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**SAFEGUARDING VALUES IN THE EUROPEAN  
UNION: THE EUROPEAN PARLIAMENT,  
ARTICLE 7 AND HUNGARY**

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# ABSTRACT

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*The recent constitutional crisis in Hungary and other political developments in several member states have raised concerns over the capacity of the European Union to safeguard its fundamental values: democracy, the rule of law and human rights. Mechanisms in the hands of the institutions are considered to be weak and ineffective, especially if compared to those used during the process of accession of candidate countries. Several proposals to strengthen the current system have been presented. The paper analyzes the role of the European Parliament in this context, looking at whether and how it is involved in existing mechanisms, and how it has used its powers during the Hungarian crisis. The paper concludes that the Parliament, as the most democratic and representative EU institution, has a crucial role to play in order to ensure the legitimacy of EU's action to safeguard fundamental values in the Member States.*

Keywords: *European Parliament, Rule of Law, Democracy, Human Rights, Hungary*

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## INTRODUCTION

Democracy, the rule of law and human rights are recognized today as the keystones of the European Union and of the project of European integration. They are considered to be parts of the ‘DNA of Europe’<sup>1</sup> and of the ‘European constitutional heritage’.<sup>2</sup> Over time, they have found recognition in several provisions of the European Union’s Treaties. EU institutions are engaged in safeguarding and promoting democracy, the rule of law and human rights on both the internal and the external scene, and mechanisms have been created in order to guarantee their compliance with these fundamental values of the Union. Yet, the European Union is more than the sum of its institutions: it is a ‘multilevel system’,<sup>3</sup> involving European as well as national actors, which has reached an unprecedented level of integration, when compared to other traditional international organizations. If some values are to be considered truly fundamental for such a system, they must be upheld and guaranteed not just by EU ‘central’ institutions, but by all the actors involved, including Member States’ governments and by other national authorities in their spheres of action. When democracy, the rule of law and human rights are threatened or violated even in a single member state, the entire system suffers. It is therefore necessary to construct mechanisms at EU level to safeguard the fundamental values in the Union as a whole, and EU institutions have a responsibility in ensuring compliance with common standards.<sup>4</sup>

Over the past few years, however, the Union has often struggled to guarantee respect for the fundamental values at national level. Alarms have been raised over the capacity and willingness of EU member states to respect democracy and the rule of law, and protect human rights. Political and constitutional developments in Hungary are arguably the most striking example of democratic

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<sup>1</sup> See for example the recent speech of the Vice President of Commission Frans Timmermans, ‘The rule of law is part of Europe’s DNA, it is part of where we come from and where we need to go. It makes us what we are’: Frans Timmermans, The European Union and the Rule of Law - Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015, available at [https://ec.europa.eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en).

<sup>2</sup> See in particular the work of the European Commission for Democracy Through Law (the ‘Venice Commission’) on Europe’, in particular contained in Council of Europe, ‘The Constitutional Heritage of Europe’, 18 *Science and Technique of Democracy* 1 (1996), and recent opinions, including Venice Commission, Opinion 685/2012, Constitutional Issues in Romania, Strasbourg, 5 September 2012, Doc CDL-REF(2012)031.

<sup>3</sup> For the concept of multilevel constitutionalism and governance, see e.g. Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited’, 36 *Common Market Law Review* (1999) and ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’, 15 *Columbia Journal of European Law* (2009); Liesbet Hooghe - Gary Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, Washington DC, 2001).

<sup>4</sup> For a more detailed analysis of the normative reasons explaining EU’s involvement in the field, see below Section 1.

and rule of law backsliding,<sup>5</sup> but other issues have emerged over the past few years, such as violation of the rights of minorities,<sup>6</sup> failing asylum systems,<sup>7</sup> threats to media pluralism,<sup>8</sup> and widespread corruption.<sup>9</sup> These situations have significantly put into question the capacity of the EU to guarantee that all the member states comply with the basic common values of the Union. Current mechanisms have been largely considered insufficient and ineffective, and new instruments have been proposed and introduced by the Parliament, the Commission and the Council.

The topic has been largely discussed in academia as well as in the institutional and political debate. This paper wants to contribute to the on-going debate from a more specific point of view, which has been covered less intensively: the role of the European Parliament in the system to safeguard the EU's fundamental values. Little attention has been dedicated to the contribution of the EP in guaranteeing democracy, the rule of law and human rights in the Member States. Nonetheless, as the only directly elected EU institution, democratically representing EU citizens, and as an engaged human rights actor in several domains, the EP has both the legal competence and the political responsibility to contribute in this field. Its contribution to the strengthening of the overall system of protection of EU's values is therefore crucial. The purpose of this paper is two-folded: firstly, in the more descriptive part, the paper reconstructs the role of the Parliament in existing mechanisms, and in particular in the context of article 7 TEU, complementing and developing existing analyses; secondly, looking at whether and how the Parliament has used its powers during the 'Hungarian crisis', the paper intends to reflect on possible future developments

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<sup>5</sup> On the concept of backsliding, see e.g. Ulrich Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession', *52 Journal of Common Market Studies* 1 (2014).

<sup>6</sup> For example, the Commission has opened in 2014 two infringement procedures against Czech Republic and Slovakia for discrimination of Roma children in education, and non-conformity with the Race Equality Directive. The letters of formal notice has been sent in September 2014 and the procedures are still open. The 'Roma affair' developed in summer of 2010 in France has always demonstrated the difficulties of the Union to effectively guarantee the rights of minorities: see Sergio Carrera - Anaïs Faure Atger, 'L'affaire des Roms. A Challenge to the EU's Area of Freedom, Security and Justice', CEPS Policy Paper (2010), <http://www.ceps.eu/publications/l'affaire-des-roms-challenge-eu's-area-freedom-security-and-justice>.

<sup>7</sup> Even before the developments of 'refugee crisis' of the summer 2015, the European Court of Human Rights had already signaled the difficulties of certain states to guarantee fundamental rights of asylum seekers and critical aspects of the Dublin Regulation: see cases *M.S.S. v Belgium and Greece*, Application No 30696/09, 21 January 2011; *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014 (concerning the Italian asylum system). The Court of Justice addressed the issue in Joined Cases C-411/10 and C-493/10, *N.S. and M.E.* [2011] ECR I-13905.

<sup>8</sup> See the conclusions of the High Level Group on Media Freedom and Pluralism, A free and pluralistic media to sustain European democracy, Brussels, 21 January 2013. See also the European Parliament Resolution on concentration and pluralism in the media in the European Union, 25 September 2008, Brussels, Doc. P6\_TA(2008)0459.

<sup>9</sup> In order to fight corruption, the European Commission has started to adopt a bi-annual Anti-Corruption Report, the first edition of which has been presented in 2014, stressing several critical points for the fight of corruption in the European Union: see European Commission, EU Anti-Corruption Report, 3 February 2014, Brussels, Doc. COM(2014) 38 final.

of the system to safeguard the EU fundamental values, and on the role of the Parliament within it: can the European Parliament be an effective ‘watchdog’ for the protection of human rights and other fundamental values vis-à-vis the member states of the Union? How should it be involved in the system?

The structure is organized as follows. Firstly, in section I, the paper explores the concept of ‘EU fundamental values’, and briefly introduces the recent ‘constitutional crises’<sup>10</sup> emerged in Hungary and in other member states of the Union. Section II contains an analysis of existing mechanisms to safeguard fundamental values in the member states, including Treaty provisions and the more recent instruments introduced by the Commission and the Council. In section III, the focus shifts on the European Parliament, looking at its general role in the area of democracy, rule of law and human rights, at its involvement in the procedures of article 7 of the TEU and in other mechanisms to safeguard the EU values, and finally at the monitoring instruments in its hands. The IV and last section analyzes how the EP has dealt with the Hungarian crisis, with the aim to draw some insights on future developments and to answer the questions raised above.

## 1. THE EU’S FUNDAMENTAL VALUES AND THEIR CRISIS

European Union’s primary law is nowadays crowded with references to democracy, the rule of law and human rights. They are cited in the preamble of the Treaty of the European Union (referring to ‘...the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law...’) and listed among the ‘fundamental’ values of the organization in article 2 TEU: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. The promotion of these values is one of the aims of the Union according to article 3 TEU,<sup>11</sup> and values ‘inspire’ the Union’s action on the external scene, which seek to advance and safeguard democracy, the rule of law and human rights in the wider world (article 21 TEU). Moreover, article 49 TEU affirms that to respect and promote the values of article 2 is a condition to gain membership of the organization,<sup>12</sup> and article 7 TEU gives to EU

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<sup>10</sup> On the concept of ‘constitutional crises’, see Armin von Bogdandy – Pal Sonnevend (eds.), *Constitutional Crises in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, Oxford, 2014).

<sup>11</sup> Article 3 TEU: ‘The Union’s aim is to promote peace, *its values* and the well-being of its peoples’.

<sup>12</sup> Article 49 TEU: ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union’.

institutions the possibility to sanction those EU member states that are found in violation of the fundamental values.

Even if the Treaties describes them as ‘founding’ values (‘the Union is founded on the values...’), democracy, the rule of law and human rights were not mentioned in the first documents paving the way for the development of the process of European integration – the 1951 Paris Treaty creating the European Coal and Steel Community and the 1957 Rome Treaties creating the European Economic Community. While the realization of peace and the improvement of living standards underscored the whole project of European integration, conceived as a reaction to the tragic events of World War II, and traces of these underlying ideas were expressed in the Schuman Declaration,<sup>13</sup> the method chosen to start the process of integration was a ‘functionalist’ one, largely based on strengthening economic and technical cooperation between the original members.<sup>14</sup> Beside a marginal reference to the need to ‘preserve and strengthen peace and liberty’ in the preamble of the EEC Treaty, other values today considered as fundamental were not mentioned in the original documents, and no explicit competences were conferred to EEC institutions in the field. Authors have explained this absence of reference to values in the original Treaties in the light of several elements, including the existence of another organization entrusted to promote and safeguard human rights and democracy in Europe – the Council of Europe and its European Convention of Human Rights -, and the failure to ratify the Treaty on the European Political Community (EPC Treaty) in 1954, which was meant to combine the ECSC with the proposed European Defence Community, introducing several human rights clauses in the new organization.<sup>15</sup> As a consequence, human rights, democracy and the rule of law were largely absent from the life of the Communities at least in the first two decades of its existence.

As the process of integration evolved, institutions acquired new competences and their actions started to have a more direct impact over the life of individuals and to interfere with competences traditionally assigned to national states. To argue that European integration remained merely a project of technic and economic cooperation, and that human rights, rule of law and democracy had to be dealt with only at national level, or in the Council of Europe, became untenable. Gradually, in a process guided by the Court of Justice, and to a lesser extent by the European Parliament, these values started to penetrate the EU legal and political order and produced a

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<sup>13</sup> The Schuman Declaration affirmed for example that ‘This production [of coal and steel] will be offered to the world ... with the aim of contributing to raising living standards and to promoting peaceful achievements’.

<sup>14</sup> On the functionalist method and the Monnet project, see Ernst B. Haas, *The Uniting of Europe* (Stanford University Press, Palo Alto, 1958).

<sup>15</sup> For an extensive analysis of the absence of fundamental rights and other values from the original treaty text, see Grainne de Burca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’, *American Journal of International Law* 105 (2011).

process often defined as the ‘constitutionalization’ of the European Union, which has had a profound impact on the core structures of the project of integration.<sup>16</sup> This implied a ‘transformation of Europe’<sup>17</sup> from a purely economic project to a more political and constitutional enterprise, in which all actors, at European as well as at national level, needed to comply with the basic principles of constitutionalism.<sup>18</sup>

This process of constitutionalization or transformation of the EU has been described by many, and it is beyond the scope of this paper to analyze it in great detail. It seems sufficient to underline how from a purely internal dimension, where the main concern was to ensure respect for the fundamental values by EU institutions themselves, values became crucial also in the relationship with third countries and with candidates to membership, and finally even in the very complex and dense relationship between the Union and its member states. To the first, internal dimension belongs most famously the recognition of human rights as ‘general principles of [EU] law’ by the Court of Justice, which allowed for judicial review, on the basis of human rights, of acts of EU institutions,<sup>19</sup> but also the idea of the Union as a ‘community based on the rule of law’ expressed in *Les Verts*,<sup>20</sup> as well as the more recent efforts to fight the alleged ‘democratic deficit’ of the Union. As for the external projection of values,<sup>21</sup> the Union has intensified its efforts in the 1990s, attaching provisions on human rights and democratic conditionality to international treaties concluded with third countries<sup>22</sup> – the Parliament played a crucial role in this development, as will be described below –, but also putting the values of democracy, the rule of law and human rights as the bases of the new Common Foreign and Security Policy. Moreover, the Copenhagen

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<sup>16</sup> See in particular the groundbreaking works of Eric Stein ‘Lawyers, Judges and the Making of a Transnational Constitution’, 75 *American Journal of International Law* 1 (1981), and Federico Mancini, ‘The Making of a Constitution for Europe’, 26 *Common Market Law Review* 595 (1989).

<sup>17</sup> As described by Joseph HH Weiler, ‘The Transformation of Europe’, 8 *The Yale Law Journal* 100 (1991).

<sup>18</sup> For a more critical overview on the importance of values in the process of integration, see Andrew Williams, *The Ethos of Europe. Values, Law and Justice in the EU* (Cambridge University Press, Cambridge, 2010), concluding that the ‘creation’ of values have been largely a ‘myth’, since the content and the practical implications of these values have never been clarified, they lack substance and coherence, and they had therefore little impact on the ‘institutional ethos’ of the Union.

<sup>19</sup> See cases Case C-29/69 *Staduer v City of Ulm* [1969] ECR 329 and Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. See also the successive recognition of this doctrine by the other EU institutions: European Parliament, Council, Commission, Joint Declaration on Fundamental Rights, 27 April 1977, OJ C-103-1: ‘The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms’ and ‘In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.’

<sup>20</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23.

<sup>21</sup> See generally M. Cremona, ‘Values in EU Foreign Policy’, in Maurice Evans - Panos Koutrakos, (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing, Oxford, 2011).

<sup>22</sup> See Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, Oxford, 2005)

criteria<sup>23</sup> assigned a crucial role to these values in the context of the enlargement process, a role that is today formalized in article 49 TEU.

It is however the third of the dimensions mentioned above that matters the most in this context, the one related to the role of values in the constitutional relations between the Union and the Member States. With integration between member states further accelerating, and the principle of mutual trust and mutual recognition gaining relevance, in the internal market but also in new fields of cooperation such as the Area of Freedom, Security and Justice, the need to guarantee between the member states a 'level playing field' in terms of respect for democracy, human rights and the rule of law, in order to ensure common standards, rose quickly. Moreover, the Maastricht Treaty and successive reforms stressed the idea of the Union as a 'community of values', creating EU citizenship and implying that every citizen has a legitimate interest in the conditions of democracy, human rights and rule of law in other member states: an illiberal government participating in EU decision-making in the Council would in fact affect the overall quality of democracy in the European Union, and the legitimacy of the entire structure would be put into question. They also paved the way for EU's engagement in the promotion of values abroad and vis-à-vis candidate countries. All these evolving features could not be upheld if the EU was not equipped with instruments to guarantee that both its institutions and its Member States comply with the basic values of constitutionalism: one could wonder, for example, how the EU's external promotion of human rights and democracy can be credible, legitimate and effective, if the same values are not sufficiently guaranteed at home. The need to guarantee values at all levels of governance is also implicitly acknowledged in the second sentence of article 2 TEU, where it affirms that values of democracy, rule of law and human rights are 'common to the Member States, in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.<sup>24</sup> When a member state deviates from these common standards, the EU is therefore called to react.

These issues gained particular relevance during the process of accession of Central and Eastern European countries, since those were all newly established democracies, they posed challenges in

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<sup>23</sup> European Council, Conclusions of the Presidency, 22-23 February 1993, Copenhagen, Doc. SN 180/1/93. On the topic, see e.g. Karen E. Smith, 'The Evolution and Application of EU Membership Conditionality', in Marise Cremona (ed), *The Enlargement of the European Union* (Oxford University Press, Oxford, 2003); Christophe Hillion, 'The Copenhagen Criteria and their Progeny', in Christophe Hillion (ed.), *EU Enlargement: a legal approach* (Hart Publishing, Oxford, 2004).

<sup>24</sup> On the normative reasons for EU's intervention in this field, see also Carlos Closa – Dimitry Kochenov - J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI RSCAS Working Paper 2014/25, [http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS\\_2014\\_25\\_FINAL.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3), and Jan Werner Muller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States', 21 *European Law Journal* (2015).

terms of respect for the rule of law,<sup>25</sup> and did not have the same ‘Western’ tradition in terms of human rights protection. Member States of the Union realized therefore that the EU needed a mechanism to ensure respect for the fundamental values *after* accession: a mechanism allowing the EU to intervene when a state, after gaining membership of the organization, was found in violation of democracy, the rule of law or human rights.<sup>26</sup> In other words, the aim was to complement the system of political conditionality introduced with the Copenhagen criteria with a new post-accession mechanism.<sup>27</sup> With the Treaty of Amsterdam, the member states introduced a new instrument in article 7 TEU, creating a procedure that can ultimately lead to the suspension of the voting rights in the Council of the member states responsible of a ‘serious and persistent’ breach of article 2 values. The mechanism was then complemented with a ‘preventive arm’, introduced by the Treaty of Nice and today contained in article 7(1) TEU.

However, even after the introduction of the new instruments, ensuring respect of the fundamental values in the Member States has remained particularly problematic for EU institutions. Two possible, complementary explanations can be advanced. First and foremost, the area of democracy, rule of law and human rights is one of particular sensitivity for the Member States and for their national sovereignty. It often touches upon their national and constitutional identity, which has found recognition in article 4(2) TEU: the provision states that ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. The EU is called to strike therefore a difficult balance: on the one hand, it is called to find common standards and ensure that all the Member States respect them, as required by article 2 and 7 TEU; on the other, it must show respect for national ‘constitutional identities’.<sup>28</sup>

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<sup>25</sup> See in particular Adam Czarnota – Martin Krygier – Wojciech Sadurski (eds.), *Rethinking the Rule of Law after Communism* (Central European University Press, Budapest, 2005).

<sup>26</sup> On the link between article 7 and the process of enlargement, see Bruno de Witte – Gabriel N Toggenburg, ‘Human rights and membership of the European Union’, in Steve Peers – Angela Ward (eds.), *The European Union Charter of Fundamental Rights* (Hart Publishing, Oxford, 2004) at 59: ‘the political impetus for [the enactment of article 7] was the concern for the human rights and democracy standards in applicant countries of Central and Eastern Europe’. The same connection has been underlined also by Grainne De Burca, ‘Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union’, 27 *Fordham International Law Journal* 2 (2004); Wojciech Sadurski ‘Adding Bite to a Bark: the Story of Article 7, E.U. Enlargement, and Jorg Haider’, 16 *Columbia Journal of European Law* (2010).

<sup>27</sup> On the concept of political and democratic conditionality, see for a comparative perspective Carlos Closa, ‘Institutional Design of Democratic Conditionality in Regional Organization’, EUI RSCAS Working Papers 2013/45, [http://cadmus.eui.eu/bitstream/handle/1814/27462/RSCAS\\_2013\\_45.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/27462/RSCAS_2013_45.pdf?sequence=1); see also Edward D Mansfield – Jon C Pevehouse, ‘Democratization and International Organizations’, 60 *International Organizations* 1 (2006).

<sup>28</sup> In this regard, the Lisbon Treaty operated a significant change: it shifted the focus from ‘national identity’ as such, to ‘constitutional identity’. The change might have made even more complex the research of a balance: while national identity could be read mostly as a cultural feature, constitutional identity has more directly to do with specific understanding of democracy, rule of law and human rights in the Member States. For the changes operated by the Lisbon Treaty, see e.g. Leonard Besselink, ‘National and Constitutional Identity Before and After Lisbon’, 6 *Utrecht Law Review* 3 (2010).

Other traces of the particular sensitivity of this area can be found in article 51(1) of the Charter of Fundamental Rights, limiting the scope of application of the Charter to the member states only ‘when they are implementing EU law’,<sup>29</sup> or in the narrow mandate conferred to the Fundamental Rights Agency. This helps to understand why the Member States have been very cautious in conferring to the Union competences in this area: the only explicit competence is provided by article 7 TEU, while several other provisions limit the scope of EU interference with national systems of democracy, the rule of law and human rights.

Secondly, the EU faces an issue of legitimacy: since the Union itself suffers from a democratic deficit, can it be a credible defender and promoter of democracy and other values vis-à-vis its Member States? Can an organization often perceived as ‘technocratic’ meddle with national conceptions of values? It is no coincidence that EU institutions have read the current challenges primarily in terms of rule of law or human rights, areas where the EU seems to have more solid grounds than democracy. This struggle for legitimacy helps to understand why it is crucial to assign a role to the European Parliament in this field. As the Parliament is the most democratic and representative EU institution, its involvement can be seen as a necessary contribution to making EU’s intervention respectful of the value of democracy, and more legitimate and acceptable for EU citizens.

Recent developments have showed that the issue of deviations from the common standards of democracy, rule of law and human rights is not a purely theoretical one. The capacity of the Union to address alleged violations of fundamental values has been largely questioned: EU institutions have seemed largely unprepared and unable to tackle the current ‘crisis of values’. Hungary has been the true ‘problem child’ of the Union, at least since Viktor Orban and Fidesz took power in 2010, after a landslide victory in the parliamentary elections gave them a two-thirds majority in the Parliament. They started a process of constitutional reforms, which has included the adoption of a widely criticized new constitution in 2012,<sup>30</sup> and other equally problematic successive

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<sup>29</sup> See Case C-617/10, *Aklagaren v Hans Akerberg Fransson* [2013] ECLI:EU:C:2013:105, for a (partial) clarification of the provision.

<sup>30</sup> See e.g. European Parliament, ‘Resolution on the Revised Hungarian Constitution’, 5 July 2011, Strasbourg, Doc. P7\_TA(2011)0315; European Commission, Hungary and the Rule of Law - Statement of the European Commission on the Plenary Debate of the European Parliament by Vice-President Viviane Reding, available at [http://europa.eu/rapid/press-release\\_SPEECH-13-324\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm), 17 April 2013; See also Venice Commission, ‘Opinion on the New Constitution of Hungary’, Strasbourg, 20 June 2011, CDL-AD(2011)016. For an academic views on the Hungarian Constitutional Reforms, see Gabor Attila Toth (ed.), *Constitution for a Disunited Nation: on Hungary’s 2011 Fundamental Law* (Central European University Press, New York, 2012), and Zoltan Szente – Fanni Mandak – Zsuzsanna Fejes (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L’Harmattan, Paris, 2015).

amendments.<sup>31</sup> In particular, the lack of independence of the new judiciary system, the limitation of the powers of the Constitutional Court, and more recently the adoption of a contested new electoral law have been subject of intense scrutiny. The EU Commission launched three infringement procedures, focusing however on rather technical aspects of the constitutional reforms,<sup>32</sup> while the European Parliament expressed its concerns more broadly with the adoption of the ‘Tavares Report’ and in other resolutions.<sup>33</sup> The Council of Europe and its Venice Commission have also participated intensively to the debate, together with individual EU member states,<sup>34</sup> but the Hungarian Government has not seemed too willing to follow the recommendations of European and international actors. Recent talks on constructing an illiberal democracy in the country,<sup>35</sup> the discussion on the possible reintroduction of the death penalty,<sup>36</sup> the crackdown on foreign-funded NGOs,<sup>37</sup> and finally the most recent refugee crisis, have showed how the EU is struggling to defend its values, and how internal developments can challenge its legitimacy and credibility in the world.

But Hungary is not an isolated case. Other member states, ‘new’ and Eastern as well as ‘old’ and Western, have also put Brussels under stress. The constitutional crisis between the Prime Minister and the President of Romania of 2012 triggered debates and a reaction by EU institutions. Moreover, the rule of law system in the country remains weak, as found by the reports of the Cooperation and Verification Mechanism (CVM), the post-accession monitoring instrument created for Bulgaria and Romania.<sup>38</sup> Slovenia has been described as a ‘*de facto* failed

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<sup>31</sup> See Venice Commission, ‘Opinion on the Fourth Amendment to the Fundamental Law of Hungary’ (17 June 2013) Opinion 720/2013, CDL-AD(2013)012.

<sup>32</sup> These included the independence of the central bank, the removal of the data protection supervisor, and an age discrimination case concerning age of retirement of judges.

<sup>33</sup> European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary, 25 June 2013, Doc. (2012/2130(INI)).

<sup>34</sup> Letter of four Ministers of Foreign Affairs to the President of the Commission, 6 March 2013, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstateljkheidsmechanisme/brief-aan-europese>

<sup>35</sup> See EU Observer, ‘Orban wants to build ‘illiberal state’’, 28 July 2014, available at <https://euobserver.com/political/125128>. The full English text of the speech is available at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>

<sup>36</sup> See Euronews, ‘Hungarian PM Orban wants to bring back the death penalty’, 9 May 2015, <http://www.euronews.com/2015/05/09/hungary-wants-to-bring-back-the-death-penalty/>

<sup>37</sup> See Amnesty International, ‘Hungary: Authorities must end unprecedented crackdown on NGOs’, 2 February 2015, <https://www.amnesty.org/en/press-releases/2015/02/hungary-authorities-must-end-unprecedented-crackdown-ngos/>

<sup>38</sup> On Romania, see Armin von Bogdandy – Pal Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania* (Hart Publishing, Oxford, 2015); and Vlad Perju, ‘The Romanian double executive and the 2012 constitutional crisis’, 13 *International Journal of Constitutional Law* 1 (2015). For the EU’s intervention, see European Commission, ‘Commission’s reaction to the Romanian Constitutional Court’s decision on 29/07 referendum’, Brussels, 21 August 2012, MEMO/12/626; as for the Council of Europe, see Venice Commission, Opinion 685 / 2012 Opinion on the Compatibility With Constitutional Principles and the Rule of Law Of Actions Taken by the Government and the Parliament of Romania in Respect of Other State

constitutional democracy'.<sup>39</sup> The ECtHR and the CJEU have found systemic deficiencies in the asylum system in Greece,<sup>40</sup> and even bigger, older member states such as France and Italy, to a different extent, have caused concerns at EU level.<sup>41</sup>

The issue has been defined as the 'Copenhagen dilemma',<sup>42</sup> since while before accession the EU is endowed with strict and comprehensive mechanisms to ensure compliance with a set of common criteria (the 'Copenhagen criteria') including 'respect democracy, the rule of law, and human rights including minority rights' in order to accede to the Union, after accession instruments are weaker and less effective. While the EU has experimented with forms of 'post-accession conditionality', introducing a 'Cooperation and Verification Mechanism' in Bulgaria and Romania, and making – informally – their participation in certain EU policies, including in particular their inclusion in the Schengen system, dependent upon progress in ensuring the rule of law and fighting corruption and organized crime, no general framework has been introduced so far.<sup>43</sup> A lively debate on the need to strengthen the protection of the EU fundamental values has therefore developed, involving EU institutions, Member States, academics, NGOs and other stakeholders.

## 2. SAFEGUARDING EU'S VALUES: ARTICLE 7 AND BEYOND

What are the mechanisms available for EU institutions to safeguard the EU fundamental values in the member states of the Union? As anticipated above, article 7 of the TEU is the crucial provision in this respect. It contains two different mechanisms, one – article 7(1) – of a preventive

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Institutions, Strasbourg, 17 December 2012, CDL-AD(2012)026. CVM Reports on Bulgaria and Romania are available on the Commission website at [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm)

<sup>39</sup> See Matej Avbelj, 'Slovenia: a de facto failed constitutional democracy', 21 June 2014, VerfassungsBlog on Matters Constitutional, <http://www.verfassungsblog.de/slovenia-de-facto-failed-constitutional-democracy>.

<sup>40</sup> See note 6 above.

<sup>41</sup> As for France, the 'Roma crisis' has been already mentioned in note 7 above: while the Commission did not take formal action, the then Vice-President Viviane Reding expressed its criticism harshly, comparing the expulsions for Roma from the country to Nazi deportations during World War II. In Italy, the level of corruption remains above the EU average, as demonstrated by several indicators – see for example Transparency International, 2014 Corruption Perception Index (available at <https://www.transparency.org/cpi2014/results>) where Italy ranks last between all EU member states (together with Bulgaria, Greece and Romania) – and media pluralism and freedom of expression have always been critical issues: see works of the EU High Level Group on Media Freedom and Pluralism, and Freedom House, 2015 Freedom of the Press Report (available at <https://freedomhouse.org/report/freedom-press/freedom-press-2015>) where Italy is listed as a 'partly free' country. □

<sup>42</sup> See Viviane Reding, 'Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism', 22 April 2013, Luxembourg, [http://europa.eu/rapid/press-release\\_SPEECH-13-348\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm)

<sup>43</sup> For the challenges of ensuring conditionality *after* accession, see e.g. Eli Gateva, 'Post-accession conditionality – translating benchmarks into political pressure?', 29 *East European Politics* 4 (2013), and with a focus on the Cooperation and Verification Mechanism introduced in Bulgaria and Romania, Susie Alegre – Ivanka Ivanova – Dana Denis-Smith, 'Safeguarding the Rule of Law in an Enlarged EU – The Cases of Bulgaria and Romania', CEPS Special Report (2009).

nature, and a second – article 7(2) and (3) – that can lead to the imposition of sanctions against a member state violating the fundamental values of the Union.<sup>44</sup>

The latter is the original mechanism created by the Amsterdam Treaty. Under article 7(2), following a proposal by the Commission or by one-third of the Member States, and after obtaining the consent of the European Parliament, the European Council acts under unanimity rule - the member state involved is obviously excluded from the deliberation – and can determine the existence of a ‘serious and persistent breach’ of the fundamental values of the EU. This first decision can pave the way to a second, separate decision under article 7(3) by the Council, at qualified majority, imposing sanctions on the member state responsible of the violation. The imposition of sanctions is merely a possibility and not an obligation for the Council. Sanctions may consist in a suspension of the rights deriving from membership, including the voting rights in the Council, and can then be varied or revoked by the Council, under the procedure of article 7(4). The preventive arm was later introduced by the Treaty of Nice, following the so-called ‘Haider affair’:<sup>45</sup> in synthesis, the EU realized that it needed not just instruments to tackle *violations* of the fundamental values, but also *risks of violations*. Rather than imposing sanctions, the new mechanisms aimed at allowing EU institutions to express their concerns and at fostering dialogue between them and the member state responsible. With these considerations in mind, a new article 7(1) was introduced by the Nice Treaty: acting at a request of the EP, of the Commission or of one third of the member states, the Council can, with the consent of the Parliament and under a special majority - four fifths of the Member States -, determine the existence of a ‘clear risk of a serious breach’ of the values of article 2. No sanctions can be imposed under article 7(1), and there is no explicit link between the preventive mechanism and article 7(2): the activation of the former is not a condition to have recourse to the latter, nor for the imposition of sanctions.<sup>46</sup>

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<sup>44</sup> For a complete analysis of article 7, its rationale and its drafting history, see Wojciech Sadurski ‘Adding Bite to a Bark: the Story of Article 7, E.U. Enlargement, and Jorg Haider’, 16 *Columbia Journal of European Law* (2010).

<sup>45</sup> In the aftermath of the Austrian parliamentary elections of 1999, a center-right coalition government took power, and the government included the FPÖ, a far-right, xenophobic political party led by the controversial leader Jorg Haider. This triggered a reaction by the other fourteen member states of the Union: they decided to impose sanctions against the new government, even before any official act taken by it. In that context, it was clear from the outset that article 7 was not deployable, since there was no breach of values yet, therefore sanctions were taken informally, outside the EU framework, and consisted mostly in diplomatic sanctions. EU institutions, including the Commission and the Parliament, were barely involved in this decision. The member states decided to remove sanctions few months later, after the adoption of the ‘Wise Men Report’, which clarified that sanctions were not effective. On the Haider affair, see e.g; Michael Merlingen – Cas Mudde – Ulrich Sedelmeier, ‘The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria’, 39 *Journal of Common Market Studies* 1 (2001); Cecile Leconte, The Fragility of the EU as a “Community of Values”: Lessons from the Haider Affair, 3 *West European Politics* 28 (2005); and Sadurski (2010).

<sup>46</sup> This has been confirmed also by the Commission Communication to the Council and the European Parliament on article 7 TEU “Respect for and promotion of the values on which the Union is based”, Brussels 15 October 2003, Doc. COM/2003/0606 final, see p. 4.

The details of the procedure, as well as the substantive criteria for assessment, have been analyzed in a Communication of the Commission presented in 2003. In particular, the Commission clarified that article 7 TEU applies to all member states' activities, irrespective of whether or not they fall into the scope of EU law: it is therefore 'horizontal and general'.<sup>47</sup> In a successive resolution, however, the European Parliament partly criticized the approach taken by the Commission.<sup>48</sup> The EP noticed in particular that 'a higher standard of protection of fundamental rights is needed than that proposed by the Commission'<sup>49</sup>, and was not persuaded by the conclusions of the Commission, where the latter considered that in a 'Union of values' it was not going to be necessary to apply penalties according to article 7: the Parliament took the view that 'ignoring the possible need for penalties must create the impression that the Union is not prepared or is not in a position to use all the means at its disposal to defend its values'.<sup>50</sup> The EP called the other institutions to start a common dialogue in order to develop clear and common criteria governing the application of article 7, but the topic remained rather marginal in the institutional discussion for several years, until the developments of the Hungarian crisis re-launched the debate. The Parliament Resolution shows two constant features of the approach of the EP to the issue: its willingness to be engaged in the system of protection of values, and the adoption of standards of scrutiny than stricter than those of other EU institutions.

While the introduction of the mechanisms of article 7 was generally considered an important step for the process of constitutionalization of the EU and for the creation of a EU system of protection of human rights,<sup>51</sup> today the relevance of article 7 is questioned by many. In fact, the provision has never been used in practice: none of the actors involved has presented a reasoned proposal for the activation of article 7 before the Council or the European Council, and no deliberations has ever been adopted. The very high majorities required in Council and in the EP have certainly formed a formidable obstacle, but more generally EU institutions have been reluctant to rely on mechanisms that, if activated, would have a profound impact over the day-to-day life of the Union. Moreover, the clarification of the substantive elements of the procedure, and of some aspects of the procedure of article 7 has remained insufficient. Currently, article 7 is largely considered unusable, a 'nuclear

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<sup>47</sup> Commission Communication, p. 6.

<sup>48</sup> See European Parliament, Legislative Resolution on the commission Communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, at 2, 2004 Doc O.J. (C104/407 – P5\_TA(2004)0309).

<sup>49</sup> The EP considered for example that a serious and persistent breach also entailed the violation of more positive obligations, such as the failure by a Member State to act when human rights are violated by non-institutional actors, or even 'the promotion of a climate or social conditions in which individual rightly feel threatened', for what concerns the activation of the preventive mechanisms. See European Parliament Resolution (2004), paragraph 4.

<sup>50</sup> European Parliament Resolution (2004), para 12.

<sup>51</sup> See for instance de Burca (2004), p. 696.

option’, as defined by former President of the Commission Barroso,<sup>52</sup> acting as a deterrent but not deployable in practice, with exception of unprecedented crisis such as a military coup d’état in a member state. This has led EU institutions and academics to propose new solutions to tackle values’ crises in the Member States.

In the academic debate, taking into account the difficulties in using article 7, even in the most controversial cases, authors have reflected on whether the traditional infringement procedure of article 258 TFEU could be also used to safeguard the fundamental values of the EU.<sup>53</sup> The Commission has not so far followed these proposals, and preferred to create a new mechanism, presented in march 2014 as ‘A New Framework to Strengthen the Rule of Law’, adopted in order to ‘fill the gap’ between article 7 and article 258.<sup>54</sup> This new framework provides for a form of structured political dialogue between the Commission, on the one hand, and the member state where a ‘systemic threat to the rule of law’ has developed. After a preliminary assessment, to be based on information collected from different sources – including the FRA, bodies of the Council of Europe, but also NGOs – and through dialogue with the European Parliament, the Commission can issue a ‘rule of law opinion’, clarifying its main points of concern. If the matter is not already solved at this first stage, and there is evidence of the existence of a threat not adequately addressed by member states’ authorities, the Commission will then issue a ‘rule of law recommendation’, pointing out how the member state should tackle the situation in more detail. In the follow-up phase, if the member state has not been able or willing to address the threat, the Commission can then consider to present a reasoned opinion before the Council or the European Council for the activation of one of the mechanisms of article 7.<sup>55</sup>

A new instrument has also been introduced by the Council, in December 2014, after an Opinion released by its Legal Service considered the Commission Framework incompatible with the

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<sup>52</sup> See Jose-Manuel Barroso, State of the Union Address 2013, Strasbourg, 11 September 2013.

<sup>53</sup> Kim-Lane Scheppele has proposed that the Commission could launch ‘systemic infringement actions’ directly based on article 2 TEU, or eventually article 2 in combination with the duty of sincere cooperation of article 4(3) TFEU, and bring a State before the Court of Justice: see Kim Lane Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Carlos Closa – Dimitry Kochenov, *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, Cambridge, forthcoming). See also Christophe Hillion, ‘Overseeing the rule of law in the EU: legal mandate and means’, *in* *ivi*. Whether this would be possible under current EU law, and would not require Treaty amendment, is still largely unclear. In addition, the Treaties do not clarify the relation between article 7 TEU and article 258 TFEU: see Frank Hoffmeister, ‘Enforcing the EU Charter of Fundamental Rights in the Member States: How far are Rome, Budapest and Bucharest from Brussels?’, in von Bogdandy – Sonnevend (2014), p 203.

<sup>54</sup> European Commission Communication, ‘A new EU Framework to strengthen the Rule of Law’, Brussels, 19 March 2014, Doc. COM(2014)158 final/2.

<sup>55</sup> For a more complete analysis of the new Commission Framework, and of the Council Rule of Law Dialogue, see Dimitry Kochenov – Laurent Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’, EUI RSCAS Working Papers 2015/24, [http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS\\_2015\\_24.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3).

principle of conferral for the lack of a legal basis in the Treaties.<sup>56</sup> The Legal Service concluded in fact that ‘there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member states’, and the Council, partially adhering to the opinion, presented a new ‘Rule of law Dialogue’ few months later.<sup>57</sup> This should be held once a year in the General Affairs council, based on the principles of ‘objectivity, non discrimination and equal treatment of all Member States’ and conducted ‘on a non partisan and evidence-based approach’. The document does not contain any other clarification of the principles that should guide the dialogue, nor of its substantive content– beside the possibility to include thematic issues -, and has been largely criticized and considered insufficient to deal with current challenges.<sup>58</sup>

### **3. THE EUROPEAN PARLIAMENT AS A WATCHDOG OF THE EU’S FUNDAMENTAL VALUES**

Having analyzed the concept of ‘EU fundamental values’ and the mechanisms to safeguard them in the first part of the paper, the focus shifts in this second part to the role of the European Parliament in this context. This section opens with some general remarks on the role of the Parliament as an actor for the protection of democracy, the rule of law and human rights in the overall institutional framework of the European Union. It then deals with the role of the Parliament in the current mechanisms of safeguard of EU values, including in particular article 7 TEU. Finally, some words are dedicated to EP’s Reports on the Situation of Fundamental Rights in the European Union. This analysis will then be complemented in Section 4 with a specific focus on the Hungarian crisis, illustrating which instruments have been used by the Parliament in practice, and how the debate has developed.

The position of the European Parliament in the EU’s institutional framework has been considerably strengthened since its creation, with the Rome Treaties, as the ‘European Parliamentary Assembly’, originally consisting of representatives from national parliaments. After the first direct elections in 1979, the EP has acquired, starting with the Single European Act and then with each of the successive Treaty reforms, significant powers not only in the legislative process – where co-decision has become the ordinary legislative procedure -, but has also more

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<sup>56</sup> Council of the European Union, Opinion of the Legal Service, Brussels, 27 May 2014, Doc. 10296/14.

<sup>57</sup> General Affairs Council, ‘Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law’, Brussels, 16 December 2014.

<sup>58</sup> See Kochenov - Pech (2015).

generally strengthened its position in the EU institutional framework. Evidence of this evolution is for example article 14 TEU, stating that ‘The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. *It shall exercise functions of political control and consultation* as laid down in the Treaties. It shall elect the President of the Commission’. The tasks assigned to the EP covers therefore a broad range of activities, well beyond the legislative process, and require that the institution engages with democracy, human rights and the rule of law at both EU and national level. The interest of the Parliament in the fundamental values of the Union derives also from the general Treaty provision on EU institutions, article 13 TEU, providing that ‘The Union shall have an institutional framework which shall aim to *promote its values*’ and ‘*advance its objectives*’. The provision commits all EU institutions to engage with the values of article 2 in all their activities, in order to promote and safeguard them. Additionally, the Charter of Fundamental Rights in article 51 contains a general duty for all EU institutions to ‘promote the application’ of fundamental rights in the exercise of their competences.<sup>59</sup>

The normative reasons underlying EP’s involvement in the field of human rights and other EU’s values have been largely discussed.<sup>60</sup> Generally, all democratic institutions have a crucial role in defending and promoting human rights and other values.<sup>61</sup> More specifically, in the EU’s context, the EP has a special position as the only democratically elected EU institution and as the most ‘diverse’ one, in the sense that it includes parties belonging to political majorities and minorities at national level – the same does not happen in the Council, because the latter is composed only by governments’ representatives. It has therefore a close link with individual EU citizens, as demonstrated also by the possibility for the latter to address petitions to the EP ‘on a matter which comes within the Union’s fields of activity and which affects him, her or it directly’.<sup>62</sup> All these features clearly express the need to include the Parliament in the system of protection of the EU’s fundamental values.

The European Parliament has not been afraid to play the role of the watchdog of the EU’s fundamental values, and has been active in promoting democracy, the rule of law and human rights in various respects. On the internal scene, the Parliament has often pushed for the introduction of human rights’ provisions in EU’s legislative acts, contributing decisively to the

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<sup>59</sup> Article 51 of the Charter: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties’.

<sup>60</sup> See e.g. Kieran St C. Bradley, ‘Reflections on the Human Rights Role of the European Parliament’, in Philipp Alston (ed.), *The EU and Human Rights* (Oxford University Press, Oxford, 2000).

<sup>61</sup> See in general Keith Ewing, ‘The Parliamentary Protection of Human Rights’, in Katja S Ziegler – Denis Baranger – Anthony W Bradley, *Constitutionalism and the Role of Parliaments* (Hart Publishing, Oxford, 2007).

<sup>62</sup> See article 227 TFEU.

'mainstreaming' of rights and values across various fields.<sup>63</sup> On the external scene, inclusion of so-called human rights and democratic clauses in agreements with third countries is to a great extent result of the pressures of the EP.<sup>64</sup> Finally the Parliament has also stressed the political dimension of the enlargement process, applying strict standards over candidate countries.<sup>65</sup> To summarize, 'it has been one of the outstanding achievements of the European Parliament that human rights are nowadays taken into account in many different spheres of activity of the European Union'.<sup>66</sup>

In the specific field of safeguarding values at national level, article 7 TEU has conferred to the European Parliament direct and explicit competences to scrutiny the quality of democracy, human rights and the rule of law on individual Member States, both when a violation emerges and in the preventive, monitoring phase. The EP has today therefore a legal and political responsibility to contribute to ensure compliance of the Member States with the European common standards. In addition, the Parliament has significant powers in the enlargement process vis-à-vis future member states: article 49 TEU confers to the EP a power of veto, which can be used to block the process of accession if the Parliament for example considers that the candidate country does not yet respect the Copenhagen political criterion.<sup>67</sup>

Even before the formal adoption of article 7 and article 49, the EP had already engaged with promoting and safeguarding democracy, human rights and the rule of law also in matters of national competence, falling outside the scope of EU law as traditionally intended. For what concerns candidate countries, one of the first example is a resolution of 1981, adopted – well before the introduction of the Copenhagen criteria - after the failed military coup d'état in Spain. In the resolution, the European Parliament stressed that membership of the EEC could only be acquired on the condition that human rights and democracy were respected.<sup>68</sup> After the recognition of formal requirements for membership, including respect for a set of common values, the EP

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<sup>63</sup> It should also be underlined that the extension with the Treaty of Lisbon of co-decision to policy areas particularly sensitive for human rights and the rule of law, and in particular to several aspects of the Area of Freedom, Security and Justice, has allowed the Parliament to play a stronger role as a human rights actor also during the drafting of new pieces of legislation. For the concept of mainstreaming human rights, see Oliver de Schutter, 'Mainstreaming Fundamental Rights in the European Union', in Philipp Alston – Olivier de Schutter (eds.), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency* (Hart Publishing, Oxford, 2005).

<sup>64</sup> See Karen E Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?', 3 *European Foreign Affairs Review* (1998).

<sup>65</sup> As demonstrated by the number of Resolutions adopted by the European Parliament discussing the political situation in candidate countries, see below.

<sup>66</sup> Reinhard Rack – Stefan Lausegger, 'The Role of the European Parliament; Past and Future', in Philipp Alston (2000), p 802. Since the powers and influence have been further extended since 2000, one could surely reach the same conclusion today.

<sup>67</sup> See article 49 TEU: 'The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members'.

<sup>68</sup> European Parliament, Resolution on the attempted coup d'état in Spain, Strasbourg, 8 March 1981, OJ 77/85.

started to adopt resolutions addressed to candidate countries more often and more continuously: the many resolutions on the political situation in Turkey are a good example of the position of the EP in the enlargement process.

For what concerns democracy and human rights in EU Member States, the recent resolutions on Hungary – which will be analyzed below – are the most significant examples of the willingness of the Parliament to follow internal political developments, but this is not a completely new phenomenon: already in 1994, the European Parliament issued a ‘warning’ to Italy after the formation of the new center-right government, including parties considered to be far-right and xenophobic,<sup>69</sup> and later in 2000 the Parliament adopted a Resolution on the political situation in Austria before the explosion of the ‘Haider affair’.<sup>70</sup> These interventions underline how the Parliament has been rather active and willing to use its political power to address possible critical situations in the member states, even before the introduction of formal treaty mechanisms. In other words the Parliament has since a long time pushed for considering ‘the principle of non-interference in the field of human rights [as] relative’.<sup>71</sup>

The creation of the mechanisms of article 7 has then made more explicit the existence of a competence for the EP in safeguarding human rights, democracy and the rule of law in the Member States. The EP is involved in the mechanisms of article 7 in two different ways. Firstly, it is one of the actors that can activate the procedure of article 7(1), the so-called preventive mechanism, together with the Commission and the Member States. According to article 7(1), the EP can present a ‘reasoned proposal’ before the Council, which will then decide whether a risk of a serious breach of article 2 has arisen in a member state, with a four-fifths majority required for a positive decision. The same power to present a ‘reasoned proposal’ for the activation of the mechanism is not explicitly conferred to the EP under article 7(2), which can lead to the determination by the European Council of a serious and persistent breach of the values.<sup>72</sup> However, according to rules 83(1)(b) of the EP Rules of Procedure, the EP can ‘vote on a proposal calling on the Commission or the Member States to submit a proposal pursuant to Article 7(2) of the Treaty on European Union’.<sup>73</sup> The Parliament carved out a role for itself also in the separate

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<sup>69</sup> European Parliament, Resolution on the political situation in Italy, Brussels, 5 May 1994, OJ 124/94.

<sup>70</sup> European Parliament, Resolution on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), Brussels, 2 February 2000, Doc. B5-0102/2000.

<sup>71</sup> See Rack – Lausegger (2000), p 804.

<sup>72</sup> The rationale for this exclusion is unclear and seems unreasonable today, but the most plausible explanation lies in the different moment of introduction of the two procedures: the preventive mechanism was introduced later by Nice, and provided for a right of initiative of the Parliament, but did not add the same right in the procedure of article 7(2).

<sup>73</sup> It can be noted that while article 7(1) TEU and also article 83(1)(a) of the Rules of Procedure refer to a ‘reasoned proposal’, in article 83(1)(b) and (c) the ‘proposal’ is not qualified as ‘reasoned’, most likely in order to avoid any explicit conflict with the provision of the Treaties.

moment of imposition and eventual removal of sanctions, which according to the Treaties is the phase where the Council can act independently: article 83(1)(c) of the Rules of Procedure provides that the EP can ‘vote on a proposal calling on the Council to act pursuant to Article 7(3) or, subsequently, Article 7(4) of the Treaty on European Union’. Decisions taken under article 83(1) shall be taken with a two-thirds majority of the votes casted, representing at least a majority of the MEPs.<sup>74</sup> The same majority applies for the ‘consent’ of the EP to the deliberations under article 7(1) and (2). When it calls other institutions to activate the procedure of article 7, the EP can also adopt a resolution, prepared by the committee responsible - the LIBE committee<sup>75</sup> - setting out the views of the Parliament on the situation in the member state, on the alleged breach of the values, and on which sanctions should be included or eventually removed.<sup>76</sup>

The second role assigned by the Treaties to the European Parliament in the context of article 7 is that of giving its ‘consent’ before any deliberation by the Council or the European Council under article 7(1) and under article 7(2) is taken. This is a critical role, which places the Parliament at the center of the system and assigning to it a power to veto the procedure. The rules of procedure for the deliberation of the EP are contained in article 354 TFEU: ‘for the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members’. MEPs from the member state involved in the deliberation participate in the vote, contrary to what happens to the member state’s government in the Council or the European Council.

In most of the analyses of the mechanisms of article 7, little attention has been given to the role played by the EP in this context.<sup>77</sup> This is surprising when one looks closely to the competences assigned to the Parliament. Analyzing the provision in detail, it emerges how the role of the Parliament is truly crucial and at least comparable to those played by the Member States, which are traditionally considered the ‘masters’ of article 7. In fact, on the one hand, the European Parliament has the possibility to raise the attention on a crisis emerging in a member state, presenting a reasoned opinion for the activation of the preventive mechanism and therefore bringing the question before the EU forum, forcing the Council to take an official position. Once a reasoned proposal is presented, the Council will in fact be obliged to vote on it. In addition, although in a more informal way, the Parliament can also stimulate the Commission or the Member States to activate article 7(2). On the other hand, the Parliament has the power to block

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<sup>74</sup> See article 83(3) of the Rules of Procedure.

<sup>75</sup> The LIBE Committee – Committee on Civil Liberties, Justice and Home Affairs – is competent for human rights’ matters on the internal scene, while for what concerns the external dimension, the subcommittee of Human Rights (DROI), operating within the Committee of Foreign Affairs, plays the biggest role.

<sup>76</sup> See article 83(4) of the Rules of Procedure.

<sup>77</sup> But see more recently Besselink in Jakab – Kochenov (forthcoming).

the procedure if it decides not to give its consent to the deliberation of the Council or the European Council. This power of veto may be exercised if the Parliament does not consider that a situation falls within the substantive thresholds of article 7: in other words, if it considers that there is no clear risk of a serious breach, or a serious and persistent breach of the fundamental values. Admittedly, such a situation is unlikely to arise, considering that Member States are generally more reluctant than the European Parliament to intervene in each other's domestic affairs, and that the EP has been traditionally the EU institution with the stricter standards of scrutiny of compliance with human rights and other values, but the mechanism does in any case confer to the EP very significant powers to influence the outcome of the procedure. The involvement of the EP, among other features, among which the position of the Commission as initiator of the mechanism, illustrates how the procedure has both a purely state-based, more traditionally intergovernmental and diplomatic component, where decisions are in the hands of the Member States, under unanimity or in any case a high majority is required, but also a more Union-based dimension, where supranational actors such as the Commission and the Parliament play a significant role.<sup>78</sup>

Finally, the fact that the Parliament is involved in the mechanism, together with the crucial role of the Council and the European Council, and conversely the exclusion of the Court of Justice, with the exception of respect for the purely procedural speculation of article 7,<sup>79</sup> is a sign of the primarily *political* nature of the mechanism. While the possible conferral of powers of scrutiny to the Court of Justice over the procedure was discussed during the preparation of the Amsterdam Treaty, the Member States ultimately preferred to endorse a more political instruments, which leave them a greater discretion to determine the existence of a breach and the final word over the criteria applied. Recently, authors have argued for the creation of other legal avenues for the enforcement of article 2 values, but the particular sensitivity of the issue at stake, the links with questions connected to national and constitutional identity of the member states, as recognized by article 4(2) TEU, and the huge impact that findings of violation under article 7 would have on the political life of the Union, all play in favor of strengthening the political dimension of the mechanism and limiting judicial involvement.

While the EP has often demonstrated its willingness to scrutiny member states' performances in the field of human rights, democracy and the rule of law, it has so far never presented a 'reasoned proposal' for the activation of the preventive mechanism, nor one of the other proposals foreseen

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<sup>78</sup> See Besselink in Jakab – Kochenov (forthcoming): 'the framework of Article 7 is *not* merely intergovernmental and gives significant powers to the Commission and Parliament'.

<sup>79</sup> See article 269 TFEU: 'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article'.

in the Rules of Procedure. A recent proposal presented to the LIBE Committee by the ALDE Group and other national parties to activate article 7(1) against Hungary for the events of the ‘refugee crisis’ has not been successful.<sup>80</sup> Moreover, with the limited exception of the 2004 Resolution, the Parliament never engaged in a clarification of the standards that it would use for the assessment of the situation.

The attitude of the EP seems therefore two-folded: while it has over time demonstrated a strong interest in the situation of fundamental values in member states of the Union, and affirmed that standards for scrutiny should be stringent and demanding it has so far avoided to make use of the powers conferred by article 7. This seems to indicate a preference for informal mechanisms of political pressure, which allow the Parliament to be more flexible and engage in dialogue with the member state concerned by potential violation of the fundamental values, rather than the more formalized and stringent procedures of the Treaty. Furthermore, the current composition of the Parliament, in consideration of the rise of far-right and other Eurosceptic parties, which generally deny the existence of EU competence on the matter, complicates the formation of the two-thirds majority required to activate the mechanism.

Under the new rule of law initiatives of the Commission and the Council, the role for the EP is on the contrary more marginal. In the Commission Rule of law Framework, the Parliament is mentioned among the actors that the Commission can consult in order to collect information in the preliminary stage leading to the formulation of the Rule of Law Opinion.<sup>81</sup> The Commission has also stated that the Parliament will be regularly informed during the procedure.<sup>82</sup> Under the Council Rule of Law dialogue, on the other hand, any role for the EP is completely excluded. Dialogue would be prepared exclusively by COREPER and no cooperation with other institutions is foreseen.

Some final considerations can be dedicated to the Report on the Situation of Fundamental Rights in the European Union, an instrument developed over the last decades in order to monitor more regularly the situation of values in the EU. These Reports are prepared and presented annually or bi-annually by the LIBE Committee and then approved by the plenary of the Parliament. Reports cover in the first paragraphs a number of general institutional issues and then contain thematic

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<sup>80</sup> On the 13<sup>th</sup> November 2015, the LIBE Committee voted against the formal proposal by ALDE. See also ALDE Group, ‘Hungarian laws to hunt down refugees are a reminder of Europe's dark past - ALDE Group to maintain demand for 7.1 procedure’, 7 October 2015, available at <http://www.alde.eu/nc/press/press-and-release-news/press-release/article/hungarian-laws-to-hunt-down-refugees-are-a-reminder-of-europes-dark-past-alde-group-to-maintain-d/>

<sup>81</sup> See in particular Annex 2 of the Commission Communication.

<sup>82</sup> See p 8 of the Communication.

reports on a selection of substantive issues.<sup>83</sup> The Report does not contain however chapters on specific Member States, and generally entirely avoid to mention single countries, even when it discusses issues specific to or a group of them.<sup>84</sup> Moreover, the focus on fundamental or human rights excludes the discussion of other broader issues concerning rule of law and democracy, unless it is possible to frame them in terms of rights. The instrument therefore does not cover therefore the whole set of values mentioned in article 2, nor consists in a full-scale, country-specific analysis of the situation in all the Member States of the Union. Whether the Parliament would have a competence to do so, it is not entirely clear, even if article 7, and in particular the possibility to present a reasoned opinion for the activation of the preventive mechanism, seems to imply that the EP should be constantly informed of the situation of democracy, human rights and the rule of law in the Member States, in order to exercise its powers effectively and be constantly aware of any possible critical development. Beside the question of competence, in fact, one should also consider whether the Parliament would be the most appropriate forum for such monitoring, or whether it would better to assign it to other more impartial, non-political institutions, assigning to them specific material, technical and human resources.

In addition to the regular monitoring of the Fundamental Rights' Report, the EU can also hold debates and adopt resolutions dealing with the situation of fundamental rights and other values in a specific member state. These are not regular and permanent monitoring instrument, in the sense that debates are not fixed periodically, nor there is a constant production of resolutions or reports. The recent resolutions on Hungary are one example, as well as the other resolutions mentioned above. In other circumstances the Parliament has focused more on thematic subjects.<sup>85</sup> The next section of the paper deals with this type of resolutions adopted during the Hungarian crisis, and more generally on the efforts of the EP to fight the deterioration of democracy, rule of law and human rights in the country.

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<sup>83</sup> The more recent report (2013-2014) includes for example chapters on freedom of expression and the media, equality and non-discrimination, protection of minorities, rights of migrants and applicants for international protection, fight of corruption, conditions in prison, justice and citizenship, and other issues. See European Parliament, Resolution on the Situation of Fundamental Rights in the European Union (2013-2014), Strasbourg, 8 September 2015, Doc. 2014/2254(INI).

<sup>84</sup> The Report refer generally to the 'Member States' as a block, or to a group of member states with expression such as the one contained in paragraph 153 of the latest report, where the Parliament 'deplores the conditions in the prisons and other custodial institutions of *numerous Member States*', without specific indications of any country.

<sup>85</sup> See European Parliament, Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights), 22 April 2004, Strasbourg, Doc. 2003/2237(INI).

## 4. A CASE STUDY: THE EUROPEAN PARLIAMENT AND THE HUNGARIAN CRISIS

The key critical elements of the situation in Hungary have been already briefly outlined in the paper. It is beyond the scope of this work to assess the situation in more detail, but it is of great interest to analyze the role played by the European Parliament in the context, looking at whether, how, and when it has made use of its political and legal powers. The first aspect that can be underlined is how the Parliament has been at the same time the most active EU institution, in terms of the number of resolutions and debates concerning the Hungarian crisis, and the one taking the strongest stance against the actions of the Hungarian government. The EP adopted a ‘direct’ approach, that is to say that its actions have not been limited to specific pieces of legislation falling within the scope of EU law, in contrast to the more sectorial approach followed by the Commission. This approach has allowed the Parliament to follow continuously the whole process of reforms over the years and to elaborate comprehensive analyses of the situation.

Other institutions have remained more silent, in some cases because they lacked clear-cut competences and opportunities to deal with crisis, and in others due to political or diplomatic considerations. The Commission expressed its general preoccupations for the reforms of the Orban Government only in a first, preliminary moment,<sup>86</sup> but its formal action was later limited to three infringement procedures based on rather specific aspects of the Hungarian reforms, which the Commission considered in violation of pieces of EU secondary law.<sup>87</sup> So far, the Commission has not pursued a more general or ‘systemic’ infringement action, eventually based directly on article 2 as suggested by Scheppele.<sup>88</sup> Even in the new Rule of Law framework created by the Commission there is no reference to the particular challenges raised by the Hungarian situation, and the framework is yet to be activated, even after the recent calls of the EP in the debates on Hungary.<sup>89</sup>

The Council and the European Council have remained largely silent, showing the reluctance of at least some of the member states to discuss such questions at EU level, while other member states

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<sup>86</sup> The first declarations on the new Hungarian Constitution and successive cardinal laws, while pointing out specific profiles of alleged incompatibility with EU law, expressed also more general concerns over respect for the obligations deriving from membership of the Union: see European Commission, Statement of the European Commission on the situation in Hungary, Brussels, 11 January 2012, Doc. MEMO/12/9.

<sup>87</sup> This approach has been defined as ‘indirect’ protection of the fundamental values: see Mark Dawson - Elise Muir, ‘Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law’, 14 *German Law Journal* 10 (2013).

<sup>88</sup> See note 53 above.

<sup>89</sup> See European Parliament, Resolution on the situation in Hungary, Strasbourg, 10 June 2015, Doc. 2015/2700(RSP).

have expressed their views through other channels.<sup>90</sup> As a consequence of this approach, the Court of Justice was called to evaluate the Hungarian constitutional reforms only in the limited framework of the infringement procedures brought forward by the Commission: in two cases,<sup>91</sup> Hungary was found in violation of EU law, but the government was able to comply with the judgments taking rather limited measures that had a limited influence over the overall context. Clearly, the Parliament enjoys a wider margin of discretion in addressing challenges such as the ones raised by Hungarian constitutional reforms. Framing the question in broader political terms, rather than relying on specific legal mechanisms, it can deal more directly with the true critical issues, analyzing whether a country respects the EU's fundamental values as such, without the need to refer to other specific pieces of EU law. Moreover, it is not constrained by the more diplomatic nature of the relationship existing in the Council and in the European Council, where Member States are less keen to criticize their peers, in order not to compromise future cooperation. The Parliament is therefore the EU institution that can better act as a forum for debate, even when the latter is sensitive and controversial.

The first approach of the EP to the controversial reform undertaken by the Hungarian Government precedes of few weeks the adoption of the new 'Basic Law'. In March 2011, the Parliament approved a Resolution on the Hungarian media law,<sup>92</sup> calling the government 'to restore the independence of media governance and [to] halt state interference with freedom of expression and 'balanced coverage', and underlining the risk of undermining pluralism in the public sphere. In the Resolution the EP anticipated its concerns about the adoption of the new Constitution, the drafting of which was on-going at the time: the EP asked to the Hungarian authorities 'to involve all stakeholders in the revision of ... the Constitution, which is the basis for a democratic society founded on the rule of law, with appropriate checks and balances to safeguard the fundamental rights of the minority against the risk of the tyranny of the majority'. The lack of involvement of the opposition in the drafting of the Constitution has been in fact one of the main points of criticism of the new Hungarian Basic Law.<sup>93</sup>

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<sup>90</sup> See Letter of four Ministers of Foreign Affairs to the President of the Commission, 6 March 2013, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstateljkheidsmechanisme/brief-aan-europese->

<sup>91</sup> See Cases C-286/12 Commission v Hungary [2013] ECLI:EU:C:2012:687 and C-288/12 Commission v Hungary [2014] ECLI:EU:C:2014:237

<sup>92</sup> European Parliament, Resolution on media law in Hungary, Strasbourg, 10 March 2011, Doc 7\_TA(2011)0094. The Parliament has been very active in the field of freedom of expression media pluralism: see note 79 above for a Resolution on Italy and other countries, and also the successive Resolution on the EU Charter: standard setting for media freedom across the EU, Strasbourg, 21 May 2013, Doc 2011/2246(INI).

<sup>93</sup> As noticed in particular by the Venice Commission in its Opinion, see note 24 above.

Once the new Basic Law was adopted, the EP presented a new resolution in July 2011,<sup>94</sup> ‘sharing the concerns of the Venice Commission particularly regarding the transparency, openness and inclusiveness of and the time frame for the adoption process, and regarding the weakening of the system of checks and balances’. The Parliament called the Hungarian government to immediately address the points raised by the Venice Commission and several international observers.<sup>95</sup> Moreover, it entrusted the Commission to ‘conduct a thorough review and analysis of the new Constitution ... in order to check that they are consistent with the *acquis communautaire*, and in particular the Charter of Fundamental Rights of the European Union, and with the letter and spirit of the Treaties’. Another Resolution was adopted in February 2012 expressing ‘serious concern at the situation in Hungary in relation to the exercise of democracy, the rule of law, the respect and protection of human and social rights, the system of checks and balances, equality and non-discrimination’, and the EP strengthened its efforts to put pressure on the Hungarian government in order to achieve compliance with the recommendations of the EU Commission and of CoE organs.<sup>96</sup> In the latter Resolution, the Parliament entrusted to the LIBE Committee, in cooperation with other institutions and bodies, the preparation of a follow-up report on the political situation in Hungary.

The so-called ‘Tavares Report’, prepared by LIBE with Portuguese MEP Rui Tavares as rapporteur, was then presented in June 2013 and approved by the plenary in 2014.<sup>97</sup> The Report contains a wide-range and comprehensive analysis of reforms undertaken in Hungary, including the new constitution, but also more specific issues such as the extensive use of cardinal laws, the weakening of the system of check and balances, the reforms of the Constitutional Court, of the Data Protection Authority and of the judiciary – the latter two issues subject of the infringement actions of the Commission. The breadth of the issues discussed in the Report shows how the Parliament is able, in this type of situations, to look both at the overall picture of the situation in a country, and to analyze with more precision and detail more specific issues, which may or may not

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<sup>94</sup> European Parliament, Resolution on the Revised Hungarian Constitution, Strasbourg, 5 July 2011, Doc P7\_TA(2011)0315.

<sup>95</sup> See point E of the Resolution: ‘...whereas the Constitution has been widely criticised by national, European and international NGOs and organisations, the Venice Commission and representatives of Member States’ governments, and was adopted exclusively with the votes of the MPs from the governing parties, so that no political or social consensus was achieved...’

<sup>96</sup> European Parliament, Resolution on the recent political developments in Hungary, 16 February 2012, Doc 2012/2130(INI).

<sup>97</sup> European Parliament, Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), Strasbourg, 3 July 2013, Doc 2012/2130(INI).

be linked with pieces of EU secondary law.<sup>98</sup> Furthermore, the Report shows the rather demanding standards of scrutiny applied by the Parliament: the EP expressed strong criticisms of several aspects of the reforms, using a very direct and explicit language. This appears clearly where the Parliament ‘strongly criticizes the provisions of the Fourth Amendment to the Fundamental Law’, and ‘deplores the fact that the abovementioned institutional changes resulted in a clear weakening of the systems of checks and balances required by the rule of law and the democratic principle of the separation of powers’.<sup>99</sup> In paragraph 57, the Report concludes that ‘the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU’ and that ‘– unless corrected in a timely and adequate manner – this trend will result in a clear risk of a serious breach of the values referred to in Article 2 TEU’, adopting the expressions used in article 7(1).

The Report contained also list of recommendations addressed to several actors, including Hungarian authorities. A peculiar element of these recommendations is that the Parliament did not merely call for a general change of attitude of the government, but on the contrary included very detailed suggestions, covering all the thematic aspects analyzed in the first part of the report and prescribing several specific measure to be taken in order to meet the concerns of the Parliament and of other observers.<sup>100</sup> The aim of the EP went beyond that of raising a general alarm on the gravity of the situation with EU institutions and public opinion, and of generally calling the Hungarian government to a better cooperation with European actors. The EP aimed rather to intervene on the substantive content of the reforms and to influence more directly the situation on the ground, specifying with a greater detail the steps to be taken by national authorities, in a way similar to what EU institutions and the Parliament in the context of the infringement procedure or pre-accession. The tone, content and type of recommendations addressed to the Hungarian government included in Tavares Report resemble those of resolutions adopted towards candidate countries, monitoring their progresses in complying with the Copenhagen criteria, such as for example the ones on Turkey.<sup>101</sup>

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<sup>98</sup> In this respect, see in particular the recommendations to the Commission contained in paragraph 69 to not focus exclusively on specific provisions of EU law, but also to the ‘systemic change in the constitutional and legal system and practice’, adopting a more comprehensive approach and looking at the ‘multiple and recurrent infringements’.

<sup>99</sup> See para. 5 and 26 of the Resolution.

<sup>100</sup> The Recommendations are contained in para. 72 of the Resolution: see in particular the points on the independence of the judiciary and the powers of the Constitutional Court.

<sup>101</sup> See for example European Parliament, Resolution on the 2013 progress report on Turkey, Strasbourg, 12 March 2014, Doc. 2013/2945(RSP), containing chapters on ‘strong democratic foundations’, and ‘fulfilling the Copenhagen criteria. The resolution on the 2014 Progress Report is yet to be adopted.

Another noteworthy element of the Report is the determination of the European Parliament to work together with other EU institutions and other international organizations – in particular the Council of Europe and the Venice Commission - to address the Hungarian crisis: this is what the appeals to the institutions and also the several references to the Opinions of the Venice Commission suggests. A first part of the recommendations, in particular those addressed to the Commission, called for the creation of an ‘Article 2 Alarm Agenda’, a mechanism to monitor the Union values until full compliance is restored. In this light, the EP invited the Commission and the Council to designate a representative for an ‘Article 2 Trilogue’,<sup>102</sup> responsible for the follow up phase and the assessment of the implementation of the recommendations sent to the Hungarian government. Finally, the Report contained other recommendations for the medium-long term, including the possibility to a future revision of the Treaties in order to strengthen the mechanisms of protection of values. An option considered was the creation of a ‘Copenhagen Commission’, a group of experts in charge to evaluate compliance with the common values.<sup>103</sup>

The Tavares Report underlines therefore how the EP has the ambition to give a decisive contribution to the system of safeguard of the founding values in the member states, not just as a forum for debate, but also as an institution able to have a direct influence on the situation on the ground and to trigger changes in national systems in order to protect democracy, the rule of law and human rights. The relevance of the Tavares Report lies both in the sharp criticisms of the reforms of the Hungarian authorities and in the large-scale recommendations addressed to all actors involved. Moreover, for the first time the Parliament considered explicitly a possible activation of article 7(1), had the Hungarian government not adequately complied with the recommendations.<sup>104</sup> While the Report and the attitude showed by the parliament in that circumstances can be generally praised, one can reasonably doubt whether it has been able to re-address the alleged violations of EU’s values by the Hungarian government: as seen above, the situation remains critical despite the intervention of the EP and of other EU institutions. Moreover, the Parliament has not followed-up its threat to activate article 7(1) even if the situation has not improved so far. As several observers and other institutions, the EP most likely considers article 7, and even its preventive mechanism, which does not envisage any sanction against Member States,

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<sup>102</sup> See para. 85 of the Resolution.

<sup>103</sup> See para 77-79. The idea of a Copenhagen Commission was first advanced by Jan Werner Muller, ‘Safeguarding Democracy Inside the EU: Brussels and the Future of the Liberal Order’, Transatlantic Paper Series 2/2013, <http://www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order>.

<sup>104</sup> See in particular para, 81 of the Resolution, where the Parliament entrusts the Conference of Presidents ‘to assess the opportuneness of resorting to mechanisms foreseen by the Treaty, including Article 7(1) TEU in case the replies from the Hungarian authorities appear not to comply with the requirements of Article 2 TEU’.

a nuclear option, which should not be activated in practice. It can be mentioned to put pressure on a member state's government, but no formal action should be taken.

The reluctance to deploy article 7 against Hungary could also be explained from a more partisan perspective: Orban and Fidesz are in fact still members of the European People's Party (EPP), the biggest group of the Parliament, which does not want to alienate completely their votes and provoke a rupture within its ranks. A political-partisan reading of the difficulties faced by the EU and by the Parliament to activate article 7, and more generally to deal effectively with the situation in Hungary, has been proposed by Kelemen.<sup>105</sup> The EPP officially opposed the adoption Tavares Report and the majority of the party voted against the resolution, but different views coexist:<sup>106</sup> in particular, while current President and then Vice-President of the EPP Group Manfred Weber criticized the report and considered it a political attack from the leftist groups, other representative of the EPP, including for example former Commissioner and today MEP Viviane Reding, have criticized more directly Fidesz and Viktor Orban.<sup>107</sup> Recent developments, including the negative decision of the LIBE Committee on the 13<sup>th</sup> October 2015 on the proposal by the ALDE group to start article 7(1) proceedings against Hungary have showed that even the PES group, the second biggest party in the Parliament, is reluctant on the activation of the mechanism, perhaps fearing a counter-attack of the EPP against some of its own members,<sup>108</sup> and in any case divided on the issue, as the majority of the PES members voted together with EPP to reject the proposal, but others voted in favor, including the Chair of the LIBE Committee Claude Moraes.<sup>109</sup>

In the spring of 2015, new controversial declarations of PM Orban, and in particular the discussion on the possible reintroduction of the death penalty in the country, have once again triggered a reaction of the European Parliament. After debates with the Commission and the Hungarian

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<sup>105</sup> See R. Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in a Democratic Union', Paper for the CES Conference of Europeanist (2015), available at <http://fas-polisci.rutgers.edu/dkelemen/research/Kelemendemocraticdeficit.pdf>. The authors argues that 'in the interest of party loyalty and of maintaining their majority in the European Parliament, many EPP politicians have proven themselves willing to tolerate Orbán's violations of democratic values'.

<sup>106</sup> See Kim Lane Scheppele, 'In Praise of the Tavares Report: Europe finally said no to Viktor Orban', Verfassungsblog on Matters Constitutional, 5 July 2013, <http://www.verfassungsblog.de/en/in-praise-of-the-tavares-report-europe-finally-said-no-to-viktor-orban-2/#.VgR72rQ9Xdk>

<sup>107</sup> See the recent views expressed in Politico Europe, 'Black sheep in the European Parliament', 25 September 2015, available at <http://www.politico.eu/article/black-sheep-in-the-european-parliament-viktor-orban-epp-mep/>. See also R Daniel Kelemen, 'EPP loves Orban', Politico Europe, 18 June 2015, available at <http://www.politico.eu/article/epp-defends-hungary-orban-against-criticism/>

<sup>108</sup> Slovak Prime Minister Robert Fico, PES member, has been criticized for some recent declarations on the refugee crisis. See Euractiv, 'Robert Fico: Anti-refugee, pro-Russian headache for the Socialists', 8 October 2015, available at <http://www.euractiv.com/sections/justice-home-affairs/robert-fico-anti-refugee-pro-russian-headache-socialists-318324>. The PES group is reflecting on a possible expulsion of his party.

<sup>109</sup> The results of the roll-call vote on the ALDE proposal are available at <http://www.europarl.europa.eu/committees/en/libe/votes-in-committee.html>

government, a new resolution was adopted in June 2015.<sup>110</sup> The EP noticed that ‘the death penalty is incompatible with the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights on which the Union is founded, and that any Member State reintroducing the death penalty would therefore be in violation of the Treaties and of the EU Charter of Fundamental Rights’. While recognizing the steps taken with the new Rule of Law initiatives of the Commission – which was called by the EP to activate the new rule of law framework against Hungary - and the Council, the Parliament was not completely satisfied by these new instruments, and called for strengthening inter-institutional dialogue in order to create a better EU EU mechanism on democracy, the rule of law and fundamental rights.<sup>111</sup>

Even if not directly related to the Hungarian crisis, the 2013-2014 Report on the Situation of Fundamental Rights in the EU, approved in September 2015, is the most recent document illustrating the position of the EP in the debate on the creation of new mechanisms to safeguard the EU’s common values.<sup>112</sup> The position of the EP has slightly shifted from the conclusions contained in the Tavares Report. The idea of a Copenhagen Commission has been abandoned, and the Parliament adopts in the new report a two-folded approach: on the one hand the EP recognizes that Treaty change would be required to strengthen the protection of rights and other values in the EU framework, and proposes a new mechanisms, which has its roots in a proposal by the ALDE group,<sup>113</sup> namely a ‘EU values scoreboard’, consisting in country-specific assessments, on a regular basis, of member states’ respect for the fundamental values, bases on data supplied by the Council of Europe and its bodies, NGOs and especially from a FRA with a renewed and broader mandate.<sup>114</sup> When the Scoreboard or FRA annual reports highlights that a member state is violating article 2 TEU, a formal warning should be sent to the state in question, and a process of dialogue involving all EU institutions should be launched.<sup>115</sup> An interesting aspect of this phase is that the EP foresees to involve also the national parliament, together with the government, in dialogue between EU institutions and the member state: as demonstrated also by other references

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<sup>110</sup> See European Parliament, Resolution on the situation in Hungary, Strasbourg, 10 June 2015, Doc. 2015/2700(RSP).

<sup>111</sup> See in particular paragraph 12 of the Resolution.

<sup>112</sup> See note 77 above.

<sup>113</sup> ALDE, The EU Democratic Governance Pact Upholding the Rule of law and Fundamental Right. The proposal by ALDE included also the creation of a ‘European semester’ – similar to those in place for economic governance - for Democratic Governance, Rule of Law and Fundamental Rights, during which breaches of the values could be addressed via dialogue with the member state concerned, but containing also a more binding mechanism that could serve before the application of article 7.

<sup>114</sup> See para. 10 of the Report. One of the proposals by the Parliament is to broadening the mandate of the Commission ‘EU Justice Scoreboard’, which measures certain parameters of the justice systems of the member states.

<sup>115</sup> This phase would be therefore similar to current Commission Rule of Law Framework, but with a broader involvement of other EU institutions, and based more directly on precise evidence collected during the regular annual monitoring.

to national parliaments contained for example in the Tavares Report,<sup>116</sup> the EP seems willing to strengthen forms of inter-parliamentary cooperation with national parliaments in the field of the protection of democracy, the rule of law and human rights.<sup>117</sup>

On the other hand, conscious of the urgency of the situation, the Parliament underlines also that ‘full use must be made of the existing mechanisms’, including article 7 TEU, with the Parliament deploring ‘the lack of political will to invoke article 7 TEU against member states responsible for breaches of fundamental rights to penalize them and operate as a deterrent’.<sup>118</sup> As described above, however, the Parliament itself has so far refused to make use of its competences to activate article 7(1). The political will lacks in the Parliament as well as in other EU institutions. Finally, the Report mentions the new Commission Rule of Law Framework, underlines how it constitutes a rather positive ‘first attempt’ to fill the gaps in the system, but notices its limits and suggests a series of amendments to it.<sup>119</sup>

Some conclusions can be drawn from overview of the EP’s intervention during the Hungarian crisis. Firstly, the number of debates and resolutions shows how the Parliament, more than other EU’s institutions, has demonstrated a great willingness to make use of its powers in order to contribute to the safeguard of the EU’s fundamental values vis-à-vis the Member States. At the same time, it can be underlined how this has been done primarily through political means: the document adopted had the main aims to put pressure over the government of Viktor Orban to conform with European standards, and to open a true European debate on the ‘constitutional transformation’ of Hungary. Even when formal mechanisms exist, such as in the context of article 7, the EP has decided in fact not to make use of them, perhaps conscious of the far-reaching consequences which would derive from the activation of the mechanisms, and of the difficulties in reaching the very demanding voting thresholds in the Council and in the European Council. The approach of the Parliament shows also that internally, the Parliament has been more divided along partisan lines than what a first reading of the documents would suggest. Finally, the story of the EP and Hungary tells us how EU institutions are struggling to act together in a coordinated way in order to safeguard EU values. Despite the positive efforts of the Parliament to foster dialogue and

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<sup>116</sup> See para 63 of the Tavares Report: ‘Calls on the national parliaments to enhance their role in monitoring compliance with fundamental values and to denounce any risks of deterioration of these values that may occur within the EU borders, with a view to maintaining the credibility of the Union vis-à-vis third countries, which is based on the seriousness with which the Union and its Member States take the values they have chosen as foundations’.

<sup>117</sup> On cooperation between the EP and national parliaments in human rights’ issues, see Jan Wouters and others, ‘Enhancing Cooperation between the European Parliament and National Parliaments on EU Human Rights Policy’, Study for the European Parliament, March 2014, Doc. EXPO/B/DROI/2013/20.

<sup>118</sup> See para 6 of the Report.

<sup>119</sup> At paras 8-9.

cooperation, a marked diversity of approaches has emerged and question of competences not completely solved.

The last, encouraging element to underline is the participation of Prime Minister Orban to the debates before the EP, after the adoption of the Constitution, during the discussion of the Tavares Report and more recently in a visit after the comments on the death penalty. The fact that Orban accepted the European Parliament as a forum for discussion, acknowledging a competence in dealing with internal situations in a member states, and his willingness to accept questions and criticisms by MEPs, should be, if not praised, at least underlined as a positive element for the construction of a European public debate on the safeguard of values. This has been in fact noticed both by MEPs and by academics: Jan-Werner Muller remarked for example that ‘it is significant that Orban went in front of the European Parliament and defended his record in the face of harsh criticisms, ... his appearance dignify the Parliament with an importance as an arena of European-wide debate that many other European heads of governments would probably not see’.<sup>120</sup>

## CONCLUSIONS

How to improve the mechanisms to safeguard the fundamental values of the European Union is still an open question, one that is destined to remain for a long time on the EU’s institutional agenda. The recent constitutional crisis in EU Member States have clearly showed how the Union is struggling to protect democracy, the rule of law and human rights, when a national government is threatening or violating these values. Further challenges are at the horizon, considering the rise of anti-establishment, radical parties challenging the status quo, both on the left and on the right of the political spectrum, the existence of unresolved human rights and minorities’ issues, and the pressure deriving from the increased flux of migrants and asylum seekers in the EU.

While EU institutions have all, to a different extent, engaged with the issues raised by the Hungarian crisis and by critical situations in other Member States, their overall answers can be considered insufficient so far, since few improvements have been observed on the ground. Institutions have been reluctant to use the formal mechanisms provided by the Treaties, in particular article 7 TEU, and have rather tried to address the crises either through political channels, or with the creation of new, softer and informal instruments, the efficacy of which is

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<sup>120</sup> See Muller (2015), p 23.

however still questionable. Institutional approaches have been rather different and cooperation limited. It is however evident that the construction of a more effective mechanism to safeguard the EU fundamental values requires the involvement of all institutions and the strengthening of cooperation between them, as article 7 itself demonstrates assigning to each of them a role in the procedure. New mechanisms should also require and provide for involvement of all the mentioned institutions.

In this context, and for the reasons outlined in the paper, it is beyond any doubt that the European Parliament should play a significant role in the system to safeguard the EU's fundamental values. In particular, the involvement of the EP can give a decisive contribution to EU's intervention in terms of legitimacy: the participation of a democratic and representative institution such as the European Parliament allows the EU to more convincingly respond to the claims that a technocratic organization should not meddle with national values, and that intervention would be by itself non-democratic. Moreover, acting as a forum for political discussion at EU level, and as a crucial point of reference for the developing European public sphere, the EP is able to give to crises developing at national level a more 'European dimension', underlining the interdependence of the process of integration, and how violations of the fundamental values can have an impact over other member states and on the Union and its citizens at large. Even taking into account the natural risks of partisanship of parliamentary debates, partially emerged during the discussion on Hungary, there are overwhelming normative reasons to include the European Parliament in the system of safeguard of the EU fundamental values, and to assign to it, in cooperation with other institutions, a role as a 'watchdog' and guarantor of human rights and other values vis-à-vis the member states of the Unions.

Any possible reform of the system should therefore take into account the important role of the European Parliament in this context, and involve it in the new mechanisms. The proposals for the creation of a new 'Values Scoreboard', advanced by the Parliament itself, and of other instruments to be used in the preventive phase, provide the most appropriate structure for involving the EP: in a moment where what is crucial is dialogue, common understanding, and a reflection on the 'European dimension' of a crisis, the Parliament can act as the natural forum for debate and even for direct confrontation between MEPs, national governments and other EU institutions. Debates before the Parliament can also be used to involve members of national parliaments, NGOs and other stakeholders. The Parliament could also significantly contribute to the reflection on the substantive content of article 2 values, and to the determination of clearer standards and benchmarks: a difficult but necessary enterprise, if the Union wants to safeguard its values effectively

On the other hand, the role to be assigned to the European Parliament in the successive phase, where the focus is rather on enforcement, sanctions and ensuring Member States' compliance, seems to be more limited. The EU appears to be quite weak in this respect at the moment, as authors have underlined, arguing for the creation of more judicial and legal avenues to enforce the Union's fundamental values, beyond the political instruments of article 7. It has been proposed to rely more directly on the Court of Justice, either via Commission's infringement procedures, or broadening the ways in which individuals and groups can bring violation of rights and values before the Court. The idea behind these proposals is that excessive reliance on political mechanisms creates too much discretion for the actors involved, with the risk of blocking effective intervention and of creating double standards, depending on the political importance of the question or even on the size of the member state concerned. In this separate and different stage, the risks of excessive politicization and of partisanship deriving from Parliament's involvement emerge more clearly. However, the Parliament could significantly contribute to this 'judicialization' of values through its 'mainstreaming' of human rights, democratic and rule of law considerations into EU secondary law, broadening the possibilities for enforcement via national courts and the Court of Justice.

The introduction of new mechanisms and procedures for this enforcement stage of the system would however not exclude a strengthening of the preventive mechanisms, nor a radical change of the procedures of article 7, in which the EP would still play a crucial role. In fact, the two phases should not be seen as concurrent but rather as complementary, and both are required if institutions aims to make the system effective and legitimate. Constant monitoring and the determination of clear standards, for example, would make the enforcement of values easier, as the existence of a breach would emerge already in the preliminary phase, and would limit political controversies on alleged disparate treatments of Member States. Conversely, the existence of stronger mechanisms of enforcement would also reinforce political approaches and dialogues, providing better incentives for the member states to follow the recommendations of EU's institutions. The EU's enlargement policy offers a possible model: the possibility for the EU to suspend funding and technical assistance to a candidate country, together with the incentive of gaining membership of the organization, gives more solid grounds to the recommendations contained in the Commission's progress reports and in the Parliament Resolutions.

The European Parliament has therefore both the competences and the capacity to be a watchdog for the protection of the EU's fundamental values. A separate question is whether its action can be truly effective. The answer cannot be given looking exclusively at the role of the Parliament, but needs to take into account the overall context. All EU institutions must be involved in the

mechanisms of safeguard, as well as national governments, parliaments and courts, EU citizens, NGOs. Safeguarding democracy, the rule of law and human rights in the EU's multilevel system requires in fact a common effort: it requires not only refining the characteristics of existing and new mechanisms, but a deeper reflection on the current situation, as the described crisis of values is challenging the foundations of the European Union and of the overall process of European integration. The inability of EU institutions to protect the fundamental values in the Member States is threatening the credibility and legitimacy of the Union on the external scene, and internally undermines cooperation based on mutual trust and mutual recognition. For EU's intervention to be considered genuinely effective, these underlying issues need to be faced and solved adequately by all institutions. Ultimately, effectiveness will depend on the true capacity of the European Union to guarantee and improve the quality of democracy, the rule of law and human rights at both national and European level.

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