (V. 11.) para 41.

<sup>41</sup> Case C-288/12 European Commission v Hungary, 8 April 2014.

<sup>42</sup> Act CLXXIV of 2010 amending Act XXIII of 1992 on the legal status of public officials.

<sup>43</sup> HCC Decision 29/2011. (IV. 7.).

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and unworthiness – rather vague terms that can easily be abused – can be cited as a cause for dismissal.<sup>44</sup>

Unorthodox Hungarian fiscal policies included nationalizing private pension funds, introducing special taxes on the banking, telecom, energy and retailing sectors, and extension of the powers of the President for the Hungarian Central Bank under the guidance of the Minister of Economy who later moved to this position himself. The saga about the Hungarian Central Bank's independence is closely followed and frequently criticized in the international arena.<sup>45</sup>

### Ending media pluralism

It is not only that criticism ceased to exist, but positive reinforcements were also employed: once important positions were filled with “friends”, long-term appointments guaranteed their continuous support. The concept of the political became the existential basis for any domain that reached the level of politics trumping state policies' moral, esthetic or economic dimensions.<sup>46</sup> This is well reflected by the government's stance towards the media: media diversity was curtailed in a powerful move to eliminate the dissemination of dissenting voices and diminishing external criticism against government policies.<sup>47</sup> At the same time the media is used a form of government propaganda, often in disrespect of the very basic standards of journalism.<sup>48</sup>

Support by the electorate is enhanced through emotionalism, which has a nationalistic connotation unifying an allegedly homogenous Hungarian nation along ethnic lines,<sup>49</sup> and at the same time – by way of a negative definition – excluding from its members “others” including unpopular minorities (for example suspects, convicts, homosexuals, drug users,

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<sup>44</sup> Act CXCIX of 2011 on the public service officials.

<sup>45</sup> European Commission's accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm); Economic Affairs Commissioner Ollie Rehn proposed to partially suspend commitments of EU Cohesion funds from January 2013 due to Hungary's excessive deficit. There is no need to read between the lines, the last sentence of the statement outspokenly connects the prospect of suspension of funds to Hungarian law- and policy-making in the recent years: “Restoring confidence in the Hungarian economy and supporting the prosperity of Hungarian citizens is the goal of our decision today.” Statement by Vice-President Rehn on Hungary, MEMO/12/27, Brussels, 22 February 2012; Hungary grappling with suspension of EU vital funds, 12 August 2013, <http://uk.reuters.com/article/2013/08/12/uk-hungary-eufunds-idUKBRE97BOEK20130812>

<sup>46</sup> That is difficult to grasp for someone outside the scope of this paradigm. See Neelie Kroes rushing out of the room after a Hungarian politician broke his promise made a few minutes before they jointly addressed the public. Kroes threatens nuclear option against Hungary, 9 February 2012, <http://euobserver.com/justice/115209> Francis Fukuyama was equally puzzled when a Hungarian State Secretary turned to the editors of the journal publishing his piece concerning some factual mistakes that did not have any influence on the message he tried to convey. Francis Fukuyama, “What's Wrong with Hungary?” The American Interest 6 February 2012, <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>

<sup>47</sup> Judit Bayer, Agnes Urban, Gábor Polyák, Media Law in Hungary, Alphen: Wolters Kluwer, 2012. For up-to-date details see The Hungarian Media Monitor by the Center for Media and Communication Studies (CMCS) at the Central European University, available at <http://mediamonitor.ceu.hu/>.

<sup>48</sup> See <https://888.hu>, <http://pestisracok.hu>.

<sup>49</sup> Zsolt Körtvélyesi, “From ‘We the People’ to ‘We the Nation’,” In: Gábor Attila Tóth, Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, 111-140.



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Roma, the poor) or anyone diverging from the “ordinary” (for example members of small churches or advocates of home birth). State captured media plays an important role here as well.

Just to name one example in more detail: the refugee crisis has been exploited by using it as a tool for gaining more political support for those in power. Early 2016 based on fear-mongering and incitement to hatred against migrants, the government initiated a referendum against allowing the EU “to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly”. It conducted a massive campaign costing at least – even in the government’s own estimations – 34 million EUR for the no-votes, spreading information via all possible channels. Billboards flooded the country, booklets were sent to all households, and the screening of the 2016 Olympic Games was interrupted every ten minutes or so by one-minute campaign spots suggesting that all those who seek refuge in Europe are terrorists, rapists or economic migrants. The referendum failed since the turnout was lower than the statutorily prescribed 50%, but the state-generated hatred stayed: whereas in 2015 two-thirds of respondents expressed their tolerance and pro-migrant support, a year later the proportion decreased to one-thirds.<sup>50</sup>

Government propaganda is to a great extent based on lies, the biggest one being the claim that the Fidesz government represents national interests and anyone critical of its moves was an enemy of the nation. As if fearmongering, incitement to hatred, questioning of European values including human rights served anyone’s, but the government’s interests. People are however influenced by the media, and – unless one has access to the internet or some remaining journals read by a handful of intellectuals – have a distorted image of reality. Despite this, many are discontent with the government’s policies, and its deconstruction of the rule of law, nevertheless have good personal reasons not to voice their criticism. These may include for example losing a job or other employment-related disadvantages, less or no chances when applying for state funds, or having relatives or beloved ones dependent on state money in one way or another.<sup>51</sup>

### Attacks on civil society

Among the few independent entities count the non-governmental organisations, especially those receiving foreign funds. It shall come as no surprise that in the past year a quasi war has been conducted against civil society – mainly human rights – organizations, subjecting them to extraordinary tax procedures. Authorities did not find any irregularities, nevertheless before Christmas 2016 hostility against NGOs reached its peak when the Prime Minister foretold that in 2017 NGOs, especially those funded by George Soros and his foundations will be “pushed out” of the country.<sup>52</sup> A law will be adopted against them in the coming days.<sup>53</sup>

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<sup>50</sup> <http://www.bbc.com/news/world-europe-37310819>

<sup>51</sup> For a detailed explanation see a personal confession at <http://24.hu/poszt-itt/2017/04/07/vallomas-a-ceu-ugy-kapcsan-fogva-vagyok/>.

<sup>52</sup> <http://888.hu/article-orban-2017-a-lazadas-eve-lesz>.

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According to the bill any association or foundation receiving foreign support above the amount of 23.200 EUR will have to notify the courts about this fact. EU money is exempted, but only if distributed by the Hungarian state through a budgetary institution. The respective organization will be labelled as a so-called “organization supported from abroad”, which will need to be indicated at the entity’s website, press releases, publications, etc. Organisations shall retain the above status for five years after they had received the last foreign support. The bill is disturbing in many aspects: it mimics Russian worst practices, which have been condemned by international organizations as violations of freedom of association and free speech.<sup>54</sup> It gives the semblance as if NGOs were somehow not transparent or as if they served some foreign government interests – whereas the operation of civil societies had to be transparent according to the law previously in force, too. The law may lead to the shutting down of several NGOs which do not wish to be labeled, or the funders of wish do not wish to continue supporting them. Since Hungary is not famous for a culture of donation, this will mean that only NGOs dependent on state money will survive, and the opinions of all the others will be dismissed as serving foreign interests.

### Lex CEU

Anti-Soros propaganda also reached the Central European University (CEU), founded by George Soros. On 4 April 2017, the Hungarian Parliament adopted amendments to the country’s law on higher education,<sup>55</sup> in an attempt to force CEU out of the country.

The new law introduces a number of elements that make the operation of CEU in Hungary difficult, if not impossible in the future. One of the decisive new requirements is that foreign universities will be able to function in Hungary, only if their operation is backed up by an intergovernmental agreement between Hungary and the respective country in which the program is accredited. Universities accredited in the EU/EEA are exempted. In case of federal countries, such as the US, a preliminary agreement needs to be concluded with the federal government to be followed by a treaty with a state. Let us consider what the new rules mean for CEU. This means that the decision whether CEU could continue its operations in Hungary and under what conditions will be at the political discretion of the two country’s leaders, Donald Trump and Viktor Orbán. Making the fate of CEU dependent on the exclusive political discretion of two governments – one being openly hostile to CEU – is a clear violation of academic freedom. What is worse, the first requirement is impossible to comply with in the US context, where education is a state power, and therefore President Trump, even with the best of intentions, could not make a decision on the issue, or would be acting outside his authority if he did so.

### Dissenters are labelled as enemies of the nation and as threats to national security

Labelling Mr. Soros, CEU faculty and NGO representatives – virtually anyone still capable of formulating dissent in Hungary – as enemies of the Hungarian nation or foreign agents was taken to a whole new level: these individuals and entities are said to pose a national security

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<sup>53</sup> See Bill T/14967.

<sup>54</sup> <https://www.hrw.org/news/2017/02/24/briefing-shrinking-space-civil-society-russia>

<sup>55</sup> Act CCIV of 2011 on National Higher Education.

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threat to the country. This is getting very close to demonising dissenters as terrorists and indeed the government claims that NGOs receiving foreign support – i.e. the most professional ones – are helping asylum seekers, and among them terrorists, into the country. The explanations of both the draft law on civil society organisations and Lex CEU refer to the protection of national security among the objectives of the norms. This by the way is a smart move from a legal point of view, and can serve (or be abused) as the basis for lobbying for exemptions from European standards.<sup>56</sup>

## Conclusion on the responsibility of European institutions

In a country where domestic checks failed, solely the control mechanism of international law including international courts protecting the rule of law is left. That is a great responsibility which the EU shall live up to and at the same time it should be prepared for a crusade by illiberal governments against its institutions and the values it stands for.

Quite tellingly, simultaneously with submitting the draft for Lex CEU and the bill attacking civil society organizations, in the zeal of the upcoming elections, the government initiated a national consultation “to stop Brussels” from intruding into Hungarian national affairs.<sup>57</sup>

There are signs that the Hungarian government crossed the red line with its attacks against Brussels, CEU and civil society. Patience is running out in Brussels. The EU strongly reacted to the anti-EU national consultation by refuting point by point all the Hungarian government’s allegations.<sup>58</sup> Frans Timmermans, first vice-president of the Commission said already in the middle of April that they would “complete a thorough legal assessment of [Lex CEU’s] compatibility with the free movement of services and the freedom of establishment,”<sup>59</sup> and towards the end of the month it indeed announced it was sending a formal notice of an infringement proceeding over an alleged breach by the Hungarian government of CEU’s right to exist and educate its students.<sup>60</sup> In April 2017 the European Parliament discussed the Hungarian case, amidst harsh criticism from all sides of the political spectrum. Viktor Orbán was summoned to the Presidency of the European People’s Party (EPP) where Fidesz’ party family members made clear that they expect the Hungarian government to comply with the Commission’s demands, let CEU continue to operate, stop scapegoating the EU and spreading lies in the national consultation entitled “Let’s stop Brussels”, and stop harassing NGOs. The double talk in Brussels and Budapest, the alternative facts and lies presented by Prime

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<sup>56</sup> See also Renáta Uitz’s suggestion “to pay closer attention to the national security exception, which Article 4(2) makes the ‘sole responsibility’ of the member states. If used lightly and carelessly, the national security exception can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be.”

<http://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/>

<sup>57</sup> <http://hungarianspectrum.org/2017/04/02/national-consultation-2017-lets-stop-brussels/>

<sup>58</sup> <https://www.facebook.com/notes/european-commission/our-response-to-the-so-called-stop-brussels-consultation/1486604851357916/>, [http://europa.eu/rapid/attachment/MEX-17-1116/en/Commission%20answers%20Stop%20Brussels%20Consultation\\_EN.pdf](http://europa.eu/rapid/attachment/MEX-17-1116/en/Commission%20answers%20Stop%20Brussels%20Consultation_EN.pdf)

<sup>59</sup> <https://twitter.com/TimmermansEU/status/852105838185590786>

<sup>60</sup> <https://www.theguardian.com/world/2017/apr/26/eu-launches-legal-action-against-hungary-higher-education-law-university>

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Minister Orbán are making even conservative MEPs ever more hostile towards the Hungarian government. As Frank Engel, an EPP member from Luxembourg put it, when Mr. Orbán claimed that the European Parliament was misled by George Soros and the ones he financially supported: Fidesz shall “Forget the crap. We know what is happening, and why. Why don’t you leave both the EPP and the EU on your own terms? ... You’re practically and factually out anyway. So go. Please go.”<sup>61</sup>

Despite the harsh political attacks and the more and more vocal critiques, the EU still has certain illusions about the Hungarian case. Frans Timmermans still believes or at least says that “in the formal sense there is, in the view of the Commission today, not a systemic threat to the rule of law in Hungary.”<sup>62</sup> In light of the Hungarian events one may wonder how far the ruling elite of an illiberal state had to go so that rule of law backsliding was registered and effectively addressed by European Union institutions.

The EU shall finally acknowledge that backsliding by a member state in the rule of law is a European matter, and European institutions must react accordingly, employ diplomatic and legal sanctions against a country undermining the EU’s foundational values, and instead of watching an autocratic regime being built from EU money, they should make use of all available instruments, including the power of the purse – seemingly the only convincing tool vis-à-vis an illiberal government of a net beneficiary country. Plans to create a multi-speed Europe or one focusing on the single market solely, are disastrous from a Hungarian viewpoint.<sup>63</sup> Being ignored by European organisations would also mean leaving Hungarian citizens and legal persons without an external rule of law and fundamental rights supervisory mechanism – whereas the external mechanisms are currently the only robust and efficient ones in the country, where domestic channels of rights protection are already captured by an illiberal state.

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<sup>61</sup> <http://www.politico.eu/article/hungarys-anti-george-soros-education-law-sparks-schism-in-european-parliament-viktor-orban/>

<sup>62</sup> <http://www.euronews.com/2017/04/12/no-systemic-threat-to-rule-of-law-eu-official-on-hungary>

<sup>63</sup> [https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf)