

**IN SEARCH OF THRESHOLDS FOR ACTIVATING ARTICLE 7 OF THE LISBON  
TREATY.**

**THE CASES OF AUSTRIA AND HUNGARY.**

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## Abstract

In the present thesis I aim to approach the question of thresholds for activating article 7 of the Lisbon Treaty. Article 7 provides a prevention and sanction mechanism. This article can be triggered in two circumstances: a clear risk of the serious breach or an existence of the serious and persistent breach of the common values against the EU Member States in question.

In order to examine thresholds I will compile two cases. First, I want to look at the thresholds on which 14 Member States decided to take measures against Austria, after the extreme right party led by Jörg Haider entered the government. Secondly, I will examine the post-Austrian case which regard constitutional changes in Hungary that raise concerns in the international arena and especially caused unrest in the European Union. The analysis of the two cases in the light of the European Union law leads to the conclusion that thresholds on which the decision depends are subjected to the current political atmosphere among Member States.

Moreover the Member States are not willing to trigger the prevention and sanction mechanism being afraid that once it may be used against them, Surprisingly The European Council as a guard of the common values is also very reluctant to start proceeding. Since the time of the Austrian case when the drastic measures were applied, one can observe a very careful approach of the European Union in using article 7. Therefore I will provide recommendations which could help to improve effectiveness of article 7 or form a totally new body guarding values enshrined in article 2.

## Introduction

In the parliamentary elections in October 1999, the Austrian Freedom Party – the party considered as an extreme right party led by Jörg Haider gained 27 % of the votes and consequently entered the government. At that time the European Union included 15 Member States. Unprecedentedly 14 of them stood up against the newly formed government requiring from Austria not to create government which would include Austrian Freedom Party and threatening with the use of sanctions. Although the government pledged its commitment to European values and human rights protection, the 14 countries froze diplomatic relations with Austria.

Over 10 years later in Central Europe, the Hungarian party Fidesz, which is considered as a conservative, nationalist and Christian party<sup>1</sup> after 8 years of absence in the government, entered again the parliament, forming a coalition with the Christian Democratic People's Party, which gave both parties 2/3 majority in the parliament.<sup>2</sup> Fidesz's objective announced during the campaign was to reconstruct the constitutional system of Hungary. After successful elections in which Fidesz together with Christian Democratic People's party gained majority, the new government started pushing a wide range of new laws. The new constitution was introduced on 25 April 2011 and came into force on 1 January 2012.<sup>3</sup> The new basic law caused a lot of unrest on the domestic, European and international level. After the new constitution was adopted, many Member States of EU voiced strong criticism towards Hungary, suggesting to start the procedure of article 7 of the Treaty on European Union. As

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<sup>1</sup> Democracy and Human Rights at Stake in Hungary: The Report of the Norwegian Helsinki Committee, accessed: March 23, 2013, at p.7, available at:

[http://nhc.no/admin/filestore/Publikasjoner/Rapporter/2013/Rapport\\_1\\_13\\_web.pdf](http://nhc.no/admin/filestore/Publikasjoner/Rapporter/2013/Rapport_1_13_web.pdf),

<sup>2</sup> Ibid, at p. 57

<sup>3</sup> Id, at 12

the changes in Hungarian legislation were much broader, I will focus on those which stir up a lot of negative emotions .<sup>4</sup>

The Hungarian case is a very fresh and ongoing process in the European Union. Moreover, the Fidesz programme is far from accomplished. Therefore, it is of my interests to compare the Austrian case where Member States of the EU decided to take actions against Austria, acting outside of the EU treaties, with the very fresh topic of Viktor Orbán and Fidesz's programme of reforms which again cause so much of unrest in the EU. In my paper I will also show the impact of the Austrian case on the current reluctance for triggering article 7, and formulate recommendations to improve the protection of European common values.

There is a broad literature on the case of the Austrian Freedom Party such as publication of Wojciech Sadurski "Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jörg Haider", article of Per Cramér and Pål Wrangé "The Haider Affair, law and European Integration" and article of Michael Merlingen and others: "The Right and the Righteous? European Norms, Domestic Politics and the sanctions against Austria". At the same time, many academics are currently scrutinizing the situation in Hungary, as for instance the Norwegian Helsinki Committee report on "Democracy and Human Rights at Stake in Hungary" . However, there are no publications compiling the two cases and examining thresholds on which the EU Member States make its determination regarding sanctions. Therefore it is of my interest to look at the development of the Hungarian case in the European Union from the perspective of unprecedented sanctions of 14 EU Member States against Austria.

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<sup>4</sup> Not all of the amendments in Hungarian law, which are considered to be at stake, fall under article 7 of the Treaty on European Union. Many of them are subject to the infringement procedure which is enshrined in article 258 of the Treaty on the Functioning of the European Union. Article 258 provides that the Commission observes if the domestic law of the Member State complies with EU law. Therefore Commission has a power to bring infringement procedure against the country which does not obey the EU law.

Article 7 of the Treaty on European Union consists of two mechanisms: prevention and sanction mechanism. The prevention mechanism expressed in article 7 (1) can be triggered in the circumstances of a clear risk of a serious breach by a Member State of the values referred to in Article 2.<sup>5</sup> The sanction mechanism can be triggered when there is a serious and persistent breach by a Member State of the values referred to in article 2. Although it might seem clear that whenever there is a clear risk of the breach or the existence of the breach the article 7 procedure may be started. However, the use of article 7 was entrusted totally in the hands of the European Parliament, the Commission and the Council. At the same time, article 7 does not provide for the Court of European Union's competence to review the merits on the determination. Therefore, article 7 should be seen as purely political tool provided by the Treaty.

This paper will aim to demonstrate that opening the procedure of article 7 is made on purely political grounds based predominantly on the political circumstances within the Member States as well as the current political atmosphere in the European Parliament. In the two examined cases- Austria and Hungary, I will search for the thresholds on the basis of which the political decisions were made.

The first chapter provides a relevant background of the introduction and development of the Treaty provision expressed in article 7. The objective is to explain the mechanism and the structure of this article. Furthermore, I will look at the meaning of European 'common values' which, if breached, open the gate to the application of article 7. The first chapter is crucial in order to understand the next chapters.

In the second chapter, I first endeavor to explain the political situation in Austria in 1999 which led the 14 Member States of the EU to freeze bilateral relations with this country.

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<sup>5</sup> Consolidated version of the Treaty on European Union, accessed: March 23, 2013, at article 7, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>

Secondly, I will describe the main changes in Hungarian law introduced by the government, which caused unrest and accusations towards Hungary, since many voices coming from the EU, NGOs and international organizations contend that Hungary is in breach of European fundamental derived from article 2 of the Treaty on the European Union.

The third chapter of my thesis will be dedicated to examining the thresholds of the determination made in the Austrian case. Further, I will compile different positions, views and concerns regarding changes in Hungary in order to see whether the thresholds for starting article 7 procedure have been reached. Moreover, I will focus at the current political developments in the European Parliament to see what could the Hungarian case can bring us.

Finally, in the last chapter of my thesis I would like to formulate some suggestions of possible changes in the current procedures in order to improve their effectiveness and with a view of ensuring, that situations of violations of common fundamental values are efficiently remedied.

## Chapter 1: What do articles 7 and 2 stand for?

In the first chapter of my thesis I look at the treaty provision expressed in article 7, which in combination with article 2, gives a way to trigger prevention and suspension mechanisms. The first aim of this chapter is to show the development of the article 7 mechanism, giving a historical background and outlining the circumstances which influenced its introduction. Further, I explain what is the current wording of article 7 and what the particular elements of article 7 mean. Given the article 7 can only be triggered when a Member State is in breach of common values expressed in article 2, the second aim of this chapter is to present the latter provision of the treaty and explain what do the values expressed in article 2 stand for. I do this in section 2 of this chapter .

### 1.1 Sketching the sanctioning mechanism

Article 7 provides the EU with a weapon against Member States which are in breach of common values expressed in article 2 of the Treaty. It foresees a sanctioning and preventive mechanism. The sanctioning mechanism now included in article 7(2) of the Lisbon Treaty was first introduced in the Amsterdam Treaty. The idea of article 7 was given birth at the Inter-Governmental Conference when during its Summit in Corfu a Reflection Group was established. The group was created by the Ministers of Foreign Affairs of the Member States and the President of the Commission. It carried its work in a cooperation with other EU institutions and organs.<sup>6</sup> The aim of formatting this reflection group was to “examine and elaborate ideas relating to the provisions of the Treaty on European Union for which a revision was foreseen and other possible improvements in a spirit of democracy and openness,

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<sup>6</sup>European Council at Corfu.24-25 June 1994 Presidency Conclusions, accessed: March 21, 2013, accessed: March 22, 2013, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/EUROPEAN%20COUNCIL%20AT%20CORFU%20-%20Presidency%20conclusions.pdf>,



on the basis of the evaluation of the functioning of the treaty as set out in the reports”.<sup>7</sup> Furthermore the mandate of the Reflection Group was established also to “elaborate options in the perspective of the future enlargement of the Union on institutional questions”.<sup>8</sup>

The reflection group issued its report in which it stated that although the European Union does not tend to become a super-state it cannot be seen only as an entity with limited economic (i.e. mainly Internal Market related) objectives. Therefore it was described as “a unique design based on common values”<sup>9</sup> which shall be strengthened. Moreover, the report added that the Treaty must clearly proclaim values guaranteeing respect for human rights, which are common to all citizens of the European democratic states.<sup>10</sup> According to the report, the Union already included human rights as general principles, furthermore it mentioned previous suggestions for creating the sanction mechanism. The Reflection Group in the second part of the report called for a provision that would punish a member state who would commit a “serious and repeated breach of fundamental human rights or basic democratic principles”.<sup>11</sup> From the report we can read that most representatives were not keen to open the possibility of expulsion of a member state if such a provision as suspension of the rights flowing from EU membership was effective.<sup>12</sup>

During the inter-governmental conference countries expressed their position about *inter alia*, the sanction mechanism in a white paper on the 1996 intergovernmental conference. As Wojciech Sadurski noted in his article “Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider” Austria together with Italy presented stronger views on the future article 7 than other countries. However, when referring the

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Reflection Group’s Report, Part 1, accessed: March 22, 2013, available at: [http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2\\_en.htm#](http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm#),

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

sanction mechanism, they linked it mainly to the forthcoming accession of new member states.<sup>13</sup> Indeed, this was because the whole system of protecting fundamental values in article 7 was originally seen as a precaution against new entering countries.<sup>14</sup>

The shape of article 7 was given during the Irish Presidency in June 1996 in the document: *Conference des représentants des gouvernements des Etats membres*. As Wojciech Sadurski states, all the elements of article 7 with only small later modifications were included in this document.<sup>15</sup> The current wording of the sanction mechanism in article 7(2) enables the European Council either after the proposal made by one third of the Member States or by the Commission after obtaining the consent of the European Parliament to decide (acting by unanimity) about the existence of serious and persistent breaches of values expressed in article 2 of the Treaty on European Union.<sup>16</sup>

Paragraph 2 contains two stages of this procedure. First of all, as stated there must be a determination made whether the country at stake committed a serious and persistent breach of the common values. But such a determination is made after giving the opportunity to the Member State concerned to submit its observations. If the Council decides that such a breach took place in the second stage there is a decision to be made whether the country should be suspended of its membership rights or not.<sup>17</sup> The second stage does not require unanimity but a qualified majority. Paragraph 3 of article 7 contains the consequences of the determined existence of such a breach. The Council acting by a qualified majority, may decide to suspend certain rights flowing from EU membership, such as voting rights in the Council.

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<sup>13</sup> As Wojciech Sadurski in the article "Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jörg Haider" noticed there was a link between the proposal of sanction mechanism and enlargement policy. Austria together with Italy proposed to include a sanction mechanism after the provision regulating conditions for accession not after the provision dealing with foundational principles of the Union.

<sup>14</sup> Per Cramér, Pål Wrange, "The Haider Affair, Law and European Integration," *Europarättslig tidskrift* 28 (2000), at 50

<sup>15</sup> *Id.*, at 9

<sup>16</sup> Consolidated version of the Treaty on European Union, *supra* note 5

<sup>17</sup> Alina Karczorowska, *European Union Law: 2<sup>nd</sup> Edition*, Routledge, 2010, at 67-68

According to the “Communication from the Commission to the Council and the European Parliament on Article 7”, the existence of the serious and persistent breach may be interpreted in the following manner: serious breach consists of several elements that must be fulfilled in order to claim a violation as serious. First of all, the purpose of the breach, according to the Commission, can be understood as meaning that there is a specific group that is affected by the measures undertaken by the Member State.<sup>18</sup> The second element of serious breach is a result of this specific violation. As a consequence of the violation, the state is in breach with several common values expressed in article 2 of the Treaty . Although in order to activate the mechanism in article 7, it is enough to violate one of the values, only the simultaneous violation of several values makes the breach serious. As I will present in section 1.3 values are also interdependent of each other. A breach must not only be serious, but also persistent. For understanding the meaning of persistent breach, the Commission proposed several international documents on the basis of which the phrase persistent breach can be interpreted, such as article 6 of the United Nations Charter.<sup>19</sup>

## 1.2 Preventive mechanism

The preventive mechanism, which is now included in article 7(1) of the Lisbon Treaty, was added to the Treaty of Nice after the democratic turbulences which took place in Austria in 2000. In an unprecedented manner 14 out of 15 EU Member States took sanctions against Austria after the far right Austrian Freedom Party led by Jörg Haider entered the government. In parallel, the President of the European Court of Human Rights conferred a special mission of drawing a report on the situation in Austria to three persons. Those were: Martti Ahtissari, Jochen Frowein and Marcelino Oreja. In their report they not only evaluated the democratic

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<sup>18</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based /\* COM/2003/0606 final \*/ , accessed : March 20, 2013, available at : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0606:EN:HTML>

<sup>19</sup> Id.

turbulences in Austria but also inspired birth to the preventive mechanism of article 7 (in its current form) in order to avoid further situations such as the Austrian case. The wise men stated that an amendment to article 7 would be required to emphasize “the fundamental commitment of the EU to common European values. Such a mechanism would also allow from the beginning an open and non-confrontational dialogue with the Member State concerned”.<sup>20</sup>

The procedure of the ‘prevention mechanism’ is laid down in article 7(1) of the Treaty on European Union. According to its wording, the Council acting by a majority of four-fifths<sup>21</sup>, after the proposal made by a one-third of the Member States, by the European Parliament or by the Commission may determine that there is a clear risk of serious breach. The Council also needs to obtain the consent of the European Parliament. But before the decision is made, the Member State has the right to clarify and explain its situation. Also the Commission is obliged to verify whether the allegations towards the defaulting state still apply.<sup>22</sup> This provision is considered as an early warning system and is connected to the monitoring of the current situation of the country at stake. An urge for such monitoring of the countries in question was emphasized in “Communication from the Commission on article 7 of the Treaty on the European Union”.<sup>23</sup> However, as it was stated by the Council in the mandate of the Fundamental Rights Agency, such a mechanism does not allow for the permanent monitoring of any Member State.<sup>24</sup>

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<sup>20</sup> Report by Martti Ahtisaari and others, *supra* note 14

<sup>21</sup> Worth mentioning is that in deciding about the existence of clear risk of a serious breach there is no need for unanimity as when deciding about the existence of the serious and persistent breach in article 7(2)

<sup>22</sup> Consolidated version of the Treaty on European Union, *supra* note 5

<sup>23</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, *supra* note 18

<sup>24</sup> Gabriel N.Toggenburg, The role of the New EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance? *European Law review* 2008,vol.33, no.3, at 394

### 1.3 What are the common European Union values

In order to understand the mechanism provided by article 7, we have to understand first what the values referred to in article 7 of the Treaty stand for. Article 2 in its current form proclaims that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”<sup>25</sup>. As Laurent Pech distinguished in his publication, article 2 contains fundamental moral values which are, for instance- human dignity and freedom and structural principles which are democracy and the rule of law.<sup>26</sup> Moreover according to Pech, values referred in article 2 are to be considered together, not separately. This author argues that the current wording of article 7 clearly indicates that the values are not independent of each other.<sup>27</sup>

This argument is strengthened by the position of the Commission which in its “Communication from the Commission on article 7 of the Treaty on the European Union” stated that although the violation or the clear risk of the violation of one of the common values is enough to open the procedure of article 7, breach of more of the values simultaneously will be a proof of the seriousness of the breach. The latter is one of the elements required to determine the breach.<sup>28</sup> I would also like to refer to the speech of Morten Kjaerum- the Director of the European Union Agency for Fundamental Rights, who during the public hearing held by Civil Liberties Committee in European Parliament, spoke

<sup>25</sup> Consolidated version of the Treaty on European Union, supra note 5

<sup>26</sup> Laurent Pech, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09, at 23

<sup>27</sup> Id., at 64

<sup>28</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, supra note 18

inter alia about the meaning of common values expressed in article 2.<sup>29</sup> As he stated the rule of law plays the role as the link to the other values expressed in article 2. According to Kjaerum, the rule of law shall be understood on the basis of European constitutional tradition and requires that the exercise of public power is subject to “procedural as well as substantive limitations”<sup>30</sup>. Rule of law is also subjected to conditions such as: “separation of powers, legality of administration, principle of legal certainty, the principle of reliability, the prohibition of retroactive acts, and the principle of proportionality”.<sup>31</sup>

In the “Three Wise Men” report, the three European appointees recalled the existence of generally accepted common values, which therefore create a legal obligation on member states to obey them. They referred to a set of binding and non binding documents which create a legal obligation of the European Union Member States to protect values expressed in article 2 of the Treaty on European Union.<sup>32</sup> In this connection, the report concluded that among legally binding documents applicable to Austria were *inter alia*: the Treaty on European Union, the European Convention on Human Rights. Among the non binding documents, the report mentioned- the Declaration against Racism and Xenophobia.<sup>33</sup> These documents were considered as relevant for setting standards concerning common values which were at stake.

Democratic turbulences in Austria also helped to codify, generally accepted common values. Although their existence was clear to Member States, there was a need for an exact

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<sup>29</sup> Situation in Hungary: consolidation or undermining of democratic values? European Parliament/News, February 8, 2012, accessed: March 19, 2013, available at: <http://www.europarl.europa.eu/news/en/headlines/content/20120203STO37174/html/Situation-in-Hungary-consolidation-or-undermining-of-democratic-values>,

<sup>30</sup> Morten Kjaerum, Liber Meeting, February 9, 2011 Brussels, accessed: March 18, 2013, at point 3, available at: <http://www.europarl.europa.eu/document/activities/cont/201202/20120228ATT39497/20120228ATT39497E-N.pdf>,

<sup>31</sup> Id., at 3

<sup>32</sup> Report by Martti and others, adopted in Paris on 8 September 2000, accessed: March 17, 2013, at point 1, available at: <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf>,

<sup>33</sup> Id., at point 3 and 4

wording in the Treaty in order to strengthen “mutual constitutional trust”.<sup>34</sup> Therefore the set of principles was introduced by the Amsterdam Treaty. The publication by Armin von Bogdandy and others “Reverse Solange- Protecting the essence of fundamental rights against EU Member States” noticed the wide scope application of article 2. First of all it is observed in this paper that article 2 applies in any situation which refers to action of public authority on the legal territory of the EU. Secondly the authors pointed out that contrary to article 51 of the Charter of Fundamental Rights of the European Union which limits the application of the Charter only to areas falling within the scope of powers which were transferred by the Member States to the EU, the scope of article 2 is not limited in this manner.

Furthermore, according to the authors of the same paper, the values of article 2 can be interpreted by analyzing “the jurisprudence of Europe’s highest courts with regard to certain infringements upon certain rights which cannot be justified”.<sup>35</sup> They also identify three patterns which shall help determining whether the fundamental rights which are expressed in article 2 were infringed. These patterns are to be applied in concrete situations. First of all, it is “the notion of essence”, which is referred to by the European Court of Human Rights as an “absolute limit to balancing”. Second is “the essence of a right” which is protected by the Court, whenever the essence of a right is at stake, the margin of appreciation which is applied by the Court is limited. The margin of appreciation will be restricted in such cases unless there are circumstances which occur and cause “incitement to violence”. Last but not least, even though it is not possible to recognize the essence of a right, we can deduct the difference between the essence and the periphery from the jurisprudence of the Court.<sup>36</sup>

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<sup>34</sup> Per Cramér, Pål Wrange, “The Haider Affair, Law and European Integration”, supra note 14

<sup>35</sup> Armin von Bogdandy and others “Reverse Solange- Protecting the essence of fundamental rights against EU Member States”, *Common Market Law Review*, Volume 49, Issue 2, at 21

<sup>36</sup> *Id.*, at 23

## Chapter 2: Looking at Austria and Hungary

Austria and Hungary have something in common as both of these countries attracted attention and concerns of the EU Member States, NGOs, as well as various international organizations and many more. However the two stories differ from each other with the background, circumstances and consequences. In both cases EU Member States did not remain indifferent to the incidents which took place in the countries. In this chapter I want to introduce to the background of both cases in order to help understand the reasons for decisions and concerns which were raised in the European Union.

### 2.1 The problem with Jörg Haider

The turbulent story of problems with Austrian democracy started in October 1999 when the Freedom Party of Austria (*Die Freiheitliche Partei Österreichs*- FPÖ) gained 27 % of the votes in parliamentary elections.<sup>37</sup> FPÖ was described by other EU countries as an extreme-right party, such a definition was also given to FPÖ in European Parliament's resolution from 3 February 2000.<sup>38</sup> Although all the countries considered FPÖ as an extreme party, definition "extreme party" did not have the same meaning among all the EU Member States.<sup>39</sup> In the Three wise man report FPÖ was also described as "a right wing populist party with radical elements".<sup>40</sup> One of the reason justifying such assessment that was FPÖ's campaign which was based on xenophobic sentiments.<sup>41</sup>

In aftermath of the elections in Austria the Prime Minister of Portugal- Antonio Guterres (Portugal was holding the Presidency of the Council) warned that if FPÖ entered the

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<sup>37</sup> Per Cramér, Pål Wrange, "The Haider Affair, Law and European Integration", supra note 14, at 28

<sup>38</sup> European Parliament resolution on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), accessed: March 18, 2013, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0045+0+DOC+XML+V0//EN>,

<sup>39</sup> Cécile Leconte, "The Fragility of the EU as a Community of Values: Lessons from the Haider Affair", 2013, West European Politics, Vol.28, No.3, May 2005, at 633

<sup>40</sup> Report by Martti Ahtisaari and others, supra note 17

<sup>41</sup> Id, at point 110



government, The 14 countries would take measures against Austria. Since he stated that European Union is based on a common values, he described FPÖ as a party “which does not abide by essential values of European family”.<sup>42</sup>

The main problem with FPÖ seemed to be linked to the concern about its democratic character. Thus, EU Member States did not want to let the creation of a government composed of such a party. Concerns were raised not only in relation to the identity of the government, but also in relation to this government’s intentions. Although the Austrian government did not manage to pass any law yet,<sup>43</sup> all Member States were seriously concerned with FPÖ’s antidemocratic background which in their views violated fundamental rights.<sup>44</sup> Although Thomas Klestil- who was the president of Austria at the time shared concerns expressed by 14 member states, he nevertheless decided to approve the government because as he stated “the parliamentary democracy has to be respected”.<sup>45</sup> However the President took precautionary measures and decided to withhold his decision until the government confirms in a special document its commitment to democratic values and the rule of law. The document expressed the government’s commitment to democratic values and the rule of law. The government also needed to affirm that there would be no space for anti-Semitism, xenophobic measures, religion discriminations etc in the public sphere.

These statements were also confirmed in the official programme of the government. Once these document were signed, the president could approve the newly formed government. But the 14 EU Member States did not change their position and decided to take measures against Austria. The sanctions which were undertaken had strictly diplomatic character. As the Portuguese Prime Minister observed, the measures against Austria included freezing

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<sup>42</sup> Michael Merlingen and others, “The Rights and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria”, *Journal of Common Market Studies* (March 2001), vol.39, No.1, at 65

<sup>43</sup> *Id.*, at 64

<sup>44</sup> *Id.*, at 61

<sup>45</sup> *Id.*, at 61

diplomatic relations ( both on bilateral diplomatic and political level, lack of support for Austrians in search for positions in international organizations as well acknowledgement of Austrian ambassadors only on the technical level.<sup>46</sup>

The story of sanctions against Austria is that although the 14 Member States acted in the name of the shared by the whole EU community values, they did not act on behalf of EU. They acted outside of the EU framework. The evidence of the outside action strengthens the fact that neither the European parliament nor the Commission were informed about the undertaken measures. Per Cramer and Pal Wrangé in their article compared the action to “the definition and execution of the Common Position within their intergovernmental framework of the Common Foreign and Security Policy”.<sup>47</sup> The measures taken against Austria were a sign of disapproval and non acceptance, but were also dedicated to all extreme right parties and countries willing to join the EU. Although Jörg Haider resigned from leadership of FPÖ and the government made several attempts to convince the 14 countries to repeal their sanctions, they were upheld.

The Portuguese Prime Minister asked Luzius Wildhaber who was the President of the European Court of Human Rights to appoint three persons called “wise man”. Their task, which I have already mentioned was to elaborate a report on the situation in Austria.<sup>48</sup> The final outcome of this work included *inter alia* the examination of commitment to fundamental values of Austrian’s government and also re-consideration of bilateral relations between Austria and 14 countries.<sup>49</sup> The conclusion of the report was that although the political nature of the FPÖ party still raised concern, the rights which were considered to be in danger (especially rights of minorities and refugees) were respected. What is more the report

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<sup>46</sup> Ibid, at 29

<sup>47</sup> Per Cramér, Pål Wrangé, “The Haider Affair, Law and European Integration”, supra note 14, at 29

<sup>48</sup> Ibid, at p.33

<sup>49</sup> Report by Martti Ahtisaari and others, supra note 17

concluded that in the area of protection of right of minorities, the standards applied were higher than in other EU Member States.<sup>50</sup>

Overall conclusions which were made on the basis of complex examination of a number of legal documents in the human rights field by which Austria was bound, stated that Austria was not in breach of these documents. In this connection, it is worth mentioning that among the documents to which the wise man report referred to, was Treaty on European Union and especially article 6(1) (currently in the amended form it is article 2)

## 2.2 New constitutional order in Hungary

The Hungarian case starts with elections to the National Assembly, which took place in April 2010. In its campaign Fidesz, a party led by Viktor Orbán, which defines itself as a Christian, conservative and nationalist party,<sup>51</sup> promised to close the chapter of the transition process from communism. Given the popular sentiment of disappointment with the previous government, whose mandate ended in the atmosphere of scandal and multiple accusation for corruption it was hard not hard for Fidesz to get into the parliament with a majority of votes. Fidesz formed a coalition together with the Christian Democratic People's Party (*Keresztény Demokratikus Párt- KDNP*) which was seen as a satellite party to Fidesz. Together they secured 263 out of 286 seats. Hungary has an electoral system which combines majoritarian and proportionate system and therefore a party can obtain two-third majority in the National Assembly already with a bit more than 50% of votes.<sup>52</sup> Together with KDNP Fidesz got 53% of the votes and 68% of the seats in the National Assembly.

Hungary was the only state among central Europe formerly under the communist rule which did not introduce a new constitution after the end of communism. Therefore, Viktor

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<sup>50</sup> Id, at 33

<sup>51</sup> Democracy and Human Rights at Stake in Hungary: The Report of the Norwegian Helsinki Committee, *supra* note 1

<sup>52</sup> Krisztina Kovacs, Gabor Attila Toth, Hungary's Constitutional Transformation, *European Constitutional Law Review*, 2001, Volume 7, Issue 2, at 187

Orbán, in the line with his promises from the campaign decided to take this step, as he believed it would be a way to finalize the transition process from communism.

First, it is important to observe in this context that in comparison to other countries the Hungarian constitution is quite easy to amend. It requires a two-third majority of all the MPs, which is 258 members and does not ask for a referendum or any other kind of ratification.<sup>53</sup> Therefore amending the constitution or adopting a totally new one was no longer a dream of Fidesz but became a reality. One year after the successful elections in April 2011, the new constitution (called Basic Law) was promulgated. The adoption of the Basic Law only nourished concerning the possible infringements of the democratic values and rule of law in Hungary already expressed at earlier stage.

First objections against the new constitution were made on the basis of the lack of consultations with opposition and civil society. Moreover the constitution was drafted very fast, which also raised many concerns.<sup>54</sup> The Hungarian Ombudsman- Máté Szabó expressed his worries about the speed of constitutional changes in Hungary. He stated that the law making process should be subject to better supervision. In this connection he emphasized his lack of involvement in the adoption of a number of important law proposals due to the lack of consultation.<sup>55</sup> At the international level, the official position expressing disagreement was issued by the Venice Commission. It also expressed its concerns about abovementioned issues. Moreover the Commission underlined the lack of the transparency in the constitution

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<sup>53</sup> Id., at 186

<sup>54</sup> Democracy and Human Rights at Stake in Hungary: The Report of the Norwegian Helsinki Committee, *supra* note 1, at 13

<sup>55</sup> Id., at 13

making process in Hungary.<sup>56</sup> However, the adopted constitution, as the Venice Commission itself acknowledged, respects the democracy, rule of law and human rights.<sup>57</sup>

But the Venice Commission raised its concerns regarding cardinal statutes.<sup>58</sup> It noticed in this context that there is too wide use of the cardinal statutes. This is in its view highly problematic, since cardinal statutes shall be reserved basically for fundamental principles and not for detailed and specific rules. The new Hungarian Constitution includes references to over 50 cardinal statutes.<sup>59</sup> As authors of “The Basic Law of Hungary: A first Commentary” stated it is not sure whether the big amount of cardinal statutes puts Hungarian democracy at stake. However, their content and in particular the fact that they contain some “detailed and politically biased regulations”<sup>60</sup>, may be considered as jeopardizing democratic principles. Further constitutional changes refer *inter alia* to amendments which were put into the constitution as transitional provisions. The latter, however, were submitted at the request of the Hungarian Ombudsman to the Constitutional Court which stroke them down mostly on the procedural grounds.<sup>61</sup> As it turned out most of the provisions could not be considered as transitional. Therefore the Constitutional Court struck them down and stated that changes in Fundamental Law must be introduced in a formal amendment procedure. Only the provision regarding registration of voters was stroke down by the Court on the substantive grounds, therefore the Court found it unconstitutional. Amendments regulate a wide scope of

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<sup>56</sup> Venice Commission: Opinion on the New Constitution of Hungary, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session, 17-18 .06.2011, accessed: 17 March, 2013, at point 11, available at: [http://www.venice.coe.int/webforms/documents/CDL\(2011\)032-e.aspx](http://www.venice.coe.int/webforms/documents/CDL(2011)032-e.aspx),

<sup>57</sup> Id., at point 18

<sup>58</sup> Cardinal statutes (cardinal laws) are special kind of statutes which require two-thirds majority of votes of the present MPs (the difference with the constitution is that for the constitution there is required a two-thirds majority of all MPs). The required two-thirds majority is introduced in order to prevent too easy changes regarding matters of constitution, which are although not enough important to put them in the constitution.

<sup>59</sup> Lóránt Csink and others, The Basic Law of Hungary: A First Commentary, Clarus Press, 2012, at 60

<sup>60</sup> Id., at 60

<sup>61</sup> “Most of the temporary provisions of the Hungarian Constitution are scrapped by the Constitutional Court”, Hungarian Spectrum, December 28, 2012, accessed: March 20, 2013, available at: <http://hungarianspectrum.wordpress.com/2012/12/28/most-of-the-temporary-provisions-of-the-hungarian-constitution-are-scrapped-by-the-constitutional-court/>,

provisions referred to for instance social rights and judiciary. Although the Constitutional Court stroke down the provisions on the formal grounds, the Hungarian government decided to incorporate amendments directly into the Basic Law.

At the same time, concerns were also raised at international level as to the compliances of the changes introduced in a short period by Fidesz-KDNP government with European values and international binding documents on Human Rights protection. The European Commission is currently examining whether the Hungary “did not fail to fulfill obligations under the Treaties” (infringement procedure expressed in article 258 of TFEU)<sup>62</sup> and whether did not violate common values from article 2.<sup>63</sup>

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<sup>62</sup> Consolidated version of the Treaty on the Functioning of European Union, at article 258, last accessed: March 21, 2013, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

<sup>63</sup> Consolidated version of the Treaty on European Union, *supra* note 5, at article 2

## Chapter 3: In search for thresholds in Austrian and Hungarian case

In this chapter I will compile the two cases to examine thresholds on which EU Member States based their objections. In the first section of this chapter I will give an introduction to what the thresholds for starting article 7 procedure stand for. Furthermore in the next two sections I will look for the thresholds on which decisions regarding Austrian and Hungarian case were made.

### 3.1 Introduction to thresholds

Before I demonstrate what can be considered as thresholds for determining a violation of common values, I need to explain which kind of informal requirements have to be fulfilled in order to trigger article 7. The European Parliament in the resolution “Respect for and promotion of the values on which the Union is based” set several principles which has to be obeyed when deciding on article 7.

First of all, the principle of confidence provides that the Union has a confidence in the democratic and constitutional order of all Member States. Second, the principle of plurality gives to the Member States a margin of appreciation in understanding “plurality of ideologies, political objectives and values and the democratic competition between them on the basis of fundamental rights and common values”.<sup>64</sup> Third, the principle of equality imposes the requirement of equal treatment of all Member States no matter of their size, current political orientation etc. The last principle to be considered is a principle of openness which proclaims that the procedure which falls under article 7 must be “transparent, understandable and open to the public”<sup>65</sup>. An important factor of the article 7 is that it gives the European Union a

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<sup>64</sup> European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, accessed: March 21, 2013, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:104E:0408:0411:EN:PDF>, at point 11

<sup>65</sup> Id.

wide spectrum of intervening into internal matters of the defaulting Member State. This is because the scope of article 7 covers the area where Member States act autonomously.<sup>66</sup>

Thresholds for activating article 7 of the Treaty on European Union are basically violation of the common values expressed in article 2 themselves. However as I will demonstrate in the next sections the thresholds on which article 7 read together with article 2 are based, are not unambiguously defined. This is because article 7 is a political tool which lays in hands of Member States and EU institutions. Article 7 does not provide constitutional review which means that there is no scope for the court to review the merits of the determination. Therefore a decision on article 7 depends strictly on the political will of the Member States. Moreover, as with every political issue, the political decision whether to start article 7 procedure or not may depend on the circumstances.

Although the demonstration of disapproval to breaches of values on which the EU is based is necessary to emphasize and strengthen the proper functioning of European Union, the self-interests of Member States play role in this procedure as well.<sup>67</sup> Therefore, in my opinion and as I will try to demonstrate below, the thresholds for starting the preventive and sanction mechanism are actually very high, inter alia because of the Member States' fear and protectionism of their internal interests. Another important factor is that violation of values expressed in the article 2 is not the same kind of violation as in the individual cases where any breach of fundamental rights is considered as serious. Article 7 does not cover remedies for individual breaches but of the breaches "through a comprehensive political approach".<sup>68</sup> Therefore article 7 can be considered in situations of systematic issue, and does not concern only one specific situation. Moreover from a very beginning of the history of article 7, the

<sup>66</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, supra note 18., at point 1.1,

<sup>67</sup> Id., at 58

<sup>68</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, supra note 18



suspension clause was considered as the measure of last resort and kept for the time of extreme circumstances.<sup>69</sup> As I previously mentioned threshold to start the early warning mechanism and sanction mechanism are diverse. The thresholds for the early warning mechanism which is expressed in paragraph 1 of article 7 seems to be lower from the thresholds required to start the sanction mechanism from paragraph 2. This is the case because in order to determine serious and persistent breach of the common values, the acceptance of all Member States (not counting the vote of member state which in breach of the common values) is required.

### 3.2 Thresholds that triggered diplomatic sanctions against Austria

Sanctions towards Austria were aimed at the ideology of the Austrian Freedom Party and not at their concrete actions. The three wise men referred to in section 1.2 were appointed to examine commitment to “the European values and the political nature of FPÖ”.<sup>70</sup> As they stated in their report the government did comply with international and European standards regarding human rights, in particular rights of national minorities, rights of refugees and rights concerning immigrants. Moreover, according to the Three Wise Men’s examination of the level of the commitment to the common European values, regarding national minorities rights, standards applied in Austria were actually higher in comparison to the other European Member States. Therefore it can be concluded that thresholds which were applied when determining on sanctions towards Austria, were low and dependent purely on the political self-interests of the 14 Countries what I will prove in the next paragraph.

Reasons for such a strong ostracism which had effect on the whole country could be sought in domestic interests of the Member States At the time when sanctions against Austria were taken, the problem of extremism was present in at least three other EU Member States.

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<sup>69</sup> Per Cramér, Pål Wrange, “The Haider Affair, Law and European Integration”, supra note 14, at 50

<sup>70</sup> Id.

Belgium with its Belgian Flemish Bloc, Netherlands with its Dutch Centre Party and France with French National Front. But also in Italy National Alliance, party which was considered as post-fascist, entered the government. As a matter of fact during the 1990's the extremist parties started gaining significant popular support. Therefore it was in the own interest of such politicians as inter alia president of France- Jacques Chirac and Belgian prime minister – Guy Verhofstadt<sup>71</sup> since by opting for sanctions as in this manner at the EU level, they could forward the message to the extremist's movements in their own countries. In this manner they wanted to send a warning message to extremist parties.

Authors of the article “the Right and the Righteous?” argue that without Chirac and Verhofstadt the sanctions against Austria would not have been applied.<sup>72</sup> However not all the countries opted for ostracizing Austria. For instance Denmark was skeptical from the beginning.<sup>73</sup> In the Austrian case the domestic politics of EU Member States played definitely an important role. As I already described in chapter 2.1 measures undertaken by EU Member States did not fall under any of the Treaty provisions, but the notion of European common values was used in the declaration punishing countries to strengthen the legitimacy of EU Member States' common action.<sup>74</sup> The sanction used by the 14 countries was indeed a drastic measure. The importance of this case is that Austria did not breach any of the common values which were expressed under the provision 6(1)<sup>75</sup> of the Treaty on European Union.<sup>76</sup> Thresholds to trigger article 7 were not reached, therefore the sanction mechanism which was that time the only mechanism provided by article 7 could not be applied.

<sup>71</sup> Michael Merlingen and others, “The Right and the Righteous?(...)”, supra note 42, at 68-69

<sup>72</sup> Id., at 72

<sup>73</sup> Id., at 30

<sup>74</sup> Per Cramér, Pål Wrange, “The Haider Affair, Law and European Integration”, supra note 14, at p.29.

<sup>75</sup> Article 6(1) provided narrower scope for protection of values. According to the wording of article 6(1): “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.

<sup>76</sup> Id., at 44

The lesson learned from this case gave birth to the prevention mechanism, introduced in the Treaty of Nice. The thresholds for triggering the prevention mechanism are now lower than for the sanction mechanism. We could imagine this was precisely the mechanism that 14 countries standing against Austria lacked in their intervention. Paragraph 1 of the article 7 now provides for “constructive action in order to safeguard abidance to the common European values”.<sup>77</sup>

### 3.3 Examining thresholds in Hungary

The new Hungarian constitution caused many debates and raised many concerns in the European Parliament. Voices coming from the European Parliament called for the possible use of article 7 against Hungary. Morten Kjaerum- the Director of the European Union Agency for Fundamental Rights in his speech during the LIBE committee meeting on Hungary, stated that when assessing whether there is a clear risk of a serious breach by a Member State of the values referred to in article 2 it is relevant to examine not the single development, but the whole system<sup>78</sup>. In relation to the issue of the independence of judiciary in Hungary, he stated that when assessing whether the rule of law is at stake, it is not enough to look at the single development in “isolation at the appointment of judges”,<sup>79</sup> but it must be assessed together with other changes such as “new standard terms of public officials” or “new electoral laws”<sup>80</sup>. In the conclusion Kjaerum states that such an assessment should be approached by “three C-s what is comparative, comprehensive and continuous analysis of various developments”,<sup>81</sup> which requires from the EU a wide approach.

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<sup>77</sup> Id., at 52

<sup>78</sup> Morten Kjaerum’s speech, Liber Meeting, 9.02.2011, Brussels, at p.3, accessed at: March 20, 2013, available at: <http://www.europarl.europa.eu/document/activities/cont/201202/20120228ATT39497/20120228ATT39497EN.pdf>,

<sup>79</sup> Id, at 4

<sup>80</sup> Id, at 4

<sup>81</sup> Id, at 4

The question that arose in European Parliament, based on the suggestion made by Alliance of Liberals and Democrats for Europe, was whether the situation in Hungary reached the thresholds which would trigger the application of article 7 of the Treaty. The European Parliament decided to vote on drawing up a resolution on this question. The decision was approved.<sup>82</sup> The report touched upon issues such as inter alia the independence of the judiciary. It also discussed the possible activation of article 7 of the Treaty. The report caused many reactions from among the members of the European Parliament which were both positive and negative. Simon Busuttil an MP from European People Party said that although the Commission shall investigate the concerns about Hungary, the situation did not fall under the article 7.<sup>83</sup> Renate Weber, an MP from ALDE expressed the opposite view and said that the procedure from article 7 should be triggered in the name of fundamental values protection.<sup>84</sup> She also stated that the thresholds for the clear risk of a serious breach were already reached.<sup>85</sup> In a similar vein, Guy Verhofstadt- the leader of ALDE shared Weber's views and added that the decision to draw up a resolution was made in order to protect Hungarian citizens from Orbán's government. A completely opposite position on the constitutional changes in Hungary was expressed by the representative of conservatives in European Parliament- Anthea McIntyre. She said that every country has the right to establish constitution and any evaluation made on that "should be conducted with fairness and balance".<sup>86</sup> From the voices outside of the European Parliament, warm words of support towards the decision of the European Parliament were issued by Amnesty

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<sup>82</sup> "EU Parliament places Hungary under scrutiny", February 17, 2012, accessed: March 21, 2013, available at: <http://www.euractiv.com/central-europe/eu-parliament-places-hungary-scr-news-510938>,

<sup>83</sup> "Hungary: MEPs hear from civil society, media and the government", European Parliament Press, February 10, 2012, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20120206IPR37350&format=XML&language=EN>,

<sup>84</sup> Id.

<sup>85</sup> "EU Parliament places Hungary under scrutiny", supra note 82

<sup>86</sup> "Hungary: MEPs hear from civil society, media and the government", supra note 83

International.<sup>87</sup> Although it might seem that thresholds for triggering prevention mechanism were reached, the Council remained reluctant to start the procedure. As GUE/NGL MEP Marie Christine Vergiat stated, the European Commission was very slow in the procedure of article 7.<sup>88</sup>

The action undertaken by European Parliament did not result in any further steps. However, it did not take long for the European Parliament to raise its concerns towards Hungarian government once again since the Hungarian government as I described in chapter 2.2 introduced in March 2013 a package of new amendments to the Constitution. However, this time, Minister of Public Administration- Tibor Navracsics in his letter to the Secretary General of the Council of Europe- Thorbjorn Jagland assured that “The Proposal is, to a great extent, merely a technical amendment”<sup>89</sup>. Many international organizations and independent bodies as well as the European Union were not convinced by these statements and raised again their concerns. This time, however as the position of ALDE, leader Guy Verhofstadt demonstrates the strong will and determination for triggering article 7. According to the Eötvös Károly Institute, the Hungarian Helsinki Committee and the Hungarian Civil Liberties Union new changes in the Hungarian Basic Law violate fundamental values of European Union. In their opinion, the rule of law is violated by the incorporation of new amendments into the constitution. Moreover, by introducing the amendments which were earlier struck down by the Hungarian Constitutional Court, the government violated international standards.<sup>90</sup> According to the authors of the article, further violation of the rule of law is

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<sup>87</sup> “EU Parliament places Hungary under scrutiny”, supra note 82

<sup>88</sup> “Hungary: MEPs hear from civil society, media and the government”, supra note 83

<sup>89</sup> Deputy Prime Minister Navracsics’s letter to Secretary General Jagland, March 7, 2013, accessed: March 22, 2013, available at:

<http://www.kormany.hu/download/c/ee/c0000/Letter%20from%20DPM%20Navracsics%2007-03-2013.pdf>,

<sup>90</sup> “Newest amendment to the Fundamental Law of Hungary would seriously undermine the rule of law”, Hungarian Helsinki Committee, March 6, 2013, accessed: March 21, 2013 available at:

<http://helsinki.hu/en/newest-amendment-to-the-fundamental-law-of-hungary-would-seriously-undermine-the-rule-of-law>,

connected with the control which the Parliaments has over the Constitutional Court.<sup>91</sup> Despite widely expressed criticism, US Helsinki Committee co-chair - Christopher H. Smith defends Hungarian democracy, saying that the criticism is “unfair and made use of double standards, as the system of constitutional checks and balances is alive”.<sup>92</sup>

Irrespective of the opinion of Hungarian Minister of Public Administration that the 4<sup>th</sup> Amendment to the Constitution is rather a technical amendment, Kim Lane Scheppele - professor at Princeton University and a former researcher at the Constitutional Court of Hungary, calls the new amendment – “the mega amendment”.<sup>93</sup> Therefore, in order to see whether the thresholds for starting article 7 were reached in this case I would like to examine and focus only on two of the newly introduced provisions. However, given that the Commission has not yet examined whether the provisions at stake fall under its competences in the infringement procedure and breach of common values, I would like to focus on two of the amendments which judging by the amount of the criticism towards them ,seem to be most controversial.

Article 14 of the Fourth Amendment to Hungary’s Fundamental Law provides that the President of the National Judicial Office can decide which court will deal with the case in order to “provide enforcement of the fundamental rights to a court within a reasonable time”.<sup>94</sup> The situation refers to cases which are defined in a cardinal act. That means that the President of National Judicial Office can reassign the case instead of assigning it to the court which is accurate according to the procedural law. This new constitutional provision was

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<sup>91</sup> Ibid

<sup>92</sup> “US Helsinki Committee co-chair defends Hungary”, Hungary around the clock, March 25, 2013, at 5, Access-Hungary Kft.

<sup>93</sup> Kim Lane Scheppele, Constitutional Revenge, guest post at Paul Krugman’s blog, March 1, 2013, accessed: March 27, 2013, available at: <http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge>.

<sup>94</sup> Fourth Amendment to Hungary’s Fundamental Law, Office of the Parliament, Document number T/9929, Submitted: February, accessed: March 22, 2013, available at: <http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf>,

among transitional provisions which were stroke down by the Constitutional Court. The Venice Commission issued its suggestions regarding transitional provisions. In its report Eötvös Károly Institute examined the Venice Commission's recommendations on transitional provisions with the new package of the 4<sup>th</sup> Amendment. According to the Institute, the Hungarian government does not comply with the Venice Commission's suggestions, which raised concern about the institution of National Judicial Office and its dependency on the government.<sup>95</sup> The level of distrust towards the judiciary in Hungary and its independence is confirmed by the recent case of Francis Tobin, an Irish citizen who committed a crime on the territory of Hungary. Although according to the European Arrest Warrant, Tobin should have been surrounded to Hungary in order to face murder charges, the Irish Court denied to extradite Tobin. Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding in her opinion given in the interview to the German daily, suggested a link between the refusal decision on extradition of Tobin and recent developments in Hungary, concerning the independence of the judiciary system which is considered to be at stake.<sup>96</sup>

The second provision on which I would like to focus is Article 8 of the Fourth Amendment, which regulates in paragraph 3 the question of homelessness. According to the wording of paragraph 3 "law or local government may outlaw the use of public space in order to preserve the public order, public safety, public health and cultural values". As Kim Lane Scheppele noticed, the Constitutional Court stroke down already the provision (as transitional provision) on homelessness. The provision was violating the human dignity of the homeless.

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<sup>95</sup> Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, Eötvös Károly Institute, February 26, 2013, accessed March 20, 2013, available at: [http://helsinki.hu/wp-content/uploads/Appendix\\_1\\_Main\\_concerns\\_regarding\\_the\\_4th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_of\\_Hungary.pdf](http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf),

<sup>96</sup> "Navracsics writes to Irish minister", Hungary around the clock, March 25, 2013, at 5, Access-Hungary Kft.

Now it came back as a constitutional provision.<sup>97</sup> Firstly, the homelessness regulated by transitional provision enabled to outlaw use of specific public spheres by law or local government. Such a provision was found in the Petty Offence Act, where homeless person living on the public premises could be punished with a fine or with a confinement.<sup>98</sup> This law was stroke down by the Constitutional Court as a law not complying with a human dignity. Government did not correspond with the line of the Constitutional Court, as a result in the 4<sup>th</sup> Amendment of the Constitution there is a provision enabling again the parliament or the local government to criminalize homelessness. This provision is foreseen in the 3<sup>rd</sup> paragraph of article 8<sup>th</sup>. The two first paragraphs are dedicated to the right to housing for every homeless person, however the provisions do not put any obligation on the state to regulate this matter. This can be deducted from the wording of paragraph 2 which reads as follow : “The state and local governments shall strive to guarantee housing”.<sup>99</sup>

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<sup>97</sup> Kim Lane Scheppelle, Constitutional Revenge, March 4, 2013, available at: <http://www.verfassungsblog.de/en/constitutional-revenge/#.UU6jDRxFWAg>,

<sup>98</sup> Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, supra note 95

<sup>99</sup> Fourth Amendment to Hungary’s Fundamental Law, supra note 94



## Chapter 4: What comes next

In the last chapter of my thesis I would like to look at the very recent opinions on Hungary trying to point out the possible further steps of the European Union. This will be described in the first section. In the second section of this chapter I would like to focus on the suggestions on effective mechanisms protecting common values.

### 4.1 Hungary to be continued

Recently adopted changes once again raised concerns of Alliance of Liberals and Democrats for Europe. The leader of ALDE- Guy Verhofstadt sees Hungary at the same point as it was last year. According to him, Hungary did not learn its lesson from the events of last year, when Hungarian government was strongly criticized by international organizations, NGOs and many more.<sup>100</sup> Verhofstadt went further in his judgments expressing hopes for the strong and determined reaction from the European Parliament and Council – triggering article 7 of the Treaty.<sup>101</sup>

As I described at the beginning of this section the Hungarian government's actions attracted both strong criticism and support in European Parliament. Depending most of the time on the fraction, Guy Verhofstadt in his speech on Hungary called the European Parliament to put a Hungarian case on the Commission's agenda (1/3 of the member states can put it on the agenda of the Commission) and to trigger the article 7 (1). Also the President of the European Parliament- Martin Schulz expressed his strong criticism towards Orban's government. On the other hand the European People's party to which Fidesz belongs spread its protective umbrella above Fidesz. However, I find crucial for the further development of

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<sup>100</sup> "Hungary is still not applying its Treaty obligations to respect fundamental rights", ALDE, March 7, 2013, accessed: 20 March, 2013 available at: <http://www.alde.eu/press/press-and-release-news/press-release/article/hungary-is-still-not-applying-its-treaty-obligations-to-respect-fundamental-rights-40901/>,

<sup>101</sup> Guy Verhofstadt, "Hungary, Syria and Cyprus represent the failure of our European policies", ALDE, March 20, 2013, accessed: March 21, 2013, available at: <http://www.alde.eu/press/press-and-release-news/press-release/article/verhofstadt-hungary-syria-and-cyprus-represent-the-failure-of-our-european-policies-40956/>,

the Hungarian topic in the European Parliament, the request coming from the leader of Socialist Party in Hungary- Attila Mesterházy, who turned to Schulz as an MEPs asking for no support on the possible application of article 7 against Hungary. As he stated the sanctions aimed at Hungary would not only affect the government but the Hungarian nation who should not suffer because of the government's decisions.<sup>102</sup> Overall, in order to trigger the application of article 7 a consent among the European Parliament is required. With such a political division as described above it is almost impossible.

Attila Mesterházy made a good point in his stating that citizens should not be affected by the punishment directed at the government. This statement is especially relevant in the debate on possible sanctions which could be applied against Hungary. According to the wording of article 7(3) the Council may decide to suspend certain rights, including voting rights of the Member State in question.<sup>103</sup> However the list is not exhaustive- other actions would be also possible. Therefore, some voices have been suggesting recently to use the cuts in EU payments as a consequence of breach of fundamental values. Such a proposal came up the European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding.<sup>104</sup> However the legitimacy of such sanction will always cause a lot of criticism. As the European Union learned from the Austrian case, applying ostracism towards the whole country mostly harms citizens. Moreover authors of the Report on Austria recommended the suspension of the sanctions. In their opinion the sanctions had a counterproductive effect, wakening nationalist feelings and strengthening the reluctance towards European Union Member States.<sup>105</sup> The same situation could take place in relation to Hungary, if the EU determines to trigger article 7 of the Treaty. As Helsinki Foundation noticed in its report on

<sup>102</sup> "Mesterházy asks EU for restraint", Hungary around the clock, March 25, 2013, Access-Hungary Kft.

<sup>103</sup> Consolidated version of the Treaty on European Union, supra note 5

<sup>104</sup> Id.

<sup>105</sup> Report by Martti Ahtisaari and others, supra note 17, at 116

Hungary, the extreme right-wing party – Jobbik triggers anti-European sentiments and benefits from the arguments on the line EU vs. Hungary.<sup>106</sup>

## 4.2 Further developments for protection of common values

If the fears and self interests of the EU Member States are too strong in order to trigger the application of article 7, we should ask the question what can be done in this matter. There is no doubt that European Union needs an effective mechanism to protect European common values. There are two possible directions of further developments on this matter.

First, proposal was put forward by a Foreign Ministers of Germany, Denmark, Finland and Netherlands, who asked European Commission to consider “a new and more effective mechanism to safeguard fundamental values in member states”<sup>107</sup> there can be a new instrument established which will protect values enshrined in article 2 of the Treaty on European Union in more successful manner.

Jan-Werner Müller in his proposal “Protecting Democracy and the Rule of Law inside the EU, or: Why Europe needs a Copenhagen Commission” argues that article 7 can not only be considered as almost dead provision since triggering the suspension provision is almost impossible but he also claims that the idea of article 7 mechanism is against “mutual accommodation, and defense towards national understanding of political values”.<sup>108</sup> Therefore the author suggests to embrace another alternative solution, which was originally proposed by Armin von Bogdandy and others in “Reverse Solange—Protecting the essence of fundamental rights against EU Member States”. These authors suggested to assign protection of fundamental rights to domestic courts of Member States. The mechanism is based on the

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<sup>106</sup> “Democracy and Human Rights at Stake in Hungary”: The Report of the Norwegian Helsinki Committee, *supra* note 1, at 32

<sup>107</sup> Hungary under scrutiny over changes to the constitution, *EuropeanVoice*, March, 14, 2013, accessed: March 21, 2013, available at: <http://www.europeanvoice.com/article/imported/hungary-under-scrutiny-over-changes-to-the-constitution/76643.aspx>,

<sup>108</sup> *Id.*

notion of the European citizenship. It suggests that in order to protect the “substance” of European citizenship, one should be able to turn to the domestic court (and ultimately to the European Court of Justice) in situation when the government is abusing rights of the European citizen.<sup>109</sup>

Second solution suggests amending article 7, so the rule of law will could be monitored in all Member States (in uniform manner, avoiding prejudices resulting from targeting only one state). Müller raised his concerns regarding the body whose mandate would be dedicated to monitoring. In his opinion it is not the best solution to entrust the mandate to the Commission. Recently, in order to strengthen legitimacy of the Commission, there are voices to give it more political character. Müller argues, that partiality will not be good for such purpose.<sup>110</sup>

The author proposed to grant the monitoring mandate to already existing body as for instance the Fundamental Rights Agency, whose mandate shall be extended. The second option for which the author opted is to form a new institution. This could be following MP-Rui Taveres suggestion a “Copenhagen Commission”. As there were “Copenhagen Criteria” established in order to determine whether the country before the accession fulfills democratic criteria.<sup>111</sup>

The mandate of the Copenhagen Commission could include suggestions to European Commission on suspending rights of the Member State in question.<sup>112</sup> Although it might seem to be a good solution to pass on the mandate to impartial body, the European Union would

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<sup>109</sup> Id.

<sup>110</sup> Jan-Werner Müller, “Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission”, March 13, 2013, accessed: March 21, 2013, available at <http://www.verfassungsblog.de/en/hungary-taking-action-jan-werner-muller/#.UVGLWRxFWAg>,

<sup>111</sup> Id.

<sup>112</sup> Id.

still need to come up with better solutions for punishing the country. As I already argued, the financial cuts will at last harm the most innocent.

## Conclusion

In the present thesis, by analyzing the two cases of Austria and Hungary, I tried to examine thresholds on which the decision for activating article 7 is made.

One could say that European Union did not learn its lesson after the Austrian case. At the time of Freedom Party of Austria, 14 Member States, acting outside of European Treaties decided to take very drastic measures, which had effect not only on the government, but also on the citizens. Although after the report issued by the Three Wise Men was published, it appeared that Austria not only complies with European values but moreover its commitment to the European standards was at some points higher than of other EU Member States. The case of Freedom Party of Austria gave birth to a prevention mechanism, which aim is to avoid similar situations in the future. Although two articles have been introduced (article 7(1) and 7(2)), to this day – despite many intentions made to trigger them – the articles have not been put into practice yet.

In my research I could not completely summarize the Hungarian case, since it is still an ongoing process. Whether the article 7 will be triggered in this particular situation, is difficult to predict. Reflecting the effectiveness of this provision, I would remain skeptical of the article being activated. Although at this time some of the European Union Fractions seem to be extremely determined and convinced of the urgency for activating article 7 in the Hungarian case.

I believe that the European Union could learn its lesson from the Hungarian case. The urge for creating more effective or totally new protection for common European values seems to be unavoidable. Therefore we should hope that such a monitoring instrument will be put on the agenda of the European Union shortly.

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