A brief summary of the developments in Hungary since April 2010 which are relevant to ascertaining whether there is a "systemic threat" to the rule of law

1 The meaning of "the rule of law" and of "a systemic threat" relevant to the EU Rule of Law Framework and the purpose of this paper

In its communication to the European Parliament and the Council on "A new EU framework to strengthen the rule of law" (http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf), the Commission states that

"The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies ***a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law****.*

Both the Court of Justice and the European Court of Human Rights confirmed that those principles are ***not purely formal and procedural requirements****.* ***They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components****.*

This means that ***respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights****: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process."* (Emphasis added.)

In the same Communication, the Commission states that *"In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law."* The Communication also explains that *"The main purpose of the Framework is to address threats to the rule of law (as defined in Section 2) which are of a systemic nature.* ***The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened.****"* (Emphasis added.)

This paper provides a non-exhaustive summary of the developments in Hungary, most relevant in these respects, since April 2010, when Prime Minister Orbán's party won 52.7% of the votes, which the disproportionate electoral system translated into 68% of the seats in the Parliament, just enough to enact profound changes in the constitutional system unilaterally. (Orbán's government retained its supermajority in the Parliament in the 2014 elections by winning 45% of the votes - 43.5% of the

votes cast in Hungary - in a new, even more disproportionate election system which they created in the meantime. They lost supermajority in March 2015 when Commissioner Navracsics was appointed and stepped down as a member of the national Parliament, and the subsequent by-election in his constituency was won by an independent candidate.) The developments recited will be contrasted to the requirements stemming from the principle of the rule of law, as highlighted in the above quotes from the Commission communication. The purpose is to substantiate the claim that the least that can be said of these developments is that they constitute a systemic threat to the rule of law.

2 The Constitution as a limit to the exercise of executive powers disrespected - vs. "Prohibition of the arbitrariness of the executive powers"

In a constitutional democracy, the "prohibition of the arbitrariness of the executive powers," starts with the Constitution being respected as a limit to the exercise of power. PM Orbán's regime had the two-thirds supermajority required to change the constitution between 2010 and 2015. This is how they used it.

The 1989 Constitution was amended no less than 12 times in the 18 months after the 2010 elections, before the regime unilaterally replaced it with a new Fundamental Law, which entered into force on 1 January 2012. The new Fundamental Law has not been treated with much more respect. It has already been amended six times, changing about one-fourth of its original text. All the amendments were practically unilateral, that is, passed with the exclusive support of the governing faction, save for one or two extra votes on some occasions from far-right MPs. On quite a number of occasions, the motivation for amending the Constitution or the Fundamental Law has been to prevent the review and annulment by the Constitutional Court of unconstitutional legislation.

Here are some examples.

In October 2010, a retroactive tax, as of January 2010, was adopted by the Parliament on severance pay for public sector employees. In May 2010, the Constitutional Court annulled this law. In response, the ruling majority revoked the Court's authority to review legislation with an impact on the budget, and an amendment to the Constitution was passed allowing the taxation of income from public funds retroactively for up to five years. Subsequently, the law on the special tax was re-introduced and passed once more. Needless to say, the prohibition of imposing obligations with a retroactive effect is itself an elementary requirement of the rule of law. The authority of the Constitutional Court was curbed because it wanted to uphold this principle.

In November 2012, the Constitutional Court ruled that it is unconstitutional to criminalise homelessness. In response, the governing majority amended the Fundamental Law to explicitly authorise the legislature to criminalise homelessness, a bizarre provision to contain for a constitution.

In February 2013, the Constitutional Court ruled that the provision of the 2011 Church Law making a religious organisation's status as a church conditional on the Parliament's approval was unconstitutional. In response, the governing majority amended the Fundamental Law to empower the Parliament to grant or deny church status.

Supplementing unconstitutional bills with amendments to the Constitution to prevent their annulment was quite a standard practice in the period when the regime had supermajority. The Venice Commission, in its Opinion of 17 June 2013 on the Fourth Amendment of the Fundamental Law, concluded: *"In this respect, a consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the the Fourth Amendment follows this pattern.*

Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of 'constitutionalisation' of provisions of ordinary law excludes the possibility of review by the Constitutional Court." (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e)

This practice is in stark contradiction with the principle of the "prohibition of the arbitrariness of the executive powers."

3 The Constitutional Court packed with party loyalists - vs. "Effective judicial review" + "Prohibition of the arbitrariness of the executive powers"

Besides curtailing its authority, the regime also chose to occupy the Constitutional Court. Not much after the collision between the governing majority and the Court over the retroactive tax, the appointment procedure of the judges was changed. Beforehand, constitutional court judges were nominated by a committee in which all parties in the parliament had one member. This arrangement served to force the majority to seek consensus or compromise with the minority, since the Parliament can only vote on candidates nominated by the committee. Under the new procedure, the composition of the nominating committee reflects that of the Parliament: whoever has majority in the house, has majority in the committee. As a result, the regime seized total control over the appointment of Constitutional Court judges in 2010, which they kept until March 2015, when they lost their supermajority (the Parliament elects Constitutional Court judges by two-thirds majority). In this period they packed the Court with party loyalists. The Court was enlarged from 11 to 15 members, so that the newly elected judges loyal to the regime can sooner outnumber the old members who had previously been elected through the consensual procedure as their mandates reached their end at different times. To secure control over the Constitutional Control for many years to come, the regime increased the term of the newly appointed judges to 12 years (from 9), and abolished mandatory retirement age (which was 70 beforehand). The right to elect the president of the Constitutional Court was also transferred from the Court itself to the Parliament.

The regime's appointees gradually took over the Court as planned as the mandates of the old members ran out. The first time the new members outnumbered the old ones was April 2013. By April 2016, the Constitutional Court had only members appointed unilaterally by the governing majority. In the selection of the new judges the regime made no attempt to maintain a facade of independence. The first new judge to be appointed was the former minister who ran the Prime Minister's Office in Orbán's previous (1998-2002) government, and two of the subsequent appointees were transferred from their seats in the Parliament, in Orbán's faction of course, to the bench of the Court. The analysis of the rulings of the Constitutional Court leave no doubt that the replacement of the old, consensually elected judges by the appointees of the regime caused a sharp change in the functioning of the Court, and the turning point was the time when the new judges first outnumbered the old ones. The Court can now be pronounced functionally dead as a check on PM Orbán's power. Here is an analysis of the rulings of the Court in the relevant period (prepared, notably, by some of the NGOs the current NGO legislation targets): http://ekint.org/lib/documents/1490874872-DRI_EKINT_indicators_2016.pdf.

4 The process of adopting the new Fundamental Law: rushed, nontransparent, and unilateral - vs. "Transparent, accountable, democratic and pluralistic process for enacting laws" + "Prohibition of the arbitrariness of the executive powers"

One of a constitution's main functions is to establish limits to majoritarian decision-making. The constitution is supposed to make the political community home for citizens with diverse world-views and political opinions. It also establishes the system of institutions among which public power is shared and are capable of functioning as a system of mutual checks and balances. It is therefore essential that the constitution be adopted in a process which creates a chance that it will be accepted by the overwhelming majority of the society, including those who do not belong to the political majority of the day.

The political community has not been given an opportunity to express whether or not it wants a new constitution. Orbán and his party never raised this issue before the 2010 elections, either in their election manifesto or otherwise in the campaign, before the first (and decisive) round of the elections. The pace of framing the new constitution was rushed and the process was nontransparent. It started in mid-June 2010 with an amendment to the old Constitution revoking its Article 24 (5) which was meant to force even a two-thirds supermajority to seek cooperation and compromise with the opposition, requiring a four-fifths majority to adopt the procedural rules for the preparation of the new constitution. As of 29 June 2010, an ad-hoc committee was established in the Parliament entrusted with the responsibility to prepare the new Fundamental Law. After the Constitutional Court was penalised for annulling retroactive taxation (see above), the opposition parties refused to participate in the preparatory process, as they interpreted the actions taken against the Court as evidence of the governing majority's disrespect for constitutionality. The deadline for drafting a concept paper on the principles of the new constitution was 30 November. It was discussed by the committee in six days in December. The concept was discussed at the February 2011 plenary of the Parliament. The general debate was closed two days after it had been opened, the detailed debate took less than five hours. It did not matter much, since, in the end, it was declared that the concept paper does not determine the outlines of the new constitution, it merely serves a "supporting material to help the MP's constitution-making work." In other words, it turned out that this meagre piece of paper briefly subjected to public scrutiny had nothing to do with the actual drafting process. The actual draft was prepared in the meantime by members of the ruling party (most notably an MEP), introduced to the Parliament on 14 March as a proposal from two individual MPs, and adopted 35 days later, after merely 9 days of discussion in the Parliament, on 18 April. In its opinion, the Venice Commission deemed that "*it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe*" (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e).

5 The substantive requirements of constitutionality: dismissed in the Fourth Amendment - vs. "The rule of law is … a constitutional principle with both formal and substantive components"

The principle that constitutionality has, beside procedural ones, also substantive requirements, enjoys a wide consensus among the theorists of constitutional democracy. In this vein, the Hungarian Constitutional Court, in its Decision 45/2012, held that *"Constitutional legality has not only procedural, formal and public law validity requirements, but also substantive ones. The constitutional criteria of a democratic state under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic states under the rule of law, as well as the ius cogens, which partly coincides with the foregoing. As appropriate, the Constitutional Court may examine*

whether these substantive requirements of the constitutionality of a democratic state under the rule of law are consistently observed and included in the constitution." (Point IV. 7.) Consistently with this statement, earlier, after the new Fundamental Law entered into force, in its Decision 22/2012, the Court established that its rulings made on fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed fundamentally by the Fundamental Law remain valid.

The Fourth Amendment to the new Fundamental Law in March 2013, however, repealed the rulings of the Constitutional Court adopted before the entry into force of the Fundamental Law, reintroduced into the Fundamental Law a number of provisions previously declared unconstitutional by the Court, and stipulated that the Court may review the Fundamental Law and its amendments only from a procedural point of view. With this, the ruling majority basically declared that it only acknowledges merely a narrow interpretation of the procedural requirements of constitutionality, dismissing the Court's position that constitutionality also has substantive requirements.

6 The independence of the judiciary under sustained attacks - vs. "Independent and impartial courts"

The separation of powers is one of the cornerstones of the rule of law. The independence of the judiciary is arguably its most crucial element.

The current regime's systematic attack on the independence of the judiciary started with the removal of Judge András Baka, President of the Supreme Court, three and a half years before the expiry of his mandate. Judge Baka was elected in 2009 by the Parliament for a six-year fixed term. After the 2010 elections, the ruling majority announced its intention to undertake legislative reforms affecting the judiciary. Judge Baka, in his professional capacity as the head of the Supreme Court, commented extensively on these reforms, raised concerns about the constitutionality of some aspects of the proposed measures, officially addressed the President of the Republic, the Prime Minister, and the Speaker of the Parliament about the foreseeable affects of the then planned reduction of the mandatory retirement age of judges, and, subsequent to the adoption of this measure, he also addressed both the Hungarian and the EU public in a communiqué on the same subject. He also successfully challenged the July 2011 amendments to the Code of Criminal Procedure before the Constitutional Court on the ground of unconstitutionality and violations of obligations stemming from international treaties (note that it was before Orbán's appointees started to outnumber the old members of the Constitutional Court). The New Fundamental Law, adopted in April 2011, re-named the Supreme Court "Kúria," which was the Supreme Court's historic Hungarian name. On 6 July 2011, in the Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission, the Government assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would "not be used to unduly put an end to the terms of office of persons elected under the previous legal regime." Senior members of the government and governing faction, including then State Secretary for Justice Róbert Répássy and Gergely Gulyás, MP, declared that the change of the name "will certainly not provide any legal ground for a change in the person of the Chief Justice." In November the same year, the very same MP Gulyás submitted a proposal to amend the old Constitution (then still in force) providing that the Parliament would elect the President of the Kúria by the end of December 2011, to take office on 1 January 2012. Also in November 2011, a bill on the transitional provisions of the Fundamental Law was introduced by two members of the majority faction, providing that the mandate of the President of the Supreme Court would be terminated upon the entry into force of the Fundamental Law on 1 January 2012. The ruling of the Grand Chamber of the European Court of Human Rights found that

both Judge Baka's right of access to a court, as guaranteed by Article 6 § 1 of the European Convention on Human Rights, and his freedom of expression, as guaranteed under Article 10 of the same Convention, has been violated. In § 117 of its judgement, the ECtHR endorsed the opinion of the Venice Commission on Judge Baka's case that the legislation bringing about the termination of his office was "directed against a specific person," and was therefore *"contrary to the rule of law."* In § 172 of its judgement, the Court expressed its view that the fact that the President of the Supreme Court was removed from office three and a half years before the end of his fixed term *"can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence."* (The text of the ECtHR ruling is available here: https://www.icj.org/wp-content/uploads/2016/06/Hungary-CASE-OF-BAKA-v.-HUNGARY.pdf.)

With the entry into force of the new Fundamental Law on 1 January 2012, the mandatory retirement age of judges has been lowered from 70 to 62 years. This measure is in stark contrast with the abolishing of the retirement age for Constitutional Court judges (see above), which had also been 70 years. Here is a joint opinion of three of the NGOs now persecuted as "foreign-funded" pointing out the incoherence: http://helsinki.hu/wp-content/uploads/NGO_Statement_on_Age_limit_for_CC_judges_14112013.pdf.

This contradiction clearly reveals the complete disregard for general normative principles in the legislations by means of which the current regime reshaped the Hungarian political and legal system to cement its power. The retirement age of Constitutional Court judges was abolished, combined with the extension of the length of the term of the newly elected ones (see above), because it served the interest of the regime to keep its appointees in office for as long as possible. Ordinary judges were sent to retirement, removing about 10% of all judges, and about one-fourth of the senior ones, mostly court presidents who assign cases, accompanied by the centralisation of the administration of courts, which gave control to an official hand-picked by the regime over the appointment of judges, to achieve essentially the same goal through a contrary measure: to tighten the regime's grasp on the judiciary by replacing as many judges as possible in the shortest possible time. In November 2012, the European Court of Justice ruled that lowering the mandatory retirement age from 70 to 62 violated EU law. The Parliament passed a law that made it possible for judges previously forced to retire to return to service. By this time, most of them had been replaced by young judges, and most of them declined the opportunity to be reinstated.

As indicated just above, in 2011, a radical centralisation of the administration replaced the former self-government of the judiciary with a single-person governance by an appointee of the parliamentary majority elected for nine years. The appointee turned out to be a judge with very close ties to the ruling party. The President of the newly established National Judicial Office was given authority to appoint and terminate judicial positions, to transfer and assign judges, oversee the inspection of judges and procedures of judicial discipline. At the outset, the President was even vested with the right to reassign hand-picked cases to hand-picked courts, which led to the transferring of a number of politically sensitive cases. This latter element of the system was abolished in 2013 after the Constitutional Court (before the regime's appointees had majority in it) deemed it unconstitutional, without any rectification for those whose right to a fair trial had been violated. Here is a list of worries that the Venice Commission raised about the centralisation of the administration of the judiciary at the outset: http://www.venice.coe.int/Newsletter/NEWSLETTER_2012_02/1_HUN_EN.html, and here is an assessment of how the situation changed four years after the initial concerns were raised by the International Bar Association's Human Rights Institute, titled "Still under threat: The

independence of the judiciary and the rule of law in Hungary:" http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=93e2c33c-71e5-4ab5-89a7-299f5c5752ce.

7 Capture of the remaining independent institutions - vs. "Prohibition of the arbitrariness of the executive powers"

Dismantling the system of checks and balances did not stop at capturing the Constitutional Court and attempting to do the same with the judiciary.

Since the authority of the President of the Republic is mainly moral, and the President is supposed to "represent the unity of the nation," in the first 20 years after the fall of the Communist regime, it was customary to elect a President who was at least assumed to be capable of rising above partisan politics. This tradition was discontinued in 2010 when a former vice-president of the ruling party, Pál Schmitt was elected as President. He showed no inclination whatever even to appear independent. One of the few means at the President's disposal to influence legislation is to send a bill, after it has been passed by the Parliament, back to the Parliament for reconsideration, or to the Constitutional Court for review. Both these tools were frequently used by László Sólyom, the last pre-2010 President. Schmitt, at his hearing in the Parliament prior to his election, stated that he had "no intention to be an obstacle to legislation." Once elected, he even had the link "Motions for Constitutional Review" removed from the presidency's website. He was forced to resign after he was found out to have plagiarised his doctoral dissertation. His successor, János Áder, was an active MEP of PM Orbán's party when he was elected, and he previously served as leader of the parliamentary faction and as vice-president of the same party. It is perhaps natural that a time came when the presidency is taken over by party politicians, it should be noted, nevertheless, that the presidency is neither a check nor a balance to PM Orbán's rule since 2010.

A notable case similar to that of Judge Baka, the former head of the Supreme Court (see above), is the case of the former Ombudsman for Data Protection, András Jóri. Mr Jóri was elected as Ombudsman for Data Protection in 2008. In 2010, the office of the Ombudsman for Data Protection was abolished and a new data protection authority was established in its place. Ombudsman Jóri was removed from office years before the end of his fixed mandate. In April 2014, the European Court of Justice found this to be in violation of EU law. The Court emphasised that by ending the mandate of the Ombudsman before the end of his fixed term, the government undermined the independence of the data protection authority. The government was made to apologise to Ombudsman Jóri and pay a compensation to him. It did not change the fact, however, that an independent constitutional control institution has been abolished and replaced by a government agency, led by an official appointed by the government. (The ECJ's ruling: http://curia.europa.eu/juris/document/document.jsf?docid=150641&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=524755)

Even though, just like the previous Constitution, the 2011 Fundamental Law lists the Chief Prosecutor's Office among the independent constitutional institutions, a former head of the ethics committee and election candidate of the ruling party, Péter Polt, has been elected by the parliamentary majority as Chief Prosecutor. He had already held this position once when Orbán's party had its first chance to elect its own candidate. The length of his term was extended from 6 years to 9. Given the strictly hierarchical organisation of prosecutorial offices in the country, it is ultimately up to him to decide which case will be investigated, who will be charged and brought before a court, and who will avoid to be held to account. Since his appointment as Chief Prosecutor, according to the data provided

by his office, the number of rejected prosecutions in corruption cases increased three-fold and the incidence of abandoned investigations doubled (http://www.crcb.eu/wp-content/uploads/2015/05/research_note_2015_court_judgements_150612.pdf).

From the authorities overseeing specific sectors the capture of the Media Authority and its Council is especially significant because it affects media freedom. Before 2010, compliance with the media law was overseen by a board in which the parties belonging to the governing majority and those in opposition had an equal number of delegates, and its president was appointed consensually by the President of the Republic and the Prime Minister, who frequently belonged to different political sides. Now the five-member board overseeing the media, called the Media Council, is elected by the Parliament for nine years upon nomination by an ad-hoc committee, in which the parties are represented according to the number of their seats in the Parliament, with the exception of the board's president, who is nominated by the Prime Minister. Consequently, no other party than Orbán's Fidesz has appointees in the Media Council. In 2010, a former Fidesz MP was appointed as the Council's first President.

A former student of the Bibó College, the birthplace of Fidesz, PM Orbán' party, and a close associate of Lajos Simicska, the former treasurer of the same party, Ildikó Vida was appointed as head of the tax authority. Ms Vida is currently the head of the board of Simicska's flagship company, Közgép, a former champion winner of public procurement contracts, until Simicska fell out with Orbán.

An MP from Orbán's party, László Domokos, was made head of the State Audit Office.

A cardinal law, passed on 30 December 2011, gave the Prime Minister the right to appoint all vice-presidents of the Central Bank. Beforehand, the president of the bank initiated the nominations himself. The law also created a new third vice-president for the bank, so PM Orbán could name one of the vice-presidents immediately without having to wait for the mandate of the incumbent vice-presidents to end. A similar technique was used to increase the PM's influence over the Monetary Council, in charge of monetary policy and interest rates. (In fairness, the previous Socialist government also used this technique in an attempt to take control of the Monetary Council.) The President of the Central Bank, András Simor, whose salary was previously slashed by 75% in an attempt to force him out, was kept in office mostly by pressure from the European Central Bank, but the government created a way for itself to get rid of him before the end of his term in 2013. Also in 30 December 2011, the Parliament passed an amendment to the Fundamental Law that authorised The Parliament to merge the Central Bank with the Financial Supervisory Authority to create a new institution. Using this option, the government would have been able to appoint the head of this new institution. In the end, Mr Simor held on to his office until 2013. He was then replaced by György Matolcsy, who until then served as minister of the national economy in PM Orbán's government.

A Fiscal Council was created in 2009, after the adoption of the Financial Responsibility Act of 2008, in an attempt to restore the credibility of the country's fiscal policy. The Council had three members, highly esteemed both for their professional record and their independence, elected by the Parliament for a non-renewable nine-year term, upon nomination by the President of the Republic, the President of the Central Bank, and the President of the State Audit Office. One eligibility requirement was that a nominee must not have been active in a political party for at least four years prior to the nomination. The members of the Council were elected practically unanimously by an otherwise bitterly divided Parliament. Notably, they were endorsed by every single MP belonging to Fidesz, Orbán's party. The Council had a secretariat consisting of about 30 officials. The Council's function, as an independent watchdog institution, was to review legislative proposals affecting state finances, analyse the effects of reforms proposed by the government, and make its own macroeconomic forecasts. Most notably, it had to validate the credibility of the state budget. The Council soon earned international respect. Then, after Orbán's takeover in 2010, the Council criticised the first budget proposed by the new government

for overly optimistic forecasts and a lack of transparency. Retaliation was swift. The Council's operational budget was slashed from HUF 836 million to a mere 10 million, as a result of which the Council's secretariat had to be disbanded, depriving the Council of its ability of making independent macroeconomic forecasts and analysis. Here is an open letter from this period from the heads of the comparable Swedish, British, and Dutch institutions published in the Financial Times calling for the preservation of the Council's independence: https://www.ft.com/content/69d5e212-00d0-11e0-aa29-00144feab49a. The head of the State Audit Office, a person appointed from the ranks of Fidesz MPs just months before, rushed to explain to the press that the creation of the Council was a measure to respond to a crisis, and now that the crisis was over, there was no clear need for the institution in its original form any longer. After, in a cardinal law also adopted on 30 December 2011, the statute of the Council was changed profoundly, its president, George Kopits, stepped down. A new president was chosen by the President of the Republic with a mandate of six years, without remuneration and on a part-time basis. The remaining two positions were filled by the President of the Central Bank and the President of the State Audit Office *ex officio*. With two of the three new members having close ties to the government, the Council was no longer an independent institution. Nor had it any resources. Curiously, the new law gave it a much stronger mandate that it previously had, nevertheless. The Council was given the right to veto the state budget if it is deemed not to be in line with long-term goals to limit the state debt.

The list could be continued. Consensual appointment mechanisms have been abolished. Officials previously appointed whose fixed terms did not end soon enough have been forced out of their offices. Every constitutional institution with functions to limit and control the power of the government are in the firm grip of party loyalists appointed for unprecedentedly long terms.

8 Curbing the space for debate in the Parliament - vs. "Transparent, accountable, democratic and pluralistic process for enacting laws"

The rule of law also crucially depends on the rules that apply to the process through which laws are adopted.

Right after the 2010 elections, the ruling majority started to rush an enormous amount of bills through the Parliament. By the end of the first full year of the Parliament elected in April 2010, that is, by the end of 2011, it passed more than 350 bills. Many times parliamentary debates of important legislation affecting large parts of the society (like the Labour Code, to take one example) took place during the night, thus shielded from the eye of the public.

Some of this large amount of bills were proposed by the government, but many of the most significant ones that reshaped the constitutional system came from individual MPs belonging to the ruling party. The reason behind this practice was to circumvent the legal requirements applicable to legislative proposals made by the government set out in Act 131 of 2010 on the participation of civil society in the preparation of legislation and in Decree 24/2011 of the Minister of Public Administration and Justice on preliminary and ex-post impact assessment, which do not apply to bills introduced by individual MPs. Besides affecting the quality of legislation, pushing legislation through the Parliament using this procedure also entails a restriction on public debate. Laws that have been passed this way include amendments to the old Constitution, the new Fundamental Law itself, its the Second and Fourth Amendments, the Transitional Provisions of the Fundamental Law, and a number of cardinal laws, including the media laws that attracted much international attention.

On 30 December 2011, the Parliament adopted amendments to the House Rule. The new rules gave the governing majority new ways to curtail debate in the Parliament, push bills through the House at an insanely fast pace, or circumvent the discussion of significant provisions altogether by submitting them as amendments right before the final vote to be voted on without discussion. Previous limitations on the content of amendments submitted after the plenary phase of the legislative process has ended, just before the final vote, have been abolished. A whole new "exceptional urgent procedure" was introduced. Under this procedure, the MPs had only three hours to propose amendments to a bill, and the plenary debate on the bill and the proposed amendments, as well as the final vote, had to be completed within 24 hours. The majority required to initiate this procedure was established at two-thirds of the MPs present, which is the majority the government had at the time in the House. The Parliament already had a much more relaxed "exceptional procedure," which required a four-fifths majority. This requirement was also reduced to three-fourths. Here is an analysis, again, prepared by three of the NGOs currently under attack, some time after these changes were passed, assessing these issues and others: http://helsinki.hu/wp-content/uploads/Rights-of-opposition.pdf.

The house rules were modified again in February 2014. More reasonable rules were adopted for amendments before the final vote, and the fast-track procedures were also re-regulated. A more relaxed "urgent procedure" and a very swift "exceptional procedure" has been introduced. Under the latter, the proponent of the adoption of the procedure also proposes the deadlines for the MP's to submit draft amendments, which, just like under the previous "exceptional urgent procedure" can be as short as three hours, and also the time of the vote on the proposed amendments and the final vote, which can be the next day. The Parliament can now decide to use the exceptional procedure by simple majority, and it can be used four times per semester. This was the procedure used to adopt the amendment to the Higher Education Law to force CEU out of the country. The 2014 changes to the House Rule also curb spontaneous plenary debate.

The Parliament can establish committees of inquiry for the purpose of investigating matters pertaining to the responsibility of the Government. The House Rule stipulates that a committee of inquiry shall be set up if it is initiated by one-fifth of MPs, and a formal decision to establish the committee is passed by the simple majority of the plenum. Prior to 2010, parliamentary inquiries were a frequently used institution, and were often initiated by the opposition. In the 2010-2014 term the governing majority did not allow a single parliamentary inquiry initiated by the opposition.

It is just natural that to these restrictions of discussion in the Parliament opposition MPs started to react by resorting to previously unusual means, such as holding up placards and banners. The Speaker, however, has been given extensive means to restrict the MPs freedom of expression. MP's can face high fines or exclusion from parliamentary sessions if the Speaker deems that they are "undermining the prestige of the Parliament" by holding up a sign. Here is a European Court of Human Rights case in which the Court ruled that the interference from the Speaker's part with the right to freedom of expression of a number of opposition MP's who held up placards during a vote was not "necessary in a democratic society" and, accordingly, there has been a violation of Article 10 of the Convention: https://lovdata.no/static/EMDN/emd-2013-042461-2.pdf.

9 Unfair political competition - vs. "Respect for the rule of law is intrinsically linked to respect for democracy"

In 2011, the ruling supermajority adopted a new electoral law unilaterally. The bill was accompanied by a newly drawn map of electoral constituencies, a piece of shameless gerrymandering. While the

details of a gerrymandered redrawing of electoral districts is usually quite a subtle matter, there is a straightforward indicator of systematic bias: districts that can be foreseen to be left-leaning on the basis of the distribution of votes at earlier elections are larger, typically by 5-6 thousand, than the righ-leaning ones, giving more weight, on average, to the vote of citizens expected to vote for the incumbent right-wing government. Had the current election rules been in effect in the last two elections Orbán's Fidesz lost, in 2002 and 2006, they would have won them.

The new system is, just like the old one was, what political scientists call a "mixed-member majoritarian" system with partial compensation. That is, mandates are won both in single-member electoral districts and on party lists, but, unlike in "mixed-member proportional" systems, used, e.g., in Germany or Scotland, the two elements are not coordinated to produce a proportional outcome. This is a feature shared by the old and the new Hungarian election system, but the system was made significantly more disproportional than it already was by shifting the balance for single-member districts at the expense of the number of seats to be filled from party lists, and with the introduction of "winner compensation." This latter means that not only votes cast for candidates who loose in an individual constituency are counted as votes for the compensational list, but also the votes cast for the winner in excess of what would have been minimally necessary to win the district. (For example, if the winning candidate beats the runner-up by 3,000 votes, 2,999 votes will be counted for the compensatory list of the party of the winning candidate.) This latter rule won 6 extra mandates for the ruling party at the 2014 elections.

Another significant change is that the previous second round of the election in individual electoral districts has been abolished. The seat of an electoral district can now be won by relative majority achieved in a single round of voting. Besides being a particularly poor method of preference aggregation, this method strongly favours a large party with multiple smaller competitors, especially if, for political reasons, they cannot afford to create a straightforward alliance before the first and only round of the elections, which happens to be the case in Hungary.

It is already highly problematic from a democratic point of view if a party that wins supermajority by winning slightly more than half of the votes jumps at the opportunity to unilaterally change the electoral rule in its own favour, without the slightest inclination to seek consensus or compromise with the opposition, but this was not the main reason why the OSCE/ODIHR election observation mission pronounced the 2014 Hungarian elections "free but unfair."

The concerns raised by the OSCE/ODIHR mission have to do mainly with the media conditions in which the campaign was carried out. In the mission's analysis, the governing party enjoyed an undue advantage because of the restrictive campaign regulations (amendments to the Fundamental law practically confined the campaign to the public media and to street billboards), because of the political bias of public service media, because of the lack of clear separation of the ruling party and the state in the campaign, and because of the lack of media plurality and the lack of balance in the Media Council. Here are some key observations from the mission's final report:

"The use of government advertisements that were almost identical to those of Fidesz contributed to an uneven playing field and did not fully respect the separation of party and State, as required in paragraph 5.4 of the 1990 OSCE Copenhagen Document."

"Since March 2013, over a year prior to election day, the government conducted a campaign with the slogan "Hungary is performing better." According to government officials, the cost of the campaign in 2013-2014 was EUR 4.5 million. It then sold the rights to use this slogan to Fidesz for EUR 640, after which the government and Fidesz ran advertisements which were strikingly similar. On 18 March 2014, the Supreme Court ruled that the government's campaign constituted political advertising and overlapped with the Fidesz campaign in content and form. Several Fidesz-governed municipalities also campaigned in favour of the ruling party in a similar manner."

"Formally, numerous electronic and print media outlets provide for media diversity. Increasing ownership of media outlets by businesspeople directly or allegedly indirectly associated with Fidesz and the allocation of state advertising to certain media undermined the pluralism of the media market and heightened self-censorship among journalists. The limited amount of free airtime for candidates and absence of paid political advertisement on nationwide commercial television impeded electoral contestants' access to campaign via the media, at odds with paragraph 7.8 of the 1990 OSCE Copenhagen Document."

"Furthermore, a lack of political balance within the Media Council combined with unclear legal provisions on balanced coverage created uncertainty for media outlets. The public service broadcaster followed its legal obligation to allocate free airtime to contesting parties, albeit with limited impact. The OSCE/ODIHR media monitoring results showed that three out of five monitored television stations displayed a significant bias towards Fidesz by covering nearly all of its campaign in a positive tone while more than half the coverage of the opposition alliance was in a negative tone."

"The majority of campaign billboard spaces were rented by Fidesz, although other parties had the possibility to do so. Opposition parties and candidates had limited access to broadcast media and public advertising space, including on billboards, lampposts and public buses, most of them owned by individuals affiliated with the government. This contributed to an uneven playing field. This restricted voters' access to information and, thus, potentially their ability to make an informed choice."

The full text of the final report of the OSCE/ODIHR mission is available here: http://www.osce.org/odihr/elections/hungary/121098?download=true.

10 Media freedom and pluralism stifled - vs. "Respect for the rule of law is intrinsically linked to respect for democracy"

The last topic leads us naturally to that of media pluralism and freedom. The freedom of the press, the pluralism and independence of the media, are as indispensable for a democracy as is the separation of powers and the independence the institutions that serve as checks and balances. Indeed, in this respect the media is often treated on an equal footing with constitutional institutions that are supposed to be independent from the government. From the reforms enacted by the current regime, it is perhaps the new media laws that attracted the most attention in the EU and internationally.

The new media package consisted of three elements: an amendment to the constitution, Act 185 of 2010 on Media Services and Mass Media, and Act 104 of 2010 on the Freedom of the Press and Fundamental Rules of Media Content. All three were put forward by individual MPs rather than by the government to avoid requirements of participation and impact assessment, as was standard practice at the time (see above). The scope of the regulations encompasses radio, television, printed and on-line press, including commercial blogs, well beyond the scope of the previous regulations which left print media and the internet largely free from content regulation. The new law required all media content providers to register with the new Media Authority, including providers of print media products and online content (Article 41 of Act 185/2010).

Content regulations were heavily criticised for including vague and overly general norms. For example, Article 4 of Act 104/2010 states that the exercise of the freedom of the press may not "violate public morals." Article 17 (2) ruled that "media content may not offend...persons,...any majority, as well as any church." This latter provision was later changed to forbid the "exclusion" rather than merely the offending of the said entities. They also included provisions that most media were foreseeably unable to comply with. The original wording of Article 13 of the same act required that "all media content providers shall provide authentic, rapid and accurate information on local, national and EU affairs and

on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation." Given that the law defined the meaning of the term "media content provider" in the broadest possible way, this requirement was simply impossible to meet for most who fell within its scope. An assessment of the proposed legislation before its adoption Commissioned by the Office of the OSCE Representative on Freedom of the Media called these requirements "traps content providers cannot avoid falling into, giving an opportunity for the authorities to penalise them for it" (http://www.osce.org/fom/71218?download=true). Again, these requirement were subsequently relaxed to some extent.

Compliance with the content regulations is overseen by the Media Council, which, as it was explained above, is comprised exclusively of the nominees of the ruling party and the Prime Minister. The Council may impose fines, as specified in Article 187 of Act 185/2010, which are so heavy that they may easily lead to the closure of printed and online newspapers, radio and TV stations, especially when imposed repeatedly. One of the main initial worries about the new media legislation was that the combination of the vague content requirements, the political bias of the supervising authority, and the heavy fines at its disposal, will be a major factor to revive self-censorship, a long tradition in the Hungarian media from the pre-1990 era.

Originally, Article 6 (2) of Act 104/2010 gave right to a court or "an authority" (without further specifying which) to oblige media content providers and their employees to reveal the identities of their sources even on grounds so vaguely defined as the interest of protecting "public order." Article 155 of Act 185/2010 allows authorities to search the premises of media content providers and "inspect, examine and make duplicates and extracts of any and all media containing data, document and deeds, even if containing trade secrets, related to the media service provision, publication of a media product or broadcasting." On the appeal of the Hungarian Civil Liberties Union, one of the NGOs currently attacked as "foreign-funded," in December 2011, the Constitutional Court in its Decision 165/2011 struck down the obligation of journalists to reveal their sources, and obliged the legislature to add provisions to Article 155 of Act 185/2010 that enable journalists to protect data that would reveal their sources. (This was, of course, before judges appointed unilaterally by the regime got majority in the Constitutional Court, and also before the new Fundamental Law that came into force on 1 January 2012 abolished *actio popularis* i.e. the right of anyone to turn to the Constitutional Court asking for the review of the constitutionality of a legal provision.)

As it turned out, the regime chose much simpler ways to ensure its now overwhelming media domination (including, of course, a widespread culture of self-censorship) than it was presumed at the time certain provisions of the new media legislation were intensely debated. Near-hegemony in the media was achieved primarily through exercising tight control over public service broadcasters which turned the public media into the propaganda outlet of the government, through the licensing policy of the all-Fidesz Media Council which fundamentally transformed the radio market in the government's favour, through ownership, i.e., the regime's oligarchs simply buying up media outlets (one relatively recent and significant development in this process has been the shutting down of the largest broadsheet newspaper Népszabadság, after Lőrinc Mészáros, a former schoolmate of the Prime Minister and mayor of the PM's native village, a gas-fitter turned the fifth riches individual in Hungary in a matter of years, mostly on winning EU-funded public procurements, bought up its publisher), through the centralisation of the advertising activities of state agencies and state-owned companies and channelling the spendings to pro-government media, through taxation policies targeting mainly the one remaining independent commercial tv channel accessible nationwide, and occasionally by other, chiefly economic means (such as applying pressure on the Hungarian subsidiary of German telecommunications giant Deutsche Telekom, which owned the then market leader on-line news outlet Origo.hu, which led to the laying-off of the editor-in-chief after Origo's independence became a nuisance to the government, and the eventual selling and transformation of the once well-respected independent news site into a

widely abhorred tool of government propaganda, after which previous government plans for higher taxes on mobile communications, which would have affected DT's profits negatively, were conveniently forgotten). For a detailed report on these developments, prepared by another of the NGOs now targeted, Mérték Media Monitor, see: http://mertek.eu/sites/default/files/reports/gasping_for_air.pdf.

11 Critical civil society organisations harassed and defamed - vs. "Equality before the law" + "Respect for the rule of law is intrinsically linked to respect for democracy"

Now that Vice-President of the Commission have stated that the newly proposed legislation on civil society organisations is a cause of concern for the Commission, but the Commission sees no systematic threat to the rule of law, it is just appropriate to remind the parties to the discussion of another piece of there-being-no-systematic-threat-to-the-rule-of-law, the continual harassment of independent NGOs, especially those that work for the protection of democracy and human rights, for marginalised groups, and for transparency, which started several years ago. The government's main goal is to undermine the credibility of civil society organisations that are critical of the government, and to intimidate their staff and activists. It started in 2013 by government officials and politicians of the ruling party starting to state publicly and highly repetitively that the independent NGO's are "agents of foreign interests," their staff and activists "are on foreign payrolls," and they are "instruments of undue foreign interference with the sovereign self-determination of the Hungarian state." Pro-government media also launched an extensive smearing campaign to turn public opinion against the civil society organisations in question, demonising, most of all, George Soros, portrayed as paying these organisation for criticising the government.

Here is a characteristic excerpt from a speech by PM Orbán, from July 2014, commenting on the issue:

"If we look at civil organisations in Hungary, ... , debates concerning the Norwegian Fund have brought this to the surface, then what I will see is that we have to deal with paid political activists here. And these political activists are, moreover, political activists paid by foreigners. Activists paid by definite political circles of interest. It is hard to imagine that these circles have a social agenda. It is more likely that they would like to exercise influence through this system of instruments on Hungarian public life. It is vital, therefore, that if we would like to reorganise our nation state instead of the liberal state, that we should make it clear, that these are not civilians coming against us, opposing us, but political activists attempting to promote foreign interests. Therefore, it is very apt that a committee was being formed in the Hungarian parliament that deals with constant monitoring, recording and publishing foreign attempts to gain influence, so that all of us here, you as well, will know who the characters behind the masks are." (An English translation of the whole speech is available here: http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592.)

By the time these words were spoken, the concrete harassments already began. The first targets were the operators and recipients of the EEA/Norway Grants NGO Fund. In the spring of 2014, after a breach of the bilateral agreement between Hungary and Norway concerning the administration of the funds from the part of the Hungarian government, Norway suspended the disbursement of the funds, with the sole exception of the NGO Programme, which was the only one administered by an independent consortium of civil society organisations unaffected by the changes. As it was later leaked, this prompted the government to blacklist 13 grantee organisations of the NGO Programme, some of which were later drawn into unsubstantiated allegations of embezzlement and fraud.

In May 2014, the Government Control Office started auditing the organisations operating the EEA/ Norway Grants NGO Fund and its grantees, even though, as emphasised at the time by the Norwegian government, according to the bilateral agreements on the EEA and Norway Grants, it had no jurisdiction to perform such audits. The Norwegian government expressed that it had no willingness to give any credit to the audit performed by the Hungarian government agency. In September 2014, two NGO Fund operator organisations' offices were spectacularly raided by the riot police, seizing computers and documents, and the tax numbers of the four NGO's were suspended on grounds of alleged non-cooperation with the audit, blocking their operation. The Government Control Office reported on five organisations to the Hungarian prosecutorial services, accusing them of illegal conduct. Here is a full timeline of the relevant events between August 2013 and September 2014 prepared by the Hungarian Helsinki Committee: http://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_Hungarian_NGOs_20140921.pdf.

By October 2015, the prosecutors concluded that the organisations involved in the distribution of the NGO funds operated lawfully, having committed only a few minor administrative mistakes. At roughly the same time, it became known that the Criminal Division of the Tax Authority closed its investigation of 18 organisations, including the ones previously raided, for lack of evidence of wrongdoing.

This is the context in which the current legislative proposal on foreign-funded NGO's, practically translated from the Russian original, needs to be interpreted.

12 Violation of religious freedom and equality - vs. "Effective judicial review including respect for fundamental rights" + "Equality before the law" + "Respect for the rule of law is intrinsically linked to respect … for fundamental rights"

The new Church Act (Act CCVI of 2011), which came into force in January 2012, changed the church registration regime. Previously, every religious community with a membership exceeding a hundred enjoyed the legal status of a church. An appendix to new law listed originally 14 handpicked churches which are recognised. A longer list of 32 in total was later adopted. The rest of previously recognised churches, about 200 of them altogether, all lost their status and were required to apply for re-registration or lose their status as churches permanently. Re-registration has been made conditional on a discretionary decision of the Parliament. The constitutional basis for this legislation was Article 21 § 1 of the Transitional Provisions of the Fundamental Law, which gave the Parliament the power to identify the recognised churches in a cardinal law and to determine the criteria for the recognition of further churches that might be admitted in the future. In December 2012, the Constitutional Court annulled this provision of the Transitional Provisions of the Fundamental Law. In March 2013 (Decision 6/2013 [III. 1.]), the Court also annulled the provisions of the new Church Act which deprived the non-recognised churches of their church status, and declared that *"it would raise ... constitutionality issues if the legislature were to grant the possibility to become a legal person or to establish a specific legal entity for some organisations while arbitrarily excluding others in a comparable situation or making it disproportionately difficult for them to obtain such legal status."* The Court also recalled that, when such a power is exercised by the legislature, *"The Constitutional Court has previously established that the risk of some kind of political assessment being made in connection with the recognition of Churches cannot be excluded."* In response, in the Fourth Amendment to the Fundamental Law, which has come into force in April 2013, the governing supermajority reintroduced the power of the Parliament to grant church status into the Fundamental Law itself. The Fifth Amendment to the Fundamental Law, in force from October 2013, emphasised that everyone had equal rights to establish religious communities, whereas the state may choose to

cooperate with some of them to promote public goals, as a result of which they will be given the status of "incorporated church." Incorporated churches however, as opposed to mere religious communities, continued to enjoy preferential treatment. For one, only incorporated churches are entitled to the 1% of personal income tax earmarked by tax-payers as a donation and to the corresponding state subsidy. Incorporated churches have privileges also in the areas of religious education and confessional activities within state institutions, operation of cemeteries, including religious funerals, publication of religious printed material and production and marketing of religious objects.

In the meantime, between November 2011 and August 2012, several of the religious communities affected turned to the European Court of Human Rights claiming that, under Article 11 read in conjunction with Articles 9 and 14 of the European Convention of Human Rights, the de-registration and discretionary re-registration of Churches amounted to a violation of their right to freedom of religion and was discriminatory, and that, under Articles 6 and 13 of the Convention, the relevant procedure was unfair and did not offer any effective remedy. Notably, their legal representation for nine of them was provided by the Hungarian Civil Liberties Union, one of the NGOs now attacked as "foreign-funded." The Court decided to join the applications. In its ruling of 8 April 2014, the Court emphasised that *"the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs"* and *"the State's duty of neutrality and impartiality, as defined in the Court's case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs."* The Court reiterated that *"the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning,"* and that *"Where the organisation of the religious community was in issue, a refusal to recognise it was also found to constitute interference with the applicants' right to freedom of religion under Article 9 of the Convention."* The Court established that *"that the measure in issue in the present case effectively amounted to the deregistration of the applicants as Churches and constituted interference with their rights enshrined in Articles 9 and 11."* The Court expressed its opinion that, *"the adherents of a religion may feel merely tolerated – but not welcome – if the State refuses to recognise and support their religious organisation whilst affording that benefit to other denominations. This is so because the collective practice of religion in the form dictated by the tenets of that religion may be essential to the unhampered exercise of the right to freedom of religion."* In line with the previous ruling of the Hungarian Constitutional Court, the Court noted that *"decisions on the recognition of incorporated Churches lie with Parliament, an eminently political body, which has to adopt those decisions by a two-thirds majority. The Venice Commission has observed that the required votes are evidently dependent on the results of elections … As a result, the granting or refusal of Church recognition may be related to political events or situations. Such a scheme inherently entails a disregard for neutrality and a risk of arbitrariness. A situation in which religious communities are reduced to courting political parties for their votes is irreconcilable with the requirement of State neutrality in this field."* And also that *"religious communities cannot reasonably be expected to submit to a procedure which lacks the guarantees of objective assessment in the course of a fair procedure by a non-political body."* The Court also considered that *"Where … the State has voluntarily decided to afford entitlement to subsidies and other benefits to religious organisations … it cannot take discriminatory measures in the granting of those benefits,"* and *"Similarly, if the State decides to reduce or withdraw certain benefits to religious organisations, such a measure may not be discriminatory either."* The Court found that *"under the legislation in force, certain religious activities performed by Churches are not available to religious associations, a factor which in the Court's view has a bearing on the latter's right to collective freedom of religion,"* and that *"such differentiation fails to satisfy the requirement of State neutrality and is devoid of objective grounds."* In conclusion, the Court established that *"in removing the applicants' Church status altogether rather than applying less stringent measures, in establishing a politically tainted re-registration procedure whose justification as such is open to doubt and, finally, in treating the applicants differently from the incorporated Churches not only with regard to the possibilities for cooperation but also with regard to entitlement to benefits for the purposes of faith-related activities, the authorities disregarded their duty of neutrality vis-à-vis the applicant communities. These elements, taken in isolation and together, are sufficient for the Court to find that the impugned measure cannot be said to correspond to a "pressing social need" There has therefore been a violation of Article 11 of the Convention read in the light of Article 9."* (The Court's

judgment is available here: http://hudoc.echr.coe.int/eng#{“appno”:[“70945/11”],"itemid":["001-142196"]}.)

In September 2015, the Government published a draft of a comprehensive amendment the 2011 Church Act, notably without prior consultation with the churches that the 2011 Church Act affected negatively, aiming to fix some of the most problematic provisions. Initially, the draft received broadly welcoming remarks from some opposition corners, and also heavy criticism form a number of NGOs and churches affected. The government ignored every suggestion from opposition parties and civil society organisation to improve on the draft, which was introduced to the Parliament unaltered. As a result, in the final vote in December 20015, it failed to get a two-thirds majority support, which, being a cardinal law, it would have required to pass. (By this time the government lost its supermajority in the Parliament.)

In March 2016, the Hungarian Civil Liberties Union launched a campaign for the amendment of the Church Act, and published a concept paper for the amendment, in line with the rulings of both the Constitutional Court and the European Court of Human Rights (http://www.liberties.eu/en/campaigns/your-faith-your-case-hclu-church-law-campaign). To no avail.

The latest developments are that the ECtHR ruled on damages to be paid to churches deprived of their church status in June 2016 and, with respect to one affected church, just a few days ago, on 25 April 2017.

13 The treatment of asylum seekers - vs. “Effective judicial review including respect for fundamental rights” + “Respect for the rule of law is intrinsically linked to respect … for fundamental rights”

There is no need to provide an extensive summary of the situation here, given that in December 2015, the European Commission initiated an infringement procedure against Hungary concerning its asylum law. Among others, the Commission raised the concern that decisions in which an applicant appeals the initial verdict, the initial decision is not automatically suspended, which forces applicants to leave the country before the deadline for lodging an appeal expires, or before the appeal could have been heard. The Commission is also worried by the fact that in the judicial review of decisions rejecting an asylum application, a personal hearing is now only optional, and there is no possibility to refer to new facts and circumstances. Judicial decisions about appeals are issued by a court secretary at a sub-judicial level lacking any judicial independence. Another concern raised is that Hungarian law now allows for fast-tracked criminal proceedings against those who cross the border irregularly, but does not respect their right to interpretation and translation in criminal proceedings. These concerns all pertain eminently to the rule of law, or rather, the lack thereof.

14 Conclusion

These are just the outlines of the transformation that our country underwent since April 2010. Many other issues and cases could be cited. All aspects of this transformation affect the rule of law.

The issue of this paper is whether there is a systemic threat to the rule of law in Hungary. The expression “a systemic threat to the rule of law” has both a natural, commonsensical meaning, accessible to anyone familiar with the concepts involved, and a well-defined technical meaning in the

context of the EU framework to strengthen the rule of law. As far as the former is concerned, the changes the Hungarian Government put in place in the last seven years, affecting the constitutional system, the competence and independence of the Constitutional Court, the independence of the judiciary and other crucial aspects of the separation of state powers, the space for discussion and social participation in legislative procedures, media pluralism and freedom, and the fairness of political competition, to recite only a few areas discussed in this paper, obviously add up to a profound and systemic threat to the rule of law, and also to the core values on which the Union rests. When we look at the technical meaning of the same expression, as it is stipulated in the Communication of the Commission to the European Parliament and the Council on a new EU framework to strengthen the rule of law cited above (http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf) and its annex, we find that the meaning of the term defined for the purposes of the rule of law framework coincides with its natural meaning, making its essence explicit in a remarkably clear way.

In particular, as it was cited earlier, it is stated in these documents that the rule of law entails the requirements of *"a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."* Besides capturing how anyone sufficiently familiar with the concept of the rule of law in a constitutional democracy would spell out its content, in the light of the above summary, it sounds quite like a list of the principles that the transformation in the last seven years that has been outlined in this paper has violated.

Admittedly, most of these changes have been enacted in a manner that conformed to a narrow interpretation of the applicable formal procedural requirements in place at the time, although not without the violation of existing procedural standards which were circumvented by the government by techniques that were formally available to them. The Commission communication, however, references the stance of both the European Court of Justice and the European Court of Human Rights affirming that *"those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components."* This makes it clear that the mere fact that the profound transformation of the Hungarian constitutional system was enacted through existing parliamentary procedures, and the resulting situation in which the separation of powers and the system of checks and balances is abolished, and fundamental rights and constitutional principles are being violated, is by and large consistent with the letter of the unconstitutional laws that the regime adopted unilaterally, does not, by any means, entail that the rule of law has been observed.

The same Commission communication also clarifies what threat to the rule of law qualifies as "systemic." The crucial difference between non-systemic and systemic threats to the rule of law is that in case of the latter *"The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened."* The developments presented in this paper make Hungary a textbook case in which precisely this situation obtains.