The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association

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On 5 June the Hungarian Constitutional Court issued two injunction decisions, almost identical in their texts, which suspend the constitutional review procedures against two laws enacted in early April, 2017 by the Hungarian Parliament, outside the normal legislative process. The first, an amendment to the Act on National Higher Education known as „Lex CEU" was challenged by a constitutional complaint, the second, the Act of the Transparency of Organizations Receiving Foreign Funds by 60 opposition MPs of the Hungarian Parliament with an abstract norm control notion.

The handling of these two petitions by the Constitutional Court was odd in more than just one respect. The Court hasn't held a single hearing in either case in the almost one year passed since the filing of the petition. For the first time of its more than quarter century history, without any legal or internal regulatory basis, it has established a 'scientific' committee to help the judges to prepare to decide the cases. After the European Commission initiated infringement procedures based on Article 258 TFEU in each case against Hungary before the European Court of Justice, and more than half a year into the procedure, all of the sudden the Constitutional Court decided to suspend their (in practice not even started) review procedure and wait for the judgment of the ECJ, thereby de facto helping the government to force the Central European University (CEU) out of the country.

Despite the constitutionally problematic nature of the law (to say the least), CEU fulfilled all the conditions to get its license to operate further in Hungary. The CEU has opened an additional campus in the State of New York, where the original accreditation comes from. For months, the State of New York is ready to sign the necessary contract with the Hungarian Government, which stalls and refuses and plays for time until CEU has to give up, not being able to live in limbo for too long. The Act on the 'foreign agent' NGOs is also related to the war against foreign supporters, especially George Soros, founder of CEU and supporter of many civil society organizations, including the ones providing legal aid to asylum-seekers. This is the cynical political game the packed Constitutional Court is part of with its decision to refuse its duty to decide a case brought before it.

Even though the Act on the amendment to the National Higher Education is formulated in normative terms, the only targeted institution is CEU, hence I call it 'Lex CEU'. The law uses legal tricks to force CEU to cease operation in Budapest. The most onerous was the mentioned opening of an additional campus in the State of New York, which wasn't a condition in 1995, when CEU, holding a charter from the New York State Education Department, received its license to operate in Hungary from the Ministry of Culture and Education. Like other international universities chartered in the US, CEU does not maintain any academic or other programs in the United States. The other unacceptable and even legally impossible requirement of the new law was that the Hungarian government sign an agreement with the US federal government. Only after the latter told its Hungarian counterpart that they cannot possibly intervene in the jurisdiction of the states regarding higher educational issues, such as the operation of CEU in Hungary, the government in Budapest accepted New York State as signing partner.

The Act on Transparency of Organizations Supported from Abroad shows striking resemblances the Russian Law on Foreign Agents, critically reviewed by the Venice Commission in its opinion of 27 June 2014. Under the law, a civil society organization has to

declare that it became an organization supported from abroad within 15 days, if the allowance received from abroad reach the threshold of 7.2 million Hungarian Forint (approximately 24,000 Euros) in a given tax year. The consequence of receiving such foreign funding is that the organization has to register as a 'foreign funded organization' on the court register, indicate it on its website and on any publications issued by the organization. In case the organization did not fulfil its obligations under the law for the second time, the public prosecutor can initiate the imposition of a fine and later a lawsuit against the organization for the cancellation thereof. All in all, the law stigmatizes NGOs on the basis of the fact that they receive foreign funding from abroad.

Following a debate on the overall situation in Hungary in the European Parliament in April 2017, the EP stated in a resolution that "recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values". Therefore, the resolution, among other things, calls for: „the Hungarian Government to repeal laws tightening rules against asylum-seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution". As a consequence of this parliamentary resolution, the European Commission started an Article 258 TFEU infrigement action first on the 'Lex CEU' and later on the 'Foreign Agent NGOs' Act, and, after a thorough analysis of Hungary's response to the Commission's letters of formal notice, in both cases has decided to send a reasoned opinion, and as Hungary still didn't comply, finally turned to the ECJ. Whether the infringement procedures chosen by the Commission are the most effective tool to remedy the two grave violations of EU values, or whether the EU has such tools and the necessery political will, remains to be seen.

But Viktor Orbán, after the Hungarian Constitutional Court decision issued in December 2016 (ab)using the constitutional identity argument against the Council's relocation plan, has once again demonstrated that he can always rely on his packed Constitutional Court when it comes to ducking his obligations to comply with EU values. Paradoxically and cynically the same judges who defended the Hungarian historic constitution against the EU Treaty, this time based the suspension of their review on 'constitutional dialogue' with the ECJ, and the possible inforcement of EU law. These judges, most of them university professors, have abandoned their constitutional duties to decide cases brought before them, and instead once again came to the rescue of their lord and commander, the Prime Minister, this time betraying their fellow professor's academic freedom, and freedom of association of their fellow lawyers working as human rights defenders.

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