



**fidh**

# Hungary: Democracy under Threat

## Six Years of Attacks against the Rule of Law

Cover photo: Thousands of people gathered outside parliament building in Kossuth Lajos Square call for Prime Minister Viktor Orban's resignation with slogans of «for a European Hungary» in Budapest, Hungary on February 1, 2015. © Mehmet Yilmaz / ANADOLU AGENCY

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# 1. Introduction

Since Prime Minister Viktor Orban took power in 2010 following the country's general elections that saw its party, conservative Fidesz (the Hungarian Civic Party) and their small coalition partner the Christian Democratic People's Party (KDNP) win the two-thirds (67,88% or 262 seats) in Parliament, Hungary has undergone a progressive shift away from the principles on which a democratic state is built. Constitutional and other legislative reforms implemented since 2010 have threatened democratic principles, the rule of law and human rights in the country. The ruling party, Fidesz, has abused the supermajority it held in Parliament to enact measures that would reshape the State's institutional and legal framework and cement its political will into the Hungarian constitutional order, while the space for fundamental rights and freedoms has been steadily shrinking.

The reforms weakened independent institutions and eroded democratic checks and balances, by bringing them under government control or emptying them of their prerogatives and hence their capacity to exercise effective control over the executive. As a result, the power balance has been distorted in favor of the executive to the detriment of other established and non-established (e.g. media, NGO) powers. They also reshaped the country's constitutional and legal order, through the adoption of a new Constitution (the Fundamental Law) and over 600 laws, which had an overall adverse impact on human rights across the board and led to severe limitations thereof. These include limitations on fundamental human rights such as the right to freedom of expression and information, the right to freedom of religion or belief, the right to private and family life and the rights of minorities.

Adequate procedural safeguards have not accompanied this legislative hypertrophy, as most laws have been pushed through via fast-track procedures, thereby not ensuring adequate consultation with stakeholders and preventing any meaningful parliamentary or public debate that would ensure democratic scrutiny over the proposed reforms.

Civil society has not been spared by the government's attempt to gain control over dissenting voices. NGOs that had been critical towards the government were first (2013) targeted by a government-orchestrated smear campaign accusing them of serving political, particularly foreign, interests. This was followed by a series of administrative and criminal investigations and proceedings, officially aimed at investigating alleged abuse of funding, which NGOs received from international donors under the EEA/Norway Grants NGO Fund scheme and other funding programs<sup>1</sup>. Although the investigations, including the criminal ones, eventually cleared the concerned NGOs of any wrongdoing, the proceedings significantly hampered their capacity to perform their functions. And, despite the investigation's conclusions, the government still carried on with its defamatory and stigmatizing campaign.

Most recently, Hungary's reaction to an increased flow of migrants and asylum-seekers into Europe over the summer and autumn of 2015 – including the construction of a 175km fence at Hungary's southern border with Serbia and the adoption of legislation raising serious questions as to its consistency with the country's obligations under international and European law – confirmed a trend of increasing disregard by the government for the rule of law and human rights, which goes as far as to openly challenging them in public discourse and through concrete political and legal steps.

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1. See below under Chapter 2.2.3 for further details.

Declarations by PM Viktor Orban that he intends to turn Hungary into an 'illiberal state'<sup>2</sup>, citing Russia and Turkey as examples, have raised serious concerns. This public defiance of the values, especially the respect for democracy, the rule of law and human rights, which Hungary has committed to respecting and upholding when it acceded to the European Union and became a party to other international and regional organizations and treaties, is equally worrisome and alerts against a dangerous shift away from those values in the country. Coupled with the systematic and expedited changes to the country's institutional and legal framework implemented over the past few years, these statements raise serious questions as to Hungary's continued adherence and commitment to complying with the obligations, which it is bound to honor under international and European law. These include in particular the obligation to respect democracy, the rule of law and human rights, enshrined in Article 2 of the Treaty on European Union (TEU), the Charter of Fundamental Rights of the European Union (the Charter) and the European Convention on Human Rights (ECHR).

The situation has raised concerns and drawn criticism from international organizations, including the European Union (EU)<sup>3</sup>, the Council of Europe (CoE)<sup>4</sup>, the Organization for Security and Cooperation in Europe (OSCE)<sup>5</sup> and the United Nations<sup>6</sup>, and civil society. Despite this criticism and mounting evidence gathered by both governmental and non-governmental organizations showing an increasing threat to human rights and democracy in Hungary, the response of the EU to a serious deterioration of the

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2. H. Mahony, *Orban wants to build 'illiberal State'*, EU Observer, 28 July 2014, available at: <https://euobserver.com/political/125128>; Z. Simon, *Orban says he seeks to end liberal democracy in Hungary*, Bloomberg, 28 July 2014, available at: <http://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>.

3. EU criticism was directed first at the media law package, adopted in 2010, which raised the concerns of the then EU Commissioner for Digital Agenda, Neelie Kroes. This led to an exchange of administrative letters in which the Commission requested explanations with respect to the newly adopted legislation's compliance with the EU Audiovisual Media Services Directive (AVMSD) (*Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services*), to which Hungary responded by amending the laws to address the EU Commission's concerns. It then focused on the new Constitution (the Fundamental Law) adopted in 2011 and entered into force in 2012, and related 'cardinal laws' (which is the term used in the Hungarian legal system to refer to organic laws) which sparked a debate at the EU level regarding their compatibility with EU law and the EU founding treaties. In response to mounting concerns and following some heated debates which took place at the European Parliament, the Commission decided to address some of the issues by launching three infringement proceedings, namely on new legislation which lowered the retirement age for judges, prosecutors and notaries and resulted in the early dismissal of 274 judges, the independence of the new data protection supervisory authority and the independence of the National Central Bank. It also addressed a letter to the Hungarian government requesting clarifications regarding the new law on the administration of courts. Of these three, only the first two infringement proceedings arrived at the final stage, i.e. before the Court of Justice of the European Union (CJEU), whereas the third one was closed following amendments of the concerned laws by Hungary. Regarding the effects that the CJEU decisions had in practice, see below under Chapter 2.1.2. The EU has continued since to monitor the situation in Hungary, but no further action had been taken since 2012 until recent developments in relation to refugees, namely measures taken and new laws adopted in the field of asylum and criminal law, prompted the EU's reaction and the launch of yet another infringement procedure for alleged violation by Hungary of the EU asylum acquis (December 2015), which is currently pending.

4. The Council of Europe, particularly its Venice Commission (European Commission for Democracy through Law), has been vocal in addressing the situation in Hungary and issued a series of letters, communications, reports and authoritative opinions between 2011 and 2015 on a number of issues, including but not limited to the new Fundamental Law and its Fourth Amendment, the administration of courts, the legal status of churches, denominations and religious communities, the media laws and subsequent amendments and the law on informational self-determination and freedom of information. The Commissioner for Human Rights of the Council of Europe has also been very outspoken, including in his report of December 2014 following his visit to Hungary from 1 to 4 July 2014 and in the communications issued last autumn in relation to the situation of refugees, in denouncing the incompatibility between certain laws, policies and practices with CoE standards and urging the Hungarian government to take steps in order to ensure compliance with those standards.

5. The OSCE has also voiced criticism on several occasions regarding laws and measures that threatened e.g. freedom of expression and media freedom, free and fair elections and civil society and which, according to the Warsaw-based organisation, contravened OSCE standards.

6. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and on the rights to freedom of peaceful assembly and of association, Frank La Rue, had raised concerns regarding the Hungarian media legislation following his visit to Hungary in 2011 – *Hungary: UN expert on press freedom concerned by media law*, 5 April 2011 available at: [http://www.un.org/apps/news/story.asp?NewsID=38009#.V5nBdd\\_fXGI](http://www.un.org/apps/news/story.asp?NewsID=38009#.V5nBdd_fXGI) Most recently, the UN Special Rapporteur on Human Rights Defenders Michel Forst, on his first visit to Hungary in February 2016, heavily criticised the lack of an enabling environment for and attacks against human rights defenders and civil society organisations in the country - *UN Expert urges Hungary not to stigmatise and intimidate human rights defenders*, 16 February 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17037&LangID=E>.

rule of law in one of its Member States has remained timid. Besides infringement proceedings<sup>7</sup> and some correspondence between the European Commission and the Hungarian government regarding specific aspects in the legislation that raised concerns regarding their compatibility with EU law<sup>8</sup>, no concrete steps have been taken to date to address this deterioration and the serious threat it represents to the EU's founding values, especially the rule of law. Discussions regarding the possible activation of Article 7 TEU (a mechanism by which the EU can react to situations where there is a clear risk of a serious breach of these values by a Member State) have not gone beyond political debate and have not led to an actual triggering of this mechanism. Repeated calls from civil society and the European Parliament<sup>9</sup> to initiate a procedure under the new Framework adopted in March 2014 to react to threats to the rule of law in EU Member States<sup>10</sup> have also remained unheard.

With abundant evidence showing the adverse impact that laws, policies and practices in Hungary since 2010 and especially their combined effect have had on the rule of law and human rights in the country, there is a need to review the European Commission's analysis that the conditions for the activation of the Rule of Law Framework and other mechanisms to address situations in which the values protected under Article 2 TEU are under threat have not been met. The 'rule of law safeguards', which should ensure the protection of democracy, the rule of law and human rights at the national level, thus making external intervention unnecessary, have especially been undermined or weakened

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7. Although infringement proceedings are an effective tool to address specific EU law violations, they have proved ineffective to address broader concerns related to the respect for human rights and the rule of law, which do not find protection in EU secondary legislation and cannot therefore be addressed by proceedings which focus, by their nature, on rather technical aspects in the contested legislation whose compatibility with EU law is uncertain. See below the example related to the infringement procedure on the retirement age for judges, prosecutors and notaries, under Chapter 2.1.2. The inaptitude of this type of proceedings to address these broader concerns prompted the European Commission to put forward, in March 2014, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2. The new mechanism was meant to fill the gap between infringement procedures and the mechanism provided for in Article 7 TEU to address situations where "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2". See Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, *The EU and the Rule of Law – what next?*, speech delivered at the Centre for European Policy Studies/Brussels, 4 September 2013, [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_fr.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_fr.htm).

8. See above under footnote 3 for more details.

9. The European Parliament has been extremely vocal over the years and has repeatedly urged the EU to act to address rising concerns about the respect for democracy, the rule of law and human rights in Hungary. Again in 2015, the EU House called twice, in June and in December, on the Commission to activate the Rule of Law Framework against Hungary in light of mounting evidence and concerns that the situation in the country and steps taken by its government in recent years - beyond the reaction to increased migratory flows over the summer and autumn of 2015 that contributed to reviving the debate about the respect for the rule of law and human rights in the country more broadly – may amount to a systemic threat to the rule of law in this Member State which would justify the activation of the mechanism. See *European Parliament Resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP))* P8\_TA(2015)0227, 10 June 2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+VO//EN> and *European Parliament's resolution of 16 December 2015 on the situation in Hungary: Follow-up to the European Parliament's resolution of 10 June 2015 (2015/2935(RSP))*, P8\_TA(2015)0461, 16 December 2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+VO//EN>. This follows previous calls by the European Parliament, which had already spoken out on Hungary in 2011, 2012 and 2013 respectively; *European Parliament Resolution of 10 March 2011 on Media law in Hungary* P7\_TA(2011)0094 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+VO//EN>; *European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution* P7\_TA(2011)0315 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+VO//EN>; *European Parliament Resolution of 16 February 2012 on the recent political developments in Hungary* P7\_TA(2012)0053 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0053+0+DOC+PDF+VO//EN> and *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)* P7\_TA(2013)0315 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+VO//EN>. In its July 2013 resolution, the EP had particularly requested that 'Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law'. The European Commission's March 2014 Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014 ([http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)) responded to this request by Parliament and similar calls expressed by the Council (see for instance *Council Conclusions on fundamental rights and rule of law and on the Commission 2012 report on the Application of the Charter for Fundamental Rights of the European Union*, Justice and Home Affairs Council meeting, 6-7 June 2013: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/137404.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf)) and was meant to address situations that fall between those that can be addressed through infringement proceedings and those that would require the activation of the Article 7 TEU mechanism. See footnote 7 for more details.

10. European Commission, *Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014 [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)

in Hungary to a point where they no longer seem capable of effectively addressing this threat. As indicated above, independent institutions have been restructured in such a way as to deprive them, in law or in practice, of their capacity to effectively exercise control over the executive. Significant changes to the Constitution and the Constitutional Court's structure and competences have significantly undermined the role of this body, which is the strongest safeguard against the power of the executive in a democratic state. The independence of the judiciary has also been undermined through laws that have broadened the powers and the scope of control that a non-independent organ currently entrusted with its administration can exercise over it and have led to the premature termination of the mandates of a significant number of senior judges and of the Supreme Court's president. A new constituency map has been drawn and a new electoral law passed that clearly favors the ruling party Fidesz, while the practice of enacting legislation through accelerated procedures and often based on proposals tabled by individual MPs<sup>11</sup> has severely curtailed the opposition's right to participate in the legislative process. Restrictive media laws have introduced strict requirements (both registration and content requirements) for media that curtail their right to freedom of expression and media freedom and have a chilling effect on their ability to exercise these rights freely and without hindrance; a politically homogeneous media authority under direct government control and the lack of a politically diverse media landscape resulting from non-independent public media and increased control exercised by the government directly or indirectly over private media, which struggle to access or remain on the media market, are also raising concerns. Shrinking space for civil society, which faces increasing attacks and obstacles in exercising its fundamental watchdog role, laws restricting the possibility for religious groups to exercise their rights on an equal basis with other confessions and a vile xenophobic campaign targeting migrants and asylum-seekers and accompanied, in recent months, by measures blatantly disregarding Hungary's obligations under international and European law, complete the picture of a country where democratic institutions and standards, including of respect for human rights, have significantly deteriorated and are under serious threat.

In this context, the EU's reluctance to use existing mechanisms to address the situation and the threats that this represents to its own founding values or create new ones, which would integrate and complement them and close existing gaps, thus enabling the EU to better address these challenges, is deeply concerning. It exposes the shortcomings inherent in a system apparently incapable of ensuring compliance by its Member States with their obligations under the Treaties. It also highlights the incoherence of requesting that prospective member states meet certain criteria, especially of respect for democracy, the rule of law and human rights, while failing to ensure their respect by Member States after accession<sup>12</sup>.

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11. The parliamentary process of legislation is laid down in the Fundamental Law, the Act on Legislation and, in greater detail, the Standing Orders (amended in June 2014, 10/2014. (II.24.) OGY). New legislation's proposals could be submitted to the Parliament (called National Assembly) by the President of the Republic, the government, every parliamentary committee and any Member of the National Assembly. If several bills are submitted on the same subject at the same time or for the same law, the Government's bill takes priority over the committee's or the MP's. Act CXXXI of 2010 on Public Participation in Developing Legislation regulates public consultation in Hungary. Under its Article 1, MPs', parliamentary committees' and the President's bills are not covered by Act CXXXI. Although some exceptions to the rules regarding public consultation are provided for by Act CXXXI also for cases where bills are submitted by the government, the exclusion means that MPs', parliamentary committees' and President's bills are exempted from mandatory ministerial and public consultations, which are part of the standard law-making procedure.

12. Among the criteria which candidate countries are requested to meet in order to become eligible for accession to the European Union (also known as the 'Copenhagen criteria' after the European Council in Copenhagen, Denmark in 1993 that defined them) there are political, economic and administrative and institutional criteria. The political criteria include: *"the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"*. For more details see: [http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm). The contrast between the requirement that these criteria be complied with by prospective Member States and the failure to ensure such compliance following accession to the EU has been referred to as the 'Copenhagen dilemma'. See for instance: S. Carrera, E. Guild, N. Hernanz, *Rule of law or rule of thumb: a new Copenhagen mechanism for the EU?*, CEPS Policy Brief No 303, 20 November 2013, available at: [https://www.ceps.eu/system/files/No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights\\_0.pdf](https://www.ceps.eu/system/files/No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights_0.pdf). See also European Parliament, Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012; V. Reding, *The EU and the Rule of Law: What Next?*, speech delivered at CEPS, 4 September 2013; J. M. Durão Barroso, State of the Union 2013, 11 September 2013, available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

In order to gather evidence about the situation in Hungary, FIDH conducted a fact-finding mission to the country in October 2015. The mission aimed to assess whether this is compatible with international and European standards on the rule of law and human rights or whether it can be concluded that there is an emerging systemic threat to the rule of law in this member state that would justify EU intervention before it develops into a serious breach pursuant to Article 7 TEU. This report and its conclusions are based on the findings gathered during the mission, which include direct observation and testimonies, and on additional research and legal analysis. They show that Hungary has acted in many instances in violation of its obligations under international and European law and that democracy, the rule of law and human rights are threatened in the country.

The report urges both national authorities and the the European Union to address concerns and ensure compliance with such obligations, while refraining from measures that may violate them. The EU should particularly act and prove its commitment to defending its own founding values and the obligations that derive from EU membership by promptly addressing the situation through appropriate means and reacting to documented abuse and a systemic threat to these values in Hungary. At a crucial time for Europe, severely hit by the economic crisis, threatened by the rise of extremisms, particularly on the far right, and struggling to maintain its identity amidst a major loss of legitimacy among its citizens, Hungary represents a test for the EU to prove the continued value and credibility of its project.

## 1.1 Methodology

To gather evidence for this report and first-hand information on the situation in Hungary, FIDH led a fact-finding mission to the country from 25 to 31 October 2015.

The mission's delegation was composed of: Dan Van Raemdonck, FIDH Secretary General; Elena Crespi, FIDH Western Europe Program Officer; and Pierre-François Laval, professor of public law at the University of Orléans, France. The mission benefited from the information provided by three Hungarian NGOs active in the defense of democracy, rule of law and human rights in Hungary: the Hungarian Civil Liberties Union (HCLU), the Hungarian Helsinki Committee (HHC) and the Eötvös Károly Policy Institute (EKINT)<sup>13</sup>.

The FIDH delegation spent seven days in Budapest, where meetings were held with a wide range of stakeholders. These included:

- the Office of the Commissioner for Fundamental Rights<sup>14</sup>;
- lawyers, academics and other experts specialized in the field of constitutional law;
- a former Constitutional Court judge;
- media representatives, including independent and investigative journalists and journalists working for online and printed media across the media landscape;
- representatives of the Political Capital Policy Research and Consulting Institute, a leading

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13. The views expressed and the conclusions reached in this report are the sole responsibility of FIDH and should not be interpreted as reflecting the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee and the Eötvös Karoly Policy Institute's views.

14. The Office of the Commissioner for Fundamental Rights (i.e. the Hungarian Ombudsman) is composed, following its reform in 2011, of a Commissioner and two Deputy Commissioners, namely the Deputy-Commissioner responsible for the rights of national minorities and the Ombudsman for future generations. The work and the mandate of the Commissioner for Fundamental Rights and his Office are determined by Article 30 of the Fundamental Law of Hungary adopted in 2011 and based on the Act CXI of 2011 on the Commissioner for Fundamental Rights, both of which entered into force on 1 January 2012. The Commissioner for Fundamental Rights is the legal successor of the Parliamentary Commissioner for Civil Rights, whose mandate was terminated with the entry into force of the new regulation. See for further details the box below on the Ombudsman. More information about the Office of the Commissioner for Fundamental Rights can be found at: <http://www.ajbh.hu/en/web/ajbh-en/about-the-office>.



independent Central European political consultancy and research institute specialized in several areas including political risks analysis, policy research and election studies;

- lawyers, academics and other experts specialized in the field of migration and asylum law;
- representatives of migrant communities and grassroots organizations working with migrants, asylum-seekers and refugees;
- representatives of religious groups and confessions;
- representatives of NGOs and other civil society organizations with broad expertise spanning constitutional matters, freedom of expression and information and media freedom, data protection, corruption, migration and asylum, freedom of religion or belief, anti-discrimination and minority rights, election rights;
- representatives of national and international non-governmental organizations and foundations offering support to local civil society.

The mission also met with the United Nations High Commissioner for Refugees (UNHCR)'s Regional Representative for Central Europe and with the Ambassador and another representative of the Royal Norwegian Embassy in Hungary.

The delegation also met with the authorities. This included meetings with representatives of the Ministry of Interior; the Vice-President and head of cabinet of the President of the National Office for the Judiciary (NJO), responsible since 1 January 2012 of the administration of courts; the President of the Supreme Court (*Kúria*) and his staff; a member of the Hungarian Media Council, a body entrusted with media content regulation and whose structure and competencies were defined, alongside those of the National Media and Info-communications Authority (NMHH), in subsequent legislation that came into effect between 2010 and 2011. Requests for meetings were also sent prior to the mission to the Prime Minister's office, the Ministry of Justice and the Legislative Committee of the Parliament, but it was not possible to organize meetings with them.

FIDH has been consistently monitoring the situation in Hungary in recent years and has addressed it in press releases, letters, briefing notes addressed to the European Commission and the European Parliament, United Nations Special Procedures and urgent appeals issued under the Observatory for the Protection of Human Rights Defenders<sup>15</sup>.

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15. The Observatory for the Protection of Human Rights Defenders is a joint programme of FIDH and the World Organisation Against Torture (OMCT) devoted to taking action in support to individuals, whatever their status, title or function, who are exposed to reprisals as a result of their human rights activities.

## 2. Challenges to the Rule of Law : Undermining democratic checks and balances

### 2.1 Established powers

#### 2.1.1 Constitutional matters: Reshaping the constitutional framework

The Hungarian government's defiance to the principles of the rule of law finds expression mainly in the strategy established by the parliamentary majority in order to neutralize the control exercised by the Hungarian constitutional Court. Many works and articles have indeed shown the considerable pains taken by the Hungarian Constitutional Court prior to 2010 to transform the structures of the old Communist system into a truly « *democratic state governed by the rule of law* »<sup>16</sup>. The very broad competences granted to the Court by the 1989 Constitution, together with the activism that it demonstrated in the first twenty years of existence, contributed to its unrivaled prestige within different Constitutional Courts of Central and Eastern Europe. The Court's jurisprudence goes a long way toward enshrining some major principles essential to safeguarding the rule of law, such as the one affirming the dignity of human beings or the principle of legal certainty<sup>17</sup>.

However, the strategy designed by those in power cannot be reduced to a mere attempt to circumvent constitutional jurisprudence. At the outset, it should indeed be pointed out that one of the first initiatives of the Hungarian government following the elections in 2010 consisted in a complete overhaul of the constitutional framework by having its parliamentary majority, after only nine days of parliamentary debate, pass the new « Fundamental Law » on 31 December 2011,<sup>18</sup> while leaving itself latitude to specify its contents at any point in time using the so-called « cardinal » laws. Cardinal laws are defined by Article T (4) of said Fundamental Law as « *Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required* ».

In its opinion on the new Constitution of Hungary, the Venice Commission pointed out the abusive use of these « cardinal » laws, as it considers that the Fundamental Law refers over fifty times to these laws in very diverse fields such as family policy, freedom of the press, minority rights or electoral law.<sup>19</sup> Such use, according to the Commission, warrants criticism from two perspectives: on the one hand, the Constitution very often leaves it to these laws « *to regulate in detail the most important society setting* ». The Fundamental Law therefore contains significant gaps on issues central to the safeguarding of the rule of law, similar to those contained in the rules governing

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16. European Commission for Democracy through Law (Venice Commission), *Opinion on the new Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), Opinion n° 621 / 2011, Strasbourg, 20 June 2011, § 35.

17. P.-A. Collot, *Difficulté contre-majoritaire et usage impérial du pouvoir constituant dérivé au regard de la quatrième révision de la loi fondamentale de Hongrie*, *R.F.D.C.*, 2013/4, pp. 789-812.

18. By doing so, the Parliament claimed the exercise of constituent power, then it accomplished its task in defiance of constitutional obligations that require, for the establishment of a new Constitution, a parliamentary resolution adopted with a four-fifths majority (Article 24 (5) of the defunct Constitution of 1989). The first initiative taken by the Parliament with a view to passing a new Fundamental Law, consisted in modifying a rule introduced in 1995-1996 which required the adoption of a resolution with a four-fifths majority. Yet, this amendment was achieved through a procedure requiring only a two-thirds majority of parliamentarians. The opposition was thus easily outvoted, and the rule imposing a four-fifths majority craftily bypassed by the ruling coalition. On this topic, see, G. A. Toth, *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, Budapest/New York, Central European University Press, 2012, p. 4.

19. European Commission for Democracy through Law (Venice Commission), *Opinion on the new Constitution of Hungary*, *Ibid.*, §§ 22-27.

the judiciary. Conversely, the Commission considers that the preference given to these cardinal laws, rather than to ordinary legislation, is not justified in other areas « *such as family legislation or social and taxation policy* ». Furthermore, such cardinal laws have the definite advantage of making the provisions which they contain inaccessible to any new parliamentary majority unable to reach a two-thirds majority. In conclusion, the Venice Commission recommended in its opinion « *restricting the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority.*»<sup>20</sup>.



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Laid down end to end, the different measures adopted by the authorities since 2011 on constitutional matters reveal a strategy to weaken the Constitutional Court and obliterate its jurisprudence. This strategy is clearly embodied in the Fourth Amendment to the Fundamental Law, whose enactment cannot be truly understood unless associated with Decision 45/2012 (XII.29) of the Constitutional Court of 28 December 2012. Through this decision, the Court censured transitional provisions of the Fundamental Law that, according to their own terms, were an integral part of the latter. Although the Court recalled its lack of competence to review the constitutionality of a constitutional revision, it argued an exception based on non-compatibility of the revision with the principles of Hungarian «*public law.*»<sup>21</sup> After recalling that procedural rules provided for in the Fundamental Law should be complied with by Parliament also when exercising constituent powers<sup>22</sup>, the Court examined the procedure through which the transitional provisions were adopted, pushed through by Parliament and then incorporated into the Fundamental Law. It concluded that the Hungarian parliament had not complied with the procedural requirements set down in the Fundamental Law and had exceeded its legislative authority when enacting provisions into the transitional provisions that were

20. *Ibid.*, § 27

21. Constitutional Court of Hungary, Decision N° 61/2011 (VII.13) of 12 July 2011.

22. The Constitutional Court of Hungary, *Certain parts of the Transitional Provisions of the Fundamental Law held contrary to the Fundamental Law*, press release, 23 January 2013, available at : <http://hunconcourt.hu/sajto/news/certain-parts-of-the-transitional-provisions-of-the-fundamental-law-held-contrary-to-the-fundamental-law>. The decision is available here (in English) : [http://mkab.hu/letoltesek/en\\_0045\\_2012.pdf](http://mkab.hu/letoltesek/en_0045_2012.pdf).

not transitional in nature<sup>23</sup>. It thus rescinded on procedural grounds all the provisions adopted in contradiction with the prescriptions of the Fundamental Law. With this decision, the Court remained consistent with its jurisprudence with regard to the principle of the rule of law enshrined in Article 2 (1) of the 1989 Constitution (« *The Republic of Hungary is a sovereign and democratic State based on the rule of law* »), which it had gradually developed between 1992 and 2012.

The constitutional judges refused to subject themselves to the parliamentary majority who responded by adopting the Fourth Amendment. First, that amendment constitutionalizes a certain number of parliamentary initiatives, which up until then had been judged incompatible with the Fundamental Law. Such is the case of the initiative regarding the definition of the family – judged by the Constitutional Court as too restrictive,<sup>24</sup> of which « *marriage and the parent-child relationships*» are henceforth considered to be the foundation<sup>25</sup>. Another example is Parliament's exclusive power to attribute the official status of « Church » to certain associations that carry out religious activities (See Chapter 2.2.4 below for more details).

The Fourth Amendment is clearly a response to the intentions of the Constitutional Court to ensure « continuity in jurisprudence »<sup>26</sup>. The will to do away with the jurisprudence of the former Court is fully exemplified in Article 19 § 2 of the Fourth Amendment to the Fundamental Law of Hungary. This article provides that « *Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.*» Although the Constitutional Court did in practice continue to refer to its case-law as elaborated over time prior to the entry into force of the Fundamental Law, the provision renders the Court unable to shoulder the responsibility, which it considered to be its own, in its Decision 22/2012 (V.11) of 8 May 2012, « *to guarantee the protection of the Fundamental Law* » and thus apply, as needed, « *in the new cases, [...] arguments included in its previous decision[s] adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision.*»<sup>27</sup> In its opinion on the Fourth Amendment to the Fundamental Law, the Venice Commission criticised the provision which it deemed « *neither adequate nor proportionate* »<sup>28</sup> in that it provided for the complete removal of the earlier Constitutional Court's case-law. Even though the provision was meant to respond to concerns by the government that by basing itself on its earlier case-law, « *the Constitutional Court could perpetuate the old Constitution and would thus impair the effect of the new Fundamental Law* »<sup>29</sup>, the Venice Commission considered that enacting a provision « *that could be read as depriving the Constitutional Court of the possibility to base itself on its prior case-law* »<sup>30</sup> was disproportionate and could lead to legal uncertainty<sup>31</sup>. The provision must be seen, according to the Venice Commission, against a context of « *systematic limitation of the position of the Constitutional Court and its ability to control the other State powers* »<sup>32</sup>.

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23. *Ibid.*

24. Constitutional Court of Hungary, Decision N° 43/2012 (XII. 20) of 17 December 2012.

25. In its version modified by the Fourth Amendment to the Fundamental Law, its first article provides that "*Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent; Hungary shall also protect the institution of the family, which it recognizes as the basis for survival of the nation. Marriage and the parent-child relationships are the basis of the family*"

26. See P.-A. Collot, *Difficulté contre-majoritaire et usage impérieux du pouvoir constituant dérivé au regard de la quatrième révision de la loi fondamentale de Hongrie*, op. cit., p. 791.

27. Constitutional Court of Hungary, Decision 22/2012 (V.11) of 8 May 2012. In this decision, the Court ruled that « *In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution* ».

28. European Commission for Democracy through Law (Venice Commission), *Opinion N° 720/2013 on the Fourth Amendment of the Constitution of Hungary*, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), 17 June 2013, p. 22, § 94.

29. *Ibid.*

30. *Ibid.*, p. 23, § 95

31. *Ibid.*, p. 22, § 90.

32. *Ibid.*, p. 24 § 98.

The new provisions, which entered into force on 1 January 2012 and are contained in the Fundamental Law (Articles 6, 24 and 37) and completed by those of the Act CLI on the Constitutional Court of Hungary dated November 2011 have also profoundly affected the form and methods of the review conducted by the Constitutional Court.

As witnessed in recent years in a number of European countries, reviews of the constitutionality of laws carried out by the Courts seem to have « slid toward review of their application. »<sup>33</sup>

Indeed, it is known that German, Italian or Spanish constitutional courts are now often referred « ordinary cases from which they must extract and examine constitutional questions ». Moreover, they are often led to examine the constitutionality of decisions rendered by other courts, thereby acting as « a third or fourth degree of jurisdiction »<sup>34</sup> and exercising a function that is increasingly close to that of a Supreme Court. Similarly, these developments are perceptible in Hungarian constitutional law. The new provisions relating to the Court thus privilege the review of the constitutionality of laws when they are applied concretely in a dispute, rather than only considering their provisions. This is confirmed by the repeal of the very popular mechanism *actio popularis*, to which natural and legal persons could resort to prior to 2012 in order to contest the constitutionality of a law without having to establish the existence of a direct or personal standing, nor comply with any deadline to act.

The *Actio popularis* became a victim of its own success, leading to such a significant increase in the caseload of the Court that Parliament abolished it. As pointed out by the Venice Commission in its opinion of June 2012, the Hungarian legislator knew how to offset this abolishment by establishing « constitutional complaints both against all legal provisions and court decisions ».<sup>35</sup> It should be specified, however, that contesting a law through a constitutional complaint is only possible as an exception (Article 26 § 1 and § 2) and for a period of 180 days from the entry into force of the law. In other words, the norm remains the review of the constitutionality of a judicial decision, which has *applied* the law, and not of the law itself.<sup>36</sup> Moreover, Article 29 of the Act CLI on the Constitutional Court specifies that the admissibility of a constitutional complaint is subordinated to the fact that the conflict with the Fundamental Law « significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance ».<sup>37</sup>

While the developments of the role of the Court are comparable to those of other European courts, the conditions stipulated by the law have considerably reduced the ability of individuals and civil society organizations to act to defend their constitutionally guaranteed rights. It suffices to look at the statistics provided by the Court on its website to reach this conclusion. For example, in 2012, 500 complaints (all remedies combined) were declared inadmissible, 100 were dismissed

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33. L. Favoreu, W. Mastor, *Les Cours constitutionnelles*, Paris, Dalloz, 2011, p. 29, with regard to monitoring carried out by the German, Italian and Spanish Constitutional courts.

34. *Ibid.*

35. European Commission for Democracy through Law (Venice Commission), *Opinion on the Act CLI of 2011 on the Constitutional Court of Hungary*, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), Opinion N° 665/2012, Strasbourg, 19 June 2012, § 26.

36. Section 28 § 1 of Act CLI quoted above provides, not without keeping some confusion, that review of judicial decisions and legal provisions can be combined: « In proceedings aimed at the review of a judicial decision defined in Section 27, the Constitutional Court may also carry out the examination of the conformity of the legal regulation with the Fundamental Law as described in Section 26 ».

37. Act on the Constitutional Court, Section 29: « The Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance ».

on the merits, no judicial decision was quashed, and only 29 laws were annulled.<sup>38</sup> Other more recent statistics have since confirmed the same trends. For instance, in 2014, out of 737 petitions addressed to the Court, only twenty-five were examined on the merit<sup>39</sup>.

Other provisions of the 2011 Act have further limited the scope of application of the review of constitutionality carried out by the Court. While the 2011 Act is in line with Decision 45/2012 (XII.29) of 28 December 2012 cited above insofar as it recognizes the Court's power to examine the constitutionality of revisions of the Fundamental Law, it limits that control to mere *procedural requirements* resulting from that same Law. Now, any review of the very substance of the constitutional laws is proscribed.<sup>40</sup> In other words, the Court would be completely powerless if faced with a revision of the Fundamental Law which would endanger the values and principles of the rule of law. Similarly, *a priori* constitutional review of *ordinary* laws may itself be limited to a mere procedural dimension. This limitation of the Court's competence stems from Article 6 of the Fundamental Law. If the Parliament has not referred to the Court a law not yet enacted by the President, the President may do so himself or request another deliberation by sending the law back to Parliament. Should the Parliament make changes to the law which it receives, constitutional review may be limited to the provisions modified during the second reading or to a mere verification of compliance with procedural requirements relevant to the drafting of the law provided for by the Fundamental Law. If the text remains unchanged, the President of the Republic may request that the Court examine its conformity only with the procedural requirements provided for in the Fundamental Law. The President of the Republic can thus, by requesting further deliberations, « *create a situation of material limitation of the constitutional review, confining it to the provisions modified during the second reading and/or compliance with procedural rules* »<sup>41</sup>.

Opposition shown by the Constitutional Court concerning a fiscal measure put forth by the authorities in the summer of 2010 was, finally, one of the reasons for the limitation *ratione materiae* of the constitutional review. In reaction to the Court's quashing of the tax on the severance pay received by civil servants forced to retire since 1 January 2010<sup>42</sup>, the parliamentary majority decided to amend the constitutional provisions regarding the Court to confine its monitoring of fiscal laws or laws regarding public finances to a mere examination of their compatibility with constitutional provisions totally unrelated to any financial matters. Article 37 § 4 of the Fundamental Law now in effect still bears the mark of this parliamentary fight against the Court's activity by stipulating that « *as long as the amount of the debt exceeds half of Gross Domestic Product, the Constitutional Court may (...) review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, [...] as to their conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection*

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38. K. Kelemen, *Access to Constitutional Justice in the New Hungarian Constitutional Framework: Life after the Actio Popularis?*, 1 February 2014 available at: [https://www.academia.edu/7787198/Access\\_to\\_Constitutional\\_Justice\\_in\\_the\\_New\\_Hungarian\\_Constitutional\\_Framework\\_Life\\_after\\_the\\_Actio\\_Popularis](https://www.academia.edu/7787198/Access_to_Constitutional_Justice_in_the_New_Hungarian_Constitutional_Framework_Life_after_the_Actio_Popularis), p. 72.

39. See the data indicated by the services of the Court at the following address: [http://mkab.hu/letoltesek/ab\\_ugyforgalom\\_2014\\_12\\_31.pdf](http://mkab.hu/letoltesek/ab_ugyforgalom_2014_12_31.pdf).

40. Article S, Paragraph 3, of the Fundamental Law, as modified by the Fourth Amendment, gives the President, if he « *finds that any procedural requirement laid down in the Fundamental Law with respect to adoption of the Fundamental Law or the amendment of the Fundamental Law has not been met* » the power to « *request the Constitutional Court to examine the issue. Should the examination by the Constitutional Court not establish the violation of such requirements, the President of the Republic shall immediately sign the Fundamental Law or the amendment of the Fundamental Law, and shall order its promulgation in the official gazette.* » See European Commission for Democracy through Law (Venice Commission), adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), Opinion n° 720/2013, Strasbourg, 17 June 2013, pp. 14-20.

41. P.-A. Collot, « *Difficulté contre-majoritaire et usage impérieux du pouvoir constituant dérivé au regard de la quatrième révision de la loi fondamentale de Hongrie* », *R.F.D.C.*, 2013/4, pp. 789-812, especially p. 810 (FIDH's translation).

42. The tax will be ruled illegal by the European Court of Human Rights in the cases *N.K.M. vs. Hungary* (Application no. 66529/11, Judgment of 14 May 2013 ; *Gall vs. Hungary* (Application no. 49570/11, Judgment of 25 June 2013 ; *R. Sz. vs. Hungary* (Application no. 41838/11, Judgment of 2 July 2013) ; *P. G. vs. Hungary* (Application no. 18229/11, Judgment of 23 September 2014).

of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship ».<sup>43</sup> If a law has a budgetary impact, its constitutional review can only be carried out within this framework. As to the rest, the Constitutional Court will have no power to sanction violations of other constitutionally protected rights.

In addition to this drastic reduction in the prerogatives of the Court, a new procedure was introduced for the appointment of constitutional judges. The composition of the parliamentary committee tasked with nominating Constitutional Court judges was altered by an amendment to the former Constitution, promulgated on 5 July 2010, shortly after Fidesz took power. While it was the general rule that every political group in Parliament be represented by one of its members within the committee, the committee's composition is now based on proportional representation of the different political groups in Parliament. In other words, the new system makes it possible to give a definite advantage to the parliamentary majority within the committee responsible for nominating constitutional judges. Obviously, this procedure carries a much greater risk of politicized appointments. The pluralistic nature of the process of nominations has been called into question, as the ruling party has been able to nominate eight out of fifteen constitutional judges without having to garner the support of opposition parties, and thus make up a majority potentially favorable to its interests within the Court.<sup>44</sup> A particularly detailed study replete with figures by the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee and the Eötvös Károly Policy Institute has since clearly demonstrated that judges appointed in accordance with these new rules had generally taken decisions in line with the interests of the government whenever important political issues were at stake (e.g. constitutional revisions, separation of powers, media, electoral system, human rights)<sup>45</sup>. Out of twenty-three cases ruled on between September 2011 and September 2014, and considered particularly important, the judges whose appointments were controlled by the ruling party very rarely positioned themselves contrary to the presumed interests of the government<sup>46</sup>.

The increase in the number of constitutional judges from 11 to 15 and the extension of their mandate from 9 to 12 years starting on 1 January 2012, as well the abolition of a maximum retirement age for newly elected judges who can thus continue to exercise their functions after the age of 70, have contributed to ensuring greater control of the Constitutional Court by the executive branch and its parliamentary majority.

## 2.1.2 Reforming the judiciary

The attack on the Hungarian judiciary and the safeguards of its independence has undoubtedly been one of the main causes for concern of the European authorities and independent observers since 2010.<sup>47</sup> The sparse provisions inserted into the Fundamental Law (Article 25 to 28) on judicial organization were completed by two cardinal laws passed on 28 November 2011: Act

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43. See also on this point, Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, *Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary*, 26 February 2013, pp. 4-5.

44. International Bar Association, *Still under Threat: the Independence of the Judiciary and the Rule of Law in Hungary*, October 2015, pp. 29-30.

45. Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, *Analysis of the Performance of Hungary's 'One-Party Elected' Constitutional Court Judges between 2011 and 2014*, 25 March 2015 available at: [http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC\\_Analysing\\_CC\\_judges\\_performances\\_2015.pdf](http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf)

46. *Ibid.*, pp. 4-5 : "The six judges from the one-party nominees who generally voted the same way as each other reached a decision which conflicted with the probable interests of the Government in between 0 and 3 of cases out of the 23 cases analyzed, while in the other cases they either took a standpoint in line with the interests of the Government, or their dissenting opinion could neither be interpreted either as vote for nor against the interests of the Government"

47. See International Bar Association, *Still under Threat: the Independence of the Judiciary and the Rule of Law in Hungary*, October 2015. See also on this topic, A.-E. Courrier, A propos des 'événements politiques en Hongrie...' Quelques clés pour en comprendre le débat juridique, *Revue internationale de droit comparé*, 2012, pp. 310-324, especially p. 317 and following.

CLXI/2011 on the organization and administration of courts of Hungary, and Act CLXII/2011 on the legal status and remuneration of judges in Hungary.<sup>48</sup> The first difficulties encountered regarding the independence of the Hungarian judiciary pertained to forcing Hungarian magistrates to take early retirement. Before the authorities changed the rules, judges benefited from a special regime granting them not only the right to a full pension at 62, but also the possibility of remaining in their post until the upper age limit set at 70. That advantage was eliminated with the entry into force of Article 26 § 2 of the Fundamental Law, which provides that « *except for the President of the Curia and President of the National Office for the Judiciary the service relationship of judges shall terminate upon their reaching the general retirement age.* »<sup>49</sup> The consequences were immediate and brutal: 274 judges (that is about 10% of all Hungarian judges) who had continued exercising their functions beyond the age of 62 were notified of their imminent retirement.<sup>50</sup> The combined implementation of these reforms was considered “worrisome”.<sup>51</sup> As rightly pointed out by the Venice Commission in its opinion dated 16 and 17 March 2012 on Acts CLXI and CLXII of 2011<sup>52</sup>, the problem does not so much concern the question of age discrimination – incidentally established by the Court of Justice of the European Union in its judgment *Commission vs. Hungary* dated 6 November 2012<sup>53</sup> – as it does the endangerment of the independence of the judiciary as a whole. The Venice Commission thus observes that « *a whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and expected – to continue to work as judges, have to retire* » without any valid explanation being offered.<sup>54</sup> The Hungarian authorities may have been tempted to justify replacing magistrates forced to retire with young judges « *with up-to-date qualifications* » and able to handle a greater workload as an initiative to increase the efficiency of justice.<sup>55</sup> These reasons, however, are hardly in line with the moratorium on the appointment of judges imposed at that same time<sup>56</sup> which, in the opinion of the Commission, reflects rather the will of the Hungarian parliament « *to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system, giving the newly elected President*

48. See on the topic of these laws, European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), Opinion N° 663/2012, Strasbourg, 19 March 2012.

49. See European Commission for Democracy through Law (Venice Commission), *Background document on the Fourth Amendment to the Fundamental Law of Hungary*, Opinion 720/2013, 24 April 2013, p. 30. See also A.-E. Courrier, « A propos des événements politiques en Hongrie... », *ibid.*, p. 319.

50. *Ibid.*

51. See European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), Opinion N° 663/2012, Strasbourg, 19 March 2012, § 104.

52. *Ibid.*

53. Court of Justice of the European Union, *Commission vs. Hungary*, judgment dated 6 November 2012, C-286/12, (violation of Guideline 2000/78/EC), especially, pt. n° 68: « *the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned* »

54. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, *ibid.*

55. *Ibid.* § 105. Before the Court of Justice of European Union, the Hungarian government argued that « *the provisions at issue seek to attain, in essence, two objectives, namely, first, the standardisation, in the context of professions in the public sector, of the age-limit for compulsory retirement, while ensuring the viability of the pension scheme, a high level of employment and the improvement of the quality and efficiency of the activities involved in the administration of justice and, secondly, the establishment of a 'more balanced age structure' facilitating access for young lawyers to the professions of judge, prosecutor and notary and guaranteeing them an accelerated career* » (*Commission vs. Hungary*, judgment dated 6 November 2012, C-286/12, pt. n° 59).

56. The provisions of Act CXXXI modifying Act LXVII of 1997 on the legal status and remuneration of judges thus say that « *no judges may be appointed six months before the entry of the new legislation on the judiciary* » (see on this topic European Commission for Democracy through law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, Opinion N°663/2012, 19 March 2012, § 106.



of the *NJO* the essential role in these appointments.»<sup>57</sup> In light of these considerations, the European Union's intervention leading to the adoption of the judgment cited above in November 2012 focused on the violation by Hungary of European legislation on equal treatment in employment, only marginally addresses the issues raised by this reform regarding the independence of the judiciary and respect for the rule of law. These issues, which caught the attention of the European Commission during the reform of the organization and administration of the courts in 2012<sup>58</sup> have so far remained without response. Yet, the Commission had committed to maintaining a certain vigilance with respect to the implementation by the Hungarian authorities of the recommendations made by the Venice Commission in this regard.<sup>59</sup>

The Hungarian Constitutional Court quashed the related provisions in its Decision 33/2012. (VII.17), on ground that these were not compatible with the Fundamental Law, and abolished them with a retroactive effect. However, the decision did not reinstate the dismissed magistrates' legal relationship. Only by amending the legislation the unlawful dismissals could be remedied.

After Hungary was found by the Court of Luxembourg on 6 November 2012 to have taken a measure that it deemed « abrupt » and discriminatory, the Hungarian Parliament reacted by passing a law enabling former judges to be reintegrated into their functions, however, at posts often far inferior to the ones that they had previously occupied.<sup>60</sup> Two other options were also open to them: obtaining compensation or making themselves available to the judicial administration for a maximum of two years to exercise their judicial activities within the framework of remunerated missions. Given the way magistrates have been treated since 2011, most of them refused to exercise their right to reintegration, and over one hundred of them turned to the Strasbourg Court to challenge their dismissal<sup>61</sup>. The limited impact of the Court of Luxembourg's decision shows that an intervention limited to verifying and, if need be, sanctioning the non-compatibility of Hungarian law with European age discrimination law is insufficient to address the broader concerns and repercussions of this reform on the judiciary and its independence.

In the interim, the ECtHR also took position on a petition from former President of the Supreme Court, Mr. Baka, whose functions were prematurely withdrawn due to the entry into force of the Fundamental Law and alleged necessities associated with the reorganization of the functions of the supreme Hungarian judicial authority (now referred to as «*Kúria*»). In their judgment dated 27 May 2014, the Strasbourg judges found that Mr. Baka's right to access a court to challenge the premature cessation of his functions had been breached, namely by pointing out that such a measure had been provided for by the Hungarian Constitution itself and thus escaped any form of judicial review.<sup>62</sup> In addition, the Court concluded that there had been a violation by the Hungarian authorities of the right to freedom of expression of the former President, on the grounds that

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57. *European Commission for Democracy through Law (Venice Commission), Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, Opinion N°663/2012, 19 March 2012, § 106.

58. European Commission, Press Release, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, 17 January 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm)

59. European Commission, Press Release, *Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary*, 25 April 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm)

60. With regard to *Act XX of 2013 on the Amendments relating to the upper age limit applicable in certain judicial legal relationships* of 11 March 2013, see Hungarian Helsinki Committee, *The situation of Hungarian judges affected by the lowering of the mandatory retirement age for judges after the judgment of the CJUE in the case Commission v. Hungary* (C-286/12), December 2013.

61. See on this topic Hungarian Helsinki Committee, 105 judges turn to Strasbourg court over "forced retirement", 25 June 2012 available at: <http://www.helsinki.hu/en/105-judges-turn-to-strasbourg-court-over-forced-retirement/>.

62. *Baka vs. Hungary*, petition N° 20261/12, judgment on the merits dated 27 May 2014, §§ 73-79 of the judgment.

he was relieved of his functions essentially for publicly criticizing the government on its judicial reform. The sanction pronounced against Mr. Baka had a knock-on effect, effectively dissuading Hungarian magistrates to exercise their freedom of expression, and thus led to the condemnation of the authorities pursuant to Article 10 of the European Convention on Human Rights.<sup>63</sup>

While the eviction of the judges strongly mobilized public opinion, it constitutes only one salient aspect of a policy that calls into question the independence of the judiciary, barely veiled by the government. Since the passing of Act CLXI/2011, the administration of courts in Hungary has been entrusted to the « National Judicial Office » (NJO), newly created to replace the former National Judicial Council. The Office is headed by a President elected by Parliament for a nine-year term,<sup>64</sup> with a two-thirds majority vote. The president of the Office held all the administrative powers formerly and collegially held by the former Council, while the reformed National Judicial Council (NJC), composed of the President of the Kuria and fourteen other magistrates from regional and district Courts, was entrusted with a supervisory function over decisions taken by the President within the framework of his/her administrative functions. As the Venice Commission concluded in its opinion dated 19 March 2012, the details of the regulations concerning the competences of the president<sup>65</sup> show a real “personalization of the function” without providing a guarantee of «*sufficient democratic accountability*.»<sup>66</sup> Moreover, as he/she is elected by Parliament, that is, by an outside actor from a judicial point of view, « [the president of the Office] *cannot be regarded as an organ of judicial self-government*. »<sup>67</sup> Such an institutional configuration is all the more questionable because the personal ties between the first president of the Office and the political party in power have been decried by civil society.<sup>68</sup> No guarantee had been given either as to the maximum duration of the functions entrusted to the president, in place « *until the new President of the NJO has been elected*» (Article 70, paragraph 4, of the Act CLXI of 2011 on organization and administrations of courts). In other words, replacing the president of the Office hinged on a two-thirds majority vote in Parliament. If that *quorum* is not met, the duration of the president’s term could go far beyond the 9 years initially stipulated by the law<sup>69</sup>. A legislative reform was conducted to end this anomaly and stop the president from maintaining his/her position should the two-thirds majority vote not be reached. In the interim, however, the vice-president of the Office, that is, someone appointed by the President of the Republic upon recommendation by the outgoing president, would carry out his/her functions. The independence of the judiciary is further jeopardized by an even more dramatic twist considering the possible intrusion of governmental authorities in the recruitment process of new judges. The latter are indeed evaluated by a committee of judicial experts appointed by the Minister of Justice in agreement with the President of the NJO. The President can thus participate in the appointment procedure of candidates selected by the committee of experts. Act CLXII of

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63. *Baka vs. Hungary*, § 101. The ECtHR’s Grand Chamber recently confirmed the finding regarding the Hungarian authorities in its judgment dated 23 June 2016, by concluding that there was a violation of Articles 6 § 1 and 10 of the Convention.

64. Article 66 of organic law CLXI of 2011 on the organization and administration of the courts reads as follows: ‘*The president of the NJO shall be elected by the Parliament from among judges appointed for an indefinite period of time and having at least five years of judicial service. The president is elected for nine year with two-thirds of the votes.*’

65. For the details on the competences of the President of the Office, such as they stem from the provisions figuring in the law cited above on organization and administration of the courts in Hungary, see *European Commission for Democracy through Law (Venice Commission), Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, Opinion N°663/2012, 19 March 2012, §§ 33 and following

66. *Ibid.*, § 26. Highly problematic, this new system sticks out like a sore thumb within the European judicial space given that no other member State of the Council of Europe has chosen to concentrate so much power in a single person.

67. *Ibid.*, § 51.

68. Hungarian Helsinki Committee, Eötvös Karoly Policy Institute and Hungarian Civil Liberties Union, *Letter to V. Reding*, 4 January 2012.

69. *European Commission for Democracy through Law (Venice Commission), Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, Opinion N°663/2012, 19 March 2012, § 31.

2011 on the legal status and the remuneration of judges granted him the power to change the rank of the candidates established by the committee (Article 18, Paragraph 3, of the Act on the legal status and remuneration of judges, hereinafter referred to as ALSRJ) with only the obligation to inform the National Judicial Council of the reasons for which the order was changed (Article 14, Paragraph 1, of the ALSRJ). The decision of the President of the NJO, which was not guided by any criteria or condition of any type, was not open to appeal.<sup>70</sup> It was incumbent upon the President of the Republic to appoint one of the candidates proposed by the president of the NJO. The absolute discretionary power enjoyed by the President of the Office has legitimately raised the “perplexity” of the Venice Commission, which highlighted that such a mechanism « *violates the rule of law and the principle of transparency.* »<sup>71</sup> It also recommended that the new system be modified « *to be in compliance with the rule of law* »<sup>72</sup>, namely by obliging the president of the NJO to be accountable in the exercising of his/her prerogatives, to motivate his/her decisions explicitly and to have such decisions be subject to judicial review.<sup>73</sup> Following the criticism of the Venice Commission, rules for the appointment of new judges were modified in 2012.<sup>74</sup> Under the new rules, the National Judicial Council can veto decisions taken by the President of the NJO regarding appointment of judges. These modifications, however, did not address all the concerns raised by the Venice Commission, which adopted in October 2012 another opinion on this topic.<sup>75</sup>

Another aspect of the competences devolved to the President of the NJO also raised concerns regarding the full compatibility of Hungarian legislation with European standards. It concerned the system of distribution of caseloads among the Hungarian courts established under Article 11 (3) of the Transitional Provisions of the Fundamental Law, subsequently eliminated by the Constitutional Court in its Decision 45/2012 and integrated into the Fundamental Law by the Fourth Amendment. Under Article 27 4) a, the President had the power to override the territorially competent jurisdiction according to the rules of judicial organization, and appoint another jurisdiction in order to ensure a balanced distribution of the caseload among the courts. When examining the Fourth Amendment, the group of experts mandated by the Hungarian Ministry of Foreign Affairs to issue an opinion on the Fourth Amendment did not denounce the principle of such a power of transfer left up to the judicial administration<sup>76</sup>. However, it did not exclude the risk that its use might disregard the requirement of objective impartiality, as a litigant may get the feeling that such a transfer is meant to resolve the case in a certain way.<sup>77</sup> The risk is further increased by the lack of independence of the body responsible for administration, as well as by the total lack of effective review of its decisions. The group of experts thus recommended intervention of the legislator with a view to setting accurately the conditions in which a transfer of certain cases from one court to another could take place. Concerns about the law on the organization and administration of the courts, mainly the excessive powers of the President in the recruitment of judges and the transfers of cases, were also raised by the European Commission,

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70. *Ibid.*, § 58.

71. *Ibid.*

72. *Ibid.*, § 43

73. *Ibid.*

74. For more details, see Human Right Watch, *Wrong Direction on Rights - Assessing the Impact of Hungary's New Constitution and Laws*, 16 May 2013, available at: <https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws>, pp. 9-10.

75. Letter from Hungarian Civil Liberties Union, Hungarian Helsinki Committee and Eötvös Karoly Policy Institute to the Parliamentary Assembly of the Council of Europe, June 2015, p. 7-8. See also the European Commission for Democracy through law, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), Opinion n°683 / 2012, Strasbourg, 15 October 2012.

76. Délpéré F., Delvolvé P., et Smith E., Opinion on the Fourth Amendment of the Constitution of Hungary, provided at the request of H.E. Mr. János Martonyi, Minister for foreign affairs of the Republic of Hungary, 1 May 2013, p. 58-62 available at : [http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny\\_modositas\\_szakvelemen\\_angol.pdf](http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny_modositas_szakvelemen_angol.pdf) pp. 58-62.

77. *Ibid.*, p. 61.

which asked Hungary to provide explanations on the compatibility of these provisions with European standards, namely on the independence of the judiciary and the right to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union).<sup>78</sup> No action, however, was introduced by the Commission, even if the Hungarian authorities had not, by their own admission, fully taken up the recommendations drafted by the Venice Commission.

The repeated warnings of the Venice Commission, widely echoed by civil society, ultimately defeated this last attempt to control the Hungarian judiciary. Act CXXXI of 1 August 2013 abolished the right of the President of the NJO to make such transfers, before the Fifth Amendment to the Fundamental Law anchored that modification in the Fundamental Law in September 2013.<sup>79</sup> Nevertheless, no remedy was offered to those whose right to access the courts was violated in application of the rules on transfers.<sup>80</sup> At that same time, the powers of the National Judicial Council (NJC) were reinforced.<sup>81</sup> The Venice Commission did nonetheless express some doubts about the guarantees provided by such an institution. Although it is responsible for monitoring the action of the NJO president, this « *is dependent on the latter in many ways – the President of the NJO controls those who should control the President.* » In support of that line of thinking, the Commission thus points out, among other elements, that all the members of NJC are judges and that « *they are potential subjects to a number of allegedly neutral administrative measures, such as transfers to lower level courts (Section 34.2 ALSRJ), which can easily result in a chilling effect.* »<sup>82</sup> As pointed out by the International Bar Association in its report of October 2015 on the independence of the judiciary and the rule of law in Hungary,<sup>83</sup> such a possibility of changing judges' assignments has not been used so far. It has nevertheless contributed to considerably weaken the independence of NJC, which, as the Commission concluded, « *has scarcely any significant powers and [whose] role in the administration of the judiciary can be regarded as negligible.* »<sup>84</sup>

At the conclusion of this analysis, it appears that the Orban government's hold on the Hungarian judiciary was quickly manifested by levers created in order to control its actions and weaken its independence. Undoubtedly, it is still difficult at this stage to gauge to what extent the Hungarian

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78. European Commission, Press Release, *European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary*, 17 January 2012 available at: [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm); European Commission, Press Release, *Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary*, 25 April 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm)

79. See on this topic: Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, *Comments on the Fifth Amendment to the Fundamental Law of Hungary*, 18 September 2013 available at : [http://helsinki.hu/wp-content/uploads/NGO\\_comments\\_on\\_the\\_5th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_October2013.pdf](http://helsinki.hu/wp-content/uploads/NGO_comments_on_the_5th_Amendment_to_the_Fundamental_Law_October2013.pdf) –

80. Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Background material of Hungarian NGOs in relation to the introductory memorandum, *Situation in Hungary following the adoption of Assembly Resolution 1941 (2013)*, 2 June 2015, p.7; Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Mertek Media Monitor, *Disrespect for European Values in Hungary 2010-2014*, 21 November 2014, p. 4.

81. Article 25 § 5 of the Fundamental Law, as modified by the Fifth Amendment, now stipulates: “*The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The National Council of Justice shall supervise the central administration of the courts. The National Council of Justice and other bodies of judicial self-government shall participate in the administration of the courts.*”

82. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, Opinion N°663/2012, 19 March 2012, , p. 14, § 40. Such a possibility is however limited to when the court to which a magistrate is assigned closes, or if his jurisdiction or his territorial jurisdiction is reduced to a point where it becomes impossible to maintain the judge's post. Further, pursuant to Article 31 of the ALSRJ the president of the court himself is empowered to reassign judges without their consent to a judicial function within another service, temporarily, every three year for a maximum period of one year, in the interest of the service, or to foster their career development.

83. International Bar Association, *Still under Threat: the Independence of the Judiciary and the Rule of Law in Hungary* , October 2015, pp. 23-24.

84. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary, ibid.*, p. 15, § 50.

authorities intend to make use of the prerogatives which they have gradually been acquiring for themselves with respect to the judiciary. Both the lack of transparency surrounding the process of appointment of judges and the mobility, which can still be imposed upon them today, are however already negatively affecting the functioning of judicial institutions and the feeling that litigants have when they seek justice. The government's action stands in blatant contradiction with European and international standards with respect to due process.<sup>85</sup>

### 2.1.3 Electoral laws and other restrictions to the legislative power

Several converging elements lead to the assertion that the Hungarian elections are « *free but not fair*. »<sup>86</sup> In this regard, a first topic of concern relates to the untimely changes in the rules of the electoral game. That is how in 2014, only four months prior to the municipal elections and only eleven days after having been proposed by the government, an electoral reform pertaining to municipal elections and aimed at changing the rules of electoral representation for the city of Budapest came about. However, the truly striking element of the government's policy is the new electoral law passed in 2011 aimed at completely overhauling Hungarian electoral law. In parallel, a new map of the constituencies was drawn without any prior consultation with the population or electoral experts. While these reforms and the redefining of the map of constituencies were deemed necessary, the territorial delineations thus established, as the research and consulting institute *Political Capital*, showed, were a typical example of « *gerrymandering*. »<sup>87</sup> The traditionally « leftist » (progressive) constituencies have a surplus of approximately 5000 to 6000 voters, compared to the number of voters in traditionally conservative constituencies.<sup>88</sup> Thus, in the 2010 elections, the Fidesz-KDNP national list won 53 % of votes and 68 % of the seats in Parliament, whereas in 2014 they garnered 45 % of votes and won 67 % of seats.<sup>89</sup>

The analysis of Hungarian political observers specializing in electoral matters has exposed the will of the drafters of the new electoral law to provide the broadest possible electoral base to the leading party during elections and to minimize the opposition parties' capacity for action. In this respect, the most symbolic measure without a doubt remains the so-called « *winner compensation* » (*győzteskompenzáció*) measure. Legislative elections in Hungary are first past the post with one round in each of the 106 constituencies redefined by the electoral law, as well as a separate vote with a proportional system that has the national rosters of the different political parties compete against each other. Apart from the votes expressed for these lists, there are also the « fragmented » votes. Just as in other electoral systems, Hungarian law provides that the votes obtained by the losing candidates of the first past the post are automatically counted in favor of the national list of the party to which the losing candidate belongs. What is original about the Hungarian legislation is that it counts also the votes of the leading candidate within each constituency. Thus, the difference in the number of votes for the winning candidate (that is,

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85. Exchange of information between the FIDH and the Eötvös Karoly Policy Institute, March 2016. According to EKINT, the impact of these reforms on the functioning of ordinary courts can now be observed in the field of asylum, within the framework of procedures initiated against asylum seekers in application of the new asylum and criminal legislation.

86. *Political Capital Policy Research and Consulting Institute*, "The winner takes it all: analysis on the impact and the risks of the new electoral system", 18 February 2014 available at: [http://www.valasztasirendszer.hu/wp-content/uploads/pc\\_flash\\_report\\_20140218\\_TheWinnerTakesItAll.pdf](http://www.valasztasirendszer.hu/wp-content/uploads/pc_flash_report_20140218_TheWinnerTakesItAll.pdf). See also OSCE/ODIHR, "Limited Election Observation Mission Final Report", Warsaw, 11 July 2014, pp. 6-7.

87. *Political Capital Policy Research and Consulting Institute*, *The new Hungarian election system's beneficiaries*, 6 January 2016, specifically. pp. 2-3.

88. *Ibid.*, pp. 2-3.

89. Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Background material of Hungarian NGOs in relation to the introductory memorandum « Situation in Hungary following the adoption of Assembly Resolution 1941 (2013), 2 June 2015, pp. 4-5.

the votes that exceed the threshold required to win,<sup>90</sup>) goes to the list of that candidate's party. Such a system naturally favors the ruling political parties. Moreover, it enabled Fidesz to win six additional seats which enabled it to maintain its two-thirds majority in Parliament during the 2014 legislative elections. The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (hereinafter OSCE/ODIHR) commented in its report on the observation of the 2014 elections that the changes made to the electoral law « *negatively affected the electoral process, including important checks and balances* »<sup>91</sup>.

The Hungarian government has also sought to distort the fairness of the electoral game and to structure a balance of power to its advantage by strictly controlling the conditions of media campaign coverage. Article 5 of the Fourth Amendment stipulated that « *In order to guarantee the conditions for the formation of a democratic public opinion, political parties which have a nation-wide support and other organizations that nominate candidates must be provided free and equal access, as defined in a cardinal Act, to political advertising in public media outlets during elections for Members of Parliament and Members of the European Parliament. Cardinal Act may limit the publication of other forms of political campaign.* ». Initially integrated into the 2011 electoral law, these provisions had been declared unconstitutional by the Constitutional Court<sup>92</sup>, on grounds that they constituted « *considerable restrictions on political discourse,* » which do not serve « *the purpose of providing balanced information,* », and which « *[can] even le[a]d to the opposite result.* » They were later taken up again verbatim and constitutionalized by the Fourth Amendment. As interpreted by the Venice Commission, the different rules were intended to limit broadcasting conditions for 'political advertising' - defined as political propaganda aimed at praising the merits of candidates with a view to obtaining voter support – by banning all use of paid political advertising. So, pursuant to these provisions, political parties cannot thus promote their political programs by financing the persons or services which would be making or broadcasting their messages. More generally, all political propaganda, whether it is remunerated or not, was banned in the private media during electoral campaigns. That type of limitation (ban on the use of private media and/or paid political advertising) can be justified in order not to give an advantage to political parties with significant financial means and thus conversely not reduce the means of expression available for more modest political formations. These limitations, however, exceed the margin of appreciation left to States by the European Court of Human Rights concerning freedom of expression. The case *Tv Vest As & Rogaland Pensjonistparti vs. Norway* gave the Strasbourg judges the opportunity to recall that « *there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest* » and that « *the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference.* » The Court recognizes that « *account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media* »<sup>93</sup>.

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90. For instance, if a candidate at the top of the list garners a total of 20 000 votes and the candidate in second place only gets 15 000, the party list of the winning candidate will be credited 4999 additional votes, that is, the number of votes that it was not necessary to get to win a seat in the constituency.

91. OSCE/ODIHR, "International election Observation Mission Hungary – Parliamentary Elections", *Statement of Preliminary Findings and Conclusion*, 6 April 2014, p. 1.

92. With respect to the reasons for the rejection of the law by the Court, see: Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Károly Policy Institute, "Comments on the Fifth Amendment to the Fundamental Law of Hungary", 18 September 2013, available at: [http://helsinki.hu/wpcontent/uploads/NGO\\_comments\\_on\\_the\\_5th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_October2013.pdf](http://helsinki.hu/wpcontent/uploads/NGO_comments_on_the_5th_Amendment_to_the_Fundamental_Law_October2013.pdf).

93. Req. N° 21132/05, judgment of the Court of 11 December 2008, §§ 69-60. See also on this topic: Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Károly Policy Institute, « Main Concerns Regarding the Fourth Amendment to the Fundamental Law of Hungary », 13 March 2013, [http://helsinki.hu/wp-content/uploads/Main\\_concerns\\_regarding\\_the\\_4th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_of\\_Hungary\\_13032013.pdf](http://helsinki.hu/wp-content/uploads/Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary_13032013.pdf).

The European normative framework requires media campaign coverage to be « fair, balanced and impartial. »<sup>94</sup> Tight control exercised by the authorities over all the public media in Hungary (see Chapter 2.2.1 below) manifestly does not provide sufficient guarantee of fairness and impartiality. On the contrary, it has created conditions for a balance in the representation of political forces, which is as vulnerable as it is unstable.

The Fifth Amendment, however, changed this provision by eliminating the limitation on political advertising in public media services while maintaining the ban on remuneration for broadcasting them. That modification has had, however, a mere cosmetic effect: by continuing to impose free broadcasting of political advertising, the Fifth Amendment has hardly taken into consideration the concerns expressed by the Constitutional Court in its Decision 1/2013 regarding risks that this provision poses to freedom of expression, as well as the right of voters to be informed. The ban on remunerated political advertisement also on private media further resulted in no commercial media outlet with national coverage choosing to broadcast political advertisement for free, thus restricting political advertising to public media in practice<sup>95</sup>.

This weakness is exacerbated by the total lack of reference in the Fourth Amendment to billboards on public roads. Given the limited possibility of using commercial media for purposes of political propaganda, these billboards play an important role during the electoral campaign. Thus, the lack of regulation regarding their use has been problematic. A governmental decree was adopted in January 2014 to fill this legal vacuum. However, it imposed further restrictions with respect to where the billboards can be set up and their use which do not apply to government, nor to civil society, thus resulting in what Hungarian NGOs pointed at as an unnecessary and unconstitutional restriction to the electoral campaign<sup>96</sup>. Also, political parties were reportedly not given sufficient time to amend their electoral campaign strategies to comply with the new regulation. In 2014, the OSCE/ODIHR was disturbed to learn that the overwhelming majority of places where billboards may be set up had been rented by the ruling party and not easily accessible during the electoral campaign to opposition parties. The OSCE/ODIHR also pointed out the ties forged between the different billboard companies and Fidesz, as most of the heads of these companies are affiliated with the ruling party. Several NGOs, as well as the OSCE/ODIHR, finally bemoaned the broadcasting on paid Hungarian TV stations of political messages explicitly favorable to Fidesz, but that the National Electoral Commission had not considered political advertising despite their close resemblance to the « official » advertising messages of the party.<sup>97</sup> All of these elements led the OSCE/ODIHR to conclude in its report on the observation of the 2014 elections that the ruling party had « *enjoyed an undue advantage* »<sup>98</sup> due to the restrictive electoral rules throughout the 2014 electoral campaign.

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94. See the two recommendations of the Committee of the Ministers of the Council of Europe, cited by Délpéré F., Delvolvé P., et Smith E., *Opinion on the Fourth Amendment of the Constitution of Hungary*, provided at the request of H.E. Mr. János Martonyi, Minister for foreign affairs of the Republic of Hungary, 1 May 2013, p. 37 available at : [http://vienna.io.gov.hu/download/1/ec/60000/alaptoervenymodositas\\_szakvelemeny\\_angol.pdf](http://vienna.io.gov.hu/download/1/ec/60000/alaptoervenymodositas_szakvelemeny_angol.pdf)

95. Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Károly Policy Institute, Transparency International Hungary, Hungary Fact Sheet 4, Free but not Fair Elections, September 2014, [http://helsinki.hu/wp-content/uploads/Hungary\\_fact\\_sheets\\_20140921.pdf](http://helsinki.hu/wp-content/uploads/Hungary_fact_sheets_20140921.pdf), p. 7.

96. See Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Eötvös Károly Policy Institute, A pártok a kampánnyal ne zavarják a köznyugalmat?, 24 January 2014, <http://www.helsinki.hu/a-partok-a-kampannyal-ne-zavarjak-a-koznyugalmat/> (in Hungarian).

97. OSCE/ODIHR, "International election Observation Mission Hungary – Parliamentary Elections", *Statement of Preliminary Findings and Conclusion*, 6 April 2014, p. 1.

98. OSCE, Hungary Parliamentary Elections, 6 April 2014 OSCE/ODIHR Limited Election Observation Mission Final Report, Warsaw, 11 July 2014, p.1 available at : <http://www.osce.org/odihr/elections/hungary/121098?download=true>

## 2.2 Non-established powers

### 2.2.1 Taking control of the media

Attempts by the government to gain control over or otherwise restrict independent and critical voices in recent years have extended to media. Reforms in media legislation, which amendments adopted in response to harsh international criticism did not manage to fully realign with international standards, and attempts to curtail pluralism and independence for both public and private media have threatened freedom of expression, information and media freedom in Hungary.

Two new laws were passed in 2010 that introduced significant changes to media regulation in Hungary: Act CIV on the Freedom of the Press and the Fundamental Rules on Media Content (the 'Press Freedom Act'); and Act CLXXXV on Media Services and Mass Media (the 'Media Act'). These two laws, also referred to as 'the media law package', attracted harsh criticism at both the domestic and the international levels<sup>99</sup>, due to the restrictions they entailed and the threat they represented for media freedom, independence and pluralism. They were accompanied by constitutional amendments and other measures which, taken together, resulted in a complete overhaul of the Hungarian media landscape. As the CoE Commissioner for Human Rights pointed out in 2011<sup>100</sup> the cumulative impact of the media law package on media freedom is indeed much more threatening than each provision taken individually or even their sum. This conclusion - which can be applied to other sectors in which legislative changes have been implemented since 2010 - warns of the cumulative effect of laws and measures adopted in recent years on fundamental rights, notably on media freedom, in Hungary<sup>101</sup>.

Although media laws were subsequently amended in response to international criticism and some aspects considered problematic have been addressed, the changes have overall failed to address concerns and to bring the legislation into line with international standards.

Among the criticism leveled at the 2010 media law package figures the accelerated procedure by which these laws were passed, which prevents public discussion and consultation with interested parties a source of real concern. This practice remained unchanged when amendments to the laws were passed in response to criticism. Fast-track procedures allowing for new legislation to be passed without consulting stakeholders have been the norm since 2010, as much as the practice of legislating through cardinal (i.e. organic) laws in areas that should be left to ordinary

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99. The reforms were criticised e.g. by the OSCE Representative on Freedom of the Media, who repeatedly condemned the media laws as inconsistent with OSCE standards on media freedom and pluralism and suggested that they be amended so that they could be made compatible with those standards. See for instance: Press release, *Hungarian media legislation severely contradicts international standards of media freedom*, 7 September 2010 available at: <http://www.osce.org/fom/72229> ; Press release, *Hungarian media law further endangers media freedom*, 21 December 2010 available at: <http://www.osce.org/fom/74687> . The OSCE also mandated an expert analysis of the Hungarian media legislation to highlight concerns related to the media law and put forward proposals that should guide Hungary in meeting its commitments as a member of the OSCE. See OSCE, *Analysis of the Hungarian Media Legislation*, prepared by Dr. Katrin Nyman-Metcalf, Professor and Chair of Law and Technology at Tallin University of Technology, expert of communication law, Commissioned by the Office of the OSCE Representative on Freedom of the Media, 28 February 2011, available at: <http://www.osce.org/fom/75990?download=true>. The Council of Europe Commissioner for Human Rights also issued an opinion in which he/she expressed criticism towards Hungary's media legislation and invited Hungary to amend such legislation to bring it back into line with CoE standards on freedom of the media. See *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*, CommDH(2011)10, Strasbourg, 25 February 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1751289>

100. *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*, CommDH(2011)10, Strasbourg, 25 February 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=1751289&direct=true>

101. *Ibid.*, p. 2.



legislation. This includes the media sphere, where the Venice Commission questioned their use in relation to detailed media regulation<sup>102</sup>.

As to substance, several provisions in the media laws have raised concerns regarding their compatibility with international standards. The provision on 'balanced coverage', contained in the 2010 Press Freedom Act and prescribing what content should be provided by all media outlets (including online and on-demand media)<sup>103</sup> attracted severe criticism. Although content-based restrictions to FoE are not *per se* to be found incompatible with European standards – namely Article 10 ECHR and Article 11 EU Charter –, any legislation interfering with the right protected under these articles ought to be sufficiently precise, accessible and foreseeable so as not to leave any doubt for those it intends to regulate as to its content and the consequences that will follow from any action which contravenes it<sup>104</sup>. Laws, such as the Hungarian media laws, regulating media content *a priori* and through broad and vague formulations, do not meet these requirements<sup>105</sup>. Furthermore, even when these provisions are interpreted in a manner that does not restrict media freedom in practice, their mere existence – coupled with large discretion granted to media regulatory authorities in Hungary in determining whether the requirements are met - is liable to have a chilling effect on media<sup>106</sup>, as it could lead them to refrain from expressing opinions or circulating information which may constitute an infringement of the legislation. These restrictions are all the more worrisome when they apply to on-line media. The OSCE has recommended that the Internet remain open to free opinion and expression and that any limitation on Internet freedom should be self-regulatory and exempt from government interference<sup>107</sup>. Most OSCE countries have minimal regulations regarding print and online media.

Although the provision has been amended so as to apply only to linear (broadcast) media services (2011)<sup>108</sup> and some requirements have been removed (2013), concerns remain. Following amendments, linear media service providers (i.e. radio and television broadcasters) must still provide balanced information. Also, the law still requires media to distinguish between information and opinions and prevents them from expressing the latter in news programs.

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102. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation (Act CLXXXV on media services and on the mass media, Act CIV on the freedom of the press, and the legislation on taxation of advertisement revenues of mass media) of Hungary*, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), Opinion no. 798/2015, 22 June 2015, p.6

103. These are contained in former Article 13, now Article 10 following amendments made in response to criticism voiced by the European Commission in relation to the laws' compatibility with EU law, of Act CIV, and Article 12 (1) and (2) of Act CLXXXV.

104. European Commission for Democracy through Law European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation (Act CLXXXV on media services and on the mass media, Act CIV on the freedom of the press, and the legislation on taxation of advertisement revenues of mass media) of Hungary*, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), Opinion no. 798/2015, 22 June 2015.

105. See for instance the prohibition on media content that violates constitutional order or offending religious or political beliefs. Such requirements are not only insufficiently precise, but flout ECtHR case-law which affirms that FoE is applicable not only to information or ideas that are inoffensive, but also to those that shock, offend or disturb.

106. *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*, CommDH(2011)10, Strasbourg, 25 February 2011.

107. OSCE, Office of the Representative on Freedom of the Media, *Legal Analysis of the Hungarian Media Legislation*, prepared by Dr. Katrin Nyman-Metcalf, Professor and Chair of Law and Technology, Tallin University of Technology, expert of communication law, 28 February 2011, available at <http://www.osce.org/fom/75990?download=true>, p. 3-4.

108. The legislation was amended in March 2011 following criticism expressed by the European Commission in a dialogue, which it initiated with the government regarding the media laws' consistency with EU law, namely *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services* ('the EU Audio-Visual Media Services Directive').

Based on this provision, the Hungarian Supreme Court (*Kúria*) ruled in 2014 against TV station ATV for describing *Jobbik*<sup>109</sup> as a 'far-right' party in a 2012 news broadcast, on account that this was an opinion-forming expression<sup>110</sup>.

These provisions not only risk seriously limiting free speech, but appear at odds with the obligation to respect media pluralism contained in Article 11 EU Charter and endorsed by the ECtHR in its case-law.

The changes did not prevent the Hungarian Constitutional Court from ruling in May 2014 that content providers are to be held responsible for comments posted on their websites that may violate the media laws, regardless of whether they moderate the posts or are even actively removing the harmful content. The decision was heavily criticized by Hungarian and international civil society as well as the CoE Commissioner for Human Rights, who alerted against the serious implications, which this could have for free speech and Internet freedom<sup>111</sup>.

The chilling effect that content-based restrictions are likely to have on media is amplified when heavy sanctions are attached to them. Although rarely imposed in practice, these have reportedly forced media outlets to engage in self-censorship. The chilling effect is greater as the laws providing for sanctions are not sufficiently clear and foreseeable<sup>112</sup> and as media regulatory authorities with tight links to government (see below) are responsible for their enforcement. Sanctions also appear to be disproportionately severe, especially when they extend to censorship powers such as the power to interrupt media outlets' activities for a certain time, to withdraw their license or registration or to block users' access to media content.<sup>113</sup>

The situation is even more concerning when defamation law is considered. Despite reforms, namely a new criminal code adopted in 2012, defamation provisions were maintained and recently (November 2013) extended in scope to cover defamatory videos and sound recordings while penalties were raised to up to three years imprisonment. This extension, which is at odds with European trends to decriminalize defamation, risks seriously undermining free, investigative journalism and silencing critical voices<sup>114</sup>. Efforts by NGOs to request that the law be amended have been unsuccessful. On the contrary, testimonies gathered by FIDH and NGO statistics showing a raise in the requests for free legal assistance in defamation cases suggest that defamation provisions are used more and more frequently<sup>115</sup>.

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109. Jobbik, Movement for a Better Hungary (in Hungarian: *Jobbik Magyarországért Mozgalom*) is a radical nationalist political party originally established in 2003. The party describe itself as "principled, conservative and radically patriotic Christian party".

110. See Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, CommDH(2014)21, Strasbourg, 16 December 2014; see also Human Rights Watch, *Hungary: Outstanding Human Rights Concerns*, February 2015, p.2.

111. Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, CommDH(2014)21, Strasbourg, 16 December 2014, *ibid.*; FreedomHouse, *Freedom of the Press 2015, Hungary*, <https://freedomhouse.org/report/freedom-press/2015/hungary>.

112. «Expertise by Council of Europe experts on Hungarian media legislation: ACT CIV of 2010 on the freedom of the press and the fundamental rules on media content and ACT CLXXXV of 2010 on media services and mass media, 11 may 2012. See also Report by Nils Muiznieks, *ibid.*

113. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation (Act CLXXXV on media services and on the mass media, Act CIV on the freedom of the press, and the legislation on taxation of advertisement revenues of mass media) of Hungary*, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), Opinion no. 798/2015, 22 June 2015.

114. OSCE, *Hungary Parliamentary Elections*, 6 April 2014, OSCE/ODIHR Limited Elections Observation Mission Final Report, Warsaw, 11 July 2014, *ibid.*

115. FreedomHouse, *ibid.* See also Report by Nils Muiznieks, *ibid.* In *UJ v. Hungary*, application no. 23954/10, judgment of 19 July 2011, the ECtHR found a violation of the right to freedom of expression in a case concerning conviction of a journalist for defamation in 2009 on grounds that the sanction was not proportionate to the offence committed.

Another provision that was considered problematic and was amended following criticism by international organizations, especially the European Commission, was the one providing for registration requirements for all media as a pre-condition for their operation. The European Commission found the rule to be incompatible with EU law, namely with *Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services* (the 'EU Audiovisual Media Services Directive') and urged Hungary to amend the legislation<sup>116</sup>. Following amendment, media have to register with the media authorities within 60 days of launching their services rather than prior to doing so. However, the obligation still applies to all media outlets, including print and online media<sup>117</sup>, contrary to CoE standards, particularly the ECHR and PACE Resolution 1636(2008) on indicators for media in a democracy<sup>118</sup>. These provide that print and on-line media should be excluded from registration requirements, whereas licensing may be required for audio-visual broadcasters. The obligation to register is considered excessive also by the OSCE,<sup>119</sup> which has warned against the restrictive effect that this may have on free speech. According to the OSCE, "international practice also shows that registration is normally only required in societies where media are not really free" and that introducing new registration requirements is at odds with international and European trends on media freedom<sup>120</sup>. Risks increase when the organ that handles registration is politically biased or perceived as such due to its close ties with the government.

The Klubrádió case is a prime example showing how registration and licensing powers under the new regulation can be abused by the media authorities, which can use them to favor certain media outlets and target others. Klubrádió was a popular radio station known for being critical to the government, whose license expired in 2011. Although it had requested renewal of its broadcasting license, the media authority gave the frequency to Autórádió Műsorszolgáltató Kft instead. After a long legal battle that ended in 2013, Klubrádió finally managed to regain its frequency. However, it suffered huge financial loss as a consequence. Also, Lokomotív Radio, Klubrádió's affiliate in Hungary's second biggest town Debrecen was eventually shut down by the media authority in 2014, following its license expiration in 2012. As a consequence, Klubrádió only broadcasts now in the capital and online<sup>121</sup>.



Several thousand Hungarians protest against Prime Minister Viktor Orban in the center of Budapest on January 22, 2012. © FERENC ISZA / AFP

116. European Commission Vice-President Neelie Kroes, *Letter to the Hungarian Government*, 21 January 2011 available at: <http://nol.hu/media/file/attach/61/10/00/000001061-1855.pdf>

117. Report by Nils Muiznieks, *ibid.*

118. See PACE Resolution 1636 (2008), Indicators for media in a democracy adopted by the Assembly on 3 October 2008 (36th Sitting) available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17684&lang=en>

119. OSCE, Office of the Representative on Freedom of the Media, *Analysis of the Hungarian Media Legislation*, *op.cit.*

120. *Ibid.*

121. Interviews between FIDH and media professionals, October 2015; see also FreedomHouse, *Freedom of the Press 2015*, *ibid.*

The media laws also limit the right of journalists not to disclose their sources. In its original version, the Press Freedom Act required journalists to reveal their sources in legal proceedings, but failed to provide sufficient guarantees that would prevent abuse. Following a Constitutional Court decision,<sup>122</sup> which partly annulled the provision in December 2011, the act was amended by restricting the obligation to reveal sources only to 'exceptional circumstances.' These have reportedly been interpreted as only concerning criminal cases and following a court order<sup>123</sup>. However, the provision's vagueness and the fact that it does not apply to independent journalists leave it open to abuse and have a chilling effect on press freedom. Further, according to sources interviewed by FIDH the possibility of recourse to a tribunal is hardly used in practice. Both the Venice Commission and the ECtHR<sup>124</sup> have stressed the importance of protecting journalistic sources for press freedom and alerted against the chilling effect that the failure to provide such protection can have on journalists' public watchdog role<sup>125</sup>.

The lack of independence of media regulatory bodies also raises concerns. Since 2010, media in Hungary have been regulated by three bodies, which make up the National Media and Infocommunications Authority (NMHH or 'the Media Authority'): the President of the NMHH, the Office of the Media Authority and the Media Council. Although the independence and autonomy of both the NMHH and the Media Council are formally guaranteed in law, serious questions have been raised regarding their independence in practice<sup>126</sup>. The appointment process of the NMHH's president and the Media Council has especially raised concerns due to its failure to ensure political diversity and neutrality of these organs<sup>127</sup>. Despite amendments passed in 2013 establishing that the NMHH's president's 9-year mandate would be non-renewable and shifting appointment powers from the Prime Minister to the President of the Republic, concerns remain. The President of the Republic's role in the appointment process indeed appears to be merely formal, as she/he appoints the NMHH's president upon proposal by the Prime Minister and after non-binding consultations with stakeholders, and he may refuse candidates nominated by the PM only on formal grounds<sup>128</sup>. Also, the law still provides that the NMHH's president automatically chairs the Media Council. As for the members of the Media Council, they are nominated by an *ad hoc* parliamentary committee composed of members of each parliamentary group, whose votes are weighed according to their group's size in Parliament. Although appointment of the members of media regulatory bodies by parliament is not unusual in CoE member states, the current political configuration in Hungary raises concerns regarding their political independence, as all Media Council's members are in practice designated by the ruling party<sup>129</sup>. As pointed out also by the CoE Venice Commission in its 2015 Opinion, under the current rules, there is high risk that media sector governance is not impartial.<sup>130</sup> This, coupled with very broad powers given by the law to the media authority when compared to other European media regulatory bodies<sup>131</sup> - including licensing powers for radio and TV broadcasters, appointment powers for all the executive positions in public media service providers and the MTVA (the body which provides funding and manages assets for all public service media)

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122. Constitutional Court, Decision 1746/B/2010, 19 December 2011.

123. Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary, *ibid.*; European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation, ibid.*

124. See *Goodwin v. The United Kingdom*, (Application no. 17488/90), Judgement of 26 March 1996, § 39.

125. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CXII of 2011 on informational self-determination and freedom of information of Hungary*, adopted by the Venice Commission at its 92nd Plenary Session (12-13 October 2012), 18 October 2012, p. 10.

126. *Ibid.*

127. Report by Nils Muiznieks, 2011. Expertise by Council of Europe experts on Hungarian media legislation: ACT CIV of 2010 on the freedom of the press and the fundamental rules on media content and ACT CLXXXV of 2010 on media services and mass media, 11 May 2012.

128. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation, ibid.*

129. Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary, *ibid.*

130. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation, ibid.*

131. *Ibid.*

and sanctioning powers for infringing media regulation - raises questions regarding current rules' potentially negative impact on media freedom, quite separately from these organs' freedom from political interference in practice<sup>132</sup>. These rules, particularly regarding media regulatory authorities' appointment, composition and tenure, are not consistent with European standards requesting that these authorities' be free from political influence and any other arbitrary interference<sup>133</sup>.

Furthermore, decisions taken by the media regulatory authority on any matter falling within its competence according to the media laws can only be appealed before an administrative court whose review is limited to assessing their compatibility with the media laws. This is not only problematic when seen in combination with the media authority's questionable independence but appears to be an outright violation of the right to an effective remedy protected under article 6 and 13 ECtHR and article 47 EU Charter.

European standards also require that States protect media pluralism<sup>134</sup> and ensure that the public has access to diverse views, opinions and comments. The former Hungarian Constitution (article 61) provided that the State should ensure pluralism by imposing an obligation on Parliament to prevent an information monopoly through a legislative act. However, this duty is no longer included in the new Fundamental Law. Content-based restrictions for media also weaken guarantees of media pluralism.

Furthermore, there are other, more indirect ways, in which media independence and pluralism are being undermined. Although there are in Hungary 212 radio and 492 TV channels, and 3359 printed media<sup>135</sup>, the OSCE concluded in its report following its election observation mission to Hungary in 2014, that few media outlets can be considered independent<sup>136</sup>. This depends on various factors. Control over public service media, an increasing concentration of media outlets in the hands of tycoons with close ties to the ruling party and unequal distribution of state advertising to government-friendly media<sup>137</sup> are among the causes of a shrinking space for independent media in Hungary.

A sharp decline in public and private advertising revenue for independent media outlets has been observed since 2010. Not only the government significantly withdrew its advertising from media critical of the ruling coalition, but private companies also cut off advertising to those media for fear of losing government support<sup>138</sup>. Non-government friendly media also face increased obstacles to access state funding, which appears to be given disproportionately to media outlets that favor the government<sup>139</sup>. This runs contrary to CoE recommendations, especially the CoE Parliamentary Assembly (PACE)'s indicators for media in a democracy, which require that state subsidies be granted to media in a fair and neutral manner<sup>140</sup>.

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132. Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary, *ibid.*:

133. These standards are enshrined in numerous CoE documents as well as in article 30 *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive)* and *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)*. The Final Report of the High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy*, January 2013, also recommended that EU countries establish independent media councils with politically and culturally balanced and socially diverse membership, page 7. See also European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation*, 2015.

134. Article 11 EU Charter; Art. 10 ECHR as interpreted by the ECtHR in its case law.

135. OSCE, Hungary Parliamentary Elections, 6 April 2014, OSCE/ODIHR needs assessment mission report, 20-23 January 2014 available at: <http://www.osce.org/odihr/elections/111274?download=true>

136. OSCE, Hungary Parliamentary Elections, 6 April 2014, OSCE/o LEOM Final Report, July 2014.

137. *Ibid.*

138. Report by Nils Muiznieks, 2014. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation*, 2015.

139. European Commission for Democracy through Law (Venice Commission), *Opinion on Media Legislation*, 2015, *ibid.*

140. Report by Nils Muiznieks, 2014. See also CoE Parliamentary Assembly (PACE) Indicators for media in a democracy, Resolution 1636 (2008), indicator no. 8.19.

A new progressive tax on media advertising revenues introduced in 2014 by Act XXII (the Advertisement Tax Act) and based on volume of business, with the highest rate (40%) set for incomes exceeding 20 billion HUF also raised protests. The former EU Commissioner for Digital Agenda, Neelie Kroes<sup>141</sup> criticized the tax as unfair and warned against the adverse effect it could have on media freedom and pluralism. In March 2015 the European Commission opened an investigation into the new tax's consistency with EU state aid rules<sup>142</sup>. The EC's concern was that the new tax could selectively favor certain companies, thus giving them an unfair competitive advantage.

The tax especially affected one media outlet, TV channel RTL Klub, as the only media company in Hungary whose advertising revenue exceeds 20 billion HUF annually. Although the authorities denied allegations that the tax targeted RTL Klub, the fact that it affected disproportionately the last remaining independent TV channel in Hungary is at the very least suspicious. Suspicions increase when we consider that the advertising tax was introduced shortly after RTL had made changes to its news program, which had suddenly become more critical of the government. As one source interviewed by FIDH put it: 'I cannot imagine this happening in other countries'<sup>143</sup>.

A government plan to impose a 150 HUF per gigabyte tax on Internet data traffic was eventually withdrawn in 2015 following large protest. FreedomHouse reports that, if passed, the tax "would have been the first of its kind in the world"<sup>144</sup>.

The State's dubious tax and advertising policies have not only been criticized for being allegedly used to reward friends and punish the opposition<sup>145</sup>, by threatening their economic viability, but has reportedly resulted in soft and self-censorship<sup>146</sup>. Private media increasingly refrain from discussing politically sensitive issues for fear of losing government support or facing other retaliation. Although reporters are not usually directly targeted, informal pressure is high and has sometimes resulted in politically motivated dismissals. As an independent source interviewed by FIDH said, when it comes to media, 'the only quality that matters is loyalty'.

The case of Gergő Sáling, editor-in-chief of news portal *Origo*, dismissed in 2014 after the website made public an investigation on unlawful spending by the PM's chief of cabinet János Lázár<sup>147</sup>, has become emblematic of a practice of indirect political meddling into editorial choices. Although *Origo's* publisher dismissed accusations that the dismissal was politically motivated, media workers interviewed by FIDH seemed to agree that Sáling was fired mainly for political reasons. According to sources interviewed by FIDH, other cases went unnoticed as they had not been documented or made public. However, they all agreed that political pressure on media outlets, although often "invisible," has increased.

141. Neelie Kroes, *Media freedom remains under threat in Hungary*, 28 July 2014 available at [http://ec.europa.eu/archives/commission\\_2010-2014/kroes/en/blog/media-freedom-remains-under-threat-hungary.html](http://ec.europa.eu/archives/commission_2010-2014/kroes/en/blog/media-freedom-remains-under-threat-hungary.html)

142. European Commission, Press release, *State aid: Commission opens in-depth investigation into Hungarian advertisement tax*, 12 March 2015, available at [http://europa.eu/rapid/press-release\\_IP-15-4598\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4598_en.htm)

143. Interview with an NGO representative specialised on media freedom, 27 October 2015.

144. FreedomHouse, *Freedom of the Press 2015*, Hungary *ibid*.

145. Committee to Protect Journalists, *Balancing Act: Press Freedom at risk as EU struggles to match actions with values*, New York, 2015, [https://cpj.org/reports/cpj\\_eu\\_special\\_report\\_2015.pdf](https://cpj.org/reports/cpj_eu_special_report_2015.pdf), p. 27.

146. FIDH interviews with media representatives and NGOs, October 2015. See also OSCE, *Hungary Parliamentary Elections 6 April 2014*; FreedomHouse, 2015, *ibid*. ; Committee to Protect Journalists, *Special Report, Balancing Act: Press freedom at risk as EU struggles to match action with values*, 2015, ; Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Mertek Media Monitor, *Disrespect for European Values in Hungary*, 2010-2014, November 2014, p.7.

147. Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Transparency International, Hungary Fact Sheet 5, *Media Regulation; Distorting the Market*, September 2014. See also Committee to Protect Journalists, 2015, *ibid*.

New state funded media outlets have recently popped up, confirming the State's intention to progressively control the media. Among these, a few (such as Karc FM, faktor.hu and 888.hu, whose name echoes independent news portal 444.hu) are clearly intended as the government's counterpart to and a tool to outweigh independent media outlets. This includes, according to media professionals interviewed by FIDH, discrediting investigative independent media.

As far as public service broadcasting is concerned, the current system does not offer sufficient guarantees of independence and pluralism. Top officials of public service media are appointed by the president of the NMHH, who is in turn appointed by the President of the Republic upon the Prime Minister's proposal. This, coupled with the NMHH president's far-reaching powers over public service media, significantly undermines the latter's independence and threatens diversity in the media landscape. The lack of independence and actual monopoly over the news agency market by public news agency MTI further undermines pluralism, as well as independence and accuracy in news reporting<sup>148</sup>. MTI is not only the sole official source for all public media news content but, by providing free news services to commercial media providers, the main source for all media outlets which cannot afford to purchase information from other independent sources<sup>149</sup>. According to media professionals interviewed by FIDH, public media are increasingly used to disseminate state propaganda, particularly smear campaigns against independent media and NGOs (see below under chapter 2.2.3), migrants (see below under chapter 3) and 'conspiracy theories', while public debate is increasingly absent. One source referred to the information disseminated by public media as "openly biased and propagandist"<sup>150</sup>. Some others pointed to the recent 'refugee crisis' as the first example that shows how powerful the communication system created by the Fidesz government can be in shaping public opinion. Government orchestrated campaigns channeled via public media associating refugees with terrorism or bluntly describing them as dangerous or 'spreading diseases' are an example showing how political communication can easily manipulate and influence public opinion.



A billboard with a state-funded anti-immigration poster reads in Hungarian 'If you come to Hungary, do not take the Hungarians' jobs!' at the third district of Budapest on June 8, 2015. © AFP PHOTO / ATTILA KISBENEDEK

At the local level, independent media barely exist according to several sources interviewed by FIDH. Local media rely entirely on local government funding, which results in a limitation on their independence. As a result, there are disparities in access to public information between the capital and more peripheral areas where the media landscape appears dominated by government friendly media.

## 2.2.2 Restricting freedom of information

Freedom of information (FoI) rules have also been amended in a way which gives increasing latitude to state institutions to refuse access to information requests, thus significantly restricting the right to access information. Act CXII of 2011 on Informational Self-Determination and Freedom

148. See also European Commission for Democracy through Law (Venice Commission), Opinion on Media Legislation, 2015.

149. FIDH written exchanges with HCLU, February 2016; Venice Commission, Opinion on Media Legislation, 2015. OSCE Hungary Parliamentary Elections 6 April 2014.

150. Interview with Atlaszo.hu, 27 October 2015.

of Information, adopted in July 2011 and entered into force on 1 June 2012, attracted criticism by civil society and international organizations alike on account of several provisions that raised concerns regarding their consistency with international and European standards on the right of access to information and the right to the protection of personal data. If the choice to regulate both issues in one single legislative text is unusual in Europe, it is the right to access public interest data and especially its exceptions on the one hand, and the independence of the data protection authority on the other that were found particularly disquieting from a human rights perspective.

Although the right to 'access and disseminate data of public interest' is enshrined in the Fundamental Law in its article VI (2), it does not appear to be sufficiently guaranteed by Act CXII. Not only does Act CXII define the right's scope based on different and less stringent criteria than those contained in the CoE Convention on Access to Official Documents<sup>151</sup> (Convention 205 hereinafter)<sup>152</sup>, which sets minimum standards in the area for CoE member states and which Hungary ratified. It also fails to clearly specify under which conditions the right can be restricted. Article 27 Act CXII sets down exceptions, listing the public interests to protect which access to documents can be limited. However, it is not clear whether the list can be considered exhaustive, or whether information about the exemptions should also be found in other laws<sup>153</sup>. Moreover, no mechanism has been set up to carry out the proportionality test, which is required under Convention 205 when there is a need to balance competing interests in order to establish whether the right can be restricted.

The situation has not improved, but rather worsened, following subsequent amendments to Act CXII. In 2013, the law was amended to restrict full access to data of specific governmental institutions, thus giving those institutions wide discretion in deciding over access to information requests. Under the amended law, an 'overarching, invoice-based' or 'itemized' audit of the 'management of a public authority' shall not be regulated by FoI legislation<sup>154</sup>.

A recent amendment introduced in October 2015 to article 27 (6) Act CXII further restricted access to information by introducing a new exception to the right. Prior to the amendment, a request to disclose information related to a decision-making process could also be refused after the decision had been adopted if the disclosure was likely to endanger the institution's 'legal functioning' or prevent it from discharging its duties 'without any undue influence'. Following the 2015 amendment, refusal is also possible when 'the information [...] supports **future decision-making**' (bold added). This removes the obligation to refer to the exact decision the information supports, and allows for refusal any time the information is considered to potentially serve future 'decision-making'<sup>155</sup>. The provision runs contrary to European standards, as enshrined in the CoE Convention 205, the European Convention on Human Rights as interpreted by the

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151. Council of Europe, Convention on Access to Official Documents, CETS No. 205, Tromsø, 18.VI.2009.

152. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CXII of 2011 on Informational Self-Determination and Freedom of Information of Hungary, adopted by the Venice Commission at its 92nd Plenary Session (12-13 October 2012)*, 18 October 2012, p. 11.

153. *Ibid.*

154. Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Mertek Media Monitor, *Disrespect for European Values in Hungary 2010-2014*, 21 November 2014, p. 12; Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Transparency International Hungary, *Hungary Fact Sheet 3, The violation of particular human rights*, September 2014.

155. Email exchanges between FIDH and the Hungarian Civil Liberties Union, December 2015 and February 2016.



ECtHR<sup>156</sup> and the Charter of Fundamental Rights of the European Union<sup>157</sup>, requiring that any limitation to the right to access information meet strict requirements, namely that it is set down precisely in law, that is necessary in a democratic society and proportionate to the aim it wants to achieve. By introducing this new exception, the Hungarian legislator has failed to comply with these requirements. The provision also goes against the recommendations made by the Venice Commission, which previously stressed the importance that any exception concerning 'legal or administrative proceedings should be limited to the on-going proceedings'<sup>158</sup>. Although the Venice Commission did refer here to the exception provided for in Article 27 (2) (g) for data 'necessary to safeguard' court or administrative proceedings, its rationale should apply *a fortiori* to public interest data or information related to a decision-making process.

Other changes were introduced in 2015, which also contributed to rendering access to public information more difficult. Following this latest amendment, requests to access information are no longer anonymous; the same request for information cannot be submitted more than once a year, even when the applicant has not received a response from the administration following the request; material produced by any external provider is currently protected by the exception provided for in Article 27 (2) (h) to protect intellectual property and cannot be disclosed but only consulted. In addition to that, the amendment has introduced an obligation for the applicant to bear the cost related to the requested information's disclosure by the public administration whenever this is considered to impose a disproportionate burden on the latter. This latest provision clearly violates the principle of free access to official documents, contained in Art. 7 (1) Convention 205 and is at odds with the Venice Commission's recommendation in 2012 to explicitly state this principle in Act CXII. Furthermore, there is no way for the applicant to know in advance how much he/she will be charged for a FoI request. This uncertainty deters applicants from filing such request and is contrary to the principle that any exception to the right to access information should be clearly provided for by the law. Transparency International referred to the law as 'an unfair tax on transparency'<sup>159</sup>.

All these changes, which were adopted following a fast-track procedure that did not allow for public consultation, seem to have been inspired by the aim to further limit rather than support access to information. This is essential to promote democratic oversight over and accountability for public activities and to fuel public debate<sup>160</sup>. The reform further hampers media's role as public watchdog and risks weakening media freedom in Hungary<sup>161</sup>.

NGOs and independent media professionals interviewed by FIDH confirmed having already felt the impact of these new restrictions on their everyday work. FoI tools had been frequently and successfully used in the past to publicly expose government malpractice<sup>162</sup>, particularly

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156. The ECtHR has interpreted Article 10 ECHR as including not only the right to receive information which is already in the public realm, but also as the right to access administrative data and documents. All the requirements set for exceptions to the right protected under Article 10 ECHR apply therefore also to the right to access information.

157. Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations, which may be imposed on it, may therefore not exceed those provided for in Article 10(2) of the Convention.

158. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CXII of 2011 on Informational Self-Determination and Freedom of Information of Hungary, adopted by the Venice Commission at its 92nd Plenary Session (12-13 October 2012)*, 18 October 2012, p. 14.

159. Transparency International, *Transparency International says draft Hungarian law is a tax on transparency – Hungary set to severely restrict access to information with vague new law*, 3 July 2015.

160. See also European Commission for Democracy through Law (Venice Commission), *ibid.*, p. 5; OSCE Representative for Freedom of the Media, *Draft amendments to Freedom of Information Act in Hungary should be discussed with all stakeholders*, OSCE Representative says, Podgorica, 6 July 2015.

161. OSCE, *ibid.*

162. Transparency International, *Transparency International says draft Hungarian law is a tax on transparency – Hungary set to severely restrict access to information with vague new law*, 3 July 2015.

in corruption cases. However, since the new provisions entered into force, the government has not refrained from using them to prevent access to information, particularly in sensitive cases. Article 27 (6) Act CXII has particularly been invoked by the government to prevent disclosure of information in politically sensitive cases. This was the case for instance in the Paks II nuclear plant case, in which the government refused an access-to-information request filed by environmental NGO Energiaklub regarding contracts concluded between MVM Paks II Atomerőmű Fejlesztő Zrt., a company directly overseen by the PM's office, and Russian company Nizhny Novgorod Engineering Company Atomenergoproekt and involving public budget, on grounds that this would hamper the decision-making process<sup>163</sup>. Another case concerned documents produced by a Fidesz-linked think-tank, Századvég, funded with public money worth 5 billion HUF. The clause and the one protecting intellectual property were invoked by the government to prevent disclosure. The new provisions allowing for refusal on these grounds were passed immediately after a court order establishing that the requested documents should be made public<sup>164</sup>. According to our sources, in several cases, laws were passed which restricted the possibility of accessing information right after the applicants had initiated legal actions against the administration's refusal<sup>165</sup>.

Recent amendments have led to more criticism over the changes made by Hungary in Act CXII to the country's data protection authority. Act CXII abolished the independent Commissioner on Data Protection and Freedom of Information ('the Data Protection Commissioner'), elected by Parliament for a five year term, and substituted it with the new National Authority for Data Protection and Freedom of Information, which became operational on 1 January 2012 following the early dismissal of the previous Commissioner.

The move was heavily criticized at both the national and the international levels on several grounds. First, the mandate of the Data Protection Commissioner in office when the reform was passed was ended prematurely, two years prior to its initial expiry in 2014. Secondly, the new rules for its successor's appointment and dismissal have been found not to be in line with international and European standards on the independence of information and data protection regulatory bodies. Both CoE<sup>166</sup> and EU<sup>167</sup> standards require that these authorities exercise their functions in complete independence. The notion has been interpreted broadly so as to exclude any external influence, direct or indirect, over the regulatory authorities' functioning; this includes political influence, which could be exerted through state scrutiny<sup>168</sup>. While the former Data Protection Commissioner was assimilated to an ombudsman, the new authority is an administrative body headed by a president appointed by the President of the Republic on proposal by the PM for a nine-year term. This significantly reduces the authority's guarantees of independence, as its designation makes

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163. Christian Keszthelyi, PM's office declares Paks II deal classified, Budapest Business Journal, 8 January 2015, available at: [http://bbj.hu/economy/pms-office-declares-paks-ii-deal-classified\\_90486](http://bbj.hu/economy/pms-office-declares-paks-ii-deal-classified_90486). See also FIDH interview and email exchange with HCLU, October and December 2015.

164. Balázs M. Toth, The curious case of Századvég's government contracts, *atlatzo.hu*, 25 November 2014, available at: <http://english.atlatzo.hu/2014/11/25/the-curious-case-of-szazadvogs-government-contracts/>. See also email exchange between FIDH and HCLU, December 2015.

165. Interviews conducted by FIDH with several NGO and media workers, October 2015.

166. Namely Article 1 of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and cross-border data flows (Convention 108), 2001.

167. Namely Article 16 TFEU, Article 8 (3) Charter and Article 28.1 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995 P. 0031-0050, repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88. The requisite of the independence of information and data protection regulatory bodies is enshrined in the new regulation under Article 52.

168. Case C-518/07, *Commission v. Germany*, [2010] ECR I-01885

it in principle dependent on those it controls<sup>169</sup>. This, coupled with the possibility of the PM and the president dismissing the new supervisor on arbitrary grounds<sup>170</sup>, adds to these concerns.

Inconsistency between the new legislation and EU standards prompted the European Commission to initiate an infringement proceeding against Hungary in 2012. Following the infringement, Hungary amended the legislation in an attempt to restore the authority's independence in accordance with EU law. However, concerns remained regarding in particular the designation process, in which the executive continues to play a fundamental role while the Parliament is excluded;<sup>171</sup> and the former Data Protection Commissioner's early dismissal, which the amendments introduced in April 2012 did not address. According to the Commission, EU law requires that the national data protection supervisor be protected against removal during his/her term in order to guarantee his/her independence<sup>172</sup>. In its ruling adopted in April 2014, the CJEU confirmed the Commission's assessment and condemned Hungary for violating EU law by concluding that supervisory authorities' independence 'covers the obligation to allow them to serve their full term'<sup>173</sup>. In its ruling the Court stated that operational independence is not sufficient to protect supervisory authorities from external influence, and that the mere threat to which the authority would be exposed in case its mandate could be prematurely terminated could push the latter into compliance with the political authority thus threatening its independence<sup>174</sup>. To date, no steps have been taken by Hungary to comply with the Court's ruling.

In March 2016 the Hungarian Parliament passed controversial laws designed to further restrict public access to information concerning the Central Bank and the National Postal Service. The reform provides for the Hungarian Post's right to classify any information that "disproportionately hampers [its] business activities", thus excluding it from the scope of public interest information and limiting its accessibility to civil society. The law was highly criticized both internally<sup>175</sup> and internationally.<sup>176</sup> It is currently under review by the Constitutional Court.<sup>177</sup>

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169. See also European Commission for Democracy through Law, (Venice Commission), *ibid.*, p. 6.

170. *Ibid.*, p. 8. See also European Commission, Press Release, *European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary*, Strasbourg, 17 January 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm)

171. *Ibid.*, pp.7-8.

172. European Commission, Press release, *Hungary – Infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary*, Brussels, 25 April 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm)

173. Court of Justice of the European Union, Press release No 52/14, Judgment in Case C-288/12, 8 April 2014, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140053en.pdf>

174. Case C-288/12, *Commission v. Hungary*, (8 April 2014).

175. Including by the National Data Protection Authority. See Hungary Today, *Hungarian Parliament passes controversial laws on Central Bank, Postal Service*, 2 March 2016 available at: <http://hungarytoday.hu/news/hungarian-parliament-passes-controversial-laws-central-bank-postal-service-96253>Including

176. Office of United Nations High Commissioner for Human Rights, *End of mission statement by Special Rapporteur on the situation of human rights defenders*, Visit to Hungary 8 - 16 February 2016.

177. Hungary Today, *President Áder Reluctant To Sign Controversial Laws On National Bank, Postal Service*, 10 March 2016 <http://hungarytoday.hu/news/president-ader-relucant-sign-controversial-laws-national-bank-postal-service-56089>

## The Ombudsman

The Fundamental Law of Hungary, which came into force on 1 January 2012, together with Act CXI of 2011, have re-organized the Ombudsman institution in Hungary. The previous system of 1993 provided for four Parliamentary Commissioners: the Parliamentary Commissioner for Civil Rights and three so-called 'special Ombudsmen' -the Parliamentary Commissioner for Future Generations, the Parliamentary Commissioner for Data protection and Freedom of Information and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities. These have been replaced by one Commissioner for Fundamental Rights. Therefore, two of the three formerly independent 'special Ombudsmen' serve now as deputies of the Commissioner for Fundamental Rights (Deputy-Commissioner for Future Generations and Deputy Commissioner for the Rights of National Minorities). In parallel, the institution of the Parliamentary Commissioner for Data Protection and Freedom of Information has been abolished and replaced by the Authority for Data Protection and Freedom of Information (see chapter 2.2.2 above for more details). The Commissioner for Fundamental Rights and his/her deputies are elected by Parliament with a two-thirds majority vote of its members, on proposal of the President of the Republic and for a six-year term (Article 30, Fundamental Law).

The Commissioner surveys and analyses the situation of fundamental rights in Hungary and prepares statistics and reports on infringements of fundamental rights. Anyone may turn to the Commissioner for Fundamental Rights "if he/she thinks that an action or omission by a public authority and/or other organs performing public duties infringes his/her fundamental rights or presents an imminent danger, when the person submitting the complaint has exhausted the available administrative legal remedies or if no legal remedy is available to him/her."<sup>178</sup> Under the new regime, the Ombudsman, in addition to Parliament and the President, has the right to ask the Constitutional Court to review laws passed by Parliament, either *ex officio* or based on complaints submitted by individuals or groups. The Ombudsman therefore has the possibility of filing an application with the Constitutional Court either on his/her own-initiative or, following a complaint, in order to request the contested regulation's *ex post* (after adoption) constitutional review. Unlike under the previous regulation though, it may not request that the Constitutional Court gives an abstract interpretation of the Fundamental Law.

Although Article 6 (5) of Act CXI of 2011 provides that the Commissioner is independent and 'shall not be instructed in relation to his/her activities,' the fact that he/she is appointed by Parliament undermines the institution's perceived independence from political influence, regardless of its independence in practice. Further to that, the merger of the four ombudsman offices into one who has to handle all complaints in addition to the new tasks, while the budget remains the same,<sup>179</sup> generated an increased workload and a consequent slowdown in processing complaints. This and the downgrade of the 'special Ombudsmen' (now deputies) to "second-degree" civil servants with no independent investigative powers significantly undermined the institution's independence and effectiveness.

In the statement issued following his mission to Hungary in February 2016, the UN Special Rapporteur on the situation of human rights defenders Michel Forst observed that the "*Ombudsman's function seems to be restricted to receiving reports and forwarding them to competent authorities*". He also concluded that the replacement of the previous system of

178. For more details, see the official website of the Hungarian Commissioner for Fundamental Rights available at: <http://www.ajbh.hu/en/web/ajbh-en/about-the-office>

179. United Nations Office of the High Commissioner for Human Rights, *End of mission statement by Special Rapporteur on the situation of human rights defenders, Visit to Hungary 8 - 16 February 2016* available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17048&LangID=E>.

four Ombudsmen by a Parliamentary Commissioner for Fundamental Rights, coupled with *'the lack of enforceability of his recommendations [...] decreased the level of protection in relation to certain rights and weakened the institution'*<sup>180</sup>. The UN Special Rapporteur recommended that Hungary adopt measures to strengthen the Ombudsman's role and independence and ensure adequate follow-up and implementation of his recommendations.

The Ombudsman did react on some occasions to legislative reforms which raised concerns regarding their potential negative impact on human rights (e.g. in 2012 when the Commissioner requested the *ex post* constitutional review of the Transitional Provisions to the Constitutional Court, leading to Constitutional Court's decision 45/2012 (XII.29) cited above; or in 2013 when he/she asked the Constitutional Court to review the Fourth Amendment to the Fundamental Law. In this case however, the Constitutional Court refused to act upon the Ombudsman's initiative and examine the Fourth Amendment's compatibility with the Fundamental Law. In both cases, the Ombudsman acted upon request by complainants). However, in other instances and according to FIDH interlocutors, the Ombudsman reportedly failed to act upon human rights violations and to provide effective protection to human rights defenders. Most recently, his decision to discard the complaint submitted by the Hungarian Helsinki Committee regarding the incidents between law enforcement officials and asylum-seekers at the Röszke border crossing point on 16 September 2015 which resulted in serious human rights violations (see chapter 3 for more details), raises concerns regarding the Ombudsman's ability to exercise his/her mandate effectively and independently from undue influences, especially in politically sensitive cases.

### 2.2.3 A shrinking space for civil society

Civil society plays a central role in ensuring a well-functioning democracy, notably by ensuring respect for the rule of law and human rights and accountability for public action. Although the regulatory framework for non-governmental organizations (NGOs) in Hungary appears overall to be in line with international standards, the changes which took place over the past few years have affected the environment in which civil society operates<sup>181</sup> and progressively reduced its space, while CSOs face increasing challenges and threats in carrying out their work.

There are over 81,000 registered NGOs in Hungary (53,000 associations and 28,000 foundations)<sup>182</sup>. Hungarian legislation imposes no restriction on the activities, which NGOs can conduct, provided that the latter are compliant with the Fundamental Law and not illegal<sup>183</sup>. Only NGOs seeking to obtain 'public benefit status' must refrain from engaging in political activities and be independent from political parties. 'Public benefit status' is required though as a condition for receiving financial support from the state through the National Cooperation Fund and the 1% income tax from taxpayers<sup>184</sup>. Although non-governmental organizations face no particular impediments to their registration, recent amendments to the Civil Code<sup>185</sup> and the Act on civil

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180. *Ibid.*

181. *Ibid.*

182. *Ibid.*, see also Parliamentary Assembly of the Council of Europe, *How to prevent inappropriate restrictions on NGO activities in Europe ?* Resolution 2096 (2016), adopted by the Assembly on 28 January 2016 (8th Sitting).

183. Article 3.4, Act CLXXV/2011, the 'CSO Act'. See also PACE, *ibid.*

184. End of mission statement by Special Rapporteur on the situation of human rights defenders, 2016. See also Norwegian Helsinki Committee, *Hungary must provide space for civil society*, February 2016.

185. Act V of 2013 on the Civil Code, effective from 15 March 2014, available at: [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1300005.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV)

society organizations<sup>186</sup> have made registration more cumbersome for NGOs. The amendments<sup>187</sup> laid out new conditions to obtain 'public benefit status' and requested that NGOs revise their statutes in order to comply with the new rules. The complex nature of the new provisions that creates legal uncertainty as to what constitutes 'public benefit'<sup>188</sup> and the tight deadline set for compliance with the new rules resulted in numerous NGOs that had previously held such status failing to re-register<sup>189</sup>. The registration procedure is also reported to be particularly onerous for NGOs, which have to wait 6-8 months on average to register and are subjected to cumbersome regulations, contrary to the recommendations made by international bodies requiring that the procedure to register NGOs be 'simple, non-onerous and expeditious'<sup>190</sup>. In his statement following his mission to Hungary in February 2016, the UN Special Rapporteur on human rights defenders, Michel Forst, also recommended that the government avoid adopting new laws requiring already registered organizations to re-register<sup>191</sup>.

In parallel with a more restrictive legal framework for NGOs, new restrictions to access funding were introduced, which in turn had an impact on the conditions in which CSOs operate in Hungary. Following accession to the European Union, several international donors withdrew, gradually replaced by EU structural funds<sup>192</sup> channeled through a government-controlled agency. The former National Civil Fund (*Nemzeti Civil Alapprogram, NCA*), supervised by representatives elected by non-governmental organizations and which used to support Hungarian NGOs, has been replaced by the National Cooperation Fund (*Nemzeti Együttműködési Alap, NEA*), under government control and which reportedly supports civil society organizations selectively<sup>193</sup>. Under the new system, public funds are allegedly allocated mainly in support of church-based organizations for social inclusion activities or other government friendly NGOs,<sup>194</sup> whereas organizations promoting human rights and democracy, transparency and accountability and grounded on values opposite to those promoted by the government<sup>195</sup> are increasingly excluded from public support and, as a consequence, face increasing challenges in carrying out their work<sup>196</sup>. Scarce funding for civil society has weakened NGOs, which have reportedly been forced to discontinue programs and in some cases cease their activities. Suspending funding, including EU funding,<sup>197</sup> has reportedly been linked in some instances to information published or criticism voiced about the government,

186. Act CLXXV of 2011 on the Right of Association, Non-profit Status, and the Operation and Funding of Civil Society Organisations available at: [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100175.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100175.TV)

187. Act CLXXXI/2011 on the Court Registration of CSOs and the Relative Procedural Rules and Government Decree 350/2011 (XII.30) on Certain Issues of CSO Financial Management, Fundraising and Public Benefit Status

188. Under the new legislation, in order for an organisation to obtain 'public benefit status', it has to conduct 'public benefit activity'. « *This is defined as activity that directly or indirectly serves the completion of public (i.e. government, including local government, tasks, and thereby contributes to the satisfaction of the common needs of society and individuals* ». Norwegian Helsinki Committee, *ibid*.

189. *Ibid*.

190. *Ibid*.

191. *Ibid*.

192. The NGO Programme in Hungary, *Out of the box: Providing Oxygen to Civil Society - Mid-term evaluation of NGO Programmes under EEA Grants (2009-2014)*, Part Two: Country reports, December 2014, p. 28.

193. *Ibid*.. See also Tamas Dombos, Hatter Society, Shrinking space for LGBTIQI civil society in Hungary at ILGA-Europe Annual Conference 2014. Dombos notes as an example how family values are especially prioritised in funding calls, whereas LGBTI rights' funding proposals are often dismissed as not falling within the call's scope or « not important ».

194. FIDH interviews with NGO representatives, October 2015.

195. The government-promoted ideology referred to here is well summarised in Viktor Orban's speech of 26 July 2014 at the 25th Bálványos Summer Free University and Student Camp in Băile Tuşnad (Tusnádfürdő), Romania. H. Mahony, Orban wants to build 'illiberal State', EU Observer, 28 July 2014, available at: <https://euobserver.com/political/125128>; Z. Simon, Orban says he seeks to end liberal democracy in Hungary; Bloomberg, 28 July 2014, available at: <http://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>.

196. *Ibid*. p. 28-29.

197. UN Special Rapporteur on human rights defenders, 2016. In this regard, the UN SR has recommended that the EU « *examine carefully the impact of channelling its financial resources through governmental agencies on the weakening of independent civil society organisations and explore alternative ways to directly fund those organisations* ».

thus serving as a tool for the authorities to silence dissent and favor their affiliates.<sup>198</sup> Against this background, human rights and watchdog NGOs find their main funding source in external donors. However, foreign funded NGOs have faced sustained attacks by the government over the past three years, which generated instability and insecurity among them and contributed to a deteriorating environment for civil society in Hungary.

The attacks started with a smear campaign initiated by some government-friendly media in August 2013. The latter made the link between some civil society organisations and the opposition political parties, hinting at the fact that the former would act as a 'civil left wing' and serve political interests<sup>199</sup>. In an article, the media outlet Válasz.hu listed 11 NGOs receiving funding from the Open Society Foundations (OSF) which, it alleged, would exert political influence through them<sup>200</sup>. The campaign soon extended to cover 13 organizations funded under the European Economic Area (EEA)/Norway Grants NGO Fund, a fund aimed at strengthening civil society development in Central and Eastern Europe with a focus on seven thematic areas including human rights and democracy, gender and equal opportunities, community and organizational development and vulnerable groups.<sup>201</sup> Both the Fund operators and organizations funded through this financial instrument were targeted with accusations that they served political interests.<sup>202</sup> Although the lead consortium operator, Ökotárs,<sup>203</sup> and the Norwegian government<sup>204</sup> rebutted the allegations, they were echoed by the government, including in formal exchanges with the latter. Despite reassurances by Norway that the Fund was not used to support political activities in Hungary, the government's hostile rhetoric did not stop: NGO Fund operators were openly referred to by government representatives as 'party-dependent, cheating nobodies.'<sup>205</sup> The Hungarian government also asked Norway to suspend the NGO program in Hungary until the issue was settled.<sup>206</sup> The situation rapidly escalated, and the government asked the Government Control Office (*Kormányzati Ellenőrzési Hivatal* or KEHI in Hungarian), a state agency vested with the right to audit state money, to launch an audit into how the NGO Fund was managed in May 2014, despite firm opposition by the Financial Mechanisms Office (FMO) - the secretariat which administers the Fund for donor countries in Brussels - which insisted that the audit would breach the agreement between the donors and Hungary under which donor States are solely responsible for the Fund's implementation, including its audit.<sup>207</sup> The audit's purported aim was to ascertain

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198. UN Special Rapporteur on human rights defenders, 2016. FIDH interviews with NGOs, October 2015.

199. In Hungarian, Válasz.hu, *Soros félmilliárdot adott Orbán ellenfeleinek*, 14 August 2013, available at: <http://valasz.hu/itthon/soros-felmilliardot-adott-orban-ellenfeleinek-67174>

200. Válasz.hu, *ibid.* See also Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015.

201. The NGO Programme in Hungary, *Out of the box : Providing Oxygen to Civil Society - Mid-term evaluation of NGO Programmes under EEA Grants (2009-2014)*, Part Two: Country reports, December 2014, p. 30 The Fund is managed in Hungary by an independent consortium selected through an open call and contracted by the Financial Mechanism Office (FMO), the secretariat which administers the Fund for donor countries in Brussels. The consortium is formed by four Hungarian foundations: the Hungarian Environmental Partnership Foundation (*Ökotárs Alapítvány*), leading the consortium, the Foundation for Democratic Rights (DemNet), the Carpathian Foundation – Hungary (or *Karpatok* Foundation) and the Autonomia Foundation, *ibid.* p. 32.

202. Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015.

203. <https://norvegcivilalap.hu/en/node/4210> (in Hungarian).

204. <http://valasz.hu/publi/soros-nyiss-nekem-tert-visszhang-69399> (in Hungarian).

205. [http://hvg.hu/gazdasag/20140430\\_Csepregyh\\_szelhamos\\_gittegyletek\\_kezelik](http://hvg.hu/gazdasag/20140430_Csepregyh_szelhamos_gittegyletek_kezelik) (in Hungarian).

206. Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015. Payments under the programme were suspended on 9 May 2014, on grounds that the Hungarian government had breached the bilateral agreement it had with Norway by moving the EEA/Norway Grants' administration from the central government to a separate state-owned company. However, the NGO Fund was the only one under which disbursement was not suspended, as it was administered by an independent consortium. Norwegian Helsinki Committee, Hungary must provide space for civil society, February 2016.

207. The FMO also stressed that since no funds from the Hungarian state budget were managed by the Okotars Foundation when managing the Fund, the KEHI had no competence to audit its activities in this context.

whether the Fund was used to support political activities. In parallel, a list with potentially 'problematic' NGOs funded under the program, matching the one circulated earlier by government-friendly media, was drawn up by the government. Over the summer, KEHI carried out an on-site audit at three consortium members (Ökotárs, Demnet and Autonómia) and asked them to hand over documents, including documents which reportedly contained sensitive personal data.<sup>208</sup> The audit was challenged by Ökotárs on grounds that it lacked a legal basis. Further to that, KEHI lacked adequate safeguards that would ensure the audit's independence and impartiality.<sup>209</sup> Meanwhile, Norway reacted strongly by expressing deep concern about the Hungarian government's action against civil society, which not only violated the agreement concluded between the two States, but which it interpreted as an attempt to limit freedom of expression;<sup>210</sup> the Norwegian government later expressed concern that these actions would undermine civil society's independence in Hungary<sup>211</sup>. Despite these reactions and the FMO's request to the authorities that any further request regarding the Fund be addressed directly to them, KEHI went on requesting documents from Ökotárs and 58 NGOs supported by the NGO Fund setting them a tight deadline to hand over the requested materials and threatening them with suspension of their tax numbers if they were not to cooperate. Caught between KEHI's requests to hand over documents and the FMO's request not to comply with KEHI's demands, Ökotárs and the other investigated NGOs faced significant pressure. As tensions escalated, the Prime Minister publicly referred to NGOs as 'paid political activists who are trying to help foreign interests' in a speech delivered in the summer 2014; in the same speech Orban revealed his plan to build an 'illiberal State' in Hungary and indicated that his efforts in this regard were hampered by civil society organizations<sup>212</sup>. In September 2014, KEHI requested that a criminal procedure be initiated for alleged 'unauthorized financial activities' against an unnamed NGO. Shortly afterwards, fund operators Ökotárs and DemNet's offices were raided by the police, which showed up in disproportionately high numbers;<sup>213</sup> some staff members had their homes searched and the police seized documents concerning the 13 'blacklisted' NGOs. The raid was strongly condemned by the Norwegian Minister for EEA and EU Affairs Vidar Helgesen, who reiterated previous concerns regarding the continued harassment by the Hungarian government against civil society organizations which were critical to the authorities; according to Helgesen, this signaled a failure by the Hungarian government 'to respect common European values related to democracy and good governance.'<sup>214</sup> The raids were later to be found unlawful by a court decision following a complaint submitted by Ökotárs.<sup>215</sup> Almost simultaneously, the fund operators' tax numbers were suspended on grounds that they had not cooperated with KEHI, a decision also legally challenged by the four consortium members. Following the complaint, the court suspended the tax authority's

208. Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015.

209. Amnesty International, *Their backs to the wall. Civil society under pressure in Hungary*, February 2015. In addition to the lack of competence to audit the activities of the consortium NGOs under the Fund, both organisational and operational independence were contested to KEHI; the former because its president can be appointed or dismissed by the PM on suggestion of the minister in charge of the PM's office, and the latter because the Office of the PM and other government officials can order KEHI to audit specific organisations, as was the case in these particular circumstances. *Ibid.*, p. 9.

210. Ministry of Foreign Affairs of Norway, Press Release, *Norway concerned for civil society in Hungary*, 6 June 2014, <https://www.regjeringen.no/en/aktuelt/civil-society-hungary/id762213/>.

211. Ministry of Foreign Affairs of Norway, News Story, *Still no agreement with Hungary*, 16 June 2014, <https://www.regjeringen.no/en/aktuelt/Still-no-agreement-with-Hungary/id763125/>.

212. Viktor Orban's speech of 26 July 2014 at the 25th Bálványos Summer Free University and Student Camp in Băile Tuşnad (Tusnádfürdő), Romania.

213. FIDH interviews with consortium NGOs, October 2015. See also Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015. 43 police officers participated in the raid according to the NGOs.

214. Ministry of Foreign Affairs of Norway, Press Release, *Unacceptable police raid on EEA and Norway Grants Fund operator in Hungary*, 9 September 2014, [https://www.regjeringen.no/en/aktuelt/raid\\_eea/id2000182/](https://www.regjeringen.no/en/aktuelt/raid_eea/id2000182/).

215. [http://hvg.hu/itthon/20150129\\_A\\_birosag\\_helyt\\_adott\\_az\\_Okotars\\_panaszan](http://hvg.hu/itthon/20150129_A_birosag_helyt_adott_az_Okotars_panaszan) (in Hungarian).



decision pending the procedure for Ökotárs, Demnet and Autonómia, whereas for the fourth consortium member, the Kárpátok Foundation, referred the case to the Constitutional Court in order to review the decision regarding the tax numbers' suspension. Meanwhile, the audit's scope was extended so as to cover funding received by Ökotárs under the Swiss-Hungarian Cooperation Program. In a speech delivered in September 2014, US President Barack Obama warned against an intimidating climate for NGOs in Hungary, the only EU member state to feature amongst the countries which, according to Obama, 'increasingly target civil society.'<sup>216</sup> KEHI published its audit report in October 2014.<sup>217</sup> The report concluded that some irregularities had been committed in implementing the fund. However, it is based on vague arguments and its conclusions appear generally unfounded. The State donors refused to accept the audit, expressing concerns regarding the Hungarian government's actions, which they said challenged 'basic democratic values underpinning European cooperation' and declared that they would base their evaluation on an independent audit.<sup>218</sup> The latter found no wrongdoing in the way the fund had been operated, apart from some minor problems.<sup>219</sup> Based on the report, in November 2014 KEHI initiated a criminal procedure against the consortium NGOs and requested the National Tax and Customs Administration (NAV) to conduct an extraordinary tax audit based on the report's findings. They were followed by other investigations by the NAV and the Prosecutor General against NGOs, which had been supported by the NGO Fund in February 2015. However, the Prosecutor General's investigation only found administrative irregularities regarding three NGOs amongst those that had been investigated.<sup>220</sup> The criminal investigation also ended in October 2015 with no findings, which would prove that the fund operators had acted unlawfully<sup>221</sup>. NAV's investigation into Ökotárs and 17 other organizations was also closed without prosecution.<sup>222</sup> Meanwhile, the Constitutional Court ruled by a 4-1 vote that the provisions allowing for the consortium NGO's tax identification number's suspension was constitutional (October 2015). However, the Constitutional Court failed to rule on whether the request by KEHI to suspend the tax numbers was lawful, thus opening up to further actions against CSOs. In her dissenting opinion, Constitutional Court member Agnes Czine expressed concerns that tax number suspension is too a heavy sanction for non cooperation with KEHI and one which affects disproportionately the concerned NGOs; she also claimed that the challenged provisions do not ensure the affected organizations' right to an effective remedy against KEHI's decisions, an issue on which the Constitutional Court also failed to take a position.<sup>223</sup>

216. Remarks by the President at Clinton's Global Initiative, New York, 23 September 2014, <https://www.whitehouse.gov/the-press-office/2014/09/23/remarks-president-clinton-global-initiative>. The Prime Minister's office however discarded this criticism suggesting that it was fuelled by American political circles that feared for their 'networks', see <http://www.kormany.hu/hu/kulgzdasagi-es-kulugyminiszterium/hirek/a-magyar-nep-szabadsagszereto> (in Hungarian).

217. The report is available in English at : <http://kehi.kormany.hu/download/2/b2/c0000/Audit%20Report.pdf>.

218. The Norwegian response to the KEHI report, 28 October 2014, [http://www.norvegia.hu/Norsk/EEA-and-Norway-Grants1/EEA-and-Norway-Grants/The-Norwegian-response-to-the-KEHI-report/#.V4e9nO1c\\_CI](http://www.norvegia.hu/Norsk/EEA-and-Norway-Grants1/EEA-and-Norway-Grants/The-Norwegian-response-to-the-KEHI-report/#.V4e9nO1c_CI).

219. Audit of NGO Programme in Hungary, 28 May 2015, [http://www.norvegia.hu/Norsk/EEA-and-Norway-Grants1/EEA-and-Norway-Grants/Audit-of-NGO-programme-in-Hungary-/#.V4-ArO1c\\_CI](http://www.norvegia.hu/Norsk/EEA-and-Norway-Grants1/EEA-and-Norway-Grants/Audit-of-NGO-programme-in-Hungary-/#.V4-ArO1c_CI)

220. Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 12 August 2015.

221. Following the criminal investigation's closure in October 2015, which unblocked funds earmarked for Hungary under the EEA/Norway Grants, Norwegian minister for EEA and EU Affairs, Vidar Helgesen, suggested that the EU should draw lessons from the way the dispute had been handled by Norway. "It pays off to stand up for fundamental values" Helgesen is reported to have said in a comment to the press. "We are under so much pressure externally that it's even more important to ensure internally that we hold each other to account in Europe. The EU should take learning from that" he added. Politico, Orban backs down in battle with NGOs, 12 October 2015, <http://www.politico.eu/article/orban-backs-down-in-battle-with-norwegian-ngos/>

222. The authorities found that the activities carried out by Ökotárs and the recipient NGOs had been continuously documented, that all laws were kept, that occasional changes were properly documented and that the investigated organisations had fulfilled all the obligations related to the their inspection. *Prosecutor, NAV give Norway Civil Fund recipients clean bill of health*, <http://budapestbeacon.com/public-policy/city-prosecutors-nav-give-norway-civil-fund-recipients-clean-bill-of-health/28538>.

223. The Constitutional Court's decision can be accessed here (in Hungarian): <http://public.mkab.hu/dev/dontesek.nsf/0/5216BF6385013BEEC1257E8A00583B49?OpenDocument>.

Despite the fact that all investigations ended with no findings, thus clearing the concerned NGOs from any wrongdoing, this did not suffice to dispel government's doubts that Ökotárs and the other organizations had carried out their activities in an unlawful manner. The government maintained the position that although all legal charges had been dropped against the investigated NGOs, the manner in which funds had been distributed was unlawful<sup>224</sup>. In parallel, the government declared its intention to tighten controls on foreign-funded NGOs, thus reiterating previous statements hinting at the possibility that legislation imposing an obligation for NGOs receiving funding from abroad to register with the State – similar to the one introduced in Russia in 2012 - could be introduced in Hungary<sup>225</sup>. Meanwhile, the national Anti-Corruption Plan adopted in late 2015 foresaw the introduction of a requirement for NGO leaders to declare their private assets. These measures and statements show that, despite reassurances given to international donors, the government's attitude towards civil society organizations has not changed. Although the investigations have been closed and the smear campaign against foreign-funded NGOs temporarily toned down, hostile rhetoric against CSOs which are critical of the government persists and fears that further attacks might take place are still running high. Several NGOs met by FIDH in Hungary expressed fear that the government might crack down again on them.<sup>226</sup> As the threat that further procedures might be launched and further sanctions might be enforced upon them - thus hampering their work or forcing them to close - hangs over them, NGOs are forced to operate in an environment which is far from enabling. Some also reported exercising self-censorship for fear that any criticism might lead to further attacks or that they would lose State support<sup>227</sup>. This seems to be especially true for smaller NGOs, which do not have the means to "fight back" and cannot count on support by the international community as much as other, more renowned NGOs. NGOs interviewed by FIDH during the mission, including the Fund administrators, also pointed to the fact that many NGOs which were previously supported by the Fund, no longer apply for funding under the program reportedly for fear that this would attract negative attention from the government. NGOs also lamented that past attacks and the government's continued hostile rhetoric have harmed their reputation, including among the population<sup>228</sup>. NGOs working on migration and asylum have been particularly targeted over the past months. The government's unfriendly rhetoric against these organizations<sup>229</sup> went hand in hand with anti-migrant discourse channeled through public campaigns and new laws in this area, which raise serious concerns regarding their consistency with international standards, as detailed further below. Most recently, civil society organisations reported a new wave in the smear campaign, targeting in particular organisations funded by the Open Society Foundations and those working on migration<sup>230</sup>.

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224. [http://hvg.hu/itthon/20151021\\_Lazar\\_kitart\\_amellett\\_hogy\\_az\\_Okotars\\_bun](http://hvg.hu/itthon/20151021_Lazar_kitart_amellett_hogy_az_Okotars_bun) (in Hungarian).

225. Eötvös Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Timeline of governmental attacks against Hungarian NGO sphere, 28 February 2015. See also Amnesty International, *Their backs to the wall. Civil society under pressure in Hungary*, ibid. Norwegian Helsinki Committee, ibid. The proposal to introduce legislation inspired by the Russian law 'on foreign agents' had first been tabled by three members of the ultra-right Jobbik party in October 2013 but had been rejected. However, Hungarian NGO Civil Unity Forum, whose ties to the governing party are ascertained, had taken steps in October 2014 to push the government to adopt legislation that would enhance transparency for foreign-funded NGOs and would give the government supervisory powers over agreements concluded with their donors. A similar proposal for a parliamentary resolution instructing the government to draft a law on foreign-funded NGOs tabled by Jobbik was rejected by the Parliament's Justice Committee on 12 September 2016. See in Hungarian: <http://www.parlament.hu/irom40/10983/10983.pdf>.

226. FIDH interviews with NGO representatives, October 2015.

227. FIDH interviews with NGO representatives, October 2015.

228. FIDH interviews with NGO representatives, October 2015.

229. Among the accusations moved by the government to NGOs working on migration and asylum, the accusation that they would serve foreign interests, fuel mass immigration and even help smugglers.

230. See for instance PM Viktor Orbán's statement during a radio interview on 20 May 2016, referring to organisations sponsored by George Soros as a 'background power' which 'constantly aims to gain political influence', <http://www.miniszterelnok.hu/orban-viktor-interjuja-a-kossuth-radio-180-perc-cimu-musoraban-20160525/> (in Hungarian).

Dialogue with civil society organizations and its involvement in the consultation process over proposed legislation are also reported to be limited<sup>231</sup>. The practice of having bills submitted by individual MPs rather than ministries and to pass legislation through fast-track procedures that do not allow for adequate stakeholder or expert consultation, and allow for last minute changes to bills systematically restricts civil society participation in policy-making<sup>232</sup>. Recent reforms further limiting the possibility for civil society organizations to access public information (see chapter 2.2.2 ) and restricted access to public media for NGOs<sup>233</sup> also create new barriers for CSOs in carrying out their work and contribute to an environment which does not favor them but rather makes it increasingly difficult for them to operate.

Rather than engaging with independent civil society and publicly acknowledging its fundamental role in a well-functioning democracy, the Hungarian government has increasingly perceived NGOs as 'enemies' and systematically targeted them through government denunciation, hostile media campaigns, politically motivated audits and other administrative and criminal procedures and police raids. These measures, coupled with restrictions in access to funding and increasing administrative and financial hurdles,<sup>234</sup> has significantly shrunk civil society space in Hungary and weakened its fundamental role as a public watchdog. Contrary to the recommendations made by numerous international organizations and bodies,<sup>235</sup> urging Hungary to ensure an enabling environment for NGOs and refrain from interfering in their activities, the government has not ceased to harass CSOs and delegitimize their work, and otherwise limit their operations. These attacks, which some have qualified as 'unprecedented'<sup>236</sup> in an EU member state, raise serious concerns and exacerbate Hungary's already deplorable record in weakening independent institutions and undermining democratic checks and balances. They expose civil society organizations to serious challenges and violate their human rights and fundamental freedoms, notably their right to promote and defend human rights, as enshrined in the UN Declaration on human rights defenders<sup>237</sup> and their right to freedom of expression and association, which includes the right to form NGOs and other civil society organizations. These rights, which are protected under the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the EU Charter,<sup>238</sup> can only be limited under strict conditions, which ought to be prescribed by law and necessary in a democratic society to protect competing interests and

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231. A positive example which can be mentioned is the attempt made over the past two years to involve civil society in law-making by inviting human rights NGOs to input the draft criminal procedure code, a move which was welcomed by the Hungarian Civil Liberties Union in a public statement issued when submitting its opinion on the draft, see in Hungarian : <http://tasz.hu/informacioszabadsag/oromteli-fejlemenyek-az-uj-buntetoeljarasi-torveny-tervezeteben>, 21 June 2016.

232. FIDH interviews with NGO representatives, October 2015. See also UN Special Rapporteur on human rights defenders, 2016, *ibid.*. USAID's 2014 CSO Sustainability Index report on Hungary, available at : [https://www.usaid.gov/sites/default/files/documents/1863/EuropeEurasia\\_FY2014\\_CSOSL\\_Report.pdf](https://www.usaid.gov/sites/default/files/documents/1863/EuropeEurasia_FY2014_CSOSL_Report.pdf) ; Tamas Dombos, Hatter Society, ILGA-Europe Annual Conference 2014, Shrinking space for LGBTQI civil society in Hungary (not public).

233. UN Special Rapporteur on human rights defenders, 2016.

234. *Ibid.*

235. *Ibid.*, Commissioner for Human Rights of the Council of Europe, CommDH(2014)16, 9 July 2014.

236. See, *inter alia*, Norwegian Helsinki Committee, Hungary must provide space for civil society, *Ibid.*

237. United Nations, Declaration on human rights defenders, A/RES/53/144, 8 March 1999, Article 1

238. The fundamental role of NGOs in protecting human rights and the rule of law is recognised also by many other international instruments, such as the Fundamental Principles on the Status of Non-Governmental Organisations in Europe; Council of Europe Recommendations CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe; HRC Resolution on Civil Society Space, A/HRC/RES/27/31, 3 October 2014 and the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally recognised Human Rights and Fundamental Freedoms, adopted by the General Assembly at its 53<sup>rd</sup> session A/RES/53/144, 8 March 1999.

rights.<sup>239</sup> The right to peaceful assembly and association includes the ability for CSOs "to access funding and other resources from domestic, foreign and international sources."<sup>240</sup> Although the State might be able to impose restrictions on this right in order to prevent crime, such as money laundering or terrorism financing, these "should not be used as a pretext to control NGOs or restrict their ability to carry out their legitimate work"<sup>241</sup>. Carrying out inspections or audits against CSOs and stigmatizing or otherwise delegitimizing them including by labeling them as 'foreign agents' are also considered as violating the right to freedom of association<sup>242</sup>.

## 2.2.4 Churches and religious groups

Attempts to progressively bring all social spheres under control by the State have not spared religious organizations. The regulatory framework regarding churches, denominations and religious communities was amended in December 2011, when Act CCVI (hereinafter 'the Church Law') - which entered into force shortly after following a speedy process which did not allow for adequate consultation with stakeholders and the opposition - overhauled the rules regulating church status and religious activities. Act CCVI was hastily adopted after the Constitutional Court annulled Act C of 2011 on the Right to Freedom of Conscience and Religion, and on Churches, Religions and Religious Communities, adopted earlier that year. The Court annulled Act C on procedural grounds, namely due to substantial amendments which were tabled a few hours prior to the final vote on the draft law, contrary to the House rules<sup>243</sup> and leaving no time for parliamentary debate<sup>244</sup>. In reaction to the Constitutional Court's ruling, the Parliament passed the Church Law, which had virtually the same content as the act which had been annulled. In parallel, the House rules were modified, in order to lift existing restrictions on last minute amendments to accelerate legislation in certain cases<sup>245</sup>. The Church Law has attracted criticism due to inconsistencies between its letter and international and European standards on religious freedom.

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239. ICCPR, Article 22(2). Criminal procedures against NGOs should especially meet the necessity and proportionality requirements and be used as a last resort when no less intrusive means are available by which the legitimate aim can be achieved. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, Para. 35. See also Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally recognised Human Rights and Fundamental Freedoms, July 2011; Furthermore, throughout criminal proceedings, authorities must refrain from expressing views or issuing statements that could prejudice the trial's outcome and thus undermine the presumption of innocence. The UN SR on human rights defenders, Michel Forst, expressed concerns that the presumption of innocence had been violated in the context of the investigations conducted by KEHI and other authorities against CSOs in Hungary. The UN SR especially expressed concerns about the « openly biased approach » shown by government officials against NGOs and their attempt to stigmatise them in the media. UN Special Rapporteur on human rights defenders, 2016.

240. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, p. 20; CoE, Fundamental Principles on the Status of Non-Governmental Organisations in Europe, Principle 50; CoE Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, §. 50; European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Joint Guidelines on Freedom of Association*, adopted by the Venice Commission at its 101<sup>st</sup> Plenary Session, Venice, 12-13 December 2014, Principle 7. See also The Observatory for the Protection of Human Rights Defenders, *Violations of the right of NGOs to funding: from harassment to criminalisation, Annual Report 2013*, February 2013, available at: [https://www.scribd.com/document/127557979/OBS-Annual-Report-2013-Violations-of-the-right-of-NGOs-to-funding-from-harassment-to-criminalisation#fullscreen&from\\_embed](https://www.scribd.com/document/127557979/OBS-Annual-Report-2013-Violations-of-the-right-of-NGOs-to-funding-from-harassment-to-criminalisation#fullscreen&from_embed).

241. European Commission for Democracy through Law (Venice Commission), *Opinion on Federal Law N. 121-FZ on non-commercial organisations ('Law on Foreign Agents'), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code ('Law on Treason') of the Russian Federation*, Opinions No. 716-717/2013, Strasbourg, 27 June 2014, § 67.

242. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, *ibid*.

243. Resolution 46/1994 on the Standing Orders of the Parliament, Standing Order No. 107/1.

244. For more details, see : [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-3-006?f=templates\\$fn=document-frameset.htm\\$q=%5Bfield,E\\_Alphabetical%20Index%3A%5Bborderedprox,0%3Achurch,%20recognition%5D%5D%20\\$х=server\\$3.0#LPHit1](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-3-006?f=templates$fn=document-frameset.htm$q=%5Bfield,E_Alphabetical%20Index%3A%5Bborderedprox,0%3Achurch,%20recognition%5D%5D%20$х=server$3.0#LPHit1).

245. *Ibid*.

Under the new legislation, more than 300 religious organizations<sup>246</sup> previously recognized as ‘churches’ lost their status and were forced to undergo a re-registration procedure in order to regain it and obtain related state subsidies. Under the new rules, the registration decision lies with the Parliament, based on vague criteria allowing for wide parliamentary discretion in deciding which religious organizations should be recognized as ‘churches.’ In order to be recognized as a church, religious groups must be supported by at least 1,000 people and have existed for at least 100 years internationally or in an organized manner as an association in Hungary for at least 20 years. However, these criteria are not binding on Parliament, which is not required to indicate the reasons supporting its decision. Only 14 churches, listed in an appendix to the Church Law, were recognized as churches and could maintain their rights, without formal examination aimed at verifying their compliance with the new criteria. The list was subsequently expanded so as to include 32 denominations, which were automatically granted church status. The other religious groups faced the alternative of either filing a request for re-registration, or initiating a procedure, by which they would be turned into civil associations, or cease their activity.

Religious communities met by FIDH reported having suffered serious consequences as a result of the legislative reforms, which stripped them of their status. Although they were given the possibility of submitting a request for re-registration, many religious groups refused to do so as they did not want to comply with the new rules, which they deemed unfair to protest against the deprivation, which they considered arbitrary.<sup>247</sup> In some cases when they did submit a request, their application was refused by parliament even though the conditions provided for in the law had been met.<sup>248</sup> Many also chose not to initiate the procedure that would transform them into civil associations for several reasons. First, because there are substantial differences between a recognized church and a civil association. Civil associations do not have the same rights and privileges with regard to e.g. taxation, employment, education, performing religious services, protection afforded to symbols and places of worship, protection afforded to information obtained under confession. They do not receive state funding for social, healthcare and educational services and cannot collect the 1% income tax donations, which may be offered to churches. These changes severely impacted the capacity for those religious communities which decided to opt for the transformation into civil associations to perform their functions. As a result, many religious communities had to significantly downsize their social and educational activities, or cease them entirely. Some also complained about the fact that due to the efforts put into litigating for their rights, significant time and energies were lost for their usual activities. Participation in law making that concerns them is also possible for churches, but denied to religious associations. Also, according to the religious communities met by FIDH, social perception fundamentally changed for those communities that became associations. While churches benefited from a certain reputation, those religious communities no longer recognized as churches suffered a loss in social support and reputation; believers also reportedly felt that they were put into “different categories”.

*“We feel as if we were wearing a yellow star,”* said some religious community’s representatives interviewed by FIDH. *“We have become secondary churches,”* added another representative.

The ECtHR also held in its April 2014 ruling that distinctions in the legal status granted to religious communities must not portray them in an unfavorable light in public opinion and that member states should not overlook the fact that State recognition can sometimes be key to social reputation

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246. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, adopted by the Venice Commission at its 90th plenary session (Venice, 16-17 March 2012), Strasbourg, 19 March 2012 p. 4

247. Interview with a practising lawyer who acted for some religious communities which had lost their status following the 2011 reform in the case that was decided by the Constitutional Court in its ruling 6/2013, October 2015.

248. FIDH interview with the Hungarian Evangelical Brotherhood and other religious communities, October 2015.

when deciding to grant or deny church status.<sup>249</sup> Secondly, several religious communities decided not to apply for registration as associations because they found it humiliating to have to submit an application to be transformed into something, which carried much less rights and privileges than those they had been entitled too.

*“Not only we were given a yellow star, but we had to apply for it,”* said the same representative.

The Venice Commission criticized the law, which it found, not to be in line with European standards on religious freedom, an essential element in a democratic society. Although the aim indicated by the government for reforming the previous framework, i.e. limiting abuse by certain religious groups especially with regard to access to public funding, might have been legitimate, according to the Venice Commission, the State failed to demonstrate that the means used were proportionate to the intended aim and that less drastic measures would have been sufficient to address the situation.<sup>250</sup> Also, despite the fact that States benefit from a large appreciation in regulating church-state relationships, “the State must remain neutral and impartial in exercising its regulatory powers.”<sup>251</sup> Among the aspects that were criticized by the CoE watchdog, excessive requirements based on criteria that the Commission did not hesitate to consider ‘arbitrary’ and the recognition procedure, based on a political decision, as well as a discriminatory treatment against certain religious beliefs and communities, particularly raised concerns.<sup>252</sup> The recognition requirements provided for in Church Law did not, according to the Venice Commission, comply with the criteria set in Article 9.2 ECHR (limitations on freedom of thought, conscience and religion) read in combination with articles 14 (prohibition of discrimination) and 11 (freedom of assembly and association) ECHR which the State must abide by when imposing restrictions on the recognition as a religious association. They also appeared at odds with the OSCE/ODIHR – Venice Commission Guidelines<sup>253</sup> establishing that minimum membership requirements and requirements for lengthy existence in the State before registration should not be allowed. The recognition procedure does not allow, in the Venice Commission’s opinion, for sufficient procedural guarantees that would ensure that the legislation is applied in a neutral and impartial manner<sup>254</sup>. As it stands, the decision to recognize or de-recognize a religious organization lies entirely with Parliament, which decides based on vague criteria following a non-transparent procedure, which does not allow for sufficient democratic oversight and is tainted with political considerations. Although the Venice Commission did conclude that the possibility to submit a complaint to the Constitutional Court against decisions regarding religious organizations’ recognition as churches might be considered as effective remedy, the Commission also noted that in order to conclude that the right to an effective remedy was fulfilled, the Constitutional Court should have been able to address all relevant questions *de jure* and *de facto*.<sup>255</sup> According to human rights organizations, which acted for some religious groups affected by the Church Law, the Constitutional Court is however not in a position to review the factual elements pertaining to the

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249. European Court of Human Rights, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Applications n° 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment 8 April 2014

250. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, *ibid.*, p. 4-5.

251. *Ibid.*, p. 10.

252. *Ibid.*, p. 15.

253. European Commission for Democracy through Law (Venice Commission), *Guidelines for legislative reviews of laws affecting religion or belief*, OSCE/ODIHR panel of experts on religion or belief, Opinion no. 271/2004, CDL (2004) 061, 11 June 2004 p. 12

254. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, *ibid.*, p. 11.

255. *Ibid.* p. 12-13.

decision.<sup>256</sup> Furthermore, the only review admitted against a negative decision is the constitutional one, whereas access to ordinary courts is denied to applicants. Following de-registration, religious organizations not included in the list provided in the annex to the Church Law lost not only their status, but also their right to receive state subsidies and other privileges, and saw their ability to carry out activities including social, health-care and educational activities significantly reduced. As a consequence, recognized churches do benefit from a differential, privileged treatment that non-recognized churches are denied. European standards do not exclude the possibility of differentiating among religious groups including by conferring privileges on them based on their status. However, any difference in treatment should be based on sufficiently precise criteria clearly set down in the law and applied in a non-discriminatory manner<sup>257</sup>. In their absence, and unless any differentiation is objectively and reasonably justified, the different treatment of religious organizations must be considered unequal and discriminatory under international law.

The Hungarian Constitutional Court quashed the provision giving parliament the power to recognize churches and determine criteria for recognition first on procedural grounds in October 2012 (Decision 45/2012), then again in February 2013 in a case brought by some religious organizations (Decision 6/2013) on grounds that recognition by a body with an essentially political character rather than an impartial tribunal did not comply with the requirements included in the Fundamental Law. In this second ruling, the Constitutional Court annulled the provision with retroactive effect. However, the government did not implement the Constitutional Court's decision. Instead, shortly after the Constitutional Court had ruled that recognition as a church by a parliamentary vote was unconstitutional, it pushed through an amendment to the Fundamental Law (this was contained in the Fourth Amendment, March 2013) which raised the provision to the constitutional level, in blatant disregard for the Venice Commission's recommendations. The amendment also added some requirements for religious organizations to be registered as churches, which in no way remedied the vagueness, which characterized previous provisions, but rather added to their arbitrariness.<sup>258</sup> Further amendments passed later that year (with the Fifth Amendment to the Fundamental Law, September 2013) failed to address existing issues and cemented the principles contained in the Church Law in the Constitution. Despite some minor improvements, and contrary to the Constitutional Court's decision and Venice Commission's recommendations, the Fifth Amendment confirmed Parliament's powers to grant church status to religious communities without introducing the right for affected communities to challenge the decision on the merits; it also provides that the State shall cooperate only with religious communities which have been awarded church status and shall provide them with certain privileges to which other religious groups are not entitled, thus perpetuating the discrimination already condemned by the Venice Commission<sup>259</sup>.

The ECtHR ruled in April 2014 on the Church Law's compatibility with CoE standards, notably with Article 9 and 11 ECHR, in a case brought by some religious communities that had lost their status as registered churches and related advantages following legislative reforms in 2011.<sup>260</sup>

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256. See Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union Main concerns regarding the Fundamental Law of Hungary, 13 March 2013, p. 10-11. The Hungarian Constitutional Court also concluded in this same vein in its Decision 6/2013 (III.1), Section VI. 3.3.3.

257. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, *ibid*, p. 14.

258. Article IV, Fourth Amendment. The amendment requires that religious groups enjoy societal support and cooperate within the interest of community objectives in order to be recognised as churches.

259. Hungarian Helsinki Committee, Eötvös Karoly Policy Institute, Hungarian Civil Liberties Union, Comments on the Fifth Amendment to the Fundamental Law of Hungary, 18 September 2013, p. 4.

260. *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Applications n° 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, 8 April 2014.

The Court concluded that the applicants' de-registration, which the Court deemed unnecessary 'in a democratic society' under article 11 ECHR, did violate their rights as enshrined in Article 9 and 11 ECHR. The Court particularly criticized the government's failure to demonstrate that other less drastic solutions had been considered to achieve the legitimate aim to limit abuse. It also echoed the Constitutional Court and the Venice Commission in criticizing the fact that the registration decision lay with Parliament. The Court deemed this and the fact that the applicants were treated differently than registered churches with regard to cooperation and benefits on no reasonable grounds incompatible with the State's duty to remain neutral in religious matters. The ECtHR's ruling became final in September 2014, after the Grand Chamber deemed it unnecessary to reassess the original verdict. However, no satisfactory agreement has been found to date between the Hungarian government and all the applicants regarding their compensation for damages and their status' restoration.

In September 2015 the government did present amendments to Act CCVI that were purportedly meant to revise the Hungarian Church Law and address the ECtHR's concerns. The proposed bill was designed to replace the existing two-tier system, based on a distinction between registered (or 'incorporated') churches and religious associations with a three-tier system. Under the new rules, currently incorporated churches would have automatically been granted the higher status and related privileges. However, not all incorporated churches met the criteria set forth in the law for obtaining the higher status. In order to obtain this status (and become 'certified churches') religious communities must have at least 10,000 members or have received church income tax from at least 4,000 people over five years. According to the Forum for Religious Freedom Europe, among the 31 currently incorporated churches only 6 had met the first criterion and only 11 had received church income tax from at least 4,000 people since 2011.<sup>261</sup> As for the religious communities currently recognized as 'religious associations,' they would have fallen into the lower tier with ensuing limitations to the rights, which they had originally been granted as churches. Although under the proposed rules the registration procedure would have now lied with the courts, the amendments still allowed the government to enter into 'cooperative agreements' with certified churches only and grant them state subsidies on a discretionary basis.<sup>262</sup> The new law would have not restored status for those who have lost it, despite ECtHR and previous Constitutional Court's rulings. The proposed reform therefore failed to genuinely address the rights' violations identified by the ECtHR and perpetuated a system which differentiates between religious communities based on arbitrary criteria in a way which violates certain religious communities' right to religious freedom and discriminates against them by denying them the rights which are granted to others. In December 2015, the bill was voted down in Parliament, and no other proposal to amend the Church Law has been presented since.

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261. Forum for Religious Freedom Europe (FOREF), *Hungary : Amended Church Law Remains at Variance with OSCE Standards and the European Convention on Human Rights*, at OSCE Human Dimension Implementation Meeting, Warsaw, 30 September 2015.

262. FOREF, *ibid.*



## Hungary and international courts

The failure by the State to adequately address the violations identified by the ECtHR in relation to the Church Law by proposing substantial rather than cosmetic changes to the law seems to confirm a trend that extends beyond this particular case according to the information gathered. Human rights organizations and law practitioners interviewed by FIDH lamented the limited effects that even legal victories in cases they litigated before international courts had for their clients. Although this trend can be traced back to a time prior to when Fidesz took power, recent examples show a particularly scarce respect by the State for international courts' rulings. When coupled with domestic courts' alleged inability, at least in some cases, to adequately address these issues<sup>263</sup> and the far-reaching changes made to the courts' organization and functioning, which raise legitimate suspicions regarding their independence and impartiality especially in politically sensitive cases as detailed above, the failure by the state to adequately implement decisions taken by international and regional mechanisms for protection of rights is particularly concerning and raises questions regarding the possibility of obtaining reparation for those whose rights have been violated.

The Court of Justice of the European Union (CJEU)'s decisions on the premature dismissal of Hungary's former Data Protection Commissioner (C-288/12, *Commission v. Hungary*, OJ C 227, 28. July 2012.) and on the retirement age of judges (C-286/12, *Commission v. Hungary*, Judgment of 6 November 2012) can also be mentioned as examples. Although these two decisions did prompt legal amendments that partly addressed the Luxembourg Court's concerns, they resulted mainly in cosmetic changes which did not change the substance and failed to genuinely redress the situation of those affected by the laws ruled incompatible with European standards. Also, in some cases, the decisions led to compensation for damages but not to changes in the laws from which the violations had derived.

In other cases where the ECtHR concluded that certain provisions violated the Convention, although some legislative changes were eventually made in order to address the Court's concerns and remedy the identified violations, the steps taken or the measures planned by the government to execute those rulings were insufficient, as they generally failed to offer viable solutions or address systemic deficiencies, or because the laws did not comply with European standards even after the amendments (see e.g. from the time prior to when Fidesz' took power: *Bukta and Others v. Hungary*, Application no. 25691/04, Judgment of 17 July 2007 related to Article 11 (freedom of assembly and association); *Vajnai v. Hungary*, Application no. 33629/06, Judgment of 8 July 2008 related to Article 10 (freedom of expression); *Csüllög v. Hungary*, Application no. 30042/08, Judgment of 7 June 2010 related to Article 3 (prohibition of torture)).

The case of *Frantanoló v. Hungary* (Application no. 29459/2010, Judgment of 3 November 2010), related to the violation of Article 10 ECHR (freedom of expression), is however particularly emblematic and a symptom of an increased disrespect by the government for the ECtHR's rulings. The case followed another decision in which the Court had found that criminalizing the use of a five-pointed red star was in breach of Article 10 of the Convention. The government did not amend the relevant provisions of the Hungarian Criminal Code following the ECtHR's decision. On the contrary, a few months after the Court concluded that the provision was in breach of the Convention, a parliamentary resolution submitted by

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263. See also FIDH interviews with practising lawyers, October 2015. These pointed to the absence of fast and effective legal mechanisms to address these issues at the domestic level. Lack of professionalism and political bias (particularly at the higher courts' level) were also indicated as reasons for the incapability of the system to address these issues effectively at the national level.

Hungarian Minister of Justice and Public Administration and Deputy Prime Minister, Tibor Navracsis, was adopted (Parliamentary Resolution 58/2012 (VII.10) OGY of 10 July 2012), stating that Hungary 'did not agree' with the decision and refused to amend the relevant provisions of the criminal code. An earlier version of the resolution even explicitly proposed not to execute the ECtHR's judgment and not to afford just satisfaction to the applicant as requested by the Strasbourg Court. Although the resolution was partly amended prior to its adoption and these elements were not included in its final version, the final text still stated that the Parliament did not agree with the ECtHR's decision. The new Criminal Code adopted in June 2012 (Act C of 2012) after the Fratanolo decision, did maintain provisions sanctioning the use of totalitarian symbols, including the five-pointed red star. In May 2012, prior to the entry into force of the new provision and the adoption of the parliamentary resolution, but after the ECtHR's ruling in the Frantanoló case concluding that the provision was in breach of the Convention, the spokesperson of the Green party (Zöld Baloldal) was arrested and taken into custody for wearing a red star publicly at a demonstration against the government's positioning regarding the decision. Parliament spokesperson, László Kövér, is also reported to have publicly reacted to the ECtHR's decision in this case by stating in an interview that 'a few idiots in Strasbourg, who have no idea about what has happened in this country for 50 years [...] think that it is part of the freedom to demonstrate with a red star'<sup>264</sup>.

In another case related to life imprisonment without the possibility of parole, where the Court found a violation of Article 3 of the Convention in a decision adopted once the current government had come into power (Laszlo Magyar v. Hungary, Application no. 73593/10, Judgment of 20 May 2014), although certain legislative changes were made following the ECtHR's ruling, the legislation still does not comply with ECHR standards. In this particular case, the Supreme Court, which reviewed the case following the ECtHR decision, affirmed that the ECtHR's judgment was not directly applicable but only provided guidance to national courts and lawmakers. This example testifies to an increased bias by the Supreme Court when judging over cases that are perceived as politically sensitive in favor of the government, which intended to maintain life imprisonment without the possibility of parole in the Hungarian legal system.

The situation is particularly worrisome when seen against the background of other changes made to the relationship between Church and State in recent years. The new Fundamental Law includes in its preamble a reference to Hungary's Christian origins and formally recognizes "the role of Christianity in preserving the nation."<sup>265</sup> Besides making a clear ideological choice, by including Christian values into the Fundamental Law, to favor the Catholic Church over all other churches and religious communities, the government has entertained a privileged relationship with the Hungarian Catholic Church, by involving it in public life and granting it substantial state subsidies. Education appears to be especially and increasingly devolved to the Catholic Church, which currently has control over schoolbooks and took over education in some peripheral areas where, as a consequence, neutral public education is no longer available; religious education is financed with state budget. By reinforcing its ties with the Catholic Church and raising Christian values to constitutional status on the one hand and changing the law to make it increasingly difficult for other religious communities to act, or even to survive, on the other, the Hungarian government has undermined the fundamental separation between State and church and gradually gained control over another important sphere, which could also serve as a counterbalance to its own power structures.

264. See Budapest, *Strasbourg red star ruling stirs emotions*, 9 November 2011 available at: <http://www.budapest.eu/2011/11/strasbourg-red-star-ruling-stirs-emotions/>

265. See Preamble to the Fundamental Law, §§ 3 and 6.

### 3. Challenges to the Rule of Law: Violations of the rights of migrants, asylum seekers and refugees

Faced with a substantial increase in the number of migrants, asylum seekers and refugees since early 2015, President Orban conveyed a clear message during a visit to Brussels on 3 September 2015 : « *Quotas is an invitation for those who want to come. The moral human thing is to make clear, please don't come.* »<sup>266</sup> The invective, which forms part of an open political and media strategy to stigmatize migrants, asylum seekers and refugees, was reflected more concretely a few days later with the completion of a 175-km fence along the Serbo-Hungarian border. That same day, the Hungarian asylum system was profoundly and drastically reviewed, putting it clearly at odds with international and European obligations, and excluding almost any possibility for asylum seekers to obtain international protection in Hungary.<sup>267</sup>



Hungarian-Serbian border fence in the Röszke transit zone, Hungarian Helsinki Committee, 16 September 2015. © Hungarian Helsinki Committee

In a press release dated 17 September 2015, the UN High Commissioner for Human Rights expressed consternation with regard to the Hungarian asylum policy, particularly condemning « *the callous, and in some cases illegal, actions of the Hungarian authorities (...), which include denying entry to, arresting, summarily rejecting and returning refugees* »<sup>268</sup> A more detailed analysis of the Hungarian authorities' conduct since the summer of 2015<sup>269</sup> shows they are guilty of serious and systematic violations of the 1951 Geneva Convention relating to the Status of Refugees (hereinafter the « 1951 Convention »), international human rights law, as well as European law

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266. Migration crisis: Hungary PM says Europe in grip of madness, *The Guardian*, 3 September 2015, available at: <https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness>.

267. This situation was confirmed by a regional representative of the Office of the UN High Commissioner for Refugees for Central and Eastern Europe, Feixas Vihé, during an interview on 29 October 2015, in Budapest. It was publicly condemned on 21 December 2015 in a joint press release of the United Nations High Commissioner for Refugees, the Council of Europe and the Office for Democratic Institutions and Human Rights of the OSCE (press release available at: <http://www.unhcr.fr/56791385c.html>).

268. UN News Centre, The UN condemns Hungary's response to the refugee crisis, 17 September 2015, (press conference available at: [http://www.un.org/apps/newsFr/storyF.asp?NewsID=35578#.V5XYG\\_kiT44](http://www.un.org/apps/newsFr/storyF.asp?NewsID=35578#.V5XYG_kiT44) )

269. On all of these questions, see the Hungarian Helsinki Committee, "No Country for Refugees – New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary", an information note dated 18 September 2015, [http://helsinki.hu/wp-content/uploads/HHC\\_Hungary\\_Info\\_Note\\_Sept-2015\\_No\\_country\\_for\\_refugees.pdf](http://helsinki.hu/wp-content/uploads/HHC_Hungary_Info_Note_Sept-2015_No_country_for_refugees.pdf)

in that field,<sup>270</sup> especially the principle of non-refoulement enshrined in Article 33 of the 1951 Convention,<sup>271</sup> Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4 of Protocol No 4 to the European Convention on Human Rights (ECHR), as well as in Articles 78 (1) of the Treaty on the Functioning of the European Union (TFEU) and 18-19 of the Charter of Fundamental Rights of the European Union,<sup>272</sup> pursuant to which no State is allowed to push back « a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. »<sup>273</sup> Hungary has also violated the prohibition of host States to criminalize refugees who have fled a territory where their lives or freedom were threatened<sup>274</sup> for irregularly entering and/or staying in the country, as well as the right of asylum seekers to have an individual, objective and impartial examination of the merits of their claims,<sup>275</sup> the right to be informed in a language which they understand of the procedure to follow and their rights and obligations throughout the procedure, to have access to an interpreter to present their arguments to the competent authorities or even to have access to legal counsel or other advisors, and finally to have access to an effective remedy against decisions of the competent asylum authorities.<sup>276</sup>

The Hungarian authorities did not stop at merely violating the obligations incumbent upon them under European and international law. They distorted the purpose of some legal instruments in order to reject asylum claims already at the admissibility stage following extremely accelerated procedures. The loophole found by the Hungarian government to elude the different procedural safeguards for asylum seekers have consisted in using almost automatically the concept of « safe third country. » That concept enables authorities who have received an asylum claim to declare it inadmissible if the asylum seeker has transited through a non-EU State considered « safe, » and to return them to that country without even examining it. The concept of « safe third country », which runs counter to international law »,<sup>277</sup> assumes that the asylum seekers

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270. See Directive 2013/33/EU from the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Directive 2013/32/EU from the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) and Directive 2011/95/EU from the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (the "qualification" directive)

271. According to the UNHCR, the principle of non-refoulement is part of customary law: « *The HCR is of the opinion that prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under human rights international law, satisfies these criteria and constitutes a rule of international customary law. As such, it is mandatory for all States, including those who have not yet ratified the 1951 Convention and/or its 1967 Protocol* », UNHCR, Advisory Opinion on the Extra-territorial Application of Non-Refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: <http://www.unhcr.org/4d9486929.pdf>, p. 7.

272. While the ECHR does not guarantee the right to asylum as such, Article 3 prohibits expulsion that would expose an individual to a risk of torture or inhuman or degrading treatment or punishment. See namely the European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, 2014, p. 36, available at: [http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded\\_en.pdf](http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf). The Court also recognized that « non-refoulement is an obligation inherent » in Article 3 of the ECHR in cases where there is a real risk of exposure to torture or inhuman or degrading treatment». See, for instance, case law in this field in the Guidance Note on Extradition and International Protection of Refugees from the Office of the UN High Commissioner for Refugees, 2008, Note 27, document available at: [http://www.coe.int/t/dghl/standardsetting/pcoc/PCOC\\_documents/Documents%202013/note%20orientation%20extradition%20et%20asile.pdf](http://www.coe.int/t/dghl/standardsetting/pcoc/PCOC_documents/Documents%202013/note%20orientation%20extradition%20et%20asile.pdf)

273. Article 33 of the 1951 Convention on the Status of Refugees.

274. Article 31 of the 1951 Convention on the Status of Refugees.

275. Article 10 of Directive 2013/32/EU from the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) *ibid.*

276. *Ibid.*, Article 12 On all these questions, see the Hungarian Helsinki Committee, « No Country for Refugees », Information Note, 18 September 2015.

277. See along these lines, FIDH, "The lists of « safe countries » of the European Union: denial of the right to asylum », note dated 26 May 2015, available at: <https://www.fidh.org/fr/themes/droits-des-migrants/les-listes-de-pays-surs-de-l-union-europeenne-un-deni-du-droit-d>

have nothing to fear in terms of their life or freedom in that country, and that the authorities of that very State comply with the Geneva Convention, including the non-refoulement principle, in such a way as to have the asylum claim submitted to them and effectively examined. Most asylum seekers transiting through Hungary have first crossed Serbian territory. As the Hungarian authorities consider Serbia a safe third country<sup>278</sup>, they automatically rejected their claims under Article 39 of the Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (the 'Asylum Procedures Directive') and deported them to Serbia<sup>279</sup>. In October 2015, the rate of rejection of asylum claims exceeded 99%<sup>280</sup>, without any attention being paid to the individual situation of the asylum seekers and the risk an expulsion would entail. Such a practice stands in complete contradiction with the position of the United Nations High Commissioner for Refugees, according to which the application of the concept of « safe third country » must be limited and « *include an effective opportunity to rebut a presumption of safety* ». <sup>281</sup> It also violates Hungarian law, which grants asylum seekers the right to challenge this qualification on account of their personal situation.<sup>282</sup> However, the Hungarian authorities set such tight appeal deadlines<sup>283</sup> that it is impossible, in practice, to lodge an appeal following a refusal to grant international protection or a decision to invoke the concept of safe third country. In the rare cases when there is an appeal, this is not accompanied by another hearing of the claimant or the possibility for the latter to consult with counsel. A change to legislation in March 2016 further expanded the national list of « safe » countries of origin and third countries, by including Turkey.<sup>284</sup> According to this modification, Turkish nationals, as well as asylum seekers who transited through Turkey from other countries, may now be returned to Turkey, notwithstanding serious violations of human rights committed there, both against migrants, asylum seekers and refugees, and Turkish citizens.<sup>285</sup>

A law dated 15 September 2015 introduced a fast-track procedure called the « *border procedure*», exclusively applicable to claims made in transit border zones, and set a deadline of no more than 8 days for authorities to render a decision. Vulnerable persons, such as unaccompanied minors, elderly persons or pregnant women, are theoretically exempt from such a procedure and gathered in open or closed reception centers for asylum seekers. Non-governmental organizations that have visited transit zones, however, have pointed out the failure to take effectively into account vulnerability. This is established *prima facie* and once and for all by the authorities present in the

278. See governmental decree 191/2015 dated 21 July 2015 regarding determination, at the national level, of countries of origin and third countries qualified as safe [191/2015 (VII. 21.), Kormányrendelet a nemzeti szinten biztonságosnak nyilvánított származási országok és biztonságos harmadik országok meghatározásáról].

279. Article 39 of Directive 2013/32/EU of 26 June 2013 from the European Parliament and the Council on common procedures for granting and withdrawing international protection (recast), *ibid.*, stipulates that « *Member States may provide that no, or no full, examination of the application for international protection [...] shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country* »

280. Hungarian Helsinki Committee, No Country for Refugees: Access and protection denied, 26 October 2015.

281. United Nations High Commissioner for Refugees, "Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status Council Document 14203/04, Asile 64., 9 November 2004, document available at: <http://www.unhcr.org/43661dfc2.pdf>

282. Article 53 (2) of Act N° LXXX from 2007 on the right to asylum (Menedéjogról szóló 2007. évi LXXX. törvény, *Magyar Közlöny* 2007/83).

283. The deadline for appealing a refusal of protection was initially seventy-two hours. See also Hungarian Helsinki Committee, "No Country for Refugees – New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary," Information Note, 18 September 2015. It was subsequently raised to seven days (Section 53(3) Asylum Act, as amended by Act CXL of 2015, 7 September 2015).

284. See Government Decree 63/2016 (III.31) which amended Government Decree 191/2015 (VII/21) on national designation of safe countries of origin and safe third countries (Asylum Act)

285. FIDH, *Turkey: a safe country?*, 26 May 2016, <https://www.fidh.org/fr/themes/droits-des-migrants/la-turquie-un-pays-sur>. On the human rights situation in Turkey, see the resolution of the European Parliament dated 14 April 2016 on the 2015 Turkey Report (2015/2898[RSP]), P8\_TA-PROV(2016)0133 ; see also the FIDH and EuroMed Droits report, *Turkey : human rights under curfew*, February 2016, <https://www.fidh.org/en/region/europe-central-asia/turkey/turkey-human-rights-under-threat>.

transit zone following a fast-track procedure, which manifestly does not make an appropriate assessment possible. These organizations were also able to testify how fast the examination of the merits of claims was carried out, some inadmissibility decisions having been taken under an hour. This information was corroborated by the United Nations High Commissioner for Refugees, which indicated that the duration of these procedures rarely exceeded an hour or two.<sup>286</sup> The organizations present in the field also testified to a number of incidents in September 2015 when the army was deployed along the Serbian border to help police forces manage what the authorities qualified as a « *crisis caused by mass immigration*. »<sup>287</sup> The new laws provide for the possibility of using rubber bullets, tear gas and other coercive measures, which could cause injuries to the migrants during border operations, as long as they are not aiming to kill.<sup>288</sup> On 16 September 2015, the day after the adoption of the new legislation, serious incidents took place at the border crossing point near Röszke in the context of monitoring operations conducted by the Anti-terrorism Centre (TEK). These operations led to egregious human rights violations. The Hungarian Helsinki Committee filed a complaint with the Commissioner for Fundamental Rights (the Hungarian Ombudsman) regarding these incidents. Through this complaint, the Hungarian NGO condemned the disproportionate use of force, as well as serious breaches of the rights of refugees and observers who were present. Nonetheless, no investigation was conducted by the Ombudsman as regards these acts.<sup>289</sup>



Blood streams from a man's head as Hungarian riot police clash with refugees waiting to cross the border from the Serbian border town of Horgos on September 16, 2015. © CITIZENSIDE/DIEGO CUPOLO



Police officers guard a local refugee camp in the village of Röszke at the Serbian-Hungarian border on September 4, 2015 where migrants are being held. Hungarian police had temporarily shut the Röszke border crossing with Serbia, after 300 migrants escaped from the nearby refugee camp. © CSABA SEGESVARI / AFP

When setting up these transit zones, the Hungarian authorities considered them a « *no man's land* » outside Hungarian territory. To the authorities, pushing back these individuals could not therefore be considered a measure proscribed by the 1951 Convention. However, there is no element to back this up, nor to consider that these zones are not situated in Hungary. However, even if these zones were indeed considered to be outside Hungarian borders, the argument would still not suffice to exonerate Hungary from its international responsibility. In international human

286. Interview with the regional representative of the High Commissioner for Refugees for Central and Eastern Europe, Feixas Vihé, 29 October 2015.

287. See Act CXLII/2015, Act on the Police and the Military

288. See new Article 36 (1) (h) of the National Defense Act.

289. Hungarian Helsinki Committee, letter to the Commissioner for Fundamental Rights, 13 October 2015 (not published); exchange of emails between the FIDH and the Hungarian Helsinki Committee, 15 December 2015 (FIDH archives). The answer from the Ombudsman is available in Hungarian at the following link: <http://helsinki.hu/wp-content/uploads/v%C3%A1lasz-ombudsmant%C3%B3l.pdf>. See also Amnesty International, *Fenced Out: Hungary's violations of the rights of refugees and migrants*, October 2015, p. 22-24.

rights law, the State is indeed bound to respect its obligations even outside its national territory<sup>290</sup>. Extraterritoriality is not deemed by the European Court of Human Rights as a circumstance that excludes accountability of State for the unlawful behavior of its agents.<sup>291</sup>

The Hungarian authorities have also amended their penal legislation and criminalized the crossing of the Hungarian border, an act punishable since 15 September 2015 by three years in prison. Such an incrimination violates Article 31 of the 1951 Convention and the prohibition on host States to criminally sanction the irregular entry and/or stay of refugees.<sup>292</sup> Furthermore, the accelerated criminal proceedings initiated under the new provisions raise issues regarding their consistency with international and European law,<sup>293</sup> namely with the right to a fair trial, the right to information, the right to interpretation and translation, and defense rights.

Through the same reform, the Hungarian legislator also amended and toughened sanctions for those who facilitate irregular entries. The new Section 353 (1-6) of the Hungarian Criminal Code also introduces new aggravating circumstances in this area. Compatibility of these provisions with European standards, namely with Directive 2002/90/EU of 28 November 2002 defining the facilitation of unauthorized entry, transit and residency, read in combination with Article 49 of the Charter of Fundamental Rights of the European Union with regard to proportionality of criminal sanctions for those who facilitate unauthorized entry, transit and residency, is dubious.<sup>294</sup> In October 2015, *The Associated Press* reported the publication of messages by the Hungarian authorities in several Lebanese and Jordanian newspapers, targeting asylum seekers, and warning them of possible sanctions should they enter Hungary irregularly. On its own territory, the government did not hesitate either to justify repeated violations of domestic and international law using « cultural arguments » – mainly by the need to defend a « Hungarian lifestyle » and its differences with Islam – once again acting in blatant contradiction with the principle of non-discrimination stated in Article 3 of the 1951 Convention.<sup>295</sup> This official discourse has first and foremost revealed the will to play on fears generated by the risk of a mass influx of refugees. Since the beginning of 2015 after the terrorist attacks against French weekly paper *Charlie Hebdo*, migrants and terrorists have been cynically lumped into one category.

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290. The extra-territorial obligations of States in human rights are recognized by many international instruments, including the draft articles on the responsibility of States for internationally wrongful acts and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. In international refugee law, see the Office of the United Nations High Commissioner for Refugees, Advisory Opinion on the Extra-Territorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, *op.cit.*

291. See namely *Hirsi Jamaa and others vs. Italy*, petition N° 27765/09, judgment of the Court (Grand Chamber) dated 23 February 2012, specifically, § 74.

292. It also raises questions about compatibility with Directive 2008/115/EU (the “return” Directive), as interpreted by the CJEU in the *El Dridi* (C-61/11), *Sagor* (C-430/11) and *Achughbabian* (C-329/11) judgments, as highlighted by the European Commission itself in a letter sent to the Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Hungary to the European Union on 6 October 2015, available at: <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>.

293. Hungarian Helsinki Committee, *op.cit.* Concerns about the compatibility of these provisions with European standards in the field of procedural rights of suspected or accused persons in criminal proceedings, namely with Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, and Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings have also been raised by the European Commission in a letter which it sent to the Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Hungary to the European Union on 6 October 2015, available at: <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>. Compatibility of the new procedure with the right to interpretation and translation in criminal proceedings was later called into question by the Commission in a letter of formal notice addressed to Hungary on 10 December 2015: see European Commission, Press Release, Commission opens infringement procedure against Hungary concerning its asylum law, 10 December 2015, available at: [http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm)

294. See also European Commission, letter to the Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Hungary to the European Union on 6 October 2015, *ibid.*

295. A. Moussa, *Sentinelles-droit-international.fr*, Bulletin 445 dated 20 September 2015, <http://www.sentinelles-droit-international.fr/?q=content/crise-des-r%C3%A9fugi%C3%A9s-en-europe-la-position-de-la-hongrie>.



An agitation banner in Budapest devoted to the referendum on inadmissibility to spread migrants all over EU countries according to quotas defined by Brussels. Inscription on the poster: "Don't Risk. Vote "No"! Alexey Vitvitsky/Sputnik

The culmination of what looks like veritable anti-migrant propaganda was reached in May 2015 with the organization of a referendum, tendentious to say the least, on how to treat migrants, asylum-seekers and refugees, widely assimilated by the authorities to a threat to security, Christian culture and Hungarian jobs. Citizens were called upon to take a position on how to face this new "threat".<sup>296</sup> The referendum elicited the indignation of the European Parliament, which, in a resolution of June 2015, qualified its wording as « *highly misleading, biased, and unbalanced* »<sup>297</sup> More recently, in a joint press release published on 21 December 2015, the United Nations High Commissioner for Refugees, the Council of Europe and the Office for Democratic Institutions and Human Rights of the OSCE criticized the Hungarian government for having « *launched a new public campaign in December, portraying those fleeing war and conflict as criminals, invaders and terrorists based on their religious beliefs and places of origin. Not the first of its kind in the country, this campaign also targets migrants [...]* » The three institutions unanimously « *urged Hungary to refrain from policies and practices that promote intolerance, fear and fuel xenophobia against refugees and migrants* ». <sup>298</sup>

In 2015, the European Commission had also expressed its concerns over the amendments to Hungarian asylum legislation and the criminal code. Following exchanges with Budapest in the autumn of 2015 and the information conveyed by the Hungarian authorities, the Commission pointed out that a certain number of concerns remained, namely regarding non-compliance with *Directive 2013/32/EU on asylum procedures* and *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*. On 10 December 2015, it started an infringement procedure against Hungary by sending them a letter of formal notice.<sup>299</sup> This initiative was expected, to say the least. The Hungarian government never concealed its will to manipulate European or international rules and, if need be, break them on account of Brussels' inertia in response to the "migration crisis".<sup>300</sup> The latest initiatives adopted in this field only confirm this overall strategy.

296. <http://www.lefigaro.fr/flash-actu/2015/04/24/97001-20150424FILWWW00251-migrants-la-hongrie-va-consulter-sa-population.php>; National Consultation on immigration and terrorism, April 2015.

297. European Parliament, Hungary: MEPs condemn Orbán's death penalty statements and migration survey, 10 June 2015, <http://www.europarl.europa.eu/news/en/news-room/20150605IPR63112/hungary-meps-condemn-orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey>

298. United Nations High Commissioner for Refugees, Office of Democratic Institutions and Human Rights, Council of Europe, Press Release, *Hungary urged to refrain from policies and practices that promote intolerance and hatred*, 21 December 2015 available at: <http://www.unhcr.org/en-us/news/press/2015/12/5677cf666/hungary-urged-refrain-policies-practices-promote-intolerance-hatred.html>

299. European Commission, Press release, Commission opens infringement procedure against Hungary concerning its asylum law, 10 December 2015, *ibid.*

300. See, for instance, Hungarian Helsinki Committee, *Hungarian government reveals plans to breach EU asylum law and to subject asylum-seekers to massive detention and immediate deportation*, Information note for the medias, 4 March 2015.



Very recent changes to Hungarian legislation follow the logic aimed at making the status of asylum seekers and refugees increasingly precarious. Asylum seekers lost, as of 1 April 2016, the benefit of a daily subsistence allowance. Their children can no longer expect to be enrolled in Hungarian schools. The social rights granted to persons with recognized refugee status were also significantly reduced. In particular, refugees and subsidiary protection beneficiaries whose status was granted after 1 June 2016 are no longer entitled to receive integration support. Access to healthcare and temporary shelters has also been considerably reduced, the time that refugees can spend in a reception centre after being informed of their protection status having been cut down to only one month. These restrictions, coupled with the absence of a well-functioning social welfare system, increase the risk that international protection beneficiaries fall into homelessness and destitution. The rules regarding family reunification have also been tightened up as of 1 July 2016, thus making it more difficult for refugees to reunite with their families even once they have obtained international protection. Under the previous regime, more favorable conditions<sup>301</sup> for family reunification applied when applications were made within six months from the date when refugee status was granted to an applicant's family member. The new rules provide that applications shall be filed within three months in order to benefit from the more favorable regime. Even the right to refugee status or subsidiary protection is now being subjected to automatic review every three years.<sup>302</sup>

In the months to come, this wave of nationalism could take an even more dramatic turn. After the building of a wall on the Croatian border at the end of 2015, the process of physical isolation of Hungarian territory will probably be followed by a similar setup along the Romanian border. The latest amendment to the Asylum Act on 5 July 2016 empowers the authorities to automatically push back asylum seekers who come within under 8 km of the fences marking the border with Croatia and Serbia,<sup>303</sup> thus depriving them of any possibility of seeking international protection. Very recent use of these new prerogatives by the Hungarian authorities was strongly condemned by the United Nations High Commissioner for Refugees. In a press release dated 15 July 2016, its spokesperson, William Spindler, emphasized the need fully to investigate allegations of *refoulement*, as well as the violence and abuse inflicted on asylum seekers in the transit zones, and principally in those zones established on the Serbian border.<sup>304</sup> The new provisions, according to the UNHCR, fly in the face of international and European law. This whole strategy led to a national referendum announced by the government at the end of February 2016, and for which the Supreme Court granted a definitive authorization<sup>305</sup> on 3 May last. Hungarian citizens have thus been called upon, on 2 October 2016, to take a position on the European mechanism of mandatory relocation of refugees, and on whether or not this should be implemented in Hungary « without the approval of the Hungarian Parliament. »<sup>306</sup> Although the referendum was invalidated for not attaining the quorum (43,9% turnout, rather than the 50% required for it to be valid), the

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301. Namely, no proof was requested that the family could sustain itself, that it had an accommodation and full health insurance.

302. On all of these elements, see Hungarian Helsinki Committee, *Hungary: Recent legal amendments further destroy access to protection, April-June 2016*, 15 June 2016, available at: <http://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-legal-amendments-Apr-June-2016.pdf>

303. Hungarian Helsinki Committee, *Hungary: Latest amendments "legalize" extrajudicial push-back of asylum-seekers, in violation of EU and international law*, 5 July 2016, available at: <http://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-5-July-2016.pdf>.

304. See <http://www.unhcr.org/news/briefing/2016/7/5788aae94/hungary-unhcr-concerned-new-restrictive-law-increased-reports-violence.html>. See also Human Rights Watch, *Hungary: Migrants abused at the border*, 13 July 2013, available at: <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>.

305. In the meantime, the Hungarian Constitutional Court on 21 June 2016 recognized the constitutionality of the referendum and rejected the appeals made by leaders of several parties of the opposition: see <http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/referendum-against-forced-settlement-to-be-held-in-autumn>.

306. The question put to Hungarian citizens will be to know whether they want the "European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly? See "http://dailynewshungary.com/orban-government-to-call-referendum-on-eu-migrant-quotas/

result – which saw the 98% of voters siding with PM Viktor Orban by voting against the admission of refugees to Hungary - led the government to claim an “outstanding” victory. It also did not deter it from submitting, on 10 October, a controversial proposal for a constitutional amendment (the seventh since the Fundamental Law entered into force in 2012) on the EU’s relocation scheme, which is expected to be voted on 8 November. Both referendum and proposal have been seen by critics<sup>307</sup> across Europe as a move by which Viktor Orban is trying to symbolically defy not only the EU’s refugee sharing scheme, but the EU’s role as opposed to that of nation states and to promote its own ‘illiberal state’ model as opposed to the one professed by the EU and founded on the values enshrined in Article 2 TEU.

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307. See *inter alia*, The Guardian, Hungary’s refugee referendum not valid as voters stay away, 2 October 2016, <https://www.theguardian.com/world/2016/oct/02/hungarian-vote-on-refugees-will-not-take-place-suggest-first-poll-results>; Scott N. Romaniuk and Benoît Masset, Hungarians caught between National Referendum and European Union Migrant Quotas, The Budapest Times, 21 September 2016, <http://budapesttimes.hu/2016/09/21/hungarians-caught-between-national-referendum-and-european-union-migrant-quotas/>.

## 4. The Hungarian situation in the light of international standards on the Rule of Law

This analytical report enables us to draw conclusions regarding the current nature of the Hungarian State, member of the European Union (EU). This State's membership to the EU is contingent upon respect for a certain number of common principles, on which the Union is based: "*principles of respect for human dignity, freedom, democracy, equality, the rule of law as well as respect for human rights, including the rights of persons belonging to minorities*" (Article 2 of the Treaty on European Union (TEU)). Compliance with these principles, particularly respect for democracy, the rule of law and human rights, is a prerequisite for candidate countries wanting to accede to the European Union. These principles are also the three pillars of the Council of Europe. There is no point in wondering whether Hungary is becoming a dictatorship or where it stands on the path from democracy to authoritarianism. The dictatorial regime known to the Hungarian people in recent history was of another kind, and no one would venture to qualify the current State as such. Moreover, such a qualification does not hold any value in and of itself. Yet, the State's drift towards authoritarianism has been pointed out on many occasions and comparisons have been made with certain regimes, such as the Russian or Turkish regime, whose authoritarian tendencies have often been condemned by human rights non-governmental organizations, as well as intergovernmental organizations.

Prime Minister Orbán's intention to establish an "*illiberal democracy*," as significant as it may be, must be nevertheless deconstructed based on more objective criteria to determine whether Hungary is still meeting its international commitments, namely vis-à-vis the EU with regard to the common principles which constitute its founding values.

The EU has a number, albeit limited, of monitoring mechanisms enabling it to respond to violations of European Union (EU) law in Member States, including the EU's founding values as enshrined in Article 2 TEU and the Charter of Fundamental Rights of the European Union, now recognized as part of the Treaties (Article 6 (1) TEU). Among these mechanisms: Article 7 TEU<sup>308</sup>, often considered a "nuclear weapon," which can be used in situations where there is a "*clear risk of a serious breach by a Member State of the values referred to in Article 2*" (Article 7 (1) TEU) or "*a serious and persistent breach by a Member State of the values referred to in Article 2*" (Article 7(2) TEU) and whose scope of application is not limited to situations covered by EU law; infringement procedures, which enable the EU to react to specific violations of EU law according to the procedure provided for in Article 258 TEU ;<sup>309</sup> and the more recently adopted new EU framework to strengthen the rule of Law (hereinafter « Rule of Law Framework »), designed to « *ensure an effective and coherent protection of the rule of law* » by making it possible to « *address and resolve a situation where there is a systemic*

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308. European Commission, *Communication of the Commission to the Council and to the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, COM(2003) 606 final, 15 October 2003 <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>

309. This legal limitation, which confines the possibility of the EU to react to violations of European law, including the Charter of Fundamental Rights of the European Union, which are not violations of one or several specific provisions of EU law, is contained in Article 51 of the Charter of Fundamental Rights of the European Union. Pursuant to this provision, and according to the interpretation given by the Commission itself in its Communication „*Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*”, COM(2010) 573 final, 19 October 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF> the Charter only applies to members « when they implement Union law » and the Commission can only react to violations of rights protected by the Charter in member States in these situations. That interpretation has been confirmed by the Court of Justice of the European Union (CJEU) for example in *Kreshnik Ymeraga and other vs. Minister of Labour, Employment and Immigration*, case C-87/12, judgment of the Court (second chamber) 8 May 2013 and in *Thomas Pringle vs. Government of Ireland, Ireland et The Attorney General*, case C-370/12, judgment of the Court (plenary assembly) of 27 November 2012.

*threat to the rule of law.*»<sup>310</sup> If the Rule of Law was to be threatened, the EU reaction would be justified, by activating one of the aforementioned mechanisms, depending on whether the threat takes the form of a violation of a specific provision of EU law, or a concerning situation « *which fall outside the scope of the EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law*»<sup>311</sup> or even a « *future threat[s] to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.* »<sup>312</sup> Use of one of these mechanisms does not preclude activating the others, in parallel (i.e. in situations falling under EU law that, together, also represent a systemic threat to the rule of law) or successively (i.e. in situations which can be addressed by the rule of law framework, whose last stage can be activation of Article 7 TEU). These mechanisms are therefore complementary. Their purpose is not to replace, but rather complete other existing mechanisms, such as those at the Council of Europe, to protect the rule of law.

<b>INFRINGEMENT PROCEDURE (ART 258 TFEU*)</b>	
<b>WHO ?</b>	<b>European Commission</b> , on its own initiative or based on complaints lodged by citizens, corporations and non-governmental organization, petitions and questions by the European Parliament or non-communication of the transposition of Directives by the Member States
<b>WHEN ?</b>	If the European Commission considers that a Member State has failed to fulfill an obligation under the Treaties.
<b>HOW ?</b>	<p><b>1)</b> The European Commission sends a <b>letter of formal notice</b> (Lfn) to the concerned Member State inviting it to submit its observations on the question raised therein within two months.</p> <p><b>2)</b> If the Member State fails to reply or the reply is not satisfactory, the European Commission issues a <b>reasoned opinion</b>, allowing the Member State an additional two-month period within which to comply with recommendations.</p> <p><b>3) If the Member State fails to comply with the Commission's recommendations, the Commission can take the case to the Court of Justice of the European Union (CJEU),</b> whose judgment is binding.</p> <p>If the Member State fails to comply with the Court's judgment, the Commission may, after sending a further letter of formal notice and reasoned opinion, bring the matter before the CJEU a second time, seeking the imposition of a penalty payment under Article 260 of the TFEU.</p>

\* Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C326/27, available at: [http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF)

310. Communication of the Commission to the European Parliament and Council, *A new EU framework to strengthen the rule of law*, COM(2014) 158 final/2 p.3, 19 March 2014 available at :[http://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0011.01/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0011.01/DOC_1&format=PDF), and annexes: [http://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0011.01/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0011.01/DOC_2&format=PDF); See also the State of the Union address 2013 of the previous President of the European Commission José Manuel Barroso, 11 September 2013 available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm)

311. Communication of the Commission to the European Parliament and Council, *A new EU framework to strengthen the rule of law*, COM(2014) 158 final/2 *Ibid.*, p. 5.

312. *Ibid.*, p. 3.

The EU Framework to strengthen the rule of law*		
WHO ?	European Commission	
WHEN ?	<p>« In situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to <b>systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.</b> »</p> <p><b>“The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met”.</b></p>	
HOW ?	<b>European Commission's assessment</b>	The Commission collects and examines all the relevant information and assesses whether there are <b>clear indications of a systemic threat to the rule of law</b> . If this is the case, it initiates a dialogue with the Member State concerned, by sending a <b>“rule of law opinion”</b> and substantiating its concerns.
	<b>European Commission's recommendation</b>	If the Commission finds that there is <b>objective evidence of a systemic threat and that the authorities of the Member State concerned are not taking appropriate action to redress it</b> , the Commission issues a <b>“rule of law recommendation”</b> , recommending that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect.
	<b>Follow-up to the recommendation</b>	If there is <b>no satisfactory follow-up to the recommendation</b> by the Member State concerned within the time limit set, the Commission assesses the possibility of activating one of the mechanisms set out in <b>Article 7 TEU</b> .

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

ART 7 TEU (Treaty on the European Union)		
	Preventive mechanism	Sanctioning mechanism
WHO ?	The <b>Council</b> , acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, <b>on a reasoned proposal by one third of the Member States</b> , the <b>European Parliament</b> or the <b>European Commission</b> .	<b>1st step (Article 7 TEU, para. 2)</b> - The <b>European Council</b> , acting by unanimity <b>on a proposal by one third of the Member States</b> or by the <b>Commission</b> and after obtaining the consent of the European Parliament; <b>2nd step (Article 7 TEU, para. 3)</b> - The <b>Council</b> , acting by a qualified majority**; <b>3rd step (Article 7 TEU, para. 4)</b> – The <b>Council</b> , acting by a qualified majority**.
WHEN ?	When there is a <b>clear risk of a serious breach</b> by a Member State <b>of the values referred to in Article 2*</b>	When there exists a <b>serious and persistent breach</b> by a Member State <b>of the values referred to in Article 2</b> .
HOW ?	The Council hears the Member State in question and may address recommendations to it, in accordance with the same procedure, in order to determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.	<b>1st step (Article 7 TEU, para. 2)</b> - The European Council determines the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations; <b>2nd step (Article 7 TEU, para. 3)</b> - The Council may decide to <b>suspend certain of the rights deriving from the application of the Treaties</b> to the Member State in question, <b>including the voting rights</b> of the representative of the government of that Member State in the Council**; <b>3rd step (Article 7 TEU, para. 4)</b> - The Council may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed***.

\*Art 2 TEU : *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

\*\*The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union' (Article 7, para. 5 TEU). Article 354 TFEU provides that : 'For the purposes of Article 7 of the Treaty on the suspension of certain rights resulting from Union membership, **the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article.**

\*\*\* Article 354 TFEU : *'For the adoption of the decisions referred to in paragraphs 3 and 4 of Article 7 of the Treaty on European Union, a qualified majority shall be defined in accordance with Article 238 (3) (b) of this Treaty'.*

To conclude that there have been violations of the principles of the rule of law in Hungary, FIDH based itself on the criteria set by the Venice Commission of the Council of Europe to define the rule of law.<sup>313</sup> In this document, which also serves as a reference for the EU within its Framework to strengthen the Rule of Law, the Venice Commission (hereinafter « the Commission ») defines the criteria based on which compliance with European standards on the rule of law in Council of Europe countries should be assessed .

The Commission defines the rule of law based on Tom Bingham's works<sup>314</sup>.

Tom Bingham covers most appropriately the essential elements of the rule of law : '*all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*'.

This short definition, which applies to both public and private bodies, is expanded by eight "ingredients" of the rule of law. These include: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law<sup>315</sup>.

The Commission affirms that there is consensus on the conclusion that the following characteristics are necessary:

- (1) Legality, including a transparent, accountable and democratic process for enacting law
- (2) Legal certainty
- (3) Prohibition of arbitrariness
- (4) Access to justice before independent and impartial courts, including judicial review of administrative acts
- (5) Respect for human rights
- (6) Non-discrimination and equality before the law.<sup>316</sup>

In order to assess the rule of law situation in Hungary, FIDH referred to these criteria as interpreted by the Venice Commission. These criteria largely reflect those used by the European Commission in the annex to its Framework to strengthen the Rule of Law and based on which the Commission should assess whether there exists a systemic threat to the rule of law in a Member State of the European Union which would require that the mechanism be activated. FIDH will briefly describe the situation based on the analysis made in the previous chapters; these should be referred to for references to relevant laws, decisions and opinions from different bodies having already condemned the practices reported.

- (1) Legality (supremacy of the law) and (2) legal certainty

*'It first implies that the law must be followed. This requirement applies not only to individuals, but also to authorities, public and private. In so far as legality addresses the actions of public officials, it requires*

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313. European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), 4 April 2011 : <http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD%282011%29003rev-e&lang=fr>, its reading could be completed by European Commission for Democracy Through Law (Venice Commission), *The Rule of Law checklist*, Adopted by the Venice Commission at its 106th Plenary Session, (Venice, 11-12 March 2016), March 2016 : [http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf)

314. Tom Bingham, *The Rule of Law*, 2010.

315. *Ibid.*, p . 9.

316. *Ibid.*, p . 10.

also that they require authorization to act and that they act within the powers that have been conferred upon them. Legality also implies that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity. Law should, within the bounds of possibility, be enforced<sup>317</sup>.

[...]

The principle of legal certainty is essential to the confidence in the judicial system and the rule of law. To achieve this confidence, the state must make the text of the law easily accessible. It has also a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct.

The need for certainty does not mean that discretionary power should not be conferred on a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.

Legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. Retroactivity also goes against the principle of legal certainty, at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behavior; but also in civil and administrative law to the extent it negatively affects rights and legal interests. In addition, legal certainty requires respect for the principle of *res judicata*. Final judgments by domestic courts should not be called into question. It also requires that final court judgments be enforced. [...]

In addition, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual vis-à-vis the state and its organs and agents. [...]

The existence of conflicting decisions within a supreme or constitutional court may be contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence of their case law.

Legal certainty – and supremacy of the law – imply that the law is implemented in practice. This means also that it is implementable. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking a posteriori whether it may effectively be applied is very important. This means that *ex ante* and *ex post* legislative evaluation has to be considered when addressing the issue of the rule of law.<sup>318</sup>

Legal certainty has been seriously undermined by the successive constitutional revisions (five revisions in two years following the adoption of the new constitution (the Fundamental Law) in April 2011, a last one more recently in June 2016 and one under discussion). The supreme law can therefore not be considered stable and increasingly resembles a tool that makes it possible to consolidate those in power (the Venice Commission has already expressed criticism of this manipulation of the Fundamental Law by the authorities). Moreover, the amendments have enabled it to raise to the constitutional level elements of legislation that should not figure therein, and that had previously been the subject of ordinary laws annulled by the Constitutional Court. To avoid such «setbacks» those in power with their two-thirds majority, integrated provisions into the Fundamental Law which can no longer be modified, unless an alternative two-thirds majority can be reached (which is highly unlikely). Moreover, by doing this, the authorities escape monitoring by the Constitutional Court: although it can pronounce itself on the compliance of laws with the Fundamental Law, it cannot do so on the compliance of the Fundamental Law itself. At most, this

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317. *Ibid.*, p. 10.

318. *Ibid.*, pp. 10-11.

court can rule on the procedure, but not on the merits of the amendments to the Fundamental Law (Fourth Amendment). That is how restrictions on fundamental rights have been introduced by amendments to the Fundamental Law : restriction of freedom of expression, namely in criticism of the Hungarian nation or a national, ethnic, racial or religious community (Art. IX (5)); discrimination against LGBTI persons, excluded from all possibility of having a family in light of the constitutional definition of the family (Art. L (1)); criminalization of homelessness (Art. XXII (3)); restriction of freedom of religion and belief by a new procedure of recognition of churches (Fourth Amendment); restriction of the autonomy of universities (Fourth Amendment). By doing this, the authorities are giving themselves the right to overturn decisions using laws previously judged unconstitutional but now covered by the strength of the constitution (the Fundamental Law).

Furthermore, by repealing the decisions adopted by the Constitutional Court prior to the entry into force of the Fundamental Law, the Fourth Amendment made recourse to these decisions by the Constitutional Court and by ordinary courts more difficult. Although the Constitutional Court did continue to refer to its earlier case-law in practice, this provision “*unnecessarily interrupts the continuity of the Court’s case-law*”<sup>319</sup> and damages its consistency, while undermining the principle of foreseeability and of *res judicata*. By giving the Constitutional Court the possibility to distance itself from important principles established by the Court itself over the past two decades without having to provide reasons, it may also lower the level of protection accorded to fundamental rights.

The laws passed in the last six years in all fields that we analyzed were often qualified as inaccurate, ambiguous and not foreseeable, and that runs counter to the principle of legal certainty as interpreted by the Venice Commission and the Court of Justice of the European Union.<sup>320</sup>

The procedure for adopting legislation, from the Fundamental Law to organic and ordinary laws, has been characterized by procedures that are often accelerated, without adequate parliamentary debate and by circumventing rules which require consultation with stakeholders and a public debate on the legislative proposals, all of which are elements necessary to ensure a democratic, transparent and accountable legislative process.

Finally, taking decisions applied retroactively violates the principle of legality and legal certainty. Thus, the lowering of the retirement age of judges, some of whom held high-level functions in the judiciary – a move condemned by the Court of Justice of the European Union (CJEU) and scrutinized by the European Court of Human Rights (ECHR) was applied retroactively. Even after the CJEU’s ruling, which condemned Hungary for incompatibility of the Hungarian legislation on the retirement age of judges, prosecutors and notaries with EU law, it was not possible to reinstate the rights of all affected people, which violates the right to an effective remedy. The dismissal of the President of the Supreme Court, Andras Baka, was justified by the change to eligibility requirements for the post, a change also brought about by entrenching it into the Fundamental Law (a decision which, henceforth, cannot be legally challenged, in violation of the right to effective remedy, as pointed out also by the European Court of Human Rights).

### (3) Prohibition of arbitrariness

*Although discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, such power should not be exercised in a way that is arbitrary. Such exercise of power*

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319. European Commission for Democracy through Law (Venice Commission), *Opinion N° 720/2013 on the Fourth Amendment of the Constitution of Hungary*, 17 June 2013, p. 32, § 144.

320. Court of Justice of the European Union, Joined cases 212-217/80, *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others*[1981] *ECR* 1981 -02735§. 10.



*permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law.*<sup>321</sup>

To avoid arbitrariness, the principle of monitoring powers by other powers is an essential component of the rule of law, something that goes back to the principle of separation of powers.

The current government has changed the constitution many times. Whereas the constitution is the founding text of a country that must reflect the values of the entire population and therefore not be partisan, the drafting of the text and its rapid vote, as well as the successive modifications, did not leave sufficient room for democratic debate among parties, nor with civil society, whose voice went unheard. The ruling party proposed a text, which suited its purposes, put it to a vote and adopted it without the least concern for the legitimate consensus required for such a text. Next, the authorities attacked the highest monitoring body: the Constitutional Court. They changed its composition, from 11 to 15 judges with an extended term (from 9 to 12 years), while modifying the procedure for the selection of new judges, which is no longer done in a pluralist manner by a commission composed of a member of each party represented in Parliament, but rather by a commission composed proportionally to parliamentary representation, which ensures the appointment to the Constitutional Court of a judge approved by the majority. Thus, the ruling coalition ensures the servility of the majority of judges. Similarly, the President of the Court is not elected by his peers, but by Parliament, flouting its fundamental requirement of independence. Reshaping, by legal means, a monitoring institution to render it incapable of interfering in the plans of those in power is a blatant violation of the principle of separation of powers which is, in turn, an essential component of the rule of law. Moreover, the prerogatives of this court have been curtailed. Besides the limitation of the constitutional review to procedural matters mentioned in the previous paragraph, this control is limited by the Fundamental Law, for laws relating to the budget, to checking whether they would be in violation of the right to life or human dignity, the right to protection of personal data, the right to freedom of religion and belief and the right to citizenship. Therefore, other fundamental rights such as the right to a fair trial or the right not to be discriminated against are not covered. The new design of the court advantageous for the ruling party, the limitation of its power to intervene, and repeal of its earlier case-law are all signs that the constitutional monitoring of the government can no longer be carried out independently and that the rule of law is in danger.

The judiciary has also seen its power reduced and encouraged to toe the line of the ruling party. The President of the Supreme Court (now called *Kuria*), Andras Baka, was removed from office before the end of his term, following changes to the conditions of eligibility for the post. Forcing experienced judges into early retirement led to a redrawing of the map of the judiciary, with new judges to be appointed, decisions condemned by the Court of Justice of the EU and under scrutiny by the European Court of Human Rights. The procedure of appointing new judges was also modified. Today, and despite changes that have decreased his/her powers in some respects, these remain concentrated mainly in the hands of the President of the National Judicial Office (NJO), who is appointed by the Parliament, whereas the National Judicial Council has "*scarcely any significant powers*"<sup>322</sup> in the administration of the judiciary and is subjected to the NJO which is the real master of appointments, promotions, transfers or resignation, assigning or reassigning of judges. Its allegiance to Parliament, and therefore to the majority, renders illusory the principles of independence and impartiality of the judiciary, regardless of its independence and impartiality

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321. *Ibid.*, p. 11.

322. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary*, *ibid.*, p. 15, § 50.

in practice, and of the separation of powers which is, in itself, an essential condition for the right to an effective remedy.

The government has also redrawn the political map and reduced the power of Parliament by ensuring that a Parliamentary majority in line with its thinking gets elected easily. The introduction in 2011 of a law changing constituencies through an organic law (only modifiable with a two-thirds majority), shows once again how the authorities are redrawing the landscape as they see fit, favoring regions where they have a majority. Just as the Fundamental Law contains elements that would be difficult to modify without an alternative two-thirds majority, the use of so-called organic laws has the same effect. Should there be a political changeover, the possibility of obtaining such a majority to unpick the infringements to the rule of law and to the fundamental rights enshrined in the Fundamental Law or in the organic laws, seems illusory. After adoption of this law, Parliamentary representation was significantly changed: as a reminder, during the 2010 elections, the national Fidesz-KDNP list obtained 53% of votes and the coalition won 68% of seats in Parliament, while in 2014 the list obtained 45% of votes and won 67% of Parliamentary mandates.

Furthermore, the ban for political parties on paid political advertisement on both public and private media, resulting in commercial media resulting in commercial media outlets only being able to broadcast political ads for free, only leaves in practice political advertising to public media, which are controlled by the authorities. That undermines the principle of equality of arms required in a democracy.

Apart from the judiciary and the legislative powers, the authorities have also attacked the media and civil society or churches. As regards the media, the concentration of public media and the creation of new bodies, the Media Council and the Media Authority, with sweeping powers over public and private media is questionable. The Council has all the power to assess and regulate content and TV shows, and is responsible for ensuring compliance with the law. It is also responsible for issuing licenses for analog radio and TV stations. The independence of these two bodies is highly questionable given that their heads are supported by the ruling party. In addition, by distributing governmental advertising budgets to public TV stations and with the establishment of advertising revenue taxes affecting exclusively *RTL Klub*, the only independent TV station and one relatively critical of the authorities, the government is engaging in intimidation through financial blackmail and is jeopardizing press freedom. Such financial intimidation leads to self-censorship and limitations on freedom of expression.

The same intimidation is underway with regard to civil society, when, in keeping with a practice common in countries with a poor record of respect for the rule of law, the government decides to attack critical NGOs that receive funding from abroad by conducting smear campaigns, going as far as administrative and judicial proceedings against them. Blackmail through threats of suspension of their tax number is a type of intimidation which can also be damaging to small civil society organizations and prevents them from acting for the benefit of the community and acting as watchdog for the respect of democratic standards and human rights vis-à-vis the executive. Harassment endured by civil society organizations has been carried out with no solid legal basis and without being justified by reasons established by law, which makes the exercising of power by the authorities within this framework arbitrary.<sup>323</sup>

Churches have also seen their recognition and their status called into question by the law. The Venice Commission has already criticized the procedure, but the situation remains extremely problematic. It constitutes a flagrant violation of freedom of religion and belief and of the principle

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323. See, for example, the interpretation of the principle of the prohibition of arbitrariness provided by the CJEU in the joint cases 46/87 and 227/88 *Hoescht vs. Commission* [1989] ECR 1989 -02859, §19.

of non-discrimination among religious confessions and cults. The use of religion as a weapon or means of intimidation works well in States where religion is important. It is interesting to see this same tool used in a highly secularized society where religion occupies a very small place. What we observe here is that anything even remotely resembling checks and balances must be controlled and subjugated, if need be, using intimidation tactics that are sometimes illegal and incompatible with the principle of legality.

#### (4) Access to Justice before independent and impartial courts

*'Everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law. Normally these challenges should be made to courts of law.*

*The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.*

*The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation. Impartial means that the judiciary is not – even in appearance – prejudiced as to the outcome of the case.*

*There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognized, organized and independent legal profession, which is legally empowered, willing and de facto able to provide legal service. As justice should be affordable, legal aid should be provided where necessary.*

*Moreover, there must be an agency or organization, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts. Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of res judicata).<sup>324</sup>*

The impossibility of legally challenging infringements of fundamental rights has been orchestrated by the State by constitutionalizing many matters (related to e.g. the family, the recognition of churches, access of political parties to the media, criminalization of homelessness), which, as a consequence, can no longer be legally challenged, even before the Constitutional Court (see above, the limitations on the power of the Constitutional Court). Likewise, the dismissal of the President of the Supreme Court due to a change in the Fundamental Law, just as the dismissal of civil servants, without mandatory justification, makes any legal remedy extremely difficult, if not impossible.

The judiciary has been restructured in a way that – while it cannot be concluded that it has been subjugated by the executive branch, as the judiciary has shown a degree of professionalism in recent years – leaves it at the mercy of the executive. Although the judicial system theoretically remains independent in carrying out its functions, the reorganization of the court system, the replacement of a large number of senior judges by new judges appointed by the President of the National Judicial Office, a body whose independence from the executive is questionable to say the least and whose extensive powers make it the main organ responsible for the process of appointments, promotions, transfers and dismissal of judges, renders these guarantees of independence and impartiality weak, if not illusory.

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324. *Ibid.*, pp. 11-12.

Implementation of judicial decisions and compliance with the principle of *res judicata* have been called into question by the reforms aimed at repealing the Constitutional Court's case-law elaborated prior to the entry into force of the Fundamental Law, thus unnecessarily interrupting the continuity of the Court's jurisprudence and making it more difficult for the Constitutional Court and other courts to refer to it (Fourth Amendment), as well as through the often observed failure to execute judgments of the Constitutional Court and of regional rights protection mechanisms, such as the European Court of Human Rights and Court of Justice of the European Union.

The State thus organizes its own impunity by preventing any recourse against its actions.

#### (5) Respect for human rights

*'Respect for the rule of law and respect for human rights are not necessarily synonymous. However, there is a great deal of overlap between the two concepts and many rights enshrined in documents such as the ECHR also expressly or impliedly refer to the rule of law.*

*The rights most obviously connected to the rule of law include: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy (*ne bis in idem*) (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty, and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice or due process; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognized, organized and independent legal profession, which is legally empowered, willing and de facto able to provide legal service, and the decisions of which are implemented without undue delay.*

*Most of these rights (as well as the principle of independence and impartiality of the judiciary) are enshrined in Article 6 ECHR. However, other rights may also have rule of law connotations, such as the right to expression, which permits criticism of the government of the day (Article 10 ECHR) and even rights such as the prohibition on torture or inhuman or degrading treatment or punishment (Article 3), which may be linked to the notion of a fair trial.<sup>325</sup>*

The reasoning regarding the above mentioned criteria has already shown how infringements on fundamental rights are caused by governmental policy as it constitutionalizes ordinary laws affecting them and makes it impossible for citizens to initiate legal action before the Constitutional Court against such infringements. The limitations to the power of the Constitutional Court to exercise control of constitutionality over new laws, as well as government actions that affect fundamental rights and the reintroduction of provisions in the Fundamental Law previously judged unconstitutional by the Court, considerably reduce the possibility of having access to an effective remedy against actions or laws affecting fundamental rights. The restriction, imposed on the Constitutional Court, to examine laws with budgetary implications only if they violate the right to life or to human dignity, the right to the protection of personal data, the right to freedom of religion or belief and the right to citizenship, prevents constitutional review of laws that violate other fundamental rights.

The abolition of the former Ombudsmen and their replacement by a new Commissioner for Fundamental Rights described in our analysis, has also had an impact on the level of protection of fundamental rights, a criticism also expressed by the United Nations Special Rapporteur on the Situation of Human Rights Defenders subsequent to his visit to Hungary in February 2016.

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325. *Ibid.*, pp. 12-13.

We will not elaborate again the list of violations, namely regarding independence of the judiciary, which is an essential component of the right to a fair trial and the right to an effective remedy, as well as other fundamental rights, such as the right to freedom of expression and of information, freedom of association, freedom of religion and belief, and non-discrimination.

The right to a fair trial has been systematically violated in the context of asylum procedures and criminal proceedings in application of the new provisions that have entered into force in the past year in response to the migration crisis.

All limitations imposed by the government on the exercise of these rights and on the capacity of institutions to effectively remedy them violate international and European human rights standards and threaten the rule of law. They have been condemned on several occasions by the European Court of Human Rights.

#### (6) Non-discrimination and equality before the law

*[...] there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law.*

*Non-discrimination means that the laws refrain from discriminating against individuals or groups. Any unjustified unequal treatment under the law is prohibited and all persons have guaranteed equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*Equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges.<sup>326</sup>*

The consequence of all the violations already listed is that any person who, for whatever reason, is affected by one of them shall be considered discriminated against based on his/her belonging to a group, which is not favored by the government or which criticizes it. Yet other victims of State discrimination, inter alia, are the Roma, whose children are placed in separate schools, asylum seekers, who are subjected to a shameful policy unworthy of an EU member state. At the peak of the 2015 crisis when the Hungarian government was mired in corruption scandals that caused it to drop in the polls, it used the crisis to conceal its dubious activities and endeavored to rebuild a national majority by wielding an identity-based, nationalistic, populist, racist, xenophobic and islamophobic rhetoric. Orbán wipes the home slate clean at the expense of fundamental rights and international and European human rights law, and especially to the detriment of asylum seekers, who become scapegoats. To oppose the policy of distribution of asylum seekers at the EU level, the Hungarian government decided to organize a referendum in October 2016 on the distribution plan. In the lead up to the referendum, the government intensified its anti-migrant discourse, lumping asylum-seekers in with profiteers, criminals, rapists, terrorists.

The EU cannot just stand by helplessly when faced with such discourse and contempt for its founding principles. Opportunistic use of such rhetoric combined with a policy that contravenes international and European law in practice is gaining ground in the absence of a strong reaction by the EU, taking into account all the violations and the threat they pose to the rule of law above and beyond specific infringements of European law.

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326. *Ibid.*, p. 13.

## 5. Conclusions

In light of the above, it is clear that while each one of the violations listed in this report may not perhaps in itself constitute sufficient grounds to speak of systematic and irreversible violation of the rule of law, with the authorities frequently arguing that such and such a measure or law has been borrowed or is similar to those of other EU Member States, consideration of all these violations taken together, and the mass of resulting infringements enables us to see that in the system set up by the Hungarian authorities since 2010, lies a network of grey areas and stumbling blocks that draws an opaque picture where the principles of the rule of law seem ineffective.

This network constitutes a «*best of*» the worst practices in the field. All these violations taken together demonstrate a concerted action by the State that can only be premeditated, in order to take control systematically, with determination and to the sole advantage of the supporters of Fidesz, of the whole State apparatus, with disregard for the necessary separation of powers, with disregard for the sound organization of democratic checks and balances, including civil society, with disregard for fundamental rights and the principle of non-discrimination and in flagrant violation of the principles underpinning the rule of law.

This analysis also shows that this concerted action has led to a situation where the mechanisms which, at the national level, should guarantee respect for the rule of law, especially the constitutional and judicial system that should be serving as protection from all threats to the rule of law, are no longer able to respond to this threat effectively in Hungary.

Such systematic and concerted action cannot be merely admonished sporadically on the basis of a specific violation of a particular directive or regulation. It is crucial that the EU finally consider the violations as a whole and with what they reveal as a concerted attempt against its founding values.

If the EU truly wants to base its actions on the values enshrined in Article 2 TEU, it is important that it stops repeating a mantra and that it practices a fair, constant and regular assessment of all of its commitments, as well as those of its Member States with respect to these principles. If that were not to be the case, the EU would be practicing a policy of double standards (both internally and externally), a policy which it condemns in its relations with other partners or competitors. In order to break the gridlock, the EU must stop its inaction in recent years when it comes to ensuring respect for the rule of law and fundamental rights within its borders. Such inaction in the face of the drift observed in Hungary has opened the door to populists and nationalists in certain countries, namely the countries of the Visegrad group, especially Poland, which today is following the example of Hungary to set up a regime where – the EU recognized this when it decided to activate the Rule of Law Framework against this country – the rule of law is suffering from different types of abuse. If the EU had reacted more firmly and earlier, Poland would undoubtedly not have felt free to violate the EU's principles and its obligations under the Treaties. Today, activation of the EU framework to strengthen the rule of law against Poland, as necessary and sound as it is, comes quite late. That activation should have taken place earlier to prevent breaches of the principles of the rule of law in Hungary.

That is why FIDH recommends that the EU activates as soon as possible the first stage of the Framework against Hungary, in order to engage in a constructive but firm dialogue on its principles and on the reinstatement in this Member State of a rule of law worthy of this name. If that stage does not suffice, or if a clear risk of a violation of the values enshrined in Article 2 TEU were to be

found, directly or due to «a sudden deterioration» necessitating «a stronger reaction by the EU.»<sup>327</sup> FIDH recommends taking further steps, right up to, if need be, the activation of Article 7 TEU, with the aim to determine the existence of such a risk (Article 7 (1) TEU) or of a serious and persistent breach by Hungary of the values referred to in Article 2 (Article 7 (2) TEU). Any action undertaken pursuant to Article 7 TEU should primarily aim at ensuring compliance by the State with the values referred to in Article 2 TEU, notably with respect for democracy, the rule of law and human rights.<sup>328</sup> Activation of one or another or of all these mechanisms should be without prejudice to the activation of other mechanisms provided for in EU law to react to specific violations of European law, just like the infringement procedures provided for in Article 258 TEU. It must be complementary to and rely on other regional and international rights protection mechanisms, by coordinating with them and asking for their opinion on questions « *also under their consideration and analysis.*»<sup>329</sup>.

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327. Communication from the Commission to the European Parliament and Council, *A new EU framework to strengthen the rule of law*, COM(2014) 158 final/2, 19 March 2014 p. 7 ; see also European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, 15 Octobre 2015 COM(2015) 606 final.

328. The sanctions that the Council may decide to impose pursuant to Article 7 (3) TEU are the lever that the EU can use to push the member state into compliance with the values referred to in Article 2 TEU;

329. Communication of the Commission to the European Parliament and Council, *A new EU framework to strengthen the rule of law*, COM(2014) 158 final/2, 19 March 2014, p. 9.

## 6. Recommendations

In light of the above findings and conclusions, FIDH recommends:

### To the government of Hungary:

- To ensure full compliance with the principles of respect for democracy, the rule of law and human rights, enshrined in Article 2 of the Treaty on European Union (TEU) and recognised as the three pillars on which the Council of Europe's system for human rights protection is founded. In particular, to ensure that any institutional and legal change fully respects and does not weaken the principle of separation of powers among independent institutions and a functioning system of checks and balances, essential elements of democracy and the rule of law;
- To this end, to fully and swiftly implement the recommendations and decisions of regional and international courts and mechanisms, as well as the decisions of the Hungarian Constitutional Court in order to comply with these principles;
- In order to ensure respect for democracy, the rule of law and human rights and a functioning system of checks and balances, it urges the government in particular:

#### *On the Fundamental Law:*

- To restore the Fundamental Law's supremacy by refraining from integrating new provisions and removing those which were previously declared unconstitutional by the Constitutional Court, as recommended also by the European Parliament in its 2013 *Resolution on the situation of fundamental rights: standards and practices in Hungary*<sup>330</sup>;
- To limit the recourse to cardinal laws to legislate on matters – such as social, economic, cultural, religious or fiscal matters - which should be left to ordinary legislation, as recommended by the Venice Commission in its 2011 *Opinion on the New Constitution of Hungary*<sup>331</sup>, so as to allow for their full constitutional review and to make them accessible to future majorities;
- To ensure that any amendment to the Fundamental Law is adopted following a democratic, transparent and accountable procedure, which provides for a reasonable time for genuine political debate and reflects political and societal consensus;
- To provide for stronger guarantees for the effective protection of human rights in the Fundamental Law, as also recommended by the Venice Commission in its 2011 *Opinion*<sup>332</sup>.

#### *On the Constitutional Court:*

- To ensure that the Constitutional Court can fully exercise its role of constitutional protection and of control over the executive. To this end, to fully restore the Constitutional Court's prerogatives by removing from the Fundamental Law current limitations to the Court's power to review the constitutionality of laws;
- To repeal the provision, contained in the Fourth Amendment to the Fundamental Law, which revokes the Constitutional Court's case-law which precedes the latter's entry into force, and restore the possibility for the Constitutional Court and other courts to refer to decisions adopted prior to the entry into force of the Fundamental Law;
- To ensure full independence of Constitutional Court's judges, including by reviewing the rules

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330. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), P7\_TA(2013)0315.

331. European Commission for Democracy through Law (Venice Commission), Opinion N° 621/2011 on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session, (Venice -17-18 June 2011), 20 June 2011.

332. *Ibid.*



relating to their appointment, which currently leave their designation in the hands of the parliamentary majority, and ensuring that their election is as consensual as possible between parliamentary forces, as recommended also by the European Parliament in its 2013 Resolution<sup>333</sup>.

*On the judiciary:*

- To fully guarantee the independence of the judiciary, which is a necessary requirement of the separation of powers and an essential element of democracy and the rule of law. To this end:
- To further limit the powers granted to the President of the National Judicial Office (NJO) with respect to the administration of courts, and provide for stronger guarantees of his/her institutional independence, including by reforming the rules related to his/her appointment; to increase the prerogatives and the independence of the National Judicial Council (NJC), as an organ of judicial self-government, to ensure effective and independent democratic oversight and accountability for the President's actions in line with the recommendations made by the Venice Commission<sup>334</sup> ;
- To ensure the irremovability and security of tenure of judges, including by refraining from enacting laws which result in a premature termination of their term of office and ensure that those who had their term of office prematurely terminated have access to an effective remedy against that decision. This should include the possibility of being reinstated into the positions they held prior to the entry into force of the law or measure which arbitrarily removed them.

*On the electoral reforms:*

- To ensure that any change in the electoral laws and any redrawing of the electoral districts is adopted in consultation with the opposition and does not disproportionately favour the ruling party;
- To ensure that all political parties can campaign for elections on equal conditions, including by amending the rules providing that political advertisement in public and private broadcast media during electoral campaign should be free and those regarding the use of billboards, which unduly benefit the ruling coalition, as indicated also by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE)<sup>335</sup>.

*On media:*

- To protect freedom of expression as one of the main conditions of a functioning democracy, as recommended also by the European Parliament in its 2013 *Resolution on the situation of fundamental rights: standards and practices in Hungary*<sup>336</sup>;
- To further amend the media laws to address the remaining concerns of the Venice Commission as expressed in its 2015 *Opinion on Media Legislation of Hungary*<sup>337</sup> and repeal the provisions which threaten media freedom, independence and pluralism. In particular:
- To repeal the provision on balanced coverage, prescribing which content should be provided by media outlets, including for broadcast media;
- To ensure that any content restrictions imposed on media, be it linear, printed or on-

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333. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, *ibid*.

334. European Commission for Democracy through Law (Venice Commission), Opinion N°663/2012 on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organisation and administration of the Courts in Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), 19 March 2012.

335. OSCE/ODIHR, Hungary Parliamentary Elections, 6 April 2014, Limited Election Observation Mission Final Report, 11 July 2014.

336. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, *ibid*.

337. European Commission for Democracy through Law (Venice Commission), Opinion N° 798/2015 on Media Legislation (Act CLXXXV on media services and on the mass media, Act CIV on the freedom of the press and the legislation on taxation of advertisement revenues of mass media) of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), 22 June 2015.

line media, and any consequent limitation to the right to freedom of expression, and the sanctions attached to them, are sufficiently precise, accessible and foreseeable, in order to ensure that they do not have a chilling effect on media. Sanctions should be proportionate to the aim they intend to achieve;

- To limit registration requirements to broadcast media, while removing the obligation to register for print and on-line media so as to not unduly restrict freedom of expression and hinder pluralism, as requested by the Council of Europe and the OSCE;
- To ensure the National Media and Infocommunications Authority's independence, neutrality and diversity in law and in practice, by reforming the rules related to its appointment, composition and tenure. To reduce the powers granted to it – particularly appointment, licensing and sanctioning powers - and ensure full review of its decisions before an independent and impartial court in order to ensure people's right to an effective remedy against decisions affecting them;
- To decriminalise defamation, as recommended by the Commissioner for Human Rights of the Council of Europe<sup>338</sup> and the OSCE, or at minimum restrict their scope and ease the sanctions attached to them to ensure they are proportionate to the harm caused;
- To reform the rules regarding confidentiality of sources, in order to make them sufficiently precise, accessible and foreseeable, and to extend their scope to protect independent journalists;
- To ensure a pluralistic, free and independent media market, including by: reintroducing the provision, contained in the former Constitution, imposing an obligation on the State to prevent information monopoly by a legislative act; loosening control over public media and providing for sufficient guarantees of its independence and pluralism; ensuring access for all media outlets to the media market on equal conditions through licensing and other authorising procedures; distributing State advertising fairly and neutrally among media outlets, both public and private; and refraining from introducing and repealing taxes on media advertising revenues that disproportionately affect certain media outlets;
- To refrain from exercising any pressure, direct or indirect, on media, and from developing or supporting any mechanism that would threaten media freedom and editorial independence, as recommended also by the European Parliament<sup>339</sup>.

#### *On Freedom of Information:*

- To guarantee the right to access information and ensure that any restriction to this right is consistent with international and European standards, requesting that any limitation be sufficiently precise, accessible, foreseeable and proportionate. In particular, to limit the authorities' discretion in deciding over access to information requests and ensure free access to public information, as recommended by the Venice Commission in its 2012 Opinion<sup>340</sup>;
- To provide for sufficient guarantees of independence of the newly established National Authority for Data Protection and Freedom of Information, including by amending the rules related to its appointment and dismissal which are not consistent with international standards requiring that data protection regulatory bodies be independent from any external influence, direct or indirect, and are protected against removal, as recalled also by the Court of Justice of the European Union in its 2014 decision<sup>341</sup>; to promptly and fully implement the CJEU's ruling.

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338. Report by Nils Muznieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, CommDH(2014)21, Strasbourg, 16 December 2014.

339. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (*pursuant to the European Parliament resolution of 16 February 2012*) (2012/2130(INI)), P7\_TA(2013)0315.

340. European Commission for Democracy through Law (Venice Commission), Opinion on Act CXII of 2011 on Informational Self-Determination and Freedom of Information of Hungary, adopted by the Venice Commission at its 92nd Plenary Session (12-13 October 2012), 18 October 2012.

341. CJEU, *Commission v. Hungary*, Case C-288/12, 8 April 2014.

*On civil society:*

- To ensure an enabling legal, institutional and administrative environment for civil society, which acknowledges the fundamental role that civil society organisations play in protecting democracy, the rule of law and human rights and ensuring democratic oversight over government's actions, and ensures their protection;
- To this end, to ensure that the registration process for NGOs is simple, non-onerous and expeditious and to refrain from adopting laws requesting already registered NGOs to re-register as recommended by the United Nations Special Rapporteur on the situation of human rights defenders following his visit to Hungary in February 2016<sup>342</sup>;
- To ensure free and non-politicised access to funding, including EU funding, for NGOs, refrain from imposing and lift any restriction that would hinder access to such funding;
- To refrain from issuing statements and running public campaigns targeting civil society organisations and attempting at delegitimising them through an hostile rhetoric or by associating them to political interests or groups; address any attempt to stigmatise human rights defenders, whether by public officials or non-State actors, as recommended also by the United Nations Special Rapporteur on the situation of human rights defenders in February 2016;
- To immediately halt attacks against NGOs, such as politically motivated audits, administrative and criminal investigations and procedures, tax numbers' suspension and arbitrary inspections, which significantly hinder the possibility for NGOs to conduct their activities and contribute to generating an intimidating climate for NGOs, and ensure that any measure, audit or investigation has a clear legal basis and provides for adequate safeguards of independence and impartiality;
- To recognise and guarantee the right to peaceful assembly and association, which includes the ability for civil society organisations to access funding and other resources from domestic, foreign and international sources, and to refrain from enacting any measure aimed at tightening government control on foreign-funded NGOs;
- To conduct a regular and constructive dialogue with NGOs, including by holding consultations with civil society organisations over proposed legislation and seeking their expertise on matters which fall within their mandate;
- To strengthen the newly established Commissioner for Fundamental Rights's independence, by amending the rules relating to its appointment, and to reinforce its role by giving it sufficient resources which would enable it to carry out his mandate effectively and by ensuring that his recommendations are adequately implemented, as recommended also by the United Nations Special Rapporteur on the situation of human rights defenders following his visit to Hungary in February 2016.

*On freedom of religion and belief and recognition of churches:*

- To ensure that, when exercising its regulatory powers regarding church status and religious activities, the State remains neutral and impartial and does not discriminate against certain religious beliefs and communities, as recommended by the Venice Commission<sup>343</sup> and the European Court of Human Rights<sup>344</sup>;
- To promptly and fully implement the ECtHR's decision in *Magyar Keresztény Menonita Egyház*

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342. Office of the United Nations High Commissioner for Human Rights, End of Mission Statement by the Special Rapporteur on the situation of human rights defenders, Visit to Hungary, 8-16 February 2016.

343. European Commission for Democracy through Law (Venice Commission), *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, adopted by the Venice Commission at its 90th plenary session (Venice, 16-17 March 2012), Strasbourg, 19 March 2012.

344. European Court of Human Rights, *Magyar Keresztény Menonita Egyház and Others v. Hungary*, Applications N° 70945/11, 26998/12, 41155/12, 41553/12, 54977/12 and 56581/12, 8 April 2014.

*and Others v. Hungary*<sup>345</sup>, by ensuring that all those who have been affected by the provisions ruled incompatible with European standards obtain redress, notably compensation and their status' restoration.

*On asylum and migration:*

- To ensure that asylum-seekers seeking refuge can have access to international protection in Hungary. To this end, ensure that they have access to a fair and effective asylum procedure, including an individualised assessment of the merits of their claim and adequate procedural safeguards in line with international and European standards. These guarantees should apply also to accelerated procedures conducted at the border and in application of the 'safe third country' concept;
- To repeal the list of 'safe countries' as it is contrary to international law;
- To instruct police and military forces to refrain from violence when conducting operations at the border; in cases when it might be necessary in order to stop or prevent crime, to exercise restraint and use force only as far as it is proportionate to the aim it intends to achieve. Any incidents must be promptly, impartially and thoroughly investigated and perpetrators must be brought to justice;
- To repeal amendments allowing for summary expulsions of migrants and asylum-seekers from Hungarian territory and to promptly, impartially and thoroughly investigate any allegation of refoulement, as recommended also by the United Nations High Commissioner for Refugees in July 2016<sup>346</sup>;
- To decriminalise irregular entry and facilitation to irregular entry in Hungary;
- To refrain from running political and information campaigns which stigmatise migrants and associate them with security threats, and instead contribute to fighting intolerance and xenophobia in Hungary.

*On procedural aspects:*

- To ensure the any legislative process is conducted in a democratic, transparent and accountable manner, which provides for a reasonable time for genuine political debate between parliamentary forces and ensures stakeholder participation.

**To the European Union institutions:**

- To use all necessary means to ensure full compliance by Hungary with its obligations under European Union law, particularly with the EU's founding values of respect for democracy, the rule of law and human rights, as enshrined in Article 2 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union, as well as in the European Convention on Human Rights to which every member state is a signatory and to which the EU shall accede;
- To closely cooperate with one another as well as with other international organisations, particularly the Council of Europe and its Venice Commission, and civil society, in monitoring observance and ensuring full compliance by Hungary with such obligations.

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345. European Court of Human Rights, *Magyar Keresztény Menonita Egyház and Others v. Hungary*, Applications N° 70945/11, 26998/12, 41155/12, 41553/12, 54977/12 and 56581/12, 8 April 2014.

346. United Nations High Commissioner for Refugees, Hungary: UNHCR concerned about new restrictive law, increased report of violence and a deterioration of the situation at border with Serbia, 15 July 2016.

FIDH recommends in particular:

### To the European Commission:

- To continue monitoring the situation in Hungary, with a view to assessing the impact that institutional and legal developments over the past six years and especially their combined effect had on the respect for democracy, the rule of law and human rights, and take action as appropriate;
- To launch investigations and initiate infringement proceedings whenever it considers that a member state has failed to fulfil an obligation under the Treaties, including the Charter of Fundamental Rights of the European Union. In particular, to conclude the infringement proceeding initiated against Hungary concerning its asylum law and ensure full compliance by Hungary with European Union law;
- To activate the first stage of the EU Framework to strengthen the Rule of Law and initiate a structured dialogue with Hungary in order to assess the emergence of a systemic threat to the rule of law in this member state, which could develop into a clear risk of a serious breach of the values referred to in Article 2 TEU, as repeatedly requested by the European Parliament, most recently in its 2015 Resolutions on the Situation in Hungary<sup>347</sup>;
- In light of the evidence of a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, or following the Commission's assessment and structured exchange with Hungary within the EU Framework to strengthen the Rule of Law, which leads the Commission to conclude that there is a systemic threat to the rule of law in this member state and that the Hungarian authorities are not taking appropriate action to redress it, to submit a reasoned proposal to the European Council to activate the mechanism provided for under Article 7 (1) TEU;
- To act upon the European Parliament's recommendation, as expressed in its October 2016 *Resolution on an EU mechanism on democracy, the rule of law and fundamental rights*<sup>348</sup>, to establish a new mechanism which would integrate and complement existing ones to assess and ensure compliance by member states with the values enshrined in Article 2 TEU and close existing gaps, by submitting, by September 2017, a proposal for the conclusion of a Union Pact for democracy, the rule of law and fundamental rights;
- To closely monitor the use of EU funds in Hungary, so as to guarantee transparency and accountability and ensure that they are not used to directly or indirectly violate human rights or otherwise undermine democratic standards and the rule of law.

### To the European Parliament:

- To follow-up on its previous work and on its calls, as expressed in particular in its Resolutions adopted in 2011<sup>349</sup>, 2012<sup>350</sup>, 2013<sup>351</sup> and 2015<sup>352</sup>, and to hold other institutions to account for

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347. European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8\_TA(2015)0227; European Parliament resolution of 16 December 2015 on the situation in Hungary - Follow-up to the European Parliament's resolution of 10 June 2015 (2015/2935(RSP)), P8\_TA(2015)0461.

348. European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409.

349. European Parliament Resolution of 10 March 2011 on Media law in Hungary, P7\_TA(2011)0094; European Parliament Resolution of 5 July on the Revised Hungarian Constitution, P7\_TA(2011)0315.

350. European Parliament Resolution of 16 February 2016 on the recent political developments in Hungary, P7\_TA(2016)0053.

351. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), P7\_TA(2013)0315.

352. European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8\_TA(2015)0227; European Parliament resolution of 16 December 2015 on the situation in Hungary - Follow-up to the European Parliament's resolution of 10 June 2015 (2015/2935(RSP)), P8\_TA(2015)0461.

their action in response to the situation in Hungary;

- In light of the evidence of a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, to submit a reasoned proposal to the European Council to activate the mechanism provided for under Article 7 (1) TEU;
- To contribute to measuring the progress of, and monitoring compliance with, the values enshrined in Article 2 TEU in Hungary in the context of a future European Union mechanism for democracy, the rule of law and fundamental rights which would integrate and complement existing mechanisms to assess and ensure compliance by member states with the values enshrined in Article 2 TEU and close remaining gaps and which could be established pursuant to European Parliament's *Resolution on an EU mechanism on democracy, the rule of law and fundamental rights*<sup>353</sup>.

#### **To the Council of the European Union and the European Council:**

- To promptly address the situation of democracy, the rule of law and human rights in Hungary by adopting conclusions on the matter, including in the context of the dialogue among all member states to promote and safeguard the rule of law within the European Union, in line with the commitments made by the Council and member States in their Conclusions on ensuring respect for the rule of law of 16 December 2014 and as repeatedly requested also by the European Parliament, most recently in its December 2015 Resolution on the situation in Hungary<sup>354</sup>;
- In light of the evidence of a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and on a reasoned proposal by one third of its member states, by the European Parliament or the European Commission, to activate the mechanism provided for under Article 7 (1) TEU;
- To support and endorse the European Parliament's proposal for a new Pact for democracy, the rule of law and fundamental rights which would integrate and complement existing mechanisms to assess and ensure compliance by member states with the values enshrined in Article 2 TEU and close remaining gaps, as detailed in the European Parliament's *Resolution on an EU mechanism on democracy, the rule of law and fundamental rights*<sup>355</sup>.

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353. European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409.

354. Conclusions of the Council of the European Union and the member states meetings within the Council on ensuring respect for the rule of law, General Affairs Council meeting, Brussels, 16 December 2014.

355. European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409.

# Annexes

## Annex I. Historic Chronology

1974	Hungary ratifies the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)
1975	Hungary is among the 35 States that sign the Helsinki Declaration, the final act of the Conference on Security and Co-operation in Europe, renamed Organization for Security and Co-operation in Europe in 1995 (OSCE)
1989	Communism collapses in Hungary
1989	Hungary amends the Communist Constitution of 1949, contrary to other former communist countries which drafted new constitutions after the fall of communist regimes. Roundtable talks between political groups took place in the summer of 1989 to discuss the reform of the Constitution. Constitutional amendment Act XXXI of 1989 established a parliamentary democracy with a multi-party system and a social market economy. The Constitution was further amended several times since 1990 till 2012, when the new Fundamental Law entered into force.
May 1990	First free general elections: Conservative Hungarian Democratic Forum won the elections
5 November 1992	Hungary ratifies the European Convention on Human Rights
1998	Parliamentary elections: Fidesz has an enormous success after an internal restructuring (from 7% votes in 1994 to 29,4% votes in 1998). Fidesz forms a center-right coalition with the Independent Smallholders Party and Hungarian Democratic Forum
2002	Parliamentary elections: the Hungarian Socialist Party wins 178 seats and forms a parliamentary coalition with the Alliance of Free Democrats (20 seats). However, Fidesz is the largest party in the unicameral Parliament (188/386 seats)
May 2004	Hungary accedes to the European Union
June 2004	European Parliament elections: Fidesz obtains 47,4% of votes; the Hungarian Socialist Party is defeated with only 34.3 %
2006	Parliamentary elections: the Hungarian Socialist Party wins 190/386 seats, maintaining its majority and becoming the largest party in Parliament in coalition with the Alliance of Free Democrats
July 2009	European Parliament elections : Fidesz obtains 56,36 % of votes, the Hungarian Socialist Party only 17,37 %
11 and 25 April 2010	Parliamentary elections: Fidesz – Hungarian Civic Alliance party (Magyar Polgári Szövetség) and its ally the Christian Democratic People's Party (KDNP) come to power after winning 262/386 seats (68%) in Parliament
18 April 2011	Adoption by the Parliament of the new Fundamental Law , which was promulgated by the President of Hungary on the 25 April 2011
April 2014	Parliamentary elections: Victor Orban is re-elected as Prime Minister. Fidesz - Hungarian Civic Alliance and its ally the Christian Democratic People's Party (KDNP) win 132/199 seats, confirming the two-third majority
May 2014	European Parliament's elections : Fidesz gains 51,48 % of votes, the Hungarian Socialist Party obtains only 10.9 %
February 2015	Following a by-election of an independent candidate in Veszprém, in the North West of Hungary, Fidezs loses its two-third majority (131/199 seats)

## Annex II. Chronology of Laws

02 November 2010	Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content
21 December 2010	Act CLXXXV of 2010 on Media Services and Mass Media
<b>1 January 2011 (entry into force)</b>	Act CXXXI of 2010 on Public Participation in Developing Legislation
18 April 2011	<b>Fundamental Law</b>
11 July 2011	Act CXII of 2011 on Informational Self-Determination and Freedom of Information
14 November 2011	Act CLI of 2011 on the Constitutional Court of Hungary
28 November 2011	Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary
	Act CLXII of 2011 on the Legal Status and Remuneration of Judges
December 2011	Act CCIII of 2011 On The Elections of Members of the Parliament of Hungary; the Act was subsequently amended four times, most recently in July 2013.
30 December 2011	Act CCVI of 2011 - The Act on Churches: on the right to freedom of conscience and religion and the legal status of churches; denominations and religious communities of Hungary
31 December 2011	<b>Transitional provisions to the Fundamental Law of Hungary</b>
1 January 2012 (entry into force)	<b>The Fundamental Law of Hungary comes into effect</b>
18 June 2012	<b>First Amendment to the Fundamental Law</b>
29 October 2012	<b>Second Amendment to the Fundamental Law</b>
21 December 2012	<b>Third Amendment to the Fundamental Law</b>
11 March 2013	<b>Fourth Amendment to the Fundamental Law</b>
	Act XX of 2013 on the legislative amendments relating to the upper age limit applicable in certain judicial legal relations (amending Act CLXII of 2011 on the legal status and remuneration of judges)
30 April 2013	Amendments to Act CXII of 2011 on Informational Self-Determination and Freedom of Information
16 September 2013	<b>Fifth Amendment to the Fundamental Law</b>
17 June 2014	Act XXII of 2014 on Advertising tax
4 July and 18 November 2014	Amendments to the Act XXII of 2014 on Advertising tax
6 July 2015	Amendments to Act CXII of 2011 on Informational Self-Determination and Freedom of Information
1 August 2015	Act CXXVII of 2015 on the amendment of acts relating to the establishment of a temporary border fence and migration
4 September 2015	Act CXL of 2015 on the Amendment of Certain Acts relating to the Management of Mass Immigration
31 March 2016	Government Decree 62/2016 (III.31) which amended Government Decree 301/2007 (XI.9) implementing the Asylum Act.
	Government Decree 63/2016 (III.31) which amended Government Decree 191/2015 (VII/21) on national designation of safe countries of origin and safe third countries (Asylum Act)
07 June 2016	<b>Sixth Amendment to the Fundamental Law</b>



## Annex III. European Union's institutions' main reactions to developments in Hungary since 2010

Date		Link
<b>10 March 2011</b>	European Parliament Resolution of 10 March 2011 on Media law in Hungary, P7_TA(2011)0094	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN</a>
<b>5 July 2011</b>	European Parliament Resolution of 5 July on the Revised Hungarian Constitution, P7_TA(2011)0315	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN</a>
<b>11 January 2012</b>	Statement of the European Commission on the situation in Hungary on 11 January 2012	<a href="http://europa.eu/rapid/press-release_MEMO-12-9_en.htm">http://europa.eu/rapid/press-release_MEMO-12-9_en.htm</a>
<b>17 January 2012</b>	European Commission launches accelerated infringement procedures against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary	<a href="http://europa.eu/rapid/press-release_IP-12-24_en.htm">http://europa.eu/rapid/press-release_IP-12-24_en.htm</a>
<b>16 February 2012</b>	European Parliament Resolution of 16 February 2012 on the recent political developments in Hungary, P7_TA(2012)0053	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0053+0+DOC+PDF+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0053+0+DOC+PDF+V0//EN</a>
<b>7 March 2012</b>	Hungary : European Commission continues accelerated infringement procedure on independence of the data protection supervisor and measures affecting the judiciary and asks additional information on central bank's independence	<a href="http://europa.eu/rapid/press-release_IP-12-222_en.htm?locale=EN">http://europa.eu/rapid/press-release_IP-12-222_en.htm?locale=EN</a>
<b>25 April 2012</b>	Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary	<a href="http://europa.eu/rapid/press-release_IP-12-395_en.htm">http://europa.eu/rapid/press-release_IP-12-395_en.htm</a>
<b>24-26 September 2012</b>	European Parliament's delegation's fact-finding visit to Hungary. Eight MEPs from the EP Civil Liberties, Justice and Home Affairs (LIBE) Committee visit Hungary to gather information on the recent legal changes in the country.	
<b>6 November 2012</b>	Court of Justice of the European Union, Judgment in Case C-286/12, European Commission v Hungary on measures affecting the judiciary	<a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0286">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0286</a>
<b>12 March 2013</b>	European Commission's response to Hungarian Parliament's adoption of new constitutional changes	<a href="http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2013/03/20130312_1_en.htm">http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2013/03/20130312_1_en.htm</a>
<b>17 April 2013</b>	Hungary and the Rule of Law - Statement of the European Commission in the Plenary Debate of the European Parliament	<a href="http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm">http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm</a>
<b>3 July 2013</b>	European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), P7_TA(2013)0315	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN</a>
<b>8 April 2014</b>	Court of Justice of the European Union, Judgment in Case C-288/12, European Commission v Hungary on the independence of the national data protection authority	<a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0288">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0288</a>
<b>19 May 2015</b>	European Parliament Plenary – Commission statement on the situation in Hungary, First Vice-President Timmermans, Strasbourg, and closing remarks	<a href="http://europa.eu/rapid/press-release_SPEECH-15-5010_en.htm">http://europa.eu/rapid/press-release_SPEECH-15-5010_en.htm</a>
<b>10 June 2015</b>	European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8_TA(2015)0227	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0227+0+DOC+PDF+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0227+0+DOC+PDF+V0//EN</a>
<b>10 December 2015</b>	Commission opens an infringement procedure against Hungary concerning its asylum law	<a href="http://europa.eu/rapid/press-release_IP-15-6228_en.htm">http://europa.eu/rapid/press-release_IP-15-6228_en.htm</a>
<b>16 December 2015</b>	European Parliament resolution of 16 December 2015 on the situation in Hungary - Follow-up to the European Parliament's resolution of 10 June 2015 (2015/2935(RSP)), P8_TA(2015)0461	<a href="http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN">http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN</a>



# Keep your eyes open

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**For FIDH, transforming societies relies on the work of local actors.**

The Worldwide movement for human rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Mouvement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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