

# Civic Strategies Against Governmental Populism and Hate Campaigns



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POLICY INSTITUTE

Budapest, May, 2018

In cooperation with the Prague office of the Heinrich-Böll-Stiftung



## 1. Reasons for Choice of Topic, Background Literature

The systematic demolition of the institutional system under the rule of law has been ongoing in Hungary since the change of government in 2010, being executed in a well-documented manner, and despite plentiful criticism at home and abroad. It is interlinked with governmental attacks on external and domestic voices that are critical of the process. Political philosophers, sociologists and practitioners of constitutional law have all been trying to define the theoretical framework that would allow an interpretation of the process in the course of which a European Union Member State has demonstrated a conscious shift away from the core values of liberal democracy and the rule of law (and, as such, those of the European community). Assistance for a conceptual interpretation of the Hungarian situation was provided by Prime Minister Viktor Orbán himself, who set the new course for governing Hungary in his speech delivered at the “Bálványos Open University and Student Camp” event in Baile Tusnad (Tusnádfürdő) in Romania. According to the Prime Minister, in order to make Hungary a competitive and successful country, its efforts must be focused on creating an “illiberal state”—taking the cue from Singapore, China, India, Russia and Turkey—instead of following the principles of liberal democracy.<sup>1</sup>

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1 The full text of the speech is available in English at: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp> (accessed April 18, 2018)

The illiberal “independent path” taken by Hungary is not a unique phenomenon within the EU, although it has beyond doubt reached the most critical level in Hungary.<sup>2</sup>

The “illiberal state” is not an unknown concept; political philosophy often links it to the term “illiberal democracy”, mainly in the wake of Fareed Zakaria’s 1997 study “The Rise of Illiberal Democracy”<sup>3</sup>. In his frequently cited paper, Zakaria specifies the key characteristics of “illiberal democracies”, such as the erosion of individual liberties; populism; an election system that is at least partly free, but which strongly favours the political forces that are in power; painting external and domestic voices that criticise the power of the government as illegitimate, and rendering their existence impossible.

In contrast, János Kis explicitly warns against the use of the terms “illiberal” and “democracy” together to claim that democracy is not liberal; that is, its illiberal form is incomprehensible at the conceptual level, and liberalism and democracy are concepts that cannot be separated from one another.<sup>4</sup> Instead, he argues that what is worth looking at is where the boundary between democracy and autocracy can be drawn on a given theoretical scale. János Kis believes it is the form and substance related criteria, in other words the condition of a democracy’s “subsystems,” that need to be examined in order to draw that line, i.e. to decide whether a regime can still be seen democratic or already lends itself more to the description of an autocracy. He posits that, in terms of its form, there is democracy if an electoral system

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2 See the Civil Liberties Union for Europe’s summary of attacks against NGOs in Hungary, Poland, Romania, Italy and Ireland: [https://drive.google.com/file/d/1otccIP-TD1BSC23Lw\\_DUuqmJCkd0jnM16/view?mc\\_cid=c3f9f2bf4e&mc\\_eid=857645a3e3](https://drive.google.com/file/d/1otccIP-TD1BSC23Lw_DUuqmJCkd0jnM16/view?mc_cid=c3f9f2bf4e&mc_eid=857645a3e3) (accessed April 18, 2018)

3 Zakaria, Fareed: *The Rise of Illiberal Democracy*. Foreign Affairs, Vol. 76, No. 6 (Nov. – Dec. 1997), pp.

4 Kis, János: *Mi a liberalizmus? – Esszék, tanulmányok 1985-2014*. (What Is Liberalism? – Essays and Studies. 1985-2014) Kalligram, 2014

guaranteeing legislative rotation exists, if public authority decisions can solely be made by elected officials or the individuals they select and, moreover, if the principle of the separation of powers prevails. On top of the form-related criteria, Kis also specifies requirements of substance, i.e. he believes there is democracy if the sum total of political rights is guaranteed for every citizen, if the protection of human rights (personal rights) prevails, and the opportunity for legal redress for any violation of rights to which they may be exposed by public authorities is provided to citizens. He identifies the Orbán regime as an autocracy after a systematic analysis of these democracy criteria (subsystems) and the severity of their defects, and thinks that the stabilisation of the regime is ensured by the very same institutions that formerly worked as the stabilisers of democratic operation (thereby already going beyond the boundary from which one has to talk about an autocracy). Kis believes that an analysis of this kind also allows light to be shed on, among others, how the election process in Hungary is hegemonic, how public media are subject to direct government control, and the fact that independent rule of law institutions have been subordinated to the power of the executive branch, to at least a degree that no longer permits them to effect any substantive change in government decisions that concern the system.<sup>5</sup>

Though working with a different notional inventory, András Bozóki and Dániel Hegedűs provide a diagnosis of the Hungarian situation that is similar to that of János Kis. In their 2017 study<sup>6</sup>, they identify the

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5 See in Kis, János: Az autokráciák fogalmi topográfiájához. (On the Notional Topography of Autocracies) Paper delivered at the 'A nép nevében?' (In the name of the people?) conference. University of Debrecen, Faculty of Law and Government, Department of Constitutional Law – CEU Faculty of Political Science, 12 January 2016; available on YouTube: <https://www.youtube.com/watch?v=wSvZnJpNJBE> (accessed April 18, 2018)

6 Bozóki, András – Hegedűs, Dániel: A kívülről korlátozott hibrid rendszer. Az Orbán-rezsim a rendszertipológia tükrében. (The Extraneously Restricted Hybrid System. The Orbán Regime in Light of System Typology.) in *Politikatudományi Szemle*, No. 2017/2, pp. 7–34

Hungarian “illiberal state” as an extraneously restricted hybrid regime positioned somewhere between modern democracies and autocratic dictatorships based on objective definitional traits, including for instance the existence but unfair and unjust nature of political competition, or the systemic shortcomings of liberal constitutionalism. The authors mainly see the suitability of the Hungarian condition as a model in the fact that Orbán’s regime—which can be ranked neither among the democracies nor with dictatorships—is seeking to accomplish its goals in a landscape that is alien to the system—among the democratic EU Member States. Bozóki and his colleague point out that the EU’s attitude towards the Hungarian government’s “illiberal” actions since 2010 has been ambivalent: it simultaneously sponsors, legitimises and—above all else—restricts them. The authors believe that this feature is gradually becoming integral to the regime’s characteristics—even though in many cases Orbán achieves his goals by going against the EU, he still considers its system support function to be sufficiently important for him to recognise the EU’s partial authority over nation state governance, as stipulated in the constitution and international treaties. The authors believe that Orbán’s “illiberal state”, which they deem an extraneously restricted (by the EU) hybrid regime, continues to be forced to dress its political objectives in democratic garb.

## **2. Research Objectives and Applied Methods**

The interpretation of the Hungarian “illiberal state,” in terms of political philosophy and political science outlines a set-up in which even though the constitutional institutions typical of democracies still formally exist, they however no longer function—even while occasionally adopting decisions that comply with constitutionality—as intended at the system level: Instead of serving as true checks on how the government wields power, they function as institutions stabilising the autocratic workings of the state.

To illustrate this phenomenon, we are going to examine one of the crucial features of how “illiberal states” operate, namely populist and inflammatory government communication that seeks to make public debate hegemonistic and the closely related government actions intended to silence critical opinions, together with the legal instruments available to counter these things. A review of events will show that the institutionalised legal procedures intended to limit the government’s exercise of power are not effective in Hungary, as they are unable to fulfil their purpose under the rule of law. At the same time, analysis will point out that, in the framework of the “illiberal state”, other legal instruments not explicitly assigned to remedying a given infringement could serve as more effective tools for defence against power, as may civic actions belonging to the concept of civil disobedience.

This paper examines typical cases grouped by types of government action which, in terms of subject matter, constitute valid problems for the legal regime or the respective legal concept as a whole; as such, one may be justified in assuming that the conclusions related to the effectiveness of legal instruments linked to them will also be valid concerning similar matters that are not touched upon in the paper. In the research, legal regulations, constitutional court, court and authority proceedings were scrutinised in the light of rule of law standards, and the learning points—associated with this paper’s purpose—gleaned are summarised after typifying them. This method follows what is known as the “law in context” approach<sup>7</sup>, the starting point of which is not primarily the law but rather the social problem; this is because, as we have seen above, the law itself is problematic in the illiberal system—it is the internal and self-sustaining system of rules, principles and decisions that stabilises an autocratic regime.

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7 Mike McConville, Wing Hong (Eric) Chui: *Research Methods for Law* Edinburgh University Press, 2007

## **1 The Struggle Against Hegemonising Political Power—Legal Instruments Available for Use Against Government Propaganda**

One of the main characteristics of illiberal, autocratic states is that the governing power seeks to dominate and maintain control over public debate, fighting off any voices that may be critical towards it.<sup>8</sup> In addition to laws to stigmatise and delegitimise the NGO sphere,<sup>9</sup> media regulation incentivising self-censorship<sup>10</sup> and a distorted election system,<sup>11</sup> the government has also engaged in communication campaigns since 2015. While conventional rights protection mechanisms (see II.2) can, in theory, be used against infringing regulations and measures based on them, the options for legal action against the latter non-regulatory (political communication) activities are far from obvious. The admissibility of legal proceedings also depends on whether commu-

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8 Rocha Menocal, A., Fritz, V., Rakner, L.: Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries. *South African Journal of International Affairs*, 2008, 15(1), p. 34

9 Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds, and the proposal of the Government of Hungary on the Stop Soros legislative package.

10 For more details, see Bayer, Judit: Az új médiatörvény sajtószabadságot korlátozó rendelkezései. (Provisions restricting the freedom of the press in the new Act on the Media.) *Médiakutató*, spring 2011 Available at: [http://www.mediakutato.hu/cikk/2011\\_01\\_tavasz/02\\_uj\\_mediatorveny](http://www.mediakutato.hu/cikk/2011_01_tavasz/02_uj_mediatorveny) (accessed April 18, 2018); Majtényi, László: Az új médiaszabályozás alapvető hibái. (Fundamental faults in the new media regulation.) *Médiakutató*, spring 2011 Available at: [http://www.mediakutato.hu/cikk/2011\\_01\\_tavasz/01\\_mediaszabalyozas\\_hibai/](http://www.mediakutato.hu/cikk/2011_01_tavasz/01_mediaszabalyozas_hibai/) (accessed April 18, 2018)

11 For more details, see Unger, Anna: A demokratikus választások alkotmányos és politikai ismérvei és a magyar választási rendszer. (Constitutional and political criteria for democratic elections and the Hungarian election system.) *Fundamentum*, Vol. 18, No. 4, 2014

nication activities take place during official (pre-election, pre-referendum) campaign periods or at other times. Although, from the formal perspective of its substance, the government's campaign activity has been continuous, the mechanisms that are available against its actions outside, in formal terms, official campaign periods are different from those during them.

Since 2015, the government has launched communication campaigns in three major waves, in the framework of which it primarily displayed its propaganda messages in the form of billboard and newspaper advertisements, as well as radio and TV advertising spots. The first wave was launched in June 2015, and took shape in the campaign surrounding what they styled "national consultation" related to the refugee crisis. While it ran, the government formulated messages like "If you come to Hungary, you won't be allowed to take Hungarians' jobs" or "If you come to Hungary, you must respect our culture". The "Our message to Brussels" and "Did you know (...)" campaign began as the second wave in May 2016, and encouraged voting no at the referendum on the refugee quota, held on 2 October 2016. The government took the messages of this campaign to suggest manipulatively that there is a clear correlation between migration processes, the NGOs which support refugees, terrorism and other acts of violence.<sup>12</sup> As the third wave in 2017, government propaganda first set its sights on the European Union, which had sharply criticised the government's measures, in the shape of a national consultation titled "Stop Brussels now!" and the related campaign,<sup>13</sup> which in fact only served to prepare the legislative processes and communication campaign against NGOs critical of the government,

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12 This message, for instance, ran on billboards and advertising spots for months: "Did you know? More than 300 have died in terror attacks in Europe since the start of the immigration crisis."

13 The European Commission has compiled a publication in which it refuted, item by item, the claims appearing on the Hungarian government's consultation questionnaire. [https://ec.europa.eu/commission/sites/beta-political/files/commission-answers-stop-brussels-consultation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/commission-answers-stop-brussels-consultation_en.pdf) (accessed April 18, 2018)

which followed in the spring of 2017. In the summer of 2017, the government launched a campaign—in order to legitimise the use of laws to make it impossible for NGOs critical against it to operate—under the slogan of “Don’t let Soros have the last laugh!”, and this was followed up in the autumn of 2017 with the national consultation and campaign on the “Soros Plan”, which also named specific NGOs,<sup>14</sup> and then the “Stop Soros” campaign from the start of 2018.<sup>15</sup> The shared feature of these waves of inflammatory communication is that the government uses them to associate people fleeing war with terrorism, at the same time stigmatising NGOs which stand up for asylum seekers’ fundamental human rights as agent organisations “controlled by foreign interests”. In relation to such groups, the government depicts the European Union, and lately even the United Nations, as enemies.

For the most part, these government communication campaigns draw their force from changes that have occurred on the media market. Substantial media businesses have ended up in the hands of investors and oligarchs close to the government as a consequence of the media market restructuring, which has been ongoing since the change of government in 2010, while the scope of foreign-owned media and those in Hungarian control and independent of the government has been dwindling continuously.<sup>16</sup> In addition to all of that, the public media—intended to provide objective and unbiased information to citizens—has been under full government control for years, functioning as a propaganda instrument for the prevailing power. The passing of media companies to investors close to the government is a good example of

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14 <https://nemzetikonzultacio.kormany.hu/> (accessed April 18, 2018)

15 George Soros is a Hungarian-born American businessman and economist, who also supports NGOs in Hungary through his organisation called the Open Society Institute, which, among other activities, criticises government policy.

16 For more details, see Leonárd Máriás, Krisztina Nagy, Gábor Polyák, Ágnes Urbán: *Soft Censorship in Hungary 2016 – When Propaganda Rules Public Discourse*. Mérték Médiaelemző Műhely. Budapest, 2017 <http://mertek.eu/wp-content/uploads/2017/10/MertekFuzetek12.pdf> (accessed April 18, 2018)

how public debate is being hegemonised through economic means, and the government has facilitated this process with legal instruments, the transformation of the regulation of the media in 2010<sup>17</sup>, and channelling EU funds to entrepreneurs with close ties to the government<sup>18</sup>.

## **1.1 Complaints related to the referendum campaign during the campaign period**

In February 2016, the government initiated a referendum on the EU's admission quotas (see II.3.1), and the referendum was held on 2 October.<sup>19</sup> The government campaigned in support of the no vote using billboards, TV and radio advertisement spots, as well as newspaper advertising, from as early on as July 2016. The "Did you know? Informative campaign," which encouraged people to vote no, and saw the government mainly disclosing misleading and false information, primarily about migration processes and the European Union, thus began before the official campaign period<sup>20</sup>, which started from 13 August 2016.

The question of whether how the government's campaign or the content of the government's messages was lawful was referred to the National Election Commission (NEC), the election body that adjudicates on election objections, and to the Curia, the highest judicial forum, which is authorised to review the NEC's decisions. Neither the NEC nor

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17 For more details, see the Council of Europe's in-depth analysis prepared on Hungarian media laws in the summer of 2012: <https://rm.coe.int/168048c26f> (accessed April 18, 2018)

18 See Transparency International Hungary's analysis titled 'The Corruption Risks of EU Funds in Hungary': <https://transparency.hu/wp-content/uploads/2015/11/The-Corruption-Risks-of-EU-funds.pdf> (accessed April 18, 2018)

19 See the Károly Eötvös Institute's analysis titled 'A message to Hungary' about the referendum question and the campaign linked to the referendum: <http://ekint.org/en/constitutionality/2016-09-13/a-message-to-hungary> (accessed April 18, 2018)

20 Under Section 139 of the Act on Election Proceedings, the election campaign period began from the 50th day before the date of voting, October 2, i.e. on August 13.

the Curia conducted a substantive inquiry in those cases where objections were filed concerning the government's activity prior to the official campaign period—for the very reason that the campaign period had not yet started, therefore they did not consider the matter to be election-related.<sup>21</sup> However, they did examine the government's activity during the referendum campaign period, and found it to be lawful.<sup>22</sup>

In the case that was referred to the Curia, the petitioner believed that the government had made untrue claims in its “Did you know (...)?” campaign for the quota referendum, and also voiced ambiguous conclusions, mixed important concepts up together with manipulative intent, and failed to exercise its rights in good faith and as intended. In contrast, the starting point of and key to the court's argumentation was the conclusion that the campaign activity (campaign content) subject to the objection was exercising the right to freedom of expression, to which the government is entitled. According to the Curia, the specific billboards and advertisements subject to the objection express a value judgement concerning public affairs, and are thus accorded critical protection under the constitution; because they are not factual statements, their truthfulness cannot be examined nor can they stand in breach of the principle of electoral procedure of the bona fide and proper exercise of rights.

This Curia decision reflects an incorrect interpretation of constitutional law: no fundamental rights are owed to the government by virtue of their concept, and this also includes the fundamental right to freedom of opinion, so the reasoning and verdict based on that both fail to stand. The right of citizens to be informed establishes the obligation for the government to provide information, but in no instance does it establish the government's freedom of opinion. With regard to the government—as opposed to citizens—no untrue disclosure of facts

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21 9 NEC Decisions 36/2016, 39/2016, 50/2016, Curia Order KnkI.37710/2016/32.

22 NEC Decision 53/2016, Curia Order KnkI.37723/2016/3.

can be justified whatsoever, as that would violate the state's obligation to provide information. If the government information campaign's claims are not interpreted as the statement of false facts, but as a value judgement instead, then one may formulate the constitutional requirement whereby the government is obliged to respect and protect constitutional values, the rule of law, democracy and human rights, and therefore may not represent any political position contrary to those (e.g. any that may be exclusionary and violate human dignity and equality).

## 1.2 Media authority proceedings outside the campaign period

The government's propaganda messages are regularly broadcast on commercial radio and television channels that have wide audiences, as well as in the form of ad spots aired on public media. Since 2015, it has become established practice for media providers to air government propaganda spots as public service advertisements (pro bono spots), thus circumventing, among others, the Media Act<sup>23</sup> provision whereby political advertisements can only be broadcast during campaign periods. The matter of the government's political propaganda messages aired in the form of pro bono spots was put before the media authority (Media Council) on several occasions.<sup>24</sup>

Most recently, the Media Council was contacted in July 2017 with a view to investigating whether the government's "Don't let Soros have the last laugh!" spots were in breach of law.<sup>25</sup> The notification was filed by Mérték Media Monitor, which—insisting on what it had explained

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23 Act CLXXXV of 2010 on Media Services and Mass Communication (Media Act)

24 For more details, see Polyák, Gábor: A propaganda visszaszorításának intézményi-szabályozási keretei. (Institutional/regulatory framework for the containment of propaganda.) Produced in the context of OTKA (Hungarian National Scientific Research Funds) grant research no. 116551.

25 [http://mertek.eu/wp-content/uploads/2016/12/Mediatanacs\\_beadvany\\_Soros\\_kampany.pdf](http://mertek.eu/wp-content/uploads/2016/12/Mediatanacs_beadvany_Soros_kampany.pdf) (accessed April 18, 2018)

in the unsuccessful petitions it had previously submitted<sup>26</sup> in similar cases—argued that the ad spots referred to qualify as political advertising as defined in the Media Act,<sup>27</sup> the publication of which violates the Act’s clause stating that no political advertisements may be published outside election campaign periods (except in connection with referenda already decreed).<sup>28</sup> In its notification, the NGO pointed out that the Media Act explicitly demarcates public service advertising and public service announcements from political advertising, confirming that any communication qualifying as a political advertisement by virtue of its substance may not be deemed either a public service advertisement or a public service announcement. They argued that the challenged government communication was a political advertisement based on the categories in the Act, the reason being that, according to the statutory definition, programmes “promoting or advocating support for (...) the Government, or promoting the (...) objectives (...) of the government ” must be listed in this category. The Media Council did not respond to the notification (it is not obliged to institute proceedings based on a notification).

At the end of 2016, Mérték Media Monitor filed a notification related to the spots in the “Did you know (...)?” and “Message sent to Brussels (...)” government campaigns, along the lines of the same argument. The Media Council refused to institute proceedings against the media provider.<sup>29</sup> According to the media authority’s position, no infringement occurred in the case. According to the Media Council, “the spots do not qualify as political advertisements, since they provided information about immigration and the outcome of the referendum by stating facts”. The media authority adopted this decision despite the National Election Commission already having established in a case concerning

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26 Media Council Decision 160/2016 (II. 9) and 161/2016 (II. 9).

27 Media Act Section 203(55).

28 Media Act Section 32(3).

29 Media Council Decision 34/2017 (I. 17).

the “Did you know (...)?” campaign described above<sup>30</sup> that they contained “the Government’s political opinion associated with the subject of the referendum it initiated and set to be held on 2 October 2016”, and that they serve “to influence the will of the voters and expedite their decision-making options”. The Curia also traced this interpretation in its binding decision.<sup>31</sup> The Media Council therefore failed to institute proceedings in the case despite the National Election Commission and the Curia both having rendered clear-cut interpretations to the effect that these spots were political advertising with the explicit purpose of the government using them to “express its political opinion, and seek to influence the will of the electorate or attempt this.”

### **1.3 Action taken by municipal governments against the government’s inflammatory posters**

In March 2018, the municipal government of the 19th District of Budapest had the government’s propaganda billboard posters covered over, citing reference to a municipality by-law<sup>32</sup> amended at the end of 2017. Among others, the municipality by-law states that billboards “may not be capable of inciting hate nor may they encourage behaviour aimed at discrimination against private individuals”. This local level legal regulation also provides that where inflammatory content is published despite the aforementioned, this may incur the respective public area use permit being revoked.

An objection—claiming that the municipal government acted unlawfully when it had the billboard covered over—was filed with the election commission in the district concerning one of the covered bill-

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30 NEC Decision 53/2016

31 Curia Order Knk.I.37723/2016/3

32 Budapest Metropolitan 19th District Kispest Municipal Government Assembly Municipality By-law 9/2013 (III. 29), Section 7/B.

boards, which depicts the most popular opposition parties' leading candidates and prime ministerial contenders with the caption "Joining forces to break down the border fence", thus containing false facts<sup>33</sup> and capable of misleading votes. In its decision, the National Election Commission established a violation of the Act<sup>34</sup>, banned the municipal government from continuing the breach, and also imposed a fine. In adopting its decision, the NEC made reference to, among others, municipal government by-laws not being applicable to the election campaign,<sup>35</sup> and that covering billboards over violates the equality of opportunity among nominating organisations.<sup>36</sup> It also explained that covering billboards over is prohibited during campaign periods, nor is it possible to regulate or restrict their placement.<sup>37</sup> Additionally, the NEC also cited the Constitutional Court in explaining that the constitutional bounds for the freedom of expression must be defined "so that, apart from the individual rights of the person expressing an opinion, they also take into account the interest—indispensable to democracy—of creating and freely shaping public opinion."<sup>38</sup> The NEC cites Constitutional Court Decision 5/2015 (II. 25) AB, which states the following: "In an election campaign, the right to freedom of expression and its limits must typically be construed and weighed in the context existing regarding public figures. Above all else, this means that the candidates seek to secure an advantage when competing with each other and, to achieve that,

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33 There is no consensus among opposition parties as to their intention to break down the fence erected along Hungary's external Schengen borders; indeed, their representatives have given public statements quite to the contrary on several occasions.

34 NEC Decision 423/2018.

35 Curia Decision KvkII.37.307/2014/3, as referred to by the NEC, confirms that "according to the correct construction of Section 144 of the Act on Election Proceedings, the provisions in Section 144 of the Act on Election Proceedings shall prevail regarding the placement of election posters." The NEC believes that the municipality by-law is contrary to the indicated section in the Act on Election Proceedings having regard to this.

36 Act on Election Proceedings Section 2(1) c).

37 Act on Election Proceedings Section 144.

38 Constitutional Court Decision 64/1991 (XII. 17) AB.

they may be frank and even blatant in how they express themselves.” The Constitutional Court also added that “it stands in the interest of society to have campaigns that not only discuss public affairs, but also the suitability of the various candidates and the programmes of the nominating/supporting organisations.” This—as the body reflects—“may at times entail tough verbal exchanges, but this falls in the scope of the right to freedom of expression as realised during the campaign.”

There are compelling arguments supporting that no limitation of the fundamental right of expression—on the candidates’ and nominating organisations’ side—and that of freely gathering information—on the voters’ side—may be permitted. Such limitations are not consistent with the constitutional requirement of due process, either. Language like “capable of inciting hate” or “discrimination against private individuals” are examples of blurred wording that fails to meet the requirement of normative clarity. Inciting hate has legal relevance in the field of criminal law (the Constitutional Court has addressed these constitutional issues several times), yet the billboards concerned do not fit the notion of inciting hate under criminal law, therefore removing them should not be possible on this basis either. The local government by-law sets inaccurate legal requirements that lead to the legal regulation exposing those who order and place the billboard posters to arbitrary interference by the municipal government in its application of the law.<sup>39</sup> Local government by-laws cannot be suitable for this kind of limitation of fundamental rights by virtue of even their level as a source of law, since, pursuant to Fundamental Law Article I (3), fundamental rights may only be restricted through acts of law.

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39 For more details on the question of regulating the placement of political posters through local government by-laws, see the Hungarian Civil Liberties Union’s position: [https://tasz.hu/files/tasz/civicrm/persist/contribute/files/20180307\\_onkormanyzati\\_plakatszabalyozas\\_elemzes.pdf](https://tasz.hu/files/tasz/civicrm/persist/contribute/files/20180307_onkormanyzati_plakatszabalyozas_elemzes.pdf) (accessed April 18, 2018)

## 1.4 Civil disobedience actions

The government's first anti-immigration billboards first appeared in public spaces in June 2015, and several of them were torn down or painted over by activists. The actions of billboard vandalising activists can be considered as civil disobedience. In cases of civil disobedience, citizens take action against morally reprehensible decisions or policies leading to social injustice, doing so in ways that formally violate the law.<sup>40</sup>

In one of the cases that drew the loudest outcry, two activists vandalised one of the government's anti-refugee billboards displaying the "If you come to Hungary, you must respect our culture" caption in June 2015, then walked into the police station and filed charges against themselves, which resulted in misdemeanour proceedings. In its binding order<sup>41</sup>, the court cited the Fundamental Law and a previous Constitutional Court Decision<sup>42</sup> while declaring that vandalising a billboard is part of expressing an opinion, and dismissed the misdemeanour proceedings against the vandals. According to the court, the activists subject to the proceedings were exercising their constitutional fundamental right to freedom of expression, as guaranteed in Article IX of the Fundamental Law, when they vandalised the billboards.<sup>43</sup>

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40 For more details, see Misetics, Bálint: Thoreau és Gandhi az engedetlenségről és az ellenállásról. (Thoreau and Gandhi on Disobedience and Resistance.) *Múltunk*, Issue 2016/4. Available at: [http://www.multunk.hu/wp-content/uploads/2017/11/miseticsb\\_16\\_4.pdf](http://www.multunk.hu/wp-content/uploads/2017/11/miseticsb_16_4.pdf) (accessed April 18, 2018)

41 Central District Court of Pest Order Sze. 24735/2015/2.

42 Constitutional Court Decision 30/1992 (V. 26) AB.

43 For more details, see the Eötvös Károly Institute's position regarding the assessment of civil disobedience in the administration of justice: [http://ekint.org/lib/documents/1498035783-EKINT\\_Polgari\\_Engedetlenseg\\_2017.pdf](http://ekint.org/lib/documents/1498035783-EKINT_Polgari_Engedetlenseg_2017.pdf) (accessed April 18, 2018)

In another case, activists supporting asylum-seekers painted over the government's anti-immigration billboard displaying the "If you come to Hungary, you must respect our laws" caption in the town of Szedged, also in June 2015. Because the aggregate damage exceeded the statutory value limit, criminal rather than misdemeanour proceedings were launched<sup>44</sup> against them. In the first instance, the court found the defendants guilty of vandalism, a criminal offence, in January 2017, and put them on probation for one year as the penalty. The defendants cited freedom of expression to no avail in the first instance proceedings; according to the judge's reasoning, by also causing material damage, the billboard vandals overstepped the mark of freedom of expression. At the time, the prosecution acknowledged the court decision, and the defendants lodged an appeal for acquittal. However, before the second instance hearing set for the end of September, the prosecutor's office filed a surprising new motion<sup>45</sup>, in which it proposed the acquittal of the defendants. The prosecutor's office pointed out that critical constitutional protection accorded to freedom of opinion is reflected in multiple Constitutional Court decisions. Pursuant to Constitutional Court Decision 13/2014 (IV. 18) AB, which was referred to in detail, the criterion of the democratic and free development of public life must always be given critical attention when the boundaries of freedom of opinion are drawn. According to the Court, the for the state to assert its powers under criminal law against communications disputing public affairs has particularly sensitive implications in terms of the freedom of opinion and for anyone who wishes to exercise it—on account of the gravity, stigmatised nature and capability of resulting in self-censorship that criminal law sanctions have. Despite the prosecutor's motion and the constitutional law arguments it contained, the court of second instance—like the first instance court—ruled against the billboard vandals in February 2018, thus also raising the matter of whether the binding judicial decision might be contrary to the Fundamental Law.

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44 Criminal court case Bf.397/2017.

45 Motion 6.B.947/2015 of the Csongrád County Chief Prosecutor's Office.

Something one cannot disregard in billboard vandalism cases is that, by physically damaging the billboards, those who do so intend to express a political message. If judges apply misdemeanour or criminal sanctions to punish those concerned in a billboard vandalism case, at the same time they use their ruling to declare that, in cases like these, the constitutional fundamental right of such individuals to express their opinion freely can be restricted through punishment. Among the Hungarian media relations, sanctioning this form of expressing an opinion ultimately and only facilitates the government's position in reaching a significant part of citizens, without allowing them to learn that a significant part of society rejects government policy. As the court also perceived in the misdemeanour case described above, a ruling against people who damage billboards resulting from disregarding freedom of opinion can stand in violation of fundamental rights with regard to billboard vandalism committed for the purpose of expressing a political opinion.<sup>46</sup>

## **2 Action Against Governmental Anti-NGO Measures**

The government uses political statements, authority proceedings and lately legislation in its attempts to contest the right of NGOs voicing criticism about the government to participate in the discussion of public affairs. From 2014 onwards, the government has sought to discredit, intimidate and render the operation of numerous NGOs impossible by launching police, tax authority and prosecutor's office

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46 For more details, see Majtényi, László – Somody, Bernadette: A jogsértés alkotmányossága? – A plakátszaggatók büntethetőségéről és a véleményszabadság határaitól. (Constitutionality of infringement? – On the culpability of billboard rippers and the limits of the freedom of opinion.) *Mozgó világ*, Vol. 41 No. 9, 2015, pp. 71–79 [http://epa.oszk.hu/01300/01326/00173/pdf/EPA01326\\_mozgo\\_vilag\\_2015\\_09\\_071-079.pdf](http://epa.oszk.hu/01300/01326/00173/pdf/EPA01326_mozgo_vilag_2015_09_071-079.pdf) (accessed April 18, 2018)

proceedings that last for years. The government's accusations have not been proved true in even a single case.<sup>47</sup> The series of measures against NGOs—underpinned by the continuously maintained inflammatory communication campaigns—reached a point where, in June 2017, the National Assembly adopted Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds (NGO Act), which is aimed at making the operation of NGOs critical of the government difficult, which led to the European Commission instituting infringement proceedings against Hungary.<sup>48</sup> Despite the EU's response, along with ample criticism from home and abroad, the government submitted its Bill on the "Stop Soros" legislative package to Parliament in February 2018, intended to make the operation of NGOs that support migration using any means whatsoever (whether by expressing an opinion or judicial protection) conditional on a ministerial licence to be granted under discretionary powers, in addition to levying a punitive tax on their foreign funding.<sup>49</sup> In some cases, the government targets specific NGOs, and occasionally natural persons as well. This government practice takes shape in the form of statements by politicians, accusing NGOs of breaching the law with the intention of discrediting them.

## **2.1 Requests for data of public interest to certify the political nature of anti-NGO measures**

In the summer of 2013, the government launched a series of attacks against NGOs supported by the Norwegian Civil Society Support

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47 For more details of the elements of the government's series of measures and attacks against NGOs critical of its ways, see the timeline created regarding it: [https://www.helsinki.hu/wp-content/uploads/Timeline\\_of\\_gov\\_attacks\\_against\\_HU\\_NGOs\\_short\\_07042017.pdf](https://www.helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_07042017.pdf) (accessed April 18, 2018)

48 [http://europa.eu/rapid/press-release\\_IP-17-1982\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1982_en.htm) (accessed April 18, 2018)

49 For more details, see the Eötvös Károly Institute's analysis of the "Stop Soros" legislative package: [http://ekint.org/lib/documents/1517944148-StopSoros\\_eng.pdf](http://ekint.org/lib/documents/1517944148-StopSoros_eng.pdf) (accessed April 18, 2018)

Fund. From May 2014, Hungary's Government Audit Office (Kormányzati Ellenőrzési Hivatal or KEHI) included a total of 62 NGOs in its examinations over the course of two years. While this was going on, the Hungarian National Tax and Customs Administration (Nemzeti Adó- és Vámhivatal or NAV) attempted to suspend the VAT registration numbers of four foundations and ran critical audits on seven organisations, while the police investigation lasted some sixteen months, and the prosecutor's office investigated seven organisations. Not a single NGO was found to be remiss during these proceedings, and in one case even the court declared<sup>50</sup> that the respective proceedings were unwarranted and unlawful.

The human rights watchdog, the Hungarian Civil Liberties Union, brought a lawsuit against KEHI in September 2014 to find out who gave the instruction to institute the investigations into the NGOs. In February 2015, the court ruled in favour of that NGO, pursuant to which the Government Control office was compelled to disclose the letter containing the instruction.<sup>51</sup> The court based its decision on the fact whereby the Prime Minister's instruction ordering the extraordinary government audit<sup>52</sup> qualifies as data of public interest in its capacity of a decision on the drafting of the audit report, and may not also be also considered data in preparation of a decision.<sup>53</sup> Based on the documents, the disclosure of which was secured through litigation, it became manifest that the anti-NGO measures were personally ordered by Prime Minister Viktor Orbán,<sup>54</sup> which corroborates their politically motivated nature.

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50 The Budapest Central District Court's order dated 23 January 2015 in the 'Ökotárs' Foundation's case.

51 Budapest Court of Justice Ruling 33.P.24.148/2014/8.

52 Government Decree 355/2011 (XII. 30) Section 11(3).

53 This court interpretation was important, because Section 27(5) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information states that any information compiled or recorded as part of a decision-making process will not be made available to the public for ten years from the date it was generated.

54 The Prime Minister's instruction ordering the extraordinary audit of the

## 2.2 Legal proceedings available for use against legislation attacking NGOs

The government opened a new chapter in the series of attacks on NGOs with the NGO Act that was promulgated in June 2017, since it had not previously applied any regulatory instruments against them prior to adopting that Act. The Act “on the Transparency of Organisations Receiving Foreign Funds” is applicable to all associations and foundations that receive foreign support exceeding HUF 7.2 million (roughly EUR 23 000) a year. Based on the statutory criteria, organisations that qualify as “supported from abroad” are subject to the obligation of stigmatising registration, and to display the marking “organisation supported from abroad” on their publications. If they violate these obligations, they must face paying fines, and ultimately the threat of being dissolved. Several proceedings have been launched in connection with this gravely injurious Act, but no decisions have been reached in any of them.

Some Members of Parliament filed for a ex post constitutional review procedure within the meaning of Section 24 of Act CLI of 2011 on the Constitutional Court (Constitutional Court Act) with the Constitutional Court, applying for the annulment of the Act.<sup>55</sup> According to the petition, the NGO Act violates, among others, the due process of law by including ambiguous language e.g. concerning whether or not a Hungarian person making bank transfers from a foreign bank account or a foreigner transferring from a Hungarian bank account count as being foreign, and also by applying negative discrimination and implementing disproportionate legal restrictions to the injurious detriment of reputation and the freedom of expression.

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NGOs can be accessed here: <http://www.mediafire.com/file/gu9o67zbt9bri4/KE-HI+%281%293.pdf> (accessed April 18, 2018)

55 [http://public.mkab.hu/dev/dontesek.nsf/0/80442b2f58384f6bc125815d00589a69/\\$FILE/II\\_1460\\_0\\_2017\\_inditvany.002.pdf/II\\_1460\\_0\\_2017\\_inditvany.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/80442b2f58384f6bc125815d00589a69/$FILE/II_1460_0_2017_inditvany.002.pdf/II_1460_0_2017_inditvany.pdf) (accessed April 18, 2018)

A constitutional complaint within the meaning of Section 26(2) of Constitutional Court Act was filed by 23 NGOs, led by the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee.<sup>56</sup> The petitioners believe that, in the current political publicity in Hungary, the “supported from abroad” attribute is only capable of undermining the organisations’ credibility and the public trust expressed towards them. In turn, the petitioners think that all of that violates the NGOs’ right to reputation and to their privacy being respected; moreover it restricts their right to express opinions and to association. The regulation is also discriminatory, according to the petition, because it does not oblige certain NGOs, such as sports and religious associations, to comply with requirements that differ from the previous ones on account of their foreign funding sources. Greenpeace Hungary<sup>57</sup> and Transparency International Hungary<sup>58</sup> likewise filed constitutional complaints using similar argumentation.

In December 2017, fourteen Hungarian NGOs—which had turned to the Constitutional Court for the same purpose earlier on—also filed to contest the NGO Act before the European Court of Human Rights, with the aim of having this court establish that the anti-civil society Act on “foreign support” infringes NGOs’ fundamental rights.<sup>59</sup> The NGOs decided to institute proceedings before of the court in Strasbourg in the absence of other options for legal remedy in Hungary, as the Constitutional Court failed to include a discussion of the NGO Act in the five months lasting until January 2018 (according to the regulations applicable to it, the body is not subject to any procedural time limits).

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56 [http://public.mkab.hu/dev/dontesek.nsf/0/928220418567d33cc125818b-0042257d/\\$FILE/IV\\_1685\\_0\\_2017\\_ind%C3%ADtv%C3%A1ny\\_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/928220418567d33cc125818b-0042257d/$FILE/IV_1685_0_2017_ind%C3%ADtv%C3%A1ny_anonim.pdf) (accessed April 18, 2018)

57 [http://public.mkab.hu/dev/dontesek.nsf/0/e1edfbe54961be09c12581d-9004c4a4d/\\$FILE/IV\\_2041\\_0\\_2017\\_inditvany\\_anonimiz%C3%A1lt.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/e1edfbe54961be09c12581d-9004c4a4d/$FILE/IV_2041_0_2017_inditvany_anonimiz%C3%A1lt.pdf) (accessed April 18, 2018)

58 [http://public.mkab.hu/dev/dontesek.nsf/0/baf33402a9313756c12581a-a0058c074/\\$FILE/IV\\_1830\\_0\\_2017\\_inditvany.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/baf33402a9313756c12581a-a0058c074/$FILE/IV_1830_0_2017_inditvany.pdf) (accessed April 18, 2018)

59 [https://drive.google.com/file/d/1HhLHEEJd2UJHOs\\_OWbak\\_DmNmQx00cq/v/view](https://drive.google.com/file/d/1HhLHEEJd2UJHOs_OWbak_DmNmQx00cq/v/view) (accessed April 18, 2018)

After the NGO Act was adopted, several significant NGOs announced that they would not comply with the statutory requirement, and will not register themselves as NGOs “supported from abroad”. Their conduct can also be deemed to be civil disobedience (see II.1.4), which serves multiple purposes at the same time. Because these organisations fail to comply with their obligations required by the Act, their case may be tried by the courts, which opens up further legal opportunities to contest the Act. The reason being that, should proceedings be launched against any of the NGOs based on the NGO Act, a concrete constitutional review procedure under Section 25 of the Constitutional Court Act might also be initiated; a constitutional complaint under its Section 26(1) can also be filed, and—due to the application of legislation contrary to EU law—a preliminary ruling may also be sought before the European Court of Justice. In addition to all of these, civil disobedience also aims to call broader public attention to the NGO Act’s unjustness, and any publicly embraced conflict will necessarily increase the political cost of implementing the Act as well.

### **2.3 Personality rights-related lawsuits filed by NGOs subject to attack**

Since 2015, there has been a regular stream of government displays and statements by governing party politicians which attempt to delegitimise and discredit specifically targeted NGOs. Such actions also infringe personality rights subject to protection regulated under civil law, such as individuals’ right to reputation. Under the Civil Code of Hungary<sup>60</sup>, the statement, publication, or dissemination of an injurious untrue fact pertaining to another person or a true fact with an untrue implication that pertains to another person shall be deemed defamation. Civil law also protects the reputation of legal entities, including NGOs. For such organisations, the protection of their reputation is one of the key guarantees of their professional credibility as perceived by

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<sup>60</sup> Act V of 2013 on the Civil Code Section 2:43 d).

society. NGOs critical of the government that were attacked by name have launched personality rights-related lawsuits on several occasions, which were mainly aimed at the court establishing—subject to granting a grievance award—that the respective NGO’s reputation had been violated, and obliging the government and governing party actors to apologise in public and inform the public of the false and misleading nature of accusations thrown at the NGOs.

In October 2017, the Hungarian Helsinki Committee—which, among other tasks, engages in protecting asylum-seekers’ rights—brought a personality rights lawsuit against the Prime Minister’s Cabinet Office, which had the national consultation questionnaire (see II.3.2) delivered to every voter, on the grounds that it believes the claims appearing on the consultation questionnaire infringed the association’s right to reputation. The consultation questionnaire mentioned the Hungarian Helsinki Committee by name among false claims, stating, among others, that the organisation protects immigrants who commit acts that are against the law, and thus promotes unlawfulness. In its ruling dated February 2018,<sup>61</sup> the court of first instance declared that the Ministry violated the NGO’s personality right associated with the protection of reputation, and barred it from continuing that infringement. According to the court, the national consultation questionnaire sections concerning the Hungarian Helsinki Committee do not qualify as the “government’s opinion”, but a statement of facts instead, which display the non-governmental rights watchdog organisation falsely and contrary to its true activity. In that context, the court explained that even if the false claims appearing on the questionnaire were to qualify as opinions, the freedom of expression may not—even in important matters concerning public affairs—extend to questioning and discrediting the actual professional activity of the petitioner NGO, nor to infringing its protected rights.

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61 Budapest Court of Justice Ruling 31.P.23.654/2017/27.

In April 2018, the Eötvös Károly Institute was likewise delivered a favourable ruling<sup>62</sup> in the second instance of its personality rights lawsuit, which saw litigation against Szilárd Németh, Deputy Chair of the governing party and the Parliament's Standing Committee for National Security, because, in a statement published in March 2017, the politician claimed that the NGO received much more money than indicated in its charitable status statement (i.e. the statutory public report on the given organisation's charitable activity, benefits received and their use) from endowments linked to George Soros—pinned as public enemy number one by government propaganda in recent years,. In other words, the politician essentially accused the NGO of falsifying its charitable status statement. Even in his statement that became subject to litigation, Szilárd Németh claimed that he knows this information from disclosures by the national security services to the Parliament's National Security Committee. The governing party politician was unable to prove his claims that infringed the Eötvös Károly Institute's reputation. Based on the court's decision, the governing party politician will not only have to pay a grievance award on account of his false factual statements, but also publicly apologise to the Eötvös Károly Institute.

One can still draw the conclusion that if—as part of its communication aimed at delegitimising critical voices—the government makes statements on subjects who can be accurately identified, the personality rights lawsuits filed on such grounds by those concerned can be successful.

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62 Budapest-Capital Regional Court of Appeal Case 2.Pf.20.202/2018.

## **3 Options for Taking Action Against Government Initiatives Feigning Direct Democracy**

The illiberal state endeavours to realise its political goals in a framework that appears democratic, and to this end, it frequently cites the democratic legitimacy behind its decisions. To demonstrate social support to the public, the government uses instruments that may well be or resemble the known instruments of direct democracy in terms of their form; in reality, they can only be appreciated as no more than distorted manifestations of them. This included the referendum organised on settlement quotas as an instrument of resistance against the EU's immigration policy, as well as the series of what are dubbed national consultations, which started in 2010 as discussion with the people on various issues.

### **3.1 The referendum and boycott related to settlement quotas**

The national referendum on 2 October 2016 was held on the Government's initiative. The question asked at the referendum was the following: "Do you want the European Union to be able to require the mandatory settlement of non-Hungarian citizens in Hungary even without the National Assembly's consent?". The courses of legal remedy available against the initiated referendum serve, in part, action against the authentication of the question, and in part against the National Assembly decision ordering the referendum; however, neither of these led to any result despite legal arguments that were substantiated from multiple perspectives. The referendum ultimately proved invalid, that is it failed to accomplish any legal effect, as less than half of the electorate cast a valid vote.<sup>63</sup> The fact that a significant proportion (over 6 percent) of voters cast invalid votes played a role in the invalidity of the referendum, which was preceded by a strong campaign calling for a boycott.

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<sup>63</sup> Fundamental Law Article 8(4).

### 3.1.1 Legal redress against the authentication of the referendum question

The question in the quota referendum contradicted the constitutional requirements applicable to referendum questions on two points. All existing legal options were exhausted against the question asked at the quota referendum; the National Election Commission, the Curia and the Constitutional Court all conducted proceedings, but none of these forums prevented the question from being authenticated.

The authentication of referendum questions falls within the scope of the National Election Commission's duties.<sup>64</sup> In its Decision 14/2016 (III. 2. ) NVB, the NEC authenticated the question without any substantive statement of reasons, and concluded that it complies with the requirements specified in the Fundamental Law and the Act on Referendums.

Several applications for legal redress were filed with the Curia against the NEC's decision, and they cited various grounds. Some of the remarks pertained to the lack of the National Assembly's competence. Under the Fundamental Law of Hungary, only matters in the National Assembly's scope of duties and authority may be the subject of a referendum,<sup>65</sup> yet the question posed at the quota referendum failed to satisfy this requirement. In connection with that, the supreme judicial forum concluded that the quota resolution affects the scope of Parliament's duties and authority, and found that to be sufficient grounds for verification in order to dismiss uncertainties related to the National Assembly's authority. However, it did not examine the merits of the fact whereby the Hungarian position on the EU's refugee policy is represented by the Government in front of EU bodies, and although the National Assembly can ask for the Government's position,<sup>66</sup> it is not in a decision-making situation, i.e. its standpoint cannot establish

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64 Act on Referendums Section 11.

65 Fundamental Law Article 8(2).

66 Act XXXVI of 2012 on the National Assembly (National Assembly Act) Section 64(1).

any obligation for the Government. Therefore, because the decision falls in the scope of the Government's instead of the National Assembly's powers, it may not be the subject of a referendum. In addition to the unconstitutional nature of the subject matter, those who initiated the Curia proceedings believe that the requirement for the question to be unambiguous was not met either. Pursuant to that, questions proposed for a referendum must be formulated in a way that allows an unambiguous answer; furthermore, in order for the referendum's outcome to be used by the National Assembly as the basis for deciding what kind of legislation it is obliged to carry out.<sup>67</sup> In contrast to this, whether the question related to Council Decision (EU) 2015/1601, adopted in September 2015,<sup>68</sup> or if it was intended to secure political authorisation from voters against the EU's immigration policy by virtue of denouncing settlement with uncertain meaning, remains unclear to this day. In managing the uncertainty related to the content of the word 'settlement', the Curia actively contributed to unravelling the substance of that word,<sup>69</sup> and essentially chose to ignore that Council Decision (EU) 2015/1601, adopted in September 2015, does not entail forced permanent relocation that is independent of the authorities that review asylum applications—as suggested, in the Hungarian language, by the word 'settlement'—but instead the allocation of asylum application reviews. In its Order Knk.IV.37.222/2016/9, the Curia upheld the National Election Commission's decision. The constitutional complaint proceedings that can be conducted in front of the Constitutional Court may be used against decisions made by the Curia<sup>70</sup> if it can be evidenced that the complainant is an individual stakeholder in the matter, and there is a right guaranteed in the Fundamental Law that is infringed by the Curia's decision.

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67 Act CCXXXVIII of 2013 on Initiating Referendums, the European Citizens' Initiative and Referendum Procedure (Act on Referendums) Section 9(1).

68 This was the decision on the basis of which 1,294 asylum-seekers would be relocated to Hungary for the purpose of conducting the asylum procedure.

69 Knk.IV.37.222/2016/9 [44]

70 Act CLI of 2011 on the Constitutional Court Section 27.

In its Order 3130/2016 (VI. 29.) AB and Order 3151/2016 (VII. 22.) AB, the Constitutional Court examined and rejected two constitutional complaints filed against the Curia's decision. In the first case, the petitioner mainly established the complaint on the rule of law clause in the Fundamental Law<sup>71</sup>, moreover the provisions of Article E), applicable to the creation of European unity and the shared exercise of competences. In this context, the Constitutional Court concluded that the complainant failed to refer to any right which would qualify as their right as guaranteed in the Fundamental Law pursuant to the Constitutional Court's practice and therefore to substantiate their being a stakeholder; therefore, the petition failed to comply with the statutory criteria. The second petition differed from the first insofar as the petitioner appeared as an applicant in the judicial review proceeding in front of the Curia, i.e. their being a stakeholder was beyond debate, but they were unable to invoke any right guaranteed in the Fundamental Law which the Curia decision would have violated.

### **3.1.2 Legal redress against the National Assembly decision ordering the referendum**

Ordering referendums on the basis of authenticated questions falls within the scope of the National Assembly's powers, and the Act on the Constitutional Court provides limited options for legal remedy in this respect: The Constitutional Court will only carry out an examination regarding the merits of the National Assembly resolution ordering a referendum on the merits if between the authentication of the signature-collecting sheets and the ordering of the referendum, the circumstances changed to a significant degree in a manner that may significantly affect the decision, and if said changes could not be taken into account by the National Election Commission or the Curia when making a decision on the authentication of the question or the decision

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71 Fundamental Law Article B(1).

on the review thereof.<sup>72</sup> The Constitutional Court merged and adjudicated three petitions filed on this subject in Constitutional Court Decision 12/2016 (VI. 22.) AB.<sup>73</sup> In their petitions, the petitioners echoed the problems that had existed concerning the authentication of the question in the quota referendum from the start, and also posed new arguments, but were unable to prove any material change in circumstances.

In other words, preventing the referendum from being held using the means of legal remedy provided in the referendum procedure was unsuccessful and impossible. However, due to the invalidity of the referendum, the government's initiative failed, in legal terms, to accomplish its goal after all, and that, in part, was due to the NGO actions launched against it.

### **3.1.3 The referendum boycott**

The notion of a boycott can be construed in the light of the Fundamental Law provision applicable to the validity of national referendums. Under the Fundamental Law, a national referendum is valid if more than half of all citizens entitled to vote cast their ballots validly.<sup>74</sup> Taking this as the starting point, absence from balloting aside, the voter behaviour of decreasing the number of validly cast votes by knowingly casting votes invalidly may also be construed as boycotting.

Regarding the referendum, the opposition parties reached broad agreement on a boycott appearing to be an appropriate response to the unconstitutional initiative. The Magyar Szocialista Párt (Hungarian Socialist Party), the Demokratikus Koalíció (Democratic Coalition), the 'Együtt' (Together) Movement and the Párbeszéd Magyarországért (Dialogue for Hungary) called for staying away from the referendum,

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72 Act on the Constitutional Court Section 33(2).

73 The petitioners contested National Assembly Decision 8/2016 (V. 10.) OGY.

74 Fundamental Law Article 8(4).

while the joke Hungarian Kétfarkú Kutypárt (Two-Tailed Dog Party) explicitly encouraged the casting of invalid votes. The Hungarian Liberal Party was the only party among opposition parties affiliated with the political left that diverged from boycott tactics; it argued for casting “Yes” votes, i.e. against the government’s initiative, while the Politics Can Be Different movement took a neutral stance. In addition to the parties, 22 NGOs issued an open call to voters, requesting them to mount a boycott.<sup>75</sup>

Of the electorate, 56.65% did not take part in the referendum, and 6.17% of those who did turn out cast invalid ballots, while 98.36% of valid votes were in support of the government position. It is impossible to distinguish clearly between those who stayed away due to passivity and those who did so as a boycott out of conviction, but it is likely that a significant part of them were motivated by the call for a boycott. Similarly to those who stayed away, it is also impossible to declare that those who cast invalid votes did so solely as the result of the boycott, but upon comparison with figures from national referendums held in previous years, one can conclude that 6.17% is a significantly higher invalidity rate than that measured during all the previous national referendums.<sup>76</sup>

The unconstitutional referendum initiative was ultimately unable to trigger legal effects due to the invalidity of the referendum, even though the government tried to attribute an effect of political legitimacy

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75 [https://merce.hu/2016/09/14/22\\_civil\\_szervezet\\_keri\\_a\\_polgaroktol\\_szavazzanak\\_ervenytelenul\\_vagy\\_bojkottaljak\\_a\\_nepszavazast/](https://merce.hu/2016/09/14/22_civil_szervezet_keri_a_polgaroktol_szavazzanak_ervenytelenul_vagy_bojkottaljak_a_nepszavazast/) (accessed April 18, 2018)

76 For example, the proportion of invalid votes at the 2003 referendum on Hungary’s accession to the EU was 0.49%; that level came to 2.03% at the referendum held on the option for the preferential granting of citizenship to Hungarians beyond the borders in 2004 (which is incidentally the highest measured figure among all referendums); while the number of invalid ballots remained below 1% for all three questions during the 2008 social referendum.

to it.<sup>77</sup> Instead of legal proceedings, the success of action against the initiative depended on a means based on citizens' resistance, i.e. the boycott.

### 3.2 National Consultations

The series of national consultations has been a preferred instrument for the government in seeking to reach out to voters directly since 2010. Whereas referendums are an established and legally regulated legal concept, subject to public law consequences in democracies (valid and effective decisive referendums impose the obligation to draft legislation on the National Assembly), national consultation is a kind of questionnaire with no guarantees whatsoever—as known from the referendum procedure—asserted during drafting, delivery to citizens and the aggregation of responses, and the results of which fail to establish any obligation for any state bodies.

During the first national consultation, organised in 2010, pensioners received a questionnaire on pensions; in 2011, people were first asked about the Fundamental Law, and then “social consultation” began, which included questions on the elderly, foreign currency denominated loans, utility companies and education. In May 2012, “economic consultation” primarily addressed issues on taxation; questionnaires on “immigration and terrorism” were sent out in 2015; and again with the title “Stop Brussels Now!” in April 2017. The most recent consultation, initiated in October 2017, was about the “Soros Plan”, and the government evaluated it as the most successful national consultation ever.<sup>78</sup>

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77 <http://www.origo.hu/itthon/20161002-elsopro-a-nemek-gyozelme-a-kvotareferendumon.html> (accessed April 18, 2018)

78 <http://www.kormany.hu/hu/miniszterelnoki-kabinetiroda/parlamenti-allamtitkar/hirek/a-kormany-koszonetet-mond> (accessed April 18, 2018)

### 3.2.1 People's right to block their data

Having regard to the fact that national consultation lacks any kind of procedural rules whatsoever, nor are there any legally regulated options for legal remedy in the context of national consultation, at best, it is by adapting other legal instruments that provides the possibility of taking action. Among these, the right to block data is the first one that can be mentioned. It allows people to achieve that they do not have to take part in national consultation by virtue of not receiving any national consultation questionnaires. The gist of the right to block data is that citizens subject to the registration of personal data and addresses are entitled to restrict the disclosure of data kept on file about them. The Government delivers consultation forms as unsolicited content, obtaining delivery addresses from the entity that manages the population register. By blocking their data, people can make sure that the Government cannot access their address from the entity managing the population register, and thus ensure that it does not send them any national consultation forms.

The right to block data already existed before the “economic consultation” in 2012, but was not in fact an option that could be used, as the Government essentially dispatched the economic consultation questionnaires and those before it without any legal basis under law whatsoever. The former provisions of the Act on Address Records<sup>79</sup> merely provided the opportunity for the government to instruct the entity managing the population register (KEK KH, i.e. Central Office for Administrative and Electronic Public Services) to find the pool of people intended to be engaged with a consultation form in order to reach out to them.<sup>80</sup> What this meant was that the population register would have been able to inform people about nothing more than the intention of

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<sup>79</sup> Act LXVI of 1992 on Keeping Records on the Personal Data and Address of Citizens.

<sup>80</sup> Under the then effective Section 18(3) b) of the Act on Address Records.

the Government to initiate consultation, i.e. in no circumstances would it have had the opportunity to send out unsolicited consultation forms. The section of the Act explicitly allowing ministers with jurisdiction in matters specified by the Government to request address data from the record-keeping entity for the purpose of consultation, and thus to reach out to citizens directly, entered into force after the delivery of economic consultation forms began.<sup>81</sup> This new provision also specifically announced that requests applicable to querying data must be refused if someone will have blocked the disclosure of their data,<sup>82</sup> i.e. the option to block data became available for subsequent consultations.

### 3.2.2 Data protection-related authority investigations

The blocking of data failed to settle the comprehensive problem of data processing having been entirely unlawful due to the lack of legal grounds during the early consultations, which was why the Eöt-vös Károly Institute petitioned the Hungarian National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság, NAIH).<sup>83</sup> In its reply, the NAIH refused to launch an investigation in the matter,<sup>84</sup> saying that “whether or not the procedure subject to the objection was political marketing is not a question that concerns the protection of personal data, nor is the content with which KEK KH satisfies contacting requests”.

Later on, there were some examples of NAIH initiating investigations in matters related to consultations. In April 2017, online news portal ‘444.hu’ wrote<sup>85</sup> that the Government’s officially licensed natio-

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81 Section 19/A(1).

82 The blocking of data can be requested under Section 19(4).

83 <http://www.ekint.org/maganszfera-adatvedelem/2012-06-27/az-idei-nemzeti-konzultacio-is-jogserto> (accessed April 18, 2018)

84 [http://ekint.org/lib/documents/1479309553-naih\\_valasza\\_gazd\\_konz.pdf](http://ekint.org/lib/documents/1479309553-naih_valasza_gazd_konz.pdf) (accessed April 18, 2018)

85 <https://444.hu/2017/04/09/szemelyes-adatok-at-is-tovabbit-orosz-szervekre-a-magyar-kormanyzati-konzultacios-oldal> (accessed April 18, 2018)

nal consultation website uses the Yandex.Metrica analytics service to forward the personal data of those completing the form to a Russian server. The NAIH instituted a data protection authority procedure in the matter. According to the report,<sup>86</sup> Yandex refuted forwarding the data, and although the authority did not come to a conclusion that was contrary to the Yandex statement, no probative action could be conducted without an examination of foreign servers.

### 3.2.3 Control by Members of Parliament

An additional difference between national referendums and national consultations is that while the results of national referendums are aggregated in a procedure subject to the guarantees specified in the Act on the Election Procedure,<sup>87</sup> the process of evaluating national consultation forms that are received is wholly non-transparent and not legally regulated in any way. The government can communicate the return ratios and outcome of consultation forms without any checks by independent bodies;<sup>88</sup> however, as to the means available for verifying the truthfulness of statements concerning them, no examples were seen up to most recent times.

It was an opposition MP (Ákos Hadházy, LMP) who first reached out to the Prime Minister's Cabinet Office in October 2017 to learn where the received consultation forms are processed and verified. A range of partial information came to light in the wake of this request for

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86 [https://naih.hu/files/Adatved\\_jelentes\\_naih-2017-2088-20-V.pdf](https://naih.hu/files/Adatved_jelentes_naih-2017-2088-20-V.pdf) (accessed April 18, 2018)

87 Under Section 1(1) of the Act on Referendums, the General Provisions of Act XXXVI of 2013 on the Election Procedure shall apply to the procedures falling under the scope of the Act on Referendums.

88 <https://magyaridok.hu/belfold/ketmilliot-meghaladta-konzultacios-reszvetel-2515420/> (accessed April 18, 2018)

information,<sup>89</sup> but it was the MP's address in the House of Parliament on 20 November 2017 that brought some tangible results, in which he asked the Minister in charge of the Prime Minister's Cabinet Office a question serving as an instrument of parliamentary control on the authenticity of consultation. The day after asking the question, the MP received notification of being given the chance to view the consultation forms, if subject to an almost unrealistic schedule. During his visit, he found out that no records whatsoever are drafted on incoming consultation forms. The MP recorded a conversation in which the manager of the company engaging in the computerised processing of the consultation forms estimated the number of received forms to be 700,000 fewer than the figure announced by the Parliamentary Secretary of the Prime Minister's Cabinet Office the following day.<sup>90</sup>

The MP's actions were a suitable way of refuting the government's claims about the national consultation, based on which one may assert that parliamentary checks could be an effective tool for taking action against national consultations.

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89 <https://24.hu/belfold/2017/11/23/hadhazy-szerint-irtozatosan-nagy-kamunak-tunik-a-konzultacio/> (accessed April 18, 2018)

90 According to the manager of the firm concerned, 400,000 forms had been received until 13 November; however, the Parliamentary Secretary of the Prime Minister's Cabinet Office talked about 11 million returned forms the next day. [https://index.hu/belfold/2017/11/24/ures\\_dobozokkal\\_akarta\\_lebuktatni\\_a\\_kormany\\_hadhazyt/](https://index.hu/belfold/2017/11/24/ures_dobozokkal_akarta_lebuktatni_a_kormany_hadhazyt/) (accessed April 18, 2018)



## Conclusion

The possibility of using legal instruments against populist government hate campaigns and the elimination of critical opinions that is typical of how illiberal states function is restricted. For one, no legal procedures dedicated to this purpose exist, and on the other hand, the level of success one can expect from the conventional means of asserting rights is limited.

The altered conditions pose a moral dilemma for those seeking justice. People might wonder whether those using the mechanisms of dubious effectiveness for asserting their rights, which the illiberal state maintains, are not themselves thus contributing to upholding the regime's democratic semblance. While in liberal states based on the rule of law, unsuccessful legal proceedings indicate the lack of substantiation of a claim intended to be asserted, that correlation is far from self-explanatory in an illiberal state—legal instruments proving unsuccessful do not, in many cases, indicate that the person who initiated proceedings was not right, it rather highlights the inoperability of the mechanism for asserting their rights. Any infrequent successes call attention to systemic anomalies from within the system. Where applying legal instruments serves this purpose, raising moral concerns against attempts to assert rights cannot be substantiated. The chance for proceedings achieving that goal, even independently of any actual legal result, is a collateral argument for maintaining activity, since unsuccessful legal proceedings also raise the political price of the regulatory tools and propaganda the government uses, by constantly keeping problems affecting the rule of law on the agenda.

People likewise need to adjust their attitudes to the illiberal environment:

1. Civil society and citizens have an increased responsibility for preserving the values of the rule of law.
2. Citizens' activity may be manifested in the use of available existing legal proceedings, which need not be surrendered merely because they operate in an illiberal framework.
3. Existing procedures to assert rights must be extended to the illiberal state's assertions that are difficult to comprehend in legal terms.
4. The role of measures beyond institutionalised legal proceedings, thus for instance, those of NGO actions, is appreciated in an illiberal state.
5. Members of Parliament belonging to the democratic opposition share the obligation to be consistent in using their legal entitlements against the illiberal regime.