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# Opposing illiberalism: a case-study of Hungary

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## **Abstract**

This research is a reflection on the role and state of the political and civil opposition in political regimes in general, and in Hungary through a case-study. It seeks to reaffirm that the opposition is a democratic variable that deserves our undivided attention as it highlights the nature of the political system in which it operates. The study of the rights of the opposition in a democratic society offers a comprehensive overview of present European legal guarantees in relation to this key actor of democracy. At the same time, it stresses the complexity of distinguishing democratic and non-democratic rules, as their effects always depend on an original political context. The illiberal trend that is spreading in European countries constitutes an anti-democratic agenda that inherently attacks pluralism and opposition voices. The treatment of the opposition in such regimes helps to clarify the regime types and this can aid those who are being oppressed.

Through a case-study on the Hungarian opposition, this research will provide, via a new perspective, a better understanding of the de-consolidation process that has been occurring in Hungary over the last eight years. Building on this analysis, the research will explain the main challenges that the last bastion of democracy faces in order to be an effective check and balance mechanism. Obstacles appears very diverse and the analysis stresses their causes and effects in the particular context. Crucial challenges, such as the media capture and attacks on civil society organisations, are objects of further consideration as they are decisive for the Hungarian political system in the long-run.

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## Introduction

‘Probably, all this was only an illusion’<sup>1</sup>.

After the results of the 2018 parliamentary elections, the Hungarian opposition was knocked out and is now seeking to understand what just happened. This time, many thought it would be different: the opposition was widely considered to have a chance to assert itself. But nothing changed and Viktor Orbán, leading the coalition Fidesz-KDNP<sup>2</sup>, won the elections with a two-thirds majority, granting him wide-ranging constitutional powers, for its third consecutive mandate.

By now, the re-elected government is willing and has the capacity to pursue its authoritarian agenda that has already attacked the Hungarian constitutional democracy in weakening the independence and impartiality of the judiciary; the administrative and economic institutions; the media; the activities of the civil society such as universities and watchdog organisations, and so on and so forth. Long is the list with regards to Hungarian state violations of European values of democracy, human rights and the rule of law. These values have grounded the European Union’s (EU) construction and its further development. What is happening in Hungary is fissuring the EU right to its very foundations and in the EU’s conception of forming a multi-level governance encompassing liberal and democratic political systems that are bound by their mutual respect of EU values enshrined by Article 2 of the Treaty of the European Union (TEU). Facing the greatest democratic challenge of its history, the EU is struggling to cope with Hungarian illiberalism. The EU piecemeal reaction is not working to tackle the systemic trend in place in the country. Until now, no significant action has been taken against the derivation of power. For some Hungarians opposed to the Orbán regime, this quasi *omerta* on the supranational level provokes impatience, disappointment or even anger toward European politics; while others explain that the EU is not a saviour and ‘it is [their] responsibility to fight for [their] freedoms and future and [they] cannot expect anyone else to do it for [them]’<sup>3</sup>.

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1 Arpad Lakatos, ‘personal interview: candidate from the opposition - Momentum’. Candidate in Debrecen. 9 April 2018.

2 ‘Young Democrats-Hungarian Civic Alliance’ (Fidesz) and the ‘Christian Democratic People’s Party’ (KDNP).

3 Kevin Bolnar, ‘Interview candidates from the democratic opposition’ - Momentum. Communication staff in Budapest. 25 March 2018.



Given the current packing of institutions of checks and balances (such as the judiciary) and given the EU's inaction, civil and political oppositions remain the last bastions for democracy facing the illiberal state. The opposition is a key actor in a democratic society, as it promotes and protects democratic values and principles such as equality, pluralism, participation, legitimacy of decision-making, individual rights and fundamental freedoms. The functions to oppose and control the government while reminding it that its hold on power is temporary in democracy, keep the state power 'an empty seat'<sup>4</sup>.

The present master thesis is a research on the role and state of civil and political opposition forces in political regimes in general, and in Hungary through a case-study. Theoretically, the research argues that the observation of the opposition is of fundamental relevance for the study of the democratic quality of a given regime and its trend. As a key feature of democracy, studying the opposition contributes to underlying discussions on core democratic features and their protections against illiberal pressures. The case-study focusing on opposition actors in the current Hungarian regime is not only aimed at providing a better understanding of the de-consolidation process via a new perspective, but it also assesses practical opportunities and challenges the opposition can confront given the context. The objective is to target the most crucial obstacles that prevent the opposition from being an effective adversary of power.

Clarifications on the adopted definition of 'the opposition' in this present research have to be done here, as it will situate the object and purpose of the analysis. Within both theoretical and empirical approaches, 'the opposition' does not only describe the institutionalised parliamentary political opposition, as it does in its traditional way<sup>5</sup>. Instead, the conception is willing to be more inclusive than that – excepted when it is explicitly specified. In fact, an analysis of the opposition's capacities to be an effective force cannot only rest on one part of its base: the dynamics in the high political sphere are not the only important aspect, but also the observation of the many civil forms of opposing government's legitimacy and/or policies. Both the political and social climate are relevant as both spheres share a 'disposition to resistance'<sup>6</sup> and participate to create dynamics of adherence or rejection of the current political agenda.

4 Claude Lefort, 'L'invention du politique' dans *Philosophes de notre temps*, p 171

5 Nathalie Brack and Sharon Weinblum, 'Pour Une Approche Renouvelée de l'opposition Politique' (2011) 18 *Revue internationale de politique comparée* 13.

6 Jean Charles Léonard Simonde de Sismondi, *Études sur les constitutions des peuples libres* (Brussels, 1836) self translation 230

In addition to this, the analysis must take into account new socio-political contextual developments: since 'trust in political institutions show a marked decline'<sup>7</sup>, the opposition prefers to raise its voice through unconventional forms of disapproval's expression, providing a diversification of means of action for citizens to oppose.

Such chosen inclusive conception is present in most relevant literature on the opposition; the highly abstract definition provided by Robert Dahl forms evidence, explaining:

Suppose that A determines the conduct of some aspect of the government of a particular interval. (...) Suppose that during this interval B cannot determine the conduct of the government; and that B is opposed to the conduct of government by A. Then B is what we mean by 'an opposition'<sup>8</sup>.

The signification of 'the conduct' and 'to oppose' can be left undefined according to him; it is however important to distinguish 'active' and 'passive' opposition, where the latter undertakes a deliberate course of action intended to modify the conduct of government while the former does not.<sup>9</sup> This distinction seems to even include 'internal' opposition that point members or allies of the government party that sometimes 'opposed to the conduct of government'.

Additionally, it can be said that for academic purposes, an inclusive conception of the opposition produces new fruitful thoughts, as the classical interpretation of the opposition –seen as 'the parliamentary minority excluded for the executive power'<sup>10</sup>– framed analyses into limited lists of actor, means of action and place for opposition.<sup>11</sup> Without never fully rejecting the relevance of the classical type of opposition, some

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7 Pierre Rosanvallon, *La Contre-Démocratie. La Politique À L'âge de La Défiance*. (Seuil, 2006). P.19.

8 Robert A Dahl, *Political Oppositions in Western Democracies* (Yale University Press 1966). Xviii preface.

9 Ibid.

10 Nathalie Brack and Sharon Weinblum, 'Pour Une Approche Renouvelée de l'opposition Politique' (2011) 18 *Revue internationale de politique comparée* 13 <<http://www.cairn.info/revue-internationale-de-politique-comparee-2011-2-page-13.htm>> accessed 28 April 2018. Para.17.

11 Ibid. Para. 8 and Para. 13.

scholars have called researchers to also take extensively into account extra-parliamentary opposition<sup>12</sup>.

Consequently, the adopted definition of 'the opposition' must authorise to study a group of actors that, as a whole, is considered to be a key feature of democracy –specially promoting pluralism, participation, representation and transparency. Hence, it does not only refer to the 'political opposition' but also to the 'civil opposition'. In turn, 'political opposition' would not only refer to action of the parliamentary opposition, but also to extra-parliamentary actions of politicians. And 'civil opposition' would not only refer to the work of civil society organisations having a mission of information and control, such as non-governmental organisations, but also spontaneous mobilisation of citizens with the clear aim to participate to the political confrontation of ideas, instigating directly or indirectly a potential change of leadership.

What forms a 'democratic society' has to be analysed into a qualitative approach. In this master thesis, being (non-)democratic is a question of degree of (non-)respect of core democratic aspects – *de jure* and *de facto*. However, democracy remains an 'essentially contested concept'<sup>13</sup>: an exhaustive list of elements necessary in a democracy is still difficult to be univocally accepted<sup>14</sup>. Nonetheless, a minimum requirement for a political system to be called democracy is that the legislature is periodically elected by citizens, among free and competitive candidates.<sup>15</sup> Democracy is at least a political system in which the seat of power remains empty and electoral results are relatively uncertain. For this, an 'effective' or 'meaningful' opposition must exist, which means actors able to compete freely in order to achieve opposition's primordial objectives – to change: (1) 'the personnel of the government'; (2) 'the policies'; (3) 'the political system'; and (4) 'the socioeconomic structure'<sup>16</sup>. An effective opposition is not necessarily one that wins elections and become (part of) the government, but is able to express alternatives for the government and for policies.

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12 Ibid., in general. Ibid. Para.13, referring to ' J. Blondel'.

13 Walter Bryce Gallie, 'Essentially Contested Concepts' in Proceedings of the Aristotelian Society, Vol.56, 167–198 (1956) 186. 'Politics being the art of the possible, democratic targets will be raised or lowered as circumstances alter, and democratic achievements are always judged in the light of such alterations.'

14 See, for example, Schumpeter, Dahl, Rawls, Freedom house's definition of democracy and constitutive elements.

15 Janos Kis, *Constitutional democracy*, (CEU Press, 2003) Introduction, ix

16 Robert A Dahl, *Political Oppositions in Western Democracies* (Yale University Press 1966) 332.

The nature and force of the opposition significantly depend on the constitutional framework of the political system. Constitutional rules protect against abuses of the state power that would take advantage of political institutions in place in the state. Through constitutional democracy, rules are protected by special procedures, restricting manoeuvres and obliging political consensus to reform. But the capacity of the opposition in a given regime depends as well on the political, historical, cultural and sociological context. The importance of legal protection of rights of the opposition becomes even more crucial when the system does not show a sufficient 'democratic maturity'<sup>17</sup>, creating a political culture respectful of democratic rules. Then, the opposition can form a mere force on paper and stop providing the necessary oxygen to democracy. This is illustrated by the fact that it can exist as an 'opposition' in non-democratic regimes.

Today, Hungary is an exceptional illustration of the new page that has been turned within the European political history. In the region, a new trend towards more populist leaderships, fundamentally anti-pluralist and willing to deconstruct democracies, started after Viktor Orbán came into power in 2010. Poland is the most known example among countries that extensively followed the path of its acolyte by October 2015; but it also concerns Croatia, Slovakia, Romania and Serbia.<sup>18</sup> So the question goes beyond Hungary in challenging European values of democracy as a whole. Nonetheless, a case-study on the Hungarian opposition facing illiberalism is of fundamental importance for at least three reasons. Firstly, it is the model for others as it created a set of ideological justification and legal and political implementations. Hungary shifted into a democratic regression the first, by 2010, when nationalist-populist government came into power, explaining his wish to build an 'illiberal democracy'<sup>19</sup>, playing with semantic.<sup>20</sup> This model still needs more explanations for outsiders, and the narrower focus avoiding superficial overview propose to contribute to this. Secondly, Hungary is a unique case in showing such extended and contrasted regime trend. Indeed, after it has been considered as having met the democratic requirements in the post-communist era and consolidated these features<sup>21</sup>, the Hungarian regime demonstrated a very changing form along these last eight years. Also,

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17 VENICE COMMISSION, 'Rapport sur le rôle de l'opposition au sein du parlement démocratique'. (2010) 5

18 Human Rights House Foundation (HRRF), 'Resisting Ill Democracies in Europe' (2017).

19 Viktor Orbán speech Băile Tuşnad/Tusnádfürdő, Roumania. (26 July 2014) Full text available at: <http://budapestbeacon.com/public-policy/full-text-of-viktororbans-speech-at-baile-tusnadtusnadfurdo-of-26-july2014/10592>

20 See, for instance, Jeffrey C Isaac, 'Is There Illiberal Democracy? A Question with No Semantic Response.' [2015] Public Seminar. (see later)

studying the situation in Hungary today shed a light on its further developments, especially those of the three last years, and in the 2018 elections' context.

'Hungary is an example of how the political system of a stable liberal democracy may erode'<sup>22</sup> according to Andras Bozoki and Daniel Hegedus.

Helped by different territories of academic disciplines – mainly law, political science, and legal philosophy –, the present research is willing to reply to these following questions:

*What are the core criteria permitting to the opposition to be an effective adversary of power? Is the Hungarian opposition still capable to challenge the illiberal regime?*

The master thesis is willing to provide a comprehensive analysis of the role of the opposition in democratic society and challenges it faces because of illiberal, anti-democratic trends. It is composed of two parts that mutually connect between each other.

The first part is seeking to analyse contradictory trends constituting the relationship between democracy, opposition and anti-pluralism (Part I). This part offers a theoretical approach of the necessary protection of the democratic opposition in the light of anti-pluralist trends. The research grounds the analyse into an interdisciplinary theoretical framework, engaging legal philosophy, European Human rights Law and political science, to catch the conception of the opposition as a crucial element of democratic regimes. It provides necessary understandings of political and legal dynamics linked to the opposition to be able to practically analyse particular cases.

The case-study of the current Hungarian opposition facing illiberalism (Part II) studies practical evolutions of the prerogatives of the opposition within the trend of the de-consolidation of democracy, stressing opportunities and disadvantages.

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21 Kaldor and Vejvoda, *Democratization in Central and East European Countries: An Overview*. (1999); Freedom House (until 2016) <https://freedomhouse.org/report/freedomworld/2017/hungary>.

22 András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) *Democratization*

## **Part I. Democracy, opposition and anti-pluralism**

As such, considering the opposition as an element of democracy is a very basic assumption; so basic that it is often a forgotten element in contemporary studies. Yet, fundamental relevance of the opposition as a key feature of democracy is still a valid assumption. Moreover, the nature of the links between democracy and opposition is rendered more complex by perceptible dynamics in place in a political system: one consequence of them is the weakening of rights of the opposition.

This first part of the master thesis will theoretically frame the relationship between democracy and opposition, with contemporary and European perspectives. It argues that in order to continue to protect European democratic values and principles, it is fundamental to strongly reaffirm that an effective opposition is a core feature of the definition of democracy (Title 1); and to unveil anti-pluralist trends presented by certain political forces (Title 2). This theoretical analysis will serve as a base for the second part of the present master thesis, as aspects analysed in this part are central to understand and evaluate dynamics in place in the current Hungarian regime.

### **Title I. An effective opposition as cornerstone of democracy**

Fundamental democratic theories demonstrate a double correlation between democracy and opposition. Indeed, while the survival of democracy depends on the oxygen produced by the opposition, the latter needs the protection implemented within a democratic state. Consequently, the opposition is not only a mere consequence of democracy; but is a criteria of it. That is why the place of the opposition in democratic theories is essential (Chapter 1). Yet, one needs to bear in mind that the mere existence of opposition in a political system is no guarantee for democracy. To be so, the opposition has to be meaningful and effectively exercising its main functions. This depends on the protection granted to rights of the oppositions in Europe (Chapter 2).

## Chapter 1. The essential place of the opposition in democratic theories

This first chapter seeks to show that democracy is essentially a political system in which opposition of ideas is granted *de jure* and *de facto*. It studies classical conceptions of democracy and their contemporary developments that demonstrate intrinsic links between the democratic system and principles of pluralism, participation and deliberation (1.1). Then, the opposition is considered as having a fundamental role for the well-functioning of democracy (1.2). In its various forms, democracy needs effective opposition to remain: this passes through the recognition of rights and freedoms of the opposition (1.3). This section provides a theoretical framework to the overall discussion of this master thesis: it presents philosophical arguments that explain why the opposition is essential to democracy and how rights' protection should be thought – leaving to the next section the detailed study of these rights.

### 1.1 Political liberalism as a ground for conceptions of democracy

Classical theories of democracy form the philosophical foundations for modern discussions relative to the democratic system. In facts, it seems relevant to come back to read the classical literature, given that democracy is subject to timeless questioning. These concern, for instance, its definition, substance, efficiency and desirability. The Philosophy of the Enlightenment in the XVIII century founded modern conceptions of democracy. Directed by principles of liberty, equality and rationality of individuals, thinkers of this period, such as Rousseau and Montesquieu, grounded a conception of democracy that is essentially pluralist, participative and deliberative.

Eminently representative of the ideas of the Enlightenment, Rousseau is also one of the great thinkers of democracy. In '*Le Contrat Social*'<sup>23</sup>, Rousseau's concept of democracy is characterised by several key elements, mainly: the concept of 'popular sovereignty', the notion of '*la volonté générale*'<sup>24</sup> and the preference for direct democracy. All these aspects of Rousseau's theory constitute direct links between his conception of democracy and principles of pluralism, participation and deliberation. Rousseau theorises the social contract concluded between citizens of a society as a reply of its fundamental

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<sup>23</sup> Jean-Jacques Rousseau, *Du Contrat Social Ou Principes Du Droit Politique* (1762).

<sup>24</sup> Hereafter 'general will'

ambition 'to find a form of association which defends and protects from all the common force the person and goods of each associate, and by which, uniting to all, yet only obeying to himself, and stay as free as before'<sup>25</sup>. This would transfer the political power from the hands of the monarch to those of the people, each receiving a part of sovereignty.

Analysing Rousseau's concept, the exercise of the popular sovereignty as the expression of the general will he theorises<sup>26</sup> is inherently advocating for participation and deliberation in a society. The citizens are by now seen both as public agent – as member of the sovereign – and subject of policies – as members of the community.<sup>27</sup> As such, they have the right and duty to participate in political life; political rights granted via the social contract –freedom of expression, association, assembly, to vote and be elected – allow them to do so. According to Rousseau, the general will of the people as a whole would result into law, which would produce the concept of 'common good'<sup>28</sup>. In fact, this is because the 'common good' has been possible to be expressed and then stably established by the rule of law. Adding to this, Rousseau's preference for direct rather than representative democracy radically supports the principle of participation of all the citizens in democracy. The philosopher explains that direct democracy permits full participation of citizens of the society, while representative democracy only allows for punctual participation through voting.<sup>29</sup> Rousseau's theory also founded the principle of respect for pluralism, without calling it as such, as it is '(...) reconciling particularism of individualism within the Rule of Law'<sup>30</sup>.

If we broadly consider the Rousseauist theory, democracy in itself would be the system providing full equality, liberty and participation; proving that democracy would be the ideal system of government for a modern society. In fact, democracy would be desired for its intrinsic values of political liberalism which are inherently pluralist, participative and deliberative.

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25 Jean-Jacques Rousseau, *Du Contrat Social Ou Principes Du Droit Politique*. Self translation (1762) 14 (« Trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé, et par laquelle chacun, s'unissant à tous, n'obéisse pourtant qu'à lui-même, et reste aussi libre qu'auparavant. »)

26 Ibid 20

27 Ibid 15; 56

28 Ibid 20

29 Ibid 48

30 Guy Lafrance, *La Démocratie et Le Défi Des Particularismes*. Chapitre Cinquième. <<http://books.openedition.org/uop/1888?lang=fr>> accessed 26 April 2018.



Another thinker of the Enlightenment, Montesquieu, sought to link democracy and principles of political liberalism; moreover, he sought to show the direct link between democracy and the concept of opposition.

In '*De L'Esprit des Lois*'<sup>31</sup>, Montesquieu seeks to conceptualise the political ideal of a moderated government that would protect individual liberties. To achieve this, he studies different 'types of government'<sup>32</sup>, and distinguishes them according to their nature and principles. Montesquieu was the first to write that 'Republic' is 'democracy' when the sovereignty remains in the people in corpse.<sup>33</sup> Montesquieu's concept of democracy highlights that such a government type would be fundamentally based upon political liberalism and liberty and equality of the people. For him, equality is the constitutive principle of democracy. And 'love for fatherland and equality'<sup>34</sup>, called 'political virtue'<sup>35</sup>, is the conservative principle of democracy<sup>36</sup>, as it guides the exercise of liberty of individuals into no excessive manners, for the sake of the stability of democracy.

For Montesquieu, a moderated government is one that organises the divisions of power. His line of thought related to this is fundamental in grounding the link between democracy and opposition. The classical explanation of Montesquieu's theory of division of powers can be summarised by the well-known formula: 'If power is not to be abused, things must be arranged so that power stops power.'<sup>37</sup> With due regard to Montesquieu's goal – to find a form of government that in nature and principles would protect individual liberties against abuse of state power –, it seems reductive to refer to his theory of divisions of powers as 'only' providing the clear separation between legislative, executive and judiciary branches of State power. This is particularly highlighted by theoretical and practical evolutions of constitutionalism and shapes that European parliamentary systems have developed through centuries, until now. Indeed, the executive and legislative powers are rarely, if ever, of a different political colour, due to the head of the government usually holding a net majority in the Parliament. The latter is not a genuine '*contre-pouvoir*' of the executive anymore because there the majority in place follows the political agenda of the

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31 Charles de Montesquieu, *De L'Esprit Des Lois* (1748).

32 Ibid

33 Ibid 48. Republic is 'aristocracy' when the sovereignty remains in the people in part.

34 Ibid 'Avertissement'

35 Ibid

36 Ibid 100

37 Ibid 199 (Self translation of « *Pour qu'on ne puisse abuser du pouvoir, il faut que par la disposition des choses, le pouvoir arrête le pouvoir.*»)

rulers. Such a phenomenon of 'presidentialisation' of political systems, consequence of the majority rule, erases the effects of the classical conception of the separation of powers spelled out by Montesquieu. On the contrary, an interpretation of the theory of division of powers that would as well enclose the need for a clear separation between the 'power to act' and 'power to prevent' appears more efficient in limiting the power from abuses, as majority and opposition forces are the real actors of intrinsic political moderation.

Shown through these philosophical foundations, democracy is necessarily a liberal political system in which free and equal people are the active sovereign of political power.

After the Age of Enlightenment introduced the foundational principles of democracy in line with political liberalism, democratic theories that followed built on these classical concepts. The nature of the links between democracy and its principles, with regard to political evolutions and practical limits of the democratic system, has been developed.

One of the earliest difficulties with democracy is to organise an equal treatment of all opinions made by the different holders of the popular sovereignty. It resides now in the principle of pluralism in democracy that protects diversity of opinions, justifying and protecting the right of everyone to take part in the management of public affairs.

Then, pointing out limits of the principle of participation – mainly, the punctuality of the participation relegated into the action to vote in periodic elections –, contemporary scholars suggest reforms of democracy that would stress democracy as the confrontation of ideas in society. The concept of 'participative democracy' that appeared in the 1960s, for instance, is a form of sharing of the exercise of power, founded upon the strengthening of participation of citizens to the political decision-taking.<sup>38</sup>

Nevertheless, the remaining practical impossibility of organising direct democracy, already revealed by Rousseau himself<sup>39</sup>, is the starting point for the extensive development of democratic theories relative to representative forms of democracy, its limits and the necessity to better connect the sovereign people to political decision-making. Jürgen Habermas, for instance, elaborated the concept of 'deliberative democracy' based on the idea that it is possible to take decision in democratic societies through public

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38 Le Politiste, 'La Démocratie: Le Politiste' <<http://www.le-politiste.com/la-democratie/>> accessed 26 April 2018.

39 *ibid.* 48 Rousseau explains that 'democracy', understood as direct, is not realisable.

deliberation of all its members of the society. The agreement that is taken is based upon the best argument.<sup>40</sup>

Political liberalism, founding pluralism, participation and deliberation, are essential features of democratic society. If these principles shape the arena of public debate, they do not necessarily guarantee a functioning democracy, as the arena for debate could remain an empty site if the respect for opposition forces, their free participation and the enactment of disagreement<sup>41</sup> are not fulfilled. What would serve political pluralism, participation, deliberation if there are no opposing voices against positions of the government?

## 1.2 The fundamental role of the opposition in a democratic society

We must bear in mind that political pluralism encompasses three interrelated elements: (1) the organisation of free elections; (2) the exercise of power by the majority and (3) the respect for rights of the opposition. As such, the allocation of the political power depends on a numerical logic consecrated by the principle of majority: the elected majority will represent the general will and must orientate political actions until the next elections<sup>42</sup>. The latter would show such a level of political competition that their outcomes would remain uncertain – potentially changing the government. In this political organisation, the opposition is considered being ‘the last one of the three pillars of the evolution of democratic institutions’<sup>43</sup>, as it the voice and guardian of rights and freedoms of those not sharing the majoritarian conception of what is ‘good’ for the society.

Seen as a criteria of pluralistic constitutional regimes, the opposition contributes to the balance of powers in a democratic system, framed in the ‘power to act’ and ‘power to prevent’ as explained above<sup>44</sup>. This ability to oppose is spread in the civil society since it

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40 Jurgen Habermas, *Notes programmatiques pour fonder en raison une Ethique de la discussion* (1983)

41 Ranciere Jacques, ‘Disagreement: Politics and Philosophy’

42 Charles Montesquieu, *De l’Esprit des Lois* (1748).

43 Robert A. Dahl, *Political Oppositions in Western Democracies* (Yale Univesity Press, 1966) xiii preface.

44 Ibid 4

became clear the mandate given through voting cannot oblige the government to take specific action. The civil society created new powers for itself, in order to further control politics.<sup>45</sup> But opposition is not a mere reaction against the political power; rather it becomes a formal actor *of* democracy itself, that bears dimensions of control, defiance and protestation, directly linked to the citizens. Rousseau had already advocated for the ‘complication’ of the definition of citizenship, that would add the rights ‘to voice an opinion’, ‘to deliberate’, ‘to propose’, ‘to discuss’ to the one of ‘to vote’.<sup>46</sup> Pierre Rosanvallon qualified the comprehensive prerogatives of the civil society to oppose as a ‘counter-democracy’<sup>47</sup>. This has not to be understood as the contrary of democracy but rather as its direct counterpart, actually necessary to strengthen it in a sustainable way.<sup>48</sup>

We can classify the main functions of the opposition into three aspects<sup>49</sup>. While these are all relevant, a more extensive explanation of the second function is considered to be necessary in order to evince its fundamental importance relative to our conception of the minimum core criteria of democracy.

(1) The opposition is a ‘*contre-pouvoir*’, with a mission of oversight and control towards actions of the government. While controlling the majority in power, the opposition promotes and defends rights, especially those of minorities it represents, opposing and suggesting other ideas.

(2) The opposition is the one that allows a political alternative, where opposition parties aspire to gain power and must elaborate and diffuse their views in each of the domains of the national life. Allowing political alternatives, the opposition actually provides the oxygen that any democracy needs in rendering a change of leadership possible<sup>50</sup>. This function is so important that some scholars have defined the opposition in democracy as: ‘parties excluded from power whose first function would be to prepare an alternative

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45 Pierre Rosanvallon, *La contre-démocratie. La politique à l’âge de la défiance*. (Paris Seuil, 2006) 14

46 Jean Jacques Rousseau, *Du contrat social*, Book IV, Chap 1(1776) 75

47 Ibid 8

48 Ibid

49 Nathalie Brack and Sharon Weinblum, ‘Pour Une Approche Renouvelée de L’opposition Politique’ (2011) 18 *Revue internationale de politique comparée*. 13 <<http://www.cairn.info/revue-internationale-de-politique-comparee-2011-2-page-13.htm>> accessed 23 April 2018

50 P. Norton ‘Making Sense of Opposition’, *The Journal of Legislative Studies*, vol. 14, n°1, (2008) 238

government'<sup>51</sup>, because 'the ambition of the opposition would not be accommodation but conquest'<sup>52</sup>.

(3) The opposition would finally permit to renew the political personnel.

In 1966, Robert Dahl wrote:

'Today, one is inclined to regard the existence of an opposition party as very nearly the most distinctive characteristic of democracy itself; and we take the absence of an opposition party as evidence, if not always conclusive proof, for the absence of democracy'<sup>53</sup>.

Accordingly, the existence of opposition forces would create an assumption of democracy. Because of the spread of democracy that occurred in Europe, nowadays we can say that a political opposition exists inside and outside of parliaments in the majority of the Member States of the Council of Europe<sup>54</sup>. Nevertheless, it seems important to highlight that existing is not enough. What really matters is that the opposition is mobilised, able and willing to fulfil its functions effectively: 'the problem is not anymore to know whether the opposition is willing to control the government in a majoritarian democracy (...) but whether it has means for this'<sup>55</sup>. Indeed, the importance is to be able to be a great *contre-pouvoir*, having political weight and the ability to influence the political life. An effective opposition will permit to fully respect the principle of pluralism and becomes then the important criteria to think opposition forces as a fundamental element of democracy.

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51 A. Mujica and I., Sanchez Cuenca, 'Consensus and Parliamentary Opposition : the Case of Spain', *Government and Opposition*, vol. 41, n°4 (2006) 86-108

52 King quoted in P Norton, 'Making Sense of Opposition', in *The Journal of Legislative Studies*, vol. 14, n°1, (2008) 238

53 Robert A Dahl, *Political Oppositions in Western Democracies* (Yale University Press, 1966). Preface xviii.

54 VENICE COMMISSION, 'Rapport Sur Le Role de L'opposition Au Seain Du Parlement Démocratique' (2010) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)025-f](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)025-f)> accessed 22 April 2018.

55 Marie-Claire Ponthoreau, 'Les Droits de l'opposition En France Penser Une Opposition Présidentielle.' Self-translation (2004) 2 *Revue Pouvoirs* <<http://www.cairn.info/revue-pouvoirs-2004-1-page-101.htm>> accessed 22 April 2018.

### 1.3 An inclusive definition of rights of the opposition

Determining conditions for the establishment of a meaningful opposition amounts to observing legal and practical conditions in which rights of the opposition are effectively protected.

The present research considers the content of rights of the opposition in an extensive way, looking into specific and general legal provisions. There are several justifications for this. Before all, this conception is coherent with the inclusive definition of 'the opposition' that has been adopted<sup>56</sup>: since parliamentary, extra-parliamentary, political and social opposition constitute relevant actors which participate in the possible change of leadership, rights and freedoms related to their diverse activities have to be taken into account in a comprehensive way. Also, the majority of states in Europe do not regulate the legal status for the opposition that would strictly determine its rights.<sup>57</sup> Rights of the opposition are mainly protected in an indirect way<sup>58</sup>, via the protection of fundamental rights as such that effectively permit protection. Then, political science studies suggest adopting an inclusive conception of rights which would mirror increasing extensive means to oppose the government. The so-called 'democratic disenchantment'<sup>59</sup> has led to decreased electoral participation but increased the number of people 'participating in strikes, signing petitions, and expressing collective solidarity in other ways'<sup>60</sup>, involving the exercise of a broader range of civil and political rights.

Given these, 'rights of the opposition' are: any individual and collective right whose exercise permits fulfilling the role and functions of an opposition in a democratic society. Accordingly, the rights of the opposition are seen as means of action to develop the counter-democracy. The list would encompass, firstly, universal human rights that are considered intrinsically linked to prerogatives of the opposition, such as: freedom of expression; freedom of thought; freedom of reunion, association and assembly; right to participate in public and political life, especially right to vote and to be elected. Secondly, rights of the opposition include specific rights granted to institutionalised opposition forces,

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56 Cf 'Introduction'.

57 VENICE COMMISSION. 'Rapport sur le role de l'opposition au sein du parlement démocratique'. (2010) 4

For further explanations and examples, see the following section 2 of this chapter.

58 Ibid 4

59 Pierre Rosanvallon, *La Contre-Démocratie. La Politique À L'âge de La Défiance*. (Seuil, 2006) 19

60 Ibid

such as: rights of the parliamentary opposition, in its individual quality or as part of a group of opposition; right of political parties and political associations and rights of so-called 'watchdogs' Non-Governmental Organisations (hereafter 'NGOs').

The respect of principles of pluralism and participation and the protection of the rights of the opposition are conditions to sustain the democratic political system. These rights have not only to be understood as a consequence of democracy; but as criterion of it, that need to be ensured. In Europe, the protection of rights of the opposition would be the last step to reaching democratic maturity. An overview of the protection of these rights is necessary to assess the state of the opposition and of democracy in the Continent.

## **Chapter 2. Overview of the protection of the rights of the opposition in Europe.**

For an overview on the protected rights of the opposition in Europe, the present section opts for a comprehensive approach, encompassing all rights that have to be effectively exercised by the opposition forces to be meaningful. Different dimensions of the protection are taken into consideration in order to provide a frame for the systemic assessment of the protection of rights of the opposition in a state. After considering the role of the political culture (2.1) and the importance of legal guarantees (2.2), a comprehensive picture of the rights of the opposition is presented (2.3) to then explain some important elements (2.4).

### 2.1 The role of the political culture

In its preliminary opinion concerning Ukraine, the European Commission on Democracy through Law (hereinafter 'Venice Commission') explained that: 'tangible adopted solutions [to protect rights of the opposition] are conditioned by the constitutional framework, the electoral system and other historical, social and cultural factors'<sup>61</sup>. Before the legal dimension, the protection of rights of the opposition can be approached under the

<sup>61</sup> VENICE COMMISSION, 'Rapport sur le rôle de l'opposition au sein du parlement démocratique'. (2010) ; P.12, quoting VENICE COMMISSION, 'Avis préliminaire sur le projet de loi relative à l'opposition parlementaire en Ukraine de mars 2007', CDL-AD(2007) 015, para 4

cultural considerations. The existent political culture in a given society would be primordial in shaping ways the democratic system is experienced and regulated. A significant culture of democracy, rooted by historical and social factors, inherently impulses the respect for pluralism, participation in political life, deliberation, transparency, fairness, etc. The Venice Commission affirmed that the respect for opposition voices would demonstrate the 'democratic maturity'<sup>62</sup> of the political system, that would effectively protect itself from non-democratic practices. One would expect from a 'mature democracy' that, for instance, the parliamentary majority would constrain itself from taking all advantages it could have given its current position<sup>63</sup>. In the case where the power is abused, protest reactions should be intense and undermine the stability of the government.

In Europe, it exists cultural similarities among states; although each has built its own political culture from different historical episodes and political traditions. Hence, significant differences remain. New democratic states, such as Hungary, do not have a democratic tradition and rest on a weak culture of democracy<sup>64</sup>. Its citizens are considered for some as 'far from adhering fully to liberal western conception of democracy'<sup>65</sup>.

While a democratic political culture is not rooted everywhere in Europe, it does not even constitute a real barrier against abuses of power seeking to weaken the opposition in 'consolidated' democracies. It is then evident that guarantees provided by the culture remain limited. It would rather be reasonable to think that a well-established democratic political culture can prevent blatant abuse of the government, because rulers realise that it does not worth risking a strong uprising of the society in attempting manipulation. However, the political culture could appear completely inefficient in stopping a progressive derivation of power that changes the political practice and slowly shrinks the space for opposition forces. The culture of opposition a society have formed neither produces enough social awareness on the importance of every important elements needed in a pluralist and participative democracy: for instance, on the most technical issues concerning taxation or financing. Finally, a political culture can change itself with new socio-political contexts.

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62 Ibid 5

63 Ibid 5

64 Ibid 12

65 Balint Magyar, *Post-Communism Democracies. The Mafia State. The Case of Hungary*, (CEU press, 2016), Chapter 2.1



Legal guarantees, given this, can be seen as even more necessary in order to continue to build and maintain a democratic framework.

## 2.2 The importance of constitutional guarantees

The legal recognition of the rights for the opposition is fundamental for the functioning of any democratic system, as key guarantor of its principles. Through law, the space for the opposition is not only permitted *de facto*, merely depending on aspirations of the society and judges. It rather receives a definition, stability and legitimacy by the normative and democratic process. It is a transformation of the confrontation of ideas, passing from a state of nature to the rule of law as prescribed by social contract theories.

Contrary to the cultural dimension, a legal protection consecrated binding obligations with regard to determined rights: negative obligations to refrain from interfering into the exercise of rights of the opposition and positive obligations to take active measures to ensure the fulfilment of these rights. The latter is mainly directed to the state and its legislative power that must adopt legal provisions establishing necessary favourable conditions for the fair and peaceful political confrontation, such as provisions relative to political parties, NGOs' status and guarantees and the media. The legal system of protection allows justiciability of these rights, access to remedies in case of violation and implements accountability and reparation.

Despite the fundamental importance of a legal protection, there is no legally binding international standard that grants a specific protection of the rights of the opposition. Yet, this would have recognised the fundamental importance of the role of the opposition as core criteria of any democratic society. At the national level, there is sometimes complete legal uncertainty relative to such protection, despite the political omnipresence of the opposition. States in which specific provisions concerning the rights of the opposition have been adopted are rare exceptions, deemed to derive from particular national configurations and political traditions. At best, these states adopt a constitutional status of the opposition that defines and gives rights to its actors. Otherwise, some states institutionalised the parliamentary opposition through internal provisions or rules of the

assembly.<sup>66</sup> By this, the concept of ‘opposition’ is not only political but becomes a legal concept, independent from current majority in parliament.

This quasi absence of legal status of the opposition in democratic countries mirrors in fact the sensitivity of this matter. Indeed, the role and functions of the opposition is a highly political topic. To be object of national regulations, the majority would have to think beyond its current mandate and its ambitions to stay in power – where constitutional provisions allow to run for a consecutive mandate. The majority in government would have to take a degree of abstraction in considering that its future place in the political arena depends on the protection of opposition forces once out of power to govern. Hence, reforms concerning rights of the opposition are not often occurring.

The inherent relationship between the opposition and core aspects of constitutionalism seems to prevent that international or European bodies can adopt a binding instrument to grant a protection of the rights of the opposition as key guarantor of democratic society.

Given this legal context, guarantees of rights of the opposition are scattered across different levels of protection and different sources.

Regarding national sources, main relevant standards relative to the rights of the opposition are consecrated by the constitution. Specific constitutional provisions regulating the electoral system, state institutions and the exercise of power by the government and parliament are directly involved in the protection of the rights of the opposition – even when ‘the opposition’ as such is not explicitly mentioned. According to the Venice Commission, the constitutional framework would be in itself ‘the best guarantee of the existence of an effective political opposition’<sup>67</sup>, because it renders effective the principle of political pluralism within state institutions, in particular into the parliament. Other legislation, concerning for instance the national electoral system and its procedures, are important. Finally, national media laws form important regulations that are directly impacting the protection of rights of the opposition.

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66 VENICE COMMISSION, ‘Rapport Sur Le Role de l’opposition Au Sein Du Parlement Démocratique’ (2010). 4  
The european exception is the UK, in which the parliamentary opposition beneficiate from a true status of the opposition, where the function of the ‘head of the opposition’ is enshrined as official function, leading the ‘shadow cabinet’.

67 VENICE COMMISSION, Rapport Sur Le Role de L’opposition Au Sein Du Parlement Démocratique’ (2010), Paragraph 50. P.13.<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)025-f](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)025-f)> accessed 22 April.

With regard to the international sources, specific provisions from the International Covenant on Civil and Political Rights' (hereinafter 'ICCPR') are relevant standards as they provide clarifications on the content of rights of the opposition. Given the case-study on Hungary, it is the European level of protection that is main reference for this present research. Existing standards conceived by the two systems of protection for human rights existing on the Continent – the European Convention for Human Rights<sup>68</sup> (hereinafter 'ECHR') and the Charter on fundamental rights of the European Union<sup>69</sup> (hereinafter 'EU Charter') – form instruments of references, as well as case laws Strasbourg and Luxembourg Courts have ruled concerning the opposition. Studying them, it is clear that the ECHR, by its specific competence on human rights, its long-lasting activity and given its broader scope of application (not only with regard to EU Law or its application in national level), provides more information on the state of the protection of the rights of the opposition in Europe. The European system of protection conceived by the Council of Europe is thus our main level and source of reference. In addition, non-binding instruments are significant sources in this domain. They furnish well-detailed guidelines – especially regarding specific rights of the institutionalised opposition – and also impulse the binding protection of rights of the opposition in Europe. These non-binding instruments are mainly studies, reports and recommendations elaborated by the Council of Europe and its bodies – especially opinions of the Venice Commission – and the Organisation on Security and Cooperation in Europe (hereinafter 'the OSCE') – mostly the so-called 'Copenhagen Document'<sup>70</sup> relative to human rights.

In the light of all above mentioned elements, showing the importance but scattered legal protection of rights of the opposition, a full picture of these rights can be elaborated.

### 2. 3 The rights of the opposition in a democratic society

The rights of the opposition are summarised in Table 1. This compilation have been elaborated based on the study of several materials previously mentioned, mainly the ECHR, decisions and judgements of the European Court for Human Rights (hereafter 'the

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68 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

69 Charter of Fundamental Rights of the European Union 2012

70 OSCE, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE' (1990).

ECtHR’) in cases relative to civil and political opposition<sup>71</sup>, non-binding guidelines instruments provided by the European Commission<sup>72</sup>, reports of the Venice Commission<sup>73</sup> and guidelines documents of the OSCE<sup>74</sup>. These rights have been considered being necessary prerogatives in order to fulfil the role and functions of the opposition in a democratic society, from the birth of opposition actors through its entire life and before, during and after elections. They form somehow a check-list in order to assess the state of the opposition in a given state. These rights are grouped in broader categories of rights (column 1), guiding the way they are protected under human rights standards.

Table 1: system of legal protection of rights of the opposition

THEMATIC	GUARANTEES
JUSTICE	Access to an independent judiciary ; treatment of political cases
	Access to independent institutions of control for electoral matter ; transparency of control
PARLIAMENT	<i>Parliamentary expression.</i> Freedom of expression of members of the parliamentary opposition, right to deliberate and contest.
	<i>Parliamentary participation.</i> Equal participation in all parliamentary activities : plenary and commission
	<i>Right to scrutiny.</i>
	Right to veto or delay important acts (constitutional and organic acts)

71 See later

72 European Commission, Compendium on International standards for elections (2007)

73 Venice Commission, Good practices in electoral matters (2002)

74 OSCE, ‘Copenhagen document’ (principles 6 to 10); OSCE, guideline for for the observation of legal framework on elections (2013).

	Protection against persecution and abuse
ELECTIONS	<i>Free participation in elections.</i> Right to periodic elections; right to stand for elections; right to associate in political party or movement
	<i>Free and fair electoral campaigning.</i> Equal treatment for public funding and controlling (transparency); equal and fair media coverage of the political campaign.
	<i>Fair electoral outcomes.</i> Equal suffrage (substantial and procedural); transparent and professional constituency's delimitation; fair and transparent counting of votes cast; transparency of results
MEDIA	<i>Media freedom for the political opposition.</i> Free and fair access to public media; respect of equal treatment during electoral campaign; right to publish/broadcast critical statements;
	<i>Media freedom for independent journalism.</i> Right to investigate; right to impart views and criticise; protection against persecution and abuse
CIVIL SOCIETY	<i>Access to information</i> of public usefulness. Right to seek, receive and impart views and information
	<i>Right to peaceful carrying of activities.</i> Right to create, join and participate effectively in NGOs; right to cooperate with other NGOs; right to receive legal donations from national and international source; protection against persecution and abuse

Source: Own compilation.<sup>75</sup>

Table 1 presents the compilation of the rights of the opposition, encompassing different types of prerogatives – from basic human rights particularly necessary for the opposition actor (freedom of expression, of association and assembly) to very specific rights, for instance, of the institutionalised opposition, on technical matters, etc. The picture tries to be as comprehensive as possible because all rights mentioned matter. The violation of one aspect of a right that could have appeared as ‘subsidiary’ into another analytical framework can annihilate core functions of an actor of the opposition. Technical

<sup>75</sup> See abovementioned sources

or financial obstacles, for instance, can lead to an uneven playing field for the political competition, which does not permit elections to ‘ensure the free expression of the opinion of the people in the choice of the legislature.’<sup>76</sup>.

Given the state of the legal protection mentioned earlier, scattered into different level and sources, the table allows to regroup all them in a structured overview. Also, rights enshrined in legal standards are often unclear, restricted to minimum elements. As such, the wording do not show the comprehensive protection that a right protects for the opposition actor, as this is rather provided by the enlargement of the protection elaborated by the jurisprudence of courts. A direct illustration of this is the wording of Article 3, protocol 1 of the ECHR, only mentioning three vague elements for the development of ‘free elections’: ‘reasonable intervals’, ‘secret ballot’ and ‘to ensure the free expression of the opinion of the people in the choice of the legislature’<sup>77</sup>. Further explanations on important aspects are discussed in the following.

## 2.4 Further explanations on legal guarantees

Neither the ICCPR nor the ECHR do explicitly protect ‘the rights of the opposition’. However, they do so each time a specific human right, absolutely linked to the effective exercise of functions of the opposition, is regarded by systems of protection. To ascertain this, the European Court of Human Rights (hereinafter ‘ECtHR’) expressed its commitment to protect democracy and the opposition several times, stating in its two Judgements on a case concerning political parties in Turkey that ‘there can be no democracy without pluralism’<sup>78</sup> and ‘democracy is without doubt a fundamental feature of the “European public order”...’<sup>79</sup>.

Some precisions regarding main human rights are made to clarify their scope, related legal provisions and specific importance for the opposition.

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<sup>76</sup> Article 3 Protocol 1 ECHR

<sup>77</sup> European Convention on Human Rights 1950. 3 Protocol 1

<sup>78</sup> Ibid. Para 89; para 44.

<sup>79</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey*, Judgment of 13 February 2003, para 86, and Judgment of 31 July 2001, para 45, quoting observations in the *Case of United Communist Party of Turkey v Turkey*, para 45 (see footnote 21).

Before all, the freedom of assembly and association appeared to be fundamental cornerstone for the rights of the opposition. Enshrined in Article 11 ECHR, Article 12 ICCPR and Article 12 EU Charter, this is notably protecting the right to associate into political party and Civil Society Organisation (hereinafter 'CSO'). The applicability of Article 11 ECHR to political parties became a principle within the European system, led by the extensive interpretation made first by the European Commission for Human Rights and followed by the Court: the ECHR affirmed that 'the conjunction "including" [in Article 11 ECHR] clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised'<sup>80</sup> and 'in the Court's view, (...) political parties are a form of association essential to the proper functioning of democracy'<sup>81</sup>. The freedom of association protects the establishment and carrying of activities of such associations: organisation and functioning and the right to make reunion. Without such scope, Article 11 ECHR 'would be largely theoretical and illusory if it were limited to the founding of an association'<sup>82</sup>. Following this, freedom of association also protects the ending of such associations, conditioning means to dissolve or prohibit political parties and associations. Thus, while several European states have developed provisions relative to the prohibition of certain types of political parties, this constitutes a violation if the state cannot justify that the interference into rights of the association is 'provided by law', has 'legitimate aim' and is 'necessary in a democratic society'.

Often in its case laws relative to the rights of the opposition, the ECtHR interprets Article 10 ECHR in conjunction with Article 11 ECHR, ruling that

... protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy<sup>83</sup>.

The freedom of association is also the vehicle for the freedom of expression and information, protected in itself by Article 10 ECHR, as well as Article 11 EU Charter and

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<sup>80</sup> *Case of United Communist Party of Turkey v Turkey* (1998) EHRR 24

<sup>81</sup> *Ibid* 25

<sup>82</sup> *Ibid* 34

<sup>83</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey* (Judgment of 13 February 2003) 88 ; (Judgment of 31 July 2001) 44.

Article 19 ICCPR. In the light of the opposition's purposes, the freedom to express political positions – including those that 'shock, offend or disturb'<sup>84</sup> – to comment, criticise and contest policies or propose other ones, is without equal weight in the effective exercise of its core functions. Given this importance, the European judge is even more vigilant when a claim on a violation of Article 10 ECHR is relative to the expression of political opinions. Two judgements against Hungary illustrate the protection of freedom of expression in the political sphere. In *Karacsony* case, the Court concluded to a violation of freedom of expression of the political opposition where parliamentary sanctions are imposed to members of the national Parliament for having disturb works in protesting against two legislative proposals<sup>85</sup>. The Court stressed that the freedom of expression of a member of the parliament is more than the general rights of any individual but is part of its function within its mandate.<sup>86</sup>

In *Baka* case, the Court concludes as well to a violation of freedom of expression, *inter alia*, for having prematurely make legally ceased the mandate of the president of the Supreme Court, after having expressed criticism concerning constitutional and legislative reforms. Far from contributing to the impartiality of the judiciary as the Government claimed, the Court considered the interference 'not necessary in a democratic society'<sup>87</sup>. The vigilance of the European Court is also increased relative to freedom of the press and independence of journalists, strictly protecting their critical judgement necessary in a democratic society. To do so, the Court clarified a distinction between 'value-judgements', that must remain free, and 'facts', that are remain objective.<sup>88</sup> The Court protects the fundamental function of the press 'to impart information and ideas on political issues just as on those in other areas of public interest.'<sup>89</sup> It also protects NGOs' freedom, which rights are mainly clearly stated in the OSCE Copenhagen Document.<sup>90</sup>

Political rights especially protecting the opposition are, first, specific rights protecting the parliamentary opposition and second, the general right to free elections.

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84 *Handyside v. United Kingdom* (1975) EHRR 49

85 *Karacsony and others v Hungary*, ECHR (2016) 161 1.

87 *Baka v Hungary*, ECHR (2016)

88 *Lingens v Austria*, ECHR (1986) 46

89 *Ibid* 41

90 OSCE, 'Copenhagen Document', 1990, Principles 10.1 ; 10.2 ; 10.3 and 10.4 (See Table 1 at thematic 'Civil society').



Concerning the parliamentary opposition, it is the Venice Commission's report on the role of the political opposition in parliament that offer a synthesis of common practice of European state on the matter. The parliamentary opposition is seen as the most important feature of check and balance in a democratic society, according to the ECtHR.<sup>91</sup>

In its report, the Venice Commission concludes in what it believes are the most important rights for the parliamentary opposition, that should be protected in all member states. This five guarantees are those duly referred in Table 1.<sup>92</sup>

Concerning the right to free elections, this human rights is encompassing various elements that protects effectively the political opposition in election and the free will of the people. Right to free elections emanates from the right to participate in public and political life, protected by Article 25 ICCPR. Article 3 of Protocol 1 ECHR does not provide a right to participate in elections but an obligation for states to organise them.

According to Article 3 Protocol 1 ECHR, elections has to be settled at 'reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'<sup>93</sup>. In comparison, Article 25 (b) ICCPR presents more precision, prescribing that elections must be 'universal', with an 'equal suffrage' and 'genuine'. The later adjective implies the notion of 'fairness of elections' also enshrined by the OSCE Copenhagen Document, in principle 6.<sup>94</sup> This implies national regulations relative to the electoral system and procedure to provide the conditions to run for a mandate without discrimination and with genuine opportunities to be elected. As such, prerogatives of the opposition are depending on the electoral system's configurations.

The Venice Commission states that, while European states enclose very different systems, a common practice exists, though. Requirement to enter parliament after elections, for instance, share same principle of representativity of the votes cast. Legal threshold to enter parliament is a very illustrative example of how different system and emergent common practice are treated by the Venice Commission and the ECtHR's interpretation of Article 3 Protocol 1 ECHR. The Venice Commission explains first that 'any sound conclusions as to the comparative merits of [thresholds] would have to take into

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91 *Karácsony and others v Hungary*, ECHR (2016)

92 See earlier Table 1 (Thematic 'Parliament')

93 Article 3 Protocol 1 ECHR.

94 OSCE, 'Copenhagen Document' 1990

account a complex set of different contexts associated with the numbers'.<sup>95</sup> Each threshold applied in a specific system would have different impact on the inclusiveness/exclusiveness of minor parties in parliament. Hence, the analysis has to be on a case-by-case basis, taking into account the particular context and conditions of application of such rules. In turn, the ECtHR confirmed Venice Commission's views. On one hand, the Court affirmed the 10% threshold (applied in Turkish elections) is in general a too high requirement, given 'a threshold of about 5% corresponded more closely to the member States' common practice'<sup>96</sup>. On the other hand, the Court was not persuaded that it prevented in itself the essence of rights enshrined in Article 3 Protocol 1 ECHR. For the Court, the recorded representative deficit of the parliament due to these 2002 elections might have come from not only the 10% threshold but specific contextual elements. In addition, correctives and other safeguards – namely the possibility to run as independent candidate and not having to reach such threshold and the possibility to form party-coalition – were relevant elements of the political system permitting to mitigate the effect in practice the threshold requirement.

This chapter formed the theoretical guideline to consider the human rights protection concerning the opposition in democracy. From a scattered protection given the very national and sensitive topic, it has been possible to sketch the picture of rights of the opposition. In the following Title, two political dynamics are studied as they make one confront the theoretical protection to anti-democratic politics.

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95 Venice Commission, 'Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament (Venice, 12-13 December 2008)' (2008) 5

96 *Yumak and Sadak v Turkey*, ECHR (2008)

## Title II. Defining anti-democratic threats

‘For reasons of strategic ambiguities, governments does not have a clear definition of democracy.’<sup>97</sup> The blur that divide democratic and non-democratic practices is an open door for more and more vagueness alimented by infamous political discourses and measures. Democratic principles and values are confronting the living nature of politics, that by the way, encloses the inherent motivation to conquest and keep as long as possible the political power. To circumvent constitutional democracy framework, anti-democratic leaders play with definition and concepts – such as ‘liberalism’, ‘people’s will’ or ‘legitimacy’ – and can progressively advance in parliament policies that weaken institutional checks and balances. This title wants to continue to sketch the theoretical framework necessary to observe the relationship between democracy and opposition. This time, the analysis passes on the other side of the line in analysing the treatment of the opposition within anti-democratic trends to understand better political dynamics that fundamentally undermine democratic aspirations. Through the focus on opposition actors, the title is willing to unveil legal and political strategies, assess threats against constitutional democracy and argue for the inherent aversion of certain political dynamics against pluralism and opposition. This participates to build theoretical foundations needed to understand particular political configurations and regime types, such as the current Hungarian regime.

For this study, two anti-democratic dynamics are chosen: nationalist-populist politics and political regime tipping into less democratic aspirations. These two phenomena encompass a range of interesting aspects, but the ambiguities they present with regard to the role of the opposition in a society are particularly interesting. Contrary to what it claims, populist politics is essentially a threat for European value of pluralism (Chapter 1). This pan of literature is interesting to weigh the blurring of lines, ideologically and politically, that populist leaders undertake. This first chapter tries to synthesize main important points that are particularly interesting for the Hungarian case that follows. In turn, contrary to what it seems, non-democratic regimes are not all adopting same ways to weaken rights of the opposition in society (Chapter 2).

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<sup>97</sup> Pat Lyons, *Adjectives of democracy : citizenship and political attitudes under socialist and liberal democracy in the Czech Republic*, Praha (Sociologické nakladatelství (SLON), 2013) 21, quoting George Orwell in 1946.

## Chapter 1. Populism as essentially anti-pluralist

Populism is a very controversial concept in the academic sphere. This is because it has been used as somewhat of a 'catch-all' word for years, targeting every anti-conformist politician who wins support via rhetoric manipulations. Yet, populism is not a catch-all notion and assigning to it a mere function of denunciation of any unwilling opponent would render the concept meaningless. For this present research, the populist phenomenon is interesting as it represents an anti-democratic trend, specifically at odds with the principle of pluralist democracy.<sup>98</sup> Opposition voices are particularly subject of attacks from populist rhetoric and politics, constituting one of the main threats for it today.

The populist literature has proved that the phenomenon encloses an ambiguous relationship with democracy and its institutions: populism is considered for some as both friend and foe of democracy<sup>99</sup>; its manifestations can be perceived as staying on the 'internal periphery of democracy'<sup>100</sup> or as absolutely violating democratic principles<sup>101</sup>. Studying populism as essentially anti-pluralist would probably unveil the very anti-democratic nature of populism, necessary to understand European developments and assess threats against the opposition actors. Especially because the Hungarian Prime Minister Viktor Orbán is identified as nationalist-populist<sup>102</sup>, political narratives and politics of the Hungarian ruling party *Fidesz* is used in this chapter to illustrate several general aspects of anti-pluralist populism (and already connecting the theoretical part with the case-study).

The present chapter explains first why populism can be seen as a great supporter of political pluralism (1.1). Then, both populist's rhetoric and politics are studied to stress the inherent aversion they enclose concerning democratic principles of pluralism, deliberation, opposition (1.2).

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98 Jan Werner Müller's book 'What is Populism' (2016) is an important reference to assess the anti-pluralist nature of populist rhetoric and politics, as some parts of the book specifically targets the question. It becomes a main source for this section. Yet, other literature are engaged, completing or contrasting arguments.

99 Cas Mudde, 'Are Populists Friends or Foes of Constitutionalism?', The Foundation for Law, Justice and Society (2013)

100 Benjamin Arditi, 'Populism as an Internal Periphery of Democratic Politics.' in Francisco Panizza (ed), *Populism and the Mirror of Democracy*. (Verso, 2005)

101 See most critical literature, for instance Nadia Urbinati, *Democracy Disfigured. Opinion, Truth and the People* (Harvard Press University 2014) and Pierre Rosanvallon, *La Contre-Démocratie. La Politique à l'âge de La Défiance*. (Seuil, 2006)

102 See, for instance, Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press, 2016) 37

## 1.1 Populism coming from the principle of pluralist democracy

Generally speaking, populism – as any other political ideology – is allowed to emerge because of the openness of a democratic society based on the principle of pluralism, freedom of opinion, deliberation. Both populist supply and demand can pop up and rise thanks to this configuration. In a free and pluralist democratic society, to exclude groups on grounds of opinion has to remain rigorously exceptional<sup>103</sup>. Yet for many, populists should be marginalised from the political arena and not invited into debates because of their radical and negative discourse. This seems contradictory and counter-productive: we cannot exclude opinions and expressions... On behalf of the protection of democracy! Jan-Werner Müller suggests that: 'as long as populists stay within the law – and do not incite violence, for instance – other political actors (and members of the media) are under some obligation to engage them.'<sup>104</sup>. In sum, populism *comes from* and *is* pluralism.

When we look at the contemporary rise of populism, in Europe for instance, populism appears as a product of what many scholars have described the crisis of representative democracy. This is due to a certain disconnection between the citizens and political decisions.<sup>105</sup> The people feel evinced from the political life. Such distancing is amplified by the complexification of levels of governance due to increasing socio-political international challenges. For the most critical scholars, the phenomenon would be negative consequence of the democratic crisis: 'a democratic pathology'<sup>106</sup> according to Pierre Rosanvallon. For others, populism responds to a real need of democracy and of the need to discuss how we conceive its institutions, its mechanisms, its quality. In the same manner as the 'discomfort caused by the arrival of a drunken guest at a dinner party'<sup>107</sup>, populist emancipatory perspectives disrupt the *status quo* on the presupposed well-functioning of consolidated democratic countries.

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103 For a brief understanding of conditions, see ECHR – press unit 'factsheet political parties and associations', 2016  
Available at : <https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=fr>

104 Jan-Werner Müller, *What Is Populism* (University of Pennsylvania press 2016) 59

105 See, for instance, Pierre Rosanvallon, *La Contre-Démocratie. La Politique à l'âge de La Défiance*. (Seuil, 2006) 16 and 279

106 Ibid 279

107 Benjamin Arditi, 'Populism as an Internal Periphery of Democratic Politics.' in Francisco Panizza (ed), *Populism and the Mirror of Democracy*. (Verso, 2005) 91

Yet, as Müller explains, ‘populism is not a useful corrective for democracy’<sup>108</sup>: It does not fortify democracy. In reality, populism ‘does not disperse power and put in practice direct democracy; rather it concentrates power’<sup>109</sup>.

## 1.2 Populism essentially attacking the principle of pluralist democracy

### *Anti-pluralist rhetoric*

Before all, populists present a non-pluralist vision of the society: for them, ‘the people’ seems to be considered as a unique and homogeneous set of individuals. This conception is a total illusion and a political manipulation. It is an illusion because the people of a territory comprise a diversity of individuals, who are free to think, believe, form an opinion and express it in a democratic society. As Jürgen Habermas stated once, the people is not singular but has to be put in plural<sup>110</sup>. Populism is thus anti-pluralist as it considers the people as part of a unique way of thinking. Such rhetoric is also a dramatic political manipulation. To see the people as such does not come from a naive idealisation of the society<sup>111</sup>. Rather, they use this rhetoric as a Machiavellian tactic: it allows them to determine for themselves a conception of the ‘real people’ with the goal of excluding whomever they wish. In general, any opponent – political party members, independent journalists and civil society organisations – are excluded from the ‘real people’ – those ‘good’, ‘pure’ and ‘hard-working’<sup>112</sup>. For populist, the opposition is the ‘corrupted elite’ – those ‘immoral’, ‘bad’ or ‘parasites’<sup>113</sup> – and acts against the interests of the ‘Nation’.

Conspiracy theories, delivered through mass media, are great tools to make the public opinion believe in such cleavage between the ‘truthful’ and the ‘threatening’ people. In Hungary, for instance, NGOs are all said to be under the rule of Georges Soros<sup>114</sup>,

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108 *ibid.*P.13

109 Urbinati 131-132

110 Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt am Main. (Suhrkamp, 1994) 607

111 The use of the term ‘ideal people’ or ‘idealisation’ is very present within the literature, including in Müller’s book. We suggest to refrain to use this, as this could make think that populists are just naive.

112 Müller 21

113 Nicolas Maduro, quoted in Müller 14

114 Georges Soros is Hungarian-american retired trader. Because he is also philanthropist and finance organisations working for democracy and Human rights, he became the target of the conspiracy theory elaborated by Viktor

acting against the national interest and to facilitate Western domination<sup>115</sup>. Criteria taken to proceed to the division of the society are often of discriminatory natures in right-wing populist rhetoric, such as nationality, ethnicity, language or religion. Fidesz and Jobbik Hungarian political parties regularly target Hungarian Jewish and Roma communities as undermining interests of the – white and Christian – nation<sup>116</sup>.

According to the formula of Claude Lefort, individuals allowed to belong to the great people of the nation have to be ‘extracted’<sup>117</sup> from the totality, according to a particular image against value pluralism. Populism would not only refer to political claims defending to speak on behalf of the people but to those evidencing that only a part of the people as ‘the people’<sup>118</sup>. In sum, we agree with Müller’s following statement: ‘the core claim of populism is thus a moralized form of anti-pluralism’<sup>119</sup>.

Seeing ‘the people’ as a homogeneous whole, it is sufficient to have a unique representative of ‘their’ interests. Often presenting their political programmes as drafted in line with ‘the true popular will’, populist parties explicitly advance the idea that there is only one acceptable political programme to support. For instance, Viktor Orban has not participated in any public debate on television since 2006<sup>120</sup>, often explaining that it is of ‘common sense’ to know what has to be done<sup>121</sup>. In fact, this claim on ‘exclusive representation’ of the citizens into the instances of power: ‘populists claim that they, and only they, represent the people.’<sup>122</sup> This resonates strongly with Viktor Orban’s statement made after his loss in the 2002 elections: ‘The Nation cannot be in opposition’.

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Orban’s political party. This theory is also spread and used in other populists parties of the region, such as in Slovakia.

115 See, for instance, Griff Witte, ‘Once-Fringe Soros Conspiracy Theory Takes Center Stage in Hungarian Election’ [2018] Washington Post. (See later, Part II, Title 2, Chapter 1 : *media capture and hostile campaigning*)

116 See, for instance, European Union Times, ‘Hungarian Fidesz Eyes 2010 Elections: Gypsies, Jews, Homosexuals Beware’ (21 October 2009) <http://www.eutimes.net>; Roma population targetted by Jobbik far-right party by statements on ‘gypsy crimes’

117 Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge Polity, 1988) 79

118 Ibid 20

119 Müller 19

120 Hungarian Free Press, ‘Forcing Viktor Orban to debate his opponents through legislation’ (13 February 2018). Available at : <http://hungarianfreepress.com/2018/02/13/forcing-viktor-orban-to-debate-his-opponents-through-legislation/>

121 Müller 23

122 Ibid

Given this conception of exclusive representation, a full rejection of the whole set of political actors is undertaken. This type of rhetoric is especially intense during electoral campaigns in order to appear as the only alternative and to win voters. Populists' pitches follows a regular pattern of delegitimisation of the political opposition: the whole current political landscape – to the exception of themselves – is formed by all the same corrupted politicians who do not speak nor act for the interests of the great people but in their own 'caste interests'<sup>123, 124</sup>.

During the 2014 and 2018 electoral campaigns, the Orban government constantly discredited all party leaders of the opposition.<sup>125</sup> In 2018, public advertisements shown them all around the figure of Georges Soros, holding pairs of pliers: the so-called 'Soros agents' were apparently ready to cut the Hungarian anti-migrants fence built by the government to defend Hungary against an 'invasion'. Nevertheless, such denigration continues even after elections, whether populist politicians are sat on the bench of the opposition or part of the government. In opposition, they are isolated and alone. Once in power, populist rulers will reject any form of institutionalised opposition, considered illegitimate. In sum, populists are in opposition against all but themselves.

### *Anti-pluralist politics*

According to Nadia Urbinati,

Populism (...) is a certain political style or set of rhetorical tropes and figures, but it also seeks state power to implement an agenda whose main and recognizable character is hostility against liberalism and the principles of constitutional democracy, from minority rights, division of powers, and pluriparty system. Populism is a radical contestation of parliamentary politics...<sup>126</sup>

The populist conception of 'exclusive representation' is intensified once in office: they understood the people and the people understood and elected them. Hence,

123 La France Insoumise, 'L'avenir en Commun. Le programme de la France insoumise et de son candidat Jean-Luc Mélenchon' Online Version, Self-translation (2016) Available in: <http://laec.fr/>

124 See later Part II, Title 2, Chapter 1 (on hostile campaigning in Hungary)

125 See Part II, Title I, Chapter 1.

126 Ibid 128-129



confrontation of ideas within public debates and parliamentary deliberations are more and more seen as unnecessary and reduced as much as possible for populists.<sup>127</sup> This is reinforced by their so-called belief that they receive an 'imperative mandate'<sup>128</sup> from the people: their acts would be fully committed to the will of the great people, and for no reason they could divert from it. This creates what Freedon calls a 'decontested democracy'<sup>129</sup> in which 'awkward questions are swept under the ideological carpet'<sup>130</sup>.

The populist's way of thinking a government is based upon a strict majoritarian conception of democracy. This is key aspect to understand the magnitude and shape of the threat populists in power are posing, regarding rights of the opposition in minority into Parliament.

The majoritarian conception of democracy has two faces with regard to principles of representative democracy. On one side, the majority rule is remaining a foundational principle for modern constitutionalism. It is a practical response to: How to decide when the people is in disagreement if democracy is the government of the people for the people? On the other side, inherent limits of the majoritarian conception of democracy have been stressed for so long. Probably, the most known for pointing out limits of the majoritarian rule is Alexis de Tocqueville, who warned new Western democracies on the risk of the 'tyranny of the majority'<sup>131</sup> that would present the concentration of power into the legislative body.<sup>132</sup> According to the philosopher, the 'tyranny of the majority' is a phenomenon in which the majority is 'all-powerful' and does not respect barriers settled by 'Justice' and '*raison*' and '*droits acquis*'.<sup>133</sup> For John Stuart Mill, the majoritarian conception of democracy is the main threat within consolidated democracies and these have to protect themselves from it.<sup>134</sup>

Arend Lijphart and Ronald Dworkin have both proposed divergent modern conceptions of democracy aimed to overcome the limits of the majoritarian model. The former compared majoritarian and consensual democracies through a list of ten different

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127 See later Part II, Title 1, Chapter 1 (on the Hungarian opposition in parliament)

128 *ibid* 24-26

129 Freedon, as referred in Margaret Canovan, 'Taking Politics to the People: Populism as the Ideology of Democracy.' in Yves Mény – Yves Surel (eds.), *Democracies and the Populist Challenge*. (Palgrave, 2002) 25-44

130 *Ibid*.

131 Alexis de Tocqueville, *De la Démocratie en Amérique*, tome 1, Paris. Self-translation. (Flammarion, 1981) 230

132 *Ibid*

133 *Ibid* 518

134 John Stuart Mill, *On Liberty* (1859) 65-66

characteristics<sup>135</sup>. This list evidences the lesser democratic nature of the majoritarian conception of democracy than the presupposed, provoking, *inter alia*, 'the concentration of executive power in single-party majority cabinets'<sup>136</sup> and 'executive-legislative relationships in which the executive is dominant'<sup>137</sup>. In turn, Ronald Dworkin explains despite the fact that 'the majority vote has great importance'<sup>138</sup>, to govern by majority is not in line with 'the idea that democracy is self-government'<sup>139</sup>. The majoritarian model of democracy sometimes has to be rejected because other principles are also of great importance, such as 'justice or individual rights'<sup>140</sup>. The author concludes with the strong affirmation that 'we should reject the majoritarian conception of democracy because it doesn't state anything of intrinsic value.'<sup>141</sup> In line with Lijphart, Dworkin chooses to promote another model of democracy that would also allow a broader diffusion of the political power, basing the decision-making process on cooperation. Its 'partnership democracy'<sup>142</sup> is 'a government by the people as a whole acting as partners in a joint venture of self-government'<sup>143</sup>.

Nadia Urbinati demonstrates the connection between populism and limits of the majoritarian conception: populist demagoguery is precisely changing the 'majoritarian rule' into 'the rule of the majority'.<sup>144</sup> According to the author, the way the opinion of the parliamentary majority is 'unified' and publicly 'exalted' make that the assembly directly translates into law this specific opinion without any compromise.<sup>145</sup> In this context, one could say that the 'tyranny of the majority'<sup>146</sup> takes all its sense in populist parliamentary regimes. The principle of the majority rule as applied in liberal democracy is emptied of its sense because populists will deny, *inter alia*: that a decision could have been taken in

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135 Arend Lijphart, *Patterns of Democracy* (1999) 3-4

136 Ibid 4

137 Ibid

138 Ronald Dworkin, 'What Is Democracy?' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*. (Central European University Press 2012) 31

139 Ibid 32

140 Ibid 31

141 Ibid

142 Ibid 30

143 Ibid 26

144 Urbinati 139-140

145 Ibid

146 Alexis de Tocqueville, *De la démocratie en Amérique*, tome 1, Paris. (Flammarion, 1981) 230

another way; that another future majority can change the decision; that constitutional provisions cannot be changed by way of majoritarian rules and the constitutional review of laws is a fundamental barrier against the passions of the legislative body.<sup>147</sup> All the contrary, there is one way, one politics; the rest does not mean anything. The populist majority can oppress rights of the opposition until restraining the deliberative process like authoritarian regimes.<sup>148</sup> The Parliament becomes a mere registration chamber, emptied of its main prerogatives such as the proposal of laws, the assembly only acknowledging and registering the governmental policy. No internal disagreement from party members is permitted: the parliamentary majority executes orders coming from the head of the party ruling.

Actually, one main characteristic of populism is that it tends to the personification of power into the head of the political party. Presented as the strong leader that people would need to make the country great again, he (populists leaders are mostly all male) is concentrating individual aspirations into his own person. Representative democracy changes into a form an 'audience democracy'<sup>149</sup> or 'plebiscitarian democracy'<sup>150</sup>: a democratic system where the social function of control is progressively lost due to the general infatuation the political leader provokes, presented as being part of the people, having a 'real' personal rapport with them and meriting the people's confidence. Once elected, the leader has to be followed because he – and not his party – received all the confidence or trust of *his* people and then he has to lead *his* parliamentarians in the right way. The personification of power and the aversion for democratic checks and balances that populism encloses threaten democratic institutions needed to disperse and control the executive power.

This present chapter focused of the populist disdain for political pluralism and opposition. Both populist rhetoric and politics constantly discredit and then effectively reduce checks and balances needed in constitutional democracy, that prevent the confiscation of power into the hands of one. The majoritarian conception of democracy and reduction of deliberation render impossible concerted decisions that would respect rights of the opposition. Nevertheless, this willingness to annihilate opposition and political

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147 See later Part II, Title 1, Chapter 1 (on the Hungarian opposition in parliament)

148 See later Chapter 2 (on non-democratic regimes)

149 B. Manin, referred in Benjamin Arditi, 'Populism as an internal periphery of democracy' in Francisco Panizza (ed.), *Populism and the Mirror of Democracy*. Verso, (2005) 72-98

150 Nadia Urbinati, *Democracy Disfigured. Opinion, Truth and the People* (Harvard Press University 2014). Chapter 4  
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competition of ideas are never claimed by political actors. Unlike in totalitarian type of regimes, populists in power permit 'formal pluralism', keeping institutions of control and participation in place. In the following, populist literature is left to pass somehow to another step on the anti-democratic trends: chapter 2 assesses non-democratic regimes under the way each types of regime is treating the opposition.

## **Chapter 2. Spectrum of non-democratic regimes and restriction of rights of the opposition**

In its willingness to determine the very nature of former and contemporary political regimes, regime typology literature is as complex as realities are. Patterns are difficult to conceptualise and scholars have focused their research on specific elements and specific cases. This provided new criteria and new regime types that render discussions more complex and more divided. Trying to render the literature more confluent, 'hybrid regime'<sup>151</sup> has been used to encompass any regime that is neither a 'dictatorship' nor a 'democracy', filling the void provided by such dichotomy. Yet, it is not acceptable for a concept to fully falsify realities: this residual approach of 'hybrid regime' does not present the nuances the internal characteristics and dynamics regimes enclose.

This chapter demonstrates that the complexity of regimes can be diminished if we observe directly the fundamental element giving the oxygen to democracy that is the opposition. Indeed, the existence and shape of the political arena is crucial for the establishment of a certain type of regime. Authoritarian leaders have almost illimited possibilities to threaten rights of the (present and potential) opposition as means change in very different forms and intensities. Sometimes, the space for a democratic opposition is rather unclear, ambiguous; especially within no-democratic regimes that still conceive a façade of democracy. However, it is still possible to identify main obstacles faced by opposition actors. This chapter evidences that the observation on the various obstacles faced by opposition actors is a straightforward indicator, erasing ambiguities regimes conceive. It allows to assess regimes in theory and then compare this framework to concrete regime developments, such as in Hungary. In addition, the study of challenges of the opposition is a base to be able to think about its potential opportunities and possible strategies within the given political context.

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<sup>151</sup> See Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*. New York. (Cambridge University Press 2010)

## 2.1 Non-democratic regimes and opposition

Kenneth Greene notes that 'slowly but surely, the comparative study of dictatorship seems to be rediscovering the full range of authoritarian means of domination.'<sup>152</sup> Restrictions on political pluralism and electoral competition can take very different shapes. These can go from the most repressive and violent state action – killings of political opponents, as the most obvious example – to a legal and non-provocative 'incumbency advantage'<sup>153</sup> – better media coverage to the governing party candidate due to its current political mandate, for instance. Consequently, the category of non-democratic regimes would encompass regimes types from those ranging from the full annihilation of any opponents present in the society, till those providing for very ambiguous political attitudes with regard to opposition forces. This leads to the following types: totalitarian, authoritarian and competitive or electoral authoritarian regimes (hereinafter 'EAR').

By definition, totalitarianism is a political system that considers the society as one and homogeneous and represented by a unique political party. It does not admit any divergent idea and opinion from the official state ideology. Indeed, the State is willing to control all aspects of the society : political, economic, social, cultural, religious or ideological, etc. The opposition is expeditiously destroyed by state terror and violent police; and even when the opposition is already crushed, state terror still occurs and new enemies are targeted; the Nazi regime was willing to exterminate Ukrainian, Polish and Russian people after the extermination of Jews.<sup>154</sup> In sum, totalitarian regimes are fundamentally anti-pluralist as they organise a unique model of mentalities and constantly destroy those that are considered not part of the homogeneous society. Totalitarianism is the opposite of pluralism, and also the opposite of democracy.<sup>155</sup>

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152 Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective* (Cambridge University Press 2007) 57

153 Ibid

154 Hannah Arendt, 'Totalitarianism' in *The Origins of Totalitarianism*. 3rd volume. (Harcourt Brace & Co., New York, 1951)

155 Brigitte Studer, « Totalitarisme », *Encyclopædia Universalis*. (2018)  
<http://www.universalis.fr/encyclopedie/totalitarisme/>

Authoritarianism has been defined by Juan Linz in his work on Franco's Spain.<sup>156</sup> Its definition remains the well-accepted conception of so-called 'conventional authoritarianism'. According to Linz, authoritarianism is 'neither democratic nor totalitarian'<sup>157</sup>. It does not organise a total ideological constraint over the citizen; however, it provides for a very limited space for pluralism through the confiscation of mass media, for instance. Authoritarian regimes can sometimes conceive opposition; but it is limited to a particular format, such as forms of intra-opposition. Opposition is never institutionalised into political parties. And there is no mass political mobilisation.<sup>158</sup> For Steven Levitsky and Lucan Way, mostly opposition forces and elections do not exist in this type of regime.<sup>159</sup> However, if an opposition does exist, it is however excluded from electoral competition, or can participate but is blocked by violent repression ending into imprisonment and/or exile<sup>160</sup>. In any case, the 'pseudo-opposition'<sup>161</sup> does not destabilise the hold on power that the incumbent has. Hence, the clear cut between authoritarianism and democracy.

Electoral authoritarianism is a less obvious type of regime belonging to non-democratic regimes, first mentioned by Juan Linz.<sup>162</sup> The concept tries to catch the ambiguities issued from the will of authoritarian leaders to blur the lines between democracy and authoritarianism. To put it simply, the regime organises formal democratic institutions, mainly periodic and multiparty elections, but authoritarian means are employed to reduce chances of the opposition to win.<sup>163</sup> It can be said that it organises a *non-closed* non-democratic regime, in contrast with Juan Linz's conception of '*closed* non-democratic regimes'.<sup>164</sup>

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156 Juan Linz, 'An Authoritarian Regime: Spain.' in *Mass Politics: Studies in Political Sociology*, Eric Allardt and Stein Rokkan (eds. ). (New York Free Press, 1970) 255

157 Ibid

158 Ibid

159 Steven Levitsky and Lucan A. Way. *Competitive Authoritarianism: Hybrid Regimes after the Cold War*. New York (Cambridge University Press, 2010) 365

160 Ibid

161 Juan Linz, *Totalitarian and Authoritarian Regimes*. Boulder. (Lynne Rienner, 2000) 168

162 Ibid

163 Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective* (Cambridge University Press 2007)

164 Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: South Europe, South America and Post-Communist Europe*. Baltimore. (John Hopkins University Press, 1996). 'Politically *closed* non-democratic regimes' are regimes that does not permit political competition ; it encompasses : 'totalitarian', 'post-totalitarian', 'authoritarian', and 'sultan' regimes.

While EAR are considered as having existed since the nineteenth century<sup>165</sup>, the end of the Cold War provoked the rise of this regime type: the fall of communist regimes has been more complex than a linear transition process from authoritarianism to democracy; the transitional process has even been described as a slight movement from authoritarianism to *less* authoritarianism:

...the fall of the Berlin Wall marked a historical turning point in the authoritarian management of representative institutions. It triggered a broad shift from selective to comprehensive institutional concessions, and thus from selective to comprehensive institutional manipulation.<sup>166</sup>

It is stupefying to record that a number of current EAR were born not directly from authoritarian regimes but following a political and institutional democratic period, in which no pattern of authoritarianism seemingly remained. The impact of the political turn was able to make the regime fall into authoritarianism – through the adoption of regressive constitutional reforms disrupting the balance of power and interfering into the independence of democratic institutions.

Electoral authoritarianism became an independent and fully conceptualized regime type by the publication of *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* in 2013 by Andreas Schedler<sup>167</sup>. It detached the concept from conventional authoritarianism and avoided vaguely categorising these authoritarian regimes with elections as 'hybrid' nor 'non-democratic regime' - two concepts unable to point nuances provided by the relative openness due to the preservation of 'elections'. The following discussion about electoral authoritarianism is mainly based on this book.

## 2.2 Contradictory features of electoral authoritarianism

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<sup>165</sup> Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (Oxford University ed, OXFORD STU, 2013)

<sup>166</sup> Ibid 60

<sup>167</sup> Andreas Schedler edited *ibid.* but the publication of 2013 provides an non precedent extensive conceptualisation of the regime type.

According to Andreas Schedler, an electoral authoritarian type of regime is distinctive because of its two fundamental aspects: (1) the regime provides the comprehensive set of formal institutions that are in place in well-functioning democracy; (2) authoritarian measures are employed to constrain these institutions and increase the chance to retain political power.<sup>168</sup> Electoral authoritarianism would be a form of non-democratic regime stabilised through the *prima* of institutionalisation, implemented before all by constitutional reforms.<sup>169</sup> Schedler defines two types of institutions present in an EAR: ‘...a *contingent* set of institutions of domination with a *comprehensive* set of institutions of representation, subject to authoritarian manipulation’<sup>170</sup>.

On one hand, ‘institutions of domination’ permit to keep and exercise the power by the settlement of repressive, economic and ideological institutions. Repressive institutions, supposed to be conditioned by the rule of law in liberal regimes, are in this context, the reflection of the bureaucratic organisation of state violence.<sup>171</sup> Economic institutions<sup>172</sup> and cultural institutions<sup>173</sup>, while implementing pluralism in liberal society, will serve to aid the confiscation of power via the provision of financial support and organised suffocation of divergent voices.<sup>174</sup>

On the other hand, ‘institutions of representation’ are set up giving all its ambiguity to the regime in its relationship to opposition forces. Andreas Schedler explains: ‘while institutions of domination are congenial to the authoritarian project, modern autocracies often incorporate formal political institutions that seem puzzlingly incongruent with their nature.’<sup>175</sup> Formally, these institutions are those traditionally associated with ‘liberal’, ‘democratic’, ‘representative’ systems: parliament of elected representatives; periodic, free, multi-party elections at national level; universal suffrage; and a ‘political arena’ for electoral competition where the opposition exists and can act; possible mass mobilisation, etc. As such, their presence implement *de facto* pluralism and political competition, to a certain extent. However, these ‘institutions of representation’ are not considered democratic due to

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168 Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (Oxford University ed, OXFORD STU, 2013) 54

169 See later, Part II, Title 1, Chapter 1, Section 1.1 (on the opposition excluded from the constitutional framework)

170 Ibid 54 (emphasis added)

171 See later, Part II, Title 1, Chapter 1, 1.3 (on arbitrariness of Hungarian state institutions towards the opposition)

172 See Ibid 58

173 Ibid. Primarily ‘mass media’ and ‘educational system’, but also ‘associative, sportive and cultural entities’.

174 See later, Part II, Title 2, Chapter 1 (on media capture and denial of access for the opposition)

175 Ibid 59



the employment of non-democratic means that reduce their effectiveness in forming a check and balance' mechanism and a great protector of pluralism. The opposition has indeed diminished chances to have an impact.

The parliament, for instance, is prevented to be the place *par excellence* of the democratic contradictory debate, because of legal and political changes. These reforms include, *inter alia*: reduction of time allowed to plenary debate; denial of right to question members of the government; reduction of time dedicated to preparatory works in commissions; no respect of political parity into commissions, etc.<sup>176</sup> Such aversion for constitutionalism and political pluralism can lead to additional methods to oppress the opposition that are even more straightforward authoritarian ones, such as the threatening, harassment of members of the opposition or suspension of mandate, for instance.<sup>177</sup>

Through reforms of the electoral process – by electoral law, electoral procedure and also media law –, the ruling party implements a biased system. This is done via very different means, such as: too high requirement for electoral registration that impose a disproportionate burden for opposition candidates; restrictive conditions to run campaign; confiscation of public funding system, etc.<sup>178</sup> In this system, democratic institutions are formally in place without the democratic 'spirit'.

In sum, we can categorise a regime as an EAR where: (1) it is not democracy; (2) it is not conventional authoritarianism; nevertheless, (3) it is still a form of authoritarianism. It is not democracy because of authoritarian means of reducing the efficiency of checks and balances; it is not conventional authoritarianism because of the democratic features integrated that would never appear in such a regime, such as elections and a relative political competition; but the regime is still considered being a form of authoritarianism – rather than a form of democracy – because of the level of manipulation presented. Indeed, 'electoral contests are subject to state manipulation so severe, widespread, and systematic that they do not qualify as democratic'<sup>179</sup>. The party-ruling retains a significant 'incumbency advantage'<sup>180</sup> which is considered bypassing a certain level compared to

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176 Venice Commission, 'report on the role of the opposition in democratic parliament', 2010

177 Ibid

178 See later, Part II, Title 1, Chapter 1, 1.3 (on the Hungarian opposition disadvantaged by the electoral system)

179 Andreas Schedler, 'The Logic of Electoral Authoritarianism', in *Electoral Authoritarianism: The Dynamics of Unfree Competition*, Andreas Schedler (ed.) 1-23, Boulder (Lynne Rienner, 2006) 3

180 Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative*

democratic regimes that still respect a true electoral competition all over its development – pre-election, during elections and post-elections.

The demarcation between (electoral) democracy and electoral autocracy is complex since scholars would have to agree on when and why a regime with elections reaches the curving point where it shifts from one to another regime type. In truth, it is all a question of practical degree of competition. The more the regime uses ‘full’ authoritarian means of restriction, the more limited is the space for the opposition in the given regime; and vice-versa. On the spectrum, the ‘non-democratic regimes’ category is considered to start appearing exactly on the point where fair participation into political competition is not permitted because of a significant degree of state manipulation. Thus, for Levitsky and Way, ‘the existence of a reasonable level playing field between incumbents and opposition’<sup>181</sup> would be an indispensable criteria for a finer definition of democracy.

The contradictions of such a political system does not come by pure chance, but is the product of strategic planning made by the government. As Schedler explains:

the far-reaching formal–institutional concessions they make to the liberal–democratic heritage represent the last line of authoritarian defence in a long history of struggle that has been unfolding since the invention of modern representative institutions.<sup>182</sup>

Putting a veil of democracy on the authoritarian regime provides an internal and international ‘veil of legitimacy’<sup>183</sup> to the government, while operating a basic confiscation of power. The establishment of such an institution also provides a controlled outlet for opponents’ political frustrations, aimed to prevent violent forms of opposition, such as rebellion or coups. Actually, contemporary authoritarian rulers choose ‘electoral authoritarian rule (...) as their third-best alternative’, given their establishment as ‘head of

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*Perspective*, New York (Cambridge University Press, 2007)

181 Steven and Lucan A Way Levitsky, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (New York: Cambridge University Press 2010) 6

182 Ibid 59

dynasty' or 'chairperson of single parties' is not a possible option<sup>184</sup>. Measuring the level of fair competition is a difficult enterprise and formal institutions of democracy sufficient – to a certain extent. Elections are only a facade for needed democratic threads. In reality, it is the theatre of the governmental treachery.

### 2.3 Uncertainties on regime trends

In Schedler's book, a consequential feature of this regime type is extensively developed and called 'the politics of uncertainty'.<sup>185</sup> The uncertainty presented by the regime is particularly fundamental as it opens doors to the analysis of various internal and external dynamics that forms pivotal points in the development of the regime – its sustaining or its change. The theoretical framework on uncertainty is crucial to determine key factors potentially influencing the regime trend.

According to the author, EAR face two types of uncertainty: (1) 'institutional uncertainty', as they are never totally sure about their hold on power and so have to constantly to be reactive to threats on their power; and (2) 'informational uncertainty', as leaders are never sure about the level of reliability on information they receive and perceive relative to their grasp on power. As a second step, Schedler explains that an EAR suffers from an even more intense level of uncertainty than the one presented within conventional authoritarianism. This is due to its institutional ambiguity to convene the whole liberal democratic institutional *apparatus*, even if only on paper.<sup>186</sup> Indeed, 'electoral authoritarianism does not offer absolute protection. It is not a source of tranquillity...' <sup>187</sup>. While 'in autocracies, the existence of a legal opposition is inconceivable'<sup>188</sup>, electoral authoritarianism lets open the regime to a possible subversion allowing to proceed elections. These are somehow competitive, with the introduction of different 'actors, resources, strategic options, relation of conflict, and relation of dependence'<sup>189</sup>.

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183 Ibid 173

184 Ibid

185 Ibid 37

186 Ibid, Chapter 4 'Two levels of struggle' 112-140

187 Ibid 173

188 Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press, 1999) 149

189 Ibid 117

The level of uncertainty will be shaped by the 'political game', encompassing both choices made by the incumbent to reduce probabilities of being subverted and choices the opposition takes to compete as better as it can within a shrinking space. If the opposition decides to play along, it does so in 'an asymmetric game'<sup>190</sup> that is to its disadvantage. Necessarily, the opposition has to make calculations to challenge the government both on the institutional level – contesting the electoral system as such, for instance – and on the electoral arena – determined to win votes cast.<sup>191</sup>

Importantly, this level of competition depends whether all opposition actors are touched by manipulations or some are still in capacity to have a significant weight. For instance, media and the civil society can remain active without interference from the government. These would constitute independent institution, capable to control political developments and spread awareness within the society.<sup>192</sup>

## 2.4 List of potential obstacles faced by the opposition in EAR

Based on the theoretical framework provided by Andreas Schedler's book, other researches on authoritarian means, reports that have observed common practices in authoritarian regimes, this chapter concludes in suggesting a non-exhaustive list of main obstacles and challenges opposition actors could confront because of a political system aspiring to non-democratic practices. These are general challenges due to legal and political circumstances, necessarily disrespecting the role of the opposition in the political society and essentially altering the representativeness of state institutions. It is an indicative list that could be used to check any political regime. Items could be compared to what is concretely in pace in a given system, confirming the regime type and trend and stressing original strategies of the regime that have been picked in the menu of possible manipulations.

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190 Ibid 113

191 Ibid and following pages

192 See later Part II, Title 2

- No independent judicial and extra-judicial remedies in case of political case and electoral grievance;
- reduction of prerogatives for parliamentary opposition (parliamentary expression, control and participation, immunity);
- disproportionate requirement for the creation of political party or association, new media outlet and/or watchdog NGO;
- Too high administrative electoral requirements to stand in elections (ie unnecessary burden);
- Too low administrative electoral requirements to stand in elections (eg unfair competition; registration of fake parties or 'business party'<sup>193</sup>);
- Biased electoral system (eg gerrymandering; high threshold to enter parliament; disadvantaging or fraudulent vote counting and impunity);
- fragmentation of the political opposition (by the implementation of unfavourable rules or by own political configuration);
- Unequal treatment of the media (unequal access, unequal coverage, subjectivity of contents)
- Hostile campaigning, vilification of the opposition;
- Censorship and self-censorship of journalists (because of control, intimidation and/or persecution);
- Disproportionate restrictions of public demonstration (eg too strict legal protection of the 'public order', intense police presence and intimidation of protestors, etc);
- persecution of the opposition (eg inspections, arbitrary fines, economic pressures, violent repression).

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<sup>193</sup> 'Business parties' refer to political parties that are created few months before elections. These enjoy public campaign funding without truly running campaign. The misappropriate funding and disorientate the electorate.

In this chapter, the effectiveness of the opposition within non-democratic regimes is depending on the degree of restrictions and manipulations the rulers implement. Its capacity to emerge, carry activities of control and protest, compete in elections, determine the nature of the regime. Given that electoral authoritarianism is characterised by a significant level of uncertainty of its own regime trajectory, there is always the possibility to be sustained or subverted. This depends on various factors and dynamics in place in a specific political context. Indeed, while common patterns on regime trends can be sketched given the level of manipulation, original dynamics are fundamental factors to expect to draw political strategies in favour of subversion and trajectories.

## **Part II. Illiberalism and opposition: a case-study on Hungary**

The current state of Hungarian democracy shows, despite itself, the necessity of granting the genuine attention opposition actors deserve. For the last eight years, Viktor Orbán's government has been working for a democratic de-consolidation and neither Hungarian institutions of checks and balances nor Hungary's EU membership have been capable to put an end to such systemic backsliding on democracy and human rights. More than elsewhere, the opposition can be considered as the last bastion of democracy against authoritarian abuses of the current Hungarian ruling party.

The original Hungarian context is put under light in a comprehensive study of the state of the opposition in the country, as this present case study seeks to assess the Hungarian opposition's effectiveness and practical opportunities. For this, there are mobilised democratic theories, legal guarantees' framework and non-democratic trends' studies as presented in the previous theoretical part. Fundamental guarantees that should protect the opposition in Hungary are discussed under the light of the various challenges it concretely confronts. Such equating of fundamental rights and obstacles allows a more specific characterisation of the regime as it stands today. More importantly, the application of regime theories to the Hungarian contemporary experience is a necessary step to develop the analysis on the current (and potential) opposition and regime's trends.

First, the present case study is willing to explain to what extent the original Hungarian democratic backsliding corresponds with the weakening of one key feature: the opposition (Title 1). A comprehensive study of legal, political and social challenges is presented, catching the full picture through another lens. Then, the focus will be narrowed on two crucial challenges. Indeed, deeply affecting the Hungarian opposition in the long run and so influencing the Hungarian regime's trend, media capture and attacks on civil society organisations are object of further considerations (Title 2).

## **Title I. A shrinking space for the Hungarian opposition**

The opposition in Hungary is far from being situated in a peaceful contradictory debate. Since the Hungarian Prime Minister has changed the political line of the *Fidesz* more toward conservatism, nationalism and xenophobia, he does not cease to express an anti-pluralist conception and act against all that would be against him. This first Title will comprehensively evaluate the weakening of opposition's capacities in confronting the illiberal trend in Hungary. This will not provide another overview on the current Hungarian situation, rather a focused perspective stressing what *Fidesz* and its authoritarian character are capable of. The present Title attempts to offer the most complete overview of existing challenges, while discussing obstacles arising from governmental, legal and political manipulations and inherent incapacities. While a comprehensive picture will be presented, the analysis will focus on some obstacles that merit greater explanations than others. Mainly, an obstacle is considered as such when it highlights the original configuration of the current Hungarian political situation, proving that a protection of the opposition depends both on homogeneous standards but also needs to be reconsidered given special national contexts. To give a more detailed analysis of crucial challenges that are the media capture of attacks on the civil society, these two topics are not discussed here but separately in the next title.

For the moment, the following comes back on eight years of democratic de-consolidation through four steps of weakening of the opposition (Chapter 1). Then, the research offers the broad picture of obstacles of the opposition that have been observed in Hungary (Chapter 2).

### **Chapter 1. Eight years of de-consolidation, four domains of weakening of the opposition**

The last eight years (2010-2018) that Hungary has experienced must be seen as a defeat for all in Europe who believed the democratisation process in the region would exclusively pursue a positive trend, one that would lead to a strong constitutional culture. These last eight years are a defeat for the EU integration policy and provokes the most important crisis of values that it has ever confronted. These last eight years are an even



more painful defeat for those in the country refusing to surrender to such regressions on democratic values and principles.

In itself, the declared political project to build an ‘illiberal democracy’ in Hungary constitutes a rejection of those considered as ‘liberals’<sup>194</sup> - those shaping an open society in which individuals’ rights and freedoms are respected. We have seen in the populist literature that the rejection of the ‘elite’ is used to target critical voices willing to oppose the populist leader. Judges, lawyers, politicians, professors, academics, activists, artists, etc, are excluded from the political project since the beginning. Note that when Viktor Orbán explains that we wants to build an ‘illiberal democracy’ because ‘democracy is not necessarily liberal’ and ‘just because something is not liberal, it still can be a democracy’<sup>195</sup>, the Prime Minister plays with the different meanings of the word ‘liberal’. He erases its political sense – the protection of individual liberties – and concentrates his efforts against liberal economic model’s bashing. In fact, his entire project of ‘illiberal democracy’ is a fraud, a semantic justification for authoritarian derivations of power – also paving the way for other anti-democratic political leaders in the region. Such a possibility does not exist, given that democracy is inherently grounded on political liberalism that protects fundamental rights and freedoms.<sup>196</sup> As Janos Kis explains, when Viktor Orbán attacks institutions of checks and balances, he is not attacking only liberalism, but democracy itself.<sup>197</sup>

The two consecutive mandates of Viktor Orban were specially employed to weaken, one by one, all critical voices in Hungary. This chapter sketches three main domains that are seen as deeply shrinking the space for an effective Hungarian opposition. At the same time, their attacks may stress shifting points along the authoritarian derivation of power Viktor Orbán experiences. Indeed, in the light of theories of non-democratic regimes we previously studied<sup>198</sup>, these steps give an insight on the Hungarian regime trend between 2010 and 2018. These domains are: the constitutive power (1.1), the Parliament (1.2) and the electoral system (1.3). Media and civil society,

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194 Janos Kis, ‘*The puzzle of illiberal democracy*’ Rethinking Open Society. Conference CEU on 5 June 2018

195 Viktor Orbán’s speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014. Full text available in English: <http://budapestbeacon.com/public-policy/full-text-of-viktororbans-speech-at-baile-tusnadtusnadfurdo-of-26-july2014/10592>.

196 See earlier Part I, Title 1, Chapter 1, (1.1. ‘political liberalism as a ground for conceptions of democracy’)

197 Janos Kis, ‘*The puzzle of illiberal democracy*’ Rethinking Open Society. Conference CEU 05 June 2018

198 See Part 1, Title 1

also confronted with this authoritarian trend, are relegated to further considerations in the last Title of this case-study.<sup>199</sup>

### 1.1 The opposition excluded from the constitutive power

The two-thirds majority requirement provided by the Hungarian constitution could have been seen as 'the cornerstone of Hungarian checks and balances'<sup>200</sup>. As in other constitutional democracies, such majority rule is meant to restrain the possibility of changing the most important laws where there is not enough consensus among parliamentarians. In possession of a two-thirds majority in the Parliament since 2010<sup>201</sup> and seeking to 'renew the country'<sup>202</sup>, Viktor Orbán's ruling party passed a law to reduce the constitutional requirement to amend the constitution from a four-fifths to a two-thirds majority.<sup>203</sup> Then, the ruling party reformed the constitutional framework in a way that fully disregarded opposing views, removing the opposition from the constitutive power. Note that such use of constitutional reform perfectly echoes what we have learned about authoritarian means to create non-democratic regimes.<sup>204</sup>

Firstly, the constitutional-making process and adoption on 18<sup>th</sup> April 2011 of the new Fundamental Law of Hungary<sup>205</sup> are characterised by a blatant lack of transparency, the non-inclusion of representatives from the opposition, very short deliberations and no opportunity for public debates within the civil society.<sup>206</sup> Moreover, the majority has already amended the constitution seven times<sup>207</sup>, provoking legal uncertainty and de-stabilising the constitutional framework, not to mention the weakening of the rule of law.

<sup>199</sup> See later, Part II, Title 2

<sup>200</sup> Balint Magyar, *Post-Communism Democracies. The Mafia State. The Case of Hungary*, Chapter 2.6 (CEU press 2016) 49

<sup>201</sup> Fidesz-KDNP won 263 seats out of 386 in 2010, 133 out of 199 in 2014 and 2018. 133 is the exact number of seats required to win the 'supermajority' since the Electoral reform in 2011.

<sup>202</sup> New York Times, 'Foes of Hungary's Government Fear 'Demolition of Democracy' (2011) <https://www.nytimes.com/2011/12/22/world/europe/foes-of-hungarys-government-fear-demolition-of-democracy.html>

<sup>203</sup> Renáta Uitz; 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary', *International Journal of Constitutional Law*, Volume 13, Issue 1 (1 January 2015) 280

<sup>204</sup> See earlier, Part 1, Title 1, 46

<sup>205</sup> 'The Fundamental Law of Hungary, entered into vigour by 1 January 2012 - English Version'.

<sup>206</sup> Venice Commission, 'Opinion on the New Constitution of Hungary' (adopted on 25-26 March 2011), paras 13 and 114

<sup>207</sup> The Seventh Amendment was adopted on 20 June 2008 (see later)

Secondly, constitutional provisions are substantially 'biased in favour of the winners of the 2010 elections and against everybody else.'<sup>208</sup> Indeed, they clearly enclose the nationalist-populist design of the ruling party. For instance, Zsolt Körtvélyesi explains that the Fundamental Law does not proclaim 'the people' but 'the members of the Hungarian nation'<sup>209</sup> as holders of the constitutive power and belonging to such nation. The constitution seems to express a cultural or ethnic vision of the 'Hungarian nation', where 'the members' are not determined by their citizenry or residence but by their culture, regardless of state borders.<sup>210</sup> By this drafting, the ruling party enshrined in the constitution an anti-pluralist, exclusive conception of the Hungarian people.

Thirdly, drafters of the constitution in 2011 constrained possibilities for future amendments, 'cementing'<sup>211</sup> a large number of matters into cardinal law (organic law) requiring a two-thirds majority. The abuse of this category of law-making is problematic, not least because it crystallises the current governments vision for years to come. The Venice Commission showed great concern, explaining for instance that 'cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law'.<sup>212</sup> Media regulations and financing of political parties, for instance, are also now belonging to such protection.<sup>213</sup> This prevents future governments from being effective<sup>214</sup> in translating the will of the people in changes of policies.

Fourthly, the *Fidesz* majority weakened the role of the Constitutional Court as the guardian of democracy. April 2013 marked a turning point, as constitutional judges appointed by the *Fidesz*-led Parliament became the majority.<sup>215</sup> Since then, constitutional decisions reflect a clear lack of independence of the judiciary<sup>216</sup>. In relation to the rights of the opposition, several decisions did not protect equality of arms between the government and the opposition. For instance, the Court did not declare that it was unconstitutional to

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208 Gábor Attila Tóth, 'Preface' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012), IX.

209 Ibid. Preamble ('National Avowal')

210 Zsolt Körtvélyesi, "From 'We the People' To 'We the Nation,'" in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation Hungary's New Fundamental Law* (Central European University Press 2012) 111-140

211 VC para 131 and 145

212 VC para 145

213 Ibid, (See footnote 11) 6

214 Freedom House, 'Nation in transit - Hungary' 2012

215 HCLU HHC, EKINT, 'Analysis of the Performance of Hungary's "one-Party Elected" Constitutional Judges between 2010 and 2014' (2015). Eight out of fifteen by April 2013. They became eleven out of fifteen by 2016.

216 For an analyse of judges' performance during 2010-2014 and the shifting point, see *ibid*

put restrictions on freedom of expression of members of the Parliament<sup>217</sup>; prohibition of placement of electoral posters<sup>218</sup> or the rule on winner compensation for parliamentary elections.<sup>219</sup><sup>220</sup> Most recently, the inertia of the Court in front of the two most controversial laws on foreign universities and NGOs<sup>221</sup> show that the Court is protecting nobody but the government's actions.<sup>222</sup>

Given such a crisis of constitutional democracy, the Hungarian Fundamental Law and Constitutional Court have stopped being functioning limits of the government's power. The above-mentioned sketches the first dimension of the weakening of rights of the opposition through the constitutional framework, changing the political regime into an ill democracy, at least. The second dimension is relative to the political opposition into Parliament.

## 1.2 The opposition erased from the parliament

The way the Orban regime approaches parliamentarism perfectly mirrors the previous analysis on anti-democratic populism.<sup>223</sup> Self-declared unique representatives of the people, the majority rule becomes the rule of the majority<sup>224</sup> and the role and rights of the parliamentary opposition diminish *de jure* and *de facto*. Taking a close look at the way the Hungarian government shapes the parliamentary arena allows us to see concrete examples of the excessive use of the majoritarian conception of democracy.<sup>225</sup>

The first method is to circumvent the consultation with stakeholders and experts required in case of governmental proposals, using individual members of the

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217 Cases 3206/2013 and 3207/2013, Constitutional Court of Hungary

218 Case 3036/2014, Constitutional Court of Hungary

219 Case 3141/2014, Constitutional Court of Hungary

220 HCLU HHC, EKINT, 'Analysis of the Performance of Hungary's "one-Party Elected" Constitutional Judges between 2010 and 2014', Final table (2015)

221 These two Laws will be extensively discussed in Title 2.

222 Gábor Halmai, 'The Hungarian Constitutional Court Betrays Academic Freedom and Freedom of Association' [2018] Verfassungsblog.

223 See earlier Part 1, Title 2, Chapter 1

224 See earlier Part 1, Title 1, Chapter 1, 1.2

225 See also *ibid.*

majority to propose legislation in the Parliament.<sup>226</sup> In addition, the two-thirds majority is used to proceed to a fast-track legislative process that prevents the parliament from being the check and balance on governmental policies. This type of parliamentary tactic has become commonplace since 2010.

The second method is to restrict the rights of the parliamentary opposition by reforming the rules of procedure of the Hungarian Parliament. Enshrined in the 2012 Act on the National Assembly (hereinafter 'the Act') and a 2014 Resolution completing the Act (hereinafter 'the Resolution'),<sup>227</sup> the provisions were compared to the five categories of rights that the Venice Commission judged particularly important to recognise.<sup>228</sup> There are several worrying points to this. Concerning procedural rights of participation, first, the freedom of expression of parliamentarians is restricted as Section 38/A of the Act prohibits the showing of 'objects, images or recorded voice' without previous approval by the House of committee or the committee in which the parliamentarian is willing to use such device. Such a general restriction comes after Karáscony and others cases<sup>229</sup> that have protested showing maps and posters. It is an example of restriction that particularly targets the opposition's expression in parliament. Parliamentarian's freedom of expression is fundamental as majoritarian rule renders other parliamentary activities meaningless. Concerning special rights of scrutiny, submitting an interpellation to members of the government can be rejected by the Speaker of the Assembly if it would '...imply reprimanding according to section 48(1) of the Act'<sup>230</sup>, that is for using '...an indecent term or a term offending the reputation of the National Assembly or any person or group...' <sup>231</sup>. In addition, questions towards the government are allowed into two minutes time-frame for both asking and answering a question,<sup>232</sup> which is too short. Concerning rights of veto or delay for certain decisions of fundamental characters, such as constitutional amendments or organic laws, Hungarian rules do not confer such prerogatives while they remain spread in Europe.<sup>233</sup> This is a crucial obstacle for the parliamentary opposition: facing a majority that does not constrain itself to constitutional rules, the opposition is incapacitated to stop

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226 Freedom House, 'Nation in Transit 2011 – Hungary' 2011

227 Act XXXVI of 2012 on the National Assembly ; Resolution 10/2014. (II. 24.) OGY on certain provisions of the Rules of Procedure ; both texts available in English in : <http://www.parlament.hu/en/web/house-of-the-national-assembly>

228 See earlier, Part, Title 1, Chapter 2, Table 1 (Thematic 'parliament')

229 See earlier, Part I, Title 1, Chapter 2

230 Section 121(4)(b) Resolution

231 Section 48(1) Act

232 Section 124(1)(b) Resolution

233 See earlier Part 1, Title 1, Chapter 2,

attacks. The de-consolidation through legal manipulation is somehow unlimited in the parliament. Concerning the right to demand a constitutional review, only a motion of the proponent itself, the Government or the Speaker can initiate a review *ex ante*.<sup>234</sup> This appears in practice very limited given these individuals are logically in favour of the proposal. Apart from this, only one-quarter minority of parliamentarians can initiate a review, which in practice, requires cooperation between the left and the far-right. The *Actio popularis* mechanism disappeared from the new Fundamental Law.<sup>235</sup> Finally, concerning protections against persecution and abuse, the Hungarian legislation seems to have reached minimum legal requirements, especially since a new procedure has been introduced by Section 51/A of 2014 Resolution, where a disciplinary sanction imposed on a parliamentarian is reviewed by a committee of the Assembly. The lack of the find a violation of Article 10 ECHR in Karácsony case.<sup>236</sup> In total during the 2014-2018 term, '28 penalties were imposed by the House Speaker, almost three and a half million'<sup>237</sup>, exclusively on members of the opposition.

Since the *Fidesz* has the majority, the Hungarian parliament does not favour a peaceful and constructive law-making process, which would enhance the legitimacy of legislation. Circumventing deliberations and cutting out the possibility of expressing dissenting opinions, rules and practices relative to the parliamentary work do not protect the parliamentary minority from abuses of the majority. In fact, the most alarming is the incapacity for the parliamentary opposition to block or at least significantly delay the adoption of fundamental and important acts, such as constitutional amendments. On 20 June 2018, a seventh constitutional amendment was adopted without sufficient input from the opposition and continues to threaten rights of the opposition. Indeed, this new round of changes rules, *inter alia*: the creation of an administrative high-court (permitting to continue to weaken the independence of judiciary) and stating the 'people must not be

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234 Article 6,2 Fundamental Law of Hungary

235 Eszter Bodnár, 'Developments in Hungarian Constitutional Law: The Year 2016 in Review' I-CONnect

236 *Karácsony and others v Hungary* (2016) 161. 151; See earlier Part 1, Title 1, Chapter 2

237 'Szél Bernadettet büntette legtöbbször Kővér, de nem ő fizeti a legtöbbet' [Bernadette Szel was punished the most but she is not paying the most], 02 June 2018, ATV.hu Available at : <http://www.atv.hu/belfold/20180205-szel-bernadett-kapta-a-legtobb-buntetest>

bothered in their homes' (possibly basing future restrictions of freedom of assembly near 'homes'...).<sup>238</sup>

The opposition in the Hungarian parliament is incapable of having a say in the decision-making and oversight of the government. This second dimension of the weakening of the opposition in Hungary represents a serious debilitation of democratic principles. In front of an authoritarian ruling party, 65 opposition MPs out of 199 is not enough to defend their rights in parliament and fight back partisan reforms. This second dimension intrinsically lays on the hypothesis that elections can effectively allow the entering of any candidate in pursuit of a free and fair electoral competition. The electoral system is the third dimension of our overview.

### 1.3 The opposition disadvantaged by the electoral system

An undeniable minimum core requirement for a democratic regime is to hold free elections periodically, through which a change of political leadership is reasonably conceivable. Elections would have to reflect the will of the people and provide legitimacy.<sup>239</sup> Apart from these principles and minimum rules to respect, the matter is strictly relegated to national decisions and so there is not a unique model of electoral system.<sup>240</sup>

A year just after its elections, the *Fidesz* majority reformed the Hungarian electoral law<sup>241</sup>; then the electoral procedure<sup>242</sup> and campaign finance regulation<sup>243</sup>. National and international organisations agreed upon the facts that the system disproportionately prevents the opposition from entering parliament. To be clear, Viktor Orbán's argument, that the Parliament implemented rules that exist in other European countries and are not castigated, is insufficient and once more an attempt to blur the lines between democratic

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238 'Hungarian Parliament Passes Seventh Constitutional Amendment: Banning Homelessness - Daily News Hungary'. 20 June 2018

239 See earlier Part 1, Title 1, Chapter 2

240 Ibid

241 Act CCIII On the Elections of Members of Parliament (Elections Act), adopted in December 2011, amended four times, most recently in July 2013

242 Act on Election Procedures (Election Procedures Act), adopted on 8 April 2013, amended three times, most recently in December 2013.

243 Act on the Transparency of Campaign Costs (Campaign Finance Act).

and non-democratic standards. The observation of, on the one hand, outright violations of international and European standards on electoral matters, and on the other hand, others obstacles that have a particular impact within the Hungarian system are enough to be sure on the lack of an even playing field for candidates. The following points review those obstacles, presenting first those directly benefitting the *Fidesz* and then moving to explain those helping the *biggest parties* in elections (currently *Fidesz*, but the rules could advantage other parties in potential new political configurations).

### *Obstacles benefiting the Fidesz*

First, the delimitation of electoral constituencies' boundaries, amended nine months before the 2014 elections, remains a violation of international practice and the 2011 Electoral Act itself. Indeed, according to the OSCE limited mission observation of the Hungarian 2018 elections, 'five constituencies exceed the 15 per cent deviation allowed' by the Section 4 Electoral Act and a 'further 17 deviate from the national average by more than 10 per cent'.<sup>244</sup> This is at odds with international good practice recommending to permit no 'more than 10% and should certainly not exceed 15%, except in special circumstances.'<sup>245</sup> In a 2012 joint opinion of the OSCE and the Venice Commission, allegations of gerrymandering have been expressed, targeting insufficient transparent and professional administrative cut of boundaries.<sup>246</sup>

Secondly, the lack of transparency and independence of electoral institutions is a serious threat to fair electoral competition. In Hungary, the State Audit Office (hereinafter 'SAO') in charge of public funds and campaign financing has been taken over by the *Fidesz* with the reform. On one hand, the State Audit Office's mission of control seems insufficiently transparent. The 2018 OSCE mission in Hungary states that the elections were mainly characterised by 'a pervasive overlap between state and party ruling resources'<sup>247</sup>, where 'the government's information campaigns, which directly reinforced

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<sup>244</sup> OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018). 3

<sup>245</sup> Venice Commission, CODE OF GOOD PRACTICE IN ELECTORAL MATTERS GUIDELINES Adopted by the Venice Commission at its 52 nd session ( Venice , 18-19 October 2002 ) 2002 18

<sup>246</sup> OSCE-ODIHR, 'Limited Election Observation Mission Hungary – Parliamentary Elections 6 April 2014', Final Report (2014), (footnote 18) 7

<sup>247</sup> Douglas Wake, 'preliminary statement of OSCE-ODIHR mission observation in Hungary', press conference on 8April 2018



the ruling coalition's message, do not figure in campaign finance calculations, serving as an avenue to circumvent the campaign expenditure limits.<sup>248</sup> In addition, the SAO provides very unsatisfying level of details in its reports concerning campaign spending, preventing the voters and the opposition to have transparent views on the competition.<sup>249</sup> On the other hand, the lack of independence of the institution resulted in targeted enforcement of electoral rules, such as the imposition of fines on several parties of the opposition, just few months before 2018 elections.<sup>250</sup> For instance, *Jobbik* was fined HUF 663 million for infringement on spending regulations<sup>251</sup>. As Freedom House states: 'Many see the process as a state-sponsored attempt to weaken the strongest opposition party ahead of 2018 elections.'<sup>252</sup> The biased oversight of the authority of this institution is an obstacle for the opposition to compete on an even playing field.

Third, the *Fidesz* majority made a sophisticated combination of changes that are very specific to the Hungarian cocktail – contrary to the two precedent obstacles, well-known within the menu of non-democratic means.<sup>253</sup> After having opened the possibility for millions of descendants of Hungarians living abroad (mainly in neighbouring countries such as Romania, Serbia, Ukraine) to quickly obtain Hungarian citizenship<sup>254</sup>, the majority reformed the electoral procedure to grant the right to vote to out-of-country Hungarian citizens, deleting the condition of residence for them. It is clear that the ruling party calculated this combined reform to increase its electoral base. In 2014, 95% of all votes from abroad voted for *Fidesz*.<sup>255</sup> A few months before the 2018 elections, Viktor Orbán sent letters to Hungarian citizens living abroad to motivate them to vote. 'In the letter, Orbán reminds these voters that it was his government that granted them dual citizenship seven years ago.'<sup>256</sup> It is not the purpose of this section to discuss voting rights of Hungarian citizens living abroad. However, the difference of voting procedures, based on the criteria

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248 OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018) 10

249 Ibid ; See also later, Part II, Title 2, Chapter 1 (on media capture)

250 OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018) 10

251 Ibid 10

252 Freedom House, 'Freedom in the World 2018, Hungary' 2018  
<<https://freedomhouse.org/report/freedom-world/2018/hungary>> accessed 6 July 2018.

253 See earlier, Part I, Title 2, Chapter 2, 2.3 and 2.4

254 See Act on Hungarian Citizenship 2011

255 Róbert LÁSZLÓ (Political Capital), 'The New Hungarian Election System's Beneficiaries' (2015) 4

256 Hungarian Politics, 'Orban encourages Hungarian citizens in neighboring countries to vote next year' July 17 2017,  
<<http://hungarianpolitics.com/2017/07/17/orban-encourages-hungarian-citizens-in-neighboring-countries-to-vote-next-year/>>

of residency, breaches the principle of equal suffrage between voters and favours in practice the ruling party.<sup>257</sup> On the one side, out-of-country voters *not having a residence* in Hungary (mainly those living in neighbouring countries) can vote for ‘national list by post or by delivering their voting package in person or by proxy to a diplomatic mission’<sup>258</sup>. On the other side, out-of-country voters *having a residence* in Hungary can vote for both lists but only going in person to diplomatic missions.<sup>259</sup> While, in other countries, votes cast from abroad are relatively insignificant for the electoral outcome, in Hungary, this new procedure helped *Fidesz* to have the necessary party-list votes to hold the constitutional two-thirds majority in 2014.<sup>260</sup>

### *Obstacles benefiting the biggest party (currently Fidesz)*

Fourth, the Hungarian electoral system enshrines an original rule, so-called ‘winner compensation rule’<sup>261</sup> at stake for the determination of electoral results and necessarily ‘favouring the largest political force enjoying relative majority’<sup>262</sup>. On the one hand, a vote cast for a candidate in a constituency that did not win the mandate are transferred to the national list of the party he belongs to.<sup>263</sup> On the other hand, votes cast for the winning candidate that are surplus – above those needed to win – are transferred to his party as well.<sup>264</sup> While the first rule is common in European systems and favours representation in Parliament, the second rule is completely to the contrary as it actively works against the logic of compensation.<sup>265</sup> This rule seems to have been passed to directly enlarge the electoral base of *Fidesz* given political configuration by 2010. In effect, the rule is not an irrelevant particularity: it allowed *Fidesz* to win additional six seats needed to hold the constitutional two-thirds majority.<sup>266</sup>

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257 OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, ‘Statement of Preliminary Findings and Conclusions’ (2018) 5-6

258 Ibid

259 Ibid 5

260 Róbert LÁSZLÓ (Political Capital), ‘The New Hungarian Election System’s Beneficiaries’ (2015) 5 (data unavailable for 2018 elections).

261 FIDH, ‘Hungary: Democracy under Threat Six Years of Attacks against the Rule of Law’ (2015).

262 Róbert LÁSZLÓ (Political Capital), ‘The New Hungarian Election System’s Beneficiaries’ (2015) 2

263 Section 15(1)(a) Electoral Act

264 Section 15 (1)(b) Electoral Act

265 Róbert LÁSZLÓ (Political Capital), ‘The New Hungarian Election System’s Beneficiaries’ (2015) 2

266 FIDH, ‘Hungary: Democracy under Threat Six Years of Attacks against the Rule of Law’ (2015) 21

Fifth, there is a threshold requirement that a party (or parties' coalition) must reach in national party-list election to be part of the proportional attribution of seats in parliament reserved for such party-list elections. The general threshold is established at 5% of all votes cast<sup>267</sup>; it jumps at 10% in the case of two-party coalition and until 15% when the coalition merges more than two parties.<sup>268</sup> If the party (or coalition) do not achieve the threshold required, it is inadmissible to the attribution of seat in Hungarian Parliament.

It has been previously mentioned the Venice Commission's and ECtHR's views on the question on thresholds to enter parliament.<sup>269</sup> To recall, threshold rules have to be assessed within the particular political context and conditions of application. Within the Hungarian case, the least one can affirm concerns the 10% and 15% higher threshold requirements in place. These rules discourage coalition strategies and blur the electoral supply, thus cementing the fragmented political opposition in the country.<sup>270</sup> Nevertheless, one could also argue that 5% threshold is already an interference in rights of the smaller parties, non-necessary in a democratic society, recalling that the impact of such rules is directly depending on particular political context of the country and possible arrangements made that would mitigate the effect. In Hungary, no arrangements have been made except for minority party-list<sup>271</sup>. No 'exit door', such as the possibility to qualify for the attribution of the party-list seats where the party won in a few constituencies, is implemented. Given the access to parliament is of fundamental importance for the opposition, such a rule remains very problematic for the representation of the legislature, while the stability of the parliament is not a problem.

We have seen in this chapter the main obstacles enshrined in the constitutional framework, the parliamentary sphere and the electoral system and procedure. Compared to what we have learned in the theoretical part, these legal and political manipulations coincide perfectly to configurations of electoral authoritarianism. The last bastion of Hungarian democracy is, indeed, not fighting on an even playing field. But despite all, *Fidesz* reforms did not directly prevent from the development of regular elections: new parties have been able to emerge (*Momentum* and *MKKP* for 2018 elections) and

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267 Section 14 (1) Electoral Act

268 Section 14(2) Electoral Act

269 See earlier, Part I, Title 1, Chapter 2

270 See later, Part II, Title 1, Chapter 2 (on the coalition of the opposition for these 2018 elections)

271 Quorum of approximately 0,2 %. It allowed the attribution of one seat to the 'National Self-Government of Germans in Hungary' party.

compete, mobilisation is still possible, votes cast were deemed to have been counted fairly<sup>272</sup>, etc. We could have thought to organise a boycott of these unfair elections, but political parties stayed into the game. The theoretically existent uncertainty in an electoral authoritarian regime trend would be reflected in this way within the Hungarian context. The opposition can expect that, in the case of a different political configuration provoking a change in the polls, results would base a regime change accepted by the ruling party. This hypothesis depends on various factors. And regarding the opposition actors, the picture of obstacles is not complete. To assess definitively the effectiveness of the Hungarian opposition in being a key in the regime trend, the following chapter offers a broader picture of all factors in place in the current situation.

## **Chapter 2. Thinking challenges in a broader approach**

In light of the foregoing, it is clear that the Hungarian opposition is prevented from exercising its prerogatives, although indispensable in a democratic society. As previously explained, there are those restrictions that are part of the last decade's Hungarian democratic regression, while other obstacles are observable and cannot be put under such a category. Indeed, the study made in Hungary has noted other significant obstacles for the opposition, that seem to be tolerated in well-functioning democratic societies. These are not considered as violating international standards, sometimes because of the mere lack of preciseness of the latter. Some obstacles would be somehow on the borderline of European democratic standards and practices. In addition, obstacles can embrace a cumulative effect seriously affecting the situation of the opposition in the particular context.

The present chapter offers a compilation of all the challenges I have found during this research. This strives to be as complete as possible, even if more details can always be added. Structured in a table, this comprehensive proposition presents both authoritarian restrictions – determined in the light of developments mentioned in Chapter 1 – and other restrictions whose causes and impacts deserve attention as well. Consequently, 'Table 2' introduces a structured overview of all challenges for the Hungarian opposition (2.1), while further explanations regarding obstacles not discussed yet are following, catching complexities and specificities of the Hungarian cocktail (2.2).

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<sup>272</sup> OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018) 4-5

## 2.1 The compilation of obstacles confronted by the Hungarian opposition

Today, the Hungarian opposition faces multiple challenges. The regime actively threatens and disadvantages the opposition, hindering the protest and competition against the ruling party. In addition, the political context adds inherent difficulties to stand as a guardian of democracy and propose a change of leadership. Hence, the relative capacities of the Hungarian opposition must be assessed by looking at a more comprehensive list of elements. Table 2 presents such a picture of obstacles, the current state of the Hungarian society. It has been elaborated via the observation of Hungarian legal standards and political events that witnessed restrictions of rights of the opposition. These are called 'Hungarian events' (column 3) and base the identification of the list of obstacles I (column 2). Obstacles are linked with related guarantee (column 4) and distinguished in democratic obstacles (administrative requirement generally tolerated in democratic systems) or violation of guarantees (column 5).

Table 2. Compilation of obstacles of the Hungarian opposition

THEMATIC	RELATED GUARANTEE	OBSTACLE	HUNGARIAN EVENTS	DEMOCRATIC?
JUSTICE	Independent institutional judicial guarantee; access to effective remedy	No effective judicial or extra judicial remedies protecting the opposition	Packing of Constitutional Court since 2013; State Audit Office; Public Prosecution Office	No
	Independent institutional extra-judicial guarantee; Right of access to effective remedies	No effective remedy for electoral complaint	Hearing of complainant never happened in 399 cases <sup>273</sup> ; no space for debate among commissioners	No
PARLIAMENT	Parliamentary participation	Opposition prevented from genuine consultation and debate for government proposal	Governmental practice to propose laws via a Fidesz MP (since 2011)	No
	Parliamentary expression	Showing object, image, recording prohibited	Section 38/A Electoral Act	No
	Rights of scrutiny	Constrained interpellation and question to the government	Possible arbitrary reject of submissions. Section 48/1	No

<sup>273</sup> OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018 (footnote 69)

			Electoral Act	
	Right of veto or delay for important acts	Incapacity to block or delay fundamental acts (constitutional acts)	Adoptions of Constitution, Amendments and Cardinal Laws	No
	Protection against persecution and abuses	Disciplinary sanctions and fines imposed to MPs of the opposition	More than 28 penalties; non-paritary committee for review	No
REGISTRATION ELECTIONS	Right to stand for elections	500 signatures to register as individual candidate	Section 6 Electoral Act	Yes
	Fair elections	No sufficient control of 500 signatures	Constituency Election Offices' fast review; allegation of forged signatures; 'business parties' <sup>274</sup>	No
	Right to stand for elections	Minimum requirement of 27 candidates to have a party list	Section 8 Electoral Act	Yes
ELECTORAL CAMPAIGN	Fair elections	Short period of time to run campaign <sup>275</sup>	From 7 February to 8 April 2018	Yes
	Transparency and respect of campaign finance	Unequal campaign financing	Overlap between state and party ruling resources	No

<sup>274</sup> See OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018) 6

<sup>275</sup> This is an opinion I heard several time during interviews with candidates of the opposition. It could be said with distance that it is rather the lack of ressource and internal party organisation that seems to have provoked this view.

	system; fair electoral competition			
	Equal treatment; right to appeal an administrative decision	Biased control and sanctions on campaign finances	December 2017 arbitrary fine on <i>Jobbik</i>	No
	Transparency of campaign financing; fair electoral competition	Opacity of campaign financing	No detailed reports on campaign spending; no regulation for third party campaign financing	No
	Freedom of association between political parties	Difficulties to form coalition	Fragmented opposition; disfavourable electoral rules (one round elections; higher thresholds candidate financing)	Yes
ELECTORAL SYSTEM	Fair electoral framework	Gerrymandering	Section 4 Electoral Act	No
	Equal suffrage	Biased differentiation of voting procedures	Divergent voting procedures for out-of-country Hungarians	No
	Principle of representation	Unfair winner compensation rule	Section 15, 1 (b) Electoral Act	No
	Principle of representation	Difficult representation of minorities into	Minority list	No



		Parliament		
	Principle of representation	Too high requirements to accede into Parliament	5%, 10% and 15% threshold rules without 'exit door'	No
MEDIA <sup>276</sup>	Freedom of information	Restriction on party advertising	Law 15 July 2017 prohibiting it outside campaign period <sup>277</sup>	No <sup>278</sup>
	Freedom of the media; fair elections; access to information	Unfair access to public media	Media capture; only 5 minutes free airtime per candidate	No
	Media freedom; Freedom of voters to form an opinion	Vilification of the electoral opposition; vilification of CSOs	Intensified hostile campaigning of Fidesz (relegated in media and 'public information' campaign)	No
	Media freedom; Freedom of voters to form an opinion	Biased and/or fake information in favour of the Fidesz	Intense pro-Fidesz propaganda; unfair media coverage (public tv, newspaper, mainly)	No
	Media freedom	Self-censorship of journalists	Recognised chilling effect on editorial freedom; criminalisation of defamation	No
	Freedom of voters to form an opinion	No possible debate with the incumbent	Fidesz representative declined any debates	No
	Media	Intimidation,	Closing of several critical	No

<sup>276</sup> See Part II, Title 2, Chapter 1

	Freedom; protection against persecution	economic pressures and persecution of independent journalism	newspapers, radio, online media; listing of journalist in ‘Soros mercenaries’	
CIVIL SOCIETY <sup>279</sup>	Freedom of assembly	Degrading conditions to protest peacefully	Arrest of three activists protesting; <sup>280</sup> intense police presence in 2018; new provision in the seventh cons. amendment <sup>281</sup>	No
	Right to good reputation	Stigmatisation of NGO work and workers	‘Labelisation’ requirement (NGO Act 2017); ‘Stop Soros National Consultation’ and targeting of Hungarian NGOs; publication of list of names incl. NGO workers	No
	Freedom of association; freedom of education	Discriminatory administrative requirements to carry activities	Foreign funded university Act (4 April 2017); NGO Act (13 June 2017)	No
	Freedom of association; right to privacy	Intrusive government inspections into activities	Financial inspections (tax audit and report); EKINT wire-tapping	No

<sup>277</sup> Freedom House, ‘Nation in Transit 2018 – Hungary’, 2018

<sup>278</sup> Given circumstances

<sup>279</sup> See extensively later, Part II, Title 2, Chapter 2

	Freedom of association	Disproportionate threats on criminal prosecution for non-compliance of legal requirements	NGO Act (2017) and NGO Act (2018) <sup>282</sup>	No
	Freedom of association	Disproportionate threat on the NGOs activities in case of non-legal compliance of one individual worker	NGO Act (2018)	No

Source: own compilation.<sup>283</sup>

## 2.2. The coalition that never happened

Why do political parties from the opposition not join each other in a coalition in order to beat Fidesz in elections? This question pinpoints one of the most frustrating question of Hungarian political life. Generally, in political science literature, to form a coalition among (as many as possible) opposition parties is known to be an excellent strategy in the case of a nebulous of opposition parties, willing to face a common enemy – mostly the ruling party.<sup>284</sup> In the Hungarian context, this strategy seemed genuinely advantageous. Indeed, Hungarian opposition parties are fragmented, however, all had the common objective to prevent Fidesz from winning the constitutional two-thirds majority by 2014 and 2018 parliamentary elections. All left and liberal parties agreed on these horrific eight years of

<sup>280</sup> Freedom House, 'Nation in Transit 2018 – Hungary', 2018 (Two activist during the demonstration on April 2017 concerning the threatening on the CEU were arrested without respecting regular arrest procedure).

<sup>281</sup> See earlier (footnote 45)

<sup>282</sup> See later extensively Part II, Title 2, Chapter 2

<sup>283</sup> This compilation is mainly based on, inter alia, OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018); Dániel Hegedüs, 'Nations in Transit 2018 - Final Report - Hungary' [2018] Freedomhouse.org ; and personal interviews.

<sup>284</sup> See earlier Part I, Title 2, Chapter 2

autocracy the country lived<sup>285</sup>, all knew in the manipulated electoral battle they entered<sup>286</sup> and all knew their relative weight in political life given, *inter alia*, results in national opinion polls.<sup>287</sup> Seeing this and given the incumbent stability, the necessity to form a coalition was obvious. However, neither in 2014 nor in 2018 elections did the democratic opposition reach a broad agreement. Some small coalitions have been formed though,<sup>288</sup> without being sufficient to revert the incumbent's majority.

This significant incapacity seems to originate from mixed causes.

On one hand, the electoral reform adopted by the Fidesz majority actively discourages parties from entering in coalition agreement with each other. To begin, the suppression of the second-round election prevents the ability to formally declare support to winners of the first round and join efforts for the final run. Also, threshold rules to enter parliament, becoming a minimum of 10% in case of two-parties coalition and 15% in case of three (instead of 5%) (as discussed above), significantly jumps and potentially makes one back away from the idea, especially to form a coalition with more than two parties. Additionally, parties' public funding depends on the number of single-constituency candidates they have and keep until elections day.

On the other hand, the failure to form a meaningful opposition coalition arises from the incapability of the current Hungarian political opposition. Firstly, there are irreconcilable ideological incompatibilities between them. Just to mention the most effective illustration: in Hungary, the far-right party, *Jobbik*, remains the second most important political force in elections. Despite the potential that an alliance with *Jobbik* with the objective of getting rid of *Fidesz* majority would give the opposition a better chance, democratic Hungarian political parties (left and right) are fully at odds with *Jobbik*'s extremist, nationalist and xenophobic ideology. An alliance with such a party could not be possible without directly infringing their values of the 'democratic opposition'<sup>289</sup> and completely blurring the Hungarian political landscape.

With *Jobbik* excluded from considerations, the democratic opposition did not reach a formal coalition before elections due to failures by party leadership to overcome

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285 'Elections 2018: All Left-Liberal Parties Are Open to Coalition - Hungary Today' [2018] Hungary Today.

286 Ibid

287 'The State of the Hungarian Opposition Ahead of the April Elections' [2018] hungarianfreepress.

288 In 2014, the socialist party (MSZP) was joined by Together 2014 (Együtt), Democratic Coalition party (DK) and Liberal Party. In 2018, MSZP and Dialogue for Hungary (Párbeszéd) formed a coalition.

289 Expression used to designate all political parties of the opposition running in 2018, excepted *Jobbik* party.

disagreements and mutual distrust. In addition to the many obstacles imposed by the corrupt electoral system, the political opposition is politically weak and missed the opportunity to unite, well in advance of electoral periods. This would have allowed them to plan a shared agenda and designate the right persons to represent the common willingness to end the tyranny's period. A few weeks before elections, some opposition parties started to agree on several withdrawals of single-constituency candidate, to only let the opposition candidate that would have most chances to beat Fidesz candidate. In total, 187 candidates withdrew, but this produced a limited effect countrywide.<sup>290</sup>

### 2.3 The European Union that never comprehensively replied to the crisis of values

There are two ways to consider the EU with regard to the democratic backsliding Hungary is living since 2010. The first one is to admit that the EU forms a supranational opposition force against the current Hungarian government. And the second one is to believe that EU omissions constitute, in themselves, obstacles against a regime change.

One can see that the diplomatic or political power the institution implements have brought formal communications and serious political discussions with the Hungarian government and might have prevented some laws being adopted exactly as the ruling party wanted.<sup>291</sup> Currently, there is a growing clamour, especially in the European Parliament, to call upon other institutions to adopt a comprehensive approach against authoritarian means continuously employed in the country. The most important argument to consider the EU as an opposition force might be the several infringement procedures brought to the European Union Court of Justice by the European Commission.<sup>292</sup> Despite these actions, the Hungarian situation on democracy and human rights has, as we have seen, worsened. And more than being an ineffective actor of opposition, the EU inaction against the systemic problem creates other obstacles.

Firstly, the fact that the EU has not triggered the procedure of Article 7 TEU keeps Hungary out of the unique procedure which the EU created for this exact situation. The Article 7 procedure is intended to sanction countries that systematically threaten EU

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290 OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018) 6

291 Alexandra Timmer and others, 'EU Human Rights, Democracy and the Rule of Law: From Concepts to Practice' (2014).

292 The last actions were against two unfamous laws : LexNGO and LexCEU of 2017. See later Part II ,Title 2

values contained Article 2 TEU. It sends a weak message, not analogous to the long-lasting discussions of eight years that occurred between EU institutions and Hungary. Article 7 TEU has been called the ‘nuclear option’<sup>293</sup> given that it leads to heavy sanctions, ‘including the voting rights of the representative of the government of that Member State in the Council’<sup>294</sup>. It is rather a long procedure, developed in several steps into different EU institutions and foresees unanimity in the European Council and qualified majority in the Council of the EU to impose sanctions.<sup>295</sup> It is not a nuclear weapon, it is strict and the only legal instrument the EU has for such new situations. In addition, the EU inaction does not show consistency when it is confronted with an authoritarian derivation of power in a member state, given that Poland is the object of the Article 7 TEU procedure while the democratic crisis appeared earlier in Hungary and is one might say, more institutionalised.

Secondly, the EU is a political obstacle against any clear opposition message due to its *de facto* legitimisation of Viktor Orbán’s party. This is because of the support Fidesz keeps within the European People Party in the European Parliament. With this, democrats of this group are silent and some others do not want to fight against one of the biggest political parties in the European Parliament. Hence, there is an absence of unanimous condemnation which does not help the internal opposition and even Hungarian European MPs to raise voices.

Thirdly, the impact of the EU takes on a significant weight regarding the ‘regime sustaining function’<sup>296</sup> that EU development funds act as. Indeed, the European Office Anti-Fraud<sup>297</sup> and Transparency International Hungary<sup>298</sup> reported that EU development funds might increase risks of corruption; mainly, in case of systemic overpricing of public procurements.<sup>299</sup> In light of these reports, it is clear that EU financial support legitimises Viktor Orbán’s regime and contributes directly to national anti-democratic actions.

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293 For instance, Joseph Bebel, « Article 7 : European Union’s ‘Nuclear Option’ (8/11) » in The European Institute blog. Available at : <https://www.europeaninstitute.org/index.php/ei-blog/307-august-2017/2234-article-7-the-european-union-s-nuclear-option-8-11>

294 Treaty on the European Union (TEU), Article 7(3)

295 Treaty on the European Union (TEU), Article 7 (2), (3) and (4)

296 András Bozóki and Daniel Hegedűs, ‘An Externally Constrained Hybrid Regime: Hungary in the European Union’ (2018)

297 European Anti-Fraud Office, The OLAF Report 2014 ( Brussels, 2015)

298 Transparency International Hungary, ‘The Corruption Risks of EU Funds in Hungary’ (2015)

299 Ibid 38

The cumulative effect of all these obstacles is to place a burden on those who decided to resist. While it is clear that the incapability of the democratic opposition to form a coalition for these elections constituted a significant and frustrating barrier to a political change, it is also a key factor that can be potentially reviewed with better efforts in the future.

In comparison to electoral manipulations, these seem difficult to tackle given the non-independence of the judiciary and the vagueness and non-binding nature of European standards. If a case were brought to the ECtHR for a violation of Article 3 Protocol 1 ECHR, this could very well be important to put an end to some rules in Hungary. And this action would be important for the whole European continent as the European judge would have to explain his/her views on specific provisions relative to electoral matters, improving the interpretation of rules. To complete the full picture of the current situation of the Hungarian opposition, the following Title will focus on two crucial areas that are by definition oppositions: the media and the civil society.

## **Title II. Crucial challenges for the Hungarian opposition**

The media and civil society organisations (hereinafter 'CSOs') have a common inherent social function. Both institutions shape a pluralist society in which freedoms are protected. They belong to the civil opposition; exercising missions of information, investigation, control and denunciation and are governed by the principle of independence. Moreover, both the media and CSOs hold a direct link with the people and therefore, they condition social peace – a fundamental base for the political leadership's legitimacy. Indeed, the media and CSOs are key players in mirroring the society as they convey awareness and critical opinions, thus, acting as a stimulant to potential protest.

Media and CSOs share another common factor: their activities are attacked by authoritarian abuses of power, whereby leaders try to eliminate independent critical voices. Like in Hungary, they use draconian measures, such as sharp delegitimisation of institutions' missions, intense economic pressure and violent repression. This weakens the democratic façade that the Hungarian government prides itself on. Keeping appearances for citizens and international observers seems to have been ignored, due to the nature of attacks.

These issues are particularly alarming: observable restrictions directly threaten the survival of the media and CSOs' independent activities. The ending of their missions of public usefulness are considered to be long-run obstacles for rights of the opposition and for the functioning of democracy. Without them, the civil, as well as political opposition, are unable to be informed, control government' actions, propose alternatives and compete for change of the leadership.

Considered to be fundamental to bet on a meaningful opposition in Hungary, this title wants to focus on the current Hungarian situation concerning media and CSOs. It studies legal and political means preventing them from being effective institutions of opposition. Through this, it stresses the unequivocal authoritarian pan that the Hungarian regime is taking, overcoming the in between place we would assigned to it regarding other issues. In addition, the analyse assesses judicial developments that intend to protect democratic standards in Hungary, in order to draw some conclusions on the global level of European guarantees concerning rights of the opposition. The tile studies first media capture and hostile campaigning (Chapter 1) and then attacks on CSOs (Chapter 2).



## Chapter 1. Media capture and hostile campaigning

The media, in a democratic society, are inherently linked to the function of opposition in two dimensions, because they are both opposition forces in themselves and the indispensable vehicle for other opposition actors.<sup>300</sup> On one hand, the media are a significant actor of opposition against the political power: independent journalism oversights, investigates, raise awareness, may criticises and denounce practices affecting any aspects of the life in the society (political, economical, social, scientific, cultural, etc.). Having the power to be in direct link with the people, the media shape the public opinion and the social atmosphere, potentially able to provoke a spread protest of the government's legitimacy. On the other hand, the media are the voice of other opposition actors, giving them the opportunity to reach the public in an efficient way. This is particularly important during elections as independent and effective media participate to inform voters on the plurality of options given to them.

Given the unequal influence the media have on opinions, the media can be considered as 'the fourth power in the state'<sup>301</sup> and, by analogy of the executive, legislative and judiciary powers, must remain separated to keep its functions of opposition. However, the relationship between media and politics is complex in any society, even in the most democratic ones, as there is no political leaders in power not having the desire to interfere in the independence of media for own political interests. Government that do illegitimacy enter in the sphere of such media power has several means for this<sup>302</sup>.

In Hungary, the Orbán government did not wait to remove media freedom in the country just after its elections in 2010.<sup>303</sup> Since, the political influence is more than intense, today we witness a genuine media capture made by the Hungarian government and its allies (1.1). Media capture is considered to be one of the main obstacles against pluralism and opposition in Hungary because it provokes disastrous consequences on rights of the opposition, mainly: a great lack of media coverage of opposition actors (1.2), in line with a

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300 See earlier Part 1, Title 1, Chapter 2

301 Honoré de Balzac, 'Chronique de la presse', in *La Revue parisienne*, 25 August 1840, 243, available in : <https://gallica.bnf.fr/ark:/12148/bpt6k1065498g/f103.item>

302 See earlier Part 1, Title 2, Chapter 2

303 Gábor Polyák, Krisztina Nagy, 'Hungarian Media Law', Mérték booklets, vol 1, 2015, 5

shrinking space for critical journalism against the government, and hostile campaigning (1.3).

## 1.1 The media capture in Hungary since 2010

The seizure of the media is a powerful tool for authoritarian leaders and there are many different methods to achieve this.<sup>304</sup> For the Hungarian government, mainly, two strategies have been in use since 2010. First, legal manipulations on media regulation that annihilates the independence of public media and institutions of control that reform public media legal framework. Second, economic seizure of the media market by Orbán's 'loyal oligarchs'<sup>305</sup>.

The media reforms adopted in 2010<sup>306</sup> were denounced since the beginning as they threaten media pluralism and freedom of speech.<sup>307</sup> We come back to main critical points of these Acts.<sup>308</sup> On one hand, the media regulatory authority (hereinafter 'NMHH') lost its independence since its main body, the Media Council, is exclusively composed of Fidesz's appointments.<sup>309</sup> As such, the opposition is not present in this key institution. In addition, NNHH's scope of control extended to cover now public and commercial print, broadcast and online media.<sup>310</sup> It also enhances its power of sanctions, paving the way for vague arbitrary fines and their great financial impact on the media outlet due to the high maximum fine prescribed.<sup>311</sup>

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304 See earlier Part 1, Title 2, Chapter 2

305 Freedom House, 'Nation in Transit 2018 – Hungary', 2018

306 Act CIV on the freedom of press and the fundamental rules of media content, 2010; Act CLXXXV on media services and mass media, 2010.

307 See, for instance, The Office of the OSCE Representative on Freedom of the Media: Analysis of the Hungarian Media legislation, 28 February 2011. Available at <<http://www.osce.org/fom/75990?download=true>>

308 For a complete overview, see Gabor Polyak, 'Context, Rules and Praxis of the New Hungarian Media Laws. How Does the Media Law Affect th Structure and Functioning of Publicity' in n von Bogdandy, Armin and Sonnevend, Pal (eds), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*. Oxford Portland Beck/ Hart /Nomos, 2015, 125-150

309 Gábor Polyák and Krisztina Urbán, 'MÉRTÉK MEDIA MONITOR HUNGARIAN MEDIA LAW' (2015).

310 Freedom House, 'Nation in transit 2011 – Hungary', 2011

311 Ibid

On the other hand, new Hungarian legislation did not remediate to public media's dependence on state funding<sup>312</sup>; while Fidesz's allies were able to buy more of the media due to the unclear media ownership regulation<sup>313</sup>. The progressive economic media seizure considerably weakened the media's freedom over the year.<sup>314</sup> In 2016, several watchdog NGOs noted an important takeover of the media<sup>315</sup>; in 2017, 'the Fidesz-led government and associated business persons consolidated their positions (...) and, with few exceptions, acquired last bench of independent printed press in Hungary'<sup>316</sup>, notably including 'all regional newspapers'<sup>317</sup> that reaches 'approximately one million of Hungarian voters'<sup>318</sup>. Today, public and also main private TV channels are not independent from the ruling party. Critical media exists but does not reach the Hungarian population, it is relegated to online press or is not diffused in around the country, such as the famous *Klubradio* that only broadcasts in Budapest.

As the investigative journalist of the Budapest Beacon, Benjamin Novak, explains

those who have followed the Orwellian transformation of Hungary's public media into a state propaganda juggernaut know that taxpayers are essentially paying for Fake news provided by fake experts; Conspiracy theories; Hate propaganda; and Fidesz's opinion on everything.<sup>319</sup>

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312 Freedom House, 'Nation in Transit 2010 – Hungary', 2010

313 Nora Katona, 'How to Discipline the Unruly Pupil in the Class without Expelling Him / Her?: The Case of Hungary in the European Union The Media War 2.0' (2015). 57-65

314 See, Reporter Without Borders, World media freedom index, Hungary ranking, available at : <https://rsf.org/en/hungary>

315 See, for instance, Freedom House, Amnesty International, Reporter without Borders reports of the year.

316 Hegedüs. 8

317 See in details *ibid.* 8-9

318 *Ibid.*, referencing Index.hu (footnote 70)

319 Benjamin Novak, 'M1 Gives Jobbik Spokesman Five Minutes of Air-Time, Immediately Regrets It - The Budapest Beacon' [2018] The Budapest Beacon.

## 1.2 Denial of media coverage for the opposition

The media seizure restricts the access to the media for opponents and particularly, for political candidates during election campaigns. Indeed, the opposition parties' leaders were invited by the public channel *M1* just three weeks before the elections, each receiving five minutes on national airtime.<sup>320</sup> The Venice Commission, however, explains that equality of opportunity in elections 'entails a neutral attitude by state authorities, in particular with regard to: (...) coverage by the media, in particular by the publicly owned media...'<sup>321</sup>.

In addition to restrict access to the media, *Fidesz's* legal and practical abuses produce editorial self-censorship, due to fear of losing financial backing<sup>322</sup> or to be punished for defamation that is criminalised in Hungary. It does not permit the journalist to freely inform on electoral campaign and political events in general. Several independent media platforms have already closed down, given financial or individual pressures.

## 1.3. Hostile campaigning against the opposition

The lack of independent media is a tool for the development of a severe, widespread and systemic propaganda, coupled with a hostile campaigning against all oppositions. These two dimensions increased as closer as the elections were coming, apparent in Budapest as well as elsewhere in Hungary. This phenomenon is directly linked to a significant overlap between public information and political message. According to the OSCE monitors, the 2018 Hungarian elections are characterised by 'a pervasive overlap between State and ruling party resources'<sup>323</sup> higher than in 2014, due to the ruling-party excessive spending on government information advertisement. Consequently, the *public interest's* information clearly relegated the political message of *Fidesz-KDNP*

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320 Ibid

321 Venice Commission, CODE OF GOOD PRACTICE IN ELECTORAL MATTERS GUIDELINES Adopted by the Venice Commission at its 52 nd session ( Venice , 18-19 October 2002 ) 7

322 OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, 'Statement of Preliminary Findings and Conclusions' (2018). 11, para 1

323 Ibid 1, para 1

campaigning<sup>324</sup> (anti-migrants, anti-Semitic, anti-EU, anti-UN). In every tram station in Budapest, all along the roadways and everywhere else in the country, *public information* billboards were showing pictures, *inter alia*, of a crowd of non-white men marching in line<sup>325</sup>, with large red 'stop' sign. This made a direct echo to Orban's rhetoric on the 'invasion' of migrants occurring in Europe, omnipresent in the campaign's message. Public TV channels remained important for the party-ruling for the purpose to spread the governmental propaganda. Indeed, parts of the countryside only has access to this mean of information. On some public TV channels, messages of this kind (alternating targets between 'migrants', 'Brussels' or 'UN'; but keeping the red sign 'stop') were appearing every 10 minutes. Such overlap between public and *Fidesz's* finances/messages is a trenchant authoritarian and totalitarian mean to restrict pluralism and fair elections.<sup>326</sup>

Many attacks against the civil and political opposition in general and against main opposition leaders in particular have been made possible via the diffusion of the media. I previously mentioned another billboard design with George Soros and other leaders of the opposition supposedly willing to cut the anti-migrant fences. This is evident when candidates of opposition parties, while campaigning on the streets of their constituency, were asked by voters questions such as: 'are you really going to cut the fence?'<sup>327</sup>

As the OSCE mission mentioned, the 'many many billboards'<sup>328</sup> which share the same message of the ruling-coalition shrinks the space for voters to not be influenced and to form an informed and reasonable choice. The confiscation of the media and hostile campaigning is a breach of State's duty of neutrality<sup>329</sup> and fully violate the freedom of voters to form an opinion<sup>330</sup>.

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324 Ibid 1, para 7

325 The government took the same image that has been used in 'breking point' campaign of UKIP during the 2016 referendum. See Hungarian government rehashes UKIP anti-migrant poster in new ad, euronews.com <<http://www.euronews.com/2018/03/28/hungary-government-s-new-anti-immigration-ad-copies-ukip-s-controversial-anti-migrant-post>> accessed 05/07/2018

326 See earlier Part 1, Title 2, Chapter 2

327 Imre Kovacs, personal interview candidates from the opposition - Momentum. Candidate in Hajdú-Bihar 5. 13 April 2018.

328 Douglas Wake, OSCE-ODIHR Limited Election Observation Mission-Hungary-Parliamentary elections 6 April 2018, preliminary statements, Press conference 9 April 2018

329 Venice Commission CODE OF GOOD PRACTICE IN ELECTORAL MATTERS GUIDELINES Adopted by the Venice Commission at its 52 nd session ( Venice , 18-19 October 2002 ).Principle 3.1 (a)

330 Ibid Principle 3.1 'Freedom of voters to form an opinion'

The second crucial authoritarian attacks on opposition forces in Hungary is to be found into the authoritarian attacks on NGOs sector.

## Chapter 2. Attacks on civil society organisations

It has been several years now that opposition actors issued from the Hungarian civil society are victims of an increasing trend of attacks. Helped by the media context just above mentioned, Viktor Orbán's government developed a constant stigmatization of CSOs receiving foreign funding from NGO Fund and government. It describes them as organisations working for 'foreign agents', against the interests of Hungary. The Hungarian Helsinki Committee (hereinafter 'HHC'), one of the most important Hungarian NGO committed to the protection of human rights and the rule of law through advocacy, made a comprehensive timeline of the many verbal and legal attacks the Orbán government perpetrated.<sup>331</sup> In the light of this very useful document, two periods can be distinguished: the period from 2010 to 2015 and the period from 2015 and ongoing.

The first period witnessed the construction of an intimidation process against watchdog NGOs and NGO Funds, punctuated by very alarming events. In a nutshell, the government progressively built an unacceptable rhetoric towards organisations, pointing them as 'foreign agents' or, in the word of Viktor Orbán, 'paid political activists who are trying to help foreign interests'<sup>332</sup>. Then, the state undertook various actions persecuting NGOs activities, such as unfair state audits, severe administrative document requests and even the launching of police raids in NGO offices (that had been declared unlawful a posteriori). In addition, criminal investigations against several NGOs started (but never result in criminal charges).<sup>333</sup>

The second period was marked by the intensification the anti-NGO campaign, framed into conspiracy theories and resulting in the recent adoption of several laws that deeply weaken capacities of CSOs to conduct their activities. For the Hungarian Helsinki

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331 'Timelines of Governmental Attacks against NGOs | Magyar Helsinki Bizottság'

<<https://www.helsinki.hu/en/timeline-of-governmental-attacks-against-ngos/>> accessed 1 July 2018.

332 Viktor Orbán speech Băile Tuşnad/Tusnádfürdő, Roumania. (26 July 2014) Full text available at :

<http://budapestbeacon.com/public-policy/full-text-of-viktororbans-speech-at-baile-tusnadtusnadfurdo-of-26-july2014/10592>

333 'Timelines of Governmental Attacks against NGOs | Magyar Helsinki Bizottság'

<<https://www.helsinki.hu/en/timeline-of-governmental-attacks-against-ngos/>> accessed 1 July 2018.

Committee, “the series of governmental attacks against Hungarian NGOs (...) is another step in the process aimed at establishing an ‘illiberal state’.”<sup>334</sup>

The present chapter will focus on this last period, particularly analysing the ‘legally sophisticated’<sup>335</sup> authoritarian legislations concerning foreign funded NGOs working in Hungary. These represent most serious threats toward opposition actors that never took the form of adopted legislation before. Despite passing in parliament, this time Viktor Orbán did not keep up democratic appearances. After reviewing the anti-NGO campaigns (2.1) framing ideological and political lines of the government; the chapter analyses anti-NGO laws newly adopted by the Hungarian parliament (2.2).

## 2.1. The anti-NGO campaign

The Year 2017 was punctuated by the ‘anti-Soros’ campaign that intensively discredited the founder of the Central European University (hereafter ‘CEU’) and Open Society Foundations<sup>336</sup>, two important places for the promotion and protection of open society in Hungary. ‘The year 2017 turned out to be the darkest year for Hungarian civil society since 1989–90’ according to Freedom House<sup>337</sup>, that evaluated down ‘the Civil Society rating from 2.75 to 3.00 due to an increasingly hostile atmosphere for NGOs and adoption of legislation that aims to intimidate and weaken CSOs that receive funding from abroad.’<sup>338</sup>

With regard to hostile statements, *foreign funded* CSOs are constantly pictured by the government as pseudo civil society not serving the public usefulness but the interest of foreign states and agents. For example, ‘Szilárd Németh, vice-president of the Fidesz and MP, stated that ‘the Soros empire’s fake civil organisations (...) have to be rolled back with every means...’<sup>339</sup>, affirming that his party is willing to support legislations in this sense.

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334 Ibid

335 Gabor Halmai, ‘Legally Sophisticated Authoritarians: The Hungarian Lex CEU | Verfassungsblog’  
<<https://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu/>> accessed 25 April 2018.

336 Open Society Foundations is a network of non-governmental organisations that have the missions ‘to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people.’

337 Hegedüs. 6

338 ibid. 3

339 ‘Timelines of Governmental Attacks against NGOs | Magyar Helsinki Bizottság’, table line ‘10-11 January 2017’  
<<https://www.helsinki.hu/en/timeline-of-governmental-attacks-against-ngos/>> accessed 1 July 2018  
(Hereinafter : ‘Timeline HHC’, with date reference)

The day after, he ‘stigmatized the Hungarian Civil Liberties Union (HCLU/TASZ), HHC, and Transparency International Hungary—the country’s three leading watchdog NGOs...’<sup>340</sup>, stating that NGOs represent a national security threat and ‘this threat must be opposed and the NGOs should be swept out of the country’<sup>341</sup>. For Fidesz vice-president, watchdog NGOs does not have a ‘legitimate participation’ in politics.<sup>342</sup> During its annual the state of the nation speech on 10 February 2017, Viktor Orbán explained his vision of CSOs:

...‘open society’ means that – instead of elected members of parliament and governments – true power, decisions and influence must be put in the hands of people who are part of the global network, media gurus, unelected international organisations and their local offices.<sup>343</sup>

The Prime Minister also stated in the same occasion that ‘it is a problem that foreign funding is being secretly used to influence Hungarian politics. (...) We are [talking about] paid activists from international organisations and their branch offices in Hungary.’<sup>344</sup>

In February 2018, the pro-government newspaper *Figyelő* published a list of more than 200 names, called ‘mecenaries’ of George Soros. The list name members of the civil society, investigative journalists, human rights defenders, scientists and academics – among those thirty are from the CEU.<sup>345</sup> This constitute a severe act of intimidation, chosen in the creative menu of authoritarian means of threatening against opponent voices. A next step for the Orbán regime is to choose legal means.

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340 *ibid.* 6-7

341 *Ibid*, referring to: Németh Szilárd elmondta, konkrétan kiket kell eltakarítani: TASZ, Helsinki, Transparency [Szilárd Németh explained, what NGOs should be swiped out of the country: TASZ, Helsinki, Transparency], 444.hu, 11 January 2017, <https://444.hu/2017/01/11/nemeth-szilard-elmondta-konkretan-kiket-kell-eltakaritani-tasz-helsinki-transparency>

342 ‘Timeline HHC’ - 10-11 January 2017

343 ‘‘The Prime Minister Viktor Orbán’s State of the Nation Address (Budapest, 10 February 2017)’  
<<http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-state-of-the-nation-address-20170214>> accessed 12 June 2018.

344 *Ibid*

345 Kata Karáth, ‘Hungarian Scientists Are on Edge as Country Is Poised to Force out Top University’ [2018] Science.



## 2.2. The anti-NGO laws

Viktor Orbán already announced by 2014 that he was willing to adopt legislation on NGOs funded from abroad, in order to see 'who's in the background' of them.<sup>346</sup>

With regard to legislations, the ruling-party introduced in 2017 and 2018 several acts that aimed to stigmatize, intimidate and render uncertain the pursuit of activities of CSOs in Hungary. Such infamous developments highlight the turn toward clear authoritarian derivation of state power, using law to repress voices attached to democracy and human rights.<sup>347</sup>

### *'LexCEU' adopted on 4 April 2017*

First, the Parliament adopted, in one week, a law amending the Higher Education Act of 2011<sup>348</sup>. It implements several additional constrains for foreign universities operating in Hungary, deemed to be particularly targeting the CEU, the university funded by Georges Soros and committed to values of open society. According to the HHC, this law makes 'it impossible for the CEU to continue its operations as an institution of higher education in Budapest.'<sup>349</sup> Indeed, main obstacles to the pursuit of activities of such establishment is that a campus in the other country of operation must be settled, they cannot have the same name and most of all the establishment accredited abroad can pursue its activities in Hungary, only if a bilateral agreement is signed between the Hungarian state and the other state.<sup>350</sup> By now, any agreement have been reached with the government despite all attempts.<sup>351</sup> The entering into vigour of the law provoked unprecedented large-scale mobilisation in Budapest and received international attention as many institutions

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346 'Timeline HHC' - 15 December 2014

347 Hegedüs. The 'National Democratic Governance [Freedom House's] rating declined from 4.25 to 4.50 due to the government's imitation of straightforward authoritarian practices with its attack on NGOs and academic freedoms...'

348 Bill T/14686 amending Act CCIV of 2011 on National Higher Education, adopted 4 April 2017

349 'Timeline HHC', 28 March – 4 April 2017

350 Ibid. For a summary of the legal analyse of the amendments :

[https://www.ceu.edu/sites/default/files/attachment/basic\\_page/18010/summary-legalanalysis7.4.17.pdf](https://www.ceu.edu/sites/default/files/attachment/basic_page/18010/summary-legalanalysis7.4.17.pdf)

351 'Central European University/#istandwithCEU' (2018) <<https://www.ceu.edu/category/istandwithceu?tid=Top&page=4>> accessed 14 June 2018.

condemned the new legislation.<sup>352</sup> The university is now waiting the infringement procedure's judgement the European Commission launched on 7 December 2017.<sup>353</sup>

*'LexNGO' adopted on 13 June 2017*

Second, the Hungarian Parliament adopted on 13 June 2017 the 'law on the transparency of organisations receiving support from abroad'<sup>354</sup> (hereinafter 'LexNGO'). Front of the European Parliament, Viktor Orbán explained that the law was aimed at 'nothing else but to be able to know of NGOs what kind of money and what kind of interests are behind them'<sup>355</sup>. But Hungarian law already obliged NGOs to show full transparency on their activities and finances through public annual reports and state audits<sup>356</sup>.

In reality, LexNGO is clearly aimed at attacking the work of NGOs, by stigmatising the fact of being a legal beneficiary of international financing. With it, **NGOs** receiving more than 7.2 million HUF (or 24000€) have to comply with new requirements. First, registering as foreign funded NGO within fifteen days through a different registration procedure.<sup>357</sup> Second, it obliges a stigmatizing mandatory labelling of concerned NGOs' websites and any materials as 'organisation receiving support from abroad'<sup>358</sup>. In fact, this law is "reminiscent of 'foreign agent' laws in Russia and Israel"<sup>359</sup>, by which the process can put

352 See Ibid, list of institutions and personalities that officially demonstrates their support toward the CEU.

353 European Commission, 'COMMUNIQUES DE PRESSE - Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law' (17 December 2017) <[http://europa.eu/rapid/press-release\\_IP-17-5004\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5004_en.htm)> accessed 13 June 2018.

354 Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds: ('Lex NGO') adopted on 13 June 2017. Available in Hungairan at: [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1700076.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700076.TV) ; in English at : [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2017\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)031-e)

355 'Tiemline HHC', 26 April 2017

356 'Hungary: Hungarian Parliament Passes Restrictive NGO Legislation | Front Line Defenders' <<https://www.frontlinedefenders.org/en/statement-report/hungary-hungarian-parliament-passes-restrictive-ngo-legislation>> accessed 4 July 2018.

357 LexNGO, Section 2

358 LexNGO, Section 2 (5)(6)

359 Front Line Defenders, 'Hungary: Hungarian Parliament Passes Restrictive NGO Legislation' (2017) <<https://www.frontlinedefenders.org/en/statement-report/hungary-hungarian-parliament-passes-restrictive-ngo>>

an end to fines and the suspension of activities of NGOs that did comply with all requirements.<sup>360</sup> LexNGO is denounced by many national and international institutions and organisations as infringing freedoms of association and expression, rights to private life and personal data, right to a good reputation and prohibition to discrimination<sup>361</sup>. And for this law too, the European Commission launched an infringement procedure against Hungary, for violation of free movement of capital, mainly.<sup>362</sup> Despite all, the Orbán government pursued its CSOs' hunt.

### *'LexNGO II' adopted on 20 June 2018*

Third, the Fidesz government presented the so-called 'Stop Soros' legislative package<sup>363</sup> in parliament by January 2018 on NGOs 'supporting migration'. After a final and third proposal made in February, Bill T/333 'amending certain laws relating to measures to combat illegal immigration' (hereafter 'LexNGO II') was adopted in one month by the Parliament, on 20 June 2018<sup>364</sup> – a cynical way to mark international refugee day.<sup>365</sup> The legislation forms a further step for the government. Formally, it did not bother to wait

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legislation> accessed 4 July 2018

360 LexNGO, Section 3

361 See, mainly: European Commission, 'COMMUNIQUES DE PRESSE - Infringements -European Commission Refers Hungary to the Court of Justice for Its NGO Law' (17 December 2017) <[http://europa.eu/rapid/press-release\\_IP-17-5003\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5003_en.htm)> accessed 13 June 2018 ; Venice Commission - CDL-AD(2017)015-e Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, 20 June 2017 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e) ; Statement by Hungarian NGOs <https://www.helsinki.hu/wp-content/uploads/OSCE-HDIM-2017-statement-Hungary-NGOs-21092017.pdf>: and Commissioner for HR of the CoE, statement, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-proposed-additional-restrictions-to-the-work-of-ngos-in-hungary>

362 European Commission, 'COMMUNIQUES DE PRESSE - Infringements -European Commission Refers Hungary to the Court of Justice for Its NGO Law' (17 December 2017) <[http://europa.eu/rapid/press-release\\_IP-17-5003\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5003_en.htm)> accessed 13 June 2018.

363 Fidesz' own qualification.

the Venice Commission's opinion on the draft legislation adopted in a rush on 22 June.<sup>366</sup> Substantially, the government implemented infamous authoritarian legal means to restrict critical voices' rights, mostly by the criminalisation of individuals working with migration. It worth assessing in details Section 11 of LexNGO II to weigh obstacles put to NGOs.

Section 11 amends the criminal Code, inserting a new criminal offence: 'Section 353/A: facilitating illegal immigration'. Accordingly, 'anyone who conduct organisational activities'<sup>367</sup> assisting asylum seekers or foreigners faces criminal sanctions up to one year of imprisonment. To 'provides financial means' or 'regularly carry out such activities' are both foreseen.<sup>368</sup> The law breaches seriously NGOs and NGOs workers' fundamental rights. Mostly, LexNGO II adopts vague terms supposed to qualify the criminal conduct, breaching the principle of legal certainty.<sup>369</sup> Indeed, the notion of 'organisational activities', as defined by subsection (5), is an open door for unlimited inclusion of behaviour that must remain legally protected in a democratic society. This is a clear risk for persecution of NGO workers. Importantly, the law does not foresee any exception concerning behaviour aimed to offer humanitarian assistance<sup>370</sup>. Furthermore, it does not exclude 'advocacy and campaigning activities'<sup>371</sup>. This lack of precision did not even prevent the lawmaker from not explicitly including fully legitimated actions of NGOs' missions of assistance and information toward vulnerable persons, such as 'preparing or distributing informational materials'<sup>372</sup>.

Given lack of exclusion and inclusion going beyond international standards, the provision breached freedom of expression and freedom of association. It is important to

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364 Bill T/333 amending certain laws relating to measures to combat illegal immigration, adopted by Hungarian parliament on 20 June 2018, (hereafter, 'Lex NGO II'), Non official translation available in : <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>

365 The present study is not the space to discuss the disastrous consequences of this new legislation on asylum-seekers' and foreigners and exclusively analyse provisions concerning rights and activities of CSOs.

366 Venice Commission – OSCE/ODIHR, Joint Opinion on the the provisions of the so-called 'Stop Soros' draft legislative package which directly affect NGOs, Adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018)' (2018), para 7 and 8

367 Lex NGO II, Section 11 (1)(2)

368 Ibid

369 The Hungarian Helsinki Committee, 'HUNGARIAN GOVERNMENT MARKS WORLD REFUGEE DAY BY PASSING LAW TO JAIL HELPERS' (2018)

370 Venice Commission – OSCE/ODIHR, Joint Opinion on the the provisions of the so-called 'Stop Soros' draft legislative package which directly affect NGOs, Adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018)' (2018), para 82

371 Ibid, para 101

372 Subsection (5) (b) of Article 353A

note the freedom of association of NGOs is violated in two main dimensions. First, in preventing NGOs, employees and volunteers to exercise lawful activities related to their missions. Second, in providing for disproportionate sanctions, such as the dissolution of the entire NGO ‘as legal consequence of criminal conviction of an NGO member under Article 353A’<sup>373</sup>.

This chapter analysed in detail the attacks against civil society organisations in Hungary. It proved that the Orbán regime no longer felt the need to maintain a democratic façade. The civil opposition, has often shocked the willingness to protest and counter an authoritarian government. Today, it is deeply weakened in Hungary. Some organisations are leaving to settle in neighbouring countries<sup>374</sup>; some decide to be part of the resistance and declare to be more than ever committed to the defence of human rights and democracy in Hungary, as last bastions. Given the context, this is admirable.

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373 Venice Commission – OSCE/ODIHR, Joint Opinion on the the provisions of the so-called ‘Stop Soros’ draft legislative package which directly affect NGOs, Adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018) (2018), para 104

374 The CEU is leaving soon in Vienna if any agreement is reached; OSF is leaving in Berlin

## Conclusions

Democracy, by its very nature, is a political configuration that encompasses opposition. The political and civil opposition have rights which are protected at different levels and by different instruments. In Europe, the sensitivity of political matters for supranational institutions might have blocked the development of the legal protection. *Today, related European standards are vague and often non-binding, which might be an open door to the establishment of an unbalanced system in favour of the rulers in place - in parallel of the difficulty to criticise tolerated measures.* The protection of rights of the opposition, an essential feature in a democracy, is now more than ever a serious concern given the democratic crisis that Europe currently finds itself in. The spreading of an illiberal trend which is bringing non-democratic leaders to power who are essentially willing to disregard checks and balances institutions and mechanisms, including opposition voices in the electoral arena and elsewhere.

In Hungary, authoritarian laws and practices implemented by Viktor Orbán's government since 2010 violate core principles of constitutional democracy and several civil and political human rights, thus hindering the effectiveness of the opposition. In addition, the implementation of well-known, tolerated rules constitute important barriers within the Hungarian cocktail. And this whole new shape has been founded and legitimised beneath a democratic façade. Besides dis-favourable laws and practices coming from the power in place, the lack of cooperation between political parties from the opposition might have prevented a potential change for 2018 elections. The cumulative effect of all obstacles allow one to conclude that the Hungarian opposition is ineffective in the state it stands today; and given the level of political and electoral manipulation, Hungary can be qualified as an electoral autocracy.

Among the most crucial challenges the opposition confronts, the study finds:

- the capacity for the media and the civil society to foster a minimum level of pluralism in the society, fundamental for the awareness of the whole Hungarian society in the long-run;
- the capacity for the parliamentary opposition to block revisions of fundamental laws such as constitutional and organic laws;
- the capacity for the political opposition to overcome political quarrelling and opt for strategic cooperation in elections.

At local, national and European levels, it is the ideological battle that has to be fought. Those who believe in democracy, after having thought they had won the battle in 1989, must now remain on the defensive. If democracy is not only about rules but about what one believes is democracy, its defenders have to act with convictions. This means that must be not be afraid to denounce autocratic manipulations in the local, national and European political sphere, adopting a consistent and strong position front of illiberal rulers. We must not accept the political discourse that these autocratic actors use and create meaningful alternatives.

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