Governmental trouble shooting and crisis management experience in Hungary. A systems approach to the dual crisis challenge

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by

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Abstract

The main theme of the conference allows a deeper reconsideration of the desired development path of state capacities in the Central and Eastern European Region. The proposed article offers a conceptual framework for better understanding the dynamics of and responses to public policy challenges in Central and Eastern Europe through analyzing the Hungarian experience.

The article uses the public policy systems approach proposed by Göktuğ Morçöl (2012) using the notion of complex systems to depict the dual nature of crises. This duality consists of the external challenges such as climate change, mass migration and international supply shortages and internal challenges such as maintaining public services and social cohesion. According to systems theory, those complex systems tend to survive that can maintain viable dynamic balance between their internal resources and external realities. Dynamic balance relies on the capacities of renewing internal resources while managing to outlive or outsmart external challenges.

Systems approach appears to be promising in public administration reforms theory for it accurately describes the current dynamics of everyday struggle for survival.

Public policy systems approach can be applied to all polities but small and unitary states – such as Hungary – are especially good examples for their strategies of resilience are more vivid and easier to depict than of federal states.

The external challenges are basically the same all over Central and Eastern Europe but internal challenges are highly contextual. Systems approach allows a deeper understanding on how

countries may cooperate to overcome their external challenges and provides interpretative propositions on the role of the European Union in the struggle for survival.

1. Research concept

The article represents an attempt to reframe the currently conflict-laden relationship between the EU and a member state, namely Hungary which has recently become the research object of vast scientific literature which could be described as country-specific criticism. Instead of occupying the stance of scientific value-signaling, amply demonstrated by numerous distinguished authors, I endeavor to apply an existing scientific approach, system theory, on the issue in order to make efforts to formulate a system model for further European studies.

System[1] theory in social research and in public policy

System theory allows a general framework of cognition for a wide range of scientific discussions. It's origins stem from the works of Ludwig von Bertalanffy's general system theory. Socio-cultural systems such as nations or other forms of human populace have been considered as legitimate research objects of system theory since than. (von Bertalanffy, p. 29.) Despite its high explanatory and associative potentials, system theory has been somewhat neglected by mainstream public administration and public policy theory until the beginning of the last decade. It is a general expectation from a theory stemming from natural sciences to be mathematically formulated but according to Bertalanffy, verbal models are scientifically valid unless there is a more exact, more mathematicised approach.

System theory differentiates simple and complex systems whereas any groups of people are considered complex systems from the differentiation of "complex, complicated and simple" systems (Morçöl 2012, p. 34.). In order for a system to be established, the elements and the relations must be determined. Both the elements and the relations among the elements have to demonstrate a certain steadiness of stability, otherwise the criteria of "systemness" are not met (Morçöl 45-49). We can determine that existing or an imaginary country with its borders, citizens, relational social networks, physical, legal, and economic relations fulfill all criteria to be considered and analyzed as a complex system.

Complexity theory applied to public policy, public administration theory or to organization theory offers a nonlinear-nondeterministic approach of thinking rather than the positivistic mindset that is based on rational choice theory and the rule of law, embedded in the idea that

[1] von Bertalanffy uses "System theory" while Fritjof Capra uses "Systems theory" which do not represent any significant difference in content.

policies, laws are determined by elected representatives, transformed into the form of law and implemented by various top-down organizations.

In the followings I briefly put forth some of the central notions of system theory that will be used later on in this work:

Holism and systemness

Holism has been emphasized by von Bertalanffy throughout his works stating that the whole is more than the sum of its parts. (1972) Furthermore, systems tend to have an organic character and an inclination to evolve, adopt and make certain internal corrections if necessary.

The concepts of holism and emergence in social sciences results in the proposition that public interest results from private interests.

Boundaries of a system define it from its environment. There are a couple of ideas about whether societies construct system boundaries of a country (Koliba, Meek and Zia 2011. pp. 168-171). According to Anthony Giddens, systems are defined by the "situated activities of human agents, reproduced across time and space. (Giddens, 1984 p. 25)

Emergence and irreducibility

Emergence is a general problem of system theory signifying the question of how the system "emerges" from the ocean of elements, similarly to how the ocean emerges from the myriad of water molecules. Irreducibility refers to the distinct properties the system has compared to its elements, such as the ocean has distinctly different properties to water molecules.

Downward causation

Downward causation is a decisive notion in social sciences for it refers to the dilemma whether "higher level properties that naturally emerge… place constraints on the behavior of their constituent parts." (Mitchell, 2009. p. 123) The notion of downward causation is contrary to the theory of utility-maximizing rational actors (Morçöl, p. 81-84), the latter being rather acontextual, while "systemness" assumes that the system element organically embedded in its context, namely the complex system. Regarding public policy, downward causation is a central notion for macro level properties emerge from micro level properties and macro level, "structural properties persist despite the changes of micro level." (Morçöl, p. 89.)

System set: the question of open and closed systems, referring to the theoretical question whether there are systems that are totally independent from any form of external influence. Cutting the long story short, we can state as an axiom that social systems are per se open and complex systems.

System dynamics: system elements change, the relations between the elements change, even the system changes but it still remains the same system with largely the same set of traits, similarly as the child grows up, many of his features change but the person remains the same. As such, countries, societies, nations, peoples tend to be the same despite their obvious or latent changes. Furthermore, changes may be incremental or abrupt, underlining the markable nonlinearity trait of complex systems.

The dubious nature of system theory in public matters

Christopher Pollitt was largely skeptical about the scientific validity of using system theory or rather complexity theory as the theory of complex systems (Pollitt 2009). According to him, complexity theory is too vague, does not really have an edge and complexity theory represents rather a descriptive than an explanatory approach, furthermore, it lacks a specific scientific method and overemphasizes structure to dynamics. Morçöl (Morçöl 2012, p. 12-13) views complexity theory significantly coherent to sustain scientifically valid claims in various branches of science, including social sciences.

2. Research model

In the followings, I put forth a set of propositions reflecting various elements of systems theory in the context of a sustained tug-of-war between the most important institutions of the European Union, namely the European Commission and the European Parliament on one side and Hungary (in certain references Poland) on the other side.

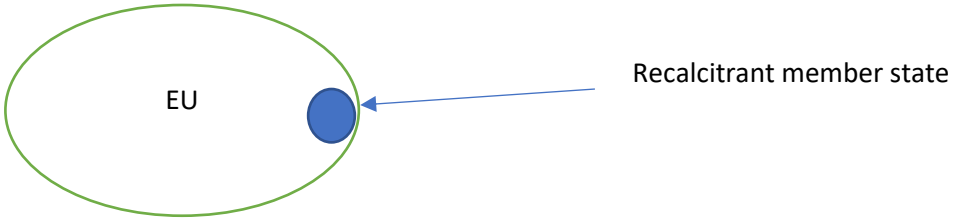


Exhibit 1. EUs and the member state's concurring claim for systemness

3. Importance of the context

Even Cristopher Pollitt appears to have succumbed to complexity theory, namely in emphasizing the inexorable epistemological bondage between context and public policy phenomena: „knowledge of what works and what does not tends to be heavily context dependent.”. (Pollitt, 2003, p. 122) The emphasis of the context is a definitive element of system ontology. The “systemness” of a complex system is largely dependent on whether the system is separate from its environment. If not, the system ceases to exist. It is simply dissolved or may be part of a larger system which is ontologically different from the previous status. The system can only exist in an environment that is different from the system itself. One entails the other.

4. Context analysis: The realm of transitology – an almost forgotten approach: transition by transaction

In this section I put forth the most important findings of transitology in order to highlight how contemporary interventionist theory developed. ‘Interventionist’, ‘transitology’, ‘democratise by transaction’ are expressions that refer to the same phenomenon: certain countries’ ambitions to spread their interpretation on democracy to other countries. The means have evolved throughout history but the ends have remained basically unchanged.

“Democratization from authoritarian rule has been one of the most intensely studied topics of the 1980s” – said Donald Share at the 1985 Annual Meeting of the American Political Science Association in New Orleans (Share, 1987).

Dankwart A. Rustow (1970), Samuel P. Huntington (1984), James L. Payne (2006) and Jeffrey Sachs (the latter being in the field of economics, known to be the promoter of mass-privatisation, not discussed here in detail) are probably the most renowned authors in ‘transitology’ applied to the democratisations of Latin America and Central and Eastern Europe. The common view they held was that democracy is not necessarily a result of socio-economic forces that organically grow in the womb of history. On the contrary, it is possible, furthermore, desirable to export democracy if one has the proper means to do so. The question discussed in volumes of publications over the 1970s and 1980s shared this as a starting point of argumentation and gradually the question of ‘Why?’ or ‘If at all?’ was overpowered by discussing the ‘How?’. Re-reading the corresponding academic writing, it appears that the course of mainstream academic discussion in the 1950s and 1960s was about the preconditions of organic democratisation in which a pivotal change came about in the early 1970s.

Democratisation through transaction has been a massive line of thought regarding Central and Eastern Europe ever since. There are two major differences though compared to the period analysed by Rustow and Huntington: the number of international stakeholders with the ambition of democratising countries increased in the recent decades while their influence deepened. "In virtually any area of policy in Central and East European countries, one can find transnational actors assisting state reforms and societal organizations active in that area. International organizations and expert networks have provided critical aid to economic reform teams…" (Orenstein, et al. 2008, p. 2). The comprehensive work of Iwona Sobis and Michiel de Vries (2009) on the details of how such expert networks and international stakeholder actually worked during the 1990s and early 2000s shall be mentioned in this context. Their judgement is far from idealistic regarding the process of democratisation in the region. They argue that international technical assistance (worth approx. USD 40 Billion) served rather the interests of the assistants than the countries' being assisted.

Vachudova (2008) depicts the role of the European Union as the "causal Behemoth" of influence. She accepts the Rustowian approach of transactional democratisation in the sense that democratisation relies more on concrete international and domestic actors than subtle socio-economic conditions. Vachudova commences her analysis on the role of EU in democratising Central and Eastern Europe by hinting that these countries have been traditionally close to or had been even internal colonies of either Moscow or Berlin and becoming members of the EU club represented a "huge reversal" (p. 20.) for them.

Vachudova classifies the main approaches to the EU becoming a prime actor of democratisation as follows:

- What had elevated the EU to be the prime influencer of democratisation has been the system of incentives and rewards that it could offer (*rationalist approach*).
- Apart from the narrow interests of finances, there is a *constructivist approach* as well according to which cognitive mechanisms such as social learning explain the EU becoming a prime actor of influence in the process of democratisation.

Vachudova tacitly utilises Rustow's findings on how the ruling elite's behaviour can be reconfigured if an external promoter of democracy realises how to harmonise democratisation with the interests of the incumbent players. In the case of the accession period of the Central and Eastern European countries, ruling elites found additional legitimacy in pro-EU policies together with friendly external support and incentives which proved to be outstandingly successful in the transition period. As such, the relationship between aspiring countries and the EU is hierarchical (Vachudova, 2008. p. 24) where hierarchy is not bound to coercion but to a

complicated texture of incentives and repressions which make compliance attractive and non-compliance costly (Ibid. p. 27).

Liberal and illiberal development paths were differentiated by Vachudova regarding the period after the accessions – the latter detected in Slovakia, Bulgaria and Romania – but leverage from the EU helped create more competitive political arenas with coherent and moderate opposition parties. Indicating the possibility of liberal and illiberal pathways of development after accessing the EU raises a couple of questions:

- Whether the EU has a mandate to promote the liberal path instead of the illiberal development path within its own borders?
- Whether such mandate – if it exists – enables liberal and democratic means such as outright coercion or the EU shall resort to the subtle means that otherwise had proven effective in the past?
- How come that after years of successful liberal development path certain countries turn illiberal and others even leave the Union?

Vachudova's (2008) view can be judged as balanced towards transactional democratisation while Payne's (2006) opinion is rather critical.

According to Fukuyama (2012), democracies have better and worse periods. According to his account, the American democracy underwent a devastating phase whereas 'liberal populism' failed to live up to its promises, distorted trust and removed the general public sentiment of a middle class and egalitarian society.[2] As such, Fukuyama allows that democracy has its own internal mechanism that moves it towards development or degradation. As long as it keeps its internal stamina, it can correct itself sooner or later. Yoram Hazony (2018) also occupies a stance that describes democracy as an organic and context-bound phenomenon. According to his account, democracies by definition constitute national level democracies and reject supra-national polities such as empires.

Complexity theory applied to public policy also supports the latter idea. If the way of general course of collective action (democracy) is imposed or controlled by another system, the complex (adaptive) system of the day will struggle to turn back to it's own development path. If this path of return to it's own systemic normality is blocked, the system cannot be called a system any more (*Morçöl, 2014).*

[2] Fukuyama, Francis: The Weakness of Liberal Populism. In. Adam Garfinkle (editor): Plutocracy & Democracy. How Money Corrupts Our Politics and Culture. The American Interest EBOOK, Washington DC. 2012.

Joseph Ratzinger also occupies the stance of moral-organic-consensual nature of democracy[3] (Ratzinger 2007, Loc. 738). Even Jürgen Habermas and Joseph Ratzinger occupy the consensual-organic view of democracy and modern state in their famous discussion (2007) starting with the 'Böckenförde theorem' ('Can a secular state guarantee its own moral basis?') although of different viewpoints (Habermas and Ratzinger 2007). Organic-sustainable vision of democracy is also supported by Shiva (2005, 2015) whereas duties and responsibilities are emphasized such as rights.

The list of influential contemporary thinkers emphasizing various organic and/or context-bound views of democracy in contrast to transactional/imposed concepts of democracy could be extended at length. The cited authors' works demonstrate that the former is by no means inferior to the latter, however, the EU institutions appear to occupy the position of bureaucratized-transactional democratisation. How this happened is partly discussed in this article but why it happened is beyond it's scope. One possible approach of explanation leads to the issue of 'institutionalisation capability' driven by 'technicist orthodoxy' put forth by Csaba (2008, p. 293.). Certain institutional settings have a higher capability to become entrenched in institutions while others have less or none. Bureaucratic interests, internal power games, ideologies, channels to access information, administrative capacity issues may stand behind these processes that require various empirical research techniques to be illuminated in the future.

5. Reflections on the EU's development path of becoming a self-declared beacon of human rights and democracy: the EU becoming a homogenizing actor by denying "systemness" from its members

Whether it is a valid scientific statement that the EU somewhere on its route of development began to deny "systemness" from its member states, is rather a hypothesis than a conclusion, nevertheless, this article is dedicated to scratch the surface of this matter.

One might argue that the origins of the European Communities' being a protector of human rights is reflected by the 1952 draft of the political Community. "Paul-Henri Spaak, president of the ad hoc assembly created on September 10, 1952, hands a draft treaty instituting a political European community to G. Bidault, president of the ECSC Council. Such a community would aim at safeguarding human rights and fundamental rights, guaranteeing the security of Member States against aggression, ensuring the co-ordination of Member countries' external policy and

[3] Ratzinger, Joseph: Europe Today and Tomorrow. Addressing the Fundamental Issues. Ignatius Press, San Fransisco. Kindle edition. 2007.

at progressively establishing a common market"[4] However, the draft was never accepted or enacted. Instead, fundamental laws had not been mentioned in the founding treaties of the European Communities during the first three decades of the European project. Fundamental laws served as legal basis for certain special rights such as the prohibition of discrimination by citizenship, freedom of movement of work force, the right to settlement, improvement of living and work conditions of employees and equality of income between men and women (Ferrano and Carmona 2015, p. 3.). These elements of fundamental rights had the function of enhancing the economic union and they had a decisively auxiliary character. It was a later stage of development when fundamental rights gradually gained protection by the Amsterdam , the Nice and the Lisbon Treaties:

„Since the entry into force of the Amsterdam Treaty (1999), and notably of the Lisbon Treaty (2009), protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice" (Ferrano and Carmona, 2015, p. 3). Fundamental rights had so loose protection in the first three decades of the Communities that in the Solange I and II Cases (1974 and 1986), the Karlsruhe Constitutional Court of Germany had to make it clear that it cannot accept the law of the European Communities to be primary to the German law until fundamental rights enjoy the same level of protection in the Community law as in Germany. (Ibid. p. 4). During the preparations of the Maastricht Treaty, there was a futile attempt to accept a declaration on fundamental rights. At this period of time, ECJ was the sole promoter of fundamental rights becoming part of Community law (Ibid. p. 6).

The Amsterdam Treaty was a game changer in the course of development of fundamental rights becoming part of Community law, having the aim of creating the European Area of Freedom Security and Justice. This objective entailed the codification of the following fundamental rights:

- anti-discrimination policies (Article 13 TEC);
- access to documents (Article 255 TEC);
- data protection (Article 286 TEC);
- freedom of movement (integration of the Schengen intergovernmental cooperation into the EU);
- asylum and migration;
- judicial cooperation in civil and criminal matters and in police cooperation.

These rules provided for the first generation of EU rules directed specifically to fundamental rights.

[4] https://europa.eu/european-union/about-eu/history/1946-1959/1953_en retrived: 01.08.2021.

The Lisbon Treaty made the Charter of Fundamental Rights an integral part of EU hard law. Still, the question of fundamental rights has been prone to debates ever since. Fuelling the debates, Art. 51. of the Charter limits the scope and applicability of its norms as follows:

„The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as *conferred* on it in the Treaties." The "principle of conferral" has been put forth by Art. 5. of the Lisbon treaty as a limitation of the scope of the law of the Union.: "the Union shall act only *within the limits of the competences conferred upon it by the Member States in the Treaties* to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

The European Court of Justice has been proven the guardian of fundamental rights becoming essential part of European law since the 1970s. In case Internazionale Handelsgesellschaft (Case 11/70 [1970] ECR 1125, para. 4.), the ECJ stated that fundamental rights are essential elements of the constitutional traditions of the member states and have to be considered and shall be upheld by Community law. The ECJ has been driven by the principles of effective legal protection, equality before law, the right to contradictory proceedings, freedom of speech, freedom of expression etc. in order to create a case law in defence of fundamental rights in the entire Union. Being a case law, it cannot be as homogenous as a charter law could be and this provides ground for endless number of new cases entailing new arguments pro- and con- in each new case.

The conclusion of this brief discussion is that the process of legal protection of fundamental rights throughout the 'European project'[5] is apparently an ever-evolving continuum. At least to many authors this appears to be the case. The development path came to its current plateau by the codifying Art. 7. of the TEU.

"1. 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 the 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. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations."

In order to make the process more functional, the Rule of Law Framework was installed by the Commission while Annual Rule of Law Reports, first issued in 2020, intend to ensure the institutionalisation of keeping rule of law issues on the agenda. The evolution of the Rule of Law Framework and the Annual Reports is introduced in detail by Gát, Ákos Bence (2020).

[5] 'European project' is a term used by Joseph E. Stiglitz: The Euro. How a Common Currency Threatens the Future of Europe. W. W. Norton & Co. Updated edition, New York, 2017.

Putting up the Rule of Law Framework was initiated by the foreign ministers of Germany, the Netherlands, Denmark and Finland in 2013.[6] The Rule of Law Framework is vested in the form of a structured dialogue between the Commission and the Member State similarly to infringement procedures. At first, the Commission (ex officio) considers whether there are signs to initiate the process, if so, the Commission tries to settle the issue with the Member State directly. If this proves futile, the Commission issues recommendations to the Member State if which not met, the Commission carries out a follow-up with a deadline to the Member State. Should these be unsuccessful, the Commission decides upon the initiation (activating) of the Art. 7. procedures. Art. 7. procedures as such are purposefully crafted to be actually used against member states that might undergo it's complicated filtering process.

Regarding the literature on the development path of Hungary and Poland after 2010, one can find a plethora of new academic publications on the abrupt change compared to the steady performance of the previous two decades. Analysing the Hungarian case in more detail we see several authors signalling their concerns about the state of democracy and later the rule of law. The upheaval of concerns started in academic circles and was transferred to the European Parliament and recently to the European Commission.

It is beyond the ambitions of this article to collect all accounts. Instead, what appeared to be realistic was the highlighting of the most influential authors first and presenting recent works (2020 and 2021) in more detail.

6. Member-state-specific critical theory: Previous non-democratic tendencies intensifying

Regarding the various statements of the member state specific critical theories, the basic mindset appears to be unwittingly or latently system oriented. The arguments discussed below seem to revolve around the concept that

a) there is a complex system the development path of which is unfavorable therefore it ought to be modified from an external source

b) the authors tend to choose sides and support one (the EU) against the other to legitimize a).

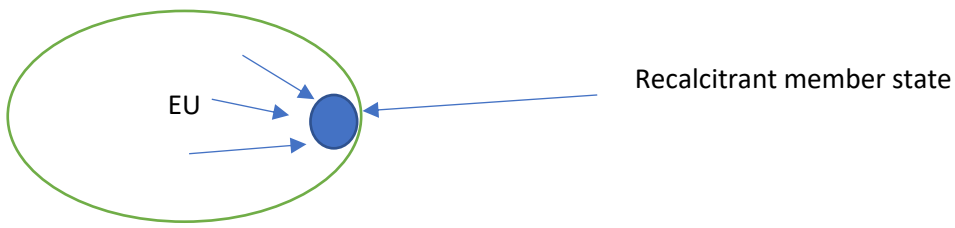


Exhibit 2. Member-state-specific critical theories' general setting: one system influencing the other but not vice versa

[6] https://www.eerstekamer.nl/eu/documenteu/_brief_nederland_duitsland/f=/vji8oh6slx9o.pdf Retrived: 08.08.2021.

The first legitimate question regarding this decisive commonality among the authors of this line theory is whether a member state should be influenced by the EU at all. Surprisingly, the arguments are well approachable by system theory. The arguments are detailed further below but here I put them forth in a formalized way:

Positivistic argument (you signed up for this)	The problem of downward causation
Existential argument (the EU would fall apart without discipline)	"Systemness" of the EU
Teleological argument (the EU has a telos and carries it out whatever it takes)	The EU's own system dynamics is more important the member states' system dynamics

In the followings, I collected the main arguments of the corresponding theories which can be used in the EU-member state system model. I also put forth the obvious shortcomings of these arguments in order to maintain a certain balance of arguments between the two systems in question: the EU and its member states.

a. Democratic backsliding theory

First of all, it shall be remarked that in Hungary one can observe a steadiness of general consensus regarding the political cycles: power has always been handed over on time and election cycles have never been shortened or extended between 1990 and present. The adamant adherence to the democratic procedure is a characteristic that would fall into Rustow's (1970) category of habituation. Another important element of steady consensus is refraining from violence towards political opponents fulfilling the paramount criterion of Payne's (2006) analysis. Violence directed against the political opposition appeared only in October, 2006 when armed police battalions – using potentially lethal rubber bullets, telescopic batons, plastic cable ties, makeshift detention centres – and flawed judiciary proceedings were applied against Fidesz supporters and MPs by the Socialist-Liberal government.[7]

According to Attila Ágh (2013), in the early years of the second Orbán Government[8] there were such immediate changes in the previously relatively steady development path that new phenomena should be considered as backsliding in democracy. Attila Ágh, turning away from his previous thoughts of desirable development,[9] emphasized a change of style in politics, politicisation of the civil service[10] and centralization of public administration as non-democratic

[7] https://www.aljazeera.com/news/2006/10/23/street-protests-intensify-in-budapest Retrived: 22.08.2021
[8] Viktor Orbán was first prime minister of Hungary between 1998-2002 and 2010-2014 was his second term.
[9] Ágh, Attila et al.: Szocialista orientáció [Socialist orientation] Kossuth Publisher, Budapest, 1984; Ágh, Attila: A marxi történetfilozófia alakulása [The development of Marxian philosophy on history], Akadémiai Publisher, 1975, Budapest; Ágh, Attila: Bevezetés a marxizmus-leninizmus társadalom és történetelméletébe [Introduction to the societal and historical theory of Marxism-Leninism] Oktatási Minisztérium Marxizmus-Leninizmus Oktatási Főosztálya [Department for The Education of Marxism-Leninism, Ministry of Education] Budapest, 1975.
[10] Referring to Connaughton, Bernadette, Georg Sootla, Guy Peters (eds.) Politico-Administrative Relations at the Centre: Actors, Structures and Processes Supporting the Core Executive. Bratislava: NISPAcee, 2008.

tendencies: taking control of the media and changing election rules, the Parliament electing a politically loyal attorney general, dismissal of civil servants have to be considered a political cleansing. The forms of tripartite consultations (employers, employees, government) were substituted with separate consultations and numerous professional chambers (Agricultural Chamber, Lawyers Chambers, Medical Doctors' Chamber, Chambers of Commerce and Industry, etc.) were entitled with public duties and rights which was considered corporatist therefore per se antidemocratic by Ágh (2013).

This work highlights the method of contemporary country-specific critical theory: detecting and lining up certain phenomena that – according to the given author – underpin the conclusion that democracy and/or the rule of law is fundamentally flawed in Hungary or in Poland.

Ágh however, apparently intended to base his conclusion on more fundamental explanations and emphasized that socio-economic and socio-political dimensions ought to be scrutinised. Ágh appears to accept Rustow's theory of transactional democratisation emphasizing that in theory transitional period (exporting and implementing institutions) would result in consolidation (habituation) of the new institutional order (Ágh 2013). According to Ágh, the cause of abrupt change is that one party achieved landslide victory at the 2010 elections acquiring supermajority (political cause). This brought to the surface the asynchronous nature of the development of polity, economy and society, sure enough, adaptive Europeanization was incomplete which in itself refutes mainstream theory that views democratisation as a constant evolutionary process – according to Ágh (2013). The main elements of structural distortions of the beneficial evolutionary development path were poverty due to loss of Eastern markets and unjust redistribution via giveaway privatisation completed with the loss of civic participation. According to Ágh's analysis, democratic deficit of the EU did not generate Euroscepticism but created scepticism towards domestic democratic institutions which he coins 'democracy paradox'. Ágh views 2006 police brutality and judicial oppression of democratic participation as a violent remobilization of right wing mob. At this point, history apparently refutes him. In fact, 2006 events can be viewed as a scene where namely democratic and rule of law compliant institutions such as police forces and judiciary used their powers to violently and unlawfully supress opposition. In fact, these evens prove that Orbán's movement never intended to grab power by street violence or even by early elections.[11] Ágh is also mistaken that extreme-right Jobbik would ever have been twin party of Fidesz. In fact, it formed a unified opposition with socialists and liberals who were not bothered by its apparent anti-semitism.[12] Populism and international isolation intensified the backslide. As a conclusion, Ágh states that Hungary needs reunification and external reintegration with the EU.

Ágh (2013) – as Vachudova (2008) – views the EU as a powerful actor of democratisation despite its apparent democratic deficit.

b. The abrupt change theory – interventionist approach

[11] For more information: Civil Jogász Bizottság jelentése a 2006 szeptember-októberi emberi jogsértésekről. [Report of the Civic Lawyer Commission on the breaches of human rights September-October, 2006] Kairosz Publisher, 2007.

[12] https://hungarytoday.hu/hungary-safest-europe-jews-rabbi-koves-first-site-conference/ retrived: 05.08.2021.

Pech and Scheppele link Viktor Orbán's speech on illiberal state to Art. 7. of the Treaty of the European Union, which regulates the so called 'nuclear option' (Pech and Scheppele, 2017b). [The word 'nuclear option' is commonly used in academic writings and by EU institutions despite it's direct connotations to Hiroshima and with it the opposite of the rule of law. One might think that this name is used to coin the successful democratisation of post-WWII Japan, however, if one visits the Hiroshima Peace Memorial Museum, it is not democratic success that meets the eye.[13]] The authors as such link research on political science to legal research and furthermore to legal argumentation. An approach that is to be followed by the second part of this article too.

Pech and Scheppele (2017b) agree with Kochenov (2008) that the establishment of a nuclear option had highlighted certain regret or leaning towards retrospective correction of the Copenhagen criteria or even the entire decade-long accession period. According to Pech and Scheppele (2017b), the EU Commission wasted too much time on futile discourses with Poland and Hungary, instead the Commission should have had launch pre-emptive 'nuclear' strikes on these countries in order "to prevent the occurrence of a consolidated autocracy in violation of EU values is to act fast as soon as the danger signals are clear." What the latter words on timing mean in substance, they fail to describe except for their emphasizing "recommendation for speed".

Concerning the context of backsliding in democracy, Pech and Scheppele (2017b) formulated a reverse-Rustowian script that enables – according to the authors – abrupt change from democratisation:

1. Poverty, failed liberalization schemes, predatory privatization, unemployment – this reminds on Ágh's circumstantial prerequisites for backsliding on democracy theory.
2. Democratic voting for a political formation that promises to correct the distorted development path.
3. "New autocrats shut down key offices that might resist their consolidation of power." (p. 7.)
4. New autocrats engage in benefit giveaways while repressing alternative views, bullying civil society, developing law enforcement against their opponents (if any).
5. Changing election law, pushing opposition out of the country or suppressing their votes.
6. Voters remain without constitutional ways to retake the initiative.
7. Biased referenda used against unlikely resistance occurring in the Parliament or in the streets.
8. Voters may vote with their pockets driven by cold calculation to preserve autocrats in their positions.

Unlike Ágh (2013), Pech and Scheppele (2017b) do not elaborate on explanatory research on the causes of democratically elected political leaders' turning into autocrats overnight (as suggested in stage 2 of Pech and Scheppele) or how come that given the public resistance, such new autocrats can win several elections or even lose elections in certain important constituencies (as happened at the municipal elections in 2018 in Hungary). In fact, the so called new autocrats perform rather badly in suppressing opposition, perhaps even so that they do not keep up to their reputation of being autocrats at all. The authors rather promote the idea that the

[13] http://hpmmuseum.jp/?lang=eng retrived: 31. 08. 2021.

EU should *intervene in order to restore democratic processes* by initiating Art. 7. TEU. How exactly would Art. 7. procedures be in causal relationship with the change of a democratically elected government in the Rustowian sense remains unclear. As a bottom line the authors opt for a new institutionalization of Europe as a two tier polity.

Kelemen and Blauberger (2017) promote the idea that Orbán undermined the independence of the judiciary, furthermore, engaged in illiberal democracy, therefore should be sanctioned but actually imposing Art. 7. sanctions on Hungary were unlikely because of the internal power composition of party politics of the European Parliament. Soyaltin-Colella (2020) also promotes the idea that Hungary and Poland should be sanctioned by the EU indicating that a large chunk of academic work deals with inter-institutional power struggles between EU institutions regarding Art. 7. The European Parliament has never been meagre on harsh communication towards Hungary and Poland and has always been ready to defend the democratic and liberal democratic path of development. Unlike the EP, the Council of the EU demonstrated a marked reluctance to apply sanctions. Soyaltin-Colella (2020) provides a list of actions that support the backsliding theory:

- Changing the powers of the Constitutional Court by the new Constitution.
- Lowering the judicial retirement age and stacking courts with loyalists.
- Accountability and legal oversight of numerous government institutions has been changed, notably the Central bank and the data protection ombudsman.
- Restricting the freedom of the press.
- Rigging the electoral system.
- Stifling independent civil society organisations.

Similarly, to Attila Ágh's account Soyaltin-Colella appears to be refuted by history that elections were "rigged" or there would be government oversight of the Central Bank.

c. Interventionist theory institutionalised by the EP

It would be beyond the limits of this article to analyse charges and defence.[14] Sure enough, if one reads the Sargentini report,[15] the following issues of academic relevance catch the eye of the observer:

- **Transactional democracy concept**

  The Sargentini Report continues the theoretical line of democratisation by transaction put forth by Rustow (1970), Huntington (1984) and Share (1985). Thus there is ample room of substantive discussions whether transactional democratisation works (can

[14] Defence of the Hungarian position is much less represented than charges. However, the Hungarian position is layed out in detail in the Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018. pp. 1-131.
https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf#!DocumentBrowse Retrived: 22.08.2021.

[15] https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html#title1 Retrived: 05.08.2021

possibly work at all) or transactional democratisation can be justifiable and purposeful in case of democracies that are underperforming compared to a certain external measure.

- **Cumulated examples have been merged in cases that had been settled already**

  The method by wich Sargentini operates is methodologically flawed. It's statements are based on a wide range of cases among which some were settled already by 2018[16] or have been settled since than. Ákos Bence Gát (2021) calls this the cumulative effect[17] of charges against Hungary. Cumulative charges can be found in the Report itself that have political importance regarding the still ongoing procedures that are partly political, partly legal. Furthermore, it is important to remark, that the ECJ did not interpret the case on the retirement age of judges in Hungary as a rule of law case, on the contrary, the case was decided upon Directive 2000/78/EC as being a case of social policy. Nor the case on the Data Protection Authority was interpreted as a rule of law case by the ECJ but was decided upon the 95/46/EC Directive.

- **Cases where an ECJ decision was based on the breach of rule of law regulations were not taken into account by the EP (a contrario argument)**
  In contrast to the above mentioned cases, there are other cases in which the ECJ decision was not based on the rule of regulations of the TEU however, were used and redefined by the EP to initiate Art. 7. procedures. There are at least 150 cases affecting practically all member states where the ECJ did base its rulings on the protection of the rule of law, still, these did not interest EP let alone the Commission in connection to becoming legal bases for Art. 7 procedures against any member state (Blatière, 2019).

- **Insufficient number of valid observations, insufficient domestic information, lack of contextual analysis**

  While the latter two arguments target the validity of the examples of the Sargentini Report, there are at least two other weak points: if the cases that had been legally settled or have been under current scrutiny by the ECJ or were only planned – according to the Report – but never manifested are put aside, remarkably few cases remain: basically the issue of the Central European University and the issue of migration policy. The question as such is the following: do two observations sufficiently underpin the legal hypothesis required by Art. 7?

  The Sargentini Report has clearly insignificant sources of domestic information. There are 47 various entities enlisted in their Report out of which cca. 34 can be identified as domestic. In contrast, there are more than 60 thousand domestic civic institutions in the Country whose opinion was neglected by the Report. As such, the empirical basis

[16] The case on the retirement of judges was decided by the ECJ against Hungary in 2012: EUR-Lex - 62012CJ0286 - EN - EUR-Lex (europa.eu) such as the case ont he Data Protection Agency in 2014: CURIA - List of results (europa.eu) Retrived: 07.08.2021

[17] Gát, Ákos Bence: Az európai uniós jogállamiság-közpolitika kialakulásának átfogó jogi és politikatudományi elemzése [The comprehensive legal and political analysis of the development of the rule of law policy of the European Union] https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Disszert%C3%A1ci%C3%B3_20210410_G%C3%A1t%20%C3%81kos%20Bence.pdf Retrived: 07.09.2021.

applied by the Report does not appear to be sufficient to lead to such sweeping conclusions that would soundly support any judgement on a Member State let alone the reprimanding conclusions initiating Art. 7. procedures.

d. Issues discussed regarding the practical application of Art. 7.

A large chunk of corresponding theory deals with the technical details of the actual application of Art. 7.

Kelemen & Blauberger (2016) emphasize that all member states, including Hungary and Poland committed themselves to Art. 2. values thus there is a certain level of consensus among all countries, even the ones about to be sanctioned. With this argument, the authors offer a reply on the fundamental question whether sanctioning certain member states affects the consensual element – and implicitly the cohesion – of the Union.

Rech (2018) takes a critical view of Igniatieff's (2005) stance according to which strengthening liberal democracy by coercion were a valid application of actual democratisation. Rech suggests the logical remark that the EU may risk its liberal and democratic values by imposing monism of values on countries instead of pluralism of values (Rech 2018, p. 335). In fact, Poland and Hungary were both disciplined by the EU when they intended to modify retail sector taxation in favour of small businesses. Such policy steps are sympathetic to the electorate and suppressing them undermines public support of the EU as a promoter of democracy and public good. Rech (2018) offers an overview of various concepts of democratisation within the EU:

- Agreement by all member states to be democratised (minimalist-positivist argument).
- Upholding constitutional values is necessary to maintain a supranational entity (existential argument).
- Upholding rule of law and democracy contribute to the stability, peace and prosperity of the EU (teleological argument).

These arguments are usually mixed and used interchangeably in EU documents but these do not necessarily support the legal homogeneity let alone a common political culture (Habermas, 1996), as such, there ought to be a right for dissent but this appears not to have such ample institutional leverage as homogenisation.

Stepping forward on this line of thought, Hellquist (2019) uses the metaphor of ostracism to describe the relationship of the EU and countries under Art. 7. Ostracism is a way to silence dissent in the form that uses the power of multitude against a minority. According to her analysis, sanctioning and being sanctioned create moral superiority for the actor of the sanctions and renders the other party morally inferior. Citing Jean-Claude Juncker and Federica Mogherini, Hellquist (2019) throws light on that the leaders of the EU were thinking about sanctioning internal and external entities in order to maintain (their) "credibility", however, the practice of sanctioning internally and externally reveals grave discrepancies. Hellquist rightly captures that internal sanctioning does not create European unity of cooperation and thus causes the dilemma of mutual harm of the actor and receiver of sanctions, furthermore: Hungary and Poland hold a trump card as being democratically elected unlike the Commission. On the other hand, Hellquist (2019) is obviously mistaken that far right were part of the government coalition in Hungary (it has never been and it is part of the united opposition with liberals and socialists – a repetitive error of international authors).

Closa (2019) also assumes that there were an actual rule of law crisis in Hungary and in Poland citing interventionist Pech and Scheppele (2017a). After interviewing Commission officials, Closa found that (interventionist) scholarly criticism by Kelemen (2017), Pech and Scheppele (2017a and b) and Kochenov (2016) made Commission officials justify their actions why they had been limited to infringement procedures. One of the justifications was that the EP was not ready to act politically. (The obstacles were removed in the meantime though). Officials had to calculate the chances of getting a 4/5 majority in the Council where the voters have to consider the political costs of their vote (e.g. Slovakia would have to consider that it would get into a semi-isolated position between Hungary and Poland similarly to the Baltic States, or Romania). Hungary and Poland would also mutually defend one other. The author concludes that the EU lacks last instance coercion to overcome recalcitrant governments regardless of there being democratically elected.

Appel (2019) continues the legacies of democratisation by transaction urging a joint international effort combined with street demonstrations to overturn current policies and possibly the democratically elected governments as well.

Kazai (2021) joins the interventionist choir by scrutinizing legislative processes in Hungary by quality and quantity. He does not put his analysis into a wider perspective. Legislation has always had its flaws in Hungary such as annual budgets were regularly accepted overnight during the last days of the year in the 1990s but viewing law itself as an adversary of rule of law is a contradiction of terms in a traditional Reschsstaat country where hard law published in the Official Journal of the country has always been paramount to soft law or judicial practice. Public administration theorists univocally emphasize that Hungary belongs to the „legalistic" public administrative culture (Hajnal 2003, Hajnal 2008: 132; Hajnal 2014; Hintea-Ringsmuth-Mora 2006; Drechsler 2005) and legalism entails rule of law or rather Rechtsstaat in the Hungarian case. Furthermore, authors regularly disregard the differences between rule of law and Rechsstaat. Regulation quality can be and should be improved but depicting the situation as backsliding on democratic or rule of law values would definitely require a comparison with a previous 'null' period. The same counterargument may apply to Poland as well.

Ovádek (2018) accepts the existential position emphasizing that the punishment of Poland and Hungary is necessary for the unity and cohesion of the EU as a community. Ovádek (2018) puts forth the difference of legality as the thin concept of rule of law from the thick concept that embraces fundamental rights and democracy. This distinction reflects the distinction between democracy as a procedural value and as a substantial value. At this point the democratic divide of the EU and the alleged rule of law deficiencies of democratic Polish and Hungarian polities collide to the extent that makes it awkward to sustain a moral high ground by the EU to act from it punitively towards its symbolically substandard members. However, Ovádek argues that Art. 7. justifies intervention without regards of the scope of EU law. Ovádek argues that EPP gives protection to Fidesz party – that cannot be a source of concern after the split of EPP in 2021. In addition, Ovádek rightly indicates that interventionist publications are widely void of legal theory or methodology (empirically studying 80 publications, none of them turned out to use legal methodology).

Blauberger and van Hüllen (2021) focus on the issue of 'money for democratisation' that resembles the first wave of structural changes in the transition countries scrutinized amply by Sobis and De Vries (2009). Blauberger and van Hüllen (2021) agree with Kelemen (2017) in

the twisted argument that the non-elected Commission is more democratic than elected national governments. The authors contemplate on the potential outcomes of actually applying conditionality of EU funds. They are not entirely sure whether such a step would play out beneficially for democratization. If open coercion by economic force takes place, the EU evidently loses it's posture of being a club of shared values. Furthermore, the authors hint that there might be a cold calculation between costly compliance and pre-meditated non-compliance beneficial for competitiveness. In such a case, insisting on a coercion policy may appear grotesque when punishment would pay better off than weathering the storm in relations with the EU institutions.

History appears to justify Blauberger and van Hüllen (2021) regarding their statement that the Commission will hardly settle debates with the recalcitrant member states. In fact, the Commission appears to deliver sanctions without bothering with due process of law by denying access to COVID recovery funds.[18] Such a step can be taken as brinkmanship or harsh negotiation tactics but would be difficult to justify by the principles of the rule of law.

Whether actual freezing access to cohesion and structural funds would be beneficial to democratic development or to the prosperity and security of the EU as a continental entity, is highly questionable. It is clear that in such a case funded cohesion and structural development would halt or would take a different route from EU strategies given a prolonged period of sanctions. If agricultural subsidies were also to be held back, this would entail an abrupt change in land prices, food prices and food market in the given country. The given recalcitrant member state might be forced to install protective steps to uphold its agricultural production capacity, internal food supply and agricultural exports. One percent of the GDP of the EU is redistributed by EU institutions and EU funds provide for an important non-indebting source of external financing that had a historical role of boosting development in transition counties. But assuming that this development has been successful, the marginal utility of EU funds is expected to decrease gradually. Sure enough, the occurrence of a long sanctioning period (similarly to decade-long sanctions against Russia) might ruin the efficacy of billions of ECUs and euros spent before and after the accession of Hungary and Poland while opening independent development perspectives for them. Ceterum censeo, the United Kingdom opted for the independent development path and according to Stiglitz (2017), cool, selfish economic calculation may coin the disintegration of certain institutional elements of the EU.

7. Major flaws in the abrupt change – interventionist argument

a. Lack of methodology or flawed methodology

In order to perform proper research, appropriate methodology is required and the same applies to legal studies. Ovádek (2018) recognised this as a general intellectual shortcoming of the interventionist school. Albeit, legal research – according to Levi (1948) – shall be performed with the awareness of social theories and changes in society that are relevant in mitigating ambiguities that might occur during legal reasoning not without respect to the fact that law itself consists of social artefacts (Ballin 2020, p. 8). The main social artefact regarding law is

[18] https://www.politico.eu/article/brussels-turns-down-hungarys-recovery-plan/ retrived: 08.08.2021.

legal grammar itself. "Legal grammar is not really 'neutral', but unavoidably situated within a cultural horizon." (Ibid. p. 5) As such, the ontological paradox of jurisprudence regarding EU law surfaces: Which meaning of highly symbolic terms should be applied when making a judgement on the applicability of Art. 7. of TEU if basic notion that are widely considered equivalent actually differ profoundly? The best example to this is the difference of 'Rechtsstaat' and 'rule of law' whereas the former refers to the state that has to maintain and enforce law and justice while the latter emphasizes a more common law-like viewpoint according to which law is inherited and preserved therefore it has to be fulfilled by public and private entities alike, enforcement relies heavily on the judiciary, while a chartered constitution – and many other elements of written hard law – are not necessarily required.[19]

Furthermore, being interventionist first and doing research afterwards creates serious research bias that has not yet been scrutinised sufficiently. Interventionist literature uses shortcuts that consist semantic bubbles such as "elections were rigged" and "extreme right is part of the ruling coalition" or the charge of being "anti-semitic."[20] These are hardly scientific affirmations instead, such remarks indicate the bias of authors who use them in their writings without critique.

b. Legal argumentation as a form of dogmatic legal research

Traditional dogmatic legal research offers grammatical, logical, historical and systematic methods of interpretation while case law research offers using analogies of previous cases. EU law allows both: dogmatic codified law together with EU case law opens up the necessity for further discursive and context-bound methods proposed by Möllers (2017). Contextual analysis regarding the theory of transactional democratisation and certain elements of historical contextualisation are part of this article.

Hypothetical syllogism is a classical and essential legal technique that is not applied by interventionist authors.

Hypothesis of Art 7: *If* "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2."

"Clear risk" and "serious breach" are legally ambiguous notions. The question at stake is whether the "in dubio pro reo" principle should be applied. Not accepting this principle would be a clear recipe for extra-hypothetical decision making breaching the classical principle of "nullum crimen sine lege" that would be the equivalent of ostrachism, in other words: excluding rule of law from a procedure that has the purpose of defending the rule of law. This is a clear logical paradox. Certain authors captured the ambiguity of the notion or rule of law itself however they have failed so far to analyse the legal relevance of apparent ambiguities regarding the legally relevant underpinning of such a logically uncertain hypothesis.

"Serious breach" indicates that there is a certain tolerance towards breaches. If there is serious breach there must be non-serious breach as well. By what principle it is to be decided that

[19] European Commission for Democracy through Law (Venice Commission) Report ont he Rule of Law Report by the Venice Commission Adopted at the 86th Plenary Session, Venice, 25-26 March, 2011. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e retrived: 06.08.2021.

[20] The contrary is true according to Köves, Slomó: https://hungarytoday.hu/hungary-safest-europe-jews-rabbi-koves-first-site-conference/

neglecting rights of the Sámi people, carrying out war crimes or being engaged in state-sponsored arms trade to shady places, mass-wiretapping and surveillance of the entire population or any other clear human rights failures (see footnote 28 for references) would suffice to initiate Art. 7.? Academic scrutiny has not tackled these issues yet.

"Risk" refers to the future, not to the past. Past excludes the notion of risk. Past risks that have been remedied already cannot be considered risks any more in the original sense. On the other hand, current risks are difficult to capture throughout a lengthy process while future risks are not actual risks therefore the consideration of such risks taken as legally relevant deeds shall be avoided due to the "nullum crimen" (non-existent deed) principle. In this aspect Pech and Scheppele (2017) rightly point out the importance of time in such a complex process. However, if past risks or even actual breaches are remedied by the normal conduct of infringement procedures or even by a ruling of the ECJ, this opens the question of double penalisation. Penalising a person or a legal entity twice for the same deed is generally out of the question. There might be certain cases where it is possible though but such parallel proceedings shall be supported by very delicate reasoning (as for the analogy: being penalised by the tax office and by criminal court for the same deeds may be acceptable in certain legal systems but it has to be legally sound). If a Member State for example fulfils the ruling of the ECJ with a settlement and still gets penalised by Art. 7., the legal responsibility of the ECJ could theoretically stand. The ECJ naturally would try to avoid the shadow of becoming an accomplice (instigator?) of a rouge Member State therefore the ECJ may be forced to take into account the possibility and the potential outcomes of Art. 7. proceedings regarding the given case when judging a case which would be a limitation of the autonomy of the ECJ and obviously a rule of law problem. As such, cumulative charges (Gát, 2021) in Art. 7. proceedings shall be extinguished in order to protect the authority and autonomy of the ECJ.

"Clear" risk entails that the case shall be well established, risks shall be imminent and, furthermore, clear risk has to be in causal relationship with the (potential) harm of Art. 2. values as being the relevant protected legal objects. Whether the threatening breach of one value is enough to fulfil the hypothesis of Art. 7. or there are at least two such values to be at risk: remains unclear. Academic research shall follow to clarify this.

As circumstantial evidence, it can be stated that Hungary is not outstandingly laden with infringement procedures. According to available statistics, Hungarian performance (33 new cases in 2019) is halfway between Denmark (22 new cases in 2019) and Cyprus (43 new cases in 2019).[21]

Disposition

Disposition is the legal – thus normative – qualification of deeds that meet the criteria determined by the relevant hypothesis. In the case of Art. 7., hypothesis and disposition are merged. Disposition is nothing else that the Member State – being attributed to the given legal qualities – becomes the legal passive subject of Art. 7. proceedings.

Guilt, Sanction and Purpose

[21] Microsoft Word - Factsheet overview. Corrected (europa.eu) retrived: 08.08.2021.

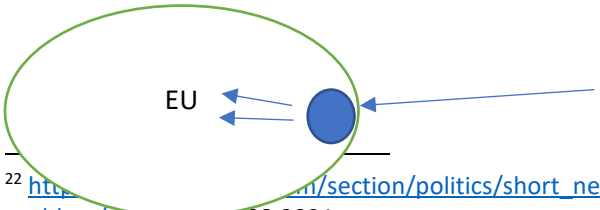
Sanctions may be determined due to the legal procedure put up in Art. 7. In order to determine whether sanctions can be applied, legal thought requires a moral linkage between the perpetrator and the deed: guilt or another form of responsibility. The importance of guilt was recognised by Ovádek (2018) in sanctions policies. Guilt signifies the moral distance between the jury representing the existing social consensus and the perpetrator's deeds and other legally relevant qualifications. However, in Art. 7. cases there is a possibility that certain countries who share the opinion of the given Member State wholly or partly are forced to participate in such a process. This possibility cannot be entirely filtered out for changing political stance or modifying policies is a privilege of Member States. For example, recently Austria appears to have changed it's opinion on migration in favour of Hungary.[22] Sure enough, Austria may find herself in a process whereas another Member State is sanctioned with regards to charges that are otherwise politically embraced by her.

Furthermore, the question of guilt regarding an entire country poses the question of "collective guilt" that is definitely contrary to the principle of human rights. The ones suffering real losses would be agricultural small holders and inhabitants of convergence regions.

The purpose of sanctioning a deed is twofold in legal thinking, consisting of 'special' and 'general' prevention. Special prevention refers to the culprit whose intention and/or capability to repeat his deeds are diminished by the sanctions. General prevention refers to the rest of the society who receive a reassertion not to do conduct the same or similar deeds that had been sanctioned. In Art. 7. cases the causal connection between sanctions and the purpose of the sanctions is highly questionable. The country under Art. 7. would be forced to establish alternative channels to finance its modernisation efforts while other countries that may assess that they might be next on the suspect's bench may be moved to diversify their financial resources of modernisation in their long term development plans, in order to contain the risk of Art. 7.

8. The "systems" strike back. Interventions tend to fail: historical evidence ought to discourage the interventionists

The following section enlists a couple of historical examples where democratization by transaction failed. This deserves – or rather: should deserve – scientific attention it has scarcely achieved yet. The "systems" approach offers an evident reply to this reality which somewhat disturbingly contradicts a large chunk of interventionist theory, namely that states, on numerous occasions, nation states, however tiny, tend to remain resilient towards external interventions. Sure enough, the targeted systems tend to regain their own course after various periods of crisis and/or adaptation.



[22] http[illegible]/section/politics/short_news/austria-says-it-will-not-solve-europes-afghanistan-problem/ retrived: 09.08.2021.

Exhibit 3. Small but organic systems tend to prevail by dynamic adaptation

The modelled format of this observation is displayed by Exhibit 3.

a. Historical analogies with regards to the country-specific interventionist theory

Ágh (2013a and 2013b) refers to the discreditation of Western influence because of poverty and pain caused by liberal reforms, Pech and Scheppele (2017) on the other hand call for quick and decisive intervention by EU institutions. Interestingly enough, similar proposals were aired regarding Tri-Zone Germany in 1949 "We must face the fact that the contradictions, vacillations, and reactionary manifestations of Western occupation policy have appallingly discredited democracy in Germany, both as a political system and an intellectual outlook" (Gurland 1949, p. 235). The analogy comes from Payne (2006) who uses the examples of post-war Germany and contemporary Iraq as examples to illustrate that coercive democratisation is doomed to fail. Kinzer (2007) provides an exhaustive enumeration of failures of interventions in the 20th century to be used as historical evidence that interventions with the purpose of democratisation tend to fall through sooner or later.

b. Utilizing historical evidence: the lack of explaining why the development path did not change despite intervention is relevant

The general lack of scientific reflection of historical failures of democratic interventions has twofold relevance.

Primarily, the widespread unwillingness of theorists' paying attention to historical failures of democratization by intervention prevents them from relying on the theory of complex systems. Were it otherwise, the epistemological limitations of normative deduction and one-dimensional positivism would be obvious for them. I am not arguing that such approaches are not valid for scientific cognition. What I intend to convey though, is that when such complex systems as an entire countries come into scientific discussion, nonlinearity and nondeterminism and multivariant analyses ought to be considered more relevant than they apparently are. In order to conduct such further inquiries, more thorough analysis of historical evidence is inevitable.

Secondarily, lacking the explanation why the supposed development path of democratization changed abruptly in Hungary, is crucial regarding the applicability of Art. 7. The application of Art. 7. requires a legally relevant purpose, namely, to put back on track the derailed democratization process of the given country. If, however, measures taken by Art. 7. do not correspond to the causes of the supposed de-democratization tendency, application of Art. 7. is doomed to fail in content furthermore, it will have no causal connection with its legally relevant

purpose. Sanctions applied without a sound legally relevant purpose of betterment do not fulfil the criteria of the rule of law. (Law developed the notions of general and special prevention to grasp this problem.) At this point, I risk the proposition that legal methodology, (juristische Methodenlehre) as a proven, scientific method of cognition – if cultivated properly – bares an ontological core of opportunistic empiricism. This enables lawyers worldwide to deal with everyday phenomena that ought not emerge in the normative sense but they in fact do (people commit crimes, traders cheat, all kinds of felonies, falsehoods and follies occur). Furthermore, complexity theory and law have already begun to interact, highlighted by the work of Capra and Mattei (2015), legal scholarship is about to re-embrace a more organic approach to the theory of law than sheer top-down positivism.

The EU-Hungary decade-long thug-of-war offers ample evidence of cognitive shortcomings.

Unlike other authors of the 'abrupt change – interventionist' school, Ágh (2013a and 2013b) such as Pech and Scheppele (2017) make at least certain attempts to explain the causes behind the abrupt change of former democratization. The majority – and the Sargentini report itself – lacks circumstantial inquiry in this regard. This is a decisive shortcoming not only in social science but in legal methodology as well. The Sargentini report – being itself a legal document – it ought to meet the requirements of proper legal inquiry.

The promoters of the theories of abrupt change do not take into account Francis Fukuyama's explanation of why traditional leftist parties tend to lose ground in industrialised counties (Fukuyama 2015, 436-440). In his magnum opus, Fukuyama describes how traditional leftist parties had to see the structural decline of their support because of manufacturing industries being relocated to Asia and either diffused into a larger middle class or descended into a diverse lower class. As the lower classes in services became more diverse, leftist parties turned to identity politics and turned away from social mobilisation by class and labour issues.

The lack of explanations on why the development path changed abruptly becomes more peculiar as theorists do not tend to think that bad policies delivered by leftist parties between 2002-2010 or furthermore the foundations of the regime change decisively influenced by policy transfer mechanisms and technical assistance of the 1990s (Sobis – De Vries, 2009) might have causal relationships with certain elements of the development path that were used as circumstantial evidence against Hungary under Art. 7.

c. 'Backsliding' assumes a prior, higher position in democracy that actually never existed

The theory of backsliding (in legal terms: serious breach of the rule of law ought to be in causal relationship with the potential or actual detriment of Art. 2. values) – can be conceived only if there had been a higher level of democracy that is now deteriorating. Still, authors do not give a point of reference from where the backsliding could have possibly started or how it could be measured. In fact, universal backsliding could not be substantially underpinned if one took into account the police brutalities of the Socialist-liberal government in 2006 covered up by the judiciary (or threatening church schools of withdrawing their finances, mass layoffs in public administration on political basis, outright corruption cases and excessive foreign currency

loans, curtailing the competencies of the Constitutional Court by so called 'harakiri-norms'[23], etc..). Bad policies[24] brought tremendous pain, poverty and suffering to the public (such as decrease of per capita GDP) that are generally considered perils for democracy (Share 1984, Huntington 1985 and Ágh, 2013a).

d. The lack of understanding the development path of the regime change

The lack of contextual analysis is obvious when neither authors of political science (post-communist studies) nor of legal studies engage in the lasting consequences of the lack of lustration in Hungary (Coman, 2014). This is a major shortcoming of comprehending the current context of Hungarian democracy. Authors do not discuss the fall of Socialist prime minister Péter Medgyessy in 2004 after it turned out that he had served communist counterintelligence services under the codename of D-209. One cannot overestimate the power of those unknown individuals, who are in possession of such secret agent files. If the prime minister (in charge of contemporary secret services and experienced secret agent himself) could not protect himself of such an attack, how would an ordinary judge be able not to distort his rulings in favour of a blackmailer? We do not know. What we know though is that there was no lustration in the judiciary. This was discerned by World Bank but not by interventionist authors. Anderson, Bernstein and Gray (2005) wrote the following: "*The transition from socialism to capitalism in Central and Eastern Europe and the Baltics (CEE) and the Commonwealth of Independent States (CIS) has required a fundamental reorientation of legal and judicial institutions. During socialist times they were subordinate to the executive and the Communist Party, and their role in the commercial sphere was oriented almost entirely toward enforcing the governments' economic plans.*"[25] (Anderson et al. 2005 p. xi) In fact, leadership positions of the judiciary used to require political engagements from the Hungarian Socialist Workers' Party. This is a non-issue for academic authors but was a reality when the Hungarian Parliament decided to lower the age of retirement of the affected generation. The lack of lustration in the judiciary resembles the situation described by Payne (2006) regarding de-nazification of post-war Germany.[26] It was a major dilemma for theorists of the day to what extent let former Nazis participate in the judiciary or public life. The dilemma is real: is it a

[23] So called "harakiri-norms" consist of legal material modifying another law but with the clause that the modifying norm automatically loses effect after the modification takes place. The Constitutional Court during its processes cannot create new norms, it's competences are limited to 'negative legislation'. As such, cessation of a given norm that had been modified by a harakiri-norm prevents the Constitutional Court of re-installing the legal text prior to the modification. This limits the de facto range of action of the Constitutional Court that has to judge whether the norm in force – however problematic – or no norm at all would be less harmful but does not have the capability of settling the matter by upholding the regulation before the modification in question.

[24] https://worldview.stratfor.com/article/hungary-just-first-fall

[25] Anderson, James H., David S. Bernstein, Cheril W. Gray (2005): Judicial Systems in Transitional Economies. Assessing the Past, Looking to the Future. The World Bank, Washington DC. https://openknowledge.worldbank.org/bitstream/handle/10986/7351/329280Judicial0Sys01public1.pdf?sequence=1&isAllowed=y Retrived: 08.08.2021

[26] „The Bonn Basic Law, the new constitution under which the Federal German Republic has been set up, is hardly likely to win new adherents for democracy. Ill-constructed, complicated, unclear, and verbose, it bears the marks of uneasy compromise. The governmental structure it erects is burdened with a bureaucracy too heavy to be genuinely democratic. Under the terms of the Bonn constitution, essential democratic freedoms and civil rights may be abrogated or suspended if their exercise is held to endanger the 'basic democratic order,' a circumlocution for the bizarre system designed in Bonn." (Gurland, 1949) Gurland, R. L. 1949. Why Democracy Is Losing in Germany. Commentary 8 (September): 227–37.

workable democracy that depends on those who were compromised in a prior dictatorship and actively fought against democrats? In Hungary this has never been settled and it appears, that rule of law institutions developed in the 1980s and 1990s defended the incumbents. Corrections to this appears as the breach of the rule of law to many contemporary academic authors.

9. The issue of moral authority

Hellquist (2019) rightly captures the importance of the symbolic-moral posture of sanctioning and being sanctioned. Still, authors do not state that member states promoting sanctions against Poland and Hungary would be flawless. Regarding on certain human right challenges in Western Europe, a quick list on news media reports might put the symbolic-moral battle into a different perspective.[27] It appears, that it is only a matter of research to find developments in pro-sanctions counties that potentially undermine their moral high ground that is a necessary element of sanctions policies applied either internally or externally, however this has not caught the attention of interventionist theorists yet.

10. Conclusions

General system theory (Bertalanffy, 1969) applied to public policy (Morçöl, 2012) or law (Capra and Mattei, 2015) offer higher level of understanding than positivist approaches amply described in this article. Furthermore, the enlisted works – with respect to their scientific values – tend to occupy top-down, linear, and normative stances assuming a self-given moral high ground.

There is a robust organic-contextual school of democracy that is practically not considered by interventionists. This – otherwise diverse – line of thought is coined by not less names as Ratzinger (2007), Habermas and Ratzinger (2007), Habermas (1996), Shiva (2015), Pollitt (2013), *Morçöl (2014), Payne (2006). I propose that academic inquiry as well as actual political actors should revisit these thoughts in order to narrow the gulf between institutional ambitions and realities.*

Art. 7. of the TEU debate is used in this article as a practical example to illustrate how system to system interaction actually takes place in a decreasingly cordial relationship. The root of conflict is to be described by systems theory in the followings:

[27] On Dutch polity being captured by drug gangs:
https://www.politico.eu/article/the-dark-dangerous-side-of-dutch-tolerance/
https://www.bbc.com/news/world-europe-50821542
https://www.express.co.uk/news/world/921983/netherlands-holland-narco-state-police-association-organised-crime-drugs-gang-underworld
Racism in Belgium:
https://www.politico.eu/article/belgiums-islamophobia-denial-discrimination-muslim-population/
https://edition.cnn.com/2019/11/30/europe/belgium-blackface-colonial-history-intl/index.html
Denial of rithts from the Sámi people in Sweden:
https://www.politico.eu/article/sami-reconciliation-process-sweden-minority-multiculturalism-human-rights-discrimination/
https://www.thelocal.se/20200206/sweden-criticized-by-un-over-sami-rights/
Rising anti-semitism in France:
https://www.ncronline.org/news/world/anti-semitism-rise-france
https://www.pbs.org/newshour/show/rise-of-anti-semitism-elevates-fears-in-france

System A denies systemness from System B. Therefore a rather complex process emerges with references to the matter of holism, irreducibility, system ontology as system context, system telos, and system adaptation/resilience.

For Art. 7. of the TEU is formally a legal tool, it is a matter of it's legal applicability to fulfil the criteria of traditional legal methodology such as hypothetical syllogism. The article shows that the interventionist swing does not seem to consider legal methodology when trying to underpin the legitimacy of intervention despite contextual analysis being an essential element of legal methodology.

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