



# Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study

Petra Bárd<sup>1</sup> · Viktor Zoltán Kazai<sup>1</sup>

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## Abstract

The rule of law as a foundational value of European integration has been taken for granted in the Member States, along with the presumption that “once a democracy, always a democracy”. This optimistic presumption proved to be wrong, when in the 2010s a top-down and systemic decline in the rule of law started, first in Hungary, then in Poland. Even though EU action against rule of law backsliding in the Member States is of existential importance for the whole European project, EU institutions seem to be either silent or too slow and inefficient when tackling the problem. In this paper we are focusing on the Court of Justice of the EU, which was emphasizing violations of a substantive understanding of the rule of law. Against this background we argue that adherence to a formal understanding or at the minimum incorporating arguments related to a formal concept of the rule of law would have been beneficial both in terms of speed and desired effect. Taking Hungary as an example we show that the lack of preliminary consultations and impact assessments during lawmaking, the enactment of significant legislative reforms in accelerated procedures without any adequate justification, the adoption of ad hominem laws, or the unclarity and unpredictability of legislation are all manifest violations of the formal understanding of the rule of law. There is significant potential in this approach that we believe the EU institutions have not exploited fully.

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✉ Petra Bárd  
bardp@ceu.edu

Viktor Zoltán Kazai  
kandinszkij@gmail.com

<sup>1</sup> Central European University, Budapest, Hungary

## 1 Introduction

The rule of law is the cornerstone of European value and *ceterum censeo* a foundational value of European integration. The rule of law has been taken for granted in the Member States, along the presumption that “once a democracy, always a democracy”. Certain precautionary measures were made before the big bang enlargement in 2004, when a number of post-Communist countries joined the EU (Sadurski 2012; Kochenov 2004), but these have been designed with the hope that their deterrent effect would be sufficient, and in practice it would never come to their actual triggering. This optimistic presumption proved to be wrong, when in the 2010s a top-down and systemic decline in the rule of law started, first in Hungary, then in Poland.<sup>1</sup> Even though EU action against rule of law backsliding in the Member States is of existential importance for the whole European project (Koncewicz 2020, p. 223), EU institutions seem to be either silent or too slow and inefficient when tackling the problem. Even the Commission, which is supposed to be Guardian of the Treaties, fails to use the enforcement tools it has available promptly to its fullest (Kelemen and Pavone 2022). Quite to the contrary, there seems to be a decline of infringement procedures, instead of being more proactive and creative, making use of academic proposals, including the proposal of bundling cases in the form of systemic infringement procedures (Scheppele 2016, p. 105), or automatically prioritising and accelerating infringement cases with a rule of law element, given the potentially huge and close to irreversible harm backsliding can cause to a democracy based on the rule of law (Bárd and Śledzińska-Simon 2019). All in all, the Court of Justice (CJEU) of the EU has proved to be the most forceful actor in the fight against illiberalism, fighting for the rule of law and constitutional democracies (Kochenov and Bárd 2019, p. 243). The CJEU’s impact is however limited by structural factors such as the number and type of applications it receives. But when a Rule of Law related case reached the CJEU, it often gave a Rule of Law friendly interpretation, almost inviting the Commission to ask for more, or – especially with regard to preliminary references – it hinted that the Rule of Law related question should be asked in the form of infringement procedures, or pointed to the responsibility of political EU institutions<sup>2</sup> (Bárd 2021, p. 371). In this article we will show that the CJEU was

<sup>1</sup> Even though other Member States were following suit, the two countries mentioned are schoolbook examples of autocratic legalism (Scheppele 2018, pp. 545–584).

These are also the countries against which Article 7(1) TEU proceedings are ongoing at the time of writing. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)); European Commission, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law (Brussels, COM(2017)835 final, 20 December 2017).

<sup>2</sup> CJEU, Case C-564/19, IS, 23 November 2021, ECLI:EU:C:2021:949; CJEU, Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECLI:EU:C:2014:2454).

focusing on a substantive understanding of the rule of law, and argue that an emphasis on the formal understanding would be beneficial.

This is so even if the EU understanding captures both formal and substantive elements of the Rule of Law – it is sufficient in this regard to have a glimpse at the main EU institutions' rule of law definition.<sup>3</sup> And yet, in light of the plethora of opinions, decisions, resolutions and judgments issued in relation to Hungary by the various EU institutions in the frame of the multiple rule of law mechanisms, one has the impression that the formal elements are frequently neglected, if not completely ignored. The lack of preliminary consultations and impact assessments during lawmaking in Hungary, the enactment of significant legislative reforms in accelerated procedures without any adequate justification, the adoption of *ad hominem* laws, or the unclarity of the norms and the unpredictability of legislation are all manifest violations of the rule of law, a concept which is supposed to guarantee, among others, the principle of “legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws”.<sup>4</sup>

Against this background we will argue that adherence to a formal understanding or at the minimum incorporating arguments related to a formal concept of the rule of law would have been beneficial both in terms of speed and desired effect. Focusing on the formal requirements of the rule of law is more than simple pedantry. There is significant potential in this approach that we believe the EU institutions have not exploited fully. Since the problem of rule of law backsliding is not simply worsening but mutating in an autocracy crisis (Kelemen 2020),<sup>5</sup> the CJEU will have plenty of opportunities to test our proposal.

We argue, that the EU institutions have not exploited all potential tools when addressing Hungary's compliance with the formal rule of law requirements. After the discussion of the differences between the formal and the substantive conceptions of the rule of law in Part I, we explain the main advantages of dedicating more attention to the formal requirements in Part II. We situate our argumentation in the context of the autocratisation processes now unfolding in the EU and with references to Hungary, one of the two EU Member States undergoing Article 7(1) TEU procedures,<sup>6</sup> to substantiate our point. Many scholarly works have documented serious

<sup>3</sup> See the Commission's Annual Rule of Law Reports or the Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

<sup>4</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps (Brussels, COM(2019)163 final, 3 April 2019). A similar wording can be found in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The Rule of Law Situation in the European Union (Brussels, COM/2020/580 final, 30 September 2020). See also Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1–10, Recital (3) and Article 2 (a).

<sup>5</sup> See also European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)).

<sup>6</sup> Supra note 2. Also, both Poland and Hungary are undergoing a monitoring procedure by the Parliamentary Assembly of the Council of Europe (PACE) over their unaddressed issues with regard to democracy and the rule of law.

shortcomings in this country which can clearly be characterized as violations of the formal rule of law requirements. The fact that the Hungarian Fidesz-government has enjoyed the support of a two-thirds (constitutional) parliamentary majority in the unicameral National Assembly since 2010 with almost no interruption<sup>7</sup> may give us the impression that it had no problems with complying with the formal rule of law criteria. The reality however is that one could since 2010 witness an incredible legislative hyperinflation combined with the acceleration of law-making at any expense (Kazai 2019a, b, c), the rapid and frequent re-regulation of complete areas of law (Chronowski and Varju 2016; Deák 2014; Laki 2015), the constant disregard of the requirements of the adequate preparation of legislative proposals (Drinóczi 2020), the large number of procedural irregularities committed in the parliamentary legislative process (Kazai 2021), the enactment of laws targeting or favouring particular individuals or groups (Bakó et al. 2021, pp. 38–44) and so on.

In Part III we analyse several infringement cases in which some rule of law violations were detected and addressed (even if they were not necessarily framed as rule of law issues), but where the formal requirements were either completely or partially ignored, even though the formal elements had? been equally violated. We conclude the article by showing that there still are many important cases which fly under the radar of the EU monitoring mechanisms because the formal elements of the rule of law are disregarded or examined only in a superficial manner. By making use of our thesis and corresponding recommendation to make better use of the formal requirements when using enforcement tools, violations of the rule of law could be tackled faster and more efficiently.

## 2 Formal and Substantive Conceptions of the Rule of Law

One commonly accepted classification in the scholarly literature is the separation of the formal and the substantive conceptions of the rule of law.<sup>8</sup> The formal conceptions focus on the instrumental aspects of the rule of law, that is “those features that any legal system allegedly must possess to function effectively as a system of laws” (Peerenboom 2004), and never pass judgment on its substance. In contrast, substantive conceptions set requirements to the content of the laws. These requirements are then used to tell good laws apart from bad ones – in other words, to examine if laws are justifiable (Craig 1997, p. 467; Bedner 2010, p. 54). Formal and substantive conceptions are supposed to work as analytical tools helping both researchers and legal practitioners to organize the large amount of information concerning the rule of law requirements.

<sup>7</sup> Due to a couple of by-elections the Fidesz-government was a few votes shy of a qualified majority in the parliament between 2015 and 2018.

<sup>8</sup> There are some authors who use a somewhat different or more complex classification. See e.g. Jeremy Waldron who adds procedural elements as a separate category which consists of certain basic requirements of legal proceedings (Waldron 2011, p. 6). See also Adriaan Bedner who singles out the institutional aspects of the rule of law (usually discussed as part of the formal elements) and put them into a self-standing category called “control-mechanisms” (Bedner 2010, pp. 68–70).

The problem is that, even though the two conceptions of the rule of law should be seen as equally important, it is tempting for researchers and even more for legal practitioners to treat the substantive requirements as superior to the formal elements or even to ignore the latter ones as insignificant. There are at least two reasons for that. The first one is that both intuitively and intellectually it seems logical to argue that the more demanding a rule of law theory is, the stronger the constraint imposed on the state is. Formal conceptions have fewer items on their laundry lists than substantive ones, that is why the former is often called the thin version of the rule of law and the latter one the thick version (Bedner 2010, p. 54; Peerenboom 2004, pp. 2–5; Craig 1997, p. 467). Substantive conceptions usually accept the formal elements but introduce additional requirements concerning the content of the law, so they are thicker than the formal conceptions by design (Bedner 2010, p. 54; Peerenboom 2004, pp. 3–4). To put it very simply, the “thickness” of the substantive conceptions can (at least partly) explain their appeal.

The second reason of dedicating more attention to substantive elements at the expense of formal ones is the assumption that the formal criteria set such a low threshold that even those states having a bad rule of law track record can reach it without any significant difficulty. Nazi Germany and the apartheid regime in South Africa are frequently cited examples among others in the literature to illustrate that even authoritarian states can comply with the formal requirements of the rule of law (Krygier et al. 2014, pp. 51–52; Waldron 2020). The essence of the problem is that not even the thickest formal conceptions offer any criteria on the basis of which the content of the law could be evaluated and this shortcoming renders them inadequate to tell good laws apart from “evil ones”, meaning those that violate fundamental rights and the basic principles of justice. It follows logically from the previous point that the formal conceptions cannot be used as an effective constraint on the arbitrary exercise of state power. As Tamanaha summarized this argument:

What makes [the formal] account of the rule of law compatible with evil is the absence of any separate criteria of the good or just with respect to the content of the law. [...] The emptiness of formal legality, to make a broader point, runs contrary to the long tradition of the rule of law, the historical inspiration of which has been the restraint of tyranny by the sovereign. [...] In closing, it should be noted that resort to democracy as a procedural mode of legitimation for law carries a limitation identical to that of formal legality. Just as formal legality can effectuate evil laws, systems that use democratic procedures to determine the content of the law can produce evil laws. (Tamanaha 2004, p. 93, 96, 100)

In sum when scholars and legal practitioners aim to detect and to prevent or to reverse a serious rule of law backsliding in a given jurisdiction, it is appealing to opt for one of the substantive conceptions not only because they represent a more demanding normative standard but also because they seem more adequate to catch autocratic leaders red handed.

We argue, however, that this choice should not lead anyone to believe that the vigorous scrutiny of the compliance with the formal elements of the rule of law can be ignored or at least relegated to secondary importance. On the contrary, our opinion

is that – notwithstanding the significance of any given jurisdiction’s respect for fundamental rights and the basic principles of justice – maintaining a strong focus on the formal rule of law requirements presents some advantages.

In practice formal and substantive elements usually get mingled when legislators and mechanisms interpreting and applying the rule of law determine the elements of this principle. The European Union is not an exception.

Although the rule of law as a concept had been present in EU law for decades,<sup>9</sup> the very first comprehensive conceptualization of this principle by an EU institution was inserted in the European Commission’s 2014 communication on the introduction of a new EU framework to strengthen the rule of law.<sup>10</sup> In 2019 the Commission’s definition was slightly reformulated<sup>11</sup> and according to Pech (2022) it entails compliance with the following six legal principles: (1) legality; (2) legal certainty; (3) prohibition of arbitrariness of the executive powers; (4) independent and impartial courts; (5) effective judicial review including respect for fundamental rights and (6) equality before the law.

As Pech rightly point out, this conceptualization of the rule of law as a constitutional principle comprised of both formal and substantive elements is perfectly in line with the understanding of the rule of law in the European jurisdictions and with the approach adopted by the Council of Europe (Pech 2022) that compiled its own separate rule of law checklist in 2016.<sup>12</sup>

Let us introduce one more distinction along the lines introduced by Palombella to make clear how vital it is for the EU to react to Rule of Law violations let alone backsliding, and how the heavier emphasis on formal Rule of Law elements would help. Palombella’s theory reflects the duality between *jurisdictio–gubernaculum*, the former being immune from the daily operation of the legal system and especially beyond the powers of the sovereign while the latter can be described as a general rule-making power (Palombella 2016, pp. 36–58). “This concept of the Rule of Law emerges as dialogical in essence. It presupposes and constantly relies upon a constant taming of law with law.” (Kochenov 2021a, b, p. 316) This understanding of the Rule of Law also incorporates an idea of hierarchy: *gubernaculum* is always to be subordinated to and controlled by *jurisdictio*, and should thus be beyond the reach of the sovereign, which in turn could be checked and guaranteed at the national level

<sup>9</sup> CJEU, Case C-294/83, *Les Verts*, EU:C:1986:166.

<sup>10</sup> Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law (Brussels, COM(2014)0158 final).

<sup>11</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps (Brussels, COM(2019)163 final, 3 April 2019); Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union: A blueprint for action (Brussels, COM(2019) 343 final, 17 July 2019).

<sup>12</sup> Venice Commission, Rule of Law Checklist (CDL-AD(2016)007-e).

via the constitution and domestic judicial review, but also at the supranational level by apex courts or a supranational understanding of human rights.

Despite the importance of a scrutiny ensuring the *jurisdictio-gubernaculum* divide and subjecting the sovereign's lawmaking power to checks, the EU forcefully objects to any such outside control. The EU infamously failed to join the European Convention on Human Rights twice,<sup>13</sup> most recently despite Treaty obligations, in the name of "autonomy" considerations, which are mostly understood as procedural aspects of EU law, such as for example supremacy, direct effect, effectiveness, mutual recognition.<sup>14</sup> In order to rely on these First Principles (Konciewicz 2020), the EU and disturbingly the CJEU are willing to compromise values including human rights even.<sup>15</sup> Should the EU institutions delay the recognition of the fact that "[u]nder a modern, liberal reading of the concept, more autonomy vis-à-vis international law in effect might mean less autonomy," (Rossem 2013, p. 42) the European Union values incorporated into Article 2 TEU will suffer,<sup>16</sup> the EU will fail to become a mature actor on a global scale, and technically the cautiously guarded system of European human rights protection will be endangered. This is already happening with regard to the so far well functioning relationship between the CJEU and the European Court of Human Rights.<sup>17</sup> An easy way out would be reliance on uncontested formal Rule of Law elements, often of a procedural nature, just like the First Principles, such as supremacy, direct effect or mutual recognition, cautiously guarded as autonomy considerations.<sup>18</sup>

### 3 The Advantages of the Formal Approach

We contend that paying more attention to the respect of the formal rule of law criteria in all the Member States, especially in those showing autocratic tendencies, offers some advantages without implying any cost. We have three arguments to support our opinion: (1) a stronger emphasis on the formal elements does not require us to give up or even to weaken our scrutiny of a given jurisdiction's conformity to

<sup>13</sup> CJEU, Opinion 2/94 – Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECR I-1759); CJEU, Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECLI:EU:C:2014:2454).

<sup>14</sup> Agreeing with Kochenov, we deliberately do not refer to these elements as part of the Rule of Law in the EU. "To say, for instance, that supremacy and direct effect as formulated by the ECJ became the cornerstones of the EU Rule of Law is not to say anything, because they simply constituted the Community/Union legal system as we know it." (Kochenov 2009, p. 23).

<sup>15</sup> See e.g. Case C-399/11, Melloni, 26 February 2013, ECLI:EU:C:2013:107; paras 59–60; CJEU, Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECLI:EU:C:2014:2454), para. 192.

<sup>16</sup> The EU will be left without a guardian when itself engaging in formal Rule of Law violations. A case in point is the Sharpston affaire (Kochenov and Butler 2021). 4.

<sup>17</sup> See ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgement of 25 March 2021, ECLI:CE:ECHR:2021:0325JUD004032416. For a discussion of the problem see Kochenov and Bárd (2022), Krommendijk and de Vries (2021).

<sup>18</sup> CJEU, Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECLI:EU:C:2014:2454).

the substantive criteria, (2) ideological battles can be turned into more neutral conversations about almost technical issues if the problem is framed in the terms of the formal rule of law conceptions and lastly, (3) it is arguably easier to prove in many cases the violation of the formal rule of law requirements than the infringement of the substantive ones.

First of all, it needs to be stressed that one does not have to choose between the formal and the substantive conceptions of the rule of law. As it was already mentioned, the substantive rule of law conceptions are built on the formal ones. In other words, the formal elements are already integrated in the substantive theories, they serve as a sort of foundation supporting the substantive criteria. Therefore, those who are in favour of one of the substantive conceptions are not required to compromise on their expectations. In fact, a vigorous scrutiny of the respect of the formal criteria just makes the analysis more comprehensive. We encourage to pay sufficient attention to the formal requirements and to avoid the mistake of ignoring them or treating them as if they had secondary importance.

Secondly, a stronger focus on the formal elements has the advantage of triggering neutral conversations instead of escalating rule of law scrutiny to fierce ideological debates simply because they are arguably less contested than the substantive criteria. Even though it would be seriously misleading to depict the formal rule of law requirements as being value-neutral,<sup>19</sup> it is true that they can be easily formulated in politically uncontroversial or at least less controversial terms (Tamanaha 2004, p. 94). On the contrary, it is much more difficult, if not impossible, to make sense of the substantive requirements without reference to any political philosophy. Conservatives, liberals, leftists, greens and so on can easily agree on the importance and the definition of generality, prospectivity, clarity, predictability and so on, but they have a hard time giving a commonly accepted interpretation to a definitive list of fundamental rights and basic principles of justice (Peerenboom 2004, pp. 6–9). In addition, one does not need to be an ardent defender of cultural relativism to accept that due to the diversity of the socio-political context in the EU Member States, substantive values can be given more or less different meanings even in those jurisdictions which belong to the same legal culture (Krygier et al. 2014, pp. 51–54). Fortunately, we have institutional mechanisms to settle these disputes, such as constitutional courts, national human rights institutions and international human rights monitoring bodies. Indeed, the meaning of the rule of law, including its substantive elements in the European jurisdictions is actually more unified than one might think at first (Pech et al. 2020, ch. 3, Pech 2020, ch. 4; Pech 2022). But let us not pretend that these differences of opinion – which are inevitably present in every pluralistic political unit – do not cause a headache for rule of law advocates.

<sup>19</sup> Jeremy Waldron is one of the most prominent scholars who argue that the formal elements of the rule of law are not simple value-neutral technicalities. “Even if the principles of the Rule of Law are purely formal in their application, we don’t just value them for formalistic reasons. Most fundamentally, people value the Rule of Law because it takes some of the edge off the power that is necessarily exercised over them in a political community. In various ways, being ruled through law, means that power is less arbitrary, more predictable, more impersonal, less peremptory, less coercive even.” (Waldron 2020). For a more comprehensive discussion about the values behind the formal rule of law elements see Andrei Marmor (2004).



Autocrats usually do not deny the importance of the rule of law principle because it is considered to be an important element of their political regime's legitimacy. Nevertheless, they do not shy away from giving a perverted meaning to this principle in order to avoid criticism or to justify their decisions (Bedner 2010, p. 53). European illiberals are not different. Hungary's and Poland's political leaders regularly relativize the meaning of the rule of law as applied by the EU institutions or explicitly deny that this principle can be given any clear interpretation (Pech et al. 2020, Pech 2020). They constantly accuse the EU of applying double-standards and criticise it for their disregard for the "specificities" of the Hungarian and the Polish legal cultures. Last year Hungarian Foreign Minister Péter Szijjártó held a press conference with his Polish counterpart Zbigniew Rau to announce the establishment of a joint comparative law institution to counter the European accusations in an intellectually more sophisticated style (Gehrke 2020).

Our proposal in itself will not remedy this problem of course. However, if EU rule of law mechanisms put a stronger emphasis on the formal requirements, they can potentially make it harder for the Hungarian and the Polish governments to frame the proceedings as a purely ideological witch-hunt. We have learnt already that neither facts nor sound legal arguments can change the aggressive rhetoric of illiberal political leaders. But at least it could be made more obvious for legal practitioners and some political stakeholders who still believe in objectivity to a certain degree that the Hungarian and the Polish governments simply play the fool and take everybody else in the rule of law debate for fool as well without having the remotest intention of taking rule of law requirements seriously.

Lastly, a heightened scrutiny of the compliance with the formal requirements arguably presents some advantages in terms of proving rule of law violations as well. The most convincing proof of an actual infringement of some fundamental rights or basic principles of justice, at least for a lawyer, is an ombudsman report, a judicial ruling, a constitutional court judgment or other decisions rendered by domestic institutions specifically mandated to detect and remedy unlawful (unconstitutional) measures. Giving preference to the evaluation of national bodies is also the approach which is consistent with the principle of subsidiarity. The problem is that by now most of the previously independent actors of the system of checks and balances have been captured by the Hungarian ruling elite and thus are under significant political influence (Zgut 2021; Magyar and Madlovics 2020). Therefore, due to their severely compromised independence and impartiality, their analyses regarding the compliance of the governing majority's measures with the rule of law principle is much less reliable than before. What is more, it is not unusual that these conquered constitutional bodies are used by the political powerholders to legally justify very controversial legislative decisions. In addition, the European Court of Human Rights treats more and more often the domestic constitutional complaint procedures as an effective remedy, including the Hungarian one.<sup>20</sup> This leads to considerable

<sup>20</sup> *Szalontay v. Hungary*, Application no. 71327/13, 12 March 2019; *Mendrei v. Hungary*, Application no. 54927/15, 19 June 2019. There are certain exceptions from the general rule, such as life imprisonment without the possibility of release. See the findings in relation to the fourth Applicant, Henrik Rostás in *Sándor Varga and Others v. Hungary*, Applications nos. 39734/15 and 2 others, 17 June 2021.

delays, especially if the constitutional court is not bound by or disrespects deadlines. By the time the Strasbourg court declares a violation of the European Convention on Human Rights, the original problem will have become irrelevant and/or the disadvantage suffered by the applicant will have become irremediable. This is the reason why it has become more difficult, even if not impossible, to prove the infringement of the substantive rule of criteria.<sup>21</sup>

We believe that in this situation it makes sense to turn our attention to those violations of the rule of law which can be easily established even without the intervention of any domestic bodies. Not all, but some of the formal criteria offer such easy cases that can be decided by the analysis of simple facts, statistical data or by other empirical research methods. And the information necessary for these analyses are usually readily available in public databases or can be simply requested from the government. For instance, the European Commission's rule of law definition prescribes a democratic and pluralistic process for enacting laws. The answer to the question of whether the government makes legislative proposals publicly available, organizes preliminary public consultations with the relevant social actors and prepares impact assessments is a simple yes or no. Legal certainty, another element on the Commission's list, implies predictability and the prohibition of creating an unstable legal environment. The frequency and the breadth of the modification of laws or even the re-regulation of whole areas of law can be measured without any significant difficulty by political scientists. The prospectivity requirement, to mention one last example, should not pose a particular problem either in the majority of the cases: if the law operates on matters taking place before its enactment and it puts the addressees of the law in a more disadvantageous position, it goes against the prohibition of retrospective legislation.

Just for the sake of clarity, we wish to make three points. First, we do believe that the careful evaluation of any given jurisdiction's compliance with the rule of law requires qualitative analysis as well. Therefore, we do not argue against the traditional methods of legal analysis, we simply advocate for the expansion of the toolbox. Second, we acknowledge that quantitative methods can be used to establish the violation of fundamental rights and the basic principles of justice as well. Third, we are aware that rule of law indices that translate the degree of respect of the rule of law into the language of numbers exist and could be used in EU proceedings as well (Jakab and Lőrincz 2017). However, these are not produced by the EU institutions themselves and cannot replace their own evaluation.

<sup>21</sup> It is true that the violation of the rights enshrined in the European Convention on Human Rights may stem partially or entirely from the infringement of the formal rule of law criteria. The most obvious example is when the measure challenged by the applicant fails the 'prescribed by law' element of the test for instance because it was not accessible to the applicant (accessibility or publicity), or it was not sufficiently precise to enable the applicant reasonably to foresee the consequences of her actions (intelligibility or clarity). Nevertheless, it remains the case that the infringement of formal rule of law requirements in themselves, without an interference with the applicant's human rights, cannot be litigated before the European Court of Human Rights. In other words, this complaint mechanism can detect the violation of the formal rule of law criteria only if the substantive elements are infringed at the same time.

## 4 Infringement Cases Referred to the CJEU

After having briefly discussed the justification and the main advantages of dedicating more attention by the EU mechanisms to the formal requirements in order to detect and to halt, or even reverse, the rule of law backsliding in illiberal Member States, let us explain our proposal in more detail through specific case studies. We have chosen four judgments rendered by the ECJ as the outcome of infringement proceedings initiated against Hungary in three areas: early retirement of judges,<sup>22</sup> attacks against civil society organisations<sup>23</sup> and measures targeting foreign higher education institutions.<sup>24</sup> This analysis is not intended to be an exhaustive overview of all the rule of law related infringement cases, but an explanation of what is lost if violations of the formal rule of law requirements are ignored.

### 4.1 Early Retirement of Judges

Back in 2011, the Fidesz government lowered public prosecutors', judges' and notaries' retirement age of 70 to the general retirement age of 62 years. As a result, representatives of the above-mentioned legal professions were required to retire with immediate effect eight years earlier than expected and – unlike in the private sector – without discretion of the employer (Halmai 2017, pp. 477–483).

The Commission initiated an infringement action against Hungary. The EU institution played safe in terms of legal grounds – or rather, it believed that Article 19(1) TEU obliging Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, was not a justiciable ground.<sup>25</sup> Even though the forced retirement of judges is a classic textbook example of a political attack against judicial independence and the rule of law, the dispute was presented solely as a breach of the prohibition of age discrimination. At that time an act of secondary EU law prohibiting discrimination in the employment sector<sup>26</sup> seemed less controversial as the basis of an infringement action against a Member State than invoking Article 19 TEU on judicial independence or – from the parties' perspective – Article 47 of the Charter of Fundamental Rights on the right to a fair trial.

<sup>22</sup> CJEU, Case C-286/12, *Commission v Hungary*, 6 November 2012, ECLI:EU:C:2012:687.

<sup>23</sup> CJEU, C-78/18, *Commission v Hungary*, 18 June 2020, ECLI:EU:C:2020:476; CJEU, C-821/19, *Commission v. Hungary*, ECLI:EU:C:2021:930.

<sup>24</sup> CJEU, Case C-66/18, *Commission v Hungary*, 6 October 2020, EU:C:2020:792.

<sup>25</sup> To the Commission's defence: the dispute arose long before the seminal *Associação Sindical dos Juizes Portugueses* case, which no doubt is a threshold judgment in the ECJ's existential jurisprudence, establishing the connection between the autonomy of the EU legal order and the independence of Member State courts, holding that the latter must comply with their obligations stemming from Article 19(1) TEU. Nine years later the ECJ made that connection in the Polish forced early retirement case, relying on the earlier *Portuguese Judges Association* case. CJEU, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, Case C-619/18, *Commission v. Poland*, Judgment of the Court (Grand Chamber) of 24 June 2019, EU:C:2019:531.

<sup>26</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

#### 4.1.1 The Formal Rule of Law Violation that Should have been Addressed

The Commission misframed the case as an issue of workplace discrimination, but at least it that the immediate retirement without any transitional measures violated the legitimate expectations of the persons concerned.<sup>27</sup> The CJEU should have emphasized that the concept of legitimate expectations is closely related to legal certainty, and the CJEU itself uses these terms almost interchangeably.<sup>28</sup> Clarity and foreseeability of the law guarantees that everyone knows what the law is, and in the light of this knowledge subjects to the law can make informed decisions about their futures (Fordham 2001, pp. 262–263). By determining violations of legitimate expectations the CJEU should have explicitly stated that the introduction of the lowered retirement age for judges overnight violated formal rule of law requirements, legal certainty and foreseeability.

The identification of the central issue as workplace discrimination instead of a (formal) rule of law violation and the application of individual compensation as the corresponding remedy had a devastating effect in practice.<sup>29</sup> Although, technically Hungary lost the case, in practice the government could remove the most senior, experienced and independent judges, persuade them to retire with financial advantages, and pack the courts with people more loyal to Fidesz.<sup>30, 31</sup>

No other restrictions of judicial independence have been addressed since, even though more than two dozens could be identified, which amount to violations of both the formal and substantive understanding of the rule of law (Bárd et al. 2022). (See the last chapter of the present article.)

<sup>27</sup> See para. 68.

<sup>28</sup> Joined Cases 212 and 217/80, *Salumi v Amministrazione delle Finanze*, 12 November 1981.

<sup>29</sup> While the procedure was ongoing, towards the end of 2012, upon pressure from the Hungarian Constitutional Court, the Venice Commission and the CJEU, the government agreed for retired judges between 62 and 70 to be rehired, if they wished so. (See Hungarian Constitutional Court, Decision no. 33/2012. (VII. 17.), Venice Commission Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CJEU, Case C-286/12, 6 November 2012, ECLI:EU:C:2012:687). At the same time, judges who had been obliged to retire received compensation for the period of their forced retirement. Most judges were financially considerably better off by staying in retirement, and accordingly most of them went for the compensation scheme. After this settlement the matter was essentially mute.

<sup>30</sup> Hungarian Constitutional Court, Decision no. 45/2012 (XII. 29.) decision; Venice Commission, Opinion 663/2012 CDL-AD(2012)001 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, Strasbourg, 19 March 2012.

<sup>31</sup> The Luxembourg case also had effects on the ECtHR judgment in *JB and Others v. Hungary*, the ECtHR found the applications lodged by the forcefully retired Hungarian judges and prosecutors inadmissible on the ground that they failed to establish convincingly the link between the challenged provisions and the interference in their private lives under Article 8 ECHR. The ECtHR also disagreed that their removal from office amounted to a “serious attack against the independence of the Hungarian judiciary as a whole”. ECtHR, *JB and Others v. Hungary* (inadmissible), Appl. No. 45434/12, 20 Dec. 2018. The ECtHR noted that “from the perspective of European Union law, the European Commission was satisfied with the adoption and implementation of the law at issue”. Id. at para 92.

## 4.2 Two CJEU Cases Concerning Attacks Against Civil Society Organisations

Infringement proceedings have been initiated twice against Hungary for the government's attacks on civil society organizations. In the first case<sup>32</sup> the European Commission decided to refer Hungary to the CJEU for its law on the so-called "foreign-funded NGOs". The Act on the Transparency of Organisations Receiving Financial Support from Abroad<sup>33</sup> (hereinafter: Lex NGO) was adopted in the early summer of 2017. Shortly after the enactment of the law the Commission started legal proceedings against Hungary on two grounds (EC Press Corner 2017). First, the Commission alleged that the discriminatory and disproportionate restriction of donations sent from abroad to Hungarian NGOs violated the free movement of capital principle. The Commission substantiated its conclusion by explaining that the contested legislative provisions applied only to foreign sources of capital, put a lot of administrative burden on the recipients of the donations and the whole regulation had a stigmatising effect on both NGOs and donors. The second ground was the challenged legislation's non-compliance with the right to freedom of association and the rights to protection of private life and personal data for basically the same reasons.

The CJEU delivered its judgment almost three years later in June 2020.<sup>34</sup> Even though it took a long time for the justices to make up their mind, they eventually agreed with the Commission's position. The Court declared that by adopting the contested provisions of the Lex NGO.

"which impose obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union".<sup>35</sup>

The pending infringement proceedings did not deter the Hungarian governing majority from enacting in the last days of May 2018 a new piece of legislation targeting human rights NGOs again.<sup>36</sup> The European Commission contested two aspects of this legislative package, the so-called "Stop Soros" legislation, on the grounds of their non-compliance with EU legislation on asylum and the Charter of Fundamental Rights (EC Press Corner 2019). The first measure that the Commission found worrisome was the criminalization of the "facilitation or support of

<sup>32</sup> CJEU, C-78/18, *Commission v Hungary* (transparency of associations), 18 June 2020, ECLI:EU:C:2020:476; For an immediate analysis see Bárd et al. (2020).

<sup>33</sup> Act LXXXVI of 2017 on the Transparency of Organisations receiving financial Support from Abroad.

<sup>34</sup> CJEU, C-78/18, *Commission v Hungary*, ECLI:EU:C:2020:476.

<sup>35</sup> CJEU, C-78/18, *Commission v Hungary*, ECLI:EU:C:2020:476, para. 143.

<sup>36</sup> Act no VI of 2018 amending certain laws in relation to Measures against Illegal Immigration.

illegal immigration”, i.e. activities carried out with the purpose of enabling asylum proceedings to be brought by persons who do not meet the requirements of international protection. The second aspect concerned the undue restriction of the right to asylum due to the introduction of new non-admissibility grounds for asylum applications. The judgment of the ECJ came out in November 2021<sup>37</sup> which upheld for the most part the Commission’s action and found that Hungary had failed to fulfil its obligations under the Procedures<sup>38</sup> and Reception<sup>39</sup> Directives.

When we examine the European Union’s reactions to these legislative measures targeting Hungarian human rights NGOs, we can see that they were not unequivocally framed as violations of the rule of law principle. On the one hand, in the above-mentioned two infringement proceedings neither the Commission, nor the CJEU mentioned the rule of law principle or made reference to Article 2 TEU. On the other hand, both the Lex NGO and the Lex Stop Soros were mentioned in the long list of reasons why the European Parliament eventually decided to launch an Article 7(1) procedure against Hungary for the violation of EU values, including the rule of law.<sup>40</sup> But even in this EP resolution, the contested pieces of legislation were listed in the part of the text on freedom of association.

#### 4.2.1 The Formal Rule of Law Violations that Should have been Addressed

Contrary to this framing adopted by the EU control mechanisms, we can easily establish that the above-mentioned legislative measures could have been challenged not only on the grounds of being in breach of fundamental rights provisions, but also on infringing some of the basic elements of the formal conception of the rule of law, namely the enactment of legislation in a legally correct manner, the principle of generality and the clarity of the norm.

First of all, let us examine why the contested legislative acts were not adopted in accordance with the rules of the law-making procedure. The Lex NGO was submitted in parliament by three prominent members of the Fidesz governing majority instead of the government.<sup>41</sup> That information is important because the introduction

<sup>37</sup> CJEU, C-821/19, *Commission v. Hungary*, ECLI:EU:C:2021:930.

<sup>38</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

<sup>39</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

<sup>40</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

<sup>41</sup> The parliamentary file of Bill no. T/14967: [https://www.parlament.hu/web/guest/iromanyok-elozociklusbeli-adatai?p\\_p\\_id=hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_auth=owgM0FFp&\\_hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8\\_pairAction=%2Finternet%2Fcplsq1%2Fogy\\_irom.irom\\_adat%3Fp\\_ck1%3D40%26p\\_izon%3D14967](https://www.parlament.hu/web/guest/iromanyok-elozociklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=owgM0FFp&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsq1%2Fogy_irom.irom_adat%3Fp_ck1%3D40%26p_izon%3D14967), accessed 13 October 2022.

of significant legislative proposals in the form of a private member's bill, even though they were obviously prepared by the government's apparatus, has been one of the routinely used tactics of Fidesz to circumvent the statutory obligation of the government to make the bill publicly available for public debate and to organize preliminary public consultations. The lack of public consultation was one of the concerns voiced by the Venice Commission after the review of the draft legislation. It was acknowledged that the Ministry of Justice held a meeting with a couple of NGOs, but it was deemed insufficient. The Venice Commission reminded the Hungarian government that a public consultation should involve, as far as possible, all civil society organizations that would be affected by the new legislation.<sup>42</sup>

Contrary to the previous case, the Lex Stop Soros was introduced in parliament by the Minister of Justice.<sup>43</sup> Nevertheless, the preparation of the legislative proposal was still not in line with the applicable legal requirements because no preliminary public consultation was organized. Therefore, the Venice Commission had to reiterate its criticism and emphasize again the importance of a consultation phase during the drafting process of any piece of legislation.<sup>44</sup>

Instead of using the legally regulated forms of public consultation, the Fidesz government has often had recourse to so-called 'national consultation campaigns' to get some sort of popular approval for contested legislative measures. In the framework of a national consultation campaign the government mails questionnaires with guided multiple-choice questions to the citizens which they are free to return with their responses to the Office of the Prime Minister. This form of communication has been deployed several times to strengthen specifically the government's anti-immigration agenda and to incite against human rights organizations<sup>45</sup>: the first one was issued in relation to constitution-making back in 2011, there was one in 2015 on immigration and terrorism (European Website on Integration 2015), another one in 2017 entitled "Stop Brussels!" – which prompted a response by the European Commission (2017) – and yet another one in the same year about the "Soros Plan" (Novak 2017). These questionnaires contained very manipulative questions and therefore were inadequate to serve as the basis of any sort of serious public debate – as it was noted by the Venice Commission itself as well.<sup>46</sup> Let us give you only one example from the "Stop Brussels!" questionnaire:

<sup>42</sup> Venice Commission, Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, CDL-AD(2017)015-e, paras. 25-28 and 67.

<sup>43</sup> The parliamentary file of Bill no. T/333: [https://www.parlament.hu/web/guest/iromanyok-elozo-ciklu-sbeli-adatai?p\\_p\\_id=hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_auth=owgM0FFp&\\_hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8\\_pairAction=%2Finternet%2Ffcplsql%2Fogy\\_irom.irom\\_adat%3Fp\\_ck1%3D40%26p\\_izon%3D14967](https://www.parlament.hu/web/guest/iromanyok-elozo-ciklu-sbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=owgM0FFp&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Ffcplsql%2Fogy_irom.irom_adat%3Fp_ck1%3D40%26p_izon%3D14967), accessed 13 October 2022.

<sup>44</sup> Venice Commission – OSCE/ODIHR: Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), CDL-AD(2018)013-e, para 69.

<sup>45</sup> For the analysis of the language used by the Fidesz government in these national consultation campaigns and their consequences see e.g. Bocskor (2018) and Lurcza (2018).

<sup>46</sup> Venice Commission – OSCE/ODIHR, Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), CDL-AD(2018)013-e, paras. 62–66.

Question 3: By now it has become clear that, in addition to the smugglers, certain international organizations encourage the illegal immigrants to commit illegal acts. What do you think Hungary should do? (a) Activities assisting illegal immigration such as human trafficking and the popularization of illegal immigration must be punished. (b) Let us accept that there are international organizations which, without any consequences, urge the circumvention of Hungarian laws.<sup>47</sup>

The second formal element of the rule of law principle that was clearly violated was the generality requirement. Based on the Fidesz government's behavior and political rhetoric, it is easy to realize that the Lex NGO and the Lex Stop Soros were not even intended to operate in an impersonal or impartial way. On the contrary, their enactment was only part of a long chain of political attacks aimed at certain Hungarian or Hungary-based NGOs particularly critical of the Fidesz government.<sup>48</sup> These measures were always justified by the narrative that the targeted NGOs were serving the interests of powerful international stakeholders, most notably George Soros, a Hungarian-born American billionaire and philanthrope who have been portrayed by the Fidesz-government as the number one enemy of Hungary.

It is true that such aggressive terms as “foreign agents” and “Soros mercenaries”<sup>49</sup> were used only in political rhetoric and the Fidesz government always tried to hide behind more neutral language (“organizations receiving support from abroad”) and some seemingly legitimate legislative aims, such as ensuring transparency, preventing crime and disorder and combatting money-laundering and terrorism financing. Nevertheless, it was clear as day from the very beginning that the purpose of the enactment of these laws was to stigmatize and to intimidate the most critical NGOs and to make their operation more difficult, if not impossible. Under the rule of law principle, the state is not allowed to direct laws against individuals or specific organizations because as a general principle laws should apply to everyone equally.<sup>50</sup> Since the Lex NGO and the Lex Stop Soros constituted *ad hominem* legislation,<sup>51</sup> they obviously went against the generality requirement of the rule of law principle.

<sup>47</sup> The English translation of the questionnaire is available at: <https://budapestbeacon.com/lets-stop-brussels-new-national-consultation/>, accessed 13 October 2022.

<sup>48</sup> For a summary of the political and legislative measures put in place by the Hungarian government to attack Hungarian NGOs see the following analysis compiled in 2017 by the Eötvös Károly Policy Institute, the Transparency International Hungary, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee (2017).

<sup>49</sup> A symbolically very important example of the Hungarian government's aggressive political rhetoric was the publication of a list of intellectuals, including human rights defenders in the pro-Fidesz weekly, *Figyelő*. According to the authors of this article, PM Orbán used the term “Soros merceneries” to describe these people. For an English summary, see “Pro-Fidesz print weekly, *Figyelő*, publishes list of Soros' mercenaries” (The Budapest Beacon 2018).

<sup>50</sup> The violation of the prohibition of *ad hominem* legislation was brought up by the Venice Commission itself as well in its opinion on the Stop Soros legislation. Venice Commission – OSCE/ODIHR, Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), CDL-AD(2018)013-e, para 61.

<sup>51</sup> Beáta Bakó uses the term „targeted legislation” instead of *ad hominem* legislation but arrives at basically the same conclusion. (Bakó 2021, pp. 38–44).



Lastly, it needs to be pointed out that the contested legislative acts were also contrary to another important element of the rule of law principle, namely the clarity requirement. The Lex NGO was challenged before the Constitutional Court shortly after its parliamentary enactment by the qualified minority of MPs. The petitioners argued *inter alia* that some of the most important terms of the legislation were too vague and therefore the legislator created a very uncertain legal environment in which the addressees of the law did not even know how to comply with the legal requirements.<sup>52</sup> The law imposed obligations on certain categories of NGOs directly or indirectly receiving support from abroad without clarifying what it means that the financial support comes “from abroad”, that the donation can be received “directly or indirectly” and without even defining what qualifies as “financial support”. Concerns about the vagueness of the language used in the law were also raised by the Venice Commission.<sup>53</sup> The Constitutional Court has never decided the case because it suspended its review<sup>54</sup> until the delivery of the CJEU’s decision<sup>55</sup> concerning the same law and has not continued its proceedings ever since.

A constitutional review procedure was initiated against the Lex Stop Soros by Amnesty International Hungary. The petition alleged the unconstitutionality of the law on several grounds, including the violation of the *nullum crimen sine lege certa* principle and the clarity requirement.<sup>56</sup> The law basically criminalized the engagement in organizing activities carried out with the aim of facilitating the initiation of an asylum procedure by anyone who does not meet the criteria of a person eligible for international protection. The problem was that certain essential elements of the legal provision, such as the term “organizing activities”, were not defined. An exemplificatory list was inserted in the provision which contained equally broad terms, such as “preparing or distributing informational materials”, “building or operating a network” or “monitoring the border”. The lack of sufficient clarity of the norm is especially dangerous in the field of criminal law because, on the one hand, the individuals simply do not know what activities constitute a criminal offense and, on the other, it gives room for arbitrary and extensive application of the law by the State’s law enforcement agencies. The Hungarian Constitutional Court rejected the petition entirely, although it did give a restrictive interpretation of the contested legal provision.<sup>57</sup> The Venice Commission was much more critical when it unequivocally

<sup>52</sup> Petition of the qualified minority of MPs in the case no. II/01460/2017, <http://public.mkab.hu/dev/dontesek.nsf/0/80442B2F58384F6BC125815D00589A69?OpenDocument>, accessed 13 October 2022.

<sup>53</sup> Venice Commission, Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, CDL-AD(2017)015-e, paras. 45 and 67.

<sup>54</sup> Resolution no. 3198/2018. (VI. 21.) of the Constitutional Court of Hungary.

<sup>55</sup> CJEU, C-78/18, *Commission v Hungary*, ECLI:EU:C:2020:476.

<sup>56</sup> Petition of Amnesty International Hungary in the case no. IV/01565/2018, [http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/\\$FILE/IV\\_1565\\_0\\_2018\\_ind%C3%ADtv%C3%A1ny\\_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/IV_1565_0_2018_ind%C3%ADtv%C3%A1ny_anonim.pdf), accessed 13 October 2022.

<sup>57</sup> Decision no. 3/2019. (III. 7.) of the Constitutional Court of Hungary. For a short analysis of the decision see Kazai (2019a).

declared that the law “lacks the required clarity to qualify as a ‘legal basis’ within the meaning of Article 11 ECHR.”<sup>58</sup>

### 4.3 Lex Central European University

At the core of the case is a modification to the law on higher education<sup>59</sup> that introduced controversial new conditions for higher educational institutions that have a seat outside the territory of the EU or the European Economic Area (EEA). It was quickly labelled as “Lex CEU” because it effected negatively one and only one institution: the Central European University (CEU).

The first main requirement was the conclusion of an international agreement between the government of Hungary and the government of the respective university’s country of origin (Article 76(1)(a), read in conjunction with Article 77(2) Lex CEU). The government enjoys full discretion to conclude or not to conclude such an agreement, therefore the fulfilment of this condition is beyond the powers of the respective universities. The government signed several such agreements, but not with regard to CEU. Another disputed condition required foreign universities established outside the EEA operating in Hungary to provide educational activities on a campus in the country where they had been accredited (Article 76(1)(b) Lex CEU). Universities that do not meet the above criteria would lose their license of operation.

In case C-66/18 *Commission v Hungary*,<sup>60</sup> the Grand Chamber of the ECJ made unequivocally clear that the Lex CEU was contrary to the General Agreement on Trade in Services (GATS-WTO), the Lisbon Treaty, the Services Directive 2006/123, and the Charter of Fundamental Rights.<sup>61</sup> The judgment is strong in defending academic freedom, freedom of establishment, the free movement of services and the freedom to conduct a business. It came however too late. Since the Hungarian government refused to sign the respective international agreement, CEU could not comply with the conditions laid down in Lex CEU and was forced to leave the country. By the time the judgment was rendered, i.e. 3,5 years after passing Lex CEU, the case had already become moot. Chasing CEU out of Hungary was possible due to the inaction of the Hungarian Constitutional Court<sup>62</sup> and the silence of the CJEU.

<sup>58</sup> Venice Commission – OSCE/ODIHR, Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), CDL-AD(2018)013-e, para. 102.

<sup>59</sup> Act XXV of 2017 of 4 April 2017 on the amendment to Act CCIV of 2011 on National Higher Education.

<sup>60</sup> CJEU, Case C-66/18 *Commission v Hungary* (Higher Education), 6 October 2020, EU:C:2020:792.

<sup>61</sup> This subchapter is partially based on Bárd (2020).

<sup>62</sup> First the Constitutional Court suspended its proceedings until the delivery of the judgment of the CJEU and then in July 2021 the Court decided to terminate its proceedings without deciding on the merits on the grounds that the National Assembly amended the challenged legislation, so the case has become moot. Resolution 3319/2021. (VII. 23.) of the Constitutional Court.

### 4.3.1 The Formal Rule of Law Violations that Should have been Addressed

In addition to the late delivery of the judgment, the other shortcoming was the lack of any meaningful reflection on those formal elements of the rule of law that the National Assembly violated by adopting the Lex CEU. The relevant legal concerns can be summarized on the basis of the petitions that challenged the law before the Hungarian Constitutional Court: lack of preliminary consultation and impact assessment, the adoption of the law in an expedited procedure without any justification, the violation of the prohibition of *ad hominem* legislation and the infringement of the foreseeability and predictability requirements.<sup>63</sup>

Firstly, despite its very clear statutory obligation, the government did not guarantee the adequate preparation of the bill. It has failed to comply with the requirement of attaching an impact assessment to the legislative proposal which is supposed to guarantee that MPs are informed about the social, economic and professional reasons, goals and consequences of the bill. Even in the lack of a separate impact assessment, the government may provide the necessary information in the explanatory memorandum of the bill. However, in the present case the explanation of the proposed legislation was very short (only two full pages) and extremely superficial<sup>64</sup> which was clearly inadequate in light of the serious consequences of the law.

In addition, the government did not fulfill its obligation to make the bill available to the public before its introduction in parliament and to organize consultations with the relevant stakeholders, most importantly the representatives of universities and the Hungarian academia. The Hungarian Rectors' Conference (an independent public body representing the whole Hungarian higher education institution system) even issued a statement: "We notice with regret that the initiator did not guarantee our right to be consulted."<sup>65</sup>

Secondly, the Lex CEU was adopted in an accelerated procedure leaving no room whatsoever for any meaningful deliberation on and scrutiny of the bill by the MPs.<sup>66</sup> The legislative proposal was submitted by the Minister of Human Capacities on behalf of the government on 28 March 2017. However, the parliamentary work on the bill did not start until 3 April, on the very same day when the motion for an accelerated procedure was introduced and adopted by the parliament. The process

<sup>63</sup> The constitutional complaint of Central European University submitted in case no. IV/01810/2017, [http://public.mkab.hu/dev/dontesek.nsf/0/4adb0820792dc2f0c12581a30058cb15/\\$FILE/IV\\_1810\\_0\\_2017\\_ind%C3%ADtv%C3%A1ny\\_anonimiz%C3%A1llt.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/4adb0820792dc2f0c12581a30058cb15/$FILE/IV_1810_0_2017_ind%C3%ADtv%C3%A1ny_anonimiz%C3%A1llt.pdf), accessed 13 October 2022; Petition of the qualified minority of MPs submitted in case no. II/01036/2017, [http://public.mkab.hu/dev/dontesek.nsf/0/af27b40ba3b0b821c1258109003f9b19/\\$FILE/II\\_1036\\_12\\_2017\\_hp\\_anonimiz%C3%A1llt.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/af27b40ba3b0b821c1258109003f9b19/$FILE/II_1036_12_2017_hp_anonimiz%C3%A1llt.pdf), accessed 13 October 2022. See also the amicus curiae by Jakab (2017).

<sup>64</sup> See the original Bill. no. T/14686 and its explanatory memorandum, <https://www.parlament.hu/irom40/14686/14686.pdf>, accessed 13 October 2022.

<sup>65</sup> Statement of the Hungarian Rectors' Conference, 3 April 2017, <http://www.mrk.hu/2017/04/03/amagyar-rektori-konferencia-kozlemenye-8/>, accessed 13 October 2022.

<sup>66</sup> See the parliamentary file of the Bill no. T/14686, [https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p\\_p\\_id=hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_auth=vzkv1z0P&\\_hu\\_parlament\\_cms\\_pair\\_portlet\\_PairProxy\\_INSTANCE\\_9xd2Wc9jP4z8\\_pairAction=%2Finternet%2Fcpql%2Fogy\\_irom.irom\\_adat%3Fp\\_ckl%3D40%26p\\_izon%3D14686](https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=vzkv1z0P&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcpql%2Fogy_irom.irom_adat%3Fp_ckl%3D40%26p_izon%3D14686), accessed 13 October 2022.

was indeed so fast that the bill was enacted by the National Assembly on 4 April and promulgated less than a week later. Such an incredibly fast legislative process may only be acceptable if it is justified by very weighty reasons. Nevertheless, the motion of the Deputy Prime Minister simply stated that “[t]he modification of the parliamentary agenda is justified by the government’s interest to get the law enacted as soon as possible.”<sup>67</sup> This is very far from being an adequate reasoning on the basis of which one could decide whether the enactment of any bill in 24 h is reasonable or not.

Thirdly, the petitioners also argued that the law constitutes *ad hominem* legislation. It is true that the legislation was formulated in general and neutral language and thus was applicable to a relatively large number of foreign universities operating in Hungary. However, the new criteria introduced by the amendment to the act on higher education were so carefully crafted that only CEU was not in compliance with the law, because only CEU did not offer higher education in its country of origin. Therefore, we can see that the Lex CEU was a textbook example of *ad hominem* legislation.

Finally, the principles of foreseeability and predictability were equally violated. No one, not even CEU was consulted before the introduction of the legislative proposal in parliament even though it targeted that particular university and imposed serious burdens on it. CEU had to comply with the requirement to offer higher education in its country of origin in an incredibly short period of time, only a few months. By September 2017, as a result of considerable efforts, CEU concluded a memorandum of understanding with Bard College chartered by the State of New York that specified the educational activities that CEU would conduct in the United States. However, the other requirement, namely the conclusion of an international agreement between the government of Hungary and the State of New York was beyond CEU’s control. The Hungarian government enjoyed full discretion to conclude or not to conclude such an agreement, therefore CEU had no influence over the fulfilment of this condition whatsoever. The government concluded several such agreements with the states of origin of other foreign universities operating in Hungary, but not with the State of New York with regard to CEU. Negotiations were held and even the text of the agreement was drafted, but it has never been signed by the Hungarian government. Consequently, CEU was kept in a limbo: it did not comply with the law and had no power to force the government to conclude the agreement, but the national authorities did not start official proceedings against the university. In other words, CEU was kept in a very uncertain situation in which it could not operate adequately and thus decided to leave Hungary and move to Vienna.

## 5 In Lieu of a Pessimistic Conclusion: Potential Infringement Cases

In the previous pages we discussed several infringement proceedings in which the European Commission and the CJEU failed to explicitly frame the violation of EU law as a rule of law issue, but at least detected some important shortcomings of the

<sup>67</sup> Motion for accelerated procedure submitted by the Deputy Prime Minister, <https://www.parlament.hu/iorom40/14686/14686-0002.pdf>, accessed 13 October 2022.

Hungarian legal system. We argued that by extending the scope of scrutiny to the formal requirements of the rule of law, the EU institutions could have better grasped the essence of the problem. However, there are several legislative measures which have escaped the attention of the CJEU because the Commission has been unwilling to initiate litigation. We do not wish to second-guess the reasons underlying the Commission's failure to fulfil its legal role as Guardian of the Treaties (Kelemen and Pavone 2022). We simply would like to show that even in those areas in which no manifest violation of secondary EU legislation or specific provisions of the primary sources of EU law can be detected, an enhanced focus on the formal requirements may help to contest the validity of legislative acts going against the rule of law principle.

Judicial independence is arguably one of the fields where the intervention of the Commission and the CJEU would be crucial in light of the negative tendencies of the past eleven years. Yet, no infringement proceedings have been launched against Hungary on any grounds. Therefore, we will conclude our article by showing that some of the most outrageous attacks on the independence of the Hungarian judiciary were enacted by violating the formal elements of the rule of law principle which could serve as a legal basis for the Commission's action.

Let us start with the irremovability of judges and the early termination of the Chief Justice's mandate. The status of the Hungarian Chief Justice (literal translation: President of the Supreme Court) deserves greater attention because *ad hominem* laws were used to prematurely terminate the office of a Chief Justice disliked by the government in 2011.

András Baka was the Hungarian judge at the European Court of Human Rights (ECtHR) between 1991 and 2008. After his term in Strasbourg expired, he was appointed as a judge to the Budapest-Capital Regional Court of Appeal, and in 2009, he was elected by the Hungarian Parliament according to the rules at the time for six years to become Chief Justice of the Supreme Court. His mandate was to expire on 22 June 2015.

András Baka in his capacity as Chief Justice formulated some concerns about the constitution-making process leading to the adoption of the Fundamental Law. The freshly enacted legislation on the judiciary introduced a new eligibility criterion for the candidates of the President of the Supreme Court, which was also renamed Kúria by the Fundamental Law. According to the new rules enshrined in the so-called Transitional Provisions attached to the Fundamental Law, later declared to be unconstitutional,<sup>68</sup> the candidate for Kúria President was required to serve at least

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<sup>68</sup> In March 2021 the Ombudsman filed a complaint with the HCC challenging the Transitional Provisions. In Decision 45/2012. (XII. 29.) the HCC indeed annulled many articles of the Transitional Provisions. As a response, Parliament adopted the Fourth Amendment to the Fundamental Law in April 2013, which transferred most quashed provisions into the Fundamental Law.

5 years as a judge in the Hungarian judiciary. Simultaneously, an amendment to the previous 1989 Constitution prescribed the election of a new Kúria President by 31 December 2011. Since Judge Baka's 17 years as Strasbourg judge did not count, and because he did not have 5 years of judicial experience in a Hungarian court until the end of 2011, he did not satisfy the new requirements, and thus his office was prematurely terminated three and a half years before the originally foreseen expiration of his mandate.<sup>69</sup> At the same time, the mandate of the Supreme Court Vice President – appointed in 2009 by the President of the Republic, upon the recommendation of the Chief Justice, Lajos Erményi – was also terminated prematurely, this time not by a constitutionally embedded provision, but on the basis of a new act on the judiciary.<sup>70</sup> The official reasoning referred to the structural changes of the judicial organization and administration as triggers for the early dismissal.

Since the Chief Justice's mandate was terminated by the Transitional Provisions of the Fundamental Law, only the Vice President of the Supreme Court could file a constitutional complaint. The Hungarian Constitutional Court found, in a 8:7 judgment that the court reform and modification of the scope of responsibilities of the Kúria, including its President and Vice-President, provided sufficient constitutional justification for the termination of their mandates prematurely.<sup>71</sup> The ECtHR saw the matter differently<sup>72</sup> and held that the premature termination of András Baka by *ad hominem* legislation violated his right of access to a court as guaranteed by Article 6(1) ECHR. Furthermore, his Article 10 ECHR rights have also been infringed, since the premature termination of his office was prompted by his views and criticisms expressed on the judicial "reform". The ECtHR added that the challenged measures had a "chilling effect", discouraging not only András Baka, but also "other judges and court presidents [...] from participating in public debate on [...] issues concerning the independence of the judiciary".<sup>73</sup> The ECtHR found in favor of the Vice President of the Supreme Court, too.<sup>74</sup> In that latter case the ECtHR found a violation of Article 8 ECHR holding that the *ad hominem* legislation incorporated into the new act on the judiciary, had also not pursued any legitimate aim.

Another important item on the list of court-curbing measures was the re-regulation of the administrative court system. The very first steps in this direction were taken in 2016 when the Fidesz-government did not enjoy the support of the two-thirds majority of MPs. Since the acts on the judiciary are so-called cardinal acts, i.e. statutes whose adoption and amendment requires the qualified majority of representatives, the government decided to get the bill enacted in an ordinary legislative process.<sup>75</sup> Upon the petition submitted by the President of the

<sup>69</sup> Point 14(2) of the Closing and miscellaneous provisions of the FL: "The mandate of the President of the Supreme Court and of the President and members of the National Council of Justice shall terminate upon the entry into force of the Fundamental Law."

<sup>70</sup> Act CLXI of 2011 on the Organization and Administration of the Courts, Art. 185(1).

<sup>71</sup> Hungarian Constitutional Court, Decision 3076/2013. (III. 27.).

<sup>72</sup> *Baka v. Hungary*, Application no. 20261/12, Judgment of 27 May 2014.

<sup>73</sup> *Id* at para. 173.

<sup>74</sup> *Erményi v. Hungary*, Application No. 22254/14, Judgment of 22 November 2016.

<sup>75</sup> Bill. no. T/12234.

Republic,<sup>76</sup> the Constitutional Court reviewed some crucial points of the adopted legislation: (i) the modification of the Metropolitan Court of Appeal's competence so that it can operate in practice as a separate administrative supreme court and (ii) the delegation of the competence to review the decisions of the National Media Authority and the decisions of the electoral commissions to the Metropolitan Court of Appeal. In its Decision no. 1/2017. (I. 17.) the Constitutional Court concluded that all the challenged provisions concerned legislative matters requiring a qualified majority, namely the organization of the judiciary, jurisdiction of the courts, legislation on media and electoral regulation. Consequently, the adoption of these rules in an ordinary legislative procedure was declared unconstitutional on the grounds that they violated the rule of law principle and the qualified majority requirements stipulated by the Fundamental Law.

The governing majority quickly redrafted the bill and Parliament enacted a watered-down version of the reform. However, when PM Orbán and his party returned for a third consecutive term with a two-thirds parliamentary majority in 2018 the governing coalition decided to move forward with their plans. In the very same year the Seventh Amendment to the Fundamental Law was adopted in order to create a clear constitutional basis for the administrative judicial reform. Shortly after that the National Assembly enacted another judicial reform package<sup>77</sup> which brought into existence a separate branch of administrative courts and placed it under the direction of a newly established Supreme Administrative Court. This legislation aimed to weaken the position of the Kúria by setting up a rival institution, to guarantee that the government can manipulate the composition of the administrative courts by exercising influence over the selection process and to extend the jurisdiction of the packed administrative judiciary to election disputes (Uitz 2019).

This legislative package was obviously very controversial, so the governing majority resorted to serious procedural irregularities to get it enacted at the face of every opposition. These violations of the law were not remained undetected. Firstly, the Venice Commission pointed out that contrary to the requirements of Hungarian law the bill was not backed up by an impact assessment and the time allowed for preliminary consultation (only a few days) was too short. The opinion considered it "regrettable that the Hungarian legislature did not make more provision to ensure that legislation entailing such a major, and politically sensitive, reform of Hungary's judicial system was passed in the right conditions."<sup>78</sup> Secondly, the opposition parties represented in the National Assembly filed a petition<sup>79</sup> with the Constitutional Court, challenging the law on both substantive and procedural grounds. The

<sup>76</sup> The constitutional petition submitted by the President of the Republic in case no. I/02039/2016, [http://public.mkab.hu/dev/dontesek.nsf/0/e9034bcb91b2c550c125808b004b19ee/\\$FILE/I\\_2039\\_0\\_2016\\_ind%C3%ADtv%C3%A1ny.002.pdf/I\\_2039\\_0\\_2016\\_ind%C3%ADtv%C3%A1ny.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/e9034bcb91b2c550c125808b004b19ee/$FILE/I_2039_0_2016_ind%C3%ADtv%C3%A1ny.002.pdf/I_2039_0_2016_ind%C3%ADtv%C3%A1ny.pdf), accessed 13 October 2022.

<sup>77</sup> Act CXXX of 2018 on administrative courts.

<sup>78</sup> Venice Commission, Opinion on the Law on Administrative Courts and on the Law on the Entry Into Force of the Law on Administrative Court and Certain Transitional Rules, CDL-AD(2019)004, para. 31.

<sup>79</sup> The constitutional petition submitted by the qualified minority of MPs in case no. II/00258/2019, [http://public.mkab.hu/dev/dontesek.nsf/0/889bbcd5e0948c29c1258399005f8cc1/\\$FILE/II\\_258\\_0\\_2019\\_ind%C3%ADtv%C3%A1ny\\_anonimiz%C3%A1lt.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/889bbcd5e0948c29c1258399005f8cc1/$FILE/II_258_0_2019_ind%C3%ADtv%C3%A1ny_anonimiz%C3%A1lt.pdf), accessed 13 October 2022.

petitioners presented three arguments. First, they submitted that the President of the chamber (one of the deputy Speakers) acted unconstitutionally when he decided to chair the Parliamentary session from the benches instead of the Speaker's podium. Second, the petitioners argued that the chamber president had been assisted by two notaries from the parties of the governing majority, contrary to the Act on the National Assembly stipulating that one of them shall be selected from an opposition parliamentary party group. Finally, the laws were challenged on the ground that the MPs had been able to cast a vote without inserting their card into the voting machine, which had potentially led to the manipulation of the results. In its decision no. 15/2019. (IV. 17) the Constitutional Court did not deny that the contested procedural irregularities had been committed but concluded that none of them constituted a breach of the Fundamental Law. Therefore, the petitioners' arguments were rejected on every ground.<sup>80</sup>

In 2019, the Hungarian government unexpectedly announced the postponement of the entry into force of the judicial reform package allegedly due to the serious concerns raised by the European Union concerning judicial independence (Szakacs 2019; Reuters 2019). However, it was all too obvious that this peacock dance which coincided with the selection of the new EU commissioners was not the sign of any genuinely good intention. In late 2019 the Fidesz government introduced an omnibus legislation which amended several legislative acts in order to yield similar results as the original administrative court reform would have produced without setting up a separate administrative judicial system (Kazai 2019b).

We would like to draw attention to one specific aspect of the law, namely that members of the Constitutional Court got entitled to be appointed as ordinary judges without going through any application procedure even if they do not meet the otherwise applicable eligibility requirements.<sup>81</sup> The Parliament also amended the eligibility criteria for the Chief Justice of the Kúria. Beforehand, at least five years of judicial experience in the ordinary court system was required in order for someone to become Chief Justice (cf. what happened to András Baka). Due to the amendment, experience in international tribunals or the Constitutional Court as a judge or as a senior legal advisor must also be taken into account. As a result of these legislative changes, several members of the Constitutional Court – that was already packed by Fidesz with political loyalists – got appointed by the President of the Republic as ordinary judges,<sup>82</sup> which means that they got entitled to take up a position in the judiciary whenever they please. Only a small fraction of them had served as ordinary judges before they joined the Constitutional Court.

<sup>80</sup> It needs to be noted that in another decision the Constitutional Court confirmed the constitutionality of the administrative judicial reform in terms of its substance as well. See Decision no. 22/2019. (VII. 5.) of the Constitutional Court of Hungary.

<sup>81</sup> Act CXXVII of 2019 on the Amendment of Certain Acts in Relation to the Single-instance Administrative Procedures of District Offices.

<sup>82</sup> <https://magyarkozlony.hu/dokumentumok/60f04856a5daf11dea3c076149c70e640a5f920d/megtekintes>, 13 October 2022.



An even more spectacular move was the nomination of Zsolt András Varga to be the next President of the Kúria. Mr. Varga became eligible to the post only due to the above-mentioned legislative changes. He had zero experience in the judiciary. He was not only one of those members of the Constitutional Court who were handpicked by the government, but his career path has been shaped to a large extent by his close alliance to Fidesz (Kazai and Kovács 2020). Therefore, it is not a surprise that the National Judicial Council (NJC), the central self-governing body of the Hungarian judiciary having a consultative role, voted against the nomination of Mr. Varga. The NJC noted:

The nomination of Dr. Zsolt András Varga was made possible by two recent legislative amendments which go against the constitutional requirement of placing someone at the top of the judiciary who meets the criterion of the appearance of independence from the other branches of power.<sup>83</sup>

The National Assembly went ahead with the election anyway.

The nominating practices of the Kúria President Mr. Varga himself appointed in an irregular procedure also deserve attention.<sup>84</sup> Applications to serve on the Kúria have to be submitted to the President of the Kúria, who according to the law, mainly has an administrative role during the process.<sup>85</sup> Applicants are ranked by a panel of judges, and the Kúria President has little room of manoeuvre according to the law. The President either agrees with the ranking and appoints the first candidate on the list, or recommends the second or the third candidate. In the latter case, the National Judicial Council takes the recommendation of the Kúria President into account, but ultimately the Council has the power to decide on the candidates. In 2021 in case of 5 vacancies – out of 11 – the Kúria President failed to appoint the first candidates, but also failed to ask for the Council's opinion. Since several similar positions were advertised simultaneously, judges applied to various positions at the same time. But when someone got one of the positions, the Kúria President failed to inform the judge whether the other applications must be withdrawn. Also, the judges were not told which positions they got, so even if they wanted to, they did not know which applications to withdraw. This gave considerable leeway for the President of the Kúria for playing around with the rankings, the order of deciding on the various positions and thus select the candidates of his choice. This was clearly visible in the appointment of former state secretary Barnabás Hajas. Even though Mr. Hajas had no judicial experience whatsoever – quite to the contrary, as a state secretary he was a high level member of the executive power –, in a highly unusual move, he was immediately appointed to the apex court of the country. The call was tailor made to him as the codicator of the 2018 Act on the Right of Assembly and required a deep knowledge in freedom of assembly, whereby many potential candidates were

<sup>83</sup> <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/?fbclid=IwAR2W2n7UWwwKVdHI6oJKyTnUxmLwpzWV6xJ79ml7vn6qO1VeRIUFYXJwkZM>, accessed 13 October 2022.

<sup>84</sup> Hungarian Helsinki Committee, Tribunal Established by Sleight of Hand, 4 September 2022, <https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/>

<sup>85</sup> Act CLXII of 2011 on the legal status and remuneration of judges.

screened out. Even so, Mr. Hajas ranked second in a tie. So instead of appointing judges in the order the positions were advertised, Mr. Varga waited for the first and the other second ranked applicants to be appointed to other courts, and appointed Mr. Hajas, without consulting the Council. Not only was the Council circumvented, in another unusual move, Mr. Hajas was appointed for an indefinite period.

In sum, judicial “reforms” put in place in the last eleven years were tainted by *ad hominem* laws and legislative acts adopted in a legally defective procedure, sometimes even in violation of the problematic laws adopted by the Fidesz majority in Parliament. These are clear violations of the EU’s rule of law definition. Even if the Commission had a hard time finding a solid legal basis to challenge these legislative acts on substantive grounds, or it had fears not to be able to grasp the depth of the problem of a systemic dismantling of the Rule of Law – and indeed the Hungarian government is an expert in “ruling by cheating” (Sajó 2021) –, it could have contested their validity at least on formal basis, whether in the form of infringement proceedings (Bárd et al. 2022), or in the framework of the Conditionality Regulation.<sup>86</sup> These cases may be water under the bridge, but hopefully they will serve as cautionary tales in the future.

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<sup>86</sup> The Rule of Law Conditionality Regulation 2020/2092 should have been employed against Hungary as of its entry into force, with regard to various issues including the independence of the judiciary, but so far the Commission only seems to focus on corruption-related issues. For further analysis, see Scheppele et al. (2021, p. 44).

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