

2019 EUSA International Biennial Conference, May 9-May 11, 2019

Denver Colorado, Sheraton Denver Downtown

Panel: 11E Defending Democracy and Fighting Corruption in the EU

## Clash over the nature of "Democracy": Governing Populist Party in East-Central Europe vs. the Council of Europe and the EU

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### 1. Introduction

Due to strongly nationalist discourse, assaults on an independent judiciary, political control over media, and the disagreement with the EU refugee policy, the Fidesz in Hungary and the "Law and Justice" in Poland have attracted much political and scholarly attention (Krastev 2016; Ekiert 2017).

Critics, including domestic opposition forces, are demanding the EU and the Council of Europe to take a tougher stance against these governments.

Although the EU has basically taken a cautious position, its institutions gradually began to express its concern for the developments in these two countries through recommendations and opinions. Theoretically it is possible for the EU to suspend member state's voting right in the Council as sanction for serious breach of the values referred in Article 2 of the TEU. Article 2 reads like this: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights: these are the fundamental values on which the EU is founded. However, the Fidesz and the Law and Justice have only partially complied with the recommendations and conflicts continue.

Why these two governing populist parties are so staunch in their measures? Why the dialogue is not established between populist parties and the European Institutions? This presentation is an attempt to illuminate a theoretical aspect of this conflict, focusing on different understandings of democracy of these governing populist parties in East-Central Europe on the one hand, and the EU and the Council of Europe on the other hand.

Critics against the Fidesz and the Law and Justice have been using a variety of expressions such as "democracy backsliding," "illiberal turn," "illiberal democracy", adding that the EU is required to act as a defender of "liberal democracy", the "rule of law", or "liberalism"

But it may be useful to be cautious about the following point: these parties have taken over governing power by winning majority in free and popular election and have executed their ideas through ordinary law-making process. From a certain viewpoint, they can claim popular and formal procedural legitimacy. In fact, the Fidesz and the Law and Justice have insisted that

their government is "democratic" against these criticisms.

Here lies the need to focus our attention on the usage of such key phrases as "liberal democracy", "democracy" and "the rule of law". By analyzing usage of these terms and exploring meanings given to them, we clarify the discursive positions of the EU, the Venice Commission and the populist parties and their interrelationships.

This presentation focuses mainly on the Hungarian case. As for the materials to analyze the discourses in the EU, we chose the EU Commission's proposal for the council decision, speeches in the European Parliament by the Commission's vice-president Timmermans and the reports submitted to the LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs) in the EP. We also analyze the EP debate, which resulted in the voting to initiate the Article 7 procedure against Hungary. As for the Council of Europe, we chose the opinions by the rapporteurs for the Venice Commission. As for populist parties, we use radio speeches by Hungarian premier Orbán, which are translated into English and published in the governmental webpage.

By analyzing these, we clarify the discursive positions of the EU, the Venice Commission and the populist parties and their interrelationships. It is illuminated that the EU has used the "rule of law" as the main argument of criticism to avoid discussions over "democracy". The differences between the arguments on the Article 7 shown by the political groups in the EP pointed out that each camp emphasize different points and debate did not uncover the real confrontation points. The migration issue was decisive on voting. The position of the Venice Commission is somewhat different from the EU. This will also help us to understand why the EU has been so cautious in criticizing the populist parties. The EU is just aware of ambiguity of these key phrases and cannot act so unilaterally. In view of differences in the treatment of the word "democracy" and other key phrases, it should be said that a real dialogue on the issues is difficult.

The paper proceeds in several steps. In the following two sections, we analyze how "liberal democracy," "democracy," and the "rule of law" are used by the EU (section 2 and 3) and the Council of Europe (section 4) in response to the controversial legislative and administrative measures in Poland and Hungary. In the fifth section, we analyze the counter-arguments of the Fidesz governments. In the final section, we summarize the findings and elucidate the differences in how these words are used.

2.The usage of "Liberal Democracy", the "Rule of Law", "Democracy" in the EU's opinion on the Populist government in Poland and Hungary.

2-1. The "nuclear option" and the formulation of rule of law framework

Since the establishment of the Hungarian Fidesz government in 2010 and the Polish Law and Justice government in 2015, the EU has carefully observed the policies of these two countries. Among various legislative and administrative measures, policies concerning the judicial system, the media and the NGOs have been criticized by international and domestic commentators, as infringement of the EU laws and the European Basic Values enumerated in Article 2 TEU. The article stipulates that the EU is founded on a common set of values, which include the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

In case of breach of these values, Article 7 TEU defines procedures for sanction. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council acting by a majority of four fifths of its members after obtaining the consent of European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 (paragraph 1). The European Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 (paragraph 2). Where a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (paragraph 3).

In comparison with ordinary non-compliance issues on the EU laws, the EU has basically cautious in applying the Article 7 procedure. Due to its highly political and explosive nature, it has been called a "nuclear option". It had not been used until recently after it came into force in the 1999 Treaty of Amsterdam, because the concrete procedure for applying Article 7 was not stipulated and operable criteria for the basic values in Article 2 TEU was unclear. In fact, the EU has first issued a warning to Hungary's judicial and media regulations after 2010, not by applying Article 7 TEU, but on more obvious rules as non-discriminatory principles, which was applicable in the case of forced early retirement of Hungarian Judges.

In March 2014, struggling to respond to the Hungarian case, the EU formulated a new framework to safeguard the rule of law in order to pave the way to Article 7 (COM (2014) 0158 final, 11.3.2014). The framework establishes an early warning tool to deal with threats to the rule of law, allowing the Commission to enter into a dialogue with the concerned Member State in order to find solution before the existing legal mechanisms set out in Article 7 TEU are to be used. The Commission will make an assessment on the case, provide recommendations to the Member State concerned, and monitor the follow-up as to whether the recommendation is put in. If it is confirmed that a systematic threat to the rule of law continues, the European Council will vote on whether sanction is possible. As the procedure to invoke Article 7 became clear, it

became possible to follow the steps of monitoring and recommendation on the way before requesting the critical voting in the Council. And the European Commission has expanded the practical choices of actions.

This new instrument has enabled the Commission to initiate dialogue with the government concerned. Over Judicial reform in Poland, the Commission started the rule of law framework procedure by opening a dialogue with the Polish Government in January 2016 and adopted the recommendation on 27 July 2016. The Polish "Law and Justice" Government amended the bills, but only partially took up the recommendations from the Commission.

As the amended bills, which were issued in December 2017, have been still problematic from the viewpoint of the Commission, it finally launched Article 7 against Poland in December 2017, making a proposal to the European Council, to determine whether sanctions be carried out against Poland. According to the Commission's proposal, the concerns of the Commission is related to the following two issues: 1) the lack of an independent and legitimate constitutional review, 2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland. The Commission invites the Council to determine, on the basis of Article 7(1), that there is a clear risk of the rule of law which is one of the values referred to in Article 2 TEU (European Commission, COM(2017)835 final, p.1). It is currently under discussion whether the European Council votes on it.

In September 2018, the European Parliament triggered Article 7 by the proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (European Parliament P8\_TA-PROV(2018)0340). It is not clear how the Council reply for this proposal.

2-2. The statement by the Commission Vice-President Frans Timmermans in the European Parliament

The Rule of Law procedure and the final proposal launching Article 7 against Poland by the Commission was exceptional. As for other cases, the European Commission has not made use of these procedures, avoiding judgment on whether it meets the Basic Values of Europe. Instead, the Commission asked the European Parliament to discuss Polish and Hungarian matters for several times. Frans Timmermans, the Commission Vice-President, has taken up these issues and made remarks in the European Parliament (EP) on 26 April 2017. This statement is important considering his position in the Commission, although it does not express any clear decisive opinion of the European Commission as organization.

According to the Timmermans's speech, several legislations which has been adopted or would be adopted under the Fidesz Government raised serious doubts about compatibility with

EU law. As for the Hungarian Higher Education Law, which was adopted just before the EP debate, the college of Commissioners decided to launch an infringement proceeding against Hungary to investigate the compatibility with internal market freedoms and the Charter of Fundamental Rights. As for the draft legislation on the funding of so-called "foreign" Non-Governmental Organizations, Timmermans pointed out that it could also raise concerns as regards the compatibility with the EU's internal market rules, particularly the free movement of capital, and the EU charter of Fundamental Rights, including the freedom of assembly. The new asylum law, which was adopted at the end of March 2017, may raise the serious concerns about compatibility with EU law. The point here is that these concerns about compatibility with EU law can be treated in ordinary infringement procedure. The Commission seems to be reluctant to use the Article 7 procedures, even after setting up concrete steps.

Caution on the side of the Commission can be discerned in another point of the Timmermans' speech. Timmermans spent a half of his speech to point out the problematic character of "Stop Brussels" consultation which the Hungarian Government conducted in April 2017. He took up each question and pointed out which were misleading and different from the fact. He spoke carefully in a fact-based manner and did not comment directly on the practice of national consultation itself or the conduct of the Fidesz government that contained misleading information into the questionnaire.

### 2-3. The resolutions in the European Parliament

The European Parliament, another European Organization which has the right to initiate Article 7 procedure, has made several attempts to adopt resolutions to recommend the Council to determine over the issues concerning the legislative and administrative measures of the two countries. The EP has been especially active in investigating possible incompatibility of Hungarian legislations with the European Fundamental Values, on which the Commission avoided to invoke the Rule of Law procedure. The EP has also been discussing the legislation of Poland, but we concentrate on the discussion about Hungary here.

The European Parliament issued its first resolution in 2011, concerning fundamental rights in Hungary over a new media law. In 2013, the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) presented an elaborated report "On the Situation of Fundamental rights standard and practices in Hungary" to the plenary (European Parliament, A7-0229/2013, 24.6.2013). Ruis Tavares, Member of the European Parliament elected as the Left Bloc candidate in Portugal, was commissioned by the European Parliament to submit this report. Based on the report, the EP adopted a resolution "Situation of fundamental rights: standard and practices in Hungary" (The European Parliament, P7\_TA (2013) 0315). The resolution concludes that "the systemic and general trend of repeatedly modifying the

constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU, Article 3, paragraph 1, and Article 6 TEU, and deviate from the principles referred to in Article 4, paragraph 3, TEU; considers that —unless corrected in a timely and adequate manner — this trend will result in a clear risk of a serious breach of the values referred to in Article 2 TEU (paragraph 58) ."

As we can see, this resolution covers a wide variety of issues concerning not only the rule of law, but also democracy and fundamental rights. The word "democratic" is used thirty-two times in the resolution, "democracy" twenty-four times, including threefold use of the phrase "representative democracy based on free elections." In its assessment, the resolution reaffirms that the respect for legality, including an accountable and democratic process of enacting laws, respect for a strong system of representative democracy based on free elections and respecting the rights of the opposition are key elements of the concepts of democracy (paragraph 1). Adding to this statement, the resolution recalls that elections should guarantee the "expression of the opinion of the people in the choice of the legislator (paragraph 7)." The extensive use of cardinal laws is criticized as it prevents future governments from carrying on social changes by a simple majority (paragraph 8). Judicial reforms by the Fidesz government are criticized because they undermine the separation of powers among independent institutions, which is required for democracy and the rule of law (paragraph 13). The electoral reforms which were conducted unilaterally by the ruling parties, with no broad consultation of the opposition are regretful (paragraph 39).

The resolution appeals to the European Council to be active over this situation in Hungary and recommends the Commission to adopt a more comprehensive approach to address any potential risk of serious breaching of fundamental values. It also urges the Hungarian authorities to comply with recommendations.

However, in spite of comprehensive analysis and resolution, the reaction from the Council was limited. The Commission, elaborating the above-mentioned rule of law framework in 2014, did not initiate dialogue with the Hungarian authorities. As a result, the first use of the framework was against the Polish Law and Justice government, which formed the government after the parliamentary election in October 2015.

In May 2017, the European Parliament finally requested the LIBE Committee for the report on the situation in Hungary, to take further steps. The report was presented on 11 April 2018 in the LIBE Committee. This report was prepared by the MEP Sargentini from the Green Party of the Netherlands. This draft report calls on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. Many amendments are attached to this Draft Report during the deliberations

of the LIBE Committee in May and June 2018. With these amendments, it was discussed at the Plenary on 11 September 2018 and voting was held for the report and for each proposed amendment. In spite of strong oppositions, proposal was approved by 448 votes to 197. We will precisely analyze the debate at the Plenary later in this presentation.

In this report, Hungarian legislation and administrative practices were evaluated in light of the EU standards over such a wide range of issues as: functioning of the constitutional system, independence of the judiciary and of other institutions, corruption and conflict of interest, freedom of expression, religion, association, academic freedom, right to equal treatment, right of persons belonging to minorities, fundamental rights of migrants, asylum seekers and refugees, and social right (The European Parliament, 2017/2131(INL), pp.7-20). At the end of report, the rapporteur shows the gratitude to third party actors, such as the bodies of the Council of Europe, United Nation, and the OSCE upon whose opinions this report is based. She points out that it illustrates the hiatus of the EU in researching and analyzing the state of the democracy, the rule of law and respect for fundamental rights in the Member States. Therefore, as the European Parliament has already called, the rapporteur wishes the Commission to establish an EU mechanism on Democracy, the Rule of Law and Fundamental Rights and use it.

#### 2-4. Variations among the EU Institutions

As we have seen, the EU institutions have taken different stance in respond to Poland and Hungary. The European Commission, which takes the initiative in relation to the Member States, has established the rule of law framework and sought reform through dialogue. It is noteworthy that the Commission deliberately focused only on the rule of law among the fundamental values enshrined in Article 2 TEU and gave clear definition, although "Democracy", the "rule of law", and "fundamental rights" are juxtaposed as European basic values in the text of Article 2.

The Commission explained its emphasis as follows: "Respect for the rule of law is a prerequisite for the protection of all other fundamental values upon which our Union is founded (European Commission, Press Release, IP/14/237, p.1)" and "By guaranteeing the respect of the rule of law, the protection of other fundamental values will be upheld (Ibid., p.2)." Here we should note that all the basic values in article 2 are not given equal weight and the rule of law is regarded as the most fundamental. Democracy is one among other values which are protected by the more foundational respect for the "rule of law".

Consequently, the Commission has given a broad and clear definition of the rule of law (European Commission, Press Release, IP/14/237, p.5; European Commission, COM (2017)835 final, p.1). According to the rule of law in the Union legal system, the rule of law consists of following principles: legality, which implies a transparent, accountable, democratic and

pluralistic process for enacting laws; legal certainty; separation of powers; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; equality before the law; and loyal cooperation among state institutions (European Commission, COM(2017)835 final, p.1). This definition is said to stem from the constitutional traditions common to the Member States, which is expressed through the judgments of the European courts: "Case law of the Court of Justice of the European Union 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 European Commission for Democracy through Law (Venice Commission)", provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law (European Commission, COM(2017)835 final, p.1)."

From this definition, we can partially explain why the Commission has been cautious in relation to Hungary. It is partly because the Fidesz is protected by the largest EP group, the European People's Party, to which it belongs (Kelemen 2016). Adding to this it has been difficult for the Commission to apply the rule of law framework to the Hungarian cases, even though this broad definition of the rule of law. One reason is that the Fidesz has revised the Constitution quickly after acquiring the governmental power with two-thirds majority. What is happening in Hungary may not be captured by the framework of the rule of law. In contrast, the legislative and administrative measures of the Polish Law and Justice government obviously conflicts with the requirements of the rule of law, which eventually triggered the rule of law procedure.

Whereas the Commission concentrates on the rule of law, the statement of the LIBE Committee and the remarks of Timmermans in the EP put democracy at the forefront. The LIBE report on Hungary in 2013 is outstanding in this respect, in discussing the essential problems of Hungary's Fidesz regime in relation to the essence of representative democracy, the role of the opposition party, and the necessity of self-control by the two thirds majority power. In some discourse, "democracy" and the "rule of law" are treated as a set of values.

However, such statements which feature the viewpoint of democracy have been very rare from the EU institutions. The vast majority of opinions and remarks are focused on the inconsistency between the rule of law and the practices in two countries. The definition of democracy is almost lacking. Although democracy is said to belong to the European basic values, the EU has not explicitly defined the principles which constitute democracy.

### 3. The analysis of the debate on Sargentini Report in the European Parliament

As we mentioned above, on 12 September 2018, the European Parliament approved the proposal which was presented by the LIBE Committee member MEP Sargentini by 448 votes to



197 and decided for the first time to initiate an Article 7 process. On the previous day, MEPs debated on the proposal for 2 and a half hour in the plenary. In this debate, all the representatives of the political groups in the EP presented their arguments and the reasons for or against the Sargentini Report. By analyzing this debate, it is possible to have a rough sketch of the each political group's positions on this conflict between Hungary and the EU.

As we have seen, the Sargentini Report evaluated Hungarian legislation and administrative practices over a wide range of issues such as functioning of the constitutional system, independence of the judiciary and of other institutions, corruption and conflict of interest, freedom of expression, religion, association, academic freedom, right to equal treatment, right of persons belonging to minorities, fundamental rights of migrants, asylum seekers and refugees, and social right.

We examined each speech, using English translation which can be heard on the EP web site, and coded reasons so that we can see which points each political group emphasizes (table 1). The debates were organized on the basis of an allocation of speaking time to each political group, depending on its size. Some MEPs raised 3 or 4 reasons and some only one. So the number of reasons does not match the number of speakers. The frequently cited reason means that the focus of the discussion is concentrated there.

As Table 1 indicates, MEPs from Progressive Alliance of Socialists and Democrats in the EPP (S&D), The Greens/ European Free Alliance (G/EFA), Alliance of Liberals and Democrats for Europe (ALDE) and European United Left –Nordic Green Left (GUE) argued in favor of the Sargentini Report on the grounds of the rule of law and fundamental rights. However, the concerns about the rule of law had not been specifically explained what they refer to, and remained to be abstract. Among the fundamental rights, many concerns about academic freedom and freedom of association were expressed. The fact that these two freedoms were often cited means that Fidesz's legislation targeting the Central European University attracted particular interest. Some criticized political corruption and abuses of the EU fund in Hungary.

On the other hand, MEPs from Europe of Freedom and Direct Democracy Group (EFDD) and Europe of Nations and Freedom (ENF) opposed the Report on the grounds that the Fidesz government was elected by a majority. They also pointed out that Hungary is criticized for matters of sovereignty in which the EU should not interfere. Speakers of the ECR, with the exception of one, had the same opinion.

European People's Party (Christian Democrats) (EPP) members were divided into pros and cons. EPP speakers who were in favor of the Report cited academic freedom as the main reason, indicating that the Central European University issue is strongly influenced.

The two camps cited different issues as arguments for and against. The issue of the rule of law and the fundamental right was ignored by the opposition camp. On the other hand, the

groups in favor of the Report hardly mentioned the sovereignty issue and the fact that the Orban administration is an elected majority government. It is noteworthy that three speakers from EPP, who support the Report, exceptionally mentioned on this point and argued that democracy is not about the majority.

The only argument cited by both sides is immigration. The political groups in favor of the report argued that the Hungarian government's policy on immigrants and refugees violates the fundamental rights. The opposition to the Report argued that the Hungarian government's policy on immigrants and refugees is justified as a sovereign state, and that the very vote of the EP was the EU's pressure on Hungary which exercises its right to protect its border.

It seemed epoch-making that the European parliament decided to launch Article 7. However, when analyzed precisely, there was only weak interest in democracy and rule of law issues among the speakers in favor of the Report. The focus was on fundamental right, especially academic freedom and freedom of association, which was the consequence of the Fidesz's persistent attack on the Central European University. Moreover, Orbán is trying to shift the focus on immigration issues and attract the support of European anti-immigrant parties, and his strategy has been successful.

#### 4. The usage of "liberal democracy", the "rule of law", "democracy" in opinions of the Venice Commission on the populist government in Hungary

Within the institutional framework of the Council of Europe, it is the European Commission for Democracy through law, which is known as the "Venice Commission" that has been in charge of observing developments in these two governments. The Venice Commission is the advisory body for the Council of Europe on the constitutional matters (The Venice Commission, For Democracy thorough Law). Established in 1990, the Venice Commission provides legal advice to its member states which try to make their legal and institutional structure in line with the European standards in the fields of democracy, human right and the rule of law. All the forty-seven member states of the Council of Europe, including Hungary and Poland, are the members of this commission. Further thirteen non-European countries and Kosovo take part in this Commission.

The Venice Commission works in three areas: i) democratic institutions and fundamental rights, ii) constitutional justice and ordinary justice, and iii) elections, referendums and political parties. The Venice Commission is composed of independent experts, who are nominated by its member states. In the field of democratic institutions and fundamental rights, the Commission provides opinions concerning overall constitutional reforms or partial constitutional reforms, such as balance and relationship between different branches of power, rule of law issues,

judicial reforms, protection of fundamental rights, minority protection, emergency powers, parliamentary immunity, ombudsman institutions and decentralizations. These opinions are provided upon request by the Member States, the organs of the Council of Europe or the international organizations participating in its work (OSCE/ODIHR, EU). In drafting opinions, the commission members act in their individual capacity as an expert.

The Venice Commission has been asked many times for opinions as to whether the legislation plan of Hungary and Poland is compatible with the standards of the Council of Europe. In 2017, with regard to Hungary, the Commission provided two opinions. The first Opinion concerns the bill on the transparency of organizations supported by foreign countries in Hungary (hereafter the NGO bill), and the second "the Amendment of Act CCIV of 2011 on National Tertiary Education (hereafter the Higher education law amendment), both under the requests by the Parliamentary Assembly of the Council of Europe. These bills were criticized for targeting the NGOs supported by George Soros' Open Society Foundation and the Central Europe University, also supported by the Soros Foundation.

As for the draft NGO law, the Opinion acknowledges the draft's aim of ensuring transparency of civil society organizations, contributing to the fight against money laundering and financing of terrorism as legitimate (Venice Commission, Opinion 889/2017, CDL-PI(2017)002, p.16). On the other hand, the Opinion recommends the Hungarian authorities to reconsider several provisions, which are too restrictive compared to their purposes.

Interestingly, the Opinion takes one more step and criticizes the Hungarian authorities saying, "the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organizations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic, raising a concern as to whether they breach the prohibition of discrimination, contrary to Article 14 ECHR (Ibid., pp.15-16)." The Opinion also points out the inadequate procedures which were applied for the public consultation for the legislation. According to the Opinion, a public consultation concerning the draft NGO Law should be conducted before the final adoption of the draft Law and the public consultation should involve all civil society organization which will be affected as a result of the entry into force of this law (Ibid. p.16).

The opinion of the Venice Committee points to the inappropriateness of the legislative process in a broad sense. It points out that the hostility of government officials against some NGOs may be a violation of non-discrimination clauses and that opinions of stakeholders should be heard before the bill is prepared. Here, the Hungarian authorities' intention to use the public consultation as a means to justify their draft is implicitly criticized. It can be said that the opinion is stepping into issues related to the way democracy is exercised, not confined to the

sphere of the rule of law and fundamental rights.

As for the Higher education law amendment, the Venice Commission acknowledges that it is up to the Hungarian authorities what kind of regulatory framework will be created for domestic activities of foreign universities. At the same time, the Opinion cautioned that this regulatory framework "should remain in line with the democratic standards of the rule of law, with due observance of fundamental rights and freedoms (Venice Commission, Opinion 891/2017, CDL-PI (2017)005, p.29)." The Opinion admitted that restrictions applied by the amendment may legitimately be applied to foreign universities which are not yet active in the Hungary. However, they added that they are problematic from the standpoint of the rule of law and fundamental rights principles when they are applied to foreign universities which have been legally operated in Hungary for many years. These universities and their students are protected by the academic freedom, the freedom of expression and assembly, and the right to and freedom of education. The Opinion points out that more transparent and inclusive legislative procedure, that offers appropriate opportunities for consultations with all concerned parties, would have been "beneficial to the Law and its democratic legitimacy (Ibid., p.28)."

In this Opinion, the Venice Commission points out that this amendment may violate the fundamental rights, when applied to the established universities. The Commission goes further to make remark on inappropriate legislative procedure which may hamper the democratic legitimacy.

To summarize, the Venice Commission mainly concentrates on the rule of law and fundamental rights principles in their opinion on the legislations in Hungary. However, it is also stressed that the Venice Commission cautioned on the political aspect of the conduct of the Hungarian government by referring to the legislative process. The Venice Commission does not explicitly use the word "democracy", but the implication that they are observing democratic quality of legislative process is clear, especially in comparison with the European Commission. The reason for this difference might be that the Venice Commission provides opinions in individual capacity of the members. In addition, the Venice Commission's Opinion does not force the member state concerned to follow. It is an advice which the member state may use at its own discretion. Those might be the reasons why the Venice Commission's Opinions are not strictly legalistic and based on comprehensive assessment of political situations.

## 5. Democracy and the Rule of Law in the argument by Fidesz

Having analyzed various strategies and discourses of different European institutions, we move on to the counter-arguments of the relevant government. Against the opinions of the EU and the Venice Commission, the Fidesz government has put emphasis on the fact that their

government is given mandate in the election. Prime Minister Viktor Orbán has periodically appeared on the Kossuth Radio programme „180 Minutes“. The name of the radio programme changed to “Good Morning Hungary” since 2018 September 28 but the substance remains unchanged. His talks has been translated into English, which can be read in the English webpages of the Hungarian Government (Orbán 2018; 2019). We analyzed 17 interviews from May 2018 to March 2019 and checked if he uses the word „democracy“ or „rule of law“ in his interviews. We also examine in which context did he use these words. Table 2 shows the outcome.

Orbán uses the word „democracy“ in two ways. First Orbán stresses that the difference between „West European Democracy“ and „Central European Democracy“ insisting that Hungary follows the latter way. He also uses the word „Christian Democracy“ as indicate Hungarian way of Democracy. The substance of the „Christian Democracy“ as he calls it is not clear enough. All what we can recognize is that it is a kind of democracy, though it is different from „liberal democracy“.

Secondly, Orbán and Fidesz places emphasis on the outcome of the elections and their strong presence in Parliament. For them, majority is the proof of democratic legitimacy. According to this understanding, there is no reason to doubt the democratic nature of their government and policy. In this context, the criticism from the European Union and the Council of Europe can be converted into an opportunity to consolidate citizen's support, by framing as an assault on the democratically authentic government. Further, although the criticisms are intended to attack the populist government, they are regarded as directed towards the voters that support such political parties. It may strengthen the antipathy against the EU and the elites in “Brussels”. The refugee problem is also used as an issue to highlight the democratic legitimacy of Hungary citizens to decide on Hungary by majority vote.

Regarding the rule of law, Fidesz emphasizes that their legislation and administration meet the criteria of the rule of law. Fidesz's interpretation of the rule of law is close to formalistic legalism. It argues that, because it is the majority who makes the law, democracy by majority superior to the rule of law. The division of powers and check and balance among organs, which are included in the definition of the rule of law by the EU, are accused of as a covert minority rule by the elite.

#### 4. Conclusion

We have examined in which way the key phrases as the “rule of law” or “democracy” have been used by the European institutions and how they are countered by the Fidesz Government. As a result, we can make the following points.

1) Neither the EU nor the Venice Commission uses the word "liberal democracy" to criticize populist governments in East-Central Europe. The words "illiberal" and "liberal" has not been applied, either. The word "liberal democracy" is only used by the Fidesz government to highlight the difference to the EU, alleging that the democracy the Fidesz is aiming for is different from "liberal democracy" the EU is trying to impose.

2) The EU institutions and the Venice Commission have rarely dealt with the problem using the word "democracy." Among the opinions which we have examined, only the opinion on Hungary submitted to the LIBE Committee in 2013 used the word "democracy" clearly. Although the basic values of Europe include "democracy" in text, this word is absent in various opinions. Accordingly, we do not know what the definition of "democracy" is for the EU. On the other hand, this word is actively used by the Fidesz. The meaning given to the word by the Fidesz government is "majoritarian rule" and "popular support", with no emphasis on the usual "rule of law" aspect.

3) The "rule of law" is the fundamental ground for the EU and the Venice Commission to urge Poland and Hungary to revise their legislations. According to the European Commission, the rule of law is a prerequisite for guaranteeing the basic values of Europe including democracy. The EU defined the rule of law as the umbrella concept of wide variety of principles. It includes transparent, democratic and pluralistic legislative process, separation of powers, prohibition on arbitrariness of executive power, judicial independence and judicial review. In the actual assessment, however, the European Commission has mainly concentrated on independence of the judiciary. Some principles that could be categorized to the definition of democracy, such as transparent, democratic and pluralistic legislative process or a prohibition on the arbitrariness of execution powers, have not been used.

4) The analysis of the plenary debate in the EP shows that there was only weak interest in democracy and rule of law issues among the speakers who voted for the launch of Article 7 procedure against Hungary. The focus was on fundamental right, especially academic freedom and freedom of association and the right of immigrants.

In view of differences in the treatment of the word "democracy" and other key phrases, it should be said that a real dialogue on the issues is difficult. The European institutions might well be in need of their own definition of democracy.

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<Table 1-1>

Surgentini Report:	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for
	Rule of law	Separation of power		Fundamental rights							
	Rule of law at risk	Separation of power at risk	Independence of judiciary at risk	Free and independent media at risk	Fundamental rights at risk	Women's right at risk	Minorities' right at risk	Academic freedom/freedom of education at risk	Freedom of religion at risk	Freedom of expression at risk	Freedom of associations/NPOs at risk
Timmermans	1	0	2	0	2	0	1	1	0	0	1
TOTAL	5	1	4	2	2	4	4	5	0	3	3
S&D	3	0	2	2	2	0	1	2	2	1	1
TOTAL	3	2	1	1	0	0	0	0	1	1	0
ALDE	0	0	0	1	0	1	1	1	0	0	2
TOTAL	0	0	0	1	0	1	1	1	0	0	2
Orbán	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0	0	0	0	0
ENF	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0	0	0	0	0
EFDD											
TOTAL											
ECR	0	0	1	1	0	0	0	1	0	0	0
TOTAL	0	0	1	1	0	0	0	1	0	0	0
EPP	1	0	0	3	1	0	2	5	2	1	3
TOTAL	1	0	0	3	1	0	2	5	2	1	3
NI	1	0	0	1	0	0	0	0	0	0	0
TOTAL	14	3	10	11	7	5	9	15	5	6	10
Surgentini Report:			Reason against Independence of Judiciary in safe				Reason against Minorities' right in safe	Reason against Academic freedom in safe			Reason against Freedom of association in safe
Timmermans			0				0	0			0
TOTAL			0				0	0			0
S&D			0				0	0			0
TOTAL			0				0	0			0
ARDE			0				0	0			0
TOTAL			0				0	0			0
GUE			0				0	0			0
TOTAL			0				0	0			0
Orbán			0				1	1			0
TOTAL			0				1	1			0
EFDD			0				0	0			1
TOTAL			0				0	0			1
ENF			1				1	0			0
TOTAL			1				1	0			0
ECR			0				0	1			1
TOTAL			0				0	1			1
EPP			0				2	0			0
TOTAL			0				2	0			0
NI			0				2	0			0
TOTAL			1				6	2			2

Source: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20180911&secondRef=ITEM-011&language=EN&ring=A8-2018-0250>

European Parliament  
Plenary,

PV 11/09/2018 - 11

Tuesday, 11 September 2018 11. The situation in Hungary (debate)

<Table 1-2>

Surgentini Report:	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for	Reason for
	Migration	Corruption		Democracy							Sovereignty
	Inadequate Migration policy/ asylum seeker	Corruption	EU Fund abused	Democracy at risk	Democracy is not about the majority	Fair election at risk	Pluralistic society in danger	Illiberalism	Not in accordance with christianity	Fundamental values at risk	Treaty >Sovereignty
Timmermans TOTAL	3	2	1	0	1	0	1	0	0	2	1
S&D TOTAL	3	3	2	1	1	0	4	2	0	2	0
G/EFA TOTAL	0	2	2	2	1	0	0	0	1	0	0
ALDE TOTAL	0	0	1	3	0	1	1	1	0	0	0
GUE TOTAL	2	1	1	0	1	0	0	1	0	0	0
Orbán TOTAL	0	0	0	0	0	0	0	0	0	0	0
EFDD TOTAL											
ENF TOTAL	0	0	0	0	0	0	0	0	0	0	0
ECR TOTAL	0	0	1	1	0	0	0	1	0	1	0
EPP TOTAL	2	2	2	0	3	0	0	2	3	1	0
NI	0	1	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>10</b>	<b>11</b>	<b>10</b>	<b>7</b>	<b>7</b>	<b>1</b>	<b>6</b>	<b>7</b>	<b>4</b>	<b>6</b>	<b>1</b>
Surgentini Report:	Reason against				Reason against	Reason against			Reason against		Reason against
	Appropriate migration policy				Majority in election/"Public consultation"	Fair election in safe			Christian nature		Sovereignty
Timmermans TOTAL	0				0	0			0		0
S&D TOTAL	0				0	0			0		0
G/EFA TOTAL	0				0	0			0		0
ARDE TOTAL	0				0	0			0		0
GUE TOTAL	0				0	0			0		0
Orbán TOTAL	3				2	0			1		1
EFDD TOTAL	3				1	0			1		3
ENF TOTAL	3				2	1			2		2
ECR TOTAL	1				3	0			0		2
EPP TOTAL	5				2	0			1		2
NI	2				0	0			1		1
<b>TOTAL</b>	<b>17</b>				<b>10</b>	<b>1</b>			<b>6</b>		<b>11</b>

<Table 1-3>

Surgentini Report:					
Timmermans					
TOTAL					
S&D					
TOTAL					
G/EFA					
TOTAL					
ALDE					
TOTAL					
GUE					
TOTAL					
Orbán					
TOTAL					
EFDD					
TOTAL					
ENF					
TOTAL					
ECR					
TOTAL					
EPP					
TOTAL					
NI					
<b>TOTAL</b>					
Surgentini Report:	Reason against	Reason against	Reason against	Reason against	Reason against
	Subsidiarity	Hungarian's honor	False information	Double standard	left vs. right
Timmermans	0	0	0	0	0
TOTAL					
S&D	0	0	0	0	0
TOTAL					
G/EFA	0	0	0	0	0
TOTAL					
ARDE	0	0	0	0	0
TOTAL					
GUE	0	0	0	0	0
TOTAL					
Orbán	0	4	2	1	0
TOTAL					
EFDD	1	1	0	0	0
TOTAL					
ENF	0	0	0	0	0
TOTAL					
ECR	0	0	1	0	1
TOTAL					
EPP	2	0	2	1	1
TOTAL					
NI	0	0	0	0	0
<b>TOTAL</b>	3	5	5	2	2

EPP	Group of the European People's Party (Christian Democrats)
S&D	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
ECR	European Conservatives and Reformists Group
ALDE	Group of the Alliance of Liberals and Democrats for Europe
G/EFA	Group of the Greens/European Free Alliance
GUE	Confederal Group of the European United Left - Nordic Green Left
EFDD	Europe of Freedom and Direct Democracy Group
ENF	Europe of Nations and Freedom Group
NI	Non-attached Members

<Table 2>

Prime Minister Viktor Orbán on the Kossuth Radio programme "180 Minutes"  
 (September 28, 2018~ Interview with Prime Minister Viktor Orbán on  
 the Kossuth Radio programme "Good Morning Hungary")

		"Democracy"		"Rule of Law"
2018/5/4	9	"Christian democracy""liberal democracy""illiberal democracy/ we are working on building an old-school Christian democracy, rooted in European traditions. In this human dignity is paramount, the branches of power are duly separated, freedom is unconditional, families are supported – because family is also a value – and global ideologies are rejected; because we believe in the importance of the nation, and in Hungary we do not want to yield ground to any supranational business or political empire. We fight for full employment. Equal rights for women are very important.	4	As regards the rule of law, we can be especially confident, because we were fully audited in 2013...we have documentary proof that here the rule of law is in order.
2018/5/25	14	"Christian democracy" / The liberal democracy in which we have lived over the past twenty or thirty years has had a number of beneficial effects and results, but has become hollow.		
2018/6/8	1			
2018/6/24				
2018/7/27				
2018/9/15			5	The EP disregarded its own regulations on the rule of law
2018/9/28	3	European Commission is not democratic institution		
2018/10/12	2	"Turkish Democracy" its own way of		
2018/11/9				
2018/11/23	2	Thirty years of democracy in Hungary		
2018/11/30				
2018/12/7	10	Democracy in Western Europe is weary and lukewarm. Central European Democracy is combative.		
2018/12/21				
2019/1/25	1	In Hungarian Democracy, people feel that they are part of public life	3	NGOs, working for Soros to reshape Europe with immigration, play decisive role to decide what is rule of law in the EP. NGOs, working for Soros to reshape Europe with immigration, play decisive role to decide what is rule of law in the EP.
2019/2/22	1	European elite vs. democracy		
2019/3/8				
2019/3/23	1	Timmermans teaches us what is democracy while his party lost in the Dutch Upper house election.		