

# Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective

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## *A. Introduction*

In this paper, I deal with recent deviations from the shared values of rule of law and democracy – the ‘basic structure’ of Europe – in Hungary. The starting point of deviation is Article 2 of the Treaty of the European Union, which demands “*respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities*”. The principles of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection of minorities. This was the main instrument, which governed the largest enlargement in the Union’s history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013.<sup>1</sup> As *Dimitry Kochenov* argues, the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria

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1 The Croatian enlargement was somewhat special, as it was part of the EU’s Stabilization and Association Policy and the conditionality was different as well. Inter alia it included the collaboration with the ICTY. I am grateful to *Elizabeth van Rijkevorsel* for pointing this out.

had been met.<sup>2</sup> It happened only after Croatia's accession that the European Commission suggested various adjustments to the negotiation procedure.<sup>3</sup> But not only the conditionality requirements were not taken seriously, but their maintenance was also missing after accession.<sup>4</sup> The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.<sup>5</sup> (During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage.<sup>6</sup>)

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be one of the reasons for non-compliance after accession in some of the new Member States. The other reason is certainly the authoritarian past of the new democracies. Even though the immediate cause might have been the Austrian 'Haider affair'<sup>7</sup>, as *Wojciech*

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2 *Kochenov*, Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law, European Integration Online Papers (EIoP) Vol. 8 (2004) N°10; <<http://eiop.or.at/eiop/pdf/2004-010.pdf>> (last visited on 16.2.18).

3 See. *Hillion*, Enlarging the European Union and Deepening Its Fundamental Rights Protection, SIEPS European Policy Analysis, June Issue 2013:11, 1 (6).

4 About the so-called 'Copenhagen dilemma' see *Closa*, Reinforcing EU Monitoring of the Rule of Law, in: *Closa/Kochenov* (eds.), Reinforcing Rule of Law Oversight in the European Union, 2016, p. 15 et seqq.

5 *Vachudova/Spendzharova*, The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession, SIEPS European Policy Analysis, March Issue 2012:1, 1 et seqq.

6 See *Bátori*, Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU, Public Administration, 2016, Vol. 94, No. 3, 685 et seqq.

7 In 2000, the far-right Freedom Party headed by *Jörg Haider* became the coalition partner of the centre-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the 'report of the three wise men' mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. For a detailed analysis of the genesis of Article 7 see *Hoffmeister*, Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?, in: *von Bogdandy/Sonnevend* (eds.), Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania, 2015, p. 195 (202-205).

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*Sadurski* rightly argues, the Central and Eastern European applicants' history was the main reason why Article 7 TEU was revised in the Treaty of Nice. This new provision made it possible to react not only to a serious and persistent breach by a Member State of principles mentioned in then-Article 6(1) TEU, but also when there is a 'clear risk' thereof.<sup>8</sup>

The weakening of liberal constitutional democracy in Hungary has started after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections.

### *B. The 'Constitutional Counter-Revolution' after 2010*

Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably model case, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary's deliberate non-compliance with the principles of constitutional democracy, because it has not yet received significant sanctioning externally nor substantial internal opposition. Therefore, the case has broader implications for Europe and it even has current resonance in some other, especially, the former communist countries of the region.

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all together at the same time.<sup>9</sup> Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law' document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubberstamped the comprehensive amendment to the Constitution,

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8 *Sadurski*, Adding a Bite to the Bark?: A Story of Article 7, EU Enlargement, and Jörg Haider, 16 Colum. J. Eur. L., 2010, 385 (394).

9 The terms 'single' and 'dual' transitions are used in *Przeworski*, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America, 1991. Later, *Claus Offe* broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. See *Offe*, Varieties of Transition: The East European and East German Experience, 1997.

which went into effect on 23 October 1990, the anniversary of the 1956 revolution, and which was the basic document of the ‘constitutional revolution’ until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.<sup>10</sup> Fidesz fed these sentiments by claiming that there had been no real transitions in 1989–1990, and that the previous *nomenklatura* had merely converted its lost political power into economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich after the transition owing to privatization. The populism of the Fidesz party was directed against all elites, including the elites who designed the 1989 constitutional system (in which Fidesz had also participated), claiming that it was time for a new revolution. That is why *Viktor Orbán*, the head of Fidesz, characterized the results of the 2010 elections as a ‘revolution of the ballot boxes’. His intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In the September 2009 speech, *Orbán* predicted that there was “a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests”. *Orbán*’s vision for a new constitutional order – one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has now been entrenched in a new constitution, entered into force in April 2011.<sup>11</sup>

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10 In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic reported worsening conditions, and 70% and 75%, respectively, perceived improvement.). Eurobarometer, 2009.

11 In an interview on Hungarian public radio on 5 July 2013, elected Prime Minister *Orbán* responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal Constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of

In its opinion, approved at its plenary session of June 17–18 2011, the Council of Europe’s Venice Commission expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.<sup>12</sup>

Before 1 January 2012, when the new constitution came into effect, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These legal regulations affect the rights on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, the functioning of the Constitutional Court and the elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new regulations had a bad effect for the political independence of state institutions, for the transparency of law making and for the future of human rights in Hungary.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country’s 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. Requests were rebuffing by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court is that the amendment annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the terminology of the old and new constitutions were substantially

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the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there.” See *A Tavares jelentés egy baloldali akció* (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 .7. 2013. Kossuth Rádió.

12 See *European Commission for Democracy through Law*, Opinion on the New Constitution of Hungary, <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)016-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx)> (last visited on 16 February 2018); Fidesz’s counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

the same, prior decisions of the Court would still be valid and could still be applied. In cases, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the decisions that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

In April 2014, Fidesz, with 44, 5 % of the party-list votes, won the elections again, and due to 'undue advantages' for the governing party provided by the amendment to the electoral system<sup>13</sup> secured again a two-thirds majority. In early 2015, Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party has received another 20,5 % of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism.

### *C. The EU's Failed Efforts to Protect European Values*

Despite the fact that the European Union has direct legal authority to protect the values of constitutionalism in the Member States, it rather preferred to use indirect means of pressure, dependent on EU economic competences to

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13 “A number of amendments negatively affected the election process, including important checks and balances [...]. The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media.” – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report. See *OSCE, Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections*, 6 April 2014.

a large extent.<sup>14</sup> Until 2013, when the Fourth Amendment to the Fundamental Law was enacted the EU did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it. Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.<sup>15</sup> The report is named after *Rui Tavares*, a Portuguese MEP at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty. The report called on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European

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14 See *Dawson/Muir*, Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law, German Law Journal, 2013 Vol. 14, No. 10, 1959 et seqq.

15 *European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the Situation of fundamental Rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16.2.2012) (2912/2130(INI))*, <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>> (last visited on 16.2.2018).

Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government “not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families”.<sup>16</sup> These words very much reflect the *Orbán*-government's view of the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution [...]. And we don't want any unsolicited help from strangers who are keen to guide us [...]. Hungary must turn on its own axis”.<sup>17</sup>

Encouraged by the Tavares report, Commission President *Barroso* also proposed a robust European mechanism to be “activated as in situations where there is a serious, systemic risk to the Rule of Law”.<sup>18</sup> Commission Vice-President *Reding*, too, announced that the Commission will present a new policy communication.<sup>19</sup>

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted

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16 On the very day that the resolution of the Hungarian Parliament was announced, *Hannes Swoboda* (Austria), the leader of the S&D Group at the European Parliament, said in a press release that the resolution was an ‘insult to the European Parliament’ and demonstrated that Hungary's Prime Minister, *Viktor Orbán*, does not yet understand the values of the EU. See Hungarian Parliament rejects Tavares report. Brussels, 05/07/2013, Agence Europe.

17 For the original, Hungarian-language text of *Orbán*'s speech, entitled *Nem leszünk gyarmat!* [We won't be a colony anymore!] The English-language translation of excerpts from *Orbán*'s speech were made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16.3.2012, at: < <https://www.ft.com/content/36c81bbb-4644-3288-ae2b-8c9b694011fb>> (last visited on 31.03.2018).

18 *Barroso*, State of the Union address 2013, Plenary session of the European Parliament (Strasbourg: 11.9.2013) SPEECH/13/684, < [http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm)> (last visited on 16.2.2018).

19 *Reding*, The EU and the Rule of Law – What Next?, Centre for European Policy Studies (Brussels: 4.9.2013) SPEECH/13/677, < [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_de.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_de.htm)> (last visited on 16.2.2018).

the Fifth Amendment on 16 September 2013.<sup>20</sup> The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum." A statement from the Prime Minister's Office said: "The government wants to do away with those[...] problems which have served as an excuse for attacks on Hungary," But this minor political concession does not really mean that the Hungarian government ever respected at least the formal rule of law, as some commentators claim.<sup>21</sup>

As none of the suggested elements have worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States.<sup>22</sup> This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed the most senior ten percent of the judiciary from office, including a lot of court presidents, and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in *Commission v. Hungary* established a violation of EU law<sup>23</sup>. But unfortunately, the decision was not able to reinstate the dismissed judges into their original position, and to stop the Hungarian government

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20 Both the foreign and Hungarian Human Rights NGOs said that the "amendments show the government is not serious about fixing human rights and rule of law problems in the constitution."; See the assessment of *Human Rights Watch*, Hungary: Constitutional Change Falls Short, 18.9.2013, <<http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>> (last visited on 16.2.2018), and the joint opinion of three Hungarian NGOs: The Hungarian Helsinki Committee, NGO Comments on the 5th Amendment to the Fundamental Law, 31.10.2013, <<http://helsinki.hu/otodik-alaptoervenymodositas-nem-akarasnak-nyoges-a-vege>> (last visited on 16.2.2018).

21 See *von Bogdandy*, How to Protect European Values in the Polish Constitutional Crisis, 31.3.2016, <https://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/> (last visited on 16.2.2018).

22 *European Commission*, Communication from the Commission to the European Parliament and the Council of 11 March 2014, A new EU Framework to strengthen the Rule of Law, Brussels, 19.3.2014 COM(2014) 158 final/2 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207632%202014%20INIT>> (last visited on 28.4.2017).

23 *ECJ, Commission v. Hungary*, C-286/12, Judgement of 6.11.2012, EU:C:2012:687.

from further seriously undermining the independence of the judiciary, and weakening other checks and balances with its constitutional reforms. Apparently, the ECJ wanted to stay away from Hungarian internal politics, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State.<sup>24</sup> This was the reason that *Kim Lane Scheppele* suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action.<sup>25</sup>

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The Framework process is designed as a three steps procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member state about how to resolve the issue. Third, the Commission monitors the response and follow-up of the member state to the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning *Viktor Orbán's* statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary.<sup>26</sup> But

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24 For the detailed facts of the case and the assessment of the ECJ judgement see *Halmai*, *The Early Retirement Age of the Hungarian Judges*, in: Nicola/Davies (eds.), *EU Law Stories*, 2017, 471 et seqq.

25 See *Scheppele*, *Enforcing the Basic Principle of EU Law through Systemic Infringement Procedures*, in Ciosa/Kochenov(eds.), *Reinforcing Rule of Law Oversight in the European Union*, 2016, p. 105 et seqq.

26 *European Parliament*, Press Release, Hungary: MEPs condemn Orbán's death penalty statements and migration survey, 10.6.2015, <<http://www.europarl.europa.eu/news/en/news-room/20150605IPR63112/hungary-meps-condemn-orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey>> (last visited on 16.2.2018).

the Commission ultimately refused to launch the procedure with the argument that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.<sup>27</sup>

In December 2015, after the Hungarian Parliament in July and September enacted a series of anti-European and anti-rule-of law immigration laws<sup>28</sup> as a reaction to the refugee crisis, the European Parliament again voted on a resolution calling on the European Commission to launch the Rule of Law Framework. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)).<sup>29</sup> This

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27 European Parliament, Press Release, Hungary: no systemic threat to democracy, says Commission, but concerns remain, 2.12.2015, <<http://www.europarl.europa.eu/news/en/press-room/20151201IPR05554/hungary-no-systemic-threat-to-democracy-says-commission-but-concerns-remain>> (last visited on 16.2.2018).

28 See Halmai, Hungary's Anti-European Immigration Laws, Tr@nsit Online, 4.11.2015, <<http://www.iwm.at/read-listen-watch/transit-online/hungarys-anti-european-immigration-laws/>> (last visited on 16.2.2018).

29 Regarding the asylum procedures, the Commission was concerned that there was no possibility to refer to new facts and circumstances in the context of appeals and that Hungary was not automatically suspending decisions in case of appeals – effectively forcing applicants to leave the territory before the time limit for lodging an appeal expired, or before an appeal has been heard. Regarding rights to translation and interpretation, the Commission was concerned that the Hungarian law fast-tracked criminal proceedings for irregular border crossings, which did not respect provisions of the Directive on the right to interpretation and translation in criminal proceedings, which ensures that every suspect or accused person who does not understand the language of the proceedings is provided with a written translation of all essential documents, including any judgments. Also, the Commission expressed its concerns about the fundamental right to an effective remedy and a fair trial under Article 47 of the Charter of Fundamental Rights of the EU. There were concerns about the fact that under the new Hungarian law dealing with the judicial review of decisions, in the event that an asylum application is rejected, a personal hearing of the applicant is optional. The fact that judicial decisions taken by court secretaries (a sub-judicial level) that lack judicial independence also seems to be in breach of the Asylum Procedures Directive and Article 47 of the Charter. European Commission, Press Release, Commission opens infringement procedure against Hungary containing its asylum law, 10.12.2015, <[http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm)> (last visited on 16.2.2018).

was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action.<sup>30</sup>

Also at the end of May 2016, the Commission issued two infringement procedures against Hungary. The first one demands Hungary to change its law forbidding the sale of agricultural land to foreigners.<sup>31</sup> The other requests Hungary to ensure that Roma children enjoy access to quality education on the same terms as all other children and urges the government to bring its national laws on equal treatment as well as on education and the practical

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30 See this option as one of three scenarios using the Charter as a treaty obligation in *Hoffmeister*, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?*, in von Bogdandy, Armin/Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, 2015, p. 195 (201). (According to *Hoffmeister* in the first scenario, a Charter right is further specified by EU secondary law. For example, Article 8 Charter on the protection of personal data lies at the heart of Directive 95/46/EC which largely harmonises the rules on data protection in Europe. In the second scenario, the Charter right is not underpinned by specific EU legislation. That is the case, for example, with Article 10(1) of the Charter on the freedom of thought, conscience and religion.) According to *Armin von Bogdandy* and his colleagues' national courts could also bring grave violations of Charter rights, such as freedom of the media in Article 11 to the attention of the CJEU by invoking a breach of the fundamental status of Union citizenship in conjunction with core human rights protected under Article 2 TEU. The idea behind this proposal is that the EU and Member States can have an interest in protecting EU citizens within a given member state. See *von Bogdandy/Kottmann/Antpöhler/Dickschen/Hentrei/Smrkolj*, *Reverse Solange. Protecting European Media Freedom Against EU Member States*, CMLR 2012 Volume 49, 489 et seq.; The proposal was released for public debate by the German-English language public law portal *verfassungsblog.de* in February 2012; (see: *von Bogdandy/Kottmann/Antpöhler/Dickschen/Hentrei/Smrkolj*, *Ein Rettungsschirm für europäische Grundrechte – dargestellt am Beispiel der Medienfreiheit [A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom]* original article only available in German, 15.2.2012, <<http://verfassungsblog.de/ein-rettungsschirm-fr-europische-grundrechte/>> (last visited on 16.2.2018); The debate initiated by the editors <<http://verfassungsblog.de/category/schwerpunkte/rescue-english/>> (last visited on 16.2.2018) featured comments by *Michaela Hailbronner*, *Daniel Halberstam*, *Dimitry Kochenov*, *Mattias Kumm*, *Peter Lindseth*, *Anna Katharina Mangold*, *Daniel Thym*, *Wojciech Sadurski*, *Pál Sonnevend*, *Renáta Uitz* and *Antje Wiener*.

31 *European Commission*, Press Release, *Financial services: Commission requests BULGARIA, HUNGARY, LATVIA, LITHUANIA and SLOVAKIA to comply with EU rules on the acquisition of agricultural land*, 26.5.2016, <[http://europa.eu/rapid/press-release\\_IP-16-1827\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1827_en.htm)> (last visited on 16.2.2018).

implementation of its educational policies into line with the Racial Equality Directive.<sup>32</sup>

On 26 April 2017, the European Commission started another Article 258 infringement action on the amendment to the Hungarian Higher Education Law, which aimed at closing down the Central European University in Budapest. According to the Commission's statement<sup>33</sup> the law is not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment. But the Commission also invoked the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as the Union's legal obligations under international trade law. The Commission sent a Letter of Formal Notice to the Hungarian Government, in which it mentions the draft legislation on the governmental oversight of the so-called 'foreign' non-government organisations, a law that very much bears resemblance to President *Putin's* 'foreign agent', as being also on the Commission's radar screen together with the new asylum law adopted at the end of March 2017.

In May 2017, the Parliament adopted for the first time a resolution on Hungary in which calling for a vote on the activation of the preventive arm of Article 7 of the TEU on the ground that the 'current situation in Hungary represents a clear risk of a serious breach of the values'. In the resolution, the European Parliament noted that it

“9. Believes that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7(1) TEU procedure;

10. Instructs its Committee on Civil Liberties, Justice and Home Affairs therefore to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU, in accordance with Rule 83 of its Rules of Procedure.”<sup>34</sup>

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32 *European Commission*, Fact Sheet, May infringements' package: key decisions, 26.5.2016, <[http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_da.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_da.htm)> (last visited on 16.2.2018).

33 *European Commission*, Daily News 26/04/2017, 26.4.2017, <[http://europa.eu/rapid/press-release\\_MEX-17-1116\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-1116_en.htm)> (last visited on 16.2.2018).

34 *European Parliament*, European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)). In July 2017, *Judith Sargentini* was appointed rapporteur for the European Parliament's investigation into whether Article 7(1) TEU should be triggered against Hungary.

In September 2017, the European Court of Justice dismissed Hungary and Slovakia's case against the Council's 2015 plan to relocate up to 160,000 asylum seekers across member states, including 1294 to Hungary from Italy and Greece over a period of two years. "That mechanism actually contributes to enabling Greece and Italy to deal with the impact of the 2015 migration crisis and is proportionate" – the European Court of Justice ruled.<sup>35</sup> While the Slovakian government fully respected the verdict, *László Trócsányi*, the Hungarian Minister of Justice promised to defend "Hungary's sovereignty, constitution, and identity" against the Commission, which is violating countries' rights, and the Polish Prime Minister also committed to support Hungary in not accepting relocated refugees.<sup>36</sup>

Despite all these non-compliances, Commission first vice-president *Frans Timmermans* in an interview given after the ECJ judgment dismissed the idea that Hungary poses the same threat to the rule of law that Poland does: "The situation in Hungary is not comparable to the situation in Poland."<sup>37</sup>

#### *D. Present and Future of Constitutionalism in Hungary*

The current Hungarian constitutional system constitutes a new, hybrid type of regime, between the ideal of a full-fledged democracy and a totalitarian regime.<sup>38</sup> Even when there is a formal written constitution, an autocracy is not a constitutional system.<sup>39</sup> Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as *William J. Dobson* argues, "today's dictators and authoritarians are far more sophisticated, savvy, and

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35 ECJ, Press Release No 91/17, Joined Cases *Slovakia and Hungary v. Council*, C-643/15 and C-647/15, 6.9.2017, <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>> (last visited on 16.2.2018).

36 *Bayer*, Hungary says refugee ruling 'raped' EU law, 9.7.2017, <<http://www.politico.eu/article/hungary-says-ecj-ruling-on-refugee-quotas-has-raped-eu-law-asylum-seekers-italy-greece-relocation-scheme/>> (last visited on 16.2.2018).

37 *Stearns/Krukowska/Chrysoloras*, Poland's Authoritarian Shift Spurs Warning of Economic Trouble, 18 .12. 2017, <<https://www.bloomberg.com/news/articles/2017-09-17/poland-s-authoritarian-shift-spurs-warning-of-economic-trouble>> (last visited on 16.2.2018).

38 For the classic differentiation between totalitarian (dictatorial) and authoritarian systems see *Linz*, *Totalitarian and Authoritarian Regimes*, 1975.

39 About totalitarian systems with written constitutions see *Balkin/Levinson*, *Constitutional Dictatorship*, 2010.

nimble than they once were.”<sup>40</sup> What happened in Hungary is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal constitutional system is functioning. Hungary became an illiberal and undemocratic system,<sup>41</sup> which was the openly stated intention of PM *Orbán*.<sup>42</sup> The Hungarian system represents an atypical form of hybrid regimes, because, as opposed to such approaches in Latin-America, the former Soviet republics or Africa, where the basis is a presidential constitution, in Hungary the formal parliamentary system remained in place with the decisive role of the Prime Minister.

The backsliding has happened through the use of ‘abusive constitutional’ tools: constitutional amendments and even replacement.<sup>43</sup> The case of

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40 *Dobson*, *The Dictator’s Learning Curve*. Inside the Global Battle for Democracy, 2012, p. 4.

41 As *Jan-Werner Müller* rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them ‘illiberal democracies’ we should describe them as illiberal and ‘undemocratic’ regimes. See *Müller*, *The Problem With ‘Illiberal Democracy’*, Project Syndicate, 21.1.2016, <<https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accessreg>> (last visited on 16.2.2018).

42 In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighbouring Romania, *Orbán* proclaimed his intention to turn Hungary into a state that “will undertake the odium of expressing that in character it is not of liberal nature.” Citing as models he added: “We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world [...]. Today, the stars of international analyses are Singapore, China, India, Turkey, Russia [...] and if we think back on what we did in the last four years, and what we are going to do in the following four years, then it really can be interpreted from this angle. We are [...] parting ways with Western European dogmas, making ourselves independent from them [...]. If we look at civil organizations in Hungary, [...] we have to deal with paid political activists here. [...] [T]hey would like to exercise influence [...] on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians ... opposing us, but political activists attempting to promote foreign interests. [...] This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests.” See the full text of *Viktor Orbán’s* speech here: <<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnad-furdo-of-26-july-2014/10592>> (last visited on 16.2.2018).

43 The category of ‘abusive constitutionalism’ was introduced by *David Landau* using the cases of Colombia, Venezuela and Hungary. See *Landau*, *Abusive Constitutionalism*, 47 *UC Davis L. Rev.*, 2013, 189 et seqq.; Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of

Hungary has shown that both the internal and the external democratic defense mechanisms against this abusive use of constitutional tools failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

In this illiberal system, the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of independent judiciary and Constitutional Court. To make it clear, competences of the constitutional courts originally very strong in the beginning of the transition can be weakened provided that they still can fulfil their function as checks and balances to the governmental power, or other control mechanisms exist.

As many scholars noted, there is an incredible range of nondemocratic, non-authoritarian regimes and their relationship with each other and democracy is often imperfect and unclear. Countries in this 'grey zone' inspired a lot of concepts, which were created to capture the mixed nature of these regimes. *Steven Levitsky* and *Lucas A. Way* introduced the term 'competitive authoritarianism' for a distinctive type of 'hybrid' civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents.<sup>44</sup>

The hybridity of Hungarian constitutionalism differs from the authoritarian character of *Putin's* Russia, where due to failing competing parties and candidates the results of parliamentary and presidential elections are uncertain. Therefore, the Russian regime can be considered as authoritarian, while the Hungarian one is still democratic, even if illiberal.

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the Polish Constitutional Tribunal reminds of the events in the years after the election of Jefferson, as the first anti-federalist President of the US. On 2 March 1801, the second to last day of his presidency, President Adams appointed judges, most of whom were federalists. The federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath see *Ackerman*, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, 2007.

44 See *Levitsky/Way*, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, 2010. p. 5.

The case of Hungary proves that democracy and liberalism do not necessarily go hand in hand. Besides liberal democratic (or democratic and rule of law-oriented, 'rechtsstaatlich') constitutions and political systems there exist non-liberal democratic ones (radical democracies without a bill of rights, such as most of the Commonwealth constitutions until very recently, or constitutions based on popular sovereignty, but little weight to the people's interest in the day-to-day politics, such as the constitutions of Latin American countries), also liberal but non-democratic constitutions (such were the ones in France after 1815, or the constitutional system of the Austro-Hungarian Monarchy), and finally neither liberal nor democratic socialist constitutions (of the former and current communist countries).<sup>45</sup>

The problem with the Hungarian illiberal constitutional system is that the country is currently member of the European Union, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course, the citizens of Hungary, as any other citizens of a democratic nation-state, have the right to oppose joint European measures for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There is still a significant number of people who either consider themselves as supporters of liberal democracy, or at least represent views, which are in line with liberal democracy. If Hungarians ultimately opt for a non-liberal democracy, they must accept certain consequences including parting from the European Union and the wider community of liberal democracies.

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The described democratic backsliding in Hungary demonstrates that an institutional framework is a necessary but not sufficient element of a successful

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45 Almost this same typology of constitutions and governance systems is used by the constitutional scholar Dieter Grimm, and the sociologists *Iván Szelényi* and *Tamás Csillag*. See *Grimm*, Types of Constitutions, in: *Rosenfeld/Sajó*, (eds.), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 98 et seqq.; *Szelényi/Csillag*, Drifting Liberal Democracy: Traditionalist/Neo-conservative Ideology of Managed Illiberal Democratic Capitalism in Post-communist Europe, *Intersections*, EEJSP, 1/2015, 18 et seqq.; Besides the four joint categories, *Grimm* adds a fifth type of constitution to his typology, namely the social or welfare state constitutions (such as the Indian, the Brazilian, the Japanese, the South Korean or the South African), which are not liberal regarding social and economic rights.

democratization. Behavioral elements, among them political and constitutional culture, are as important as institutions. The other lesson of this case study is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian regime.<sup>46</sup> Another important aspect of these developments is that emerging democracies, for instance the one in Tunisia, are not anymore influenced exclusively by the liberal democratic West.<sup>47</sup> There are economists claiming that the real question is not why are there less and less liberal democracies, but why liberal democracies still exist.<sup>48</sup> Others search for 'post-liberalism'<sup>49</sup> in the wake of financial crisis, and after Brexit.<sup>50</sup>

The behavior of the Hungarian government, supported by the other three Visegrád countries, during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy, and that membership in the European Union is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately, an outsize fear of threats, physical and social, lately, for instance, the refugee crisis and its main reason, the Syrian

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46 Asking the question whether liberal democracy is at risk, *Ivan Krastev* responds that the big difference compared to the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus. Instead, they have a problem with the liberal part of it. See *Krastev*, *Europe in Crisis: Is Liberal Democracy at Risk?*, in: Council of Europe, *Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012, 2012, p. 67 et seqq.

47 See *Youngs*, *Exploring 'Non-Western' Democracy*, *Journal of Democracy* Vol. 26 No 4, 2015, 140 et seqq.

48 *Mukand/Rodrik*, *The Political Economy of Liberal Democracy*, 2015; *Joschka Fischer*, former German foreign minister and vice-chancellor gave an interesting explanation what might have caused the decline of liberal democracy: "How did we get here? Looking back 26 years, we should admit that the disintegration of the Soviet Union – and with it, the end of the Cold War – was not the end of history, but rather the beginning of the Western liberal order's denouement. In losing its existential enemy, the West lost the foil against which it declared its own moral superiority." *Fischer*, *Europe's Last Chance*, *Project Syndicate*, 29.8.2016. <<https://www.project-syndicate.org/commentary/europe-needs-bold-leaders-by-joschka-fischer-2016-08>> (last visited on 16.2.2018).

49 See *Milbank/Pabst*, *The Politics of Virtue, Post-Liberalism and the Human Future*, 2016.

50 *The Guardian*, *Kettle*, *Brexit Was a Revolt Against Liberalism, We Have Entered a New Political Era*, 15.9.2016.

conflict, strengthened illiberal systems, such as Turkey and authoritarian regimes, such as Russia all over Europe, and in the case of Hungary even inside the EU,<sup>51</sup> not to mention Trump's presidency in the US. There is a growing gap between the old and the new Member States, and the support of populist parties has been strengthened even in the old Member States.<sup>52</sup> EU institutions so far have proven incapable of enforcing compliance with core European values. After coming to the conclusion that the traditional mechanism of the infringement procedure does not work, and in the fear from the unanimity requirement for sanctioning according to Article 7(2), the Commission duplicated the preventive mechanism of Article 7(1) by introducing the Rule of Law mechanism. Due to political considerations, it was not used against Hungary at all, and in the case of Poland despite the very strongly worded Commission recommendations and their disregard by the Polish government nothing really happened, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of oversight. The fear from Hungary's veto in the case of Poland indicates that the desired oversight for the effective use of Article 7 would require a Treaty amendment. Unfortunately, the scenarios of the European Commission's White Paper on the Future of Europe<sup>53</sup> published on 1 March do not aim at Treaty changes and do not seem to provide institutional guarantees against populism and illiberal states within the EU. We can only hope that the opportunity raised by *Viktor Orbán* that the mainstream in Europe will follow precisely

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51 At a conference in the Polish town Krynica, in mid-September 2016 *Orbán* and *Kaczyński* proclaimed a 'cultural counter-revolution' aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favour of the nation states. *Slawomir Sierakowski* even speaks about an 'illiberal international'. *Sierakowski*, *The Illiberal International*, *Social Europe*, 13.9.2016, <<https://www.socialeurope.eu/the-illiberal-international>> (last visited on 16.2.2018).

52 Regarding the constitutional crisis of the EU, *Michael Wilkinson* draws attention to the dangers of 'authoritarian liberalism'. See *Wilkinson*, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 *German Law Review*, 2013, 527.

53 *European Commission*, *White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025*. European Commission COM (2017) 2025 of 1.3.2017, <[https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf)> (last visited on 16.2.2018).

the illiberal course that Hungary has set forth<sup>54</sup> won't become reality in the future of Europe.

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54 See *Orbán*, Hungary and the Crisis of Europe: Unelected Elites versus People, National Review, 26.1.2017, < <http://www.nationalreview.com/article/444279/hungary-crisis-europe-unelected-elites-versus-people>> (last visited on 16.2.2018).