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# Challenging the Basic Values—Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them

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### 1. Introduction

‘A message to Brussels: respect for Hungarians’—the government parties, Fidesz and its satellite party the Christian Democrats could hardly have chosen a more expressive and characteristic slogan for their election campaign of the EP in 2014. Waging a ‘freedom fight’ against the dictates of the EU and comparing ‘Brussels’ to ‘Moscow’, the capital of the former Soviet Union, are not the catchwords of an extremist, anti-EU party, but utterances of Viktor Orbán, the Prime Minister of Hungary.<sup>1</sup> This might be considered astonishing from a country where more than ninety per cent of public investment is financed by EU funds.<sup>2</sup> But this is not the only ostensible paradox. Two others make understanding the current relationship between the EU and Hungary more difficult. First, it is puzzling that while from the early 1990s Hungary was a champion of the democratization process and was also a frontrunner of EU accession in the CEE region, today, constitutional democracy seems to be declining and there is growing Euroscepticism in the country. If we review the political science literature before 2010, Hungary was always praised for its democratic achievement.<sup>3</sup> Even if many drew attention to the dangers of new authoritarianism in the post-communist countries very early on,<sup>4</sup> Hungary was never regarded as endangered by such a threat. The legal harmonization and institutional adaptation to EU requirements were also success stories. Although the level of corruption and the situation of Roma people emerged as Rule of Law problems,<sup>5</sup> no serious shortcomings in compliance with the Copenhagen criteria were raised during the accession process.

<sup>1</sup> See for example his oft cited speech, quoted in English by the *Guardian*, in which he said combatively that ‘[w]e will not be a colony!’ and ‘Hungarians will not live as foreigners dictate, will not give up their independence or their freedom’. I Traynor, ‘Hungary Prime Minister Hits Out at EU Interference in National Day Speech’ (15 March 2012) *Guardian*, <http://www.theguardian.com/world/2012/mar/15/hungary-prime-minister-orban-eu>, accessed 12 October 2016.

<sup>2</sup> T Szűcs, ‘A magyar EU-tagság első évtizede az Európai Bizottság szemszögéből’ in A Marján (ed), *Magyarország első évtizede az Európai Unióban 2004–2014* (Nemzeti Köszolgálati Egyetem Nemzetközi Intézet 2014) 200.

<sup>3</sup> See e.g. J Batt, ‘The End of Communist Rule in East-Central Europe: A Four-Country Comparison’ (1991) 26 *Government and Opposition* 368; S Saxonberg, *The Fall: A Comparative Study of the End of Communism in Czechoslovakia, East Germany, Hungary and Poland* (Harwood 2001); O Havrylyshyn, *Divergent Paths in Post-Communist Transformation Capitalism for All or Capitalism for the Few?* (Palgrave Macmillan 2006), 255–75; V Bunce, ‘Political Transition’ in SL Wolchik and JL Curry (eds), *Central and East European Politics. From Communism to Democracy* (Rowman & Littlefield 2011) 32.

<sup>4</sup> See e.g. DM Brissman and J Rupnik, ‘The Post-Totalitarian Blues’ (1995) 6 *Journal of Democracy* 61; and V Tismaneanu, *Fantasies of Salvation. Democracy, Nationalism, and Myth in Post-Communist Europe* (Princeton University Press 1998).

<sup>5</sup> TA Lane and E Stadtmüller (eds), *Europe on the Move: The Impact of Eastern Enlargement on the European Union* (LIT Verlag 2005), 95.

Despite all these antecedents, recent developments have changed this picture. The new Fundamental Law of Hungary adopted in 2011 drew wide international attention and attracted heavy criticism. A number of European institutions, human rights organizations and international newspapers equally expressed their doubts at whether certain principles and rules in the new basic law comply with European, or even purely democratic standards.

The other paradox is that while the number of Hungary's infringement procedures, which is a widely used and accepted indicator of the compliance with EU law,<sup>6</sup> is relatively low (see Chapter 1), there is a tense relationship between Hungary and the European Commission, the guardian of the EU law. Hungary is often regarded as the black sheep in the community, to the extent that some have even talked about excluding this country from the EU.<sup>7</sup>

I believe that understanding the reasons for these contradictions can provide useful insight into the relations between the EU and Hungary. It is certain that since 2010 there has been a new period in these relations. The Hungarian constitutional changes have challenged the EU, testing its capacity and ability to protect the Rule of Law in the Member States. Since 2000, when the far-right Freedom Party joined the government coalition in Austria, no such trouble has emerged.<sup>8</sup> Then, almost fifteen years ago, the problem was resolved, without any institutionalized solution. Now, when the challenge from the inside—that is from a Member State—to the democratic value system of the community is significantly greater than ever, the EU faces an unexpected obstacle. To work out an effective and long-term solution to a situation which has never occurred before, it is necessary to know the problem itself, in particular whether it threatens the foundations of EU law as a whole.

## 2. Non-compliance conflicts

From a conceptual perspective, Hungary's non-compliance problems can be classified into two groups: Rule of Law problems violating the basic values of EU law, and failures to implement secondary EU legislation.

First, there are some conflicts which are quite usual between the EU and a Member State resulting from the failure of the domestic legal system to comply with EU law. If we use the number of infringement procedures to characterize the level of compliance with EU law, there were 44 such procedures brought against Hungary of the 1,347 infringement cases open at the end of 2014, and 38 of the total 1,368 open infringement procedures on 31 December 2015 (15th and 10th fewest among the 28 member states). It means that about three per cent of all procedures were instituted against this country.<sup>9</sup> Apart from the special Rule of Law cases, Hungary's record is not remarkably different from that of any other Member State, where most infringement procedures are instituted because of late

<sup>6</sup> See e.g. the annual reports of the European Commission on monitoring the application of EU law in the Member States.

<sup>7</sup> Ungarn, 'ein EU-Ausschlusskandidat' (2012), <http://derstandard.at/1302745450901/Ungarn-ein-EU-Ausschlusskandidat>, accessed 12 October 2016. 'Hungary could be expelled from the EU, former US Ambassador Palmer says' (2012) *Politics.hu*, <http://www.politics.hu/20120102/hungary-could-be-expelled-from-eu-former-us-ambassador-palmer-says/>, accessed 12 October 2016.

<sup>8</sup> See Lachmayer in Chapter 25 of this volume.

<sup>9</sup> European Commission, 'Monitoring the application of European Union law 2014 Annual Report' (2015) COM(2015) 329, 14; European Commission, 'Monitoring the application of European Union law 2015 Annual Report' (2016) COM(2016) 463, 24.

transposition of Union directives, and where transport, environment, and the internal market are the policy areas most frequently concerned.

However, the other type of non-compliance makes Hungary's case special. It is not usual for EU institutions to accuse a Member State of undermining the basic values of democracy and the Rule of Law. These values are entrenched in Article 2 TEU which declares that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Nevertheless, over the past few years, a number of compliance problems have been raised in this area in relation to Hungary, even if only a few of them were referred to the European Court of Justice by the European Commission. The country has been standing in the crossfire of criticism since it began to fundamentally transform its constitutional system in 2010. Sometimes it is difficult to distinguish between policy-related and value-laden non-compliance cases. In one example, when, in the summer of 2014, the national legislature introduced an advertisement tax for media companies,<sup>10</sup> disproportionately affecting one private broadcasting corporation, simply because it allegedly did not promote the government policy, the vice-president of the European Commission issued a statement warning against the undermining of free and plural media.<sup>11</sup> According to this law, the advertisement tax must be paid, unusually, after the revenues of the media companies, and not on their profit from advertising. The tax rates were structured so that the most tax revenues would be paid by RTL Klub, the most popular commercial TV channel, which was the only media outlet falling into the highest tax rate. The European Commission has opened an in-depth investigation into whether this new tax complies with EU state aid rules.<sup>12</sup> Although the case fell within the area of the competition regulation of the EU law, many have claimed that the imposition of the advertisement tax was an instrument of political pressure on the critical media and the freedom of the press.<sup>13</sup>

Other examples of the mixture of policy and Rule of Law issues are those policy objectives which aim to increase national property holdings in the banking sector, retail chain stores, or the public utility sector. The limitation on foreign land ownership is also a political aim, after the expiration of the moratorium on foreigners buying land. While these measures may appear to be policy (or non-compliance) problems for the EU institutions, the government tries to achieve these goals with public power tools, which might raise Rule of Law concerns, insofar as they intend to use public power to intervene in the right to property and the freedom of enterprise.

This study deals only with the second group of conflicts. I will call them constitutional conflicts, as they affect fundamental values and principles of the constitutional order of the EU.

<sup>10</sup> Law No XXII of 2014 on the Advertisement Tax.

<sup>11</sup> Commissioner Neelie Kroes, 'Media freedom remains under threat in Hungary' (2014) *europa.eu* (blog post), [http://ec.europa.eu/commission\\_2010-2014/kroes/en/blog/media-freedom-remains-under-threat-hungary](http://ec.europa.eu/commission_2010-2014/kroes/en/blog/media-freedom-remains-under-threat-hungary), accessed 12 October 2016.

<sup>12</sup> In the meantime, the Hungarian government indicated that it is open to reconsider the rates of this tax. Nevertheless, the investigation of the EC is still ongoing at the time of the closing of this study.

<sup>13</sup> When, for example, RTL Klub filed a complaint with the European Commission against the advertisement tax in 2014, it argued that 'the levy damages media pluralism and is a punitive and discriminatory [tax]'. 'RTL lodges Hungary complaint in Brussels' (2014) *Broadband TV News*, <http://www.broadbandtvnews.com/2014/10/17/rtl-lodges-hungary-complaint-in-brussels/>, accessed 12 October 2016. Eventually, the openly discriminative rules were eliminated from the law in 2015.

### 3. Threatening the basic values of the EU—the constitutional issues

The Hungarian constitutional changes which have been enacted since 2010<sup>14</sup> have brought about an unprecedented situation within the EU, in that an entire series of constitutional measures has never come under severe criticism by the EU institutions before. But it has been the case that since 2010, when the general elections saw an overwhelming victory for the former opposition parties, and a new conservative government coalition, based on a two-thirds (ie constitution-making) parliamentary majority, started to change the constitutional landscape of the country.

The objections of the EU institutions do not merely relate to a specific law or policy, but rather to the general direction of recent constitutional developments. Moreover, the criticism encompasses both the formal, procedural circumstances of the constitutional changes, and their substance.

#### a. The problems of the constitution-making process and of the subsequent legislation

The constitution-making process attracted considerable attention throughout Europe, but the EU institutions reacted to the new Fundamental Law of 2011 only after the intensive law making and its first amendments. This criticism, based in particular on the opinions of the Venice Commission of the Council of Europe, related not only to the content of the new constitution, but also to the manner in which it was drafted and adopted.

Whereas the various EU representatives recognised that the adoption of a new constitution and constitutional amendments fall within the scope of competences of the Member States, they emphasized that both the content of national constitutions and the constitutional processes must comply with the basic principles and standards of the TEU, that is, the common values of the EU. The Hungarian constitution-making process seemed not to have met these requirements, as it was extremely rapid and lacked transparency and openness. The non-consensual nature of the constitutional text, i.e. the lack of inclusiveness of the constitution-making procedure, was also condemned by various EU institutions and documents.<sup>15</sup>

The new basic law seems genuinely and likely irremediably defective in that it is a partisan constitution, in the sense that the basic rules of the game were set unilaterally by the government majority. These circumstances in the constitution-making process could on their own raise the issue of legitimacy,<sup>16</sup> even if the Fundamental Law was approved by the two-thirds majority of the National Assembly, as required by the prior constitution.

<sup>14</sup> For a more detailed description of this process in English, see K Kovács and GA Tóth, 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Review* 183; M Bánkuti et al., 'Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; I Pogány, 'The Crisis of Democracy in East Central Europe: The "New Constitutionalism" in Hungary' (2013) 19 *European Public Law* 341; JW Müller, 'The Hungarian Tragedy' (2011) 58 *Dissent* 5; M Bánkuti et al., 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions', in GA Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012), 237–68. For an apologetic presentation of the new Fundamental Law, see L Csink et al. (eds), *The Basic Law of Hungary. A First Commentary* (Clarus Press, National Institute of Public Administration 2012).

<sup>15</sup> See, for example, European Commission 'Statement of the European Commission on the Situation in Hungary on 11 January 2012' (2012) MEMO/12/9, [http://europa.eu/rapid/press-release\\_MEMO-12-9\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-9_en.htm), accessed 12 October 2016; and EP, resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary P7\_TA(2013)0315, AB–AF.

<sup>16</sup> In contrast, some argue that the legitimacy of a constitution can be evaluated only after some time has lapsed, and on the basis of experience, that is, only the formal legality of the constitution-making process has a real

In sharp contrast to the government's political stability, the Constitution has been continuously in flux over the last five years, since the change of government following the general elections in 2010. Until the new Fundamental Law entered into force on 1 January 2012, the government majority had amended the previous constitution twelve times (three times after the formal passing of the new Fundamental Law in April 2011) concerning a number of its provisions. Shortly after the formation of the new government in May 2010, the new majority adopted a whole series of constitutional amendments that were made partly to fulfil its campaign promises and partly to clear the way for a radical change of government policy. In doing so, the number of members of Parliament was reduced from 386 to 199, and the *sui generis* parliamentary representation of the nationalities was realized. In addition, the serious limitation of the powers of the Constitutional Court to review the constitutionality of public finance laws was a first step towards dismantling the system of checks and balances. Finally, some amendments introduced only technical rules.

Interestingly, the new Constitution also seems to be an ever-changing basic law; already on the day of its entry into force a number of amendments were attached to the constitutional text by a dubious legal act named 'Transitional Provisions of the Fundamental Law',<sup>17</sup> containing a political manifesto condemning the communist dictatorship in Hungary before the system change, and the full responsibility of the largest opposition party, the Hungarian Socialist Party, for the communist crimes, as well as other provisions which gave constitutional rank to a number of rules to avoid their review against the Constitution.<sup>18</sup> Moreover, the text of the new Fundamental Law was amended five times within one and a half years, and a new, sixth amendment (introducing the 'state of terrorist threat' in the constitution) was adopted in June 2016. The Fourth Amendment to the Fundamental Law was particularly strongly criticized,<sup>19</sup> as it incorporated a number of rules into the constitutional text which had previously been declared unconstitutional by the Constitutional Court. The function of this amendment was to correct the constitutional defects of the Transitional Provisions attached to the constitutional text in a separate document, and of the parliamentary legislation, and to eliminate the possibility of their future constitutional review. The Fourth Amendment was thus viewed as introducing and perpetuating shortcomings in the constitutional system, as the relevant report of the Venice Commission said.<sup>20</sup>

The subsequent parliamentary legislation also inspired heavy criticism. The Hungarian Fundamental Law specifies twenty-six legislative subject areas to be defined only by

significance at the time of the adoption. See L. Trócsányi 'The Creation of the Basic Law of Hungary', in Csink et al. (eds) (n 14) 9, 22.

<sup>17</sup> According to the relevant decision of the Constitutional Court, the legal nature and the place of the Transitional Provisions were uncertain. Z. Sente, 'Az Alkotmánybíróság döntése Magyarország Alaptörvényének Átmeneti rendelkezései alkotmányosságáról. Az Alaptörvény integritása és az alkotmányozó hatalom korlátai' (2013) 4 *Jogesetek Magyarázata* 11.

<sup>18</sup> Most of the Transitional Provisions were repealed by the Constitutional Court in a year. Decision No 25/2012 (V 18) of the Constitutional Court.

<sup>19</sup> See e.g. I. Vörös, 'The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law' (2014) 55 *Acta Juridica Hungarica* 1; M. Bánkuti et al., 'Amicus brief a velencei bizottságnak az alaptörvény negyedik módosításáról' (2013) 17 *Fundamentum* 5. In contrast to these criticisms, for apologetic views, see F. Delpérée et al., *Opinion on the Fourth Amendment of the Constitution of Hungary* (2013), an unpublished opinion prepared at the request of the government of Hungary now available at: [http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny\\_modositas\\_szakvelemen\\_angol.pdf](http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny_modositas_szakvelemen_angol.pdf), accessed 12 October 2016; and L. Trócsányi, *Az alkotmányozás dilemmái. Alkotmányos identitás és európai integráció* (HVG-Orac 2014), 153–222.

<sup>20</sup> Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice (14–15 June 2013) Opinion 720/2013 CDL-AD(2013)012.

so-called cardinal laws, requiring a two-thirds majority vote in Parliament.<sup>21</sup> While the institution of special laws has been known and used under various names since the system change in 1989–1990, a real innovation of the new Constitution is the requirement of a qualified majority for policy areas such as the pension and tax system or family law, which usually falls within the ordinary power of Parliament. According to these rules, after the adoption of the new constitution, the Parliament enacted a number of cardinal laws transforming not only the whole constitutional system, but also introducing fundamental changes to economic and social policy through accelerated legislative procedures. This process resembled ‘revolutionary’ law making; with most bills being introduced as individual member’s bills without a transparent preparatory stage and public debate. The Parliament’s amended standing orders enabled the governing parties to get their bills through the National Assembly in a few days, ignoring the views and proposals of the opposition. The so-called ‘extraordinary urgent procedure’, introduced in 2011, allowed the enactment of a new law the day following its introduction in Parliament; any bill could be amended fundamentally right up to the final vote: that is, after the closure of the plenary debate. Although these parliamentary contrivances were abolished in 2014, some new procedures were established instead, such as dispensing with the second reading of bills, depriving Parliament of the opportunity to debate on their detail. The frequent use of the accelerated legislative procedure was criticized as opaque, unaccountable, and undemocratic,<sup>22</sup> because it undermines the rights of the opposition parties to participate effectively in the law-making process, and thereby reduces the legitimacy of the enacted laws, and ultimately negatively affecting the system of checks and balances.

## b. Human rights issues

The authors of the new Fundamental Law chose a unique way of rewriting the catalogue of basic rights when they purportedly based this crucial part of the basic law on the Charter of Fundamental Rights of the EU.<sup>23</sup> The Venice Commission expressed its concerns about this idea, pointing out that some problems could arise from the different interpretation of the same provisions of the EU Charter by the European Court of Justice and the national Constitutional Court.<sup>24</sup>

The individual rights are mostly worded in a general and abstract way to allow a wide margin of appreciation for Parliament to regulate the specific rules for the scope and limitations to the respective rights, some of them (e.g. freedom of the press, the right to vote, freedom of religion, data protection, or the rights of the nationalities) in ‘cardinal laws’. There was some concern that constitutional provisions might thus be eroded by special acts.<sup>25</sup> This proved not only to be a potential risk but an actual problem, when new media laws were enacted in 2011. The institutions of the EU harshly criticized the two laws. The EP adopted a resolution,<sup>26</sup> grounded on the reports of the Organisation for Security and Cooperation in Europe and the Council of Europe Commissioner for Human Rights,

<sup>21</sup> For a detailed report about this new law making, see P Smuk (ed), *The Transformation of the Hungarian Legal System 2010–2013* (Complex 2013).

<sup>22</sup> See e.g. Statement of the European Commission (n 15) II, 9.

<sup>23</sup> See the explanatory memorandum for the Fundamental Law, <http://www.parlament.hu/irom39/02627/02627.pdf>, accessed 12 October 2016, 32.

<sup>24</sup> Opinion on three legal questions arising in the process of drafting the new constitution of Hungary, Adopted by the Venice Commission at its 86th Plenary Session, Venice (25–26 March 2011) Opinion 614/2011 CDL-AD(2011)001, 6.

<sup>25</sup> See Traynor (n 1) 59.

<sup>26</sup> EP, resolution of 10 March 2011 on media law in Hungary P7\_TA(2011)0094.

and the European Commission also started expert negotiations with the representatives of the Hungarian government. The extensive supervisory and sanctioning power of the central media authority, the composition of the powerful Media Council (which consisted exclusively of the government's candidates), the lack of independence of the media regulatory bodies, the registration requirements of the media companies, the content regulation of the printed press, and the exceptions to the protection of journalists' sources were particularly objected to by the Commission. After negotiations with the European Commission, and after the Hungarian Constitutional Court overturned many provisions of the media law in May 2012, the Hungarian Parliament amended the law at certain points. As the Council of Europe expressed its satisfaction with the changes, the European Commission removed this issue from the agenda. Nevertheless, some concerns have remained after the amendments regarded the continuing insufficient guarantees of the impartiality and independence of the public media, and exaggerated government interference with the freedom of the press.<sup>27</sup> In addition, new criticisms emerged when the Fourth Amendment of the Fundamental Law imposed strict restrictions on political advertisement on private television and radio channels. From that point on, the commercial media could publish political advertisements only free of charge, which practically eliminated these channels (as for-profit enterprises) from the election campaign. In this situation, the public media remained the main arena for the conduct of political campaigning, and which was repeatedly accused of pro-government bias. Later on, independent sources said these fears were confirmed during the election campaign in the parliamentary elections, where the Fidesz government, according to new electoral rules regained a two-thirds majority.<sup>28</sup>

Another issue attracting wide-ranging criticism was the freedom of religion and the recognition of churches.<sup>29</sup> The government coalition introduced a new regulation regime for churches, depriving all religious communities (more than 300 former churches) of their church status, and imposing new requirements for their recognition as churches. This legal re-registration was conditional on prior approval by the legislature by a two-thirds majority vote, although an exception was granted to 'historic churches' and some other religious associations which did not have to apply for recognition. It should also be noted that the new legislation did not provide any legal remedy for those religious associations whose applications were rejected by the Parliament without any reasoning being offered. The Venice Commission held that the new regulation limited the freedom of religion,<sup>30</sup> and the Hungarian Constitutional Court invalidated certain provisions of the Church Law in February 2013.<sup>31</sup> However, only two weeks later, the Fourth Amendment to the Fundamental Law incorporated the same rules into the text of the Constitution, so all the basic elements of the highly controversial regulation remained in effect. The ECtHR also

<sup>27</sup> Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media CommDH(2011)10, <https://wcd.coe.int/ViewDoc.jsp?id=1751289>, accessed 12 October 2016; PACE, 'The state of media freedom in Europe' (2013) Resolution 1920, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19474&lang=en>, accessed 12 October 2016; Opinion on Media Legislation of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19–20 June 2015), Opinion 798/2015 CDL-AD(2015)015.

<sup>28</sup> See OSCE ODIHR, 'Hungary Parliamentary Elections 6 April 2014: Limited Election Observation Mission Final Report (11 July 2014)', <http://www.osce.org/odihr/elections/hungary/121098?download=true>, accessed 12 October 2016.

<sup>29</sup> See e.g. R. Uitz, 'Freedom of Religion and Churches: Archaeology in a Constitution-making Assembly' in Tóth (n 14).

<sup>30</sup> Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session (16–17 March 2012) Opinion 664/2012 CDL-AD(2012)004-e.

<sup>31</sup> Decision No 6/2013 (III 1) of the Constitutional Court.

stated that the relevant legislation does not treat the various religious communities as equals, and some measures, like the Parliament's decision on the recognition of churches or the absence of any right to appeal against the legislature's decision violates the corresponding provisions of the ECHR.<sup>32</sup>

Some other constitutional changes, such as the explicit exclusion of same-sex marriage,<sup>33</sup> the narrow constitutional definition of family, and the empowerment of public authorities to declare illegal homeless people remaining in public areas,<sup>34</sup> caused controversy, even if those regulations were not considered to violate any particular norm of EU law.

### c. Decline of the system of checks and balances

The curious paradox of the new constitutional regulation of the exercise of public power is that while the state organization system changed only moderately, the changes introduced as a result of the introduction of the Fundamental Law have had significant political impact in practice. In general, the institutional restraints on executive power can be viewed as having been considerably weakened. Some of the politically neutral institutions with responsibility for counterbalancing the executive power have lost their independence<sup>35</sup> or some of their control powers.

One such institution which has seen its functions curtailed is the Constitutional Court, which for two decades was widely regarded as the most effective and strongest counterbalance to the executive.<sup>36</sup> Just a few months after its formation the new coalition government used its two-thirds majority to transform the process of nominating the judges of the Constitutional Court. Since then, the membership of the parliamentary committee responsible for the nomination has no longer been based on parity, but has reflected the party makeup of the National Assembly. Until the new regulation, the parliamentary majority and minority groups had been forced to compromise on new members of the Court, as the composition of the parliamentary committee responsible for nominating Constitutional Court judges had been based on parity between the government and opposition parties, thus, each candidate had to gain the support of both sides. According to the new rules, candidates are proposed by a parliamentary committee composed in proportion to the members of the parties represented in Parliament and they are elected by Parliament with a qualified majority of two-thirds. In addition, the number of judges, in order to be able to deal with an anticipated increase in its workload, was simultaneously raised from eleven to fifteen. The government coalition, over the next four years, was thus able to 'pack the Court', that is, replace retiring judges with its own allies and achieve a stable majority in the Court.

<sup>32</sup> *Magyar Keresztény Mennonita Egyház and Others v Hungary* App nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, and 56581/12 (ECtHR, 8 April 2014), paras 98, 112.

<sup>33</sup> Bánkúti et al. (n 14).

<sup>34</sup> K Gacs, 'Lakhatás helyett börtön – A hajléktalanság kriminalizációjának alkotmányossági problémái' (2014) 18 *Fundamentum* 22.

<sup>35</sup> For empirical research on the politicization of the Constitutional Court, see Z Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 *Constitutional Studies* 123–49.

<sup>36</sup> See e.g. H Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) 87–108; L Sólyom and G Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000); G Halmai, 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court', in W Sadurski (ed), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer International Law 2000), 189–211.



Simultaneously, the governing majority abolished the institution of *actio popularis*, which made it possible for anybody to submit a petition to the Court to invalidate an unconstitutional legal act. Moreover, the Court was deprived of its *ex post* review power of budget-related laws. This means that the Court has only been able to review and annul budgetary laws, acts on taxes, duties, pensions, customs, or any kind of financial contributions to the state if they violate the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and the rights related to Hungarian citizenship. This substantially limited the Court's jurisdiction, as it took the government's economic and financial policy out of major aspects of constitutional control, such as on grounds of anti-discrimination or protection of property.<sup>37</sup> The political motivation for this drastic measure was to prevent the constitutional review of the government's so-called 'unorthodox' economic policy, for example, the retroactive taxation of public sector staff severance payments or the nationalization of private pension fund savings in 2011.<sup>38</sup>

Despite the successful Court-packing in recent years, the Fourth Amendment to the Fundamental Law declares that the Constitutional Court's decisions prior to the entry into force of the new constitution are repealed, in an effort to force the Court to evolve a new jurisprudence based exclusively on the text of the new Fundamental Law.

The only new institution which emerged in the new constitution is the Budget Council,<sup>39</sup> an organ supporting Parliament's legislative activities and examining the feasibility of the state budget. However, it is not a purely advisory body, since its prior consent is required for the adoption of the state budget by Parliament. Although the Council may refuse to give consent only in specified cases (e.g. if the budget bill would allow state debt to exceed half of GDP), its decision may not be reviewed or annulled, so it will have a real veto right, which is an exceptional restriction of the Parliament's budgetary power. As a sanction for this jurisdiction, the President of the Republic was given a new power by the Fundamental Law to dissolve Parliament if it fails to adopt (and to get the Budget Council's approval) a state budget for the current year by 31 March. The Budget Council's absolute veto power can thus be a sword of Damocles over any possible leftist government in the future, because the conservative government was able to determine the composition of the Council for a long period. Although in theory this body consists of politically neutral persons, as the chairmen of the State Audit Office and the Hungarian National Bank are *ex officio* members, and its president is appointed by the Head of State (all members were appointed for nine years in 2011 and 2012), many claim that they are all only figureheads for the major government party.<sup>40</sup>

Another critical point was the independence of judiciary. The president of the Supreme Court was removed while he was still midway through his term of office by restructuring the organization of the judiciary,<sup>41</sup> and renaming the Court as 'Kúria' by the new

<sup>37</sup> The limitation was introduced by the legislature in 2011, but the Fundamental Law preserved and perpetuated it. This restriction of the Court's power will last as long as state debt exceeds half of GDP.

<sup>38</sup> For details see, Z Szente, 'Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary' in X Contiades (ed), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (Ashgate 2013) 256–7.

<sup>39</sup> The Budget Council was established for the first time by law in 2008 but it had much weaker power than under the Fundamental Law.

<sup>40</sup> In fact, the chairman of the State Audit Commission (SAC), Mr László Domokos was a Fidesz MP between 1998 and 2010, while the president of the national bank, Mr György Matolcsy was also an MP, representing Fidesz from 2006 to 2013, and he was also the Minister for Economy for a while in the first and the second Orbán cabinet. The incumbent president of the Budget Council, Mr Árpád Kovács, was a former chairman of the SAC between 1997 and 2009, though without manifest political affiliation.

<sup>41</sup> Act CLXI of 2011 on the organization and administration of courts of Hungary.

Constitution.<sup>42</sup> The new legislation established the National Judicial Office (NJO), the highest administrative body of the judiciary, and conferred wide-ranging powers upon its president, such as the power to transfer any case to any court, even if the case should fall within the competence of another court. The president of the NJO's very wide powers and his or her lack of accountability also attracted international criticism.<sup>43</sup> It should be noted that the latter proved successful in this case, as the power of the NJO's president to transfer ongoing judicial cases from a trial court to another was abolished in 2013.

#### 4. Rule of Law infringement procedures

Although a lot of problems arose in connection with the constitutional changes in Hungary, only a few of them led to formal infringement procedures initiated by the European Commission. The major problem was that the Commission did not find relevant EU legal norms on which to base a formal procedure. In the absence of effective sanctioning procedures and actions, the European Commission launched infringement procedures only in three Rule of Law cases. Even in these cases, the objections focused on a limited set of technical problems or on particular legal issues which were of only secondary importance, but the Commission could not find any relevant legal basis for action before the European Court of Justice. The removal of a number of judges by radically lowering the compulsory retirement age could thus not be litigated as a serious violation of the principle of judicial independence, as would have been obvious, but was challenged instead by the European Commission on the ground that the legislation discriminated against judges based on age.

So the EU institutions were not in a position to address directly most of the violations of the principles of the Rule of Law or human rights. In this context the European Commission preferred to have direct political consultations with the Hungarian government. As is usual, even in formal infringement procedures, the Commission tried to avoid open conflicts, that is, to avoid a legal dispute before the European Court of Justice, by means of letters and informal negotiations. Therefore, despite the recurrent objections of the Hungarian authorities relating to the 'double standards' used by the Commission against Hungary, infringement procedures took their usual course; after unsuccessful negotiations between the Commission and the national authorities, the EC started legal action against Hungary over the breach of Union law. It is another question whether the standard methods found and used for simple non-compliance cases are appropriate measures for handling Rule of Law problems.

##### a. Derogating the independence of the central bank

One of the three procedures launched against Hungary concerned the independence of the central bank, after the European Commission decided that the new Hungarian legislation of 2011 was in conflict with EU law by calling into question the independence of the Hungarian national bank. It is worth noting that the presidency of the central bank was, for

<sup>42</sup> The ECtHR in its judgment of 27 May 2014 declared that the removal of the president of the former Supreme Court violated the ECHR as Mr Baka's access to the courts had been impeded, and his freedom of expression was also violated as his dismissal was due to the criticism he had publicly expressed of government policy on judicial reform. See *Baka v Hungary* App no 20261/12 (ECtHR, 27 May 2014).

<sup>43</sup> Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session, Venice (16–17 March 2012) Opinion 663/2012 CDL-AD(2012)001-e.

a certain period, the only position of key political importance which had not been occupied by the governing coalition, as the mandate of the incumbent president of the national bank expired only in 2013. Since the central bank did not support the government's economic and financial policy unconditionally, the latter exerted political pressure on the leadership of the central bank, and by adopting new legislation, tried to gain greater influence over its activity. The European Commission raised some concerns regarding the potential violation of the independence of the central bank by some provisions of the Fundamental Law of 2011 and the new legislation. The Commission stated that the independence of national central banks is a cornerstone of the Lisbon Treaty, and the national authorities must refrain from seeking influence over their central banks.

Following a long process of negotiations at expert and political levels, the European Commission accepted the moderate amendments of the relevant law, and abandoned the infringement procedure.

## **b. The Judiciary**

A proposal was submitted (and approved) at the last moment before the vote on the Fundamental Law, on applying a general retirement age to professional judges (except the President of the *Kúria*). As a result of lowering this age limit from 70 to 62,<sup>44</sup> about ten per cent of professional judges (almost 300 judges) had to retire. In fact, most leadership positions in the judiciary became vacant within a year, because most were filled by older judges.

The Constitutional Court ruled to overturn the lowering of the retirement age, stating that this could only be regulated by cardinal law, to respect the constitutional principle of the independence of the judiciary.<sup>45</sup> Since the government ignored the Court's ruling and did not replace the invalidated regulation, the Commission brought the case before the ECJ, which declared that 'the radical lowering of the retirement age for Hungarian judges constitutes unjustified discrimination on grounds of age', because this measure was 'not proportionate to the objectives pursued by the Hungarian legislature seeking to standardize the retirement age for the public-service professions and to establish a more balanced age structure in the area of the administration of justice'.<sup>46</sup>

In a formal sense, the EU succeeded through the ECJ's ruling in enforcing compliance with the relevant EU law (in this case, the prohibition of illegitimate discrimination based on age), as the Parliament amended the Judiciary Law, setting a new uniform retirement age (65) to be introduced gradually. The Commission was satisfied by the new regulation and closed the issue.

## **c. Data protection**

The Fundamental Law abolished the position of the parliamentary ombudsman for personal data protection and freedom of information and replaced it with a National Authority for Data Protection and Freedom of Information. The ombudsman, elected by Parliament in 2008 for six years, was thus removed from his position on 31 December 2011 instead of 2014, and the Head of State appointed a new person as head of the authority for a term of nine years. The European Commission considered that the premature termination

<sup>44</sup> Law No CLXII of 2011.

<sup>45</sup> Decision No 33/2012 (VII 17) of the Constitutional Court.

<sup>46</sup> Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.

of the parliamentary ombudsman violated Directive 95/46 on data protection,<sup>47</sup> which requires the Member States to ensure the independence of the relevant national authority. After the Hungarian government claimed that the premature removal of the ombudsman did not breach the institutional independence of the data protection authority, the Commission turned to the ECJ.

Hungary argued before the Court that the new law on the National Authority for Data Protection meets the requirements of the Directive, as it provides full independence for the Authority. Moreover, if the Court found that Hungary failed to fulfil its obligations, it could lead to the compulsory resignation of the head of the new Authority before the expiry of his term of office, which would be incompatible with the principle of the independence of the data protection authority. Paradoxically, the Hungarian government itself thus acknowledged that premature removal violated the institutional independence of the supervisor of data protection. But it did not matter, as the Court refused this argument, stating that a Member State cannot plead provisions prevailing in its domestic legal system to justify a failure to observe legal obligations arising under EU law. The ECJ also concluded that compulsory retirement or resignation, as a consequence of the new law, was an unlawful intervention in the independence of the former data protection authority (ie the parliamentary ombudsman), as the previous regulation did not permit this kind of interruption of the term of office.<sup>48</sup>

## 5. The legal arguments in the debate between the EU and the Hungarian government

### a. Legal argumentation of the EU institutions

The general criticism of the constitution-making process—the use of constitutional amendments and cardinal laws to realize the short-term political ambitions of the governing parties—were basically of political nature. However, the European Commission has always refrained from publicly criticizing the political circumstances of the constitutional and legal changes. The European Commission did not want to step out of its neutral position as the guardian of EU law. Nevertheless, this policy strictly limited its room for manoeuvre in all cases when the Hungarian authorities observed formal rules. This did not pose difficulties for the Hungarian government, which enjoyed a qualified majority in Parliament between 2010 and 2015. The Commission could thus not intervene when party allies were appointed to almost every independent institution, including the Constitutional Court, the National Judicial Office, the State Audit Office, the State Prosecutor, the Budget Council, the National Election Board, and the National Media Council, or when independent journalists were purged from the public media, and serious efforts were made to strengthen the pro-government private broadcasters.

Not only the European Commission, but also the EP was, at least initially, reluctant to interfere with such a domestic affair as transforming the constitutional system. The EP has proved to be politically divided even in the most unambiguous matters on how to address these issues, and what actions would be the most effective to convince the Hungarian government to return to a more democratic line. The European People's Party, the centre-right political family at the European level to which Fidesz belongs, repeatedly defended the

<sup>47</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281, 31–50.

<sup>48</sup> Case C-288/12 *Commission v Hungary* [2014] ECLI:EU:C:2014:237.

Hungarian government's constitutional policy. The governing coalition skilfully exploited this division in domestic politics, presenting the international criticism as simple political assaults against the Hungarian reform encouraged by the left-liberal opposition parties in Budapest or some multinational corporations whose economic interests were threatened by government policy.

As to the more formal or legal position of the EU institutions,<sup>49</sup> their common starting point was that the EU is founded on the values expressed by Article 2 TEU, highlighting the founding principles such as Rule of Law, pluralism, justice, and other values common to all Member States. In addition, the EU is based on the values of respect for basic human rights as enshrined in the Charter of the Fundamental Rights and Freedoms as well as the ECHR, as expressed by Article 6(1) and (3) respectively. Since the core values of these founding documents are addressed not only politically but are also legally binding principles,<sup>50</sup> both the EU institutions and the Member States must commit themselves clearly and unambiguously to them. In other words, the basic principles such as the Rule of Law or the respect of fundamental rights are unquestionable and enforceable parts of EU law. The respect and promotion of these values, the argumentation continues, is an explicit obligation deriving also from Articles 3(1) and (5) TEU, and it is an indispensable condition not only for becoming an EU member, but also for preserving membership itself.

The EU institutions sometimes also referred to the principle of cooperation as a special requirement, as a legal base for the EU to assess and verify the continuous compliance with EU law, including the common values by the Member States on a regular basis. In addition, Article 7(1) TEU grants the power to the EU institutions to determine if there is a clear risk of a serious breach of the values referred to in Article 2 by a Member State, and also defines a procedure for this assessment. This Article is of key importance to protecting the basic values of the EU, and can be invoked freely, as its scope is not limited to the policy areas covered by the EU law.

The very abstract nature of these values have repeatedly created difficulties for the EU institutions as to how to prove that particular national policy measures violate them. In the Hungarian cases in question, the EU regularly claimed that even if all of the challenged Hungarian action or legislation individually had equivalents in other Member States, the measures and policies as a whole are contrary to the basic values of the founding treaties. It should also be noted that even if the TEU acknowledges the Member States' right to establish and determine their own constitutional structures, since they have undertaken to respect the core values of the EU and their membership is based on constitutional traditions common to all member countries, there is a basic framework within which they must establish and preserve their own constitutional systems. Similarly, the fundamental principle of the EU to respect national identities and the different legal systems and traditions of the Member States as set out in Article 4(2) TEU and Article 67 TFEU, does not justify the violation of the principles of the Rule of Law and democratic values by the Member States. To sum up, if a member country such as Hungary wants to enjoy the privileges of EU membership, it has to comply with the basic values of this community of states, whatever constitutional structures and legal system it has.

The policy of the EU institutions in the Hungarian cases reflected the EU's overall argumentation strategy. First, the European Commission and the EP uniformly

<sup>49</sup> The legal arguments discussed here were used mainly by the European Commission in its informal actions (such as in its letters to the Hungarian government or the statements of its commissioners) and formal actions, and they emerged also in the resolutions of the EP cited above.

<sup>50</sup> See A von Bogdandy, 'Defining the Field of European Constitutional Law' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart/CH Beck 2011), 22.

represented the view that the EU is a community of values including the Rule of Law, democracy, and fundamental rights. These are not subsidiary but substantial principles underlying the EU.

Then, the deterioration of the Rule of Law and the backsliding in constitutional democracy in one or more Member States can lead to a lack of trust between the various members, which undermines not only their mutual relationships and recognition, but also the cooperative mechanisms of the whole EU and their effectiveness. This does not need more justification than that the disrespect or denial of the common values adversely affects the process of economic, political, and social integration in the future.

Furthermore, the EU, as an actor in world politics and a promoter of the Rule of Law in third countries, would lose credibility if it fails to preserve democratic principles in its own Member States.

## b. The legal position of the Hungarian authorities

During the more-or-less informal consultations as well as the formal infringement procedures, the position of the Hungarian authorities was largely based on Article 4(2), according to which the EU must ‘respect [...] the national identities, inherent in their fundamental structures, political and constitutional’ of the Member States. As interpreted by Hungarian officials, constitutional issues simply do not fall within the competences of the EU. Its institutions may not thus launch any procedure or operate any control mechanism which is not explicitly recognized in the founding treaties. This approach is closely connected to the view that the obligations of respecting and guaranteeing the basic principles and values set out by Article 2 TEU impose explicit obligations, in the form of the Copenhagen criteria, only for candidate countries before their accession, also including control procedures, but such obligations are not formulated in the same form by the EU law for the Member States. Of course, this could only be an unspoken proposition, as the Hungarian government has always stressed that the recent constitutional changes meet the requirements of the basic values of the EU, and all criticisms are based on a lack of relevant information or misunderstandings.

Another direction taken in the Hungarian authorities’ argumentation was that the criticism of the EU institutions was selective, because all the elements of the Hungarian constitutional changes can be found in the other EU Member States’ legal systems. It was also a recurrent assertion that the ‘assaults’ against the ‘Hungarians’ were initiated by the leftist opposition and kept on the agenda by the European socialist parties. This allegation was particularly stressed in the debate over the ‘Tavares report’, adopted by the EP on the situation of fundamental rights, examining how far European standards and practices prevail in Hungary.<sup>51</sup> This kind of conspiracy theory was fuelled by the complaint that the same legal institutions, such as the very strong government control over the composition of the supervisory body of public and private media or the prohibition of same-sex marriage, are not criticized by the European Commission in other Member States.

In certain cases, special arguments were also used, such as active international lobbying by multinational corporations against the government’s decision to decrease household costs.

But the basic strategy of the Hungarian government was to continue negotiations with the European Commission, and if necessary, to make some concessions without any

<sup>51</sup> EP, resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the EP resolution of 16 February 2012) (2012/2130(INI).

substantial changes to the new constitutional and legal arrangements. This strategy proved successful at preserving the policy achievements of the Fidesz government, as the ‘nuclear option’, Article 7 TEU, was never invoked or even proposed by the Commission.

### **c. The state of affairs so far—striking a balance**

Examining the outcome of the conflicts between Hungary and the EU so far, it is striking how little result has been achieved by the EU institutions. In fact, they have failed to achieve any real change in the issues debated.

Undoubtedly, as the guardian of EU law, the European Commission, has always had to limit itself to the legal dimension of the crucial problems, disregarding the real consequences of the controversial measures and policies of the Hungarian authorities. Although during the informal consultations the representatives of the EU probably also raised political concerns, the Commission did not discuss the political purge in the public media and in many public authorities, and it failed to prevent the practice of personalized legislation and many other worrisome events and developments. The Commission could not do anything, even with openly undemocratic rules and measures, such as the gerrymandering in the electoral law or the packing of the Constitutional Court. In particular, these failures are impressive with respect to those issues where the Commission launched formal infringement procedures: although the ECJ ruled that the compulsory retirement of judges violated EU law, not one removed judge was reinstated in his/her earlier position; the independence of the central bank was quickly removed from the agenda: subsequently, a very close ally of the Prime Minister, the former Minister for National Economy, was elected to be the president of the National Bank; and the parliamentary ombudsman for personal data protection did not get his mandate back (rather, he got financial compensation).

In fact, the European Commission was satisfied to declare that Hungary had returned to compliance with the relevant EU law after only minor changes in the contested legal regulations. The government was thus ready to change the media laws, the new regulation of the judiciary, and it was also willing to amend the Fundamental Law. However, none of these amendments, most of which were also minor technical changes, affected the substance of the original political effort and its effect on the relevant regulations. According to independent sources, the general situation of the Rule of Law and human rights has not improved in Hungary.<sup>52</sup>

In summary, it cannot be said that the EU institutions have succeeded in achieving substantial corrections to Hungarian constitutional policy or in restoring the previous level of protection of basic rights, and the quality of constitutionalism effective before 2010.

## **6. Explaining the recent Hungarian developments**

At the moment, there is no consensual theory capable of sufficiently explaining the democratic deterioration in Hungary and for the new Eurosceptic political course in this country. We can only try to explain what has happened. One way of viewing this

<sup>52</sup> The most recent evaluations and discussions reported that the Rule of Law and human rights have deteriorated further. See e.g. Human Rights Watch ‘World Report 2015, Events of 2014’ (2015), [www.hrw.org/sites/default/files/wr2015\\_web.pdf](http://www.hrw.org/sites/default/files/wr2015_web.pdf), 209–211, accessed 12 October 2016; and Freedom in the World ‘Disregarding Democracy: Return to the Iron Fist’ (2015) Freedom House, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2015>, accessed 12 October 2016, 1, 13.

phenomenon is as an expression of widespread disappointment in EU membership. It is really surprising that the rate of economic convergence of Hungary to the EU average was faster in the pre-accession stage than after entry. The rate at which the country caught up fell significantly short of expectations; while Hungarian GDP was at 63 per cent of the EU average at the time of accession, after a decade of membership this rate is still only 67 per cent. In fact, since the beginning of the world financial crisis, the gap between the economic development of the EU average and the Hungarian economy has been widening continuously. The average standard of living in Hungary is greatly below that of Western European countries. This can contribute to the alleged disappointment in the achievement of the democratic era since the transition period. At least, the majority party in government readily relied on this argument to justify change to the constitutional framework.

Others argue that the elitist nature of the 'liberalization' of the country caused the trouble. According to this view, the economic liberalization was promoted at the expense of political liberalization. While the former was achieved through the successful establishment of a market economy, the political transformation has remained an elite-driven modernization, which 'could not sustain the goal of enhancing rights and freedoms inherent in political liberalization'.<sup>53</sup> As this model failed to deliver welfare for the masses, it was exposed to the populist position adopted by the Fidesz government after 2010, which promised a patriotic approach and the regaining of national sovereignty, emphasizing popular demands for welfare security rather than moral rights and abstract freedom. Another formulation of the same explanation attributes the recent decline in constitutional democracy to the exaggeration of legal constitutionalism at the expense of its civic form.<sup>54</sup> Whereas the system of the formal Rule of Law was carefully established, the elements of participatory democracy were overshadowed and ignored. The reason for this one-sided development is the vision of legal constitutionalism based on a distrust of the direct participation by citizens in the democratic decision-making process. This approach was supported by a 'perverse' impact of EU accession, strengthening the technocratic-instrumental view of democracy and the Rule of Law. Moreover, as this argumentation goes on, the transfer of power to the EU institutions eroded some of the bases of the constitutional democracy.<sup>55</sup> Hungary, like other post-communist countries, having just recently regained its sovereignty from the Soviet Union, suffering all the disadvantages of the oppressive domination of a foreign power, has lost a part of its sovereignty again as a consequence of EU accession.<sup>56</sup>

Although these theories have only little persuasive force and they might raise more questions than they answer,<sup>57</sup> it is a widely shared opinion that the constitutional culture of the democratic transition period in the early 1990s was not sufficiently appreciated by the people, who now believe that the constitutional structures and values of the system change have contributed to the economic and social problems of today.

Many hold that the recent conflicts cannot be explained in the dimension of the EU and Hungary. The non-compliance problems do not thus derive from clashes between

<sup>53</sup> U Korkut, *Liberalization Challenges in Hungary. Elitism, Progressivism, and Populism* (Palgrave Macmillan 2012) 195–6.

<sup>54</sup> P Blokker, *New Democracies in Crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2014) 79.

<sup>55</sup> *ibid* 136, 138.

<sup>56</sup> W Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012) 3.

<sup>57</sup> The new constitutional regime has not extended the forms of direct participation since 2010, and it is no less elitist than the old one, yet the conservative government coalition was able to repeat its electoral success in the parliamentary election of 2014. Furthermore, the transfer of public powers to the EU institutions has not led to any popular protest in the country since her accession in 2004.



European and national interests, but are rooted primarily in Hungarian domestic politics. Therefore, the intention of compliance cannot be modelled after the usual patterns of a cost-benefit analysis, according to which compliance is likely if the benefits outweigh the disadvantages. Instead, there is a new power politics at work here, aiming to replace the political, economic, and social elites and consolidate the current government's political power. If this is true, the price of non-compliance, except for in extreme cases, cannot be so high that it would encourage compliance with EU law, even if its basic values are at threat.

## 7. Lessons from the Hungarian case

From a European perspective, it is of great significance whether the change in Hungary's commitment to the European integration, as well as the deterioration of democracy in this country will be followed by other newcomers to the EU, or whether it remains an isolated, special case. Some argue that the Hungarian case, even though it might be the strongest challenge to the ability of the EU to protect democracy among its Member States, is not the only example of the deterioration of the Rule of Law. The political and legal transformations during the Law and Justice Party governments between 2005 and 2007 in Poland,<sup>58</sup> and the power politics of the Romanian government led by Victor Ponta between 2012 and 2015,<sup>59</sup> indicate that similar problems with liberal democracy can emerge in other countries in the Central and Eastern European region. Those who fear that Hungary is only the first country to diverge from the basic values of European constitutionalism argue that constitutional democracy in the post-communist countries is still vulnerable to populism and authoritarian tendencies caused by economic problems or financial crises. These presumptions seem to be confirmed in Poland where the government of the right-wing Law and Justice Party has followed the illiberal path of the Orbán government since it came to power in October 2015.

From the very beginning, EU institutions have tried to cooperate with other European organizations to exert pressure on the Hungarian authorities. The European Commission and the EP relied on the opinions of the Venice Commission, and frequently invoked the jurisprudence of the ECtHR. This itself shows that the EU institutions, including the ECJ, do not have far-reaching powers in Rule of Law or human rights issues.

Despite the strong arguments put forward by the EU institutions for recognizing the basic values entrenched in Article 2 TEU as a binding law with direct legal effects in the Member States, the European Commission has undertaken so far to bring these cases to the ECJ only if it found a relevant secondary source of EU law. The Commission probably did not feel that Article 2 TEU of itself was enough for a legal dispute. Instead, it carefully tried to find steady bases for any legal action against Hungary. The general explanation for this reticent attitude usually refers to the unavailability of appropriate instruments for the EU to enforce the respect of basic values, as the only possible sanction, the 'nuclear' Article 7(1) TEU, is widely held to be a disproportionate, politically undesirable, and dangerous weapon. Another possible argument is that the content of the fundamental values is not defined or specified in a manner necessary for the operation of any legal procedure. 'Human dignity', 'Rule of Law', 'democracy', 'pluralism', and other values are too vague as concepts, formulated generally and abstractly and without any further specification.

<sup>58</sup> EK Jenne and C Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?' (2012) 23 *Journal of Democracy* 147.

<sup>59</sup> U Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies* 105; Blokker (n 54) 150.

Secondly, not only the legal instruments, but also the political intentions failed to exert any pressure on Hungary to force it to return to a more democratic way of government. There was not even an informal political boycott against the country. There is no doubt that the strong legitimacy of the Hungarian government made the situation more difficult for the European Commission; the Commission itself, at the peak in the debate on the legitimacy crisis of the EU, was struggling with a democratic deficit, and it had to represent the values and principles of constitutional democracy against a national government with extraordinarily wide popular support. Apart from its own legitimacy problems, the EU has a serious difficulty in arguing for democratic values in Hungary against the Fidesz government which came to power democratically in 2010, and which acquired a qualified majority in more-or-less free and democratic elections again in 2014.<sup>60</sup>

There are also other plausible explanations for the surprising incapacity of the EU institutions. First, it should be noted that the EU had to manage the negative effects of the world financial crisis during the same period, and it was in its primary institutional interest to minimize possible tensions or conflicts. The European Commission, for instance, has only a limited capacity to detect non-compliance with EU law in the Member States even in normal times, and, tackling the effects of the economic depression, it had even less attention to spare for the Hungarian constitutional shortcomings.

But the most important lesson of the Hungarian case undoubtedly is that it provided strong evidence for the weakness of EU law, in particular in the field of the Rule of Law.<sup>61</sup> The conclusion of the Charter of Fundamental Rights and Freedoms, and its recognition as a primary source of EU law was an important step towards improving EU level constitutional law, but, on account of its limited scope of application and the lack of the relevant jurisdiction, it was not an effective instrument in the hands of the European Commission in this specific case.

EU law is sketchy and rough-and-ready in this area, containing only abstract and general concepts and principles which are poorly suited to establishing the effective protection of the fundamental values of the EU. There is a blatant contradiction between the carefully elaborated and specified body of law in many other fields, and the EU level regulation of the Rule of Law and other key values. For example, while the Commission was able to act against the premature termination of the official term of the parliamentary ombudsman for data protection and freedom of information, it was incapable of doing anything against a similar removal of the president of the Supreme Court. From the perspective of European law, the only difference between the two cases is that the independence of the national authority for processing personal data is explicitly prescribed by a directive, while a similar safeguard for the courts or judges is absent from EU law.

Not only are the substantive provisions lacking, but effective legal sanctions as well. It is a widely shared view that the EU does not have any appropriate instruments by which it could enforce a recalcitrant Member State to comply with the EU law. Infringement procedures could lead to a financial penalty after a long process and a repeated procedure before the ECJ, if the Member State fails to implement the Court's ruling. But even this sanction had no deterrent effect in the Hungarian case, where the government majority passed a constitutional amendment which enabled the government to impose a special tax

<sup>60</sup> Nevertheless, the ODIHR found in its report on the parliamentary elections in Hungary in April 2014 that '[t]he main governing party enjoyed an undue advantage because of restrictive campaign regulations, biased media coverage and campaign activities that blurred the separation between political party and the State'. OSCE ODIHR (n 28).

<sup>61</sup> M Dawson and E Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) 14 *German Law Journal* 1959.

to cover the financial burdens of an ECJ judgment or a Constitutional Court ruling entailing payment obligations, if the state budget does not have sufficient funds available. Although this cynical provision in the Fourth Amendment was annulled by the Fifth Amendment to the Fundamental Law, it indicates the weakness of this sanction. In such special cases, the decentralized sanctioning through national courts, as encouraged by the European Commission, does not provide an effective instrument either, because systemic problems cannot be resolved by individual judicial cases, in particular when judicial independence itself is being threatened. The ultimate sanction in Article 7 TEU is, at the same time, an extremely severe penalty, which, because of its consequences, has never been used.

The only really effective means in the hands of the EU institutions to apply pressure on the Hungarian government was the suspension of payments from the EU structural funds, and the Council of Finance Ministers decided to do so, suspending EUR 495 million in March 2012 as a consequence of Hungary's failure to meet budget-deficit limits imposed by the EU after a long 'excessive deficit' procedure against the country. The withdrawal of this sanction that is the ending of the suspension, quickly became a top priority of government policy in Hungary to avoid any definitive loss of EU subsidies. But no matter how effective this instrument proved to be, it is not an available legal sanction against Rule of Law failures, and it is highly debatable whether it could be in the future.<sup>62</sup>

By all means, even if the EU has achieved certain successes in demanding fiscal discipline and stability and has a great influence over a number of technical matters from capacity-building for absorbing EU subsidies to legal harmonization, it appears to be powerless and ineffective in protecting the basic values of the whole Union. In fact, the Hungarian case has shown the limits of the EU legal domain in a field which is a new dimension in the ongoing integration, well beyond the market freedoms and economic cooperation among the Member States. Ten or twelve years ago it would not have been seen as a defect of the system of tools of European integration, but today, when the EU is held to be not only a close economic confederation of its Member States but appears also to be a community of values and commonly shared principles as Article 2 TEU declares, this raises the serious problem of its incapacity and failure to accomplish one of its fundamental functions.

The European Commission itself is aware of this weakness. Therefore, it issued a 'Communication' to the EP and the Council on 'A new EU Framework to strengthen the Rule of Law' in which the Commission proposes a new mechanism for resolving future threats to the Rule of Law in any Member State.<sup>63</sup> Through new preventive and sanctioning mechanisms the proposal seeks to solve the problem that the European Commission may launch an infringement procedure only if a Member State breaches a specific provision of EU law, by enabling the Commission to activate the procedures set out in Article 7 TEU when these instruments are ineffective, even if no particular EU legislation has been violated. Certainly, it is an open question whether a closer monitoring and assessment system to prevent any systemic breach of the Rule of Law in a Member State will be effective or not. However, it is worth noting that the clear political warnings or even pressure from the EU institutions have failed to achieve serious results in Hungary so far. In this situation, no positive changes can be expected for a long time. The Fidesz government managed to retain its two-thirds majority in Parliament after the general elections in 2014. Before the next parliamentary elections, many hoped that a period of consolidation would follow. But

<sup>62</sup> For such a proposal, see Jenne and Mudde (n 58) 153.

<sup>63</sup> European Commission, Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law (19 March 2014) COM(2014) 158 final 2.

the conservative coalition, owing to the highly disproportionate electoral system, acquired a two-thirds majority again, and is continuing its policy of further concentration of public power. The National Assembly has remained a rubber-stamp parliament, not only because of strong party discipline, but also because of the strict procedural rules adopted before the parliamentary elections. It is the only legislature in Europe which does not have the power to have a second reading to discuss the details of bills, losing all real influence over law making. In a new development in Hungary's internal politics, a comprehensive political campaign began in the summer of 2014 against non-governmental organizations, accusing many of them of being financed by foreign countries, and serving 'foreign interests'. The former and present Prime Minister Viktor Orbán, in a speech in July 2014 openly expressed his views about the policy objectives of his government. While praising Singapore, China, India, Turkey, and Russia for 'making [their] nations successful', and as the new 'stars of international analyses', he said that 'the new state that we are building is an illiberal state, a non-liberal state'.<sup>64</sup> The idea of the reestablishment of the death penalty and the government's harsh anti-immigration policy have attracted increasingly vociferous criticism from EU leaders and institutions.<sup>65</sup>

All in all, the chances of restoring constitutional democracy and returning to full compliance with the basic EU values are not very good. The partisan Constitution can be amended only by qualified majority. There is little hope of such a change in this country, where political populism has been so prevalent in the past few years. All public bodies are led by close party alliances of the current conservative (or right-wing populist) government, who did not raise their voices against any constitutional perversion in the past, and who would probably stand behind the constitutional regime of the Fundamental Law of 2011 in future. There is a greater likelihood that this illiberal form of democracy will be exported to other EU Member States. As a matter of fact, the first step has been taken in this direction: Mr Tibor Navracsics, the Minister of Justice between 2010 and 2014, *ex officio* responsible for many of the above criticized legislative and constitutional changes, was nominated by the Hungarian government to be a member of the new European Commission led by Jean-Claude Juncker, and he was confirmed in this position in the autumn of 2014.

<sup>64</sup> The whole speech can be found at: <http://hungarianspectrum.wordpress.com/2014/07/31/viktor-orbans-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/>, accessed 12 October 2016.

<sup>65</sup> See e.g. the EP's resolutions of 10 June 2015 on the situation in Hungary (P8\_TA(2015)0227), and of 16 December 2015 on the situation in Hungary (P8\_TA(2015)0461).