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Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge

Bojan Bugarić

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Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge

Bojan Bugarič *

Abstract

After the fall of the Berlin Wall and the collapse of communist regimes, many Central and East European countries successfully managed a ‘return to Europe’. For many observers, the ‘return to Europe’ signaled the ultimate victory of democracy and rule of law over the legacy of totalitarianism in these countries. In contrast to this optimistic view, history is not over and the rising illiberalism in Hungary as well as in some other CEE countries represents a major challenge to liberal democracy. All those who expected that a decade of ‘EU accession’ for CEE legal regimes would lead to an irreversible break with the totalitarian past were simply naive. They forgot that institutions of liberal democracy cannot be created overnight. It is not only that developing liberal democracy requires more time; it also depends on continuous support and endorsement by the people. The rise of illiberal authoritarianism in Hungary is reminiscent of the dramatic events in Europe’s most horrible century. Even if the existence of the EU makes the danger of rising illiberalism less dramatic, there are still reasons to be worried about the authoritarian illiberal attacks on liberal democracy. As the Hungarian case shows, the EU has quite limited powers to effectively prevent the slide to authoritarianism. The irony is that conditionality, so powerful before the CEE countries joined the EU, loses much of its teeth once countries become member states of the EU. Yet, the discussion of the EU instruments to contain such slides into illiberalism has also shown that they are not totally unimportant and that they can be further improved. As I tried to argue, safeguarding democracy and the rule of law in the EU requires serious improvements in the legal toolkit currently available to deal with the slide to authoritarianism in Hungary. Ultimately, EU political actors must respect the limits of the EU political constitution and not attempt to go too far in their otherwise noble aim of protecting democracy in the EU.

Keywords: rule of law, EU, Hungary, Article 7 TEU, Victor Orban, democracy backsliding, illiberalism, Copenhagen Commission

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Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge

1. Introduction

The European Union is facing a unique historical situation: a political club of democratic regimes established primarily to promote peace and prosperity in post-World War II Europe is confronted with the first EU member state ever sliding into an authoritarian illiberal political regime. Namely, on April 25, 2011, the new Fundamental law was promulgated as the new Hungarian constitution.¹ Before that, in the 2010 elections, Victor Orbán's party Fidesz won an overwhelming majority of seats in the Hungarian parliament. Shortly afterwards, with its two-thirds majority, it also adopted a new constitution. The major problem of the new Hungarian constitution is that it constitutionalized a deeply problematic illiberal political order, directly dismantling basic checks and balances and, according to Müller, consequently leading to a Putin-style »guided democracy«.² Hence, the new Hungarian constitution is in a direct conflict with the 'fundamental values' of the EU "political" constitution, such as democracy, the rule of law and respect for human rights (these values are protected by Article 2 TEU).³ How well is the

¹ Kriszta Kovács, Gabor Attila Tóth, Hungary's Constitutional Transformation (2011) *European Constitutional Law Review*. Vol. 7, Issue 2, 197

² Jan Werner Müller, Europe's Perfect Storm: The Political and Economic Consequences of the Eurocrisis (2012), *Dissent*, Fall, 53. See also a comprehensive Opinion of the Council of Europe's Venice Commission containing a harsh review of the new Hungarian Constitution, Venice Commission, European Commission for Democracy Through Law (Venice Commission), Opinion on the New Constitution of Hungary, Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)016-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx)

³ The list of values protected by Article 2 TEU includes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons

EU equipped, legally and politically, to defend democracy and the rule of law in its member states?

Quite paradoxically for the organization created in the wake of World War II, the EU's concern for democracy and the rule of law is of relatively recent origin. It was the anticipation of its eastward enlargement in the 1990s that prompted the EU to grant the Copenhagen criteria for EU accession constitutional status in the Treaty of Amsterdam.⁴

Despite some early attempts in 1950s to bring protection of human rights within the ambit of European integration⁵, the EEC Treaty remained silent on the subject of human rights and democracy. The original deal reached at Messina established a dual European constitutional order: the supranational economic constitution on the one hand and the intergovernmental political order on the other.⁶ The hope of the founding fathers of the European project was that the economic constitution would provide for functionalist pressure for an »ever closer union«, eventually leading to a stronger political union. With the subsequent amendments to the original Rome Treaty, the EU developed some important elements of the political constitution.⁷ Nevertheless, the development of an elaborate and strong economic

belonging to minorities. The same article (Article 2 TEU) declares that these enumerated values are common to the Member States »in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and man prevail.«

⁴ Wojciech Sadurski, Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider, *Columbia Journal of European Law* (Summer 2010) vol. 16, no. 3, 387

⁵ As de Burca explains, with the failure of the European Defence Treaty in the early 1950s, the idea of a European political community and a strong protection of human rights suffered a strong setback. As a consequence, protection of human rights was deliberately removed from the agenda of the Spaak Report, which led to the drafting of the EEC Treaty. Gráinne de Búrca, The Evolution of EU Human Rights Law, in Paul Craig, Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edition, Oxford University Press, 2011) 474,475.

⁶ For the historical account see Alan S. Milward, *The European Rescue of the Nation State* (2nd edition, Routledge 2000) 216; for the legal account see Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press, 2006) 29-30.

⁷ Christian Joerges, Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process, *Comparative Sociology* (2010) vol. 9, 72.

constitution has not been paralleled by an equivalent pace and depth of political integration.⁸ As Weiler argues, democracy was simply not in the DNA of the European integration project.⁹

As I will argue in the text, the Hungarian constitution runs afoul of several values that are expressed in Article 2. While EU constitutional law contains legal provisions for dealing with such a situation, these provisions are largely inadequate to provide for a toolkit with which to intervene effectively in the internal matters of member states.¹⁰ Namely, Article 7 of TEU empowers the Council to determine whether »there is a clear risk of a serious breach by a Member state of the values referred to in Article 2«. If the Council finds the existence, not only a clear risk, of a serious and persistent breach of EU values by a member state, it can even suspend certain rights of the member state. But relying exclusively on this “nuclear option”¹¹ (suspension of a member state’s voting rights) may not necessarily represent the best approach to dealing with such situations. A successful approach has to involve all key segments of the Hungarian society. Building democracy and the rule of law is ultimately a political process which requires a sustained involvement of civil society in the creation of basic political institutions. An approach too “punitive”, as currently advocated by some Commissioners and EU parliamentarians, may even make things worse and seriously inhibit the process of democracy-building in Hungary.¹²

⁸ Wojciech Sadurski, Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals, *Polish Yearbook of International Law*, Vol. XXXII (2013)1.

⁹ Joseph H. H. Weiler, In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration (2012) *Journal of European Integration*, vol. 34, no. 2, 825.

¹⁰ Jan Werner Müller, Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order, Transatlantic Academy (2012-2013 Paper Series, no. 3, February 2013) 1

¹¹ The term »nuclear option« was first used by Barroso, the President of the European Commission, see *ibid* 17.

¹² For example, Gordon Bajnai, former prime minister of a left-center technocrat government and now an opposition leader, expressed his concern about the too punitive approach taken by Brussels. He said that Orbán’s system “can only be brought down by the Hungarian voters and not by any external influence.” Financial Times, 2013. EU weighs fines for democratic breaches

While the possibility to use the Article 7 TEU procedure was contemplated by the European Parliament, the European People's Party, a center-right coalition of different European parties controlling the majority of the Parliament, expressed its reluctance to take action on this ground.¹³ Given the current European political situation, it is thus quite unlikely that the Council would be willing to resort to the mechanism from Article 7 TEU. Instead, the Commission decided to initiate several separate legal actions against Hungary on more narrow legal grounds. In 2012, it commenced the legal proceedings against Hungary to challenge three pieces of the new legislation enacted under the new constitution. Moreover, after the adoption of the Fourth amendment to the Hungarian constitution in March 2013, the EU Commission expressed serious concern "over the compatibility of the Fourth Amendment to the Hungarian Fundamental Law with EU legislation and with the principle of the rule of law"¹⁴ and raised the possibility of starting further infringement proceedings against Hungary.

But the strongest critique of the new Hungarian constitutional order so far came from the Tavares report¹⁵ adopted in the European Parliament in July 2013. The Tavares Report harshly criticizes the state of fundamental rights in Hungary and it recommends the setting up of an independent mechanism to follow the development of fundamental rights in Hungary. Based on Müller's

after Hungary tensions, 11.7.2013, available at: <http://www.ft.com/intl/cms/s/0/3901b64c-ea12-11e2-913c-00144feabdc0.html>

¹³ Editorial Comments. Hungary's new constitutional order and "European unity" (2012) *Common Market Law Review*, vol. 49, Issue 3, 878.

¹⁴ EU Commission, 2013. Press release, IP/13/327. 12.4.2013: The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary, available at http://europa.eu/rapid/press-release_IP-13-327_en.htm

¹⁵ The Report is named after Rui Tavares, the Portuguese Green MEP, who was the rapporteur. EU Parliament, REPORT on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Rui Tavares, 24.6.2013 (A7-0229/2013).

idea¹⁶, the Report envisages the establishment of a “Copenhagen Commission” as a high level expert body which would review continued compliance with the Copenhagen criteria used for admission to the EU on the part of any member state. This non-political body would issue recommendations to EU institutions and member states on how to respond and remedy any deterioration concerning EU values.¹⁷

Not only is the existing EU legal toolkit largely inadequate, but also the EU’s political ability to protect democracy among its members is more or less uncontested.¹⁸ Before the Hungarian case, it was only during the Haider affair in 2000 that the use of such drastic measures was contemplated by EU political leaders. As documented in relevant literature, EU leaders in the end did not use the provisions of Article 7 but resorted to 14 bilateral coordinated moves of the EU governments to sanction Austria’s coalition government, including Haider’s FPÖ party. The sanctions included the suspension of contacts with Austrian government officials, the withdrawal of EU support for Austrian applications for senior positions in international organizations, and the absence of contacts with Austrian ambassadors.¹⁹ After the Haider affair, the Hungarian case therefore represents the EU’s first real case of one if its member states so clearly violating certain principles of democracy and the rule of law that even considerations of use of Article 7 TEU provisions are not entirely excluded.²⁰

¹⁶ Müller Safeguarding Democracy Inside the EU (n 11) 25.

¹⁷ EU Parliament, 2013, para.80.

¹⁸ Erin K. Jenne, Cass Mudde, Can Outsiders Help? (2012) *Journal of Democracy*, vol.23, no.3, 147.

¹⁹ Sadurski (n 5) 400.

²⁰ The Tavares Report does not rule out the use of the »nuclear option« if the Hungarian government does not comply with the monitoring program (EU Parliament, 2013, para.86)

Today, it is almost unanimous that imposing sanctions on Austria was highly questionable.²¹ Even though Haider's Freedom Party (FPÖ), a coalition junior partner of the People Party (ÖVP), had political views trivializing or even idealizing certain features of the National Socialist past, the matter of fact was that the Austrian government did not violate any EU rules. Thus, the bilateral "sanctions" were primarily invoked by Haider's political statements and justified as a response to them.²² Hence, the lessons from the Haider affair cast a serious doubt on whether Brussels has »any leverage over a member country once it gains admission to the European club«.²³

As a consequence, the case of the new Hungarian constitution violating certain basic EU fundamental values opens a host of important constitutional and political questions related to the future prospects of the European political constitution. From the constitutional perspective, the key questions are: under what conditions, legal principles and rules is the EU justified to intervene in domestic constitution making of one of its member states? The constitutional design of a nation's basic institutions and rules represents the most "organic" aspect of national legal rules²⁴ and an essential part of its constitutional identity protected by Article 4 (2) TEU. As a consequence, the question of intervention in the area so closely related to the sovereignty of the nation state is a difficult nut to crack. The next question is how to draw boundaries between thoroughly domestic political affairs and political affairs that are of relevance for the EU? Key political questions are how such interventions affect political legitimacy of European political integration? And

²¹ Jenne, Mudde (n 19) 147; Jan Werner Müller, Defending Democracy Within the EU (2013) *Journal of Democracy*, vol. 24, no. 2, 139.

²² Sadurski (n 5) 405.

²³ Jenne, Mudde (n 19) 147.

²⁴ Otto Kahn-Freund, On Uses and Misuses of Comparative Law (1974) *Modern Law Review*, vol. 37, no. 1. 17.

last but not least, where are the limits of such a "Madisonian model"²⁵ of constitutional politics, which was designed specifically to prevent the slide of democracy into totalitarian regimes as it happened in the mid-20th century.

The article proceeds in three parts. In Section Two, it presents the new Hungarian »unconstitutional constitution«.²⁶ This section offers a brief overview of the recent developments in the Hungarian constitutional law and argues that the new constitution indeed represents a direct threat to the values of modern liberal democracy as protected by the EU constitution. Section Three looks at the legal mechanism in EU law available to deal with the Hungarian case. Section Four looks at the political context of the Hungarian case, examines political repercussions of the political intervention against Hungary and concludes with a discussion of future prospects for development of the European political constitution.

2. Hungary's Unconstitutional Constitution

The Fidesz government accomplished a fundamental revision of the rules of the constitutional and political order in Hungary. In only three years, from 2010 to 2013, it managed to transform Hungary from one of the success stories of the transition

²⁵ By "Madisonian democracy" Müller refers to a specific post-World War II constitutional settlement limiting the unrestrained supremacy of the parliament. Jan Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press, 2011) 146-147; see also Dahl defining the Madisonian theory of democracy as "an effort to bring off a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit the sovereignty on the other." Robert A Dahl, *A Preface to Democratic Theory* (The University of Chicago Press, 1956) 4.

²⁶ I borrowed this term of Kim Lane Schepppele, who was the first to described the new Hungarian Fundamental Law of 2012 as »unconstitutional constitution«. Kim Lane Schepppele, The Unconstitutional Constitution, *The New York Times*, Paul Krugman's blog The Conscience of a Liberal, January 12, 2012, available at <http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/#more-27941>

from socialism to democracy to a semi-authoritarian regime based on the illiberal constitutional order systematically dismantling checks and balances and thereby undermining the rule of law.²⁷ The novelty and irony of the Hungarian slide into authoritarianism is that it was achieved entirely through legal means. Due to its two-thirds majority in the Hungarian unicameral parliament (Diet), Fidesz faced few obstacles in achieving this "constitutional revolution".²⁸ As Jenne and Mudde argue²⁹, Hungary thus represents a politically distinctive case of authoritarianism. Generally, authoritarian leaders usually undermine democratic institutions by not respecting the rule of law, while Hungary has managed to undermine the rule of law by changing legal rules, i.e. the constitution. Such a »constitutional revolution« thus produced a nominally democratic constitution, which, as Bánkuti, Halmai and Scheppelle argue, "can no longer be described substantively as a republican state governed by the rule of law".³⁰ The major "deficiency" of the new constitutional structure is that it vests so much power in the centralized executive that no real checks and balances exist to restrain this power.³¹ Moreover, because the new Hungarian constitution properly guarantees "neither fundamental rights nor checks and balances", which is the core function of modern constitutions, it is also "unconstitutional".³²

As Scheppelle has shown, the Fidesz government strategically changed the rules of the game in the old Hungarian constitution from 1949, which was still in force, although its content had been changed completely in 1989.³³ In one of the first constitutional amendments, the new government removed Article 24 (5) of the old constitution, which required a four-fifths vote in the Parliament to approve the rules

²⁷Jan Werner Müller, The Hungarian Tragedy, *Dissent*, Spring 2011, 5.

²⁸Kim Lane Scheppelle, Hungary's Constitutional Revolution, "Hungary's Constitutional Revolution," *The Conscience of a Liberal* post, 12/19/11; available at <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution>

²⁹Jenne, Mudde (n 19) 148.

³⁰ Miklós Bánkuti, Gábor Halmai, Kim Lane Scheppelle, From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitution, in Gábor Attila Tóth (ed) *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press, 2012) 268.

³¹Ibid 268.

³²Scheppelle, The Unconstitutional Constitution (n 27).

³³ For an overview of these changes see Kovács, Tóth, Hungary's Constitutional Transformation (n 2) 188-195.

for drafting a new constitution. This provision was put in place in 1995 in order to protect the interests of minority parties. Namely, a four-fifths vote made it almost impossible to change the constitution without consulting the opposition parties. Since the amendment rule from Article 24 (3) that requires only a two-thirds majority of all MPs to change (amend) the constitution was not altered to exempt the new four-fifths rule from its purview, the Fidesz parliament was able to use its two-thirds vote to eliminate the four-fifths rule. What followed was a series of constitutional amendments that changed the rules regulating the constitutional court, the referendum process and the authority in charge of media control. The most important was the amendment which changed the rules for nominating constitutional judges so that Fidesz could use its two-thirds majority to nominate its own candidates. The second step was a restriction of the court's jurisdiction over fiscal matters. And the third step, resembling Franklin Delano Roosevelt's court packing plan, increased the number of judges from eight to fifteen and filled seven new positions with their own candidates. For the moment, the once powerful and highly respected Court disappeared from the political scene.³⁴ In its next move, the Fidesz government brought under its political control the Election Commission, which is important because it has the power to control referendum initiatives. The government was well aware of the importance of free media and did not hesitate to reorganize the Media Authority, the state regulatory agency, supplementing it with the Media Council, a five member »independent« body in charge of the control of »media balance«. Shortly, the new chair of the Media Authority, with a nine year term, was a former Fidesz MP, while the Media Council was filled with five Fidesz candidates.³⁵ And, finally, without changing the law, the Fidesz government elected former Fidesz vice chair Pál Schmitt as the new president of Hungary.³⁶ The Hungarian constitution gives important checking powers to the President. The President can exercise a suspensive veto by sending laws back to parliament for revision, and can initiate a constitutional review before the Constitutional Court.

³⁴ Miklós Bánkuti, Gábor Halmai, Kim Lane Schepple, Disabling the Constitution (2012) *Journal of Democracy*, vol.23. no.3, 140.

³⁵ Ibid 139.

³⁶ Because of serious charges of plagiarism, Schmitt was forced to resign in 2012 and János Áder, a cofounder of Fidesz, was elected to replace Schmitt.

With “their” president in power, Fidesz no longer feared these additional checks on its executive power. As Bánkuti, Halmai and Schepple argue, these four actions »effectively created an opening through which the Fidesz government could then push a new constitution without challenge«.³⁷

Then, in less than a year, the Parliament adopted a new constitution which became valid on January 1st, 2012. The new constitution, the “Szájer constitution”, named after a Fidesz member of the European Parliament who headed the committee which proposed the new constitution, contains several provisions which radically undermine basic checks and balances from the old constitution.³⁸ The access to the Constitutional Court was radically limited so that the old system of *actio popularis*, allowing anyone to bring the case to the Court, is now replaced with the German model of constitutional complaint (*Verfassungsbeschwerde*), limiting the access to the Court only to those individuals whose constitutional rights have been violated by public authority. With lowering the retirement age for ordinary judges from 70 to 62, the government managed to remove almost all of the courts’ presidents. The legislation concerning the judiciary established a new National Judicial Office with the power to replace the retiring judges and to name new judges. Unsurprisingly, Fidesz again appointed to the position of president of this body a close friend of Orbán (the wife of Szájer, the main drafter of the new constitution).³⁹ The President of the National Judicial Office has the unusually broad power to reassigned specific cases from one court to another and, after a new constitutional amendment to the new constitution⁴⁰, even to choose, together with the public prosecutor, which judge will hear the case. The President is elected for a nine year term.

³⁷ Bánkuti, Halmai, Schepple, Disabling the Constitution (n 35) 141.

³⁸ László Sólyom, the conservative former president of both the Constitutional Court and the Republic of Hungary, publicly stated that the “Fourth Amendment” removes the last traces of the separation of powers from the Hungarian constitutional system. Under the amended constitution, no institution has the legal right to check many of the key powers of the one-party government. See Kim Lane Schepple’s Testimony at the Helsinki Commission Hearing on Hungary, US Commission on Security and Cooperation in Europe, available at: http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=539&Region_id=0&Issue_id=0&ContentType=H,B&ContentRecordType=H&CFID=21164350&CFTOKEN=28574

³⁹ Bánkuti, Halmai, Schepple, Disabling the Constitution (n 35) 143.

⁴⁰ See Articles 14 and 15 of the Fourth Amendment to the Constitution.

In its next step, the government weakened the independence and autonomy of other important bodies with controlling functions. The old system of four separate and independent ombudsmen was replaced with a “parliamentary commissioner for human rights” and the old data protection ombudsman was transformed into a quasi-governmental office in place of an independent institution.⁴¹

Another striking example of using legal/constitutional tools to undermine checks and balances is the establishment of various new bodies, such as the Budget Council, the State Audit Office and the Public Prosecutor, which are currently staffed with Fidesz loyalists, but which have usually long terms of office (from 6 to 12 years) and are vested with very strong powers to veto important decisions of Parliament, to investigate the government, and to assign cases in judicial proceedings. The Fundamental Law creates the Budget Council which has the power to veto any budget adopted by parliament that even minimally increases the national debt.⁴² Two of the members of the Budget Council are elected by a two-thirds vote in Parliament and one is appointed by the president. Two of the members have a six year term of office and one a twelve year term. Moreover, if Parliament does not adopt a budget by March 31 of each year, the president has the power to dissolve parliament and call new elections. Imagine then the Budget Council, controlled by Fidesz loyalists, vetoing the budget near the deadline, thus almost immediately triggering the constitutional provision allowing the president to call for new elections. The state audit office, once known for its independent expertise, is now headed by a former Fidesz MP with an unusual twelve year term of office. Interestingly, the new head has no professional auditing experience.⁴³ Similarly, the new public prosecutor, elected by a two-thirds parliamentary majority for a nine year term, also has increased powers such as assigning any criminal case to a court of his choosing. All these instances represent a very skillful way of entrenching Fidesz loyalists »in every

⁴¹ Bánkuti, Halmai, Scheppele, Disabling the Constitution (n 35) 142.

⁴² The Budget Council's role in enforcing fiscal discipline is based on the provision of Fundamental Law which forbids Parliament to increase government spending as long as the debt/GDP ratio exceeds 50 percent.

⁴³ Bánkuti, Halmai, Scheppele, Disabling the Constitution (n 35) 144.

corner of the state«.⁴⁴ For any future government not enjoying a two-thirds majority in the Parliament, it will be extremely difficult, if not impossible, to replace the Fidesz power-holders with new candidates. Imagine then, how difficult it would be for a new government to change the course/substance of politics as it is now entrenched by the new “partisan” constitution.

And last but not least, on 11 March 2013, the Hungarian Parliament adopted the so-called “Fourth Amendment”⁴⁵, an amalgam of various constitutional provisions seeking to limit the independence of the judiciary,⁴⁶ bringing universities under even more governmental control⁴⁷, opening the door to political prosecution⁴⁸, criminalizing homelessness⁴⁹, making the recognition of religious groups dependent on their cooperation with the government⁵⁰ and weakening human rights guarantees across the board.⁵¹ However, the most problematic are the amendments in Articles 12 and 19, which drastically limit the jurisdiction of the Constitutional Court, one of the last defenders of the rule of law in Hungary. The two amendments repeal all of the decisions made by the Court before 1 January 2012 (when the new Hungarian Constitution entered into force) so that they have no legal effect. As a result, all previous precedents of the Court are not allowed to be invoked in new cases based

⁴⁴ ibid 145

⁴⁵ The »Fourth Amendment« represents the fourth set of amendments to the Hungarian Constitution since its entry into force in 2011. See Fourth Amendment to Hungary's Fundamental Law, Office of the Parliament, Document number T/9929, Budapest, February 2013, available at: <http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf>

⁴⁶ Article 13/1 of the Fourth Amendment gives the president of the National Judicial Office an exclusive power to »manage the central administrative affairs of the courts«.

⁴⁷ Article 6 of the Fourth Amendment passes financial management of the universities to the government. In combination with Article 9 (4) of the new Constitution giving the President of the Republic the power to appoint both university presidents and professors, Article 6 thus represents a direct threat to the independence of universities.

⁴⁸ Article 14 of the Fourth Amendment entrenching the right of the head of the National Judicial Office to take any legal case and move it to a new court for decision.

⁴⁹ Article 8 of the Fourth Amendment declares that »law or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values».

⁵⁰ Article 4 (2) of the Fourth Amendment.

⁵¹ See Human Rights Watch report *Wrong Direction on Rights: Assessing the Impact of Hungary's New Constitution and Law* (2013, 1), stressing that the new constitutional provisions »undermine human rights protection in the country«; Kim Lane Schepppele, Constitutional Revenge, *The Conscience of a Liberal* post, 3/1/13; available at <http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge/>

on the new Constitution. And second, the Court is banned from reviewing constitutional amendments for substantive conflicts with constitutional principles. From now on, the Court is allowed only to review procedural validity of new amendments. As a consequence, the “Fourth Amendment” basically represents a “constitutional revenge” of the Orbán government reversing several of its “losses” caused by previous decisions of the Court or by the insistence of European bodies to modify some of the rules.⁵²

While several authors agree that the new constitutional order undermines the rule of law by displacing independent judiciary and other independent institutions and that it removes most of the checks and balances needed in a system of liberal democracy, there is less agreement on how to define such a new constitutional order. Whether it might be called a new illiberal regime, new authoritarianism, a Putin-style guided democracy, is perhaps less important. Rupnik for example argues that Hungary is not a full blown authoritarian regime like Lukashenko's Belarus and that it is not clear whether it represents a »diminished form of authoritarianism« or a »diminished form of democracy«.⁵³ Rupnik also sees a worrisome resemblance between Orbán's rhetoric and the pre-communist authoritarian regime of Miklós Horthy. Some of the key features of these pre-communist traditions, most brilliantly presented in István Szabó's movie Sunshine⁵⁴, include strong anti-Semitism, anti-Bolshevism and obsession with the Trianon trauma which cost Hungary more than two-thirds of its land and a third of its people. Whether Hungary is turning into a “Sequel Four” of the aforementioned movie or not is an open question. Imre Kertézs, a Nobel laureate, for example, thinks that there are many parallels between the situation in the 1930's and the present situation. Kim Lane Schepppele offers another poignant observation of the current Hungarian political situation. Her point is that the Fidesz government does not jail its opponents, it does not ban free travel, but on the other hand it punishes political dissent, it fires members of the political opposition from state

⁵² Schepppele, Constitutional Revenge, *ibidem*.

⁵³ Jacques Rupnik, How Things Went Wrong (2012) *Journal of Democracy*, vol. 23, no. 3, 134.

⁵⁴ Sunshine, 1999. István Szabó, director. The movie shows life of three generations of the Hungarian-Jewish Sonnenschein family in Hungary.

sector jobs and it intimidates families of critical journalists. Even if this is not yet a full blown authoritarian regime, the negative effects of its new constitutional order are real and show strong signs of sliding into authoritarianism.⁵⁵

3. Does EU Law Protect Constitutional Democracy?

EU law currently offers two different legal options to deal with cases like the Hungarian one. The first one, briefly mentioned in the Introduction, has a legal base in Articles 2 and 7 TEU. While Article 2 defines basic values of the Union, Article 7 provides for legal remedies to sanction violations of Article 2. Among the values protected by Article 2 we find democracy, the rule of law, human rights, freedom and protection of minorities. Article 7 defines the standard to be used when violations of Article 2 occur. When there is »a clear risk of a serious breach« of principles mentioned in Article 2 by a member state, the Council could issue appropriate recommendation to that State. This is so-called *preventing mechanism* described in Article 7(1) TEU. After lessons from the Haider affair, it was introduced with the Treaty of Nice in 2001. The *sanctioning mechanism* in Article 7(2) TEU was introduced with the Amsterdam Treaty in 1997. The use of the sanctions, which include a suspension of certain membership rights of the Member State in question, including voting rights in the Council, is triggered by the existence of »a serious and persistent breach« by a Member State of Article 2 (TEU).

The first question is whether the Hungarian “unconstitutional constitution” represents a clear risk of a serious breach of principles from Article 2, as defined by Article 7(1). As I argued in Section Two, there is little doubt that

⁵⁵ Kim Lane Schepppele, Goulash Post-Communism, *NewsNet*, News of the Association for Slavic, East European, and Eurasian Studies, June 2012, v.52, n.3, 3-4.

the new constitutional order, particularly those provisions which *systematically* undermine or even remove independence of judiciary, media and other independent bodies, basically undermine the very foundations of the rule of law in Hungary. This view is shared by many other legal scholars. For example, a recent Editorial Comment in one of the most prestigious European academic journals argues that this threshold was met in the Hungarian case.⁵⁶ Sadurski, on the other hand, argues that we have a case where Hungary »blatantly and clearly« violates principles of democracy and human rights and that Article 7 presents a toolkit to deal with »precisely such occasions«.⁵⁷ Last but not least, in its comprehensive Opinion, the Council of Europe's Venice Commission produced a »harsh review« of the new Hungarian Constitution.⁵⁸ Moreover, criticism has increased after the adoption of the Fourth Amendment, leading the Human Rights Watch, the EU Commission and the Council of Europe to ask the Hungarian government to bring legislation in line with the human rights standards of the EU and the Council of Europe.⁵⁹ Furthermore, as I mentioned in Introduction, the Tavares Report so far represents the strongest and most consequential “official condemnation of the Fideszs consolidation of power over the last three years.”⁶⁰

Though vague, the values from Article 2 are not meaningless.⁶¹ They represent core elements of a broader tradition of a »highly constrained form of democracy« which developed in post-World War II Europe as a response to

⁵⁶ Editorial Comments. Hungary's new constitutional order and “European unity” (n 14) 878.

⁵⁷ Wojciech Sadurski, Rescue Package for Fundamental Rights; A Comment by Wojciech Sadurski, Verfassungsblog, 24 February 2012, available at: <http://verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/>

⁵⁸ Jenne, Mudde (n 19) 150.

⁵⁹ Human Rights Watch, Wrong Direction on Rights: Assessing the Impact of Hungary's New Constitution and Law (2013) 3, available at:

http://www.hrw.org/sites/default/files/reports/hungary0513_ForUpload.pdf

⁶⁰ Kim Lane Scheppelle, In Praise of the Tavares Report (2013), available at: <http://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppelle-in-praise-of-the-tavares-report/>

⁶¹ Sadurski, Rescue Package for Fundamental Rights (n 58)

the totalitarian experience of mid-20th century Europe.⁶² Furthermore, the CMLR Editorial argues that the Hungarian constitution, which in its preamble contains a nationalistic conception of nation, distinguishing between “real” and “other Hungarians”, »sits uneasily with the model of an open and inclusive society promoted in article 2 of the TEU.«⁶³

Nonetheless, EU institutions have failed so far to utilize the mechanism of Article 7 TEU. When the European parliament attempted to take action against Hungary, it became apparent that the EU officials and MPs are internally divided over the priority and severity of the situation. Namely, the largest party in the European Parliament, the European People's Party, the center right bloc in the EP, opposed the proposal. It is important to add that Fidesz belongs to the same political bloc and that Orbán has many friends among the European Peoples' Party members. For example, the U.S. Secretary of State Hillary Clinton adopted a clearer stance, unlike the European Parliament. As Jenne and Mude report, in December 2011, she sent a letter to Orban expressing her concern for a »crackdown« on democracy in Hungary.⁶⁴ The EP's unwillingness to use the mechanism provided in Article 7 shows how difficult it is to use this essentially »political« mechanism. Namely, in order to employ the preventing mechanism, Article 7 requires a majority of four-fifths of the Council and assent of the European Parliament.⁶⁵ The sanctioning mechanism, on the other hand, requires unanimity in the Council and assent of the European Parliament. No surprise then that Kumm criticizes the required unanimity for the sanctioning mechanism.⁶⁶ Kumm has a point,

⁶² Müller, *Contesting Democracy* (n 26) 128.

⁶³ Editorial Comments. Hungary's new constitutional order and “European unity” (n 14) 874,875.

⁶⁴ Jenne, Mudde (n 19) 149.

⁶⁵ According to Article 354 TFEU, an absolute majority (a two-thirds majority) of members in the EU Parliament is required for an »assent«.

⁶⁶ Matthias Kumm, Rescue Package for Fundamental Rights: Comments by Matthias Kumm Verfassungsblog, 21 February 2012, available at: <http://verfassungsblog.de/rescue-package-fundamental-rights-comments-mattias-kumm/>

but as Sadurski responds, the preventive mechanism, on the other hand, requires »only« a supermajority.⁶⁷

The essentially political nature of the mechanism from Article 7 led some authors to argue that the use of this mechanism would be catastrophic and would undo the fabric of the Union.⁶⁸ Furthermore, since the enforcement of this article depends upon a political decision, other authors argue that such a mechanism has severe drawbacks.⁶⁹ As these authors explain, required majority voting involves “considerations of political opportunity”, which might lead to a “habit of mutual indulgence”, already apparent in states’ unwillingness to sue each other (initiate the Article 259 TFEU procedure). They also point to the negative experience of the Haider affair which had led to unwillingness to use this mechanism in the future. As a consequence, they argue that instead of a political approach, it might be more appropriate to use a legalistic approach in such situations (“integration through law”).

However, if we look at the valid Union’s law, the only available legal procedure is one provided by Article 258 TFEU. First, in January 2011, the Vice-President of the European Commission Neelie Kroes expressed her concern about the December 2010 media laws. Afterwards, Hungary addressed some of the concerns identified about banned content and balanced reporting requirements, leading the Commission to drop the proceedings.⁷⁰ But the narrow focus of the commission’s intervention left the main problems

⁶⁷ Sadurski, Rescue Package for Fundamental Rights (n 58)

⁶⁸ Andrew Williams, The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq (2006) *European Law Review*, vol. 31, no. 1, 27.

⁶⁹ Armin von Bogdandy et al. A Rescue Package for EU Fundamental Rights-Illustrated with Reference to the Example of Media Freedom, available at: <http://ukconstitutionallaw.org/2012/02/18/a-rescue-package-for-eu-fundamental-rights/>

⁷⁰ See Press release: Media: Commission Vice-President Kroes welcomes amendments to Hungarian Media Law, Memo/11/89, Brussels, 16.2.2011, available at: http://europa.eu/rapid/press-release_MEMO-11-89_en.htm

with media freedom unaddressed. Dawson and Muir criticize the Commission for using arguments based on the internal market to address restrictions on media freedom. As they argue, the Commission should rather resort to Article 11 of the Charter of Fundamental Rights of the European Union protecting the freedom and pluralism of the media in the EU.⁷¹ In other words, Dawson and Muir argue that the Commission should address the violation of fundamental rights more directly.

In January 2012 the Commission did launch three separate infringement procedures pursuant to Article 258 TFEU. In all the three proceedings, the Commission identified several infringements of the Union's primary and secondary law by the Hungarian legislation in question. The first one dealt with the independence of the national central bank of Hungary, which was allegedly violated by the provisions of the new MNB (Hungarian Central Bank) Law and by the provisions of the new Hungarian Constitution. However, under the pressure during the bail-out aid negotiations with the Union and the IMF, Orbán has promised to change the legislation on this point, and the Commission decided to suspend the infringement proceedings.

The second case involved the Freedom of Information Act which has abolished the Parliamentary Commissioner for Data Protection and established a new governmental agency, the National Agency for Data Protection, lacking a degree of independence as required by the EU Data Protection Directive (Directive 95/46 EC). The independence was also violated by a forced resignation of the former Data Protection Officer before the end of his term in 2014. According to the Commission, these provisions violate

⁷¹ Mark Dawson, Elise Muir, Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania (2012) *Maastricht Journal of European and Comparative Law*, vol. 19, no. 4., 472.

Article 16 of TFEU and Article 8 of the Charter of Fundamental Rights. A few months later, the Hungarian Parliament amended the Information Freedom Act in line with the recommendations of the Commission. Nevertheless, the Commission insists that the premature termination of the former Commissioner's term represents a violation of EU law and, on April 25, decided to refer Hungary to the Court of Justice on this matter.⁷²

The third case involves an alleged violation of the independence of judiciary caused by the provision in the Transitional Act (a supplement to the constitution with the purpose of explaining how the new constitution is to be implemented) lowering the retirement age of judges from 70 to 62 years, which, as a consequence, would lead to the retirement of 274 judges and public prosecutors in a very short time.⁷³ The most problematic aspect of this new rule is that those among the judges who are to retire are most of court's presidents who assign cases. Even though the new Constitution contains several other provisions which are even more problematic from the perspective of judicial independence⁷⁴, the Commission decided to utilize very narrow legal grounds to deal with the case: it relied exclusively on Directive 2000/78/EC on equal treatment in employment, which prohibits discrimination on the ground of age.⁷⁵ On the other hand, many more contentious issues affecting the independence of the judiciary were not raised in this case. In November 2012, the Court of Justice ruled that the radical lowering of the

⁷² EU Commission, Press release, IP/12/395, 25.4.2012: Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary, available at http://europa.eu/rapid/press-release_IP-12-395_en.htm?locale=en

⁷³ Act CLXII of 2011 on the legal status and remuneration of judges, section 230.

⁷⁴ Among the most problematic are provisions limiting the independence of the Constitutional Court and provisions giving the president of the National Judicial Office almost complete discretion to choose which judge will hear the case.

⁷⁵ Editorial Comments, Hungary's new constitutional order and "European unity" (n 14) 880.

retirement age for Hungarian judges constitutes unjustified discrimination on grounds of age thus violating Council Directive 2000/78/EC.⁷⁶

What is clear from these separate legal proceedings is that despite certain important legal victories, they ultimately fail to address broader institutional issues that threaten the very foundations of the rule of law and liberal democracy in Hungary.⁷⁷ Namely, the main aim of the infringement procedure is not to “target the constitutional order of a State”. In other words, judicial proceedings address the issues of violations of fundamental values from Article 2 only *indirectly*.⁷⁸

When the EEC was founded, the assumption was that member states were “trusted to be respectful of the common values of the liberal tradition”.⁷⁹ The Commission may be reluctant to act regarding other sensitive social or political matters in Hungary. Internationally, Orbán presents himself as a champion of democracy, but at home, he is implementing many questionable policies inspired by the right-wing extremist Jobbik party. For example, the Roma minority was “forced” to perform volunteer work and allow their living spaces to be inspected for orderliness in order to receive social assistance payments.⁸⁰ Furthermore, as a concession to Roma-haters, the rights of paramilitary organizations have been strengthened.⁸¹ A virulent form of hate speech directed at the Roma and Jewish minority has become an almost daily

⁷⁶ CJEU, Case C-286/12 Commission v. Hungary, Judgement of 6 November 2012.

⁷⁷ Editorial Comments, Hungary’s new constitutional order and “European unity” (n 14) 877, 878.

⁷⁸ Dawson, Muir, Enforcing Fundamental Values (n 72) 471.

⁷⁹ Editorial Comments, Hungary’s new constitutional order and “European unity” (n 14) 882. But see de Búrca for the alternative account, De Búrca, The Evolution of EU Human Rights Law (n 6) 465.

⁸⁰ Spiegel On Line. Hungarian Leader Adopts Policies of Far-Right, by Keno Verseck. 30.1.2013, available at: <http://www.spiegel.de/international/europe/ruling-hungarian-fidesz-partyadopts-policies-of-far-right-jobbik-party-a-880590.html>

⁸¹ Ibid.

routine in Budapest in these days. There are even reports of physical violence against the Roma and outbursts of anti-Semitic statements requiring all Jews living in Hungary to be registered and then evaluated for the potential danger to Hungary.⁸² Several prominent intellectuals, close to Fidesz, endorse the works of anti-Semitic writers from the interwar period.⁸³

As Sadurski reminds us, “under the orthodox account of the EU law, the Union lacks any general competence in the field of human rights. Its competence is limited to specific areas explicitly governed by European law, such as a limited range of external policies and anti-discrimination policy. Further, the Member States are only subject to the European Court of Justice (E.C.J.) in the domain of human rights in so far as they are implementing EU law.”⁸⁴

Current legal actions against Hungary illustrate the limits of such an approach. While the Commission was quite successful and imaginative in its legal argumentation, skillfully using the previous case law of the ECJ to press Hungary on certain less secure legal grounds, all three cases ultimately failed to address broader, legally more difficult to define, issues such as judicial independence. All this was due to the institutional limits of ECJ jurisdiction in this particular area. Namely, the most problematic aspects of the new Hungarian constitution are those where the Constitution does not implement EU Law. Instead, they represent, legally speaking, entirely “internal” affairs of a member state, if judged upon the rules defining the ECJ jurisdiction in this area.⁸⁵ As Article 51(1) of CFREU explicitly states, the EU protection of human

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Sadurski, *Adding Bite to a Bark* (n 5) 419.

⁸⁵ Ibid, 419.

rights from CFREU applies to the Member States “only when they are implementing Union Law”.

Therefore, judicial action may be useful, but only as a complement to the Article 7 TEU mechanism. There are many other controversial issues which can hardly be addressed through purely judicial means. As I mentioned above, the Orbán government implemented many questionable anti-Semitic, anti-Roma and other nationalist policies the combined effect of which is to produce an authoritarian regime. This is to say that if we treat them separately as individual judicial cases, we may see the individual trees but fail to see the entire wood, i.e., the authoritarian regime. As a consequence, they could be dealt with more effectively only by invoking the procedure of Article 7. However, in order to make the Article 7 mechanism workable, we must first reform some of its elements. I return to this issue in the next section, where I discuss potential merits of various enforcement mechanisms available in EU law for the protection of fundamental values.

In other words, the legal actions taken so far (and political action, not taken) against Hungary illustrate

“the discrepancy between, on the one hand, the self-understanding of the Union as founded on universal values and as the guarantor of their protection within the Union’s territory and, on the other hand, the limited capacities of the European Union to involve itself and intervene in the internal orders of its Member States.⁸⁶

Critical of the political mechanism provided in Article 7, a group of legal scholars proposed a new legal approach to this issue as to remedy this

⁸⁶ Editorial Comments, Hungary’s new constitutional order and “European unity” (n 14) 877.

enforcement gap. Their proposal is to open up respect for human rights set out in Article 2 TEU for individual legal actions via Union citizenship. It utilizes a creative legal thinking linking two concepts together and creating so called “reverse Solange” procedure aimed at protecting “the essence” of fundamental rights against the EU member states.⁸⁷ Building on the ECJ’s ruling in *Ruiz Zambrano*⁸⁸, Bogdandy et al. argue that EU citizenship as interpreted in this case provides a “truly fundamental status” which has to be protected in “purely internal situations”. Even in purely internal situations the “substance” of Union citizenship precludes violations of fundamental rights that amount to emptying the “fundamental status” of its practical meaning.⁸⁹ Therefore, following their approach, a Union citizen would be able to initiate individual legal actions before the ECJ against any member state allegedly violating fundamental values from Article 2 TEU. Finally, they link their newly constructed right of Union’s citizens with a new two-pronged test inspired by the German Constitutional Court’s Solange-doctrine. Outside the Charter of Fundamental Rights’ scope of application a Union citizen cannot rely on EU fundamental rights in purely internal matters as long as it can be presumed that their respective essence is safeguarded in the member state concerned. This presumption could be rebutted only if a plaintiff could “prove” that the violations of fundamental rights are of such a nature that they account for systemic failure and are not remedied by an adequate response within the respective national system.

The Heidelberg proposal has provoked a rich discussion in legal circles debating the merits of such a proposal and arguing about the advantages and disadvantages of both judicial and political instruments available in the

⁸⁷ Armin Von Bogdandy et al. Reverse Solange-Protecting The Essence of Fundamental Rights Against EU Member States (2012) *Common Market Law Review*, vol. 49, Issue 2, 489.

⁸⁸ Case C-34/09, Ruiz Zambrano, judgement of 8 March 2011.

⁸⁹ Bogdandy et al. A Rescue Package for EU Fundamental Rights (n 70).

Union's law to deal with member states' violations of core EU constitutional values.⁹⁰ Several authors⁹¹ point to the limits of a purely legalistic approach, with its institutional constraints embedded in narrow and technical framing of broad political issues in the legalistic jargon, and, as a consequence, they defend the use of a political solution as provided in Article 7. But, with equally plausible arguments, other authors question the utility of an essentially political procedure of Article 7 and call it a "dead letter."⁹² While it is clear that both camps have their points and that both approaches have their own merits and problems and that all available legal and political mechanisms should be used in the Hungarian case, I argue that a *direct approach* provided by the Article 7 mechanism⁹³ still offers a better toolkit to address the breaches of fundamental values from Article 2 TEU. As mentioned, I will return to this question in Section 4.

As forcefully argued by Bogdandy⁹⁴, the lack of credible enforcement is not problematic only from the view of an EU citizen but it has a broader systemic connotation. If fundamental rights violations are not sanctioned, that has severe repercussions for the fundamental values of European integration, including also the principle of mutual confidence and the premise that the

⁹⁰ As Iris Canor argues, the Heidelberg proposal in effect suggests that the ECJ be granted the power to protect fundamental rights from violating member states »acting within the scope of their own autonomous sovereign power«. Although this is, legally speaking, a very important question, I will not discuss it in this paper. Iris Canor, My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"? (2013) *Common Market Law Review*, vol. 50, Issue 2, 384.

⁹¹ Wojciech Sadurski, Daniel Thym and Peter Lindseth have been skeptical about addressing fundamentally political problems through legal means. See debate *Rescue Package for Fundamental Rights*, on Verfassungsblog, available at: <http://www.verfassungsblog.de/en/category/schwerpunkte/rescue-english/#.UiITBEa2iM8>

⁹² Steven Greer, Andrew Williams, Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice? (2009) *European Law Journal*, vol. 15, no. 4., 474.

⁹³ Dawson and Muir distinguish between indirect judicial approaches and a direct political approach provided by Article 7 TEU, see Dawson, Muir, Enforcing Fundamental Values (n 72) 471.

⁹⁴ Bogdandy et al. A Rescue Package for EU Fundamental Rights (n 70).

Union can rely on the functioning of institutions of the Member States.⁹⁵ As we know, member states' institutions represent a crucial part of the political architecture of the European Union. Although usually not regulated by the "acquis", they execute the vast majority of European regulations and directives. It should come as no surprise that the daily life of European citizens heavily depends on the faithful execution of regulations, directives and other European rules by national administrations and other institutions. Therefore, if major institutions of liberal democracy in one member state radically deviate from the EU's member states' constitutional traditions, and undermine the rule of law, this is an issue that the EU needs to address directly. As Sadurski argues, if the EU does not resort to these measures now, no one will take them seriously in the future.⁹⁶ While the debate about which tool is better may continue, what matters at the moment is that Hungary's case is not left unaddressed.

4. The Politics of the EU Intervention: on the Limits of the European Political Constitution

In order to make the EU intervention into Hungary's largely "domestic affairs" legitimate, Müller argues that the EU needs, apart from existing Union law, also a principled and systematic way of thinking about the legitimacy of such interventions. As he forcefully argues, they have to rely on a broader concept of the EU, which is not only an economic union but also a political community of non-negotiable values.⁹⁷

⁹⁵ Ibid.

⁹⁶ Sadurski, Rescue Package for Fundamental Rights (n 58)

⁹⁷ Müller, Europe's Perfect Storm (n 3) 53.

Müller employs here a powerful historical argument to support his claims. He basically argues that it can be shown that post-war Europe opted, as a reaction to the political catastrophes of a mid-century Europe, for a "Madisonian model" of democracy. This model, defined by Loewenstein, of so called "militant democracy"⁹⁸ is based on a series of constitutional innovations aimed at providing a new balance of democracy and liberalism, "but with both liberalism and democracy redefined in the light of the totalitarian experience of mid twentieth century Europe."⁹⁹ The essential elements of this new concept of "militant" or "constraining" democracy were new unelected institutions with explicitly delegated powers to monitor the "excesses" of parliamentary democracy. The most notable example was a constitutional court with the extensive powers to review the constitutionality of acts of the parliament. The ethos of this new constitutional order was a distrust of unrestricted parliamentary sovereignty. European integration, Müller argues, was part of this new constitutional model with its inbuilt distrust of popular sovereignty and the delegation of powers to independent bodies.¹⁰⁰

So, the argument goes, if the EU is more than just a single market, then it is essential that it protects its distinctive model of democracy. In this sense, the values from Article 2 TEU and the procedure provided in Article 7 express

⁹⁸ The concept of a militant democracy has a more specific German component. On this, see Jan Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007) 15-45. I would like to thank Marco Dani for making this point.

⁹⁹ Müller, *Contesting Democracy* (n 26) 129.

¹⁰⁰ Even though largely sympathetic towards Müller's argument, I think that it is only partially correct. The model of »constrained« democracy was not applied to the EU with the same purpose as to the nation-state. In the former case, the main aim of constraint was to limit the discretion of economic policy making without simultaneously precluding other forms of democratic policymaking at a member state level. For a similar critique of Müller, see Jan Komarek, The EU is More Than a Constraint on Populist Democracy, Verfassungsblog, 25.3.2013, available at: <http://www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/#.UX06Iq02g5s>; and Perry Anderson, After the Event, *New Left Review*, vo.73, Jan/Feb 2012, 54.

obligations of Member States “as members of the Union”, as famously argued by Advocate General Poiares Maduro in the *Europa* case.¹⁰¹ In that sense, the values and procedures from Articles 2 and 7 are more than just a political declaration left to the political discretion of the member states to decide.

Nevertheless, the political reality surrounding the use of the mechanism provided in Article 7 highlights important political limits of that mechanism. As mentioned earlier, before the Hungarian case, it was only during the Haider affair in 2000 when the use of sanctions was contemplated by the EU political leaders. Although such moves were unprecedented in EU history, what is more interesting is that there was a strong split between the center-left and center-right parties in the European Parliament concerning the legitimacy of the Austrian government. Thus, the only way for the EU Council to adopt these measures was to bypass the Parliament and the Commission. The EU Presidency of the Council thus issued the declaration without consulting the two institutions representing the Union’s interests. Another flaw of the Declaration was that the sanctions were imposed despite any explicit violation of EU rules by the Austrian coalition government. No surprise then that without using an appropriate legal basis and without support of the two key EU institutions, the sanctions were doomed to fail. In fact, they were lifted only a few months later. The same split in the equally divided EU Parliament similarly prevented the resort to Article 7 in the Hungarian case.¹⁰²

In order to redress this deeply problematic political economy of Article 7, Müller suggests some important changes of the Article 7 mechanism. As a last

¹⁰¹ Opinion in Case C-380/05, (2008) ECR I-349, para. 20.

¹⁰² On the other hand, the European Parliament passed the Tavares Report with a surprisingly strong vote: 370 MEP votes in favor, 248 against and 82 abstained. As Scheppel argues, the left alone couldn’t account for all of those votes. See Scheppel, *In Praise of the Tavares Report* (n 61).

resort, he proposes the expulsion of a member state from the EU. Such a sanction would apply only when “democracy is not just slowly undermined or partially dismantled, but where the entire edifice of democratic institutions is blown up or comes crashing down, so to speak.”¹⁰³ As we know, EU law at the moment does not envisage expulsion of a member state. Here I agree with Müller that the EU, as a political community, has outer and inner boundaries. Adding the most extreme sanction, expulsion, to the existing EU toolkit helps to define more clearly the boundaries of the EU. In other words, there is no place in the EU for a country where “liberal democracy and the rule of law cease to function”.¹⁰⁴

Furthermore, Müller suggests a system of gradated sanctions (cutting EU cohesion funds or imposing significant fines) where in the first instance, the EU Commission, upon the proposal of the Copenhagen Commission, would be able to trigger some of them without the consent of member states, but possibly in cooperation with the European Parliament.¹⁰⁵ The first part of the latter proposal seems reasonable, since it removes the major obstacle in the current mechanism as provided in Article 7, the need of majority in the Council to approve such measures. At the same time, the requirement that the Commission must cooperate with the EP would strongly legitimize such a move. The second part, envisioning sanctions different from those envisaged in Article 7, is also a good idea. One of the problems of the Article 7 mechanism is that leaves only a “nuclear option” to the Council, i.e. a suspension of voting rights. If other, primarily financial sanctions, are added, it is more likely that the Article 7 system will become more effective. Needless to say, an amendment of the treaty to that purpose is required in all cases.

¹⁰³ Müller, *Safeguarding Democracy Inside the EU* (n 11) 23.

¹⁰⁴ *Ibid.* 26.

¹⁰⁵ Here Müller's proposal is not entirely clear on the role of the EU Parliament. I think that only assent of the EU Parliament would provide for a broad enough legitimacy for such a move.

However, it was Müller's proposal to establish a "Copenhagen Commission" as a new watchdog in charge of making "comprehensive and consistent political judgments" about violations of fundamental values in specific cases which received the greatest attention in academic and political circles¹⁰⁶. After the passage of the Tavares Report, which builds on Müller's idea, the establishment of such a body is not a remote academic "dream" anymore. In fact, Barroso, the Commission President, indicated his willingness to follow the Parliament's direction. The advantage of having a Copenhagen Commission instead of the existing Commission is, according to Müller, its credibility and non-political character. The main problem for Müller is the political composition of the Commission and its partisanship. A Copenhagen Commission, named after the Copenhagen criteria used to evaluate a prospective candidate country's democratic credentials before the accession process, would be analogous to the Council of Europe's Venice Commission, an expert body composed of eminent independent experts. But at the end of the day, it is the EU Commission which has to act, only upon the proposal (advice) of a Copenhagen Commission. Therefore, Komarek's critique of Müller's proposal, which suggests that the proposal "sends a message that it is not for the current EU to deal with situations as the one in Hungary or Romania"¹⁰⁷ misses the point. As we saw earlier, it is the EU Commission, which only after being advised by the Copenhagen Commission decides whether to cut the funds or impose fines on the member state in question.

I find Müller's proposals highly persuasive and credible. Their major advantage is that they make the Article 7 mechanism both more realistic and effective at the same time. As explained by Müller, "unlike with infringement

¹⁰⁶ See debate on Müller proposal on Verfassungsblog, available at <http://www.verfassungsblog.de/en/category/focus/hungary-taking-action/#.UX4sHEa2iM9>

¹⁰⁷ Komarek, The EU is More Than a Constraint on Populist Democracy (n 101).

proceedings initiated by the European Commission, where the charges might fail truly to take account of the treats to the rule of law and democracy, such an approach allows a direct engagement with a member state's violations of European norms, as expressed in individual rights for European citizens.”¹⁰⁸ In other words, a legalistic response to an “essentially political challenge” would not suffice. As Müller makes clear, his proposal aims to strengthen and complement the essentially political mechanism of Article 7 TEU. While the Copenhagen Commission to a certain extent depoliticizes a legal-political judgement about violations of fundamental values, it still leaves key decisions in the hands of an essentially political body, i.e., the Commission. As a prime example of insufficiency of indirect legal responses Müller mentions the Commission infringement procedure against Hungary for age discrimination instead of directly addressing the real threat, i.e. a systematic undermining of the independence of the judiciary.¹⁰⁹

De Witte and Dani criticize Müller’s proposal as too “punitive” and too “technocratic”. While de Witte disagrees with Müller’s assumptions behind his institutional proposal, he finds the Copenhagen Commission as a good starting point for a less constraining and more politically inclusive procedure, “as long as its structure is not aimed at de-politicizing such issues, but rather re-politicizing them”.¹¹⁰ For that purpose, he proposes a two-pronged procedure, “a combination of legal impartiality and political authority”, where the legal part would lead, upon the binding proposal of the Copenhagen Commission, automatically to the infringement procedure with the Court using a “Copenhagen Charter”, defining the minimum

¹⁰⁸ Müller, Safeguarding Democracy Inside the EU (n 11) 20-21.

¹⁰⁹ For a similar critique, see Dawson, Muir, Enforcing Fundamental Values (n 72) 472-473.

¹¹⁰ Floris De Witte, Less Constraint of Popular Democracy, More Empowerment of Citizens, Verfassungsblog (2013), available at: <http://www.verfassungsblog.de/en/less-constraint-of-popular-democracy-more-empowerment-of-citizens/#.UX5E80a2iM8>

requirements for a functioning pluralist democracy, as a new legal standard for assessing possible violations.¹¹¹ The political party would automatically lead to a public vote in the European Council and the European Parliament, which could then impose the financial sanctions as suggested by Müller. Dani, similarly, is concerned with too much “technocratic depoliticization” in current EU “post-political vision” and accordingly skeptical about the Copenhagen Commission.¹¹² He proposes, instead, a different amendment of Article 7 TEU. He proposes the use of European citizens’ initiative from Article 11.4 TEU as a new trigger to start the Article 7 procedure. In this case, “a sufficient number of European citizens, coming from a minimum number of member states, could propose to the Commission the opening of an enforcement procedure”.¹¹³ I think that both de Witte and Dani offer valuable improvements to Müller’s “model”, but unlike both authors, I do not see why such proposals could not be accommodated within Müller’s original model.

An alternative approach, seeking to learn from the past mistakes, would try to respond directly to the main flaw of the EU response to the Haider affair which sanctioned Austria only for Haider’s words and not acts.¹¹⁴ Despite his regrettable apologism for Nazism and his unwillingness to get distanced clearly from fascist heritage, there was no track record of any concrete violations of human rights in Austria at that time.¹¹⁵ As several authors have

¹¹¹ Ibid.

¹¹² Marco Dani, Opening the enforcement of EU fundamental values to European citizens, Verfassungsblog (2013) , available at <http://www.verfassungsblog.de/de/ungarn-was-tun-marco-dani/#.UX5EXEa2iM8>

¹¹³ Ibid.

¹¹⁴ In their statements, the EU leaders condemned Haider’s »naked appeal to xenophobia« (Cook), and argued that FPO does not share the Eu »shared values« (Schroeder), and »essential values of the European family« (Gutteres). See Michael Merlingen, Cass Mudde, Ulrich Sedelmeier, The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria (2001) *Journal of Common Market Studies*, vol. 39, no. 1, 65.

Even though their statements were not far from the truth, they did not mention a single example of concrete violations of such core EU values.

¹¹⁵ This was also a major conclusion of the »Three Wise Man Report« in September 2000 which prompted lifting of the sanctions against Austria. See Cecile Leconte, The Fragility of the EU as

argued, in such cases the EU first and foremost needs to stick to clear standards allowing fair and objective evaluation of the country in question. Second, in such cases the EU should look for “a clear case of a breach” consisting not only of individual, sporadic measures but from a well-documented “track record” of such violations. Here, the EU could also rely on the Commission’s Communication from 2003 explicitly defining “the conditions” for application of Article 7.¹¹⁶

There are two important points in this Communication which help to set clear standards for future application of Article 7. First, the Communication clearly indicates that what is at stake are not only separate violations of Union’s law but a breach of the “very foundations of the Union”. And second, the Commission emphasizes that such a breach must be serious and persistent, going beyond “isolated violations of human rights”, resulting in a “systematic problem”.¹¹⁷ Furthermore, attempting to clarify a clear risk of a serious breach, the Commission argued that “purely contingent risks” should be excluded. Here the Commission used the example of legislation adopted in wartime abolishing procedural guarantees. This example drew heavy criticism from other EU institutions.¹¹⁸ But more important are further clarifications dealing with seriousness of the breach: both purpose and effect of such acts have to be taken into consideration. As far as the second prong of this test is concerned, the Commission argues that a breach must in its effect have implications for one or more of the fundamental values from Article 2. As I argue in Sections 2 and 3, the Hungarian case represents a clear violation

¹¹⁶ ‘Community of Values’: Lessons from the Haider Affair (2005) *West European Politics*, vol. 28, no.3, 640.

¹¹⁷ EU Commission, Commission Communication to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on Which the Union is Based, COM (2003) 606 final (Oct, 15, 2003)

¹¹⁸ Ibid.

¹¹⁸ The major objection to such example was that a higher standard of protection of fundamental rights is needed. Sadurski, Adding Bite to a Bark (n 5) 416.

of these standards and in that respect cannot be compared to the Austrian case. Hence, the EU institutions should not have a problem with identifying clear standards and sticking to these standards when evaluating Hungary's violations of Article 2 TEU.

The next important issue that needs to be considered is under which political conditions are such outside interventions most likely to succeed. Here it is useful to be reminded about a political delicacy of such "external" interventions. More recent literature on development of modern liberal and accountable government is up to the point. As Fukuyama and Birdsall argue, effective institutions have to evolve indigenously: "Institutions such as the rule of law will rarely work if they are simply copied from abroad, societies must buy into their content."¹¹⁹ Hence, before resorting to such an intervention, the EU institutions should pay attention to the political situation in the country examined. This point is explained by Müller who argues that "as long as there is some reasonable hope that national politics will be self-correcting, outside intervention would be illegitimate. It could look like Brussels picking a winner in a domestic power struggle."¹²⁰ For example, Jenne and Mudde observe some positive developments within Hungarian

¹¹⁹ Nancy Birdsall, Francis Fukuyama, The Post-Washington Consensus: Development After the Crisis, *Foreign Affairs*, March/April 2011, vol. 90, no. 2., 52.

¹²⁰ Jan Werner Müller, Should Brussels resist Hungary's 'Putinization'? Or do EU member states have a 'democratic over-ride?', Open democracy, 30.12.2011, available at: <http://www.opendemocracy.net/jan-werner-mueller/should-brussels-resist-hungarys-%E2%80%98putinization%E2%80%99-or-do-eu-member-states-have-%E2%80%98democ> Müller uses the example of Berlusconi Italy as a case at point. While Berlusconi tried to remove checks and balances and to introduce the presidential regime, the opposition and judiciary remained strong. Therefore, Brussels was right in not intervening in Italy. Müller uses this example to stress another important aspect of Article 7 sanctions. As he argues, it is essential that they do not discriminate between small member states (Austria, Hungary) which are picked on, while nobody ever dared to touch powerful Member States, like Berlusconi's Italy, or even Sarkozy's France, in case of deportation of Roma. On the Roma issue see Alenka Kuhelj, Conflict between Declared Roma Minority Rights and European Practice: Why the Legal Framework Doesn't Work in Reality? (2013) *Loyola Of Los Angeles International &Comparative Law Review*, vol.36, issue 2, forthcoming; Mark Dawson, Elise Muir, Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma (2011) *Common Market Law Review*, vol. 48, Issue 3.

civil society, while acknowledging the political weakness of most of the opposition parties, except Jobbik, a far-right proto Fascist party which is gaining in popularity. They argue that the outside pressure must be accompanied by sufficient political resistance from below to contain the Fidesz government.¹²¹ Similarly, Uitz presents some important recent rulings of the Hungarian Constitutional Court signaling “the return” of the Hungarian Constitutional Court, once the most powerful court in the region.¹²² Unfortunately, this return is very likely to be very short lived. As I mentioned earlier, the “Fourth Amendment” to the Hungarian constitution prohibits the use of Court’s decisions rendered before the adoption of the new Constitution. Therefore, a precedent, the Court’s essential authority in deciding cases will no longer count.

While I basically agree with the point that the EU intervention should be a last resort, the situation in Hungary clearly indicates that the situation there is far from “self-correcting”. On the contrary, the Fidesz government seems to be determined to continue with the constitutional revolution. While the EU intervention so far brought some important changes in the Hungarian legislation, it is still very far from preventing Fidesz from continuing undermining the rule of law and checks and balances in the country.

The political context of the EU intervention in Hungary reveals another very important aspect of these actions. The EU and other international organization as well, are far more likely to exert pressures on a member state in cases dealing with economic and judicial issues that directly impact foreign interests. But, they are:

¹²¹ Jenne, Mudde (n 19)154.

¹²² Renáta Uitz, The Return of the Hungarian Constitutional Court, Verfassungsblog (2013), available at: <http://www.verfassungsblog.de/en/the-return-of-the-hungarian-constitutional-court/#UX5IrEa2iM8>

“far less confrontational over matters that undermine the internal functioning of democracy, such as curtailment of press freedoms, corruption in public administration, and the centralization of power in the hands of the ruling party- partly because of their over-riding interest in ensuring fiscal stability, but also because they have a limited mandate to intervene in political matters”.¹²³

While we are witnessing unprecedented encroachments of the sovereignty of the member states when the EU is dealing with fiscal matters, there is a great reluctance among the EU bodies for such vigilant approach in more sensitive social or political matters.¹²⁴ The EU has adopted a series of measures (Fiscal Compact, European Stability Mechanism, “Six Pack”) which cut directly through the most sensitive aspects of the member states sovereignty in fiscal matters. On the most symbolic level, Article 3 of the Fiscal Compact for example requires member states to change their constitutions with permanent provisions making balanced budgets and debt-brakes constitutional obligations impossible to reverse through ordinary legislation. While the mandate of the EU in fiscal matters is more entrenched than in political matters, the measures pushed the already existing provisions (Stability and Growth Pact) to the extremes not explicitly provided in the Union’s primary law. As Dawson and de Witte argue, the new measures challenge the “constitutional balance” of the EU.¹²⁵

This contrast between fiscal and social/political measures also reflects the limits of EU integration towards a stronger political union. While the spillover effect works quite strongly in the economic matters, it is far more

¹²³ Jenne, Mudde (n 19)151.

¹²⁴ Editorial Comments, Hungary’s new constitutional order and “European unity” (n 14) 878.

¹²⁵ Mark Dawson, Floris de Witte, Constitutional Balance in the EU After the Euro-Crisis (2013) *Modern Law Review*, vol.76, Issue 5, 817-844.

benign when the EU tries to protect its fundamental political values. This seems like a paradox, but it is not. There are two possible explanations for this discrepancy. According to the first one, the EU is so preoccupied with the most serious crisis since its inception, the Eurozone debt crisis, that other important issues are simply overshadowed by the looming collapse of the common currency.¹²⁶ But there is also a second, more structural explanation, that such a paradox simply reveals the underlying logic of European integration showing a limited possibility for development of a strong political union in Europe. As Moravcsik forcefully argues, the crisis shows that the EU is reaching a “natural plateau” based on a pragmatic division between national policy and supranational policy:

“The movement toward the “ever-closer union” of which the EU’s founding fathers dreamed when they signed the Treaty of Rome in 1957 will have to stop at some point; there will never be an all-encompassing European federal state.”¹²⁷

In a similar fashion, Weiler argues that in order to solve this crisis, the EU architects this time will not be able to rely on the decisional process of the Union itself:

“It will be national parliaments, national judiciaries, national media and, yes, national governments who will involve yet a higher degree of integration”.¹²⁸

This European “sonderweg”¹²⁹ will yet again affirm the “primacy of the national communities as the deepest source of legitimacy in the integration

¹²⁶ Müller, Europe’s Perfect Storm (n 3) 47; Rupnik, How Things Went Wrong (n 54) 137.

¹²⁷ Andrew Moravcsik, Europe After the Crisis: How to Sustain a Common Currency? *Foreign Affairs*, (May/June 2012) vol. 91, no. 3, 68.

¹²⁸ Weiler, In the Face of Crisis (n 10) 837.

process."¹³⁰ In other words, while trying to protect democracy and the rule of law within the EU, the European main political actors should respect the limits of the European political constitution. Otherwise, they risk undermining democracy and the rule of law inside the EU.

5. Conclusion

After the fall of the Berlin Wall and the collapse of communist regimes, many Central and East European countries successfully managed a 'return to Europe'. For many observers, the 'return to Europe' signaled the ultimate victory of democracy and rule of law over the legacy of totalitarianism in these countries.

In contrast to this optimistic view, history is not over and the rising illiberalism in Hungary as well as in some other CEE countries represents a major challenge to liberal democracy.¹³¹ All those who expected that a decade of 'EU accession' for CEE legal regimes would lead to an irreversible break with the totalitarian past were simply naive. They forgot that institutions of liberal democracy cannot be created overnight. It is not only that developing liberal democracy requires more time; it also depends on continuous support and endorsement by the people. The rise of illiberal authoritarianism in Hungary is reminiscent of the dramatic events in Europe's most horrible century. Even if the existence of the EU makes the danger of rising illiberalism less dramatic, there are still reasons to be worried about the authoritarian illiberal attacks on liberal democracy. As the Hungarian case shows, the EU has quite limited powers to effectively prevent the slide to authoritarianism. The irony is that conditionality, so powerful before the CEE countries joined the EU, loses much of its

¹²⁹ Joseph H. H Weiler, In defence of the status quo: Europe' constitutional *Sonderweg*, in Joseph H.H.Weiler, Marlene Wind (eds) *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 7.

¹³⁰ Weiler, In the Face of Crisis (n 10) 837.

¹³¹ Müller, Safeguarding Democracy Inside the EU (n 11) 5.

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teeth once countries become member states of the EU. Yet, the discussion of the EU instruments to contain such slides into illiberalism has also shown that they are not totally unimportant and that they can be further improved.

As I tried to argue, safeguarding democracy and the rule of law in the EU requires serious improvements in the legal toolkit currently available to deal with the slide to authoritarianism in Hungary. Several approaches, as discussed in the article, focus too much on sanctioning of a belligerent state. Ultimately, EU political actors must respect the limits of the EU political constitution and not attempt to go too far in their otherwise noble aim of protecting democracy in the EU.

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