
**MTA Law Working Papers
2022/5**

**Tactics Against Criticism of Autocratization – The Hungarian
Government and the EU’s Prolonged Toleration**

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ISSN 2064-4515

http://jog.tk.mta.hu/mta_lwp

Társadalomtudományi Kutatóközpont – MTA Kiválósági Kutatóhely

Eötvös Loránd Kutatási Hálózat

Centre for Social Sciences – MTA Centre of Excellence

Eötvös Loránd Research Network

Tactics Against Criticism of Autocratization

The Hungarian Government and the EU's Prolonged Toleration

Petra Bárd – Anita Koncsik – Zsolt Körtvélyesi¹

Abstract

This paper focuses seeks to expose and take inventory of the different arguments that have been used to shield developments in Hungary from European criticism, sometimes in the form of diverting international attention from crucial aspects of developments in Hungary. Scholars and decision-makers falling prey to illiberal tactics of misusing argument in the rule of law debate. It is high time to have an inventory of such arguments, exposing the inconsistencies and often outright falsehoods; also because it is these tactics that can explain, in part, the successful coexistence of EU membership, with its benefits liked continued money transfers and mutual recognition of judgments, and serious deviations from common core values.

This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:

Paper I – State of the art - the crises of the rule of law and democracy

Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration

Paper III – Inventing Constitutional Identity in Hungary

Paper IV – The Constitutional Court

Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit

Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?

Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy

¹ Authors are grateful for the insightful comments by Professor Daniel R. Kelemen. As always, responsibility for any errors remains our own.

INTRODUCTION

The Hungarian trend of autocratization has been amply and widely documented elsewhere, including in the other papers in this series.² This trend is taking place in the broader context of the European Union with commitments to constitutional democratic principles. The European Union has an obligation, under the Treaties and the EU's professed self-image, to maintain democracy, human rights and the rule of law – values enshrined in Article 2 TEU – in the face of these threats. Here we are focusing on what arguments have been used to shield developments in Hungary from European criticism, sometimes in the form of diverting international attention from crucial aspects of developments in Hungary. Scholars and decision-makers falling prey to illiberal tactics of misusing argument in the rule of law debate.³ It is high time to have an inventory of such arguments, exposing the inconsistencies and often outright falsehoods; also because it is these tactics that can explain, in part, the successful coexistence of EU membership, with its benefits liked continued money transfers⁴ and mutual recognition of judgments, and serious deviations from common core values. Kelemen has been arguing, in a broader context, how actors with a public liberal commitment can tolerate and even sustain “illiberal pockets” for longer periods.⁵

We focus here on the rhetoric, most importantly how it is used as a façade of legal or legally relevant arguments. As Hungarian legal scholars we could not help but see the mushrooming of such tactics over the past decade and think that bringing them to light in a systemic way is itself a contribution to effective engagement and accurate factual depiction of how the system of national cooperation (NER) operates within the European Union. Sunlight is said to be the best of disinfectants, as Louis Brandeis wrote in a related context.⁶ Many of these tactics are common political tools and we wouldn't venture to make a full-scale inventory of them, were it not for their direct legal consequences in the rule of law debate vis-à-vis the EU. We are mainly interested in these tactics as they affect the prevalence of common European values with a strong focus on rule of law. The common pattern of extrapolated political rhetoric,⁷ distorting realities, was brought to a new level by the Hungarian regime in a way that managed to hamper effective enforcement of core values. What we aim to do here is to show how these arguments were used in a combination that could delay or derail the application of basic rule of law standards.

² For a broader overview, see the other reports commissioned by the Dutch Helsinki Committee in this research project, published together in MTA Law Working Papers.

³ Uitz, “Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary”, 13 *International Journal of Constitutional Law* (2015), 279–300.

⁴ Gosling, “The Subsidy Paradox: How EU Cash Props Up Populists”, *BIRN*, 27 February 2020, <https://balkaninsight.com/2020/02/27/the-subsidy-paradox-how-eu-cash-props-up-populists/>.

⁵ Kelemen, “The European Union's authoritarian equilibrium”, 27 *Journal of European Public Policy* (2020), 481–499.

⁶ Brandeis, What Publicity Can Do, in *Other People's Money and How the Bankers Use It* (Frederick A. Stokes, 1914), 92–108, 92.

⁷ Emmons and Pavone, “The rhetoric of inaction: failing to fail forward in the EU's rule of law crisis”, 28 *Journal of European Public Policy* (2021), 1611–1629.

AN OVERVIEW OF THE ARGUMENTS

In the core of the **meta-narrative of Fidesz, the Hungarian regime is a democracy that is superior to its Western counterparts, which is under siege by various Western, liberal actors, and which has to sustain attacks that are politically motivated, illegitimate, unfair and illegal**. As it is an existential war for the survival of the (culturally) Christian, where the enemies are not picky in their methods. **This justifies maneuvers to deceive opponents in what was described by Prime Minister Orbán as a “peacock dance”**: giving symbolic concessions while not compromising on substantive issues.⁸ This reinforces a view where a strong leader is necessary to protect the nation, and the opponents’ actions are either contrary to the national interests or, where they concede, were outsmarted, meaning most often outlawed.⁹

Our overview will start with the **more limited, specific techniques and move on to broader arguments, some of which go beyond legal argumentation but are nevertheless used to delegitimize rule of law criticism and hence are relevant in this context**.

First, we look at how false or distorted pieces of information are being created, including mistranslations and the misrepresentation of facts. Second, we look at how, more specifically, arguments were used to show that Hungary is compliant with EU requirements, including the application of a formalistic, narrow reading or the misleading reading of statistics or of scholarship.¹⁰ We discuss separately the misuse of comparative law in a way that seeks to demonstrate that Hungary fares not worse but, often, even better, than some Member States that are criticizing Hungary or that are not subject to similar criticism.

The arguments extend beyond the illegitimacy to also claim the illegality of EU scrutiny, emphasizing the importance of dialogue to gain time and delay sanctions meant to uphold the rule of law. We aim to cluster delaying tactics from hijacking both concept and procedure of dialogue, the claims about illegality to hiding behind extremely extrapolated relativism. As part of these tactical moves, the very notion of the rule of law is presented as impossible to define with adequate precision and considered to be a tool of pure political pressure.

As we broaden the look at further delegitimizing strategies, rule of law criticism is presented as anti-democratic, which seeks to overwrite democratic decisions based on diktats from non-democratic players.¹¹ We discuss arguments focusing on defending the ‘true democratic foundations’ of the EU, maintaining pluralism as well as arguments claiming to support the fight against neocolonialist, imperialist oppression akin to the times of Soviet dictatorship with orders from Moscow. Some arguments attempt to counter further ‘dangerous ideologies’ or operate on an ad hominem base (creating semi abstract arch-enemies while reviving the darkest episodes of XX century history).

The tactics could be categorized along the extent to which they are more defensive or offensive in nature – from shielding domestic measures from criticism to outright attacks on the legitimacy of European

⁸ Zgut and Csehi, “Orbán’s Peacock Dance”, *Aspen Review*, 28 August 2019, <https://www.aspen.review/article/2019/orbans-peacock-dance/>; Wanat, “Poland’s ‘Russian roulette’ with the EU”, *Politico*, 21 October 2021, <https://www.politico.eu/article/poland-rule-of-law-judicial-system-eu-pis-jaroslaw-kaczynski/>.

⁹ In an infamous leaked statement attributed to Viktor Orbán activists in the 2006 elections, lost by Fidesz, were asked to do everything for a victory, adding that lawyers will take care of it. See the report from Index (a once leading national outlet since put under Fidesz-loyal economic control): “Elmarasztal az OVB, megvédenek a jogászok, oszt jónapot”, *Index*, 21 April 2006, <https://index.hu/belfold/orban4945/>.

¹⁰ Scheppele “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, 26 *Governance* (2013), 559-562; Scheppele, “Autocratic Legalism”, 85 *The University of Chicago Law Review* (2018), 545-584.

¹¹ Emmons and Pavone, “The rhetoric of inaction: failing to fail forward in the EU’s rule of law crisis”, 28 *Journal of European Public Policy* (2021), 1611-1629.

responses – most of the tools in fact play defense and offense at the same time. A seemingly defensive claim that shows that criticism is unfounded will often cry “double standards” by the same move, claiming that Hungary was singled out for ideological-political reasons, hence also attacking critiques. The arguments used to counter external challenges with reference to common values – democracy, the rule of law and human rights – are often used in combination.

For instance, the European Commission’s Rule of Law Reports are said to be “absurd and false”, “unbalanced”, unfounded”, “flawed”,¹² “impossible to define”, a “legal nonsense”,¹³ and a “witch hunt masked as a legal process”.¹⁴ They “manifestly fail” at the criteria of “[f]air hearing, equal treatment, foreseeability, objectivity and impartiality”, whereas “Rule of law cannot be promoted with tools that do not comply with the basic elements of rule of law itself.”¹⁵ Further that charges concerning the “violation of the rule of law” are “legally vague”, resulting in “political abuses” and “subjective ideological conditions”, and undermining “legal certainty”, using EU funds for “political blackmail”.¹⁶

Despite these combined applications, we think it is useful to identify and categorize the various types of tactics.

After clustering tactics used in the rule of law debate, we would like to invoke the broader context and look at an eloquent toolkit of red herrings of the Fidesz. The importance of this toolkit is two-fold: first, the red herring alloys some of the arguments of the inventory, second, this alloy of arguments always goes beyond buying time or strengthening relativism (whataboutism) which keeps the community in stupor. The red herring serves to deflect attention from what goes on beyond the surface of events, that is why prominent Fidesz politicians turn the spotlight on some measures or initiatives that led to strong international upheaval, while other scandals and parliamentary acts - paving the way to state orchestrated grand corruption or further elimination of checks on the executive -, remain in the shadow. In the second chapter, the compilation of micro case studies shows these red herrings in action and points it out that not only the arguments per se, but the timing and context of these arguments provide ammo for autocrats to avoid proper rule of law scrutiny.

The overview would not be complete without a brief discussion of how the above tactics compare to the actions of the regime. What one can witness is that the regime is applying many of the tactics, in a stronger form and more straightforward way, that it blames on its opponents, therefore the regime is the true frontrunner of double standards compared to what it alleges about it.

We recognize that the inability to see through these tactics might not be the crucial factor in why they seem to work (where they work). However, we maintain that exposure and understanding are crucial steps in the right direction. For why adequate response is essential, we discuss in conclusion the various ways in which the above tactics are detrimental to the functioning of the EU and the state of democracy.

¹² “Justice Minister says European Commission Rule of Law Report is ‘absurd and false’”, *Cabinet Office of the Prime Minister*, 1 October 2020, <https://abouthungary.hu/news-in-brief/justice-minister-says-european-commission-rule-of-law-report-is-absurd-and-false>.

¹³ “Justice Minister: EU’s rule of law proposal is ‘legal nonsense’”, *Cabinet Office of the Prime Minister*, 10 December 2020, <https://abouthungary.hu/news-in-brief/justice-minister-eus-rule-of-law-proposal-is-legal-nonsense>.

¹⁴ “Justice Minister: The EU’s Article 7 procedure against Hungary is a ‘witch hunt masked as a legal process’”, *Cabinet Office of the Prime Minister*, 13 December 2019, <https://abouthungary.hu/news-in-brief/justice-minister-the-eus-article-7-procedure-against-hungary-is-a-witch-hunt-masked-as-a-legal-process>.

¹⁵ “Here are a few observations on the European Commission’s 2020 Rule of Law Report”, *Cabinet Office of the Prime Minister*, 14 October 2020, <https://abouthungary.hu/news-in-brief/Here-are-a-few-observations-on-the-European-Commission-2020-Rule-of-Law>.

¹⁶ “PM Orbán: Rule of law is the bedrock of Hungary’s value system”, *Cabinet Office of the Prime Minister*, 9 November 2020, <https://abouthungary.hu/news-in-brief/pm-orban-rule-of-law-is-the-bedrock-of-hungarys-value-system>.

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CHAPTER ONE – CLUSTER OF ARGUMENTS

I. Blatant lies and bold moves as a tactic

A relatively easy to catch tactic is the use of misleading statements, mistranslations, disinformation, misinterpretation or outright lies. The most infamous example is probably the case when, in 2011, the Hungarian government sent a wrong translation to Brussels of their controversial draft constitution, that has later become the Fundamental Law. The mistranslation was deliberate, the English text made the draft appear to be more EU law conform than the actual Hungarian original.¹⁷ This tactic is also employed the other direction, when the edge of outside criticism against the Hungarian government is taken away. For example, when the Venice Commission delivered its highly critical opinion of the Fundamental Law, it was presented in a way by the government, as if the Hungarian constitution was being praised.¹⁸

As a more recent example, Prime Minister Orbán claimed that the 2021 homophobic legislation was not about homosexuality. The law itself uses the term six times, all, without exception, enacting bans and limitations.¹⁹ He further claimed that the law only makes sure that the parents can decide about their children's sex education. The law in fact takes away the right of the parents to decide as a direct result of a legislative ban. The only place where parents are mentioned is in the restrictive definition of the family, founded on the "parent-child relationship, where the mother is a woman, the father is a man".²⁰

Lies are sometimes so blatant that they take their targets, not used to this practice, by surprise. The literature has identified "the boldness of Orbán's actions" as a reason for belated European response.²¹ When faced with the criticism that the regime in Hungary fails to live up to common democratic standards (e.g. due to curbing opposition powers, the overhaul of the media, or tinkering with electoral laws), government politicians quickly resort to the maximum of possible counterclaims: "Viktor Orbán is the most democratic leader in Europe".²² When the rule of law is questioned repeatedly, it becomes "the bedrock of Hungary's value system", in the words of PM Orbán.²³ Turning back criticism of media

¹⁷ Hungarian Helsinki Committee, Eötvös Károly Policy Institute, Hungarian Civil Liberties Union, "Full List of Mistakes and Omissions of the English Version of the Hungarian Draft-Constitution", 2011, www.tasz.hu/files/tasz/imce/list_of_all_the_omissions_and_mistranslations.pdf.

¹⁸ Hungarian Helsinki Committee, "NGOs Analyze Government Reactions Concerning the Venice Commission's Opinion on the New Constitution of Hungary", 2011, www.helsinki.hu/en/ngos-analyze-government-reactions-concerning-the-venice-commissions-opinion-on-the-new-constitution-of-hungary/.

¹⁹ See Act No. 79 of 2021 [2021. évi LXXIX. törvény a pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról], Arts. 1-2, 3, 9-2, 9-3, 10-3 and 11-1. For an overview in English, see: "Orbán spreads lies to defend the anti-LGBTQI law in Brussels", *Háttér Society*, 28 June 2021, <https://en.hatter.hu/news/orban-spreads-lies-to-defend-the-anti-lgbtqi-law-in-brussels>.

²⁰ Art. 10-1. Prime Minister Orbán also made a broader, political claim about the state actively protecting the rights of homosexuals, to which the leading LGBTQI NGO in Hungary, Háttér Society responded by a long list of post-2010 anti-LGBTQI developments showing the contrary: "The Hungarian state does not protect but actively undermines the freedom and rights of LGBTQI people", *Háttér Society*, 23 June 2021, <https://en.hatter.hu/news/the-hungarian-state-does-not-protect-but-actively-undermines-the-freedom-and-rights-of-lgbtqi>.

²¹ Batory, "Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU", 94 *Public Administration* (2016), 685–699, at 692.

²² This specific statement is from the Minister of Foreign Affairs and Trade Szijjártó: "FM Szijjártó: 'Viktor Orbán Most Democratic Leader in Europe'", *Hungary Today*, 1 October 2021, <https://hungarytoday.hu/viktor-orban-is-the-most-democratic-leader-in-europe-fm-foreign-minister-peter-szijjarto-said/>.

²³ "PM Orbán: Rule of law is the bedrock of Hungary's value system", *Cabinet Office of the Prime Minister*, 9 November 2020, <https://abouthungary.hu/news-in-brief/pm-orban-rule-of-law-is-the-bedrock-of-hungarys-value-system>.

regulation, the government has been claiming that there is real media pluralism in Hungary as opposed to Western Europe.²⁴

A similar tactic was used by Prime Minister Orbán in his speech responding to critiques in the EP discussion on the Sargentini report on Hungary, claiming that CEU never left the country:

I would ask you to take a look at the CEU website. Before coming here today I did just that, and I read the following thoughts there, on that website, which I will now quote. This is what you can read there. “CEU will continue its operations under all circumstances,” the university writes of itself. “Currently enrolled students and those enrolling in 2018 will be able to finish their studies in Budapest”, the university writes of itself. “All of the university’s accreditations remain unchanged”, the university writes of itself. And it also states the following: “Budapest is a welcoming city, we await you; come and have a look around.”²⁵

The quotes of course do little to counter criticism based on the legal situation that makes it impossible for CEU (to this day, even after the CJEU held Lex CEU to be contrary to EU law²⁶) to run accredited programmes in Hungary. The fact that transition to Vienna did not happen overnight or that operation continues in Vienna or else that non-educational academic events like conferences and public lectures continue to be held at the Budapest campus cannot alter the fact of an unprecedented move by the government, outlawing the operation of a university as part of a political smear campaign against liberalism.

II. Faking compliance

In some cases, **demonstrating compliance takes the form of full technical compliance that fails to address the root causes**, as in the case of the forced mass retirement of judges or the compensation paid to former high officials removed illegally (head of the judiciary, commissioner for data protection). In EU accession conditionality literature this is called fake compliance.²⁷ Batory calls such **behavior symbolic and creative compliance that allows a Member State to run free despite non-compliance all the while allowing the Commission to show commitment and escape from enforcement deemed too costly**.²⁸

A) Full technical compliance, or the façade of legalism

The asylum field provides a good illustration for how formal compliance can be used as an argument despite a wholesale rejection of the rationale of a policy area. Access to asylum is a human right protected under EU law but the Hungarian regulation has been denying this to almost all (would-be)

²⁴ “‘In contrast to the Western European media landscape massively dominated by leftist and liberal outlets,’ Christian Democratic views also have access to publicity in Hungary”. “Justice Minister says European Commission Rule of Law Report is ‘absurd and false’”, *Cabinet Office of the Prime Minister*, 1 October 2020, <https://abouthungary.hu/news-in-brief/justice-minister-says-european-commission-rule-of-law-report-is-absurd-and-false>.

²⁵ Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>. See also a similar claim from 2021: Orbán, “The persecuted, expelled university in Budapest, Samizdat No. 13”, *Miniszterelnok.hu [Priminister.hu]*, 18 September 2021, <https://miniszterelnok.hu/the-persecuted-expelled-university-in-budapest/>.

²⁶ Case C-66/18, *European Commission v. Hungary*, EU:C:2020:792.

²⁷ Noutcheva, “Fake, partial and imposed compliance: the limits of the EU’s normative power in the Western Balkans”, 16 *Journal of European Public Policy* (2009), 1065–1084.

²⁸ “Symbolic and creative compliance occur when an addressee, in this case a member state, pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave the addressee’s original objective intact.” Batory, “Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU”, 94 *Public Administration* (2016), 685–699, at 689.

applicants. The official narrative was letting in one person per day through a transit zone, of which two used to be in operation. This meant, so the government claimed, that Hungary was fully compliant and that the borders were not closed. We do not even have to consider all the other problematic limitations of the Hungarian regulation – including making Serbia a safe third country by law, overriding existing domestic case law, or not considering the external side of the fence Hungarian territory for the purposes of asylum law, or else the illegal pushback practices – to see that this claim would only work on an extremely narrow, technical reading which would not be an overall plausible interpretation. What in reality happens is a complete denial of the right to asylum for all practical purposes. The ECJ found the Hungarian regulation to be in violation of EU law on multiple accounts.²⁹ Of course, the fact that many of the arguments hit the wall of legal assessment does not mean that they do not work politically, with voters or in shaking the certainty of decision-makers.

Note also that the narrative on compliance was combined with a conflicting talk on zero immigration and the claim that “real refugees” from Western countries fleeing the disastrous consequences of multiculturalist policies would be taken in, as opposed to non-meritorious claims from those coming from the East and the South.³⁰

The response to the finding of Hungarian practices to be in violation of EU law shows another strategy to faking compliance. Government officials claimed that they wanted better for asylum-seekers, but the EU now forced them to close transit zones, eliminating even the extremely limited access to asylum. The move from practical denial to full formal denial of asylum at the borders was justified under EU compliance pressures,³¹ a logic that is hard to follow but certainly no small feat.

B) Deliberate overload – playing on ignorance or fatigue

Showing compliance while remaining non-compliant can follow the strategy of overload, adopting a large number of new regulations, some blatantly illegal, to be able to consent to some changes while leaving a lot of violations in place. This can overburden not only public discussions (that will necessarily focus more on the most egregious aspects), but also institutions like courts or the Commission. Batory summarizes what is wrong with the approach that accepts symbolic and creative compliance for compliance, what behavior this type of ineffective enforcement encourages:

*Violators’ strategies may include rushing through wide-scale changes all at once, knowing that the Commission would pinpoint only a small number of the most controversial changes. Member states may also cherry pick, making concessions that are inconsequential from the point of view of the measure(s)’ intended aim, yet allow the member state to claim to have been flexible. Member state governments may also simply pretend to comply and in practice ignore the spirit of the agreement reached with the Commission.*³²

The overloading strategy allows one to factor in the costs of compliance and commit blatant violations or a set of violations to be able to give up some only to demonstrate the willingness to compromise,

²⁹ See, e.g., Case C-808/18, *Commission v. Hungary*, ECLI:EU:C:2020:1029. For an analysis and discussion of related judgments, see Paper V in this series.

³⁰ “Of course, we shall let in true refugees: Germans, Dutch, French and Italians, terrified politicians and journalists who here in Hungary want to find the Europe they have lost in their homelands”. Orbán, “This year we must defend ourselves against five major attacks”, *Government of Hungary*, 11 February 2017, <http://www.komany.hu/en/the-prime-minister/news/this-year-we-must-defend-ourselves-against-five-major-attacks>.

³¹ Closing the remaining possibility to submit asylum applications from the territory of Hungary, i.e. further restricting the right to asylum that was already found to be too restrictive under EU law, is presented as compliance with the ECJ ruling: “Hungary: Abolishment of Transit Zone Following CJEU Ruling”, *European Council on Refugees and Exiles*, 22 May 2020, <https://ecre.org/hungary-abolishment-of-transit-zone-following-cjeu-ruling/>.

³² Batory, “Defying the Commission: Creative Compliance and Respect for the Rule of Law in the Eu”, 94 *Public Administration* (2016), 685–699, at 696.

leading to freeriding with the rest of the (less blatant but very real) violations. Dismissing judges through force retirement in mass, many of them losing leadership positions, could work despite a legally successful European challenge: most judges opted for compensation, and the judges who were reestablished lost these high positions as they were filled in the meantime. Legal remedies meant that those who wanted to continue working as judges could do that, while the regime was also satisfied as the overhaul of the judicial hierarchy was carried out and was now also EU-proof.³³

C) Misuse of statistics

It is often not easy to capture the nature of violations through numbers. Should one disregard the severity or the systemic nature of violations, Hungary may come out ahead, providing arguments for the government to claim bias and “double standards”:

*Hungary and Belgium have received the same number of alerts on the Council of Europe’s platform to promote the protection of journalism in the period 2019-2020. The Commission’s interpretation: In Hungary, there is a “systemic obstruction” of independent media, while in the other country, intimidation is “relatively rare”.*³⁴

Or, Prime Minister Orbán can pick one number, the ratio of tenders with a single applicant or the ratio of investigations started following notices from the Commission and claim that in this respect we are not doing much worse or even better than the EU average.³⁵

More sophisticated comparisons can also go wrong. A series of studies by a Hungarian research team uses a methodology that looks at absolute numbers of the Constitutional Court finding violations and concludes that the increased number of such findings after 2010 does not suggest a decrease in the independence of the Court.³⁶ In fact, in many cases that would have been considered unconstitutional under earlier standards, the new Court with the vast majority of judges handpicked by the current regime, lets through many violations.

It is especially saddening to see how one can find support for illiberal tactics in EU monitoring mechanisms. The Justice Scoreboard is prone to being misused just in this regard, and is, used to show that Hungary fares better than some of the Member States criticizing Hungary.³⁷ Of course, statistics on how many cases are decided and how trials are sped up do not compensate for the attacks on judicial independence.

³³ European Commission, “European Commission closes infringement procedure on forced retirement of Hungarian judges”, Press release, 20 November 2013, https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1112.

³⁴ “Here are a few observations on the European Commission’s 2020 Rule of Law Report”, *Cabinet Office of the Prime Minister*, 14 October 2020, <https://abouthungary.hu/news-in-brief/Here-are-a-few-observations-on-the-European-Commission-2020-Rule-of-Law>. Further on: “between 2014 and 2018, there were twice as many cases closed with recommendations concerning traditional own resources for Belgium than for Hungary”.

³⁵ “All tenders in Hungary are public, and any European company is free to apply. In Hungary the ratio of tenders with a single applicant is 26 per cent, compared to the EU average of 24 per cent; we still need to improve things a little in this respect. The ratio of investigations launched in Hungary based on notices from the Commission is 47 per cent, compared to an EU average of 42 per cent – meaning that we are doing slightly better in this respect.” Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

³⁶ Pócsa, Dobos and Gyulai, “Mítosz és valóság. Mennyire korlátozta az Alkotmánybíróság a törvényhozás mozgásterét?” [Myth and Reality. To What Extent Did the Constitutional Court Constrain the Manoeuvring Space of the Legislature], (2020/1) *Állam- és Jogtudomány*, 66–92.

³⁷ Kovács, “I bet you didn’t know this about Finland”, *Cabinet Office of the Prime Minister*, 20 July 2019, <https://abouthungary.hu/blog/i-bet-you-didnt-know-this-about-finland>.

The boldest move to counter criticism is probably the tactic to turn **the very fact of sustained European scrutiny upside down: “No Member State has ever been subject to such a thorough scrutiny by the European Commission as Hungary was”**,³⁸ a statement meant to imply that we are now more conforming than others. This rhetoric fits also into the arguments that ‘we are being punished for being different’ (see below). In relation to the EU proposal on the Rule of Law mechanism within the Multiannual Financial Framework back in 2018, Prime Minister Viktor Orbán stated with regard to Hungary, likely the first country to be affected by the new law that “... as regards the Rule of Law, Hungary can be especially confident, because in 2013 it was fully audited”, and “we have documentary proof that here the Rule of Law is in order”.³⁹ This position was later confirmed by state secretary of EU affairs Szabolcs Takács contending that Hungary is one of the “most audited countries” and “Budapest has ‘proof’ that its justice system is in order.”⁴⁰ These positions are hard to decipher, especially in light of the ongoing Article 7(1) TEU procedure, the lost infringement cases and the devastating picture several think tanks and NGOs draw.

D) Partial (non-)compliance sold as full compliance

Partial compliance can be sold as full compliance with both the help of misused statistics and/or academic and other expert opinions. Underpinning these strategies is the clear and unwavering intention not to comply while pretending either to comply or to follow procedural rules that lead to the enforcement of compliance (or, bad faith), a problem that we will come back later.

Academic scholarship can be misused to justify deviation from rule of law standards. One can rely on existing academic discussions on “judicial activism” or “juristocracy”⁴¹ to counter the judicial enforcement of basic requirements. The idea of “political constitutionalism”⁴² has been deployed to argue that the Hungarian regime is not a rejection of constitutionalism *tout court*, but merely a different version of constitutionalism – a strange claim considering that this would mean that constraints on power should be observed without legal entrenchment, whereas the criticism is that the regime in Hungary does not even respect written, legal limitations. (See further arguments in subchapter extrapolated relativism and pluralism.) Relying on questionable comparative studies (see below) could also be followed by a key mantra ‘nobody is perfect’ which is in the center of ‘whataboutism’.

Misusing comparative arguments can seek to demonstrate that (a) we are not doing any worse than other countries, in fact are doing something very similar, or that (b) we are in fact doing better. The most infamous example is probably the claim from the Government of Hungary that unlike Hungary, countries like Finland and the Netherlands do not even have a constitutional court, which in their views should preempt anyone complaining about the independence of such an institution in another Member State.⁴³ In the light of these arguments, Hungarian regulations may not comply with European standards

³⁸ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 4, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>.

³⁹ The Prime Minister, “Viktor Orbán, ‘It is a moral duty to “see through” the anti-migration constitutional amendment””, *Government of Hungary*, 4 May 2018, <http://www.kormany.hu/en/the-prime-minister/news/it-is-a-moral-duty-to-see-through-the-anti-migration-constitutional-amendment>.

⁴⁰ Zalan, “Visegrad Four ‘nothing to hide’ on rule of law issue”, *EUobserver*, 24 May 2018, <https://euobserver.com/institutional/141893>.

⁴¹ We discuss this argument later, in Part IV.B.

⁴² Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

⁴³ Kovács, “I bet you didn’t know this about Finland”, *Cabinet Office of the Prime Minister*, 20 July 2019, <https://abouthungary.hu/blog/i-bet-you-didnt-know-this-about-finland>; “PM Orbán: Rule of law is a matter of

but neither do other countries that are not subject of heavy criticism. The comparative exercise of shopping around in ‘bad practices’ could serve as a justification for partial or non-compliance which is considered to be only meeting the ‘European average’ (therefore is in line with de facto European standards).

The very language of describing the regime is subject to similar tactics. Hayek uses the term “weasel words” that, like a weasel sucking an egg through a hard-to-notice hole, leaving the shell intact, take out the substance. His expressions relate to socialism where e.g. “the social rule of law” should be seen as a lack thereof.⁴⁴ In a similar vein, illiberal democracy and illiberal rule of law are meant to suggest that these are but variations on the same topic, while one should conclude that the adjective here in fact suggests a negation. It is in this light that we can understand “illiberal democracy” or whatever cultural or ideological adjective is added to democracy or the rule of law: a non-compliance or active defiance instead of a compliance with slight variation.

III. Delaying tactics

A) Hijacking dialogue

Dialogue can be used as a tactic to win time and to demonstrate a constructive attitude, patience in the face of misinformation and misunderstandings as the sole grounds of criticism of the Hungarian rule of law situation. For instance, the Government of Hungary claimed in the Article 7 TEU procedure that it “stands ready to engage in a dialogue with members of the Council. It is ready and willing to clarify allegations and misunderstandings and provide facts in the procedure ahead of us.”⁴⁵ This might include the intention to use the dialogue framing as a way to downplay criticism and present it as a “routine exchange”,⁴⁶ immaterial and technical issues not worth discussing. Sometimes the EU does the downplaying, e.g. by labelling, in a heavily criticized move, the broader rule of law issue with the mass removal of judges as a mere age discrimination case. This not only allowed downplaying the problem domestically, but it also invited a technical compliance that did not rectify the underlying problem.

European institutions fall for dialogue as a European value (the reasons of which we are not trying to second-guess here), which indeed is the desired method with governments that share the language of constitutional democracy. However, with governments deliberately abusing discussions just to gain more time with entrenching illiberalism, dialoguing may backfire. There is a “crucial difference between a dialogue among constitutionalists within the framework of constitutional democracy and a dialogue with delegates of a constitutional simulacrum.”⁴⁷ Recently the 2020 Annual Rule of Law Report mirrored this positive approach building on dialogue and preventing problems from emerging. The Commission welcomed the “open dialogue with the Member States” considered that the report would prevent rule of law problems from emerging or deepening, and that it would promote “a robust political

honor”, *Cabinet Office of the Prime Minister*, 1 October 2019, <https://abouthungary.hu/news-in-brief/pm-orban-rule-of-law-is-a-matter-of-honor>.

⁴⁴ Hayek, *The Fatal Conceit* (The University of Chicago Press, 1988), pp. 114–119.

⁴⁵ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 5, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>.

⁴⁶ Batory, “Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU”, 94 *Public Administration* (2016), 685–699, at 692–693.

⁴⁷ Kovács and Tóth, The Age of Constitutional Barbarism, *VerfBlog*, 7 September 2019, <https://verfassungsblog.de/the-age-of-constitutional-barbarism/>.

and legal rule of law culture throughout the EU”.⁴⁸ Commission Vice-President, Commissioner for Values and Transparency Jourová, during the presentation of the Annual Rule of Law Report, emphasized dialogue even after the Hungarian Prime Minister suspended all relations with her and requested her to resign.⁴⁹

Dialogue is also a term that the domesticated Constitutional Court has been using to legitimize its actions and portray itself as an important actor in the European legal space, often in the case of decisions that are simply meant to shield anti-constitutionalist domestic steps.⁵⁰ A quick glance at the propagandistic news items on the page of the Constitutional Court shows this much. “Constitutional dialogue” has been presented as “of essential importance for safeguarding our national identity”.⁵¹ The president of the Court provided “authentic information to the international public on the role of the Constitutional Court in the Hungarian democracy, the significant powers it has in the field of protecting fundamental rights, its competences, and its members elected on the basis of a political consensus”⁵² to ambassadors, an effort to counter overwhelming criticism to the contrary (deterioration on all these accounts). The president stressed the importance of “close dialogues in the field of judicial cooperation”.⁵³ Meetings are recurrently used to strengthen the political message of an “exemplary Hungary”, e.g. the visit of ECtHR vice-president Spano was thematized under the title “The dialogue between the European Court of Human Rights and the Constitutional Court of Hungary is continuous and exemplary”.⁵⁴

Judicial dialogue is more than political rhetoric, as shown by the decision of the Constitutional Court to avoid having to rule on the cases of the ousting of Central European University (CEU) and the anti-

⁴⁸ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report The rule of law situation in the European Union, COM(2020) 580 final, 30 September 2020.

⁴⁹ Zsiros and Gill, “Hungary calls for EU’s Jourova to quit over ‘sick democracy’ comment”, *Euronews*, 29 September 2020, <https://www.euronews.com/2020/09/29/hungary-calls-for-eu-commissioner-jourova-to-resign-over-derogatory-comments>. Commissioner Jourová made a play of words, and said that Hungary was not an “illiberal”, rather an “ill democracy”. Becker and Müller, “EU Commission Vice President on the Rule of Law in Europe ‘The Condition of Hungary’s Media Landscape Is Alarming’”, *Spiegel*, 29 September 2020, <https://www.spiegel.de/international/europe/eu-commission-vice-president-on-the-rule-of-law-in-europe-the-condition-of-hungary-s-media-landscape-is-alarming-a-1d762f7d-b4a0-4cb8-b7a4-1a1ca5f4f9fa>.

⁵⁰ See Paper IV in this series for more on this aspect.

⁵¹ “Hungarian Fundamental Rights Gain International Attention”, *Constitutional Court of Hungary*, 19 September 2019, <https://hunconcourt.hu/announcement/hungarian-fundamental-rights-gain-international-attention>.

⁵² “Successful introduction of constitutional complaint in Hungary”, *Constitutional Court of Hungary*, 26 September 2017, <https://hunconcourt.hu/announcement/successful-introduction-of-constitutional-complaint-in-hungary>. See similar language from a later event: Sulyok, “International constitutional dialogue is of primary importance”, *Constitutional Court of Hungary*, 21 September 2018, <https://hunconcourt.hu/kozlemeny/tamas-sulyok-international-constitutional-dialogue-is-of-primary-importance/>.

⁵³ *Ibid.* In an event commemorating the independence of Indonesia, the president again emphasized the importance of dialogue: “Dialogue arching over borders between international institutions has never been so important for the Constitutional Court as it is today, since it is the key to understand each other and to move along our joint road together.” Sulyok, “The duty of the Constitutional Court is the protection of the weak against the excessive power of the strong ones”, *Constitutional Court of Hungary*, 18 September 2017, <https://hunconcourt.hu/announcement/tamas-sulyok-the-duty-of-the-constitutional-court-is-the-protection-of-the-weak-against-the-excessive-power-of-the-strong-ones>. He also stressed that “Hungary and Indonesia face similar challenges today”, which is probably right if we look at developments since, including the legislative attempts to curb the independence of the Constitutional Court: Butt, “The 2020 Constitutional Court Law amendments: a ‘gift’ to judges?”, *Indonesia at Melbourne*, 3 September 2020, <https://indonesiatmelbourne.unimelb.edu.au/the-2020-constitutional-court-law-amendments-a-gift-to-judges/>.

⁵⁴ “The dialogue between the European Court of Human Rights and the Constitutional Court of Hungary is continuous and exemplary”, *Constitutional Court of Hungary*, 30 September 2019, <https://hunconcourt.hu/announcement/the-dialogue-between-the-european-court-of-human-rights-and-the-constitutional-court-of-hungary-is-continuous-and-exemplary>.

NGO law, despite a clear mandate. The Court argued that its interpretation of judicial dialogue required it to wait for the decisions of the Court of Justice of the European Union.⁵⁵ This was not a convincing argument, since the basis for scrutiny is different, and the Constitutional Court had broader powers to review the case on more grounds provided for by the Fundamental Law than the CJEU, which was bound to focus on EU law related elements. In the meantime, CEU was forced to react to the law in force banning it from offering educational services, and the university leadership came to the conclusion that it could not admit new students without knowing whether or not it will be allowed to issue diplomas at the end of the academic year. Due to the prolonged procedure in front of the CJEU, which was used as a justification for the Constitutional Court's silence, CEU was forced to move its educational activities to another country. In what fits the "dialogue" framing even less, the Constitutional Court came back to the CEU question, realizing that amendments were made to the Lex CEU and decided to "close the cases" for "lacking purpose", i.e. without finding a violation (or lack thereof). The decision refers to the claim of the Government of Hungary that the amendments were meant to respond to EU requirements.⁵⁶

Dialogue is also used to reject not only criticism ("stigmatization"), in the name of diversity, but also challenge the legitimacy of a possible sanction under Article 7 TEU suspending the right to vote in the Council: "If we truly want unity in diversity, then our differences cannot be a cause for the stigmatisation of any country, or for excluding it from the opportunity of engaging in joint decision-making."⁵⁷ This line of argument also fuels a peculiar relativism (see below) which usually hinders universal enforcement of norms and values and is coated as a defense of true pluralism.

B) Extrapolated relativism

why here – it buys time, especially if the international community has to chew on relativistic arguments instead of thorough scrutiny and enforcement of rule of law (blocking debates and monitoring bodies)

1) *The misuse of comparative law arguments*

Since the first day of defending anti-constitutionalist measures in front of a European audience, the Government of Hungary has been relying on comparative arguments.⁵⁸ This tactic prompted the CEU Media Lab to create a site responding to government claims that the media law package would simply use elements of existing regulation in other EU Member States, hence conform to European standards.⁵⁹ Such borrowings could be best considered as "fake transplants" (variously categorized

⁵⁵ "In the spirit of the European constitutional dialogue the Constitutional Court suspended its procedures in the cases related to the Act on national higher education and the 'Act on NGOs'", *Constitutional Court of Hungary*, 12 June 2018, <https://hunconcourt.hu/announcement/in-the-spirit-of-the-european-constitutional-dialogue-the-constitutional-court-suspended-its-procedures-in-the-cases-related-to-the-act-on-national-higher-education-and-the-act-on-ngos>.

⁵⁶ "Lezárta az Alkotmánybíróság a CEU-ügyeket" ["The Constitutional Court Closed the CEU Cases"], *Constitutional Court of Hungary*, 9 July 2021, <https://www.alkotmanybirosag.hu/kozlemeny/lezarta-az-alkotmanybirosag-a-ceu-ugyeket>.

⁵⁷ Orbán, "Speech in the European Parliament in the plenary debate on the situation in Hungary", PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

⁵⁸ For an overview of the first years, see Uitz, "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary", 13 *International Journal of Constitutional Law* (2015), 279–300. For a broader analysis, see other papers in this project, especially Paper I.

⁵⁹ Center for Media and Communication Studies, "Hungarian Media Laws in Europe: An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms", *Central European University*, <http://medialaws.ceu.hu/>.

under “abusive constitutional borrowing”⁶⁰ or “malicious legal transplants”⁶¹ or else “legal gaslighting”⁶²) where the disregard for the context and application leads to unwarranted conclusions (“other do this, so it should be okay”). Kim Lane Scheppele described this type of borrowing as leading to a “Frankenstate”.⁶³ **This necessarily means a disregard for the fundamental rule of comparative law that requires a contextualized, functionalist assessment.**

The best of rules cannot be enough if we see blatant violations in practice and weak written guarantees can coexist with robust independence in fact. No meaningful comparative methodology allows one to reach conclusions from a decontextualized rule, safe for an extremely narrow, decontextualized, textualist reading. In line with this reasoning, it should not disturb anyone that Hungary is a recurring example in the literature on “abusive judicial review”.⁶⁴ **The right comparative approach, of course, is to assess how the existing institutional setup supports or fails to support rule of law requirements like the hierarchy of norms and judicial independence.** Under a functionalist reading, institutions performing constitutional review and their procedures can very well be compared.

The same people crying double standards here would probably be the first to dismiss similar blatantly formalistic comparisons in other contexts, e.g. claiming that formal rules made any officials or institutions more independent in socialist Hungary before 1990 as compared to less stringent rules of nomination in Western democracies. Only an extremely narrow, non-scholarly reading of a court named “Constitutional Court” without meeting the textbook definition of what such a court is meant to do would allow one to conclude that hence constitutional protection is in place. Or, on a less extreme but still formal reading, the European Commission has exactly the same democratic legitimacy as the Government of Hungary, including the Prime Minister, as both are elected by the majority of a directly elected parliament.

A similar tactic is used to counter arguments about the manifest political loyalty of public prosecution in Hungary, headed by a former Fidesz politician. The defense here points out that as opposed to some Member States where the prosecution is under direct government control, Hungary has a system where a qualified majority has to elect an institutionally independent chief prosecutor.⁶⁵ This sole fact naturally cannot counter criticism about political influence, especially if one knows that for most of the past decade, this supermajority was held by Fidesz, but this might suffice to create confusion. A similar claim has been made concerning the ousting of CEU, where Bavarian regulations even “stricter” than Lex CEU were cited as a proof of double standards.⁶⁶

⁶⁰ Dixon and Landau, “1989–2019: From democratic to abusive constitutional borrowing”, 17 *International Journal of Constitutional Law* (2019), 489–496.

⁶¹ Siems, “Malicious legal transplants”, 38 *Legal Studies* (2018), 103–119.

⁶² Cheung, “Legal gaslighting”, 72 *University of Toronto Law Journal* (2022), 50–80.

⁶³ Scheppele, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, 26 *Governance* (2013), 559–562.

⁶⁴ Landau and Dixon, “Abusive Judicial Review: Courts against Democracy”, 53 *UC Davis Law Review* (2019), 1313–1388.

⁶⁵ “The Commission questions the independence of the Hungarian prosecution service, even though the Prosecutor General is not subordinated to any other organ or official and may not be instructed. The Commission, however, does not find it a cause for concern that in certain Member States, the prosecution service may be instructed by the Ministry of Justice even in individual cases or that the Prosecutor General may be dismissed or suspended by the government.” “Here are a few observations on the European Commission’s 2020 Rule of Law Report”, *Cabinet Office of the Prime Minister*, 14 October 2020, <https://abouthungary.hu/news-in-brief/Here-are-a-few-observations-on-the-European-Commission-2020-Rule-of-Law>.

⁶⁶ “With regard to the CEU, Mr. Weber is mistaken. If he looks at Bavaria’s regulations, he will see that they are stricter than Hungary’s. You are using a double standard – regardless of the fact that we belong to the same party family.” Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, <https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM->

In the case of the media, the Commission’s rule of law reports have been criticized for disregarding media concentration problems in Belgium and Denmark⁶⁷ or the high risk of media pluralism in Finland.⁶⁸ The limitations on the opposition’s ability to advertise – considering that constraints on political messaging from the government on public funds are largely non-existent, as has been apparent to the Hungarian audience – was defended in light of how “[s]uch restrictions exist in several Member States.”⁶⁹

Comparative arguments sometimes slip into mere whataboutism, citing, e.g. “the fraudulent violation of the Austrian presidential election, the police crackdown against the yellow-vest protestors in France, the fatal beating of a Slovak citizen by Belgian police” as issues that should get attention instead of rule of law problems in Hungary.⁷⁰ Criticism on the state of corruption is countered by pointing out that there is lack of attention to money laundering where Denmark and Sweden show systemic failures.⁷¹ The government took whataboutery to the extreme, when the Hungarian Justice Minister launched a social media page dedicated to Rule of Law issues in other EU Member States, from abolishing referenda in the Netherlands to the treatment of the Sami minority in Finland in response to the criticism formulated against Hungary in the 2020 Annual Rule of Law Report by the Commission.⁷² Needless to say, even if criticism is justified, which often times is not, violation of the law in one country does not justify violations in another.

2) Rule of law as a “vague concept”

However convincingly and however often the opposite has been proven,⁷³ a recurring criticism of rule of law conditionality rests on a seemingly scholarly argument, i.e. that the **rule of law is a “vague concept” without one agreed-upon definition and a lot of surrounding academic and legal debates.** As Minister of Justice Varga put it, the rule of law “lacks well-defined rules and remains the subject of

011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

⁶⁷ “[T]he Media Pluralism Monitor co-funded by the European Union only cites problems in Hungary while turning a blind eye to media concentration issues in Belgium and Denmark”. “Justice Minister: Double standards regarding the rule of law are unacceptable”, *Cabinet Office of the Prime Minister*, 18 November 2020, <https://abouthungary.hu/news-in-brief/justice-minister-double-standards-regarding-the-rule-of-law-are-unacceptable>.

⁶⁸ “The Media Pluralism Monitor – often quoted when it comes to Hungary – identifies high risk to the plurality of the media market in Finland. Of course, the Finnish chapter remains silent on the issue even though it admits that there are no specific rules governing transparency of media ownership.” “Here are a few observations on the European Commission’s 2020 Rule of Law Report”, *Cabinet Office of the Prime Minister*, 14 October 2020, <https://abouthungary.hu/news-in-brief/Here-are-a-few-observations-on-the-European-Commission-2020-Rule-of-Law>.

⁶⁹ Government of Hungary, “Memorandum Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary”, 2 July 2013, 8, <https://2010-2014.kormany.hu/download/1/03/f0000/Hungarian%20Memorandum%20on%20the%20Tavares%20report.pdf>.

⁷⁰ Szájer, “Rule of law should apply equally to all EU institutions, too!”, *Cabinet Office of the Prime Minister*, 13 November 2020, <https://abouthungary.hu/blog/rule-of-law-should-apply-equally-to-all-eu-institutions-too>.

⁷¹ “Corruption appears in the report, but the text remains silent on money laundering, where systemic institutional failures have been recently exposed in some Member States, including Denmark and Sweden.” “Here are a few observations on the European Commission’s 2020 Rule of Law Report”, *Cabinet Office of the Prime Minister*, 14 October 2020, <https://abouthungary.hu/news-in-brief/Here-are-a-few-observations-on-the-European-Commission-2020-Rule-of-Law>.

⁷² See the Facebook page of the Minister of Justice: https://www.facebook.com/VargaJuditMinisterofJustice/?ref=page_internal.

⁷³ Scheppele and L Pech, “Is the Rule of Law Too Vague a Notion?”, *VerfBlog*, 1 March 2018, <https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/>; Pech, Grogan, Bárd, Beqiraj, Grabowska-Moroz, Kochenov, Closa, Pirjatanniemi, Śniadach, Moxham et al., “Unity and Diversity in National Understandings of the Rule of Law in the EU”, *RECONNECT*, 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>.

much debate internationally and among national constitutional bodies and academia.”⁷⁴ Similarly, the rule of law is “too conceptually vague”, “difficult-to-define notion”, “impossible to clearly define when a violation is committed”,⁷⁵ and the resulting conditionality would lead to “more abuses”.⁷⁶

The argument is something like this: by establishing rule of law conditionality and relying on the rule of law in scrutinizing Hungary, the European Union itself undermines the rule of law, for it uses a notion that is too vague to be applied fairly, in a way that respects legal certainty. The problems with this argument are ample (the rule of law has been routinely applied in a meaningful manner by judicial and other bodies globally) and have been subject to detailed scrutiny elsewhere, which we do not want to repeat here.⁷⁷ In sum, this argument confuses two things. Notions like the rule of law, public interest, discrimination, freedom of speech etc. are hard to define and conceptual debates continue to surround these notions, including in academic discussions. This does not mean, however, that legal decision-making does not apply these notions routinely without undermining the rule of law. Furthermore, there are violations that, regardless of the definition one adopts, are uniformly accepted as going against rule of law standards. Yes, there is academic debate, and no, there is no definition of the rule of law that would justify attacks on the judiciary that we have been witnessing in Hungary and Poland. The academic subtleties simply do not apply in those cases, as for the ultimate conclusion. It would be impossible to find a credible interpretation of the rule of law under which judges having to face the threat of sanctions for turning to the Court of Justice of the European Union would not count as a violation of judicial independence and the rule of law.

The narrow formal reading of law also plays into the hands of the government domestically. When faced, e.g. with criticism concerning the use of the Pegasus surveillance software against journalists, academics, businessmen or even a member of the government, government politicians could claim that everything happened lawfully.⁷⁸ First, this raises the question of the legal framework in place: what good do legal guarantees do that allow what seems to be a systemic misuse of surveillance powers? Second, Minister of Justice Varga, responsible for the permissions of deployment, had to point to a formally existing guarantee that is rendered meaningless under the workings of the regime: the parliamentary committee charged with oversight not being able to exercise meaningful check.

Some of the arguments on the vagueness of the concept of the rule of law lead directly to claims of ideological-political attacks (as opposed to legal challenges), sovereignty, democracy and constitutional identity. If a concept is vague, democratic decision-making should be the basis of common standards. In the reading of the Government of Hungary “It is also a fact that the content and scope of the values of the Union and that of the rule of law is not based on a commonly agreed full body of legislation approved by the Member States.”⁷⁹

⁷⁴ Varga, “Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask”, *Euronews*, 22 November 2019, <https://www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view>.

⁷⁵ “Justice Minister: The rule of law is not clear-cut”, *Cabinet Office of the Prime Minister*, 17 August 2020, <https://abouthungary.hu/news-in-brief/justice-minister-the-rule-of-law-is-not-clear-cut>.

⁷⁶ “Justice Minister: European Commission has no authority on rule of law”, *Cabinet Office of the Prime Minister*, 6 October 2020, <https://abouthungary.hu/news-in-brief/justice-minister-european-commission-has-no-authority-on-rule-of-law>.

⁷⁷ Pech et al., “Meaning and Scope of the EU Rule of Law”, RECONNECT Deliverable No. 7.2, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>.

⁷⁸ For an overview of denials, see Panyi, “Így foszlott szét a kormányzati ködösítés a Pegasus-ügyben” [“This is how the government smokescreen in the Pegasus case scattered?”], *Direkt36*, 6 November 2021, <https://www.direkt36.hu/igy-foszlott-szet-a-kormanyzati-kodosites-a-pegasus-ugyben/>.

⁷⁹ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 3, <https://2015->

3) National identity and pluralism

National or constitutional identity has become the refuge to all but discredited sovereigntist arguments, anchored in Article 4-2 TEU that provides for the respect of Member States' national identities. That is why the Government of Hungary could connect the identity argument to the illegality of the Commission's rule of law report that, in their view, "disregards the Treaty obligation on the mutual respect for the constitutional traditions and identities of Member States."⁸⁰

While there might be reasonable disagreement over where exactly the line should be drawn between Treaty-violating deviation and Treaty-violating imposed uniformity, no plausible reading would suggest that the respect of national identity is blank cheque for violating common values or EU law in general, but some level of pluralism is inherent in the formulation. It is understandable, in this light, that illiberal actors push in the "more diversity" direction, claiming: "Concern for the rule of law should pay greater respect to the specifics of Member States and not try to impose an artificial, one-size-fits-all framework."⁸¹ **This argument can be combined with the comparatist method that we have seen earlier**, e.g. Minister of Justice Varga arguing for "a comparative vision... when it comes to the rule of law", an approach that takes into account the different constitutional histories of Member States.⁸² This of course does not answer the question on the right size of the tolerable margin that is put in dispute.

The Constitutional Court of Hungary also joined the chorus, with a president and an overwhelming majority of its members nominated by votes exclusively from the governing party. The institution and its leader has been using constitutional identity in a way to legitimize deviations from EU law and to locate Hungarian developments as part of broader, European, including German, constitutional trends.⁸³ As part of the legitimizing strategy, Hungarian decisions that seek to shield deviations from EU standards in the name of national identity are presented as part of the catching up with the West, most importantly, Germany.⁸⁴ Indeed, it is easy to find judicial and scholarly arguments, in the form of dialogue, identity or pluralism, that seem to open this door.⁸⁵

2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse.

⁸⁰ Government of Hungary, "Memorandum Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary", 2 July 2013, 9, <https://2010-2014.kormany.hu/download/1/03/f0000/Hungarian%20Memorandum%20on%20the%20Tavares%20report.pdf>.

⁸¹ Varga, "Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask", *Euronews*, 22 November 2019, <https://www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view>.

⁸² Than, "Hungary rejects rule-of-law criteria for EU funding – minister", *Reuters*, 24 July 2019, <https://www.reuters.com/article/uk-hungary-justice-minister-idAFKCN1UJ1R8>.

⁸³ "The Constitutional Court Organised in Budapest a European Level Summit Conference on Constitutional Identity", *Constitutional Court of Hungary*, 9 March 2019, <https://hunconcourt.hu/announcement/the-constitutional-court-organised-in-budapest-a-european-level-summit-conference-on-constitutional-identity>.

⁸⁴ "[T]he Hungarian Constitutional Court has caught up with the trendsetting tendencies in the field of the protection of fundamental rights that prevail in Western Europe and in particular in Germany." Sulyok, "The duty of the Constitutional Court is the protection of the weak against the excessive power of the strong ones", *Constitutional Court of Hungary*, 18 September 2017, <https://hunconcourt.hu/announcement/tamas-sulyok-the-duty-of-the-constitutional-court-is-the-protection-of-the-weak-against-the-excessive-power-of-the-strong-ones>.

⁸⁵ See this argument e.g. concerning legal pluralism: Kelemen and Pech, "Why autocrats love constitutional identity and constitutional pluralism", RECONNECT Working Paper No. 2, October 2018, <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

4) National security

Another often claimed excuse also referenced in Article 4-2 TEU is, used to justify human rights violations is invocation of national security. It has been given less attention by the academic literature, even though it can be used and abused easily, since according to the cited EU law provision “national security remains the sole responsibility of each Member State.” When attacking academia and civil society, Mr. Soros as Founder of the Central European University, CEU faculty and NGO representatives – virtually anyone still capable of formulating dissent in Hungary – were labelled as foreign agents and more, as a national security threat to the country. This got very close to demonising dissenters as terrorists and indeed the government claimed that NGOs receiving foreign support – i.e. the most professional ones – were helping asylum seekers, and among them terrorists, into the country. The explanations of both the law on civil society organisations, Lex NGO⁸⁶ and Lex CEU⁸⁷ refer to the protection of national security among the objectives of the norms.⁸⁸

The claim that NGOs are somehow a threat to national security is reflected already in the Preamble of the law.⁸⁹ Also, the explanations attached to the bill on civil society organisations refer to the protection of national security among the law’s objectives.⁹⁰ Finally, the way the threshold for the obligation of NGO’s registration as a “foreign funded organization” is determined, links NGOs with terrorism: if the sum the NGO received from abroad is twice the amount determined by Article 6(1)(b) of Act LIII of 2017 on Anti-Money-Laundering and Financing of Terrorism, the NGO must register. This is getting very close to demonizing dissenters as terrorists – a claim also underpinned by the government claiming that NGOs receiving foreign support are helping asylum seekers, and among them terrorists, to enter the Hungary. Such hints were reinforced, when a parliamentary committee on national security conducted a deliberation on NGOs receiving money from Soros funds. The committee’s report was classified as state secret until 2037, and as a consequence it is impossible to challenge the allegations, but the threat of terrorism and terrorist activities was successfully linked to NGOs in the public debate.

5) Double standards

A crucial and common tactic that we have already mentioned but that deserves separate discussion is the claim of double standards being applied to the detriment of the Orbán regime. **The Tavares report of the European Parliament on Hungary was cited as a document “that applies double standards openly, amounts to an abuse of power by the European Parliament that is deeply unjust with Hungary and the Hungarian nation.”**⁹¹

⁸⁶ 2017. évi LXXVI. törvény a külföldről támogatott szervezetek átláthatóságáról.

⁸⁷ 2017. évi XXV. törvény a nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról.

⁸⁸ Bárd, “The Open Society and Its Enemies: An attack against CEU, academic freedom and the rule of law”, *CEPS Policy Insights*, 2017/14.

⁸⁹ For an unofficial English translation see <https://helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

⁹⁰ Bill T/14967 on the transparency of organizations supported from abroad, 7 April 2017, <https://www.parlament.hu/irom40/14967/14967.pdf>.

⁹¹ Government of Hungary, “Memorandum Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary”, 2 July 2013, 10-11, <https://2010-2014.kormany.hu/download/1/03/f0000/Hungarian%20Memorandum%20on%20the%20Tavares%20report.pdf>.

A similar claim: “Equality of Member States also means that the same regulation should be assessed against the same criteria.” Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 5, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>.

This argument can appear in **combination with others, including the recognition of constitutional identity, the difference in power (East-West, small and big states) with a taste of whataboutism**, completely sidestepping the concrete issue, namely the measures undermining the rule of law where the application of the very same standards mandates different responses with regard to states where systemic violations have been occurring:

*some Member States are under constant scrutiny because of their newly introduced legislation regardless of the content and their constitutional traditions, while in other Member States the same or equivalent rules are applied without any critical voice. This brings us to double standards. Political opinions and comments about some Member States' legal and constitutional provisions or changes are very much present in the media and in political statements. It would be important to analyse how that particular question under scrutiny is regulated in all Member States be it from the western, eastern, southern or northern part of Europe, or whether it is a small, medium or big Member State. Equal approach, equal treatment would significantly strengthen our unity.*⁹²

Different methods are used in order to prove the existence and viral application of the so-called double standards against some member states, including Hungary. One of the most frequently used arguments is that the EU disproportionately targets certain CEE Member States (especially those joined after 2004, often referred as "new member states"), while it does not focus on Western European ones.⁹³ Double standards critique also claims that the EU (and/or its Member States) apply the same rules on a case by case or *ad hoc* basis, following some systematic bias against CEE countries.⁹⁴ As a result, the governments of these countries are allegedly mistreated. Occasionally different issues in different member states are compared as a test of double standard.⁹⁵

As a "background explanation" for why the Hungarian regime is singled out for unfair treatment, the label of "political attacks" is the most common reference. Labelling criticism as "politically motivated" works as a delegitimizing strategy. We attempt to cluster these "political attacks" under the subchapter of "Layers of freedom fight" emphasizing that the current Hungarian regime is always at war (using steady military rhetoric) which allows the most memorable features of the Hungarian history (namely

⁹² Government of Hungary, "Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018", 5-6, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>. Emphasis added.

⁹³ A speech delivered by Prime Minister Viktor Orbán in the European Parliament is a clear example of this political rhetoric, "Those who inherited democracy, who did not have to take personal risks in order to obtain liberty, they are the ones who want to condemn [...]" de La Baume and Herszenhorn, "Orbán clashes with European Parliament critics", *Politico*, 11 September 2018 <https://www.politico.eu/article/viktor-orban-unbowed-in-face-of-eu-criticism-hungary-president/>.

⁹⁴ As in 2020 Minister of Foreign Affairs and Trade Péter Sziijártó announced Hungary and Poland will set up a joint institute to assess the state of rule of law across the European Union and its member states so they are "not taken for fools" over allegations of rule of law breaches. Sziijártó stated that this institute would examine how the rule of law was upheld across the EU to avoid "double standards" being applied to Hungary and Poland. Reuters Staff, "Hungary, Poland to set up rule-of-law institute to counter EU", *Reuters*, 28 September 2020, <https://www.reuters.com/article/us-eu-democracy-hungary-poland-idUSKBN26J1S7>.

⁹⁵ Also Justice Minister Varga, in one of her latest Tweets wrote: "Double standards in Europe: we adopt the Child Protection Act → @EP_Justice rages & Brussels launches an infringement procedure. In the Netherlands, they use violent methods to crack down on protests → the @EP_Justice remains deeply silent. Who understands that? □ ♀ " https://twitter.com/JuditVarga_EU/status/1478987707988811777

revolts and freedom fights against big empires and oppressors). We will discuss these arguments in a later section (see IV.B below).

The double standard argument is also employed in a way that criticizes the EU for not being democratic, making all similar criticism towards Hungary illegitimate. Without making this connection, the argument of the EU's "democratic deficit" is anything but new and is generally linked to the need to strengthen the European Parliament as the directly elected body. Paradoxically, on this issue Prime Minister Orbán would move to the opposite direction, stating that the European Parliament should cease to work in its present form of direct elections.⁹⁶

C) Claims on illegal European actions that should be countered

We have seen how, e.g., the rule of law reports of the Commission were labelled illegal for being beyond the Commission's power under the Treaties. It is sometimes combined with the charge that actors are **illegally pushing for federalization, going beyond what Member States have agreed to**. In the words of Minister of Justice Varga: "the EU has the tools it needs to safeguard the rule of law and the distribution of EU funding", saying that the rule of law scrutiny of national budgets was "completely contrary to the treaties".⁹⁷ In the eye of a Hungarian autocrat, rule of law monitoring is rather a comparative exercise while enforcement should only be foreseen by provisions of EU law enshrined in Article 7 TEU, and every action beyond that would be *ultra vires*.

Often "federalization" is blamed for "illegal actions", a political project condemned with harsh rhetoric: "The fabric of European unity was unravelling, and there was no stopping it. Migration, gender, a federalized European Union, the dehumanization of Europe."⁹⁸ Following the Polish example, the Constitutional Court was also called upon to support this struggle or, in fact, defiance of the primacy of EU law, although the body stopped short of a Polish-type decision.⁹⁹

Illegality can also be combined with the countercharge that EU institutions **fail to live up to the very rule of law standards that they complain about in the case of Hungary**. In the words of former Fidesz MEP Szájer, "[s]ince the European Union is not a state, but a special, treaty-based organization, it has not yet been capable of fully meeting the conditions of democracy or the Rule of law; and since important basic conditions are missing, in a certain respect, it is never going to be able to meet them entirely."¹⁰⁰ Or to cite again Hungarian criticism of the rule of law reports: "The Report ignores the competences of the European Parliament, the division of responsibilities among the various EU

⁹⁶ "in terms of European democracy, the European Parliament has proved to be a dead end. It only represents its own party, ideological and institutional interests. Rather than adding to the European Union's strength, it diminishes that strength. We must therefore significantly increase the role of national parliaments: nations' legislatures should send representatives to the European Parliament, based on the model of the Parliamentary Assembly of the Council of Europe. In addition to this, national parliaments must be given the right to halt the EU's legislative process if they believe that it undermines national powers; in other words, a "red card" system must be introduced." "Viktor Orbán's address at the conference 'Thirty Years of Freedom'", *Cabinet Office Of The Prime Minister*, 19 June 2021, <https://miniszterelnok.hu/viktor-orbans-address-at-the-conference-entitled-free-for-thirty-years/>.

⁹⁷ Than, "Hungary rejects rule-of-law criteria for EU funding – minister", *Reuters*, 24 July 2019, <https://www.reuters.com/article/uk-hungary-justice-minister-idAFKCN1UJ1R8>.

⁹⁸ Orbán, "Samizdat No. 14", *Miniszterelnok.hu [Primeminister.hu]*, 6 December 2021, <https://miniszterelnok.hu/samizdat-no-14/>.

⁹⁹ Decision No. X/477/2021 of the Constitutional Court of Hungary, 7 December 2021, available in English at http://hunconcourt.hu/uploads/sites/3/2021/12/x_477_2021_eng.pdf.

¹⁰⁰ Szájer, "Rule of law should apply equally to all EU institutions, too!", *Cabinet Office of the Prime Minister*, 13 November 2020, <https://abouthungary.hu/blog/rule-of-law-should-apply-equally-to-all-eu-institutions-too>.

institutions as well as the sophisticated legally defined system of balances between the EU and its Member States.”¹⁰¹

Hungarian government actors continue to rely on the rule of law in cases where they see violations by EU institutions, demonstrating why and how it matters in cases where they remain in the minority. The Minister of Foreign Affairs and Trade called the European Parliament vote activating TEU Article 7 “fraudulent”,¹⁰² and the government filed a legal challenge arguing that abstention should be taken into account in the total when determining the two-third threshold required under voting rules. The Court of Justice of the European Union found subsequently that the counting of votes and the adoption of the resolution was in line with the standing rules and that abstentions should not be taken into account.¹⁰³

The argument of illegality is recurrently backed up by people using academic credentials. See, e.g., the argument, in a book published by a foundation with close ties to the government, that the author has to counter a “mainstream view” that the EU can use rule of law arguments to criticize member states without constraints, even beyond its powers.¹⁰⁴ Zs. András Varga describes in his book the rule of law as “idolatry”, fitting well the government line. He has proved himself in various positions in the regime: he long served with the Fidesz-nominated (and former Fidesz-candidate) chief prosecutor as second in line, then became constitutional judge, and was elected, against the protest of the highest body representing judges, to head Kúria, the highest court in Hungary.

The nature of legal procedures is exploited where government officials can claim that challenges are either too early or too late.¹⁰⁵ In a preparatory phase, resistance and legal challenges are premature and dialogue is welcome. Defensive arguments then shift to the “too late” argument without transition. An infamous example for the “too late” argument is Prime Minister Orbán’s reaction to the CJEU decision on the forced retirement of judges rendered after judges already had been compensated, comparing it to “hitting a dead dog on the head”.¹⁰⁶ Interestingly, the implementation of the judgement was hallmarked

¹⁰¹ Government of Hungary, “Memorandum Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary”, 2 July 2013, 9, <https://2010-2014.kormany.hu/download/1/03/0000/Hungarian%20Memorandum%20on%20the%20Tavares%20report.pdf>.

¹⁰² Kovács, “FM Sziijártó: Sargentini Report adopted through voting fraud”, *Cabinet Office of the Prime Minister*, 12 September 2018, <https://abouthungary.hu/blog/fm-sziijarto-sargentini-report-adopted-through-voting-fraud>.

¹⁰³ Case C-650/18, *Hungary v. Parliament*, EU:C:2021:426.

¹⁰⁴ Gát, “Könyvajánló –Küzdelem az Európai szintéren – a Magyarországgal szembeni „jogállamiság”-kritika feltáratlan összefüggései” [“Book recommendation – Struggle on the European scene – The unrevealed connections of the ‘rule of law’ critique against Hungary”], *Nemzeti Köszolgálati Egyetem – Európa Stratégia Kutatóintézet [National University of Public Service – Europe Strategy Research Institute]*, 26 April 2020, <https://eustrat.uni-nke.hu/hirek/2020/04/26/konyvajanlo-gat-akos-bence-kuzdelem-az-europai-szinteren-a-magyarorszag-gal-szembeni-jogallamisag-kritika-feltarlan-osszefuggesei>.

¹⁰⁵ We also find the application of such tactics internally. Plans to use taxpayers’ money to finance the establishment of a Chinese university, Fudan, with high tuitions angered many in a context where Hungarian higher education has been underfinanced and considering that the project could be carried out to the expense of a project that would provide affordable accommodation to university students. The Fudan project is unpopular and the opposition started to mobilize which included the submission of a referendum initiative. The government relied on the secrecy of the project and claimed, at times, that it was too early to challenge, we are only at the preparation phase, nothing has been decided, yet, a referendum could be held not in 2021 but in 2023. Considering the visible signs of the preparation that legally speeds up and entrenches the project, the fact that it seems to be based on international agreement, it is easy to imagine how, by then, a referendum could be considered “too late” for a U-tum. “Gulyás: A kormány támogatja, hogy legyen népszavazás a Fudan Egyetemről, de csak 2023-ban” [“Gulyás: The government supports a referendum on Fudan University, but only in 2023”], *hvg.hu*, 6 June 2021, https://hvg.hu/itthon/20210606_Gulyas_A_kormany_tamogatja_hogy_legyen_nepszavazas_a_Fudan_Egyetemr_ol.

¹⁰⁶ Cseri, “Orbán: Az Európai Bíróság fejbe vágta a döglött kutyát” [“Orbán: The European Court hit the dead dog on the head”], *Népszabadság*, 6 November 2012, http://nol.hu/belfold/orban_az_europai_birosag_fejbe_vagta_a_doglott_kutyat-1344303.

by a monitoring that embraced the aforementioned argument along with the formal (legalist) compliance and ignored the fact that the affected judges in leadership positions were not reinstated.¹⁰⁷

IV. Layers of a freedom fight

A) Democracy played out against the rule of law

An obvious strategy to question the rule of law is to pit it against a narrow conception of (majoritarian) democracy. Ultimately, “the Hungarian people must judge how these [rule of law values] are implemented”.¹⁰⁸ It remains true that the resulting institutional setup means that it can happen that courts invalidate the democratically expressed will of majorities. This is an achievement that goes back far in European thinking, requiring, among others, that the most powerful are subject to certain legal standards – even where they have democratic legitimacy. It is an old insight going back at least to Montesquieu that concentration of power leads to abuses. It is easy to see how rule of law issues directly translate to problems of democracy, e.g. where an opposition cannot take refuge behind the protection of independent institutions like a constitutional court because those are under the influence of a legislative majority and an executive with direct interest in undermining the opposition. Article 2 TEU lists democracy as one of the common values of the EU, and it does this along other values like the rule of law: the two, in combination with others, should form the basis of European cooperation.

The very functioning of democracy, protecting and sustaining democratic norms require rule of law guarantees. Otherwise democracy is emptied out by equating it to majority will, which again may easily turn into the dictatorship of the majority. The Hungarian case is a clear demonstration of this, where the democratic credentials are being questioned, which are used to justify deviation from rule of law standards. In Hungary, the trend widely described as de-democratization has been co-occurring with a heightened reliance on democratic legitimacy. **The OSCE found that general elections ceased to be fair.**¹⁰⁹ We should note that no similar reservations came from official EU sources, raising the question of democratic credentials of the Hungarian leadership. Hungary marked a record in the extent of continuous backsliding in the account of Freedom House, and ceased to be a free country.¹¹⁰ To cite one concrete area, not a single referendum initiative from the opposition was let through, including an infamous case where physical force was used against an opposition politician who wanted to submit a referendum initiative. (Despite video recordings of the case and a clause in the Criminal Code specifically on impeding a referendum, no charges followed.¹¹¹)

To claim oppression in the case of the finding of incompatibility of measures that are often very divisive domestically, an intermediate logical step is necessary, namely the equation of the will of the

¹⁰⁷ See Paper V in this series and Kovács, “Ki védi meg a magyar bíróságok függetlenségét? Személyzeti politika a központi igazgatásban” [“Who Protects the Independence of Hungarian Courts? Personnel Management in Central Administration”], *MTA Law Working Papers*, 2019/10, <https://jog.tk.hu/mtalwp/ki-vedi-meg-a-magyar-birosagok-fuggetlenseget-szemelyzeti-politika-a-kozponti-igazgatasban?download=pdf>.

¹⁰⁸ “PM Orbán: Rule of law is the bedrock of Hungary’s value system”, *Cabinet Office of the Prime Minister*, 9 November 2020, <https://abouthungary.hu/news-in-brief/pm-orban-rule-of-law-is-the-bedrock-of-hungarys-value-system>.

¹⁰⁹ Office for Democratic Institutions and Human Rights, “Hungary – Parliamentary Elections – 8 April 2018, ODIHR Limited Election Observation Mission, Final Report”, 27 June 2018, <https://www.osce.org/files/f/documents/0/9/385959.pdf>.

¹¹⁰ Hungary marking the “largest cumulative decline” in Nations in Transit reports, with a continuous fall often years. Csaky and Schenkan, *Confronting Illiberalism*, 2018.

¹¹¹ “Why Viktor Orbán called a referendum on resettling refugees in Europe”, *Economist*, 26 February 2016, <https://www.economist.com/europe/2016/02/26/why-viktor-orban-called-a-referendum-on-resettling-refugees-in-europe>; “Strongmen blocking opposition referendum found to have criminal records”, *Atlátszó [Transparent]*, 10 May 2017, <https://english.atlatszo.hu/2017/05/10/strongmen-blocking-opposition-referendum-found-to-have-criminal-records/>.

government with that of the people. This leads to a conflation of public (or national or state) interests with the current interests of the government or of Fidesz or of Prime Minister Orbán, identifying the country with the mundane positions of the government, often combined with the claim that opposition amounts to a threat to national security.¹¹²

“you are not about to denounce a government, but a country and a people ... I stand here now and defend my homeland, because to Hungarians freedom, democracy, independence and Europe are matters of honour. This is why I say that the report before you is an affront to the honour of Hungary and the Hungarian people. Hungary’s decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves. Therefore I must say to you that this report does not show respect for the Hungarian people.”¹¹³

This can go to the point of self-ridicule: “for those who claim that the report is not aimed at Hungary, I suggest you read its title: it isn’t the Hungarian government they want to denounce, but Hungary.”¹¹⁴

To be fair, many politicians use similar narratives, but as Jan-Werner Müller documents, (what he sees as) populist rhetoric can go beyond what is democratically acceptable. This is especially the case where anti-pluralist statements are backed up by corresponding measures that undermine pluralism necessary for a functioning democracy. In such cases the anti-democratic element is not the mere threat of slipping into homogenizing/unifying rhetoric by an office-holder who is meant to represent the whole nation, but very real violations of the democratic principle. This can lead to the **overwriting of the results of democratic decision-making in the case of local self-governments who were deprived of not only much of their funding but also some of their competences, particularly entities that are now occupied by opposition politicians. In the case of Budapest, the government created a quasi-mayor position for a Fidesz politician with way more resources, with Budapest-related competences.**

B) Fighting “oppression”, “imperialism”, “colonialization”

The Hungarian regime has been using a variety of anti-oppression rhetoric, claiming **to be the victim of a new type of colonization, of imperial domination. Prime Minister Orbán likened EU compliance pressures to “diktats from Moscow” and the EU was replaced with “Brussels”, dismissively, in a national campaign that included large anti-EU billboards flooding the country and manipulative questionnaires sent out to all citizens (“National Consultation”).** This technique sometimes borders parody, if not shameless disrespect for those opposing Communism before the regime change, as in the case of Prime Minister Orbán titling his newsletter “Samizdat”, a reference to

¹¹² See a recent utterance of the President of the Parliament of Hungary, to the end that the opposition is a national security threat. Pethő, “Orbán’s ally told Hungarian intelligence services that opposition is the greatest national security threat, leaked recording reveals”, *Direkt36*, 27 November 2021, <https://www.direkt36.hu/en/kover-laszlo-arrol-beszelt-titkosszolgalati-vezetoknek-hogy-az-ellenzek-jelenti-a-legnagjobb-nemzetbiztonsagi-veszelyt/>.

¹¹³ Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

¹¹⁴ Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

the practice of illegal publishing under Communist censorship, this time by an all-powerful premier.¹¹⁵ A government rally was organized under the motto “we won’t be a colony”, the series of rallies, often mobilized by militant rhetoric, “peace marches”.

This follows the logic of “enemification” and the war-like rhetoric that Orbán recurrently relies on. From the point of view of internal politics, this has been explained as a need to identify a powerful hostile force where none can be found domestically. Importantly, **this rhetoric not only matched national(ist) feelings that “Hungarians deserve better”, only enemy forces undermine our success, a blame game with a long tradition, or even less conspiracy-driven resentment after a long period of unilateral conditionality, a sense of having been lectured to for far too long,**¹¹⁶ **but also corresponded to existing sensitivities in the “target” group.** The EU’s reactions to charges of domination and responsibility for a new East-West divide (or between “old” and “new” Europe) can be illustrated how German premier Angela Merkel, even in the face of the most blatant attacks on judicial independence, a core element of European cooperation, talked about the need for talks and compromises, not for court decisions.¹¹⁷ Commission Vice-President Jourová continued to emphasize the importance of dialogue, in her presentation on the 2020 Annual Rule of Law Report, even after calls for her to resign and suspending of relations with her from the Hungarian side. **Another phenomenon that can explain the application and success of this strategy is the insight from the accession conditionality literature that the EU can end up favoring strong leaders who can deliver, or “stabilitocracy”.**¹¹⁸

Political leaders of EU Member States, like Hungary, Poland, and most recently Slovenia whose government officials proclaim themselves as illiberal, often equal, or deliberately misinterpret illiberalism as the opposite of liberalism. ‘Liberals’ – in terms of ideology and party politics – are negatively labelled in the public and political discourse, they become scapegoats and the enemies of prosperity or the enemies of the nation serving foreign interests. In Hungary, the Lex NGO¹¹⁹ may serve as an illustration. It stigmatised and blacklisted some of the most prominent organisations as foreign funded ones suggesting they represent foreign interests in the country, echoing the infamous draconian Russian ‘foreign agents’ law.¹²⁰

The same blame game is also directed against any foreign power, such as the EU, that may express criticism of the Hungarian government. The core element of these allegations against the EU is that the rule of law is an ideological imprint of European institutions, and left-wing governments which allegedly

¹¹⁵ For a review, see Sheftalovich, “Politicians’ newsletters, reviewed”, *Politico.eu*, 16 September 2021, <https://www.politico.eu/article/politicians-newsletters-review-viktor-orban-charles-michel-matteo-renzi-dominic-cummings/>.

¹¹⁶ This has been presented as a form of self-colonization by pro-Western elites. For an overview, see Dzenovska, *School of Europeanness: Tolerance and other lessons in political liberalism in Latvia* (Cornell University Press, 2018).

¹¹⁷ “Merkel says EU must resolve Polish problem in talks, not courts”, *Reuters*, 15 October 2021, <https://www.reuters.com/world/europe/eu-needs-resolve-differences-talks-rather-than-courts-merkel-says-2021-10-15/>.

¹¹⁸ Pavlović, “Montenegro’s ‘stabilitocracy’: The West’s support of Đukanović is damaging the prospects of democratic change”, *European Politics and Policy – LSE Blogs*, 23 December 2016, <http://blogs.lse.ac.uk/europpblog/2016/12/23/montenegros-stabilitocracy-how-the-wests-support-of-jukanovic-is-damaging-the-prospects-of-democratic-change/>; Huszka and Körtvélyesi, “Conditional Changes: Europeanization in the Western Balkans and the Example of Media Freedom”, 3 *Intersections* (2017), 8–32.

¹¹⁹ Bárd, Grogan and Pech, “Defending the Open Society against its Enemies: The Court of Justice’s ruling in C-78/18 Commission v Hungary (transparency of associations)” *VerfBlog*, 22 June 2020, <https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>.

¹²⁰ For example, Justice Minister Judit Varga in 2020 called the European Commission Rule of Law Report “absurd and false”, and as she stated in her Facebook post that 11 out of the 12 NGOs cited in the report “recently received financial support from the Open Society Foundation [related to philanthropist George Soros]”. <https://www.facebook.com/2024678420884437/photos/a.2025259724159640/3771755486176713/?type=3>

dominate these, unfairly attack and blackmail right wing governments so as to push through a liberal and/or socialist agenda,¹²¹ or some kind of a masterplan by George Soros.¹²² This criticism is combined with one version of the double standard criticism contending that similar policies by left wing governments are not condemned by the EU. The 'ideologically motivated attack' thesis nurtures illiberal forces' domestic discourse and electoral strategies.

The ideological motivation criticism expands to echo a critique of pro-EU ideology. In this frame, EU institutions are presented as an instrument of a certain ideology. In the long saga between the European People's Party and Fidesz PM Orbán emphasized that the EPP is more and more dominated by left-wing, liberal,¹²³ pro-immigration forces¹²⁴, and the party has lost its former Christian Democratic orientation and there is a clear risk of rupture.¹²⁵ Only a new political force on the European stage will be able to offset all this. In this new party formation, the obvious partners can be the ruling party of Poland, the right and extreme right-wing forces in Italy and France. Similar criticism was expressed by PM Orbán also in relation to the EU's proposed rule of law mechanism which was called among others a "political and ideological weapon" and he claimed it was designed to "blackmail" and punish countries that reject immigration. He said: "In Brussels today, they only view countries which let migrants in as those governed by the rule of law. Those who protect their borders cannot qualify as countries where rule of law prevails [...]"¹²⁶

¹²¹ In 2021 Prime Minister Viktor Orbán at the Budapest Demographic Summit said for example: "Hungary must defend itself because the Western left wing is attacking." "Hungary: Leaders slam migration, LGBTQ at 'family values' summit", *DW*, 23 September 2021, <https://www.dw.com/en/hungary-leaders-slam-migration-lgbtq-at-family-values-summit/a-59283286>

¹²² After the election of the EC President Ursula von der Leyen Orbán said according to a post on Twitter: "We tripped up everywhere the Soros candidates. We prevented the ideological gorillas from taking up important positions." <https://twitter.com/zoltanspox/status/1155037367314669569?s=20>; "The new report of the European Commission is indistinguishable from the previous [Tavares or Sargentini] reports dictated by Soros" Hollik said in a Facebook video, branding it a "collection of lies". <https://fb.watch/avTM7cDf6b/>; or according to the Hungarian News Agency, Orbán in 2017 called the resolution adopted by the European Parliament condemning Hungary a "flawed policy", adding that the document was actually a "Soros report". MTI, "Orbán: EP resolution against Hungary a 'Soros report'", *Daily News Hungary*, 19 May 2017, <https://dailynewshungary.com/orban-ep-resolution-hungary-soros-report/>.

¹²³ In 2020 during his annual international press conference PM Orbán stated that the EPP "is getting weaker and heading in a more liberal, socialist and centrist direction [...] We are not interested in the EPP as it is today. We are interested in the future EPP, and the future EPP should be different [...]" Bayer and Wanat, "Orbán: New conservative group needed if EPP stays on 'liberal' path", 9 January 2020, <https://www.politico.eu/article/orban-new-initiative-needed-epp-stays-liberal-path/>

¹²⁴ In 2019, during the usual Friday morning radio interview he stated that "pro-immigration forces in the European People's Party (EPP) have attacked Fidesz and are seeking to transform the entire EPP into a pro-immigration international organisation." Also added that "I would much prefer it if we could transform or reform the People's Party so that there's room in it for anti-immigration forces such as us; but if it turns out that we have to launch something new in Europe – and it may well be that this is how this dispute will end, with our place being not within the People's Party but outside it – [...] then clearly the first place for us to start talks will be in Poland". (Cabinet Office of the Prime Minister), There can be no compromise on defending Christian culture (2019), available at: <https://miniszterelnok.hu/there-can-be-no-compromise-on-defending-christian-culture/>

¹²⁵ In February 2020 in a memorandum sent to the leaders of the EPP Orbán said what he saw as the grouping's failure to represent Christian inspirations openly and self-consciously, "if there are any left". He also added that the EPP was "sliding from the Christian right-wing towards the left", slowly becoming indistinguishable from the liberal, green and socialist left in the eyes of voters. The memorandum is available here: <https://www.facebook.com/photo?fbid=2572786449487238&set=pcb.2572799456152604>, while its evaluation here: MTI – Hungary Today, "Orbán Pens Memo Calling for EPP Reform", 19 February 2020, <https://hungarytoday.hu/orban-pens-memo-calling-for-epp-reform/>

¹²⁶ Euronews – AP, "Morawiecki and Orbán step up attacks on EU over rule of law debate on eve of summit", 18 November 2020, <https://www.euronews.com/2020/11/18/morawiecki-and-orban-step-up-attacks-on-eu-over-rule-of-law-debate-on-eve-of-summit>.

The President of Hungary drew a parallel between the Habsburg Empire and the European Union at a conference which was studying the relationship between national constitutional identity and EU identity in 2019.¹²⁷

Another theory called ‘juristocracy’ as originally described by Ran Hirschl, is used for blaming constitutional rights and judicial review as elitist projects.¹²⁸ As some prominent figures of the Hungarian academic, political and professional legal field and constitutional judge,¹²⁹ as well as a former MEP¹³⁰ suggests court proceedings have taken the place and role of political debates and arguments. Accordingly, the decisions no longer reflect the will of the majority population, but a narrow judiciary, and the financial and organizational powers of lawyers advising the judges or rights protection groups.

Unfortunate as it may be, the claim of double-standards and a separate Eastern and Western understanding of the rule of law is accepted and echoed at the highest political level in the EU.¹³¹ This is a misconception no European politician should fall into. As scholars have shown, there is a Europe-wide agreement on the core of the rule of law.¹³² With regard to Hungary, as demonstrated in Paper III in this series, the rule of law was one of the most used concepts in the case law of the Hungarian Constitutional Court,¹³³ the HCC capturing the most crucial difference between the ‘49 and ‘89 Constitutions in the concept of the rule of law, and defining the regime change as a “rule of law revolution”.¹³⁴ The HCC emphasized material aspects of the rule of law going beyond a formal understanding, comprising of the rule of the laws, the legality of applying the law, legal certainty, protection of rights, independence of the judiciary, fair trial, human dignity, human rights and equality.¹³⁵ The HCC also ruled that the state can only function democratically, if democracy based on the rule of law and the protection and operation of the constitutional order incorporated respect for and protection of rights and freedoms.¹³⁶ Among others, the HCC ruled on the foreseeability and limited

¹²⁷ MTI, “Európa akkor maradhat Európa, ha meg tudjuk őrizni nemzeti identitásunkat” [“Europe can stay Europe only if we can preserve our national identity”], *Origo*, 8 March 2019, <https://www.origo.hu/itthon/20190308-irott-europai-alkotmany-hijan-mihez-lehet-kezdeni-az-europai-identitassal.html>

¹²⁸ “[...] in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. [...] In other words, I argue that strategic legal innovators—political elites in association with economic and judicial elites who have compatible interests—determine the timing, extent, and nature of constitutional reforms.” Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

¹²⁹ See for example: Pokol, “European juristocracy. Questions regarding the juristocratic structure of the European Union”, *Jogelméleti Szemle*, 2019/2, 69-74. Pokol also condemns the EU Court of Justice and the European Commission which has consistently advocated the ever-increasing integration of the Union against the Member States. According to him in many cases it is sufficient for the Commission to show the possibility of opening infringement proceedings against a reluctant Member State. Member States can have no doubts about the decision of the Court of Justice in a CJE procedure, because the empirical studies show that the Commission has a 93% chance of winning before the CJE. See: Pokol, “Real Power Structure of the EU Juristocracy”, *Jogelméleti Szemle*, 2018/4, 126-190.

¹³⁰ Szájer, “A szuverenitásvédelem lehetőségei és szükségessége az Európai Unióban”, *Jogelméleti Szemle*, 2019/2, 19-27.

¹³¹ Brössler, „Von der Leyen im Interview: ‚Nicht die schärfste Drohung an den Anfang‘”, *Süddeutsche Zeitung*, 18 July 2019, <https://www.sueddeutsche.de/politik/von-der-leyen-eu-interview-1.4530615>.

¹³² Pech, Grogan, Bárd, Beqiraj, Grabowska-Moroz, Kochenov, Closa, Pirjatanniemi, Sniadach, Moxham et al., “Unity and Diversity in National Understandings of the Rule of Law in the EU”, 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>.

¹³³ Gárdos-Orosz, “Jogállamiság” [“Rule of Law”], In: Gárdos-Orosz and Halász, (eds.) *Bevezetés az alkotmányjogba: alapfogalmak [Introduction into constitutional law: definitions]* (Dialóg Campus, 2019), pp. 49-59, 59.

¹³⁴ HCC Decision 11/1992. (III. 5.), Point III. 1.

¹³⁵ Sólyom, “Introduction to the Decisions of the Constitutional Court of the Republic of Hungary”, In: Sólyom and Brunner (eds.), *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (University of Michigan Press, 2000), p. 38.

¹³⁶ HCC Decision 36/1992. (VI. 10.).

nature of exercising state power,¹³⁷ the prohibition of arbitrariness,¹³⁸ the transparent functioning of the state,¹³⁹ the need for democratic legitimacy of state powers,¹⁴⁰ the legality of law making,¹⁴¹ the efficient functioning of constitutional organs,¹⁴² separation of powers.¹⁴³ With adopting the interpretation of the rule of law known in functioning democracies, the HCC fulfilled its promise and greatly contributed to the successful closure of the regime change.¹⁴⁴ The constitutional changes during the regime change and the interpretation of the constitution and the rule of law led Hungary to accede to the Council of Europe in 1990 and the European Union in 2004.

C) Fighting dangerous ideologies

The regime uses both tactics of downplaying and amplifying. We have seen how faking compliance can happen through downplaying broader challenges as mere technical issues not worth discussing, to be closed as a result of immaterial, unimportant amendments. In the context of the label of political attacks, the strategy is the opposite, it is used to amplify external criticism as part of an international conspiracy to break the spine of the nation, requiring mass immigration etc. See in the response of the Government of Hungary to the Sargentini report:

*[The criticisms] are unjustified. They lack and deny basic facts, they are misleading and give false interpretation of the situation in Hungary. ... The motivation of the European Parliament was deeply political and should be considered in the context of party politics and ideological divisions between different European political forces as to the future of Europe and diverging answers to the migration challenges.*¹⁴⁵

We can also see here the combination of the various strategies: the attacks are based on politically motivated lies, to which it is easy to connect allegations of illegality and the argument of the vagueness of the concept of the rule of law which, lacking a well-defined meaning, is prone to misuse, in this case for ideological attacks against a country (not a series of concrete measures) that seeks to preserve Europe as European.

The main threats presented to the Hungarian public as existential and as attacks against which our only refuge is the government were variously about the survival of the nation against migration threats (see Paper V in this series), about the survival of Christian European culture (see Paper III), or even our own children facing the threat of mandatory sex-treatment, an actual claim repeatedly made in the context of the anti-LGBTI law and the related referendum (see more on this below). The **ability of Orbán to sell its own reality** is probably best shown by how immigration became a central topic after 2015 in Hungary, a country where (a) no refugees wanted to settle, (b) most of the immigration comes from ethnic Hungarians living in neighboring countries and targeted specifically by FIDESZ policies that include Hungarian citizenship, (c) immigration was encouraged by a now-defunct FIDESZ investment-

¹³⁷ HCC Decisions 56/1991. (XI. 8.), 1/1995. (II. 8.).

¹³⁸ HCC Decision 35/1994. (VI. 24.).

¹³⁹ HCC Decision 60/1994. (XII. 24.).

¹⁴⁰ HCC Decisions 16/1998. (V. 8.), 30/1998. (VI. 25.), 30/1998. (VI. 25.).

¹⁴¹ HCC Decision 751/B/1990.

¹⁴² HCC Decision 12/2006. (IV. 24.).

¹⁴³ HCC Decisions 31/1990. (XII. 18.), 38/1993. (VI. 11.), 41/1993. (VI. 30), 55/1994. (XI. 10.), 2/2002. (I. 25.), 50/2003. (XI. 5.), 62/2003. (XII. 15.).

¹⁴⁴ Sólyom “The Rise and Decline of Constitutional Culture in Hungary”, in: von Bogdandy and Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2015), pp. 5–32.

¹⁴⁵ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”,

1-2, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>.

based visa policy that attracted wealthy non-EU citizens, many from Asia, (d) where the government maintains a program to invite foreign workers in increasing numbers,¹⁴⁶ and where (e) the dominant trend has been emigration, as opposed to immigration, with hundreds of thousands having left the country, mostly for Western EU countries.

When opposing the alleged double standards, the creation of an alternative reality is supported by GONGOs and more recently newly established academic institutions that echo government claims on the vagueness of the rule of law, illegality of EU interference, abuse of concepts such as judicial dialogue, constitutional identity, national security, contending that the rule of law is a tool of oppression or an ideological weapon etc. Instead of exclusively government sources making the above claims, more and more government financed entities disguised as civil society organizations, such as the GONGO Center for Fundamental Rights (Alapjogokért Központ)¹⁴⁷ and government financed academic institutions such as the Ferenc Mádl Institute of Comparative Law spread government propaganda.¹⁴⁸ The latter was supposed to take the lead in the creation of a comparative law institute with researchers from the Visegrád countries (V4),¹⁴⁹ but according to the later news only Poland agreed to cooperate in this endeavor, which according to the two governments' self-proclaimed aims will "accumulate the necessary legal security, basis and knowledge against the suppression of opinions by liberal ideology".¹⁵⁰ According to the original plans, also a V4 Network of Professors was supposed to be established with the alleged objective of representing the region's specific points of view in the areas of EU law and integration.¹⁵¹

D) Fighting off "political attacks" and "grey eminences"

The rhetoric of the Hungarian government often plays on the different uses of the "political", here meaning that it is ideological and illegitimate, for unprincipled and in bad faith, i.e. partisan, as opposed to neutral, impartial application of the norms. But political can also imply that political actors, stakes and interests are at play, which is necessarily the case of high-profile cases like rule of law challenges in the EU, a fact that should not have a direct bearing on whether an action is legitimate or not.

As a result of this tactic, domestic audiences are conditioned against European criticism, both more sweeping challenges (seen as going beyond what is in their power, with hints of illegality, for illegitimate, i.e. political reasons) and more technical, legal criticism (with similarly political motivations, only hidden this time). Somewhat paradoxically, European actors that remain sensitive to charges of illegality and illegitimacy might become more hesitant to resort to adequate tools, broader, systemic responses to systemic challenges. It is paradoxical, because we have seen that, domestically, European action is delegitimized regardless of its form. And giving in to such intimidation is anyway ill-advised, for it is itself "politically motivated" in the narrow sense: it is simply meant to raise the

¹⁴⁶ Kálmán, "Ötszörösére nőtt a Magyarországon dolgozó külföldiek száma négy év alatt, közelítünk a vendégmunka-alapú társadalomhoz", *24.hu*, 28 April 2020, <https://24.hu/fn/gazdasag/2020/04/28/vendegmunka-kulfoldi-munkavallalo-gazdasag-migracio/>.

¹⁴⁷ Alapjogokért Központ [Center for Fundamental Rights], <https://alapjogokert.hu/en/home/>.

¹⁴⁸ Ferenc Mádl Institute of Comparative Law, <http://mfi.gov.hu/en/>.

¹⁴⁹ Government of Hungary, "Hungary and Poland to establish joint legal institute", 29 September 2020, <https://2015-2019.komany.hu/en/ministry-of-foreign-affairs-and-trade/news/hungary-and-poland-to-establish-joint-legal-institute>.

¹⁵⁰ MTI – Hungary Today, "Hungary and Poland to Set Up Joint Institute for Comparative Law against 'Suppression of Opinions by Liberal Ideology'", 28 September 2020, <https://hungarytoday.hu/hungary-poland-new-comparative-law-institute/>.

¹⁵¹ Inotai, Ciobanu and German Sirotnikova, "Jury's Out on V4 Comparative Law Institute", *BIRN*, 26 November 2020, <https://balkaninsight.com/2020/11/26/jurys-out-on-v4-comparative-law-institute/>.

stakes, regardless of the merits of the underlying arguments. Furthermore, relying on narrower types of responses will be more likely to prove inadequate in the face of systemic challenges to the rule of law.

The charge of political attacks can be used both against concrete instances of criticism and against the critiques themselves. This can take such a wholesale form that covers all possible critiques of the rule of law situation in Hungary, e.g. questioning virtually all human rights and rule of law reports. **The methodology of the World Justice Project was questioned and it was linked to George Soros through organizations and experts “hand-picked” to support political attacks on Hungary, in a post written by the leader of an organization established to push the government line without being a government employee, the scheme that the writer complains about.**¹⁵² The Government of Hungary further complained:

*the European Parliament did not carry out its own research on a given policy field, it based its findings on the opinion of government critical NGOs and presented the report of different international organisations on a selective and distortive manner that resulted in an arbitrary compilation*¹⁵³

Minister of Justice Varga linked most of the civil society sources to Open Society Foundations, seeking to undermine the legitimacy of the claims of the Commission report on the rule of law.¹⁵⁴ Many of the prominent Hungarian civil society actors broadly understood, including Viktor Orbán himself, at some point benefited from Soros grants; government spokesperson Zoltán Kovács – also cited in this report – is a graduate of Central European University, to name two prominent examples, which would mean under the cited logic that they were also planted by globalist liberal forces to destroy the nation.

This tactic leads to a circular logic: whoever criticizes the situation in Hungary is a paid activist with bad faith agenda or part of a broader conspiracy against the nation (on how this can in fact apply to government-funded activists, see Chapter Three below). **This effectively makes labels like ‘Soros mercenaries’ or ‘pro-migrant forces’, ‘leftist-liberal forces’ and ‘foreign agents’ synonymous with ‘not agreeing with the government’.** When such labels are combined with repressive measures like criminalization, outlawing activities, smear campaigns and going after activists, academics and others, those with critical views might think twice before they voice their criticism. In an Orwellian turn, sustained efforts to oppress critiques is combined with a rhetoric that government views are being oppressed.¹⁵⁵

Bringing issues deemed to be internal to forums outside Hungary are deemed by government actors as a serious form of disloyalty, sometimes labelled as outright treason, that in any case leads to escalation as opposed to true resolution.¹⁵⁶ Back when Fidesz was in opposition, turning to outside forums, including the European Parliament, was still considered to be fair game. To give but one example, József Szájer, Fidesz MEP at the time, called the attention of Europe to the police violence in

¹⁵² Szánthó, “Hungary Threatens the Rule of Law – Really? Again?”, *Cabinet Office of the Prime Minister*, 1 May 2020, <https://abouthungary.hu/blog/hungary-threatens-the-rule-of-law-really-again>.

¹⁵³ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 2, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>

¹⁵⁴ “Justice Minister: Rule of law report published by EC is wrong in many ways”, *Cabinet Office of the Prime Minister*, 9 October 2020, <https://abouthungary.hu/news-in-brief/justice-minister-rule-of-law-report-published-by-ec-is-wrong-in-many-ways>.

¹⁵⁵ See, e.g., the title of Orbán’s series of posts, ‘samizdat’: <https://miniszterelnok.hu/tag/samizdat/>.

¹⁵⁶ “The EU should stay out of the internal affairs of the member states”, *Cabinet Office of the Prime Minister*, 14 April 2016, <https://abouthungary.hu/news-in-brief/the-eu-should-stay-out-of-the-internal-affairs-of-the-member-states>.

2006 in Budapest, Kinga Gál fellow Fidesz MEP adding that “respect for the tools of the rule of law is indispensable” and that “every legal means” should be seized in such a situation.¹⁵⁷

¹⁵⁷ Interventions of József Szájer (PPE-DE) and Kinga Gál (PPE-DE), One-minute speeches on matters of political importance, *European Parliament*, Strasbourg, 13 November 2006, https://www.europarl.europa.eu/doceo/document/CRE-6-2006-11-13-ITM-015_EN.html.

CHAPTER TWO – CASE STUDIES OF RED HERRINGS

In the previous chapter, we clustered the arguments of the Fidesz-government based on scope, level of abstraction, legal skillfulness and comprehensiveness. The current chapter embarks upon to illustrate how the **timing and context of the arguments** can also be relevant and what sometimes appears to be a far-fetched rhetorical twist, it might be **part of a rational, highly eloquent toolkit serving as a red herring to conceal the true purpose of the government**. This tactic is often used in combination with the tools listed earlier, to divert attention from other issues deemed to be more sensitive for the government, by engaging relevant actors in other areas. The importance of this toolkit is two-fold: first, the red herring alloys some of the arguments of the inventory above, second, this alloy of arguments always goes beyond keeping the community in stupor (i.e. buying time or strengthening relativism – even whataboutism). The **red herring serves to deflect attention from** what goes on beyond the surface of events, that is why the regime deliberately aims at turning the spotlight on some measures or initiatives that could lead to strong international upheaval. By doing so, other scandals or parliamentary acts – **paving the way to state orchestrated corruption, centralization of power or systemic curbing of autonomies** – could remain in the shadow. In this chapter, we put 5 cases under the loop, which are telling examples of how red herrings were put into practical use, while causing enormous financial, institutional and even moral damages to Hungary.

I. Shadow-boxing 2.0 – fighting a non-existent plan in 2016

A) Red herring

During the year of 2016, Orbán spinned the rhetoric about permanent freedom fight¹⁵⁸ towards excessive shadow boxing. Hungary had spent almost a year, preparing for a ‘migration-referendum’ without foreseeable legal consequences while Fidesz-controlled (public and private) media put the – non-existent – ‘plan of Brussels’ in the center of debates that relied on deliberate distortion of facts and important omissions about European migration and asylum policy.¹⁵⁹ Fidesz gained momentum in the summer of 2015 following a dramatic spike in the number of refugees who sought to enter the EU through the Balkan route.¹⁶⁰ In addition, Hungary was outvoted (in the company of the Czech Republic, Slovakia and Romania) by other members of the Council of Ministers when it decided upon the EC’s proposal on emergency resettlement of 120,000 refugees within the EU¹⁶¹. Hungary challenged the decision in front of the CJEU and parallel to the legal procedure, the government started a campaign against Brussels and its plan while it became the biggest advertiser of the country in 2016.¹⁶² The government therefore

¹⁵⁸ See previous arguments about overused and misconceptualized freedom fight. Also a study about the main elements of the speeches of the PM that investigated the period between 1999-2018: Magyar, Gulyás, Kovács, Világosi, “Van egy magyar Magyarország” [“There is a Hungarian Hungary”], 16 June 2018, https://ia803100.us.archive.org/35/items/161189wA180616_201807/161189w_a_180616.pdf

¹⁵⁹ See the media assessment a year later: Pápay, “Allandósult blöff és konteókampány – egy évvel a kvótanépszavazás után”, *Azonnali*, 2 October 2017, https://azonnali.hu/cikk/20171002_allandosult-bloff-es-konteokampany-egy-evvel-a-kvotanepszavazas-utan.

¹⁶⁰ This influx of refugees led to the official justification of emerging a fence along the southern borders which according to the Fidesz stopped the ‘wave of migrants’.

¹⁶¹ Regarding the timeline of the events, see Magyari and Szily, “Időgép: Ez volt az a 2016-os népszavazás, amire Orbán szerint a most bejelentett hasonlítani fog”, *444.hu*, 21 July 2021, <https://444.hu/2021/07/21/idogep-ez-volt-az-a-2016-os-nepszavazas-amire-orban-szerint-a-most-bejelentett-hasonlitani-fog>; regarding the assessment, see Végh, “Hungary’s migrant quota referendum: Never let a good crisis go to waste”, *ECFR*, 9 September 2016, https://ecfr.eu/article/commentary_hungarys_migrant_quota_referendum_never_let_a_good_crisis_go7011/.

¹⁶² Spike, “Hungarian government becomes largest advertiser in 2016, spending 80 percent more than previous year”, *Budapest Beacon*, 9 May 2017, <https://budapestbeacon.com/hungarian-government-becomes-largest-advertiser-2016-spending-80-percent-previous-year/>.

successfully re-arranged media market already in 2016¹⁶³ and spent approx. HUF 13 billion (€ 40 million)¹⁶⁴ on the ‘quota referendum’¹⁶⁵ which – according to watchdogs and legal experts – was unconstitutional.¹⁶⁶ At the end of the day, the expensive referendum was not valid, it, however did not prohibit the government from claiming victory and initiating an amendment to the Fundamental Law which also failed¹⁶⁷ until the servile Constitutional Court intervened and helped Fidesz with the identity-argument for challenging EU-law (see paper III and IV in detail)¹⁶⁸. Even though the referendum technically failed, the surrounding campaign resulted in a shift in public sentiment against migrants and asylum seekers. Whereas in 2015 two-thirds of respondents to a survey expressed their tolerance and pro-migrant support, by 2016 the proportion decreased to one-thirds.¹⁶⁹

B) The deal in the shadow

Apart from the aimed political gain for Fidesz, one could ponder further tangible benefits of the referendum. To this end, it is worth looking into the developments of the year 2016. In February, only one day before Orbán announced the referendum on the quota,¹⁷⁰ a group of men physically prevented¹⁷¹ an opposition lawmaker from filing a referendum initiative on an unpopular government-backed law (Sunday shop ban).¹⁷² The politician and 21 other civilians filed a complaint, but six months later police have stated that no crime was committed and the perpetrators were never held accountable.¹⁷³ In the meantime, OLAF has concluded its investigation into the alleged theft of some HUF 2.4 billion worth of EU funds¹⁷⁴ and still was investigating the ELIOS-case (linked to the son-in-law of PM Orbán). From the day of the announcement of the quota-referendum,¹⁷⁵ the public learnt not only the halt of domestic investigations related to the findings of OLAF, but witnessed how the Hungarian parliament adopted laws¹⁷⁶ which made it possible for the Hungarian Postal Service and the National Bank (MNB) to classify information about the operation and expenditures of state-owned businesses and foundations. The National Bank of Hungary (MNB) transferred almost HUF 267 billion (approx. € 900 million) in total to a group of foundations it established under the name Pallas Athéné. TI-Hungary already warned

¹⁶³ Budapest Sentinel, “Orbán uses anti-refugee campaign to reorganize Hungarian media market”, *Budapest Beacon*, 19 September 2016, <https://budapestbeacon.com/orban-uses-anti-refugee-campaign-to-reorganize-hungarian-media-market/>.

¹⁶⁴ Dull, “Elárulta végre a kormány, mennyibe került a kvótakampány”, *Index*, 4 October 2016, https://index.hu/belfold/2016/10/04/elarulta_vegre_a_kormany_mennyibe_kerult_a_kvotakampany/.

¹⁶⁵ The numbers cover the government sponsored ‘communication’ and the technical implementation of the referendum.

¹⁶⁶ See the joint assessment of Hungarian Civil Liberties Union, Hungarian Helsinki Committee, EKINT and Political Capital at: https://tasz.hu/files/tasz/imce/nepszavazas_ekint-helsinki-pe-tasz_allasfoglalas_20160504.pdf.

¹⁶⁷ Fidesz at the time did not have the 2/3rd majority for the amendment.

¹⁶⁸ Decision 22/2016 (XII.5.) of the Hungarian Constitutional Court.

¹⁶⁹ Thorpe, “Hungary poster campaign pokes fun at migrant referendum”, *BBC*, 10 September 2016, <http://www.bbc.com/news/world-europe-37310819>.

¹⁷⁰ The referendum was initiated on the 24th of February, 2016.

¹⁷¹ Footages available in Novak, “Videos show skinheads prevented Nyakó from being first to submit referendum proposal”, *Budapest Beacon*, 18 March 2016, <https://budapestbeacon.com/videos-shows-skinheads-prevented-nyako-from-being-first-to-submit-referendum-proposal/>.

¹⁷² Serdült, “Police end investigation into election office scandal”, *Budapest Beacon*, 18 August 2016, <https://budapestbeacon.com/police-end-investigation-into-election-office-scandal/>.

¹⁷³ The action was listed as key by the Freedom House in its report about 2016. “Freedom in the World 2017 – Hungary”, <https://freedomhouse.org/country/hungary/freedom-world/2017>.

¹⁷⁴ “Lenyúltuk a korrupció elleni küzdelemre adott EU-s pénzeket?”, *Portfolio.hu*, 24 January 2016, <https://www.portfolio.hu/unios-forrasok/20160124/lenyultuk-a-korrupcio-elleni-kuzdelemre-adott-eu-s-penzeket-225964?amp>.

¹⁷⁵ ...and during the “let’s send a message to Brussels” campaign.

¹⁷⁶ Amendment to act CLIX of 2012 on the postal service [section 53(4)] and act CXXXIX of 2013 on the central bank.

in 2014, that the establishment of the foundations might be illegal and after 2 years, data gained on the base of FOI-requests, proved that the Foundations spent taxpayers' money for peculiar investments without proper legal base.¹⁷⁷ Several hundred million HUF disappeared from the books of the MNB and went through the Pallas Athéné foundations to ineligible parties, including family members of the leadership¹⁷⁸ of the MNB which led to a huge scandal and shook the chair of governor Matolcsy himself.¹⁷⁹ The Hungarian Parliament attempted to hide the funds via exempting them from the scope of public data (and data of public interest), but it only succeeded in the case of the Hungarian Postal Service¹⁸⁰. Data about the operation and management of Pallas Athéné foundations remained publicly accessible, the management, however was not subject to significant (only to minor symbolic) corrective measures¹⁸¹ and the foundations could continue operation. According to experts, these foundations were the pioneer-predecessors of the KEKVA-s of 2020/2021 (see below) and key elements of the scandal were still recalled during the mass protests in 2017,¹⁸² therefore the unconstitutional quota-referendum came especially handy for PM Orbán for various reasons.

II. Mocking the international community – the justice omnibus in 2019

A) Red herring

On the 10th of December 2019, the Hungarian government had to answer questions about rule of law in the General Affairs Council (GAC) within the frame of the article 7 procedure. Hungary was – and still is - the subject to the article 7(1) TEU procedure for presenting a clear risk of a serious breach of the values on which the Union is founded¹⁸³. In the GAC-hearing, special emphasis was put on the independence of the Hungarian judiciary, along with the most important developments from the year 2019 which was opposed by the Fidesz-government harshly¹⁸⁴. The year 2019 was rather eventful, since Fidesz attempted to set up a new administrative court system¹⁸⁵ which was heavily criticized by domestic

¹⁷⁷ See the summary in the report of TI-HU and CIIVITAS: “Black Book – Corruption in Hungary 2010 – 2018”, *Civitas Institute* (2018), https://transparency.hu/wp-content/uploads/2018/03/Black-Book_EN.pdf.

¹⁷⁸ “Buildings bought for MNB foundations to host wine shop, restaurant, museum art gallery” *Budapest Beacon*, 2 March 2016, <https://budapestbeacon.com/buildings-bought-for-mnb-foundations-to-host-wine-shop-restaurant-museum-art-gallery/>.

¹⁷⁹ “6 out of 10 Hungarians say Matolcsy should resign over MNB scandal”, *Budapest Beacon*, 23 May 2016, <https://budapestbeacon.com/6-out-of-10-hungarians-say-matolcsy-should-resign-over-mnb-scandal/>.

¹⁸⁰ The Central Bank and state owned enterprises are not allowed to allocate national assets, through foundations or in any other manner, to fund aims that are not related to the functions.

¹⁸¹ Regarding the involvement of the General Prosecutor: Novak, “Experts say MNB foundations scandal reeks of criminality” *Budapest Beacon*, 18 April 2016, <https://budapestbeacon.com/experts-say-mnb-foundations-scandal-reeks-criminality/>.

¹⁸² ‘Elvesztette közpénz-jellegét’ (it had lost its quality of public funds) was one of the leading rhymes during the pro-CEU protests that recalled the justification of the legislation which aimed at hiding the foundations' spending from the public.

¹⁸³ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html.

¹⁸⁴ See also the assessment of Varga after the hearing: Kálmán: “A magyar kormány tagjai szerint Soros emberei lekéztetik őket még mindig Brüsszelben”, *24.hu*, 10 December 2019, <https://24.hu/kulfold/2019/12/10/hetes-cikk-meghallgatas-varga-judit-kovacs-zoltan-soros-gyorgy/>.

¹⁸⁵ In 2018, the National Assembly adopted the Seventh Amendment to the Fundamental Law of Hungary. The amendment, among others, introduced the new system of administrative courts which was regulated in detail in act CXXX of 2018 (adopted on the 12th of December, 2018). The planned system became subject of increased international scrutiny.

and international watchdogs¹⁸⁶ and monitoring bodies¹⁸⁷. During the hearing, the Hungarian government used the tweets of the government spokesperson Kovács to disseminate arguments about the agents of Soros (incl the EC) in action, which created strong international upheaval¹⁸⁸. Since the summer of 2019, the government advertised the fact that the separate (government-dominated) administrative court system was put on ice,¹⁸⁹ however, it remained silent about the fact that by December, a peculiar justice omnibus bill (see below) created a new institutional setting for the administrative judges and increased pressure on adjudicating judges via more complex but still very efficient tools.¹⁹⁰

B) The deal in the shadow

On the 12 November 2019, the Hungarian Minister of Justice has submitted a comprehensive omnibus bill to the National Assembly that allegedly tackled all the amendments emerging from the introduction of simplified (one-instance) administrative procedures¹⁹¹. The seemingly procedural package, however contradicted its title and intended to set forth serious changes for the judicial system affecting both constitutional and regular courts (details see in Papers V and VII in this series). As a result, the adopted omnibus bill¹⁹² abolished conflict of interest for members of the already packed Constitutional Court judges and paved the way for them to become presidents of adjudicating panels at the Supreme Court (even with no judicial background). At the same time, the omnibus act intended to tie the hands of regular judges via introducing a special uniformity complaint and a quasi-precedent system dominated by the Supreme Court. According to analysts (see paper V), the grip on the Hungarian judiciary became tighter while the government showed no intention to remedy the constitutional crisis within the judiciary since the judicial oversight above justice administration remained extremely weak. The government relied again on ‘fake-compliance’ actions, since Mrs. Handó who was in the center of scandals about abusing power¹⁹³ indeed left the central administration of the judiciary for the Constitutional Court, however her legacy remained deliberately untouched and judicial self-governance was still not endowed with the competences to protect the independence of the third branch of power. Given the lack of time to learn and study the adopted amendments (and also the lack of available official translation), it was extremely difficult to raise pertinent questions about the actual challenges of the judiciary during the GAC-hearing. Politically motivated tweets of the spokesperson did not help to focus on the merit of the

¹⁸⁶ Some stakeholders expressed concerns about the independence and ethos of the administrative judges (being recruited from the ranks of central administration) not being in line with international standards. See “Blurring the boundaries”, *Hungarian Helsinki Committee* (2018), <https://helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf>

¹⁸⁷ the Venice Commission issued also an opinion in 2019 which stated that extensive powers are concentrated in the hands of a few stakeholders and there are no effective checks and balances to counteract those powers. See Opinion nr. 943/2018 of VC available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)

¹⁸⁸ Bayer, “Hungary clashes with other EU members in rule-of-law hearing”, *Politico*, 19 December 2019, <https://www.politico.eu/article/hungary-clashes-with-eu-governments-in-rule-of-law-hearing/>; Szűcs, “Kiborultak Brüsszelben Kovács Zoltán sorozása miatt”, *Eurológus*, 10 December 2019, https://index.hu/kulfold/eurologus/2019/12/10/hetes_cikk_meghallgatas_luxemburgi_kulugyminiszter_kovacs_ros_tweet/. The tweet of Kovacs: “Today, we witnessed the #SorosOrchestra drag the EU’s #gac into their ideologically driven political fight”, available online at: <https://twitter.com/zoltanspox/status/1204362191660564482>.

¹⁸⁹ In May, 2019 Minister of the Prime Minister’s Office Gulyás announced that the government would indefinitely postpone the introduction of the separate administrative court system, then in July, the Hungary Parliament had adopted act LXI of 2019 on the Postponing the Entry into Force of the Act on Administrative Courts.

¹⁹⁰ See also the analysis of watchdogs: Amnesty International, “Semmi sem vesz el, csak átalakul: A kormány tovább korlátozza a bíróságok függetlenségét”, 3 December 2019, <https://www.amnesty.hu/semmi-sem-vesz-el-csak-atalakul-a-kormany-tovabb-korlatozza-a-birosagok-fuggetlenseget/>.

¹⁹¹ Bill T/8016 available at <https://www.parlament.hu/irom41/08016/08016.pdf>.

¹⁹² Act CXXVII of 2019; entered into force on the 1st of April, 2020 .

¹⁹³ See also paper V and VII

developments in the field of judicial independence, furthermore, as the cherry on the sundae of cynicism, the adoption of the justice omnibus was scheduled exactly for the same time when the hearing took place. These actions already raise serious questions about the Fidesz-led interpretation of mutual respect or the willingness to comply with international scrutiny.

III. Shielding public money in the shadow of ‘family matters’

A) Red herring

During November 2020, while the second wave of the COVID-19 pandemic was rising in Hungary, the Fidesz government was busy creating a legislative tsunami that proved to be detrimental not only for legal certainty and transparency, but offered poisoned food for thought for stakeholders who wanted but could not follow thoroughly the implications of the submitted proposals at once. On the 10 November of 2020, Justice Minister Varga submitted 3 extensive legislative packages overnight.¹⁹⁴ One of the packages tackled amendments to the electoral rules,¹⁹⁵ tilting the playing field further to a Fidesz dominated-campaign for the 2022 elections.¹⁹⁶ The second package consisted of a lengthy omnibus bill,¹⁹⁷ that contained organizational rules for the judiciary, endowing the newly elected chief justice (of zero judicial background) with strong competencies which enabled the president of the highest court in Hungary to shape the whole Hungarian judicature and jurisprudence from top. The third and most well-known package was the 9th amendment to the Fundamental Law.¹⁹⁸ The constitutional amendment introduced the much debated provisions on the definition of the family (“the mother is female, the father is male”)¹⁹⁹, and that children have a right to their “identity in line with their sex by birth”, but at the same time it deliberately narrowed the concept of public funds²⁰⁰. The package also re-shaped the special legal orders in Hungary, but the latter amendment only enters into force in 2023, while the aforementioned ones already hallmarked the year 2021. While stakeholders and monitoring bodies after the hate campaign against the fairytale book *Meseország Mindenkié*²⁰¹ tried to decipher what the scandalous (and misplaced) provisions on family could mean (also for practical enforcement), there was much less attention paid to the amendments that strengthened state capture by Fidesz and prepared the governing majority for an eventual electoral loss in 2022.

B) The deal in the shadow

The constitutional amendments which narrowed the concept of public funds, not only opened the door to outsource state asset management to non-transparent foundations, but at the same time aimed at curbing freedom of information jurisprudence, too. The Hungarian courts previously granted access to

¹⁹⁴ One of the packages was de facto submitted by Semjén deputy PM avoiding compliance with public consultation rules.

¹⁹⁵ Bill T/13679 adopted as act CLXVII of 2020 on the 15th of December.

¹⁹⁶ The amendments increased pressure on the opposition to create a joint opposition list for the 2022 parliamentary elections, since the finally adopted legislative framework only enables parties to create a national list in case they can nominate candidates in at least 71 of the 106 single member constituencies.

¹⁹⁷ Bill T/13648 adopted as act CLXV of 2020 on the 15th of December.

¹⁹⁸ Bill T/13647 adopted on the 15th of December.

¹⁹⁹ Article L of FL on family.

²⁰⁰ Based on the adopted motion, Article 39(3) would define public funds as “ [...]the income, expenditure and receivable of the State.”

²⁰¹ On September 2020, *Wonderland Belongs to Everyone*, a children’s book with fairy tales featuring various vulnerable groups (LGBTQI, Roma, persons with disabilities) was published. The publisher was quickly verbally attacked by several extreme right-wing public figures, and soon, the governing party followed course (including PM Orbán), heavily contributing to the homophobic hate campaign against the book. Further info at HHC’s factsheet, available at: https://helsinki.hu/wp-content/uploads/HHC_RoL_flash_report_Hungary_12112020.pdf.

public data on the legal base that ‘every organization managing public funds shall be obliged to publicly account for its management of public funds’ [Article 38(2) Fundamental Law]. The new amendment left doubt whether the transfer of state assets to semi-private foundations (linked to prominent Fidesz cronies or public officials) still would fall under the scope of transparent and publicly accountable management. The amendment means that the public (i.e. watchdogs and journalists) could be sealed off from learning details about transfers to foundations with Fidesz dominated boards of trustees.²⁰² Another amendment to the Fundamental Law stipulated that “*the establishment, operation, termination of and the performance of public duty by a public interest asset managing foundation performing public duty shall be regulated in a cardinal Act*”²⁰³ which basically tied regulations about the aforementioned foundations (KEKVAs)²⁰⁴ to legislative supermajority. After December of 2020, the entities became shielded by cardinal acts – requiring 2/3rd majority – with the aim of ensuring untouchability of boards, assets and operation even after a win by the opposition in 2022.

It is worth noting that as of 11 November 2020, the government introduced a total ban on demonstrations,²⁰⁵ irrespective of the modalities and whether it would be compatible with social distancing and curfew rules, therefore it successfully prohibited any opinion being publicly articulated on the legislative packages.

IV. The peacock dance around Fudan University Campus

A) The deal in the shadow

As it is strongly linked to the previous chapter, hereby we start with the corruption angle, then look into the smokescreen created for international audience. In April 2021, the Hungarian Parliament adopted the cardinal act on KEKVAs²⁰⁶ which listed 32 foundations²⁰⁷ that will be subject to additional (future) cardinal acts (to be adopted by 2/3 majority). This structure implied that each and every KEKVA falls under the general cardinal act on KEKVAs as well as a specific cardinal act regulating its public duty and the transfer of state assets. This chaotic regulation forecasted the impairment of transparency and public accountability, when the situation further deteriorated. During the spring of 2021, investigative journalists shed light to the fact that the Hungarian government plans a major investment from Chinese loans aiming at creating a campus for the FUDAN University²⁰⁸. Apart from national security implications, the few publicly available detail about the project pointed towards state-orchestrated corruption. The €1.25 billion loan from China would be executed by Chinese constructing companies²⁰⁹ while the Hungarian government had already pledged to give over one of the most valuable development lots of Budapest.²¹⁰ To that, journalists obtained info that the planned campus would be established and maintained by a Chinese-Hungarian asset management foundation, a model which is similar to the

²⁰² E.g. Minister Judit Varga is member of the board of trustees of Miskolc University, Minister Nagy and former minister Lázár are members of the boards of trustees of Gödöllő University.

²⁰³ Article 38(6) of the Fundamental Law, adopted on the 15th of December.

²⁰⁴ Asset managing public foundations performing public duties, in Hungarian, “közfeladatot ellátó közérdekű vagyongazdálkodó alapítvány” (KEKVA).

²⁰⁵ Government Decree 484/2020. (XI. 10.), Articles 4(1) and 5(1)-(2).

²⁰⁶ Act IX of 2021 on asset managing public foundations performing public duties.

²⁰⁷ See annex I of act IX of 2021.

²⁰⁸ Panyi, “Huge Chinese loan to cover the construction of Fudan University in Budapest”, *Direkt36*, 6 April 2021, <https://www.direkt36.hu/en/kinai-hitelbol-keszul-a-magyar-felsooktatasi-beruhazasa-a-kormany-mar-oda-is-igerte-egy-kinai-cegnek/>.

²⁰⁹ Földes, Kovács, and Marjanovic, “Karácsony: The Fudan project is Fidesz's ultimate moral suicide”, *Telex*, 7 June 2021, <https://telex.hu/english/2021/06/07/protest-hungary-china-fudan-budapest-gergely-karacsony-viktor-orban>.

²¹⁰ The lot was the one where Budapest municipality was planning to construct a student district (Diákváros).

KEKVA-model.²¹¹ The project became subject of a big domestic upheaval and the first mass protest²¹² – after a 6-month long ban on protest – revolved around the very topic of state orchestrated corruption and national security threat. The Lord Mayor of Budapest requested a referendum on the construction of the campus and Fidesz seemingly stepped back. The Parliament, however adopted a specific cardinal act on the Fudan-KEKVA²¹³ on the 15 June 2021 and transferred the construction lot to it. Since the exact amounts of the state transfers to KEKVAs are not available on the website of the National Asset Management Bureau, according to the calculations of watchdogs, more than HUF 1000 billion (approx. € 3 billion) asset wandered already to dozens of KEKVAs during the summer of 2021.²¹⁴

B) Red herring

Only a few minutes before the adoption of the aforementioned cardinal act on Fudan, the National Assembly enacted another law that threw an A-bomb on the approaching rule of law hearing concerning Hungary (GAC-hearing tackling Article 7(1) TEU) and hijacked the attention of both domestic and international audience. This was the law on the protection of the children ('child protection-law'²¹⁵) which deliberately mashed pedophilia with homosexuality and under the title of sexual education of children, 'promotion' and 'portrayal' of homosexuality has been banned. The act was followed by a set of domestic and international steps, but the well-prepared communication of the Fidesz-government deprived the community from the ability of connecting the dots about comprehensive rule of law dismantling and the proper place of the scandalous act in the plot. In July 2021, the Commission initiated infringement procedures against Hungary,²¹⁶ as the new law breaches the EU law (primary and secondary law), but the revved up communication machinery successfully used it as a red herring to deflect attention from the corruption angle²¹⁷ and from the pre-orchestrated moves to cement Fidesz-loyalists as heads of constitutional checks even after an electoral win of the opposition in 2022.²¹⁸ Here we have to state that the 'child protection-law' is both dehumanizing and unacceptable in a democratic rule of law state within Europe, but one cannot turn a blind eye towards the underlying considerations which made it worth throwing it into the public discussion in spite of the fact that the Hungarian society reflects more acceptance towards the LMBTQI-community than the Fidesz government intends to showcase.²¹⁹

²¹¹ Panyi, "Huge Chinese loan to cover the construction of Fudan University in Budapest", *Direkt36*, 6 April 2021, <https://www.direkt36.hu/en/kinai-hitelbol-keszul-a-magyar-felsooktatas-oriasberuhazasa-a-kormany-mar-oda-is-igerte-egy-kinai-cegnek/>.

²¹² The mass protest took place on the 5th of June.

²¹³ Act LXXXI of 2021 on Fudan Egyetemért Alapítvány.

²¹⁴ HCLU – K-monitor, "Korrupciófigyelő 5." *HCLU* (2021), <https://k-monitor.hu/cikkek/20201217-korrupciofigyelo-klienturaepitesre-megtorlasra-hasznalja-a-valsaghelyzetet-a-kormany>.

²¹⁵ Act LXXIX of 2021 adopted literally minutes before the act on Fudan Egyetemért Alapítvány on the 15th of June.

²¹⁶ The adopted provisions of the act are subject of one infringement procedure, while 2 other infringements are held against Hungary related to the fairy tale book 'Meseország mindenkié' and to the publisher whose right to freedom of expression was violated by the Hungarian authorities.

²¹⁷ The referendum of the Lord Mayor on the Fudan-project will be postponed after the elections. Lengyel, "Karácsony Gergelynek siker a Fudan-népszavazás, de még a Fidesznek is jól jöhet", *Hvg.hu*, 1 September 2021, https://hvg.hu/360/20210901_Karacsony_Gergely_Fudannepszavazas_Fidesz_parlament_i_valasztas, while the FUDAN-KEKVA already received significant contributions from the HU government in the autumn of 2021. Sarkadi-Nagy, "14 milliárdnyi állami ingatlant és közpénzt ad a kormány a Fudan-alapítványba" *atlatszo.hu* 1 September 2021, <https://atlatszo.hu/kozpenz/2021/09/01/14-milliardnyi-allami-ingatlant-es-kozpenzt-adott-a-kormany-a-fudan-alapitvanyba/>.

²¹⁸ See e.g. establishment of the Supervisory Authority of Regulated Activities (cardinal act XXXII of 2021) headed by a former state secretary of the Prime Minister's Office – conflict of interest ignored) who was appointed by PM Orbán for nine years and is 'almost' irremovable during its mandate.

²¹⁹ Based on 2 surveys from 2021, 73 percent of the answers rejected the claim of the government that gay and lesbian people would pose a threat of sexual abuse for children, while 82 percent of the questioned people

V. Pegasus: up the ante! – referendum on the adopted child protection act

A) Red herring

Shortly after the provocative child protection act (see previous subchapter), the Orbán-government needed another top-up diversion, since the Pegasus-scandal (see below) started to thematize public discourse in Hungary. During the summer of 2021, members of the Orbán-government tried to dodge questions by repeating that all of the Hungarian surveillance cases are lawful²²⁰ (i.e. in compliance with the Fidesz-made legislation)²²¹ or by escaping uncomfortable questions of journalists (see Minister Justice Varga's runaway from RTL KLUB's reporter²²²). The situation became more and more unpleasant for Fidesz, therefore on the 21st of July, 2021 (which was only 3 days after the pop up of the scandal), PM Orbán announced that the government initiates a referendum on child protection²²³. In order to cut and control public dissent, the government initiated a referendum about the very same act that was adopted a month before and became subject of an infringement procedure as well. The planned referendum was not only a potent red herring,²²⁴ but also kind of controversial, since the questions themselves, did not always line up with the child protection act, and when they did, a possible valid result contradicting the governmental intentions would lead to rather strange legal/constitutional consequences (i.e. legislator could be obliged to adopt provisions e.g. on "*making gender reassignment treatments available to underage children*"²²⁵). While domestic and international public was kept busy with the preparations of the referendum (which will take place at the same time with the parliamentary election), new developments about the Pegasus-scandal revealed that the parliamentary committee on national security²²⁶ held a close circuit session in September of 2021 and classified the minutes of the session until 2050 without any further actions.

B) Classified deal in the shadow

On 18 July 2021, the use of the Pegasus spyware, produced by Israel-based NSO Group, was uncovered through an international investigative journalist consortium which found that Hungarian individuals had also been targets of the cyber warfare, incl. investigative journalists, opposition politicians and even the president of the Hungarian Bar Association.²²⁷ While the investigation did not show conclusively who had deployed the spyware, numerous signs suggested that the Hungarian government directed the spying

considered it important to learn to accept homosexuality. <https://hu.euronews.com/2021/08/14/ujabb-felmeres-igazolja-hogy-a-magyarok-tobbsege-nem-homofob>

²²⁰ See e.g. the statement of Minister of Interior Pintér on the 'legality' of the surveillance in HU. "Pintér Sándor: A magyar nemzetbiztonsági szolgálatok nem folytatnak illegális megfigyelést", *Hvg.hu*, 19 July 2021, https://hvg.hu/itthon/20210719_Pinter_Sandor_Pegasus.

²²¹ Earlier arguments about fake-compliance have to be recalled.

²²² "A Pegasus-ügyről kérdezték volna Varga Juditot, de elmenekült a kamera elől", *Hvg.hu*, 21 September 2021, https://hvg.hu/itthon/20210921_varga_judit_pegasus_rtl_klub.

²²³ Link to announcement in Szily, "Orbán 'gyermekvédelmi' népszavazást kezdeményez", *444.hu*, 21 September 2021, <https://444.hu/2021/07/21/orban-gyermekvedelmi-nepszavazast-kezdemenez>.

²²⁴ See quick international evaluation: "Orban referendum plan raises stakes in Hungary's LGBT row with EU", *Euronews*, 21 July 2021, <https://www.euronews.com/2021/07/21/us-hungary-lgbt-orban-referendum>.

²²⁵ About the assessment of the questions, see Kovács: "Why Orbán's 'child protection referendum' makes no sense, and why it does", *Telex*, 16 August 2021, <https://telex.hu/english/2021/08/16/hungary-referendum-lgbtq-eu-european-commission-ecj>. It is worth noting that the question above was later annulled by the Supreme Court of Hungary.

²²⁶ Dominated by Fidesz MPs.

²²⁷ The first article on the use of Pegasus-spyware was published by the investigative portal Direkt36, see Panyi and Pethő, "Lelepleződött egy durva izraeli kémfegyver, az Orbán-kormány kritikussait és magyar újságírókat is célba vettek vele", *Direkt36*, 18 July 2021, <https://telex.hu/direkt36/2021/07/18/leleplezodott-egy-durva-izraeli-kemfegyver-az-orban-kormany-kritikusait-es-magyar-ujsgirokat-is-celba-vettek-vele>.

operation.²²⁸ Watchdogs started to recall²²⁹ that surveillance carried out for national security purposes, is vaguely defined and can be authorized by the min Justice without judicial oversight.²³⁰ The aforementioned surveillance regime has been harshly criticized by human rights defenders and also by the European Court of Human Rights (see the Szabó and Vissy case from 2016²³¹) which called upon the Hungarian government to change the legal framework of surveillance and guarantee the judicial oversight in each and every case. The Hungarian parliament failed to comply with the judgement. In addition, purchase and deployment of the spyware was later accidentally admitted by a Fidesz MP²³² who was present at the hearing of the Minister of Interior during the session of the parliamentary committee on Homeland Defense and Law Enforcement. Therefore, after a few months, it became clear that the Hungarian government spies on its citizens by a cyber weapon which could generate a special tone for the upcoming elections in 2022. Crucially, those who were also spied upon, according to media reports, included not only a prominent figure responsible for the nuclear plant expansion (dismissed and apparently working too much against Russian interests)²³³ but also the President of the Republic, usually seen as an Orbán loyalist and close ally.²³⁴

²²⁸ Spike, “Hungary’s government won’t confirm or deny using Pegasus spyware on journalists”, *insightHU*, 22 July 2021, <https://insighthungary.444.hu/2021/07/22/hungarys-government-wont-confirm-or-deny-using-pegasus-spyware-on-journalists>.

²²⁹ Flash analysis of the HCLU: Szabó, “Magyarországon a jogsértő megfigyelés is törvényes”, *444.hu*, 19 July 2021, <https://ataszjelenti.444.hu/2021/07/19/magyarorszagon-a-jogserto-megfigyeles-is-torvenyes>.

²³⁰ Based on the statement of the Minister of Justice, these permissions were signed by state secretary Völner who recently has become subject of heavy corruption charges which led to his resignation, see Maximov: “Fidesz MP resigns from state secretary post after allegations of graft”, *Euractiv*, 8 December 2021, <https://www.euractiv.com/section/politics/short-news/fidesz-mp-resigns-from-state-secretary-post-after-allegations-of-graft/>.

²³¹ ECtHR Szabó and Vissy v. Hungary, Appl. no. 37138/14, judgement of 12 January, 2016.

²³² Lajos Kósa is a Fidesz MP who is chairing the parliamentary committee on homeland defense and law enforcement. He admitted the purchase and deployment on the 4th of November in an interview, Panyi, “Így foszlott szét a kormányzati ködösítés a Pegasus-ügyben”, *Direkt36*, 5 November 2021, <https://telex.hu/direkt36/2021/11/05/igy-foszlott-szet-a-kormanyzati-kodosites-a-pegasus-ugyben>.

²³³ Szabó and Pethő, “State Secretary who disagreed with a Hungarian cabinet member over Paks nuclear power plant targeted by Pegasus spyware”, *Direkt36*, 24 July 2021, <https://www.direkt36.hu/en/az-orban-kormany-allamtitkarat-is-megceloztak-a-pegasusszal-mikozben-belharcokat-vivott-paks-ii-miatt/>.

²³⁴ Panyi: “Hungarian president’s closest bodyguards targeted with Pegasus spyware”, *Direkt36*, 13 December 2021, <https://www.direkt36.hu/en/ader-janos-koztarsasagi-elnok-es-csaladja-legkozelebbi-testoreit-is-megceloztak-a-pegasusszal/>.

CHAPTER THREE – DOING WHAT WE CRITICIZE THE OPPONENT FOR

The true Orwellian side of illiberalism reveals itself when we look at both rhetoric and action and see how actual oppression/lies/illegality etc. are sought to be shielded from criticism by claiming to be victims of oppression/lies/illegality etc. Orbán himself talked about the strategy of criticizing in the opponent for something that one is doing, labelling it a “communist argumentation” that his opponents deploy.²³⁵ Indeed, the illiberals would never tolerate the type of measures they deploy, where they at the other end of the stick, they would be the loudest critiques of the autocratic measures were they in opposition. It was also the prime minister who claimed: “We would never sink so low as to silence those with whom we disagree.”²³⁶ The statement that became infamous in light of the series of actions that limit the space for opposition parties and for non-loyal media (documented in Paper VII in this series), NGOs (criminalizing certain activities under the label of “propaganda”, including in the field of asylum and LGBTQI rights), the ousting of a university, the ban on gender studies programmes etc.

While they criticize the European Parliament based on standards of a well-functioning parliamentary democracy, the Parliament where they make the rules fails to function as a parliament, according to academic accounts.²³⁷ This is a reaction from the government to how it was treated in the EP: “the European Parliament adopted its Resolution on Hungary offering limited possibility to the Hungarian Government to provide full information and to make clear its position on the issues raised during the preparatory process.”²³⁸ While these standards are clearly superior to how opposition proposals and arguments are considered, if at all, by the majority in the Hungarian Parliament.²³⁹ When violations occur in other countries, Fidesz is quick to identify rule of law problems. In a case where two ethnic Hungarians were charged with terrorism and convicted in Romania, a Fidesz MP was quick to condemn the violation of the rule of law²⁴⁰ – mirroring the external critique based on the notion of the rule of law that is being rejected when directed against Hungary.

We have seen how, under the notion of national identity, the government seeks to defend diversity and pluralism at the European level but it continues to act against pluralism on the domestic level.²⁴¹ Or,

²³⁵ “A kommunisták csinálták mindig azt, hogy amit ők elkövettek vagy elkövetni készültek, azzal vádolták meg az ellenfeleiket.” [“It was the communists who always blamed on their enemies the very thing they were committing or were about to commit.”] Orbán, “Response of the Prime Minister”, 20 September 2021, Országgyűlési Napló [Minutes of the Parliament] 2018–2022/211, p. 31039, <https://www.parlament.hu/documents/10181/1569934/ny210920.pdf>.

²³⁶ Orbán, “Speech in the European Parliament in the plenary debate on the situation in Hungary”, PV 11/09/2018 – 11, 11 September 2018, https://www.europarl.europa.eu/doceo/document/CRE-8-2018-09-11-ITM-011_EN.html; English translation available at <https://miniszterelnok.hu/prime-minister-viktor-orbans-response-to-the-debate-in-the-plenary-session-of-the-european-parliament/>.

²³⁷ On the claim that in important aspects, the Hungarian Parliament has ceased to function as a parliament, see Szente, “Parlamenti jogunk nyomorúsága” [“The misery of our parliamentary law”], *Fundamentum*, 2020/4, 5–19.

²³⁸ Government of Hungary, “Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018”, 2, <https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse>.

²³⁹ For more on how the functioning of the Parliament of Hungary mirrors the dismantling of Hungarian democracy, see the first section of Paper VII in this series.

²⁴⁰ “Fidesz MP: Romania fails to meet criteria of the rule of law”, *Cabinet Office of the Prime Minister*, 3 August 2020, <https://abouthungary.hu/news-in-brief/fidesz-mp-romania-fails-to-meet-criteria-of-the-rule-of-law>.

²⁴¹ For this parallel, see Körtvélyesi, “The Illiberal Challenge in the EU: Exploring the Parallel with Illiberal Minorities and the Example of Hungary”, 16 *European Constitutional Law Review* (2020), 567–600.

subsidiarity is presented as a treasured value until it is applied to 'hostile' local governments. Solidarity is used to ask for European funding, e.g. in the anti-migration measures, which can be contrasted to a statement of the minister of finance undermining the idea of solidarity: Mihály Varga said in an interview that while he would vote yes to membership today, by the end of the decade when, according to their calculations, Hungary would be a net contributor, "the question can appear in a new light".²⁴²

The rule of law is presented as a leftist-liberal plot, and it in fact becomes this partisan weapon in the hands of the government as it misapplies rule of law requirements for direct political gains through the entrenchment of regulations, institutions, nominees. It was Fidesz and Prime Minister Orbán who was complaining about the deep state (inherited from social times) but then started to put a similar structure into practice, this time a real policy of carving political preferences into stone, creating irremovable positions for loyalists, and shielding these from democratic change. Orbán, following an argument from his counselor Gyula Tellér, has for long been talking about the surviving hidden structures inherited from the earlier regime that are undemocratic for they hinder governing by the democratically elected power. Yet, the changes that Orbán has been implementing when in power do explicitly and more forcefully aim at limiting how far democratic decision-making can reach by the misuse of constitutional entrenchment and privatization to the hands of loyalists.²⁴³

There is also deep hypocrisy regarding agenda-setting. The government criticizes EU action on the rule of law as a tactic of distraction from the questions that truly matter, i.e. immigration. At the same time, the government has been heavily relying on strategies of distraction, trying to move away from issues sensitive to them: as the topic started to dominate public discourse, the regime moved to reactivate a hate campaign against LGBTIQI people it had been planning before COVID-19 hit the world, a development that overwrote these plans.

Government arguments include the claim of the politicization of funding for civil society, often from outside Hungary. Yet, it is the Hungarian government that uses huge amounts of funding and other modes of intervention to what can be described as an export of the illiberal model and autocratization in the Hungarian communities in the neighboring countries, including oligarchic structures, political oppression and the elimination of independent media.²⁴⁴ Domestically, new entities are created, lavishly founded through various channels, that act like independent actors but are in fact the mouthpiece of the government, including GONGOs, fake academic and expert groups. E.g. "Alapjogokért Központ" (Centre for Fundamental Rights) is a GONGO established to propagate the government line wherever arguments related to the rule of law or human rights pop up.

The government often poses as a victim **of a full-scale delegitimizing smear campaign. Many in Hungary can attest how such campaigns are targeting, often with toxic narratives**, critiques of the

²⁴² "Ha most, 2021-ben lenne egy ilyen kérdés, az igennel szavazók közé tartoznék. De az évtized végére, amikor számításaink szerint már nettó befizetői leszünk az EU-nak, a kérdés új nézőpontot kaphat. Pláne, ha a brüsszdi támadások az értékvesztés miatt folyamatosak lesznek. Pár év múlva térjünk erre vissza!" Csuhaj, "Varga Mihály első ízben és keményen reagál Matolcsy György kritikájára" [Mihály Varga reacting for the first time to criticism by György Matolcsy"], *ATV*, 2 August 2021, <https://www.atv.hu/belfold/20210801/varga-mihaly-fellinit-idez-es-elso-izben-reagal-matolcsy-gyorgy-kritikajara>.

²⁴³ For a recent such manoeuvre, see the "privatization" of the majority of public universities in Hungary. See Paper VII in this series.

²⁴⁴ "NERdély 1.: így hódította meg az erdélyi magyarságot a Fidesz" ["This is how Hungarians in Transylvania were conquered by Fidesz"], *Átlátszó Erdély [Transparent Transylvania]*, 5 April 2018, <https://atlatso.ro/napi-politika/nerdely-1-igy-hoditotta-meg-az-erdelyi-magyarsagot-a-fidesz/>.

government. Troll farms are being employed²⁴⁵ and huge amounts of public money spent on amplifying government-loyal messages on social media (over HUF 500 million now).²⁴⁶

The list could go on, but this might be enough by way of illustration of a trend that defines also the context of the rule of law debate. As autocratic moves are presented as actions in self-defense that are set to trigger European responses, there is a built-in logic that leads to constant escalation.

²⁴⁵ “According to the Oxford Internet Institute’s 2019 Global Inventory of Organised Social Media Manipulation, Hungary and the Hungarian media space is a target of domestic state-led social media manipulation that utilizes both automated accounts (bots) and human operators in order to attack the opposition, distract from relevant problems related to the government and enhance already existing political, attitudinal divisions in the society.” “The Hungarian government’s disinformation campaign during the 2019 municipal elections”, *Political Capital*, 5 November 2019, https://www.politicalcapital.hu/library.php?article_read=1&article_id=2467.

²⁴⁶ Hanula, “Elértünk egy újabb álomhatárt: átlépte a félmilliárd forintot a Megafon facebookos reklámköltése” [“We reached another dream threshold: Megafon’s Facebook spending over half billion HUF”], *Telex*, 3 January 2022, <https://telex.hu/belfold/2022/01/03/elertunk-egy-ujabb-alomhatart-atlepte-az-500-millio-forintot-a-megafon-facebookos-reklamkoltese>.

CONCLUSIONS: THE HARM DONE

In addition to undermining efforts to uphold common values like democracy, human rights and the rule of law, the tactics discussed above can also undermine the functioning of the EU through challenging the primacy of EU law and undermines the principle of sincere cooperation (Art. 4 TEU).²⁴⁷ They can also question the legitimacy and credibility of EU human rights conditionality in external action, neighborhood policy and accession.

When EU actors fall for these tactics, it escalates the problem. Part of the challenge is that, on a superficial level, there seems to be a shared interest: the two sides have a common interest in showing that compliance happened: the Member State seeking to avoid sanctions and the Commission demonstrating the effectiveness of its actions.²⁴⁸ The problem is that in the long run, such concessions can undermine the coherence of EU law and policies,²⁴⁹ in the case of rule of law issues, the functioning of EU law altogether.

The type of politics described in this paper seems to be a one-way street towards drying up a starting well of trust. This led to the Hungarian government losing most potential partners, including EPP. This political approach also shows why informal measures were always doomed to failure and this is also why the introduction of the rule of law framework in 2014 was a step back. Instead of creating more informal institutionalized mechanisms, recognizing the motivational structure of bad faith actors prompts one to go in the only possible direction: formal legal procedures backed up with effective sanctioning that tilt the motivational structure like systemic infringements and the current move to withhold recovery funds citing rule of law problems.

It is also crucial to realize the effects beyond legal debates on the rule of law. The enemification and polarization, the labelling of opponents as enemies of the nation not only create new and strengthen old divisions, but also undermine shared commitments that could sustain democracy both domestically and on the European level. The extreme rhetoric presents honest discussion, listening, concessions and compromises as betrayal, disloyalty and giving in to the enemy that necessarily acts in bad faith. The domestic application of arguments on ‘democracy’, of disregarding rule of law requirements, of identifying the nation with the current political leadership, of viewing criticism as inherently delegitimate, from traitors seeks to legitimize sanctions that can include the criminalization of certain activities (in the field of assisting asylum seekers or sex education). The set of tactics described in this paper undermine the pluralism that could sustain democracy.

²⁴⁷ Batory, “Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU”, 94 *Public Administration* (2016), 685–699, at 696.

²⁴⁸ *Ibid.*, at 696.

²⁴⁹ *Ibid.*, at 697.

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MTA Law Working Papers

**Kiadó: Társadalomtudományi Kutatóközpont (MTA Kiválósági
Kutatóhely**

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

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ISSN 2064-4515