



**MEMBER STATE VIOLATION AGAINST
DEMOCRATIC PRINCIPLES
- WHAT CAN THE EU DO?**

AZ EUROSZKEPTICIZMUS ARCAI



Budapest, 2015

Member state violation against democratic principles - What can the EU do?

Az euroszkepticizmus arcai

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Democracy is not a *fait accompli* project, and as we learned in the recent years not even older, Western democracies can overcome every social injustice which could cause political tensions. According to the recent diagnoses of the crisis of democracy, in the post-democratic state – Colin Crouch puts it – we can witness the depletion of democracy. It has no real substance anymore, but reduced to a bunch of mere procedural rules. The important decisions, which are affecting the lives of whole nations, are still made in dark backrooms; elected bodies have no real impact on them. As a result citizens tend to pull back to their own niches, searching for individual strategies. The decline of voters' turnout demonstrates this phenomenon. Furthermore, the growing quantity of digital data stored by private and public bodies makes the individual even more vulnerable.

In the light of the above mentioned trends it is no wonder that in the recent years transparency of decision-making and the means and modes of political participation are lying in the center of attention. Social movements, NGOs and emerging political parties are heavily criticizing and supervising the way authorities governing, making decisions and handling personal data. In Hungary as well elsewhere in Central and Eastern Europe we witness a double challenge. After the democratic turn in 1989 the civil society just started to unfold, European integration began, but at the same time the CEE countries faced with the same problems like Western-European countries (the weakening of political identification, the decline of state sovereignty, the growing power and influence of multinational companies). Moreover, paternalist state, the hierarchical social relations vis-à-vis the clients in the bureaucracy and the general servilism also hinder civil entrepreneurship.

While the perceived shortcomings of democracy in the member states of the EU make voters more exposed to anti-democratic populism, the EU has less means for intervention. We are in a vicious circle: if the EU acts on behalf of the general European principles, it will be accused of not respecting sovereignty and interfering without the consent of the people, which fuels populist politicians again. The papers in this volume addressing this problem, some from a rather subjective, others from a more objective perspective. Gábor Horn, the chairman of Republikon Foundation writes about combating illiberalism as a moral duty, while Nick Tyrone contemplates the moral and legal relativism by the “Putinistas of the world”. In his contribution Gerald Frost analyses the British-European relations and the role of referenda in the EU. The policy paper of Republikon Institute suggests that the EU and EU officials should be more visible agents on the national level. Finally, the paper by Krisztina Arató and András Varga assesses the legal and political aspects of safeguarding member state democracies.

I. HUNGARY, ILLIBERALISM AND THE EU – REFLECTIONS

Gábor Horn: It is my moral duty to protest against illiberalism

According to my thesis, the Europe of rights and values acts in a self-analogous way and does the best for our country if it acts against illiberal Hungarian governmental politics in a consistent and definite manner.

When a little more than a decade ago Hungary became a member of the European Union, it was followed by a more or less euphoric state of mind: both the people and the political mainstream felt that the process lasting since the transition has finally matured: we could become part of “the West” in both a formal and legal manner, the community is keeping us on the right track, protecting us from eventual missteps, and at the same time offering an opportunity to help form Europe from the inside. In addition, our country has received significant financial support – from taxes of wealthier countries’ citizens – for infrastructural developments.

The current Prime Minister of Hungary is known to be representing illiberal democracy. This was not a one-off bon-mot on his part, he based his whole politics on this notion. In Hungary – as is widely known by now – the Fidesz governmental party has destroyed the institutions of the rule of law, the limited democratic structure is interwoven with a bunch of elements which would have been unimaginable since the fall of communism. Public and higher education have been centralized and put to direct supervision (the former de jure, the latter de facto with officers monitoring the economic management of universities), violating the principle of separating state and church, churches arbitrarily chosen by the PM receive grants, while others are liquidated, thus violating the right to free practice of religion.

In Hungary, when somebody mentions the inviolability of the property, it makes people smile. Namely, the state has taken the people’s saved money from their private pension and burnt in setting the public debt, the state has taken land and property from agricultural workers via ad hoc laws or has expropriated land by building a fence on it at the Hungarian border. We can continue listing examples. Meanwhile, the governmental rhetoric – basically all the government activity – is always about the fight. Fight with the liberals, fight with the banks, fight with the European Union. This is the atmosphere to which a huge number of immigrants arrived to our country. And due to Orbán politics this is how they reached Schengen gate, at the Hungarian border: chased Europeans.

It can of course be asked why would have this regime shown a more sensitive or law-abiding attitude to foreigners in trouble, when for years it has been taking measures based on intolerance, leading to violation of individuals’ rights, municipalities’ rights and methodically aiming at ensuring state over-power for itself. The attitude towards the immigrants has simply strengthened and represented at an international level that the Hungarian government disregards the European Union’s Charter of Fundamental Rights, that it permanently and systematically ignores all the things that make the European Union a community of values. (All the while falsely communicating that it is merely protecting the Schengen borders. It has however been revealed that the immigrants continue to flock into the inner states of the European Union, without registration, merely avoiding the closed Serbian border.)

The question now is what the European Union should act in a situation like this, when it realizes that one of its member states methodically neglects *acquis communautaire* and the openly questions the supposedly common values. According to a phrase in Hungarian governmental communication, when

the European Union, on one of its institution's behalf or on the behalf of one of the EU's party fraction criticizes Hungary, they call it an "attack on Hungary". This stupid and infamous rhetoric seems to identify Viktor Orbán with our country and creates a false illusion of acting in the interest of Hungary, when in fact they are not. What is more, it is crystal clear that these criticisms are criticisms of the government and primarily in order to protect the citizens of Hungary, since those who formulate this criticism (righteously) believe that it is in the best interest of our citizens to have a government which shall abide by the politics and laws of the European Union.

There are people who argue against the criticism and warnings coming from the European Union, saying that it only enforces anti-EU feelings in the citizens and at the same time strengthens the government party and the extreme right, which is in many aspects identical to the previous. I consider this a cowardly and self-defeating argument.

On the one hand, if we believe that either in our country or in Europe citizens can be alienated from common values which have represented liberal democracy and unparalleled prosperity for the past 70 years, we have already lost the battle. On the other hand, it can be made understood even in Hungary that welfare and democracy go hand in hand: an illiberal democracy – as Francis Fukuyama has explained during his recent visit to Hungary – is bound to death in the medium term. Free market, predictable state operation, rule of law ensuring the rights of minorities and individuals against the majority: these are all inalienable conditions for making our country a western country, which it by all means wants to be.

I myself believe that any and all means which allow the European Union to put pressure on the Hungarian government are to be allowed, in order for it

not to violate the European legal order, not to pass laws which violate community rights or oppose the spirit of the Charter of Fundamental Rights. And exactly because there is a certain revival of Viktor Orbán's ideas in both leftist and rightist extremism, in the forums of Eurosceptics, the EU would protect itself too, if it demonstrated that it will not stand one member of the community governing as opposed to the community values.

The representatives of a democratic rule of law are in trouble in Hungary today: the opposition at home is fractional and weak, while the Prime Minister does not simply want an economic cooperation with Vladimir Putin, it is no secret that he is an admirer of the Russian president. (The absurdity of the Hungarian situation is well illustrated by the fact that the Hungarian National Television comments on the Syrian situation by transcribing texts from the Russian propaganda material.)

The Hungarian citizens' quality of life, freedom, legal certainty, and a liveable Hungary all depend on Hungary getting more help from the EU in its policy to curb Orbán's politics. This shall only have positive reception in Hungary if it is consistently communicated that these measures are against the Orbán government and that they shall be lifted immediately, as soon as Hungary has a government which follows the European Union's rule of law.

From a liberal standpoint: this kind of pressure is not only righteous but morally obligatory for all members who believe in free market and the values of democracy, and also in the principles formulated in the Charter of Fundamental Rights.

Nick Tyrone: Budapest in June – reflections on Hungary, Britain, liberal democracy and the European Union

In June of 2015, I was invited by Republikon Institute to Budapest to speak on a panel. The topic was based around the changing nature of the EU, which is a particularly relevant topic for those who are also from a country currently in the throes of its own European inspired existential crisis.

There is no doubt, that Hungary and its capital Budapest have changed a lot since Viktor Orbán started running the country. It should be understood not only in political sense, but that Budapest itself is now more westernized and (slightly) more expensive than it was at the end of the '90s when Viktor Orbán had his first term as the prime minister of Hungary. Later, back in the middle of the last decade, Orbán was in opposition and was fighting for his political life. Perhaps that partially created what he became post-2010 election: sometimes near-death in politics can make someone realise just how precious power is, and how easily it can slip away from you.

One can be curious to see just how repressive Budapest felt post-2010, since what can be read about Orbán's Hungary can often give the impression that it was on the verge of becoming almost as bad as some sort of central Asian, post-Soviet dictatorship. As a matter of fact, the hosts of the workshop, who were outspoken liberals, seemed not really to watch what they were saying, which is hardly imaginable in Azerbaijan for instance. Budapest is still an undoubtedly liberal place, as it was before 2010, when Viktor Orbán came into power with a two-thirds majority.

Nevertheless, this does not mean that the reign of Fidesz hasn't made its mark - or that its rhetoric isn't extremely dangerous. Aside from the glorious

weather in Budapest, the second thing which was remarkable for me was my co-panellist, Balázs Orbán. He has no relation to the prime minister of the country, despite him working for a think tank attached in some way to Fidesz. I was so glad that he spoke at the event. For had he not, my understanding of what is going on in Hungarian politics in the middle of 2015 would have been so much the worse for it. Namely it was the narrative of the Fidesz attached think tank, and the way in which it closely resembled Putin's way of talking about the world. In both in the Orbanist and the Putinist discourse, rule of law and human rights are only fuzzy concepts; things intellectuals have been trying to come to grips with for centuries with no luck. Everything was relative in other words, and one man's liberal democracy was another man's dictatorship. It is all completely subjective, according to this logic.

Human rights - where they should begin and end at least - is admittedly an area of some debate. Some on the Left in Britain think that welfare should be a human right, regardless of whether someone has ever worked a day in their lives, which is not a mainstream position in the UK. However, rule of law is so simple a concept I could explain it to a three-year-old. You have a set of laws, created and modified by a democratically elected parliament. Once enacted, they apply to everyone equally, including the lawmakers themselves. That's what rule of law means. It is in no way a hazy or subjective concept.

As an example, let me refer to my co-panellist, who tried to tell the assembled crowd that had gathered that for the event that China has a very different concept of rule of law than the west does. However, that's because China doesn't have rule of law; quite intentionally in fact. The Communist Party is in control of the country and all its resources and thus, by definition, that includes its entire people. So in other words, if someone calls a house a car that does not make it so. Some things in life are subjective and some simply are

not. If the laws can be bent by the most powerful within a system in an overt way, then that means rule of law does not exist within the system in question. The Putinistas of the world would probably reply with the following: don't the rich and powerful subvert the laws of their countries throughout the world, including within the western ones? This is the true genius of Putin or at least of whoever around him came up with this concept and convinced him it was a good idea: the notion of moral and legal relativism. The scheme is the following: Russia sneaks tanks into Ukraine, but how is that worse than the US invading Iraq, right? It has allowed Putin to infiltrate left-wing thinking in the west remarkably successfully. In fact, it's in countries like Hungary, countries which experienced Soviet repression first hand, where such a thing runs up against push back.

So if that is the case, why is Viktor Orbán still prime minister of Hungary? We live in times in which the predominant feeling, across pretty much the entirety of the human race, is fear. Everything feels like it's on shaky ground – people sense it is better to stick with the devil you know, regardless of the problems that presents. Change has become terrifying. In Britain, we saw that play out in the 2015 general election. Parts of the country where the Tories were thought to be fading saw an increased Conservative vote share. The unknown of an indecisive Ed Miliband being propped up by the Scottish National Party was enough to drive the voters (in England anyhow) into the arms of David Cameron ever further.

Looking finally at Hungary since I spoke there in June, we have since had the refugee crisis, one that was particularly acutely felt in that part of Europe. Orbán's reaction to the whole thing was appalling to me, and indeed I'm sure for all European liberals. His Islamophobia seemed like something most of us hoped seemed like something from some other bygone era – in Europe at

least. And no doubt it probably struck a chord with large sections of the Hungarian public, even if some of those in said sections might not necessarily say so out loud in public. Again, a large group of Syrians coming into the country all at once did almost certainly scare a lot of people, and Orbán's reactionary rhetoric was possibly soothing to many. It's like with Farage in the UK: even though most people talk about how awful he and his views are, 28% of the voting public cast a ballot for UKIP in the European parliamentary elections in 2014.

It seems therefore that the future of the European project and by extension, Europe itself is in trouble. It is controversial in the age we live in that even though fear is the predominant emotion, people still take the relative peace and prosperity we have in this continent for granted and thus tend to discount just how large a part the EU plays in all that. Despite fearing change enough to keep electing people like Viktor Orbán, in other words, Europeans seem to be willing to make the largest change imaginable, the disintegration of the entire European project, a genuine possibility.

Gerald Frost: The chimera of European reform

“That such an unnecessary and irrational project as building a European super state was ever embarked on will be seen in future years to be perhaps the greatest folly of the modern era. And that Britain, with her traditional strengths and global destiny, should ever have been part of it will appear a political error of historic magnitude. There is, though, still time to choose a different and a better course.” Margaret Thatcher

History records that when the Emperor Maximilian of Mexico went to the firing squad he was accompanied by his cook. As blindfolds were placed over the eyes of the two men and the execution squad raised their rifles, the cook was heard to say to Maximilian: “I told you it would come to this, but you wouldn’t listen.”

Whenever I reflect on the latest EU crisis – and I can’t remember a time when the EU wasn’t in a state of crisis – I feel rather like Maximilian’s cook, although I devoutly hope that I will not share his fate.

A large number of UK subjects, perhaps a majority, myself, have long felt that there was something not quite right about the EU; that something is the subject of this article. Nevertheless for more than 20 years mainstream British politicians have offered assurances that while the EU had its faults these could be dealt with through reform and it was therefore in Britain’s interests to remain a member. Reform was not only possible but inevitable because Britain was winning the argument. As a result, EU red tape would be cutback, the regulatory machine in Brussels would cease to run in overdrive, the bureaucracy would be slimmed, the principle of subsidiarity would ensure that where appropriate powers could be returned to nation states, a way would be

found to deal with the ‘democratic deficit’ the CAP would be reformed in a manner that would actually makes sense and not be desperately unfair to Third world food producers and absurdly over generous to large landowners like the Queen of England, corruption would be rooted out, finally an honest set of EU accounts would be prepared that was acceptable the Court of Auditors, and the formation new groupings would ensure that the lop-sided Franco-German partnership formalized by Treaty of Elysee would not always prevail. None of this has happened. Indeed, the direction of travel has been entirely in the other direction.

When as a journalist, a think-tanker or policy adviser I suggested that reforms listed above lay in the area of never- never land and had no prospect of success, I was informed that I was being unhelpful or dismissed as a Eurosceptic zealot. So when I contemplate the problems arising from indebtedness of Eurozone members or the huge challenge presented by the immigration, I feel a strong temptation to repeat the words of Maximilian’s cook.

For his part, however, the British Prime Minister Mr Cameron continues to assure the world that reform is possible, that he can succeed where others have failed, that Britain can be in Europe but not run by Europe, and that having achieved a negotiating triumph at Brussels the British public will back him in a referendum. I feel even less inclined to believe him than formerly. The obstacles to reform indeed formidable. I would include among them the hold that the idea of Europe, which is akin to an ideology, has on its supporters as well as their reluctance to admit that an enterprise into which such massive political and economic capital has been invested is demonstrably failing. I would also include the self-interest of the Brussels commissioners and the EU bureaucracy, the importance which should not be underestimated; as well French and German interests that it is believed can only be achieved indirectly through supranational institutions

These are formidable obstacles but the primary reason why meaningful reforms cannot take place has to do with what is by far the biggest flaw in the European project, namely the lack of democratic accountability. Were it not for this, the problems to which I have briefly alluded could be overcome because the voters would insist upon it. Eventually, the politicians would have taken notice. As the Israeli politician Abba Eban remarked, democratic politicians can always be relied upon to do the right thing – provided all other opportunities have been exhausted.

In passing, it is worth noting that the phrase “democratic deficit” is misleading in that it implies that what is absent can be corrected in much the same way as a bank deficit can be paid off – i.e. with extra effort or determination – but of course it can’t. It’s a fundamental design fault that we are talking about here and one which consequently cannot be corrected by piecemeal tinkering. For PR reasons, however, the Federalists prefer the phrase to more the more accurate phrase “post-democratic.”

As long ago as 1990, Ralph Dahrendorf, an EU Commissioner, observing this lack of democratic accountability said that if the membership criteria for applicants were applied to the EU itself, it would fail to be admitted. Things have got worse rather than better. It would find it even harder to meet those criteria today.

EU spokesmen may occasionally sound embarrassed about what they continue to call the “democratic deficit” – and even give the impression that they would like to do something about it. But their desire to do so is plainly subordinate to other wishes and imperatives which are inconsistent with democratic reform.

The truth of the matter representative government depends on the existence of a demos. This must necessarily include such things as a sense of common identity, shared allegiances and affinities, common legal norms and traditions, ideally a common language, a shared public space and shared historical experience. In the case of the EU, these things either don’t exist at all or enjoy only a ghostly or partial existence. In their absence, the attempt to build a new democratic state is doomed to fail; the history of Belgium, another artificial top-down construction, demonstrates as much. As Margaret Thatcher observed, individual nationalisms may have their faults but for the foreseeable future the nation state remains the only practical basis on which sound democratic institutions can be built.

The Lisbon Treaty took the process of political integration one step further by attempting to fill in some of the remaining building blocks needed in the construction of a unitary European state. But recall for a moment the origins of that Treaty. It was inspired by the Laeken Declaration which specifically expressed concern about the fact that many citizens felt that decisions being taken by the EU would be better taken by nation states or regions, that they wanted more democratic scrutiny and that some felt that the European project threatened their sense of identity. Let me quote:

Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union’s broad aims, but they do not always see a connection between those goals and the Union’s everyday action. They want the European institutions to be less unwieldy and rigid and, above all, more efficient and open. Many also feel that the Union should involve itself more with their particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States’ and regions’ elected representatives. This is even perceived by some as a threat to

their identity. More importantly, however, they feel that deals are all too often cut out of their sight and they want better democratic scrutiny.

Well, did the Laeken Declaration lead to more openness, greater democratic scrutiny and efficiency? The declaration called for greater democracy but the result was a further erosion of national sovereignties.

What we got was the Convention on the Future of Europe led by Giscard d'Estaing, which in common with EU institutions made up the rules as it went along. It resulted the Lisbon treaty, which is in effect a European Constitution even if out of regard for delicate British sensibilities it could not call that. In passing I cannot resist noting that as constitutions go this is one of the world's worst; it is badly written, far too long, sets impossible goals (such as a common European defence) and ignores an important aspects of reality; almost no one has read it.

The treaty involved some re-arranging of powers between the EU institutions but far from returning powers to nation states it effectively ended the ability of member states to control their own borders and it scrapped twice as many national vetoes as did the Maastricht treaty and five times as many as did the Single European Act. It also endowed the EU with legal personality so that it signs treaties – just like nation states, and it preserved the commitment to ever closer union.

When the Irish voted against the Treaty in 2008 they were told to go away and try again. This is democracy EU-style but it was nothing new. The Irish had been treated in the same way when they voted against the Nice Treaty in 2001, just as Denmark, had been told to think again when it voted against Maastricht and just as the people of France and the Netherlands were in-

structed after they voted against a European Constitution in 2005. It seems that the European electorate can vote any way it wishes, providing it comes up with the correct answer. Rather like the Italian World War II tank, which according to British schoolboys of my generation was said to possess only a reverse gear, the political travel of the EU is a one way affair, and attempts to divert from its present path are doomed to fail. Only an existential crisis which is perceived such, or the departure of an EU member that is seen subsequently to prosper, will force European's political leaders back to the drawing board. In other words, things are going to get worse before they get better. What of the British attempt to renegotiate the terms of membership and Mr Cameron's promise to hold a referendum on the outcome of what is offered in negotiation? This is a promise which it would be impossible for him to go back on, even if he would like to do so.

In fact I think that the referendum will actually take place ahead of the 2017 deadline which the British Prime Minister has set; this is because he would prefer that it should take place while his own parliamentary supporters remain grateful to him for winning the general election and preserving their parliamentary seats and before further possible turbulence in Europe resulting from the problems in Greece or the migrant crisis.

I would expect that during the course of negotiations he will be offered minor concessions by Mrs Merkel, the significance of which will be greatly exaggerated by Mr Cameron and which will probably not require treaty changes. History will consequently repeat itself; he will return from the negotiations claiming that he has obtained major concessions just as Harold Wilson claimed to have won major concessions in 1975 prior to a referendum which he won - only for the British to discover later that the concessions hadn't changed anything much at all.

It remains to be seen whether he permits members of his cabinet who are opposed to EU membership to campaign against a deal or whether it will be necessary for them to resign in order to do so. If the latter is the case I would expect only very few resignations – although it is possible that some junior ministers will quit. Mr Juncker said recently that he was quite sure Mr Cameron didn't want Britain to leave and saw the referendum as a means of binding Britain to the EU. Although this entails cynicism of a high order on Mr Cameron's part I see no reason to doubt this. If Mr Cameron had wanted to obtain real negotiating leverage he could have used Article 50 of the Lisbon Treaty which allows members to give notice of its intention to leave in the knowledge that this decision might be reversed if and when he obtained genuine reform. Instead, he is on record as saying that Britain would never leave. The outcome of the referendum campaign will depend to a crucial extent on whether the campaign centres on the details of the deal that is struck, and to what extent it centres on the more fundamental issue of membership. It will also depend on whether those seeking withdrawal are able to persuade the electorate that Britain would not be economically damaged or isolated by leaving the EU's political structures while remaining in the European Free Trade Area. In other words, the electorate grasps that it is possible to remain in the Single Market while leaving the political structures and ceasing to contribute \$10 billion to the EU budget annually the Eurosceptics are in with a chance.

Until recently I believed that the balance of probability was that that Mr Cameron would get the referendum result that he so clearly wants. The migrant crisis which led to circumstances in which democratically elected national leaders have again been overruled, however, may mean that the result will be closer than I had expected and may indeed result in a decision to leave. But even if Cameron is able to sell his deal to the electorate, I frankly doubt

whether it will be the end of the story, just as the result of the Scots referendum on independence has not settled the question of Scotland's membership of the United Kingdom.

If Britain decides to leave, think that this will close the issue for the foreseeable future, an outcome which for better or worse would allow the rest of Europe to continue with the process of integration for some years more. But if the vote is in favour of continued membership the causes of discontent are likely to remain, and I think are likely to grow as people increasingly resent the fact that more and more of our laws are made in Brussels, that national sovereignty no longer exists and that democratic accountability has substantially eroded.

Even those who are presently persuaded that it would not be in our economic interests to leave the EU, and who may consequently vote to remain, evidently feel distinctly uncomfortable with aspects of Europe's political culture, and regret the loss of important features of an Anglo-Saxon political culture which has given much to the world, but which is now in retreat.

Moreover, it is impossible to ignore the fact of an enduring legacy of bad feeling and guilt about the EU matters within the ranks of the ruling Conservative Party and especially among its supporters in the country, some whom have defected to UKIP. This because it was Conservative Party politicians who originally sold the EU to the British public on a false prospectus, presenting it as a limited commercial enterprise entailing no loss of sovereignty. Over recent decades there has been a growing awareness that some of those politicians were deceiving them, that of course there would be a loss of national sovereignty and that indeed is the whole point of the European project. The falsehoods told in promotion of the European integration have gone

far beyond the normal ambiguities and half-truths of political life and done more to lower the standards of public debate than any other factor. They have helped produce disaffection with the entire political process. A substantial number of voters feel tricked or even betrayed. If Britain votes to remain, it will consequently not be the end of the matter; it may well represent one of the final staging posts on the route to Britain's departure.

I do not know what the implications of a British exit are likely to be for the rest of Europe, although are bound to be far reaching and profound. Is it jingoistic to hope that the words of William Pitt delivered after British victories against an early architect of European unity – Napoleon – might prove apt? „England has saved itself by its exertions and will, I trust, save Europe by its example.”

We will see.

István Szent-Iványi: What, if anything, can the EU do with those who violate the norms?

The founding fathers of European integration were imbued with positive belief and optimism that the deepening of the process of European unity will lead to a strengthening and consolidation of community of values between the Member States. They thought that the deepening integration between the national economies shall induce the firm commitment of the European nations toward democratic values and the rule of law. They viewed this as a linear and irreversible process, they never even assumed this process should be encouraged and even less considered sanctioning those who are joining the integration on a voluntary basis. For a long time, this belief was supported by experience. Although some criticism was targeted at the founding countries, there were never any serious problems regarding commitment to democracy or European values in the early triumphant decades of the integration.

This belief was similar to that firm conviction that the integration itself is an irreversible process, consequently, until the Lisbon Treaty entered into force there was no valid legislation regarding eventual exit or exclusion from the integration. These options were altogether excluded and unimaginable by the otherwise extremely wise founding fathers.

What is more, this was more or less true not only for the founding core countries, but also for countries joining the integration until the mid-1990's. First time in its history, the EU faced the issue of taking human rights into account, obeying the rule of law and respecting European values, when the enlargement process called “opening of the EU towards the east” started in the 1990's to initiate EU accession talks with the countries of the former Soviet bloc. The first serious attempt at putting these issues on the agenda was in 1993,

when the European Council in Copenhagen laid down the five selection criteria, to be known as the Copenhagen criteria and ever since then playing a dominant role in the accession process. The importance of democracy, rule of law and community values is indicated in the fact that the first three out of five criteria envisages them exactly. An elaborated analysis system has been created during the accession process, the strict parameters of which need to be observed by all candidates. This study is not confined to the examination of the legal material, but puts great emphasis on the real practice and calls for accountability of the principle of Europeanness, even in areas where there is no European legal consensus (minority policy). Although call for accountability was not always strict and consequent, it can still be said that it had a great impact on consolidating the democratic system and institutions of the rule of law. With this measure, the EU managed to achieve the consolidation of the democratic system of the newly joined countries, which is to say, it managed to validate its will in a manner beyond the founding treaties but fully in its spirit.

The current problems have not therefore appeared due to deficiencies in preparedness and the accession process, but due to lack of a properly efficient sanctioning and control mechanism for the Member States already within the EU. The optimism lingered for a while in the sense that there is not going to be any problems with the commitment to democracy of the new Member States who went to the purgatory of the accession process. This optimistic expectation unfortunately has not been confirmed.

The experience of the last years shows that a few new Member States show the weakening of the commitment to democracy, a halt in or a reversal of the achieved level, the weakening or demolition of the rule of law institutions, and violation or straightforward rejection of common European values.

This mainly but not exclusively appears in the case of new Member States, although certain tendencies show there is a similar aptitude in other older Member States, too. My aim in this short discussion is not to scold or warn any of the Member States, but I also cannot hide the fact that my home country, Hungary, is most certainly among the above mentioned Member States. Politicians, experts and the general public who are worried about the future of the EU for years have been involved in finding solutions for dealing with Member States violating the norms and solutions for preserving the values of the EU. The whole history and structure of the EU so far was built on empathy, discernment and pursuit of compromises, this is why EU had difficulties in dealing with this problem. The EU institutions do not like the role of the gendarme, they do not like conflicts and they prefer aiming for compromises and agreements. Among well-intentioned parties this is an expedient and rational method, but what happens when one of the parties considers it a weakness and tries to abuse the EU's "soft power"? Many have sought the answer to this question in the recent years, but for the philosopher's stone is yet to be found.

First of all, we need to dispel the misconception that the EU does not have the means to deal with those who violate the norm. This simply is not true, as there are several means to it. The weakness lies in that these means are applied rarely and inconsistently and there is no unequivocal protocol regarding their application. One important means, which has been so far only rarely applied in issues of rule of law and democracy is the infringement procedure. This can be applied when a given Member States unambiguously violates one of the obligatory EU *acquis communautaire*. The end of the process is that the Member State modifies the criticized measure or they leave it to the European Court to decide, and its decision is binding. With reference to Hungary, there has been an infringement procedure in rule of law cases three times so

far, and in all three cases the government modified its standpoint so none of them reached the judiciary stage. As we can see, though rarely applied, it has a high success rate.

The final means is the so-called nuclear solution, Article 7 of the Treaty of Lisbon. This article allows for the suspension of the voting rights of a Member State who continuously breaches the European legislation and the values of the European Union on a system level, which basically counts as exclusion, since the given Member State is deprived of its most important right, the right to participate in joint decisions. This really is a strong measure, which is exactly the problem with it. On the one hand, the validation of the article requires a complicated procedure, which means there is not a lot of chance to execute it. On the other hand, its effect is brutal. It is not by chance that it has not yet been applied, what is more, the procedure has not once been initiated, despite the fact that there have been several proposals to do so, primarily from the European Parliament.

Others are in favour of financial consequences when a Member State violates the rule of law, in other words, they encourage withdrawing the financial support entirely or in part. There are two problems with this proposal: first of all, the current legislation does not allow for it, it can only be achieved by a treaty modification, which has no realistic chance whatsoever, and second of all, this only has a deterrent effect on those Member States which are large beneficiaries of the EU support policy. A fair sanctioning system needs to have disciplinary power regardless of economic performance.

In the current situation I consider the Democratic Governance Pact submitted by ALDE fraction the most expedient. This draft, reapplying the successful mechanisms of Stability and Growth, is based on five important pillars.

The primary basis for accountability is the Charter of Fundamental Rights (there is one small problem though, namely that the UK and the Czech Republic are not subject to this charter), which established the single European human rights legal regime. The draft encourages the EU to join the European Convention on Human Rights which would make the Member States accountable (who, by the way, are individually with different reservations all participants of the Convention, but the EU cannot hold them accountable for it). It also proposes a review of the infringement procedure and the procedure regarding Article 7 and their consistent application with regards to those who violate the norm. It recommends an annual certificate for the Member States with taking into account the most important criteria for rule of law, and finally, an introduction of a European democratic semester which would establish the framework for the political dialogue in dealing with conflicts like this. One of the big advantages of ALDE is that it does not require a modification of the Lisbon Treaty, it could be introduced tomorrow if there were a political will for it. There is also a disadvantage: this political will is yet to come. ALDE's suggestion has not even been put on the agenda, but neither has any other recommendation dealing with the issue in earnest.

There are however means which do not require any bureaucratic or legal regulation and could be efficient nevertheless. We can call it peer review and the main point is that the Member States committed to democracy and European values put a continuous and consistent pressure on Member States who violate the norm. They make it clear for the latter that they can count on the former group's support and solidarity only if they return to the values they adopted when they have accessed the Union. If this behaviour were adopted by a large majority of the Member States, its effect would probably be greater than the current sanctions applied inconsistently and in a complicated manner.

The EU has recently faced several challenges to its future - both from the inside and from the outside: the economic crisis in 2008, the Greek crisis since 2011, the Ukrainian conflict and now the immigrant crisis. In this difficult period, the EU shall only be able to provide answers to the challenges lying before it, if its cohesion and commitment to democracy and rule of law stay unquestioned and if it succeeds in managing the challenges from the inside. The liberals have optimism in their genes: we believe we can successfully overcome this hurdle, too.

II. WHAT CAN THE EU DO?

Republikon Institute: Future of EU – Human Rights – Fundamental Freedom: What role should the EU have if member states violate democratic principles?

Dilemma

The fundamental idea behind the establishment of the European Union came from the realization that a community of European nations could provide for the ideal means to develop more prosperous societies. The Constitution, the Treaties, and all relating Directives of the EU were put forth in the belief in democratic values and the conviction that democracy can reach its full potential through the joint effort of the member states towards common objectives in the name of their absolute support for the same values. That the diversity of the European Union with all its 28 member states is much rather a benefit than a hindrance is something that still stands on firm grounds when it comes to advocating for its values; however, with recent the developments of the economic crisis, the issue of the Greek debt, and now the escalation of the refugee crisis, many of even those who hitherto claimed themselves to be the avid supporters of the Union, now stand shaken in their beliefs. These developments have brought to the surface a number of comprehensive problems that the EU has always struggled with; now, however, the recognition of reasons for its support might be needed more than ever.

The roots of one of the fundamental problems of the EU can be found in the dilemma of the reconciliation of its values with the individual priorities of member states. The Copenhagen criteria, proposed by the European Commission more than two decades ago, serves to demand the existence of these fundamental values upon the accession of countries applying for member-

ship. It first and foremost stipulates for the stability of institutions responsible for sustaining democracy, a respect for the rule of law, human rights and the protection of minorities. The second criteria attends to a country's ability to handle competition and market forces in addition to being able to sustain a functioning market economy. The third condition prescribes the capacity for the implementation of the *acquis* as well as a commitment to the obligations that come with being a member.

The Copenhagen criteria, however, only go so far as to make sure the values set out by them, exist at the time of the accession; the attendance to these values becomes more difficult once a country has joined the community. The values provided for by the three general principles of the European Union, namely the principle of subsidiarity, the principle of proportionality and the principle of conferral, naturally become enhanced once a country becomes a member. Generally speaking, the principle of subsidiarity and the principle of proportionality are handled together, because they serve as a basis for ensuring a country's sovereignty along with specifying the capacities of the EU to intervene. The principle of subsidiarity primarily stands as a basis for determining the extent to which the EU can intervene in cases that fall under the division of competencies shared between the EU and the member states, outlining three criteria along which the EU is legitimized to act: whether national action (or the lack thereof) has a transnational effect, if it is compatible with the Treaty, and if EU intervention can be deemed advantageous. In strong correlation with the principle of subsidiarity, the principle of proportionality ensures that the EU does not act beyond the extent of what is necessary. The principle of conferral states that the EU shall act only within the boundaries of what is conferred upon it by the member states.

The difference between the two set of values laid down, on the one hand by the Copenhagen criteria and, on the other by the three general principles, makes for the underlying dilemma mentioned above – one that the EU is ever so often faced with, namely, the dilemma of how the priority of the fundamental values for the EU can be reconciled with the priority of sovereignty for a member state in case a breach occurs. This shows how once the value of sovereignty is included in the principles set out to define the capacities of the EU, a member state is relieved from significant pressure, as it is no longer so heavily subjected to a necessity to comply with EU demands. However, the reason for relief is not that the EU decides to undermine the priority of respecting fundamental values and subject it to the priority of respecting a country's sovereignty; it is primarily because there isn't a sufficient range of measures for the EU to put forth if it is concerned or even convinced that fundamental values are being breached.

For now, there are two options the EU can turn to in terms of sanctions: it either chooses to impose economic sanctions through an infringement procedure or the suspension of funds, or it decides to suspend certain rights of the member state concerned through the implementation of Article 7 of the Treaty of the European Union (TEU). Economic sanctions, however, are usually not the ones to respond to the violation of fundamental rights, and so they are mostly adopted to tackle problems of a more technical nature. Moreover, economic sanctions are likely to eventually more or less affect European tax-payers, which stands far from the idea of making decisions as close to the citizen as possible. They also provide a chance for a government to shift all responsibility for its violations to the EU.

This, consequently, leaves the EU with a relatively small framework on how it can transpose its own means in response to domestic violations of EU values,

including fundamental rights. Because of this limited scope of action, a member state, when tempted to act out in its own interest, is provided with not only the chance to denounce the EU for an interference in domestic affairs but also, knowing that there is such a limited space in terms of implementing restrictive measures, it, in fact, has an opportunity to explore how far the EU's tolerance goes when it is faced with the possible infringements that dubious domestic laws might cause to fundamental values. It is clear that as long as the EU cannot properly address the issue of not having less radical options to respond to the breach of fundamental values, member states will have a higher tendency to opt for acting out if they find it serves their political interests better, simply because there aren't worthwhile consequences for doing so. It is important to see, however, that even with an immense amount of efforts invested in it, extending the scale of possible sanctions will still remain within strict margins. It is not a surprise that all previous attempts and recommendations at widening the criteria as a basis for the implementation of Article 7 TEU basically exhausted the concept of "a wider range", which only further exacerbates the problem of never actually reaching the point of implementation. Additionally, despite the fact that such measures are triggered by and respond to the actions of a national government, they are not perceived as a criticism of that particular government so much as a step taken against the country as whole, which, in turn, can easily result in a more negative attitude towards the EU in general, in other words, it can fuel Euroscepticism.

This points to another relevant factor in the evolution of the general dilemma. Currently the communication of the EU can mostly be characterized by and perceived as one that is heavily imbued with bureaucratic jargon instead of being more direct and plain. In case of countries like Hungary, where governmental communication is often specifically aimed at deteriorating the prestige of the EU in order to enhance a patriotic or populist character instead,

this deficiency comes as one that impedes all other aims to protect even the little of what is left of the symbolic role of the EU, let alone its role as an authority of actual potential, which evidently leads back to the problem of how difficult it is to issue a defensive intervention for democratic principles and fundamental values.

In summary, there is the underlying dilemma of not being able to take measures without the potential threat to be denounced for interference, which is primarily caused by two unresolved issues in the EU: one is the lack of versatility in sanctions less radical than Article 7 TEU to be applied in case of a breach, while the other is the lack of a political aspect and directness when communicating with citizens. Therefore, another issue yet to be addressed by the EU is that, when it comes to the protection of fundamental values through various measures, no matter how wide of a range, the EU will have to find a way to implement them without impeding the promotion of its very own existence, that is, without increasing Euroscepticism. This makes for the part of the general dilemma insofar as it seems as if the EU either fails or ignores to see the importance of a more direct and primarily positive communicational involvement in the EU-affairs of a member state in order to make itself more perceptible for the citizens of that particular country.

Therefore, there are two directions that should have to be taken simultaneously to reach a full potential in defending fundamental values. On the one hand there should be efforts put into pulling away from the implementation of Article 7 as an only response and proposing less radical solutions instead; on the other hand, there also have to be steps taken towards a more positive and direct involvement in terms of communicating with EU citizens, instead of the use of incomprehensible bureaucratic language.

The dilemma and the issues it stems from have been pushed to the forefront of international discourse with the recent escalation of the refugee crisis, which was brought to Europe by the conflicts straining the Middle East for quite some time now. The problem of stressing the priority of sovereignty as opposed to emphasizing the priority of the shared values of the European community, closely followed by the criticism on the inability of the EU to act and sanction breaches, while perceived as distant and obstructive, all came to the surface in the form of heated debates on the EU's role altogether. The recent developments in Hungary, in particular, provide for quite an adequate illustration of all of the above.

Developments in Hungary

That there is serious concern on the part of the EU about the developments in Hungary in terms of the deterioration of fundamental rights, the rule of law and democratic values, comes as little surprise. So far, however, there have been only several cases where the criticism on the EU's inability to act when needed was, in fact, proven wrong. The Tavares report by Member of the European Parliament, Rui Tavares, on the situation of fundamental rights in Hungary, only fuelled criticism on how a possible action by the EU on the concerns outlined in the report would be an outrageous interference with domestic affairs; whereas, serious concerns on the amended media laws of 2013 caused the Hungarian government to adapt the recommendations of the European Commission to reset guarantees for violated media rights and provide the fundamental freedoms that the media is entitled to.

A current cause for serious concern about Hungary and one which confronts the EU with the tough challenge of the dilemma of possibly violating a country's sovereignty in an attempt to protect fundamental values came with the recent developments in the refugee crisis. In April, 2015, the Hungar-

ian government launched a national consultation with Hungarian citizens in the form of a questionnaire to call attention to what they called "a new type of threat" in the guise of "existential migration". In his argument for such a consultation, Prime Minister Viktor Orbán referred to the terrorist attacks at the Charlie Hebdo office in Paris as an eye-opening precedent that served as a showcase of the utter incompetency of the EU in addressing the problem of immigration. In June, as a following step in tackling their fight against illegal immigration, the government issued a poster campaign throughout the country with messages based on the presumption of a stark difference between immigrants and the Hungarian people, several of them warning immigrants (in Hungarian) that once they entered the country, they were obligated to respect the Hungarian law, other messages demanded respect for the Hungarian culture, while still others discouraged immigrants from taking the jobs of Hungarian people.

Although the national consultation and the billboard campaign both suggest that the massive inflow of migrants could not have found the Hungarian government completely unprepared, the sudden increase that culminated in early September with masses stuck at the Keleti railway station in Budapest and the Serbian-Hungarian border at Röszke, has confronted them with a situation they could not have clearly predicted either. Shortly after a communication from the German government and Chancellor Angela Merkel herself about how Germany welcomes registered asylum-seekers, there was a perceptible rise in the flow of immigrants towards Europe; Hungarian Prime Minister Viktor Orbán reiterated his statements on existential immigration, shifting all the responsibility for managing the escalation of the crisis to Germany, while also pressing on the necessity for the EU to physically close its borders in the name of protecting the Christian culture from the potential threat imposed on us by Islamic influence.

A step that finally triggered a reaction from the EU was the government's decision to amend its immigration law, police law, criminal law and National Defence Act simultaneously with physically sealing its borders with Serbia (also the external border of the EU) and declaring a state of emergency caused by mass immigration, in order to stem the growing influx of migrants arriving to the country seeking asylum mostly from Syria, Afghanistan and Pakistan. It ordered the construction of a four-meter-high, 175-kilometer-long razor-wire fence along the green border months before the new laws were enacted on the 15th of September. Even though it is not within the scope of this study to give a minutely detailed account on all the possible violations of all the amended laws, it does make attempt to call attention to the most concerning sections.

The government amended the criminal law in order to make illegal trespassing, hampering the construction of and damaging the fence a criminal offence punishable by prison or deportation. Amendments were made in the police law as well, authorizing police units to enter and search the premises of private-owned homes without a permit, in order to make sure that they do not harbour illegal immigrants. Parliament also voted for the deployment of National Defence at the border, expanding the army's scope of duties to assist the police in various tasks, such as identification of trespassers, border control, or detainment. The army is now also authorized to use rubber bullets, tear gas grenades and other non-lethal weapons; however, it is only allowed to use other coercive (although strictly non-lethal) weapons capable of causing serious physical injury in case there is an attack aimed at extinguishing human life and which is otherwise indefensible.

The new laws also make possible the deportation of those whose asylum requests are rejected, as Hungary had earlier claimed Serbia to be a safe third

country. However, such a decision from the government should include the amendment of the law in a way that the ability for the asylum seeker whose request was dismissed on the grounds of coming from a safe third country to challenge this concept if he/she finds the given country unsafe in his/her particular circumstances. The lack of this condition in the newly amended laws makes for one of the many of the potential violations of the EU's Asylum Procedures Directive.

Another serious cause for concern about the amendments to the immigration law is the non-distinguished status of immigrant children in criminal proceedings. Despite both the Charter of Fundamental Rights of the European Union and the Asylum Procedures Directive that emphasize the best interest of the child to be of utmost priority in all procedures, in its amendment of the immigration law the Hungarian government provided for the elimination of all special procedures for juveniles in connection with the criminal offences described earlier on, presumably because such special procedures would hamper the government's intention to push for swifter prosecutions. Under the new laws, decisions on both asylum requests and criminal offences go through accelerated procedures, which also explain why new regulations disqualify the necessity of the translation of indictments and decisions. This, however, is a clear violation of the EU directive on the right to interpretation and translation in criminal proceedings.

After the new laws took effect on September 15, immigrants were forced behind the fences to wait until they could enter assigned transit zones, where after registration the majority of their asylum requests were dismissed through accelerated procedures. Moreover, the new laws do not provide for an adequate framework of guarantees to challenge decisions, which also helps quickening the process of dismissal. The seemingly systematic rejection of

requests by Hungarian authorities seems to tie in with the Prime Minister's opinion on the importance to close the borders of the EU in order to save Europe from the quickly growing cultural threat the masses of immigrants impose on the continent, which he stressed on multiple occasions ever since the crisis hit Europe.

With the new laws officially in effect and after several clashes between riot police and immigrant groups at the border near the Röszke transit, refugees were forced to change their route in order to reach Austria, and consequently Germany, which led them towards the Croatian-Hungarian border. As a response, the Hungarian government ordered the construction of the same razor-wire fence along this border section as well, which was finished by the 15th of October, generating heated conflicts in Hungarian-Croatian diplomatic relations in addition to damaging Serbian-Croatian ties. As a result, immigrants are now redirecting their route towards the Hungarian-Slovenian border, where because of the legal incapacity to build a fence, the Hungarian government decided on the temporary reinstatement of border control.

With Hungary's decision to shift the responsibility to Germany and, in a wider a context, somewhat paradoxically, to the failure of the liberal ideal, while also shifting the responsibility directly to our neighbouring countries through physically closing our borders in the name of protecting the EU, a situation has evolved within the European Union, in which, a member state seems to undermine the fundamental value of solidarity (both solidarity with those coming from dire circumstances and solidarity with other member states) and the idea of compromise, by subjecting them to the value of sovereignty even in cases where there is a clear need to find a common solution by being a member of a community of nations.

To somehow address the issue of a lack of a wider scope of sanctions, in March, 2014 the European Commission issued a Communication on a new Framework to Strengthen the Rule of Law; however, the document only added a set of precursors to the possible implementation of Article 7 TEU, as if paving a wider path that leads up to the same radical sanctions measure. Nevertheless, the Commission also expressed its plan to aim for a structured dialogue with the member state concerned before deciding on implementing any sanctions. Therefore, the fact that the Commission did send a detailed letter to the Hungarian Ambassador at the Permanent Representation of Hungary to the EU, demanding that Hungary give account on the violations described above, meticulously enlisting all its legal concerns about the potential breach of EU values, stands as a good example of initiating a structured dialogue and seems to be a promising development in proving the EU's ability to act. In addition to the questions articulated in this letter, the Commission has also recently informed the President of the European Parliament, Martin Schulz, of an additional request that had been sent to the Hungarian authorities on the 19th of October asking for a reasoned response to be given in three days in connection with resetting border control at the Hungarian-Slovenian border.

Existing alternatives, potential solutions

In the light of the developments in Hungary in connection with the possible violations of fundamental values through the government's reaction to the refugee crisis, there are two projections of the dilemma described in the beginning. On the one hand, the government's intention behind the amendment of the laws raises causes for concern and enhances the problem of what happens when there is a political-ideological motivation behind dubious legal actions of a government. It is clear that the EU can only act on legal grounds, i.e. first there has to be an actual law that raises concern on the violation of rights. In the case of the amendments to the immigration law or the National

Defense Act in Hungary, the legal basis for concern is given, so much so that there is even probability for an actual measure to follow. What is important to realize, however, is that even if a legal response took place, it would not solve the problem of there being a questionable political intent behind the amendments. Naturally, the Prime Minister's speech this year at Kötöcs on the complete failure of multiculturalism, blaming the liberal ideal for infecting even conservatives all across Europe, while condemning the very same idea for its worthlessness, and his propagation of an "everyday nationalism" cannot make for a legal response on the part of the EU; however, there are unmistakable indications of the government's intention of using the refugee crisis as a means to politically position itself and the Prime Minister in accordance with an ideology it deems unassailable.

The other projection in connection with the dysfunctionality of the EU is the Hungarian government's decision to build the razor-wire fences. This brings two relevant aspects to the surface: firstly, the EU is now faced with what happens when a precedent of questionable actions by a member states to rule out itself from under the obligation of taking part in a common solution, might encourage other members to do the same. Secondly, this also sheds light on the urgency of finding a more comprehensible and permanent solution to the issue. And although the latter does not belong to the sole competence of the EU, it is also very clear that the option of ignoring it is not viable.

These aspects are precisely the ones that show how important it would be for the EU to be stronger. For example, if the EU's prestige as a capable decision-making authority were more perceptible, then the fact of warnings by the Commission, such as the letter they sent to our ambassador at the Permanent Representation, or even the initiation of hearings organized by the European Parliament to gain a clearer understanding in concerning issues, and any oth-

er criticism articulated in some form, might themselves be able to put enough pressure on governments.

In addition, less radical measures would have a higher chance to be voted for both in the Council and the Parliament than Article 7 TEU, thus their implementation could also set an example for governments and citizens alike of how the EU can actively function for the protection of its values, stepping beyond a role which, for now, is often considered to be no more than merely symbolic. Once a softer measure is proven to be effective, the tendency for it to be voted for again in another case increases, hence it might become more widely accepted. This can also result in a member state to grow less inclined to refer to the principle of subsidiarity or the violation of its sovereignty, because it realizes that the tolerance of other member states towards a certain sanctions mechanism is higher. It might instead lead towards a greater willingness to cooperate, which in turn, would strengthen the EU's role as an active player even in those alarming cases where the urge for action to be taken, albeit strong, seems, for the moment, sadly futile.

The proposal of Article 7, however, remains problematic for now, not only because, as described above, its application would quickly trigger higher levels of Euroscepticism, but also because depending on which political group suggests it on a European level, even the best intentions can easily backfire and give rise to difficult situations in the political affairs of the corresponding party or parties in the member state concerned. Hungary serves as an example in this respect as well; more precisely, the counter-productive effect on the Hungarian Liberal Party and Hungarian liberal organizations of the ALDE group's proposal on the application of Article 7 provides us with an adequate illustration.

In recent years, the state of liberalism in Hungary has become worrisome at best; the struggle to realize liberal ideals and promote the validity of the liberal mindset now seems increasingly difficult. Despite once being a self-proclaimed liberal, the Prime Minister and leader of the now conservative right-wing Fidesz party in Hungary, Viktor Orbán, has made several attempts to gradually undermine the idea of liberalism, especially so in the past few years, with his populist speeches on the promotion of an “illiberal democracy” to be realized in Hungary or on what he termed “liberal blah-blah” upon explaining how the mismanagement of the refugee crisis had led to the collapse of multiculturalism, which he also identified as the identity-crisis of liberalism in general.

In the event that Article 7 was implemented in Hungary upon the suggestion of the ALDE group of the European Parliament, Hungarian liberals would find themselves in a politically extremely uncomfortable and hardly resolvable situation: given that such a severe sanctioning measure would most probably induce Eurosceptic tendencies, it is easy to see how the suggestion of the liberal group of the European Parliament would reflect upon Hungarian liberals in the eyes of the Hungarian public, putting them into a situation where it is basically impossible to defend their own stance. In other words, the implementation of Article 7 would be much too radical a step for Hungarian liberals to defend, causing them to actually oppose European liberals, thus unintentionally justifying the Prime Minister’s words on the identity-crisis of liberalism. Given that negative attitudes towards liberalism have already set root in Hungary, in addition to an influential government-oriented communication system with a wide scope of effect, such a harsh measure from the outside would only add insult to injury, leading to opinions ranging from accusations against Hungarian liberals on applying double standards to full-fledged attacks on them as perpetrators of high treason. The Hungarian

Liberal Party, led by Gábor Fodor, did indeed object the proposal of ALDE, although their objection was chiefly derived from the fact that ALDE had misinterpreted the legal article on the right of the army to use lethal weapons against immigrants (which, in fact, does not legally stand as such).

Therefore, instead of the use of negative practices, such as severe sanctions mechanisms, but in conjunction with efforts invested in developing a wider range of sanctioning regulations, perhaps steps taken in the direction of enhancing the EU’s presence in the individual member states could make for another optimal defense mechanism for fundamental values.

The launch of a pro-European campaign, for instance, with many of its elements mimicking an actual political campaign, could serve as a sound basis for overcoming these difficulties. It is important for such a campaign to be financed and controlled from Brussels, as it would make sure that member states do not exploit these resources for their own political interests. On the other hand, what is a necessary and even beneficial distance in terms of financing should not be a distance at all in terms of communication and action: with the need to make the EU more perceptible comes the demand of bringing it closer to the citizen on the levels of both communication and political activities.

Launching a pro-European campaign is not the only tool to achieve these goals. For example, a more active political involvement on the part of the Head of the European Commission Representation in Hungary, currently Dr. Tamás Szűcs, is an idea worth considering. As a person who is directly familiar with the affairs of the country, he could be perceived as an official and credible source to legitimize concerns coming from the EU in the eyes of the Hungarian public. Moreover, a willingness to convey politically stronger opinions, for example through participating at protests against the violation

of human rights or democratic values in addition to actively communicating about it with the help of social media platforms, the image of an EU official who is greatly concerned with the situation of the rights of Hungarians would gradually evolve and make him an important promoter of the EU's role as well as a positive figure, who brings the EU closer to Hungarian citizens. Active involvement could also trigger citizens' associations of his remarks and actions to an actual person instead of a nameless and faceless figure speaking from the distance of the bureaucratic grey matter that Brussels is currently perceived as. Furthermore, the better perceptibility of his presence would also allow for the polarization of the Hungarian public opinion in cases when the government denounces the EU in an attempt to strengthen its own political position.

Another important element in the promotion of the EU's perceptibility could be realized with the more frequent participation of various EU politicians and EU officials at the initiation and closure of different projects funded by the EU, which through strengthening the role of the EU as a benefactor, would also function as an element in making the government less inclined to articulate criticism about the EU and have a difficult time taking the credit for the realization of different spectacular or humanitarian projects. In close relation to advocating such an activity, the EU should make the supervision of the funding of these projects stricter in order to eliminate the possibility of corruption and make sure that its resources aren't used for different purposes. In summary, as many issues and crises before, the current case of the refugee situation also points out that the dilemma facing the EU is a difficult one to resolve. With Article 7 of the TEU being the only measure to even attempt to resolve violations of fundamental values in addition to other issues, starting from the ability to easily disobey rules without consequences, through all the appeals to the inviolable right to sovereignty, up to the complete lack

of a citizen-focused communication strategy, a series of problems lie before the EU to be overcome in order to fully gain the role of a strong actor, who is capable of defending the values it stands for when it becomes necessary. However, these problems are not impossible to tackle; the European Union was brought to life out of a common realization of democratic values, the rule of law, human rights, fundamental freedoms, economic benefits all in service of helping European societies towards the realization of the ideals of democracy and prosperity.

If there was a properly conducted pro-European campaign in the spirit of directness and active involvement in addition to more perceivable activities by the head of the Representation, as well as the more frequent appearances of various European politicians, all in conjunction with the extension of a wider variety of sanctions procedures, the efforts to bring the EU as a whole closer to the citizen could help the European Union to grow into a relatively strong and prestigious institution that would no longer be an ignorable symbol; it would, instead finally be able to not only promote, but in fact defend the values that serve as the basis for what it was originally established for, that is, realizing a well-functioning democracy for the welfare of European citizens.

Republikon Institute: Future of EU – Human Rights – Fundamental Freedom: What role should the EU have if member states violate democratic principles?

Abstract

The aim of this paper is to assess the legal and political aspects of safeguarding member state democracies in the European Union. The paper proposes a new, pre-Art. 7 mechanism built on the monitoring of democracy and other basic values on the national level, to secure the respect of the Article 2 of TEU. To fulfil this requirement an early-warning system and continuous control process have to be elaborated and applied granting the necessary information and political bases to decision-makers for the initiation of Article 7.

Keywords: democracy, European Union, Art. 7. TEU

The European Union is a family of democratic states governed on the basis of the principle of rule of law and democracy. This notion has not always been laid down by the treaties since the 1951 treaty of Paris but was naturally understood as a basic value during the post-war history of European integration. In the 1960s and 1970s the common value of democracy was demonstrated by the facts that countries under authoritarian rule could not join the EC and the association agreement of Greece was suspended at the moment of the military coup in 1967. The 1990s brought about the inclusion of the principles of democracy in the treaties and the first decades of the new century produced several examples where full members of the European Union seem to have breached those principles.

The treaty gives a broad definition of democracy and establishes a rather general procedure in the famous (or infamous?) Article 7 potentially resulting in the suspension of certain rights of the member state in question deriving

from the application of the treaties. Since these consequences are very severe, article 7 is widely nicknamed as the „nuclear weapon” of the EU towards a member state allegedly in the process of non-democratization. Apart from the harshness of the punishment, several other questions arise. How can we tell that a member state reached a stage when democratic values are seriously breached? Who should state this and on what basis? Isn't that already a serious takeaway of national sovereignty? Is there a definition of democracy that can serve as a basis of comparison? What institution should make the decision about the suspension of membership? And – as this article is written for the European Liberal Foundation – how should European liberals relate to this?

The issue itself is so new that we do not even have the terminology for it. Commission Communication COM(2003) 606 circumscribes the problem in its title as „respect for and promotion of the values on which the Union is based”. COM (2014) 158 that deals with the same issue already narrows the subject as „a new EU Framework to strengthen the Rule of Law”. The not too wide scale social science literature addresses the issue as „safeguarding democracy in the EU” (Müller 2013) or uses the term „protection of values” (Budó 2014; Pinelli 2014). For social sciences and also for political communication purposes, a short and clear term should be identified. In our study we will refer to the subject as „safeguarding democracy”.

Our paper is organized as follows. In the first chapter we collect the history of the idea and the development of the legal basis of the EU safeguarding member state level democracy and give some examples where the problem occurred. In the second part we shortly summarize the problem of measuring democracy as a social science problem. In the third part the procedural issue is addressed: on the basis of the existing EU legal basis we give an example

how a pre-Article 7 procedure could be organized. In the fourth part we give our opinion how liberals should relate to the problem. We end our paper with indicating future prospects and challenges.

State of the art: history and examples of EU safeguarding democracy

The importance of democratic structures in member states or potential member states – while not explicitly stated in the founding treaties – have been considered throughout the history of the European Communities since its birth. While Art 237 of the original Treaty of Rome does not mention any other condition for membership than the country in question should be European, the Court of Justice of the European Communities interpreted this clause as „that state is a European state and if its constitution guarantees (...) the existence and continuance of a pluralistic democracy and (...) effective protection of human rights.¹ Also, when the association agreement of Greece had to be suspended because of the coup d'état in 1967, the Community stated that the agreement would be limited to matters of day-to-day management - in other words, the dismantling of tariffs as originally envisaged - until the democratic and parliamentary structures are restored in Greece. The Community's financial aid towards Greece was also suspended. (Commission 1978)

After the end of the Cold War when Central and Eastern European countries turned West and started their approach to the EU, the European Council decided on the application of a set of conditions for their accession. The so-called „Copenhagen criteria” – referring to the European Council meeting in Copenhagen in June 1993 – included several conditions for accession that created and „external-internal bifurcation” in the EU legal system, i.e. no equivalent criteria existed at the time for member states themselves. (Wil-

liams 2000) Thus, the idea that the EU should take on the explicit responsibility to safeguard democracy was born in a paradox: a requirement for externals, no rules for the member states.

The Copenhagen Council Presidency Conclusions included the following criteria:

„The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.

Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”²

1 Case 93/78 *Mattheus vs. Doego* (1978) Judgement of the Court 22 November 1978. Cited by Marktler (2006) 345.

2 European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993, SN 180/1/93) 12.

The idea of safeguarding democracy is embedded in the first, political criterion, including the „stability of institutions” heading: guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. However, the puzzle was, how to operationalize these concepts. Since there were no explicit definitions given, we can rely on the Commission regular reports prepared yearly on each candidate country in the accession period. On the basis of the analysis of these reports (carried out by Marktler 2006) we can list the following elements:

- elections are free and fair and in line with international standards and commitments on democratic elections;
- the national parliament continues to operate satisfactorily, its powers are respected and the opposition plays full part in its activities;
- any extraordinary legislative procedure which potentially mixes legislative and executive powers, such as legislating by executive ordinances, should be limited and well-justified;
- all stages of the legislative process, including the proposal of legislative amendments, should enjoy the highest degree of transparency, giving the public the opportunity to monitor this process in real time;
- a functioning executive: the Commission frequently criticized candidate countries for inadequate management, the lack of qualified personnel and low salaries in public administration;
- an independent civil service; a good executive is effective, professional, accountable, well-regulated and transparent;
- completely demilitarized executive, including the police, which should be composed of civilian public servants, serving the rule of law;
- judiciary should be independent, well-staffed, well-trained, well-paid, efficient, respected and accessible to citizens;

- effective fight against corruption;
- respect of human rights: civil and political rights, economic, social and cultural rights, and minority rights.

With the exception of minority rights, basically all the Copenhagen political criteria were incorporated in the Treaty of Amsterdam in 1997 in the form of naming them principles on which the EU is founded („liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”, Art. 6.). Also, in order to ensure the maintenance of these principles, the Treaty introduced a new procedure in Art. 7. – that later were called „lex Austria” because of the Haider case. In these provisions, in the case of serious breach of the principles the EU is built on, the Heads of State or Government acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may suspend the voting rights of the member state concerned while its obligations would continue to be binding.

The basic approach of this original procedure has been modified since. The Treaty of Nice – taking into account that in Austria in fact there was no serious breach of the rule of law and democracy but only the „possibility” of such change (Williams 2000:91) – introduced a preventive procedure as suggested by the report of the expert group Martti Ahtisaari, Jochen Frowein and Marcelino Oreha. (Report 2000:35) The current procedure and the relevant articles about the values that should be considered by member states are set in article 2; 4; and 7 of the Treaty of Lisbon.

Article 2

The 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.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

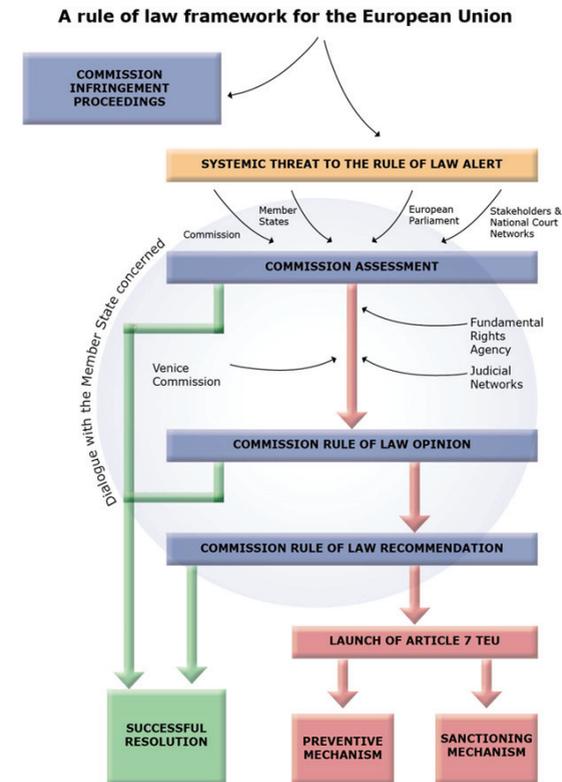
Article 2 renames what the Treaty of Amsterdam called „principles” to „values”. These values are further elaborated in the Charter of Fundamental Rights that has the same legal value as the Treaties. (Art.6.) A potential contradiction might stem from Article 4 that states that the European Union respect the identities and fundamental political and constitutional structures – we will return to this problem in Chapter 3.

Article 7 gives a detailed description on what happens if a member state (1) show a clear risk of breaching the common values or (2) definitely breaches the common values. In the first case, the Commission, the European Parliament and also one third of the member states in the Council may put forward a proposal. The Council holds a hearing and may determine on the existence of the risk of serious breach of the proposal. In the case of the existence of the breach, Art. 2, one third of the member states may come up with such a proposal (not the Parliament, it may only give its consent) and the Council acting with qualified majority may suspend the voting rights of the member state in question. This procedure, especially if applied, is generally considered as a major humiliation for the member state concerned; it is taken as too harsh, just too much and also potentially counterproductive: sanctions may even push that country and also their citizens away from common values and the EU itself.

However, before this „nuclear weapon” is triggered, there are other tools available: the infringement procedure, the Commission proposal for a pre-emptive procedure, the activities of the Fundamental Rights Agency of the EU and also co-operation with the international organization specializing on human rights protection in Europe: the Council of Europe.

First, if a possible infringement of EU law is identified by the Commission or reported in a complaint, the Commission (after attempts to quickly resolve the underlying problem with the Member State concerned by means of a structured dialogue), under Art. 258 there is a possibility to launch a formal infringement procedure that, in case the member state and the Commission is unable to resolve the problem, may lead to a litigation procedure at the Court of Justice of the European Union. The infringement process,

however, may be applied in clear-cut cases of breaching of EU law – and not EU principles or values. This dichotomy occurred e.g. in the case of Hungary, where, although there were several alleged problems about the functioning of democracy compiled in the Tavares report of the European Parliament (REPORT 25 June 2013 PE) those could be dealt with within an infringement procedure where there was a clear-cut legal basis.³



1. Chart: A rule of law framework for the European Union⁴

3 European Commission - Press release. European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary. Strasbourg, 17 January 2012. http://europa.eu/rapid/press-release_IP-12-24_en.htm

4 European Commission presents a framework to safeguard the rule of law in the European Union. European Commission. Press release Strasbourg, 11 March 2014. http://europa.eu/rapid/press-release_IP-14-237_hu.htm

Second, in March 2014 the European Commission in its Communication COM(2014) 158 proposed a framework to strengthen the rule of law in member states. The Communication acknowledges that the procedures set in Art. 7 of TEU need to be preceded by a mechanism that may contribute to the resolution of systematic democracy and rule of law problems in member states. The Communication discusses the background, the legal and the political bases and also the procedures of the framework (see Chart 1.). Two major problems occur with the proposed framework. First, it seems to seriously narrow the principles set in Art. 2 TEU: while the values of the EU are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, the framework considers only the member state practices of the rule of law. While the content of the original Copenhagen criteria - as discussed above - included a wide range of elements, the definition of the rule of law principle includes a limited list as follows (COM(2014) 158:4):

- legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
- legal certainty;
- prohibition of arbitrariness of the executive powers;
- independent and impartial courts;
- effective judicial review including
- respect for fundamental rights;
- equality before the law.

Second, the key player of the proposed framework is the Commission. While the Commission has several assets to carry out its tasks and the framework refers to co-operation with other bodies during the process proposed by the framework, it does not have one important characteristic necessary for this extremely sensitive political issue: input legitimacy. We will come back to this issue in chapter 3.

The third element of EU tools that may contribute to the prevention of the application of the „nuclear weapon” is the EU Fundamental Rights Agency (FRA). It was established by Council Regulation 168/2007 and based in Vienna and is partly useful actor for a potential procedure aiming the safeguarding of democracy and rule of law in member states. Article 2 of Regulation 168/2007 states that „the objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.” Thus, FRA has a limited mandate, its function can be identified as an information and advisory agency and its area of competence is limited to the application of EU law. Thus, we tend to agree with professor Pinelli, who says that FRA is an „opportunity lost” from the point of view of maintaining democracy in member states (Pinelli 2012:13); it has no right to report on developments in member states beyond the application of EU law and its statute does not refer to Art. 7 TEU. As a fourth element/player in a potentially effective mechanism in order to maintain democracy and rule of law in EU member states is an organization outside the EU: the Council of Europe. Established in 1949 and later becoming a key player of human rights protection in Europe, the Council of Europe has several tools to achieve its goals. First, Art. 8 of its statute establishes a procedure similar to Art 7. TEU; it states that

“Any member of the Council of Europe which has seriously violated Article 3 [according to which “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the Council as specified in Chapter I”] may be suspended from its rights of representation and requested by the

Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine”.

This Article was applied towards Greece in 1967. The Council of Europe has also other instruments for ex ante handling of serious breaches of rule of law and fundamental freedoms: in 1990, the European Commission for Democracy through Law (Venice Commission) was established to provide expertise to countries in the process of transition to democracy. Apart from this Committee, CoE has a set of pre-emptive methodologies that could create a common ground for the European Union to act together.

The reason for the creation of this wide set of legal provisions and soft tools in order to maintain member state democracies has been in the news every day for the last decade or more: we can bring several examples of democracy/human rights/rule of law problems in member states. Just to mention a few:

- The Haider case in Austria – After the 1999 elections the Freedom Party of Austria (FPÖ), considered as an extreme right party, became member of the governing coalition. The other fourteen member states of the European Union imposed sanctions of diplomatic and bilateral nature; they were intended to defend European values but not using European law. (Budó 3-4); Falkner (2001)
- Constitutional reform in Hungary – Hungarian party FIDESZ won national elections with a two-thirds majority and initiated a major constitutional reform, that also went together with the re-organization of several central state agencies, a new media law and the re-organization of the public media. (Arató-Koller 2015: 13) Apart from legal aspects,

several civil society and other issues were identified as problematic compared to the general European understanding of democracy and rule of law (Tavares Report 2013)

- In 2012 Victor Ponta became Prime Minister of Romania (Social Liberal Union, USL) with his political opponent Traian Basescu holding the position of president. A fight began between them that did not respect constitutional regulations about the Constitutional Court, the Ombudsman, the General Prosecutor, etc. (Budó 2014:5) (Müller 2013:6-8)
- Starting in summer 2010 under President Sarkozy the expulsion of Roma people from France back to Bulgaria and Romania started. Several declarations were made by Commissioners (e.g. Viviane Reding) that this act is discriminatory and also against the free movement directive (2004/38), still expulsions were maintained, even after Francois Hollande won the elections. The EU did not impose sanctions against a member state practice that is contrary to EU values. (Budó 2014:6-7)

But actually how can we tell that in a country there are problems with democracy and rule of law? Who says that? Compared to what? This is where the issue of the measurement of democracy has to be addressed.

Can democracy be measured?

In the post-WWI era two major factors contributed to the birth of a vast number of methodologies and surveys conducted all over the world for the measurement of democracies. First, the developed world spent billions of dollars/euros to aid democracies in transition in order to promote democracy and good governance. Whether the ways and methods of spending was effective and reached the desired effects, had to be measured. Second, the idea of democracy has become a kind of a „mantra” all over the world (Coppedge-Gerring 2011): since even non-democratic political systems tend to pretend

that in fact they are democratic, the desire to identify the concept, the features of democracies and thus the comparison of polities are there both in policy-making and also in social sciences. There are so many models and measurements that even a certain competition can be detected among the different models, methodologies and institutions that carry them out. Here we list only the most important ones:

- Freedom House⁵ as a government funded NGO in the USA annually publishes (among others) its Freedom in the World Report in which they identify the degree of democratic freedoms (democracy, political freedom and human rights) in nations and significant disputed territories around the world, by which it seeks to assess the current state of civil and political rights on a scale from 1 (most free) to 7 (least free). They apply a thin understanding of democracy, meaning that they mainly consider institutional and electoral features of democracy. (Ágh 2012)
- The Economist Intelligence Unit⁶ publishes its Democracy Index (on 167 countries) regularly since 2010 is based on 60 indicators grouped in five different categories measuring pluralism, civil liberties, and political culture. In addition to a numeric score and a ranking, the index categorizes countries as one of four regime types full democracies, flawed democracies, hybrid regimes and authoritarian regimes.
- The Bertelsmann Stiftung⁷, based in Germany, publishes two indexes that measure democracy. The Transformation Index (BTI) updates every two years) provides a ranking with quantitative scores for the performance of 128 developing and transition countries. The index measures the current state of democracy and market economy in a given country, its evolution over the past two years and the quality of governance. The

Sustainable Governance Indicators (SGI) – first published in 2009 - analyse and compare the need for reform in OECD member countries, as well as each country's ability to respond to current social and political challenges. The project is designed to create a comprehensive data pool on government-related activities in the countries considered the world's most developed free-market democracies. The SGI are updated every two or three years.

Apart from these systematic surveys on democracy, there are a number of universities and research institutes in the Europe / the European Union that focus on democracy research. The Arena, Centre for European Studies in Oslo, Norway, conducted a wide scale research project between 2007-2011 funded by the 6th Framework Programme for Research of the EU on democracy throughout Europe named RECON. The aim of the project was to identify strategies through which democracy can be strengthened and propose measures for rectifying institutional and constitutional defects in different policy areas.⁸ The Stockholm-based research institute, IDEA (International Institute for Democracy and Electoral Assistance, IDEA)⁹ is both a research and a policy institute with wide knowledge on democratic processes and they publish reports on democracy mainly about developing countries. The European University Institute¹⁰ (EUI) that is the „university of the EU” in Florence, Italy, doing wide scale research programmes and also Ph.D programmes, in the framework of its Robert Schuman Centre for Advanced Studies operates and „European Union Democratic Observatory (EUDO). EUDO does research and publishes policy papers on a wide range of issues connected to democracy in EU member states.

On the basis of the list above, we can see that in Europe there is vast social

5 www.freedomhouse.org

6 www.eiu.com

7 <http://www.bertelsmann-stiftung.de>

8 www.reconproject.eu

9 www.idea.int

10 www.eui.eu

science knowledge about the measurement of democracy. Probably neither of them is perfect – but we can safely say that most of them are good enough to identify major processes in democracies focusing on EU member states.

Potentials of a legal procedure of safeguarding democracy in the EU

In chapter one we saw that the sui generis political system of the European Union (that is a peculiar construction somewhere between an international organisation and a state) has been established on values like democracy, rule of law and the respect of human rights. It is also entitled by the founding treaties to contribute to the maintenance of these rights in its member states by certain procedures (Art. 7.) Its powers in this area have serious legal consequences – suspension of voting right in the Council. However, it is not yet defined, on exactly what basis the problematic nature of a MS democracy is defined; there is neither an established methodology nor an appointed institution to do that task. In chapter 2 we saw that since WWII various non-governmental organisations and also research institutions and universities produced a wide range of methodologies to rate and evaluate democracies. These ratings are supposed to make an effect through the public: they are published and political systems may learn from them if they wish. They have no legal effect whatsoever. The objective of the following chapter is to argue that the European Union should combine the two.

Legal and political obstacles

Before the outlining of a planned legal procedure to safeguard the democratic functioning of the member-states, different starting points have to be discussed. The creation of a control mechanism on the supranational level requires strong legal and political bases due the delicate status quo between European and national competencies. In the case of this mechanism these bases have to be even stronger because structuring the internal political sys-

tem belongs to the core sovereignty of the member-states. Consequently a serious legal mandate and political power is required to establish a feasible European action against its members in this field.

Two different groups of questions have to be faced with; one regarding the legal and another regarding the political background of the application of this kind of European ‘intervention.’ First the legal aspects have to be clarified; is it possible to create another mechanism in the European framework? The legal base of the safeguarding functions of the EU has derived from two sources. As it was previously described, being a voluntary cooperation among states, the European Union and its predecessors were free to elaborate the criteria for non-member countries to join their group. Considering the different cases of enlargements and other types cooperation between the EC/EU and 3rd countries, the EU had always demanded a democratic/constitutional political system from the candidate countries. The requirement of the democracy was developed into a legally binding customary law (Marktler 2006:345-346). In 1993 these criteria were formalized in the closing remarks of the European Council summit in Copenhagen, becoming official accession requirements.

The other source of the control mechanisms is coming from the binding force of the Charter of the Fundamental Rights of the European Union and Article 7 of the Treaty on European Union which are primary sources of European law. Although the customary and the written law are consequences of each other, the legal base of democracy control is supported by both. The planned legal process outlined below would be weaker than articles in the founding treaties but in our opinion a more applicable tool at the same time. Its legal bases can be proved by using the legal-dogmatic method of conclusion from major to minor. If the legal base of a more rigorous procedure has taken place, a less rigid one would be allowed as well. Consequently it is legally fea-

sible for the EU to create a complementary safeguarding mechanism without any further power transfer (Treaty reform) from the MSs' level towards the supranational one.

Regarding the political background of a new institution or mechanism to avoid the infringements against democracy, several problems have to be faced. As it was mentioned above, the application of the current procedure (described in Art. 7 TEU) met serious obstacles related to the legitimacy problems of the EU and the political will of the MSs. The general perception about consequences and results of the application of Article 7 is that it may be too strong and counterproductive. On the one hand, suspending the rights and actually the membership of any of the states would backfire to the trust and support towards the European Union and may strengthen the Eurosceptic and antidemocratic movements and political forces. On the other hand, due the lack of input legitimacy, the distance from the citizens and the democratic deficit of the EU, the European situation is significantly weaker than the MSs' one. These facts could be interpreted as the obstacles of the use of such tools. This difference in legitimacy and political position may be widely misused by the infringer countries claiming that the EU does not have the legitimate authority to interfere with national politics (Art. 4 TEU). Due to the fact the national political system and the constitutional framework belong to the exclusive competencies of the MSs, the national governments have so far opposed harshly these European actions. As it was pointed out above, the EU institutions seemed to accept this argumentation as well. However, the European Union should overcome these self-restrictions because it is mounted with the necessary authority as well as the legitimacy to act. The main argument of the infringer countries is usually that voters can choose what kind of institutional framework and political system they prefer and the European level has no right or competency to overwrite or review this decision. This

argumentation is problematic under several aspects. First, despite the truth of this statement, all of the member-states accepted, confirmed and applied the laws and rules of the European Union at the time of accession and at the IGC where the treaty reforms have taken place. There are not many common basic values the European integration is built on, but democracy is definitely one of them. Let any of the member-state undermine it, that would harm the whole European project. Second, the aim of the EU democracy control mechanism is not to overwrite or review the public will but defending the basic values of the integration. Being a voluntary cooperation, the members of the EU have decided freely upon the basic rules/values of the Union. The safeguarding processes are trying to maintain these values by excluding - by not letting in or expelling - those who do not subscribe to the common values/rules. The control mechanism let the people of the infringer country to choose their own maybe not democratic way, but it cannot be realized within the European Union. The safeguarding mechanisms are not interfering with the national sovereignty but defending the *acquis communautaire*. Third, the governments of the infringer countries are usually not elected by the voters to initiate antidemocratic changes and trigger undemocratic tendencies in the given MS; these are parallel effects or unintended (by the voters) consequences of governance. These symptoms have to be handled on the national level, but if it is failed there the EU has to act to save the integration as a whole from the systemic risk concerning the rule of law and democracy.

The application of a democracy-control mechanism is politically extremely sensitive and both the currently available and the below outlined mechanisms have to deal with this challenge. To face this problem, several elements were integrated in the proposed mechanism to increase its legitimacy and efficiency.

A framework for a procedure – before the initiation of article 7

Holding the authority and the right to act, the EU has to create a more appropriate framework for the safeguarding mechanism. As it was described above the process of Article 7 as a nuclear option does not fulfil its designated role. There is a current need for a complementary tool. This necessity was defined by the Commission as well and a new framework to safeguard the rule of law was drafted (COM(2014) 158). While it presents some acceptable innovations, there is some space to further development as well. This is why – considering the provisions of the current Treaty and also the Commission framework - we propose a new procedure for the conduct of safeguarding democracy in the European Union.

In the case of the elaboration of a control procedure three basic questions have to be answered; what are its steps and elements, when can they be activated and by who can initiate its application.

The complementary safeguarding mechanism suggested by this paper has similar aims as the Commission's one, but it would be applicable on a wider range. The EC's proposal and generally the EU institutions' suggestions on this field are related to a stricter concept of the rule of law.¹¹ However, an adequate control function should focus wider than the breaches of the rule of law, more on the threats and shortcomings of democracy on MS level. Due to the fact that the EU has currently the single 'nuclear' solution of Article 7, a less harsh tool has to be introduced. This procedure should be a pre-emptive process before the application of Article 7 but it also should create a continuous monitoring system for the MSs, functioning as an early-warning mechanism as well. If a regular control system was created regarding the state of democracy on the national level, the countries would be constrained to

respect the basic values because the initiation or the application of a safeguarding mechanism would not be a question of the political will but it would take place on the basis of regular monitoring reports that would include the changes of democracy within the MSs. This continuous MS scanning would give periodical data regarding the situation of democracy and other fundamental European values in the national political systems. This information would help to analyse of the developments and trends which makes easier to react in time and achieve a solution before the application of a harsher step against the infringer. Due to the permanent presence of the control mechanism it becomes customary which helps its acceptance.

If this regular early-warning system detected some irregularities, the cooperation would start between the EU institutions and the infringer country to avoid the initiation of the 'nuke'. In case of failure, also the political decision-making on 'pushing the red button' would be easier due to the authentic information (available for political leaders and also for the public) about the democratic trends in MS concerned. In this case, even the application of Article 7 would be less questionable, because each country is regularly controlled and evaluated by an elaborated system of standards. It would avoid the political counterattacks and backfires based on the arguments of double standards among the MSs or of national sovereignty.

The satisfactory performance of a procedure requires the presence of well-defined circumstances for its application. When would the safeguarding process take place? The Commission, in its framework to strengthen the rule of law links the initiation of the mechanism to the presence of a systemic threat to the rule of law. In our opinion, this definition is inadequate for the initiation of a procedure.

¹¹ The problems and challenges coming from this stricter interpretation are described in details in the last chapter.

The regular monitoring mechanism (the early-warning system) we propose would become a daily function of the EU. However, a system of standards has to be developed to enable a real functioning control mechanism. As it was described in chapter 2, the level of democracy is measurable using certain indicators. A vast number of methodologies are available to elaborate this control system and the EU must create its own to acquire and evaluate the required information and identify the national trends and developments regarding the fundamental values and democracy. We believe that – even is not a perfect, but – a good enough methodology can be established, based on which a „European Democracy Index” can be identified. By this index an integrated European system would be born (where a pre-defined scale would identify non-problematic democracies, democracies with slight problems and democracies under threat, in the latter Art 7 procedures could be considered) rendering easier to follow the regulation of Article 2 of TEU for the MSs as well.

The creation of an evaluation system like this requires professional skills and expertise. Due to the fact that neither the Commission, nor the EP is qualified enough for this task, an agency has to be appointed. Both the development of the indicators and the regular measurements should appertain among its competences. As it was described above, the monitoring of the MSs should be continuous and specific country reports have to be published periodically. This system would create a stable and permanent cooperation on the field of fundamental values vis-à-vis the EU and the MSs and between the MSs as well.

Through the creation of this exact and quantified system the arbitrariness can be absolutely excluded from the decision-making. Thanks for the regularity

11 The problems and challenges coming from this stricter interpretation are described in details in the last chapter.

of the monitoring and the lack of arbitrary characteristic also the base of the backfires and the political counterattacks by the infringer countries would be undermined. It would also increase the capacity of the EU to act against the breaches of democracy and other fundamental values. All of these aspects, at the end of the day, would create a more solid and more democratic political environment for the citizens.

The last question to answer regarding the control process of democracy is related to its main actors. As it was already partially mentioned there should be a professional permanent body and a politically responsible decision-maker. According to the Commission framework (COM(2014) 158), the new complementary mechanism would be under its own competencies. Although during the process several third actors would be involved but the main role would be played by the Commissioners. According to chapter 3.1, one of the main counterargument of the infringer countries against the application of the Article 7 is the lack of legitimacy and responsiveness of the EU. However the Commission’s framework would give the main role to itself, the less responsive and politically responsible supranational body of the integration.

A better solution can be achieved if the political decision would be placed to a responsible body, meanwhile the professional monitoring and control function would be given to an agency. To avoid the blame game and the legitimacy-based accusations from the MSs, the final decision has to be made by the supranational institution with the highest input legitimacy¹², the European Parliament. Stronger legitimacy would secure the political position of the decision-maker and at the same time secure the responsiveness towards the logic of politics required by the political sensitiveness of the field.

12 That form of legitimacy which is based on the government by the people; on their participation.

The main role of the EP in this safeguarding mechanism can be criticized from the same point of political logics. EP political groups generally defend their national member-parties in the case of a possible breach of the democracy or any other basic value of the EU. Due to the fact that in practice this supportive behaviour seems to be general, the exploration of the democracy situation in member states would be given to an agency that would have the necessary skills and expertise to conduct on-going research about the democracy situation in MSs.

The EP thus would be responsible only for the political decision on applying the appropriate phase of the safeguarding processes. At the same time, the monitoring of the MSs should be continuously exercised. However the EP would not be able to handle this control mechanism because its other daily roles and the fact that they do not hold the necessary skills and potentials to maintain this on-going control. To avoid these shortcomings these parts of the process would fall under the competences of the professional and politically irresponsible body, the European Union Fundamental Rights Agency. FRA was founded in 2007 as an independent agency for monitoring the application and possible violations of the fundamental rights in the MSs and EU during the application and execution of European law. As pointed out in Chapter 1, the regulation does not enable FRA to report on the member states; this, however, could be subject to change. We strongly believe - and this argument could also be used in the political debate about the potential amendment of Regulation 168/2007 - that providing a legal basis for conducting research (on a solid, open to the public theoretical and methodological basis) on the application of EU values according to Art. 2 TEU could not go contrary to the principles of any democratic government in the EU. It has to be noted that FRA would need more funding to conduct the proposed on-going research.

In summary, this paper proposes to create a complementary safeguarding mechanism, which would be composed by an early-warning mechanism based on a continuous monitoring exercised by the independent body of the EU (FRA), using its own methodology of measurement, granting the necessary information and giving alerts to the EP responsible for the decision regarding the initiation of the classical procedure of Article 7. This framework would dispose of both the professional skills and expertise and the political legitimacy needed to act in this field.

A potential liberal position

Another goal of the policy paper is to address the question what position European liberals should take regarding this issue. The liberal position has to be analysed on two different levels; on the ideological and the pragmatic one as well. The analysis tries to give an answer what happens if European liberals do and what if they do not champion the creation of the above described process.

On the ideological level the liberal support for the establishment and strengthening of the democracy control mechanisms on the European level would meet perfectly the fundamental values of liberalism. The whole theoretical school of liberalism is based on the individualistic anthropomorphic views of the world. The basic unit is the civic human being whose rights and freedoms have to be defended from the expansion of the state. The structure of fundamental rights and freedoms of the EU are corresponding to this view fully. The control mechanisms to build, both the framework proposed by the Commission and the other one elaborated by this paper are focusing on the fundamental values of liberalism, as rule of law, democracy, rights of minorities and other human rights. All of these are achievements of liberal thoughts. Consequently, the safeguarding processes are planned to defend liberal achievements.

Turning the argumentation reverse; what would happen if the European liberals did not foster the safeguarding mechanisms? If these control procedures are likely to defend liberal achievements, but the ALDE misses their support, who else is supposed to stand up for them? In other words; if the liberals are not committed enough to their own values defending them, why should anybody else do it? If the liberals are not supporting the liberal values, what differentiates them from conservatives and socialists, ideologies and parties? On the ideological level, the ALDE must champion the creation and the strengthening of the European safeguarding mechanisms of democracy.

On the pragmatic level the support for these new processes fits well into the interests of ALDE. According to the actual division of mandates among the MEPs, ALDE is the 4th biggest parliamentary group. The political position of the liberal group has been significantly weakened after the EP elections 2014. However, the elaboration of a complementary safeguarding mechanism which is likely to defend the group's basic values would help to get more space in communication and could be presented as a liberal success. Also, using these mechanisms liberal interests and values could be demanded on the MS level even in those countries which are not governed by ALDE member-parties or where liberal parties are weak. Fostering the creation of the above described tools, it would give new topics and voice-opportunities to the liberal group. Through these possibilities; following a campaign for and talking about the need for European control of democracy they can easier gain votes and retake their previous positions in the polity of the EU.

However, not supporting this project, the ALDE would miss an excellent voice-opportunity and it should find another topic to talk about. The lack of liberal advocacy for the plans strongly related their values would render their position incoherent which might bring about further decrease in public support.

Future prospects and challenges

In the paper above, while discussing several elements of safeguarding democracy of EU member states, several potential problems have been indicated, some further challenges have to be outlined. Giving the right answers for them does not fit into the aims of the current policy paper and requires a political solution.

Regarding the subject of the needed mechanism there is a conceptual chaos; there is not even an accepted and widely used term for the problem and treatment of potential breaches of EU values by member states We do not have a term because we are uncertain about the concept: are we talking about 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 as Art 2 says or just the rule of law as the Commission Communication indicates?

There are several political threats in their application. Although this policy paper shares the view that European political parties would not defend any of their members in case of a serious breach of democratic principles, what is the guarantee for this? Is the quantified and regular measuring process enough to avoid these kind of arbitrary behaviour dominated by the party logics?

The proposals of the Commission and other EU institutions are generally focused only on the principle of rule of law. Furthermore their conceptual interpretation is even stricter than usual; most of the EC drafts are underlining only the well-functioning of the judicial branch. If a judicial system is politically driven then the breach of the fundamental values of the EU is so relevant that immediately the procedure of Article 7 has to be taken place. Meanwhile when the judicial branch is well-functioning, antidemocratic tendencies could be shown up in the executive and the legislative. However

those mechanisms dominated by the technocratic aspects of the Commission would not be able to face these challenges.

Institutional problems might occur if our proposal is seriously considered: the Commission will not be happy to share their role with the European Parliament. Moreover, member states might object the extension of the scope of FRA competencies. The Council of Europe might consider a procedure proposed in Chapter 3 as competitive with their own activities. However, we believe that clever inter-institutional bargains (potential co-operation) might be proposed if the proposal is considered seriously.

Finally, we should answer the question put in the title: For liberals: an obligation and an opportunity as well: is the serious representation of safeguarding democracy in member states an obligation or an opportunity for liberals in the EU? We believe both. It is an obligation if liberals truly represent their ideology based on the rule of law; and also a political opportunity to attract the attention of citizens with firm democratic principles throughout Europe.

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