

First victims or last guardians?

The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland

Małgorzata Szuleka

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The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland

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Summary

The rule of law crisis, which evolved into a detrimental to democratic standards process of changing the entire system of the state, has also deeply influenced the condition and functioning of the civil society sector. The gradual erosion of the checks and balances system accelerates the process of limiting the operational space and independence of non-governmental organizations (NGOs). This paper focuses on NGOs perceived as organisations independent from the state, working at the national or local levels in the public purpose, and whose role is to monitor the actions of the state (also known as watchdog organisations). The paper focuses on the effects of rule of law backsliding on the NGOs' scope and methods of work, at the same time it shows how civil society organisations try to adjust to the changing reality.

The rule of law crisis – the rule of law backsliding – the establishment of the new order of the state

Respectively since 2010 and 2015, Hungary and Poland have been governed by two, quite similar parties. Both the Hungarian Fidesz and Polish Law and Justice are known for their Eurosceptic, right-wing and anti-migration policies. With winning the elections, both parties did not aim at carrying out the necessary changes of the state, but actually at creating a completely new political and legal state's order. The chain of political and legal actions aimed at undermining the functioning of check and balance mechanisms as well as basics of the constitutional democracy started rule of law crisis which underpinned the years of these parties being in power.

In his speech delivered in July 2014, Prime Minister Viktor Orbán stated that the "*Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state*".¹ His closest ally and *de facto* leader of Poland Jarosław Kaczyński has

¹ Csaba Tóth, Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, available at: <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

never tried to hide his fascination with Orbán's politics. In 2011, after losing the parliamentary elections, Kaczyński cheered his supporters with a declaration that "a day will come when we'll have Budapest in Warsaw."² Although in theory both leaders aim at creating a similar order of the state, still their visions of this state may differ – it seems that in Hungary, the illiberal democracy may be just an abstract concept serving political purposes, while in Poland this notion may be used as a pretext for reclaiming the Polish sovereignty.

As Petra Bard and Dimitry Kochenov described it "*whereas Hungary is essentially a kleptocracy where the government may pick any ideology available on the political spectrum to acquire and retain economic and political powers, the Polish government and especially PiS leader, de facto ruler of Poland Jarosław Kaczyński are more likely to truly believe in what they are preaching in terms of national interests*".³ Another important difference is the formal legitimacy to initiate this process of change – although Fidesz won the Parliamentary elections in 2010 with a constitutional majority, still the Law and Justice did not gain the enough seats in the Parliament to change the Constitution (yet, it has to be stated that Law and Justice was the first since 1989 party which won the Parliamentary elections with a simple majority). Also in 2018, after eight years in the government Fidesz has carried out numerous systemic changes that effectively reshaped the system of the state while in Poland still the process of installing the illiberal democracy is in progress.

Despite these differences, at the operational stage both parties followed almost identical scenarios of consolidating power in their hands and putting the project of creating an illiberal democracy in motion. In both cases – Poland and Hungary – the process started with constitutional crises which, first and foremost, affected the position and independence of the Constitutional Court. When in 2010, Fidesz won the elections one of its first legislative and policy steps was addressed at this key institution of the state. Fidesz changed the process of appointing new judges of the Court and, in this way, secured its right to staff the Court with its own people. Five years later, in November 2015, the new Polish governing majority Law and Justice almost immediately after the elections started a similar attack on the Constitutional Tribunal.

However, in this case the governing majority not only secured its right to appoint new judges of the Tribunal, but also disregarded the legal appointment of judges carried out by the previous governing majority. The constitutional courts in both countries not only played an important role in the mechanism of checks and balances, e.g. they have the competence to pronounce certain provisions as unconstitutional, but also they were key components of the human rights protection system. After the elections in 2010, the new governing majority

² Tvn24.pl, "Przyjdzie dzień, że w Warszawie będzie Budapeszt", available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt,186922.html>.

³ Dimitry Kochenov, Petra Bárd, Against Overemphasizing Enforcement in the Current Crisis: EU Law and the Rule of Law in the (New) Member States, East European Politics and Society, forthcoming.

adopted significant changes to the functioning of the Hungarian Constitutional Court. First of all, the obligation that each nominee for the position Court's judge had to be approved by the majority of the parliamentary parties and then accepted by a two-thirds majority was replaced by the obligation that the nominee should be accepted by the Parliamentary two-third majority.⁴ In a consequence, the former balance of different political views represented on the bench was violated. Secondly, the new Fundamental Law (which overruled the former Hungarian Constitution), increased the number of the Court's judges (from 11 to 15) and their terms of offices were prolonged.⁵ Furthermore, in the Hungarian legal system, there used to be a mechanism of *actio popularis* (a legal possibility thanks to which anyone without having an actual case or controversy could turn to the Constitutional Court to verify *in abstracto* the constitutionality of a specific provision⁶). *Actio popularis* was a very popular tool for seeking the protection of human rights – the most important human rights related cases were decided in a result of these petitions and it is estimated that almost 1,600 cases were lodged to the Court.⁷ The egalitarian nature of this complaint led to describing it as “a substitute for direct democracy.”⁸ However, this mechanism was abolished by one of the reforms of 2012, provoking the observations that “(abolishing *actio popularis* was) just one of the indications of a radical move away from a democratic dimension in constitutionalism.”⁹ Furthermore, the adopted in 2013 Fourth Amendment introduced provisions hampering the independence of the Court among others it nullified all the decisions made by the Court in previous 20 years and it also removed „Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allows the government to escape review by inserting any controversial new proposal directly into the Constitution”.¹⁰

In Poland, after the adoption within a year six different pieces of legislation concerning the works and structure of the Constitutional Tribunal, its independence has been severely undermined and its works have been visibly slowed down (e.g. by in 2017, the Tribunal issued 88 decisions while in the same period in 2016 there were 99 decisions, in 2015 - 173

⁴ Petra Bárd, Trigger and test case for EU constitutionalism. Hungary's Fundamental Law and related constitutional changes 2010–2013.

⁵ Ibidem.

⁶ Fruzsina Gárdos-Orosz, The Hungarian Constitutional Court in Transition - from Actio Popularis to Constitutional Complaint, available at: <http://akademiai.com/doi/pdf/10.1556/AJur.53.2012.4.3>.

⁷ Ibidem.

⁸ Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Springer Netherlands, 2014.

⁹ Ibidem.

¹⁰ Kim Lane Scheppele, Statement, The trajectory of democracy - Why Hungary matters?, Joint House and Senate Hearing, 113 Congress, available at: <https://www.gpo.gov/fdsys/pkg/CHRG-113jhr95506/html/CHRG-113jhr95506.htm>.

decisions¹¹). Furthermore, since 2017 serious doubts regarding the legal legitimacy of the Constitutional Tribunal have arisen as three persons appointed without a valid legal basis for the position of a judge were assigned cases. As a result, persons who do not have a constitutional mandate to rule on cases currently sit on the Constitutional Tribunal. This situation raises concerns whether the decisions issued by bench which included these three persons should be treated. The Constitution states that the Constitutional Tribunal's judgements are final and binding and does not provide a mechanism for revoking them. This uncertainty is one of the key factors weakening the position of the Constitutional Tribunal in the Polish system of human rights protection.

In both cases, the constitutional crisis has developed extremely fast, and soon evolved into a much more complex phenomenon, the so-called rule of law backsliding. The rule of law backsliding is described as *"the process through which elected public authorities deliberately implement government blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the review of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party."*¹² The process of the rule of law backsliding reaches far beyond the issue of the independence of the Constitutional Court. As Ewa Łętowska described it in reference to Poland "the changes occurring since 2016 are characterised by rapid change of law swiftly followed by systemic change of state's functioning".¹³

Both in Poland and Hungary, the governing majorities have introduced numerous changes widening political supervision over the justice system. For example, in both countries the position of the Prosecutor General has been strengthened in a way which limits its accountability and democratic oversight over the institution. In Poland the Prosecutor General is also the Minister of Justice and has competences to, among others, interfere with every single investigation, while in Hungary the Chief Public Prosecutor does not respond to the government or the parliament, and the MPs' right to pose interpellations was abolished.¹⁴ Furthermore, for both of these positions were assigned to persons loyal or affiliated to the governing majorities.

¹¹ Fundacja im. Stefana Batorego, Analiza działalności orzeczniczej Trybunału Konstytucyjnego w latach 2014-2017, available at: <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf>.

¹² Laurent Pech, Kim Lane Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, Cambridge Yearbook of European Legal Studies, 2017, 3-47, 10.

¹³ Ewa Łętowska, Zmierzch liberalnego państwa prawa Polsce, Human Rights Quarterly, Helsinki Foundation for Human Rights, No. 1-2, January-June 2017.

¹⁴ Hungarian Helsinki Committee, The HHC, the HCLU and the Eötvös Károly Institute analysed the new laws on the court system and the Prosecution Service of Hungary, available at: <http://www.helsinki.hu/en/analysis-court-system-and-prosecution-service/>.

Also, changes did not bypass the judiciary system and judges themselves. In 2011, the Hungarian Parliament lowered the retirement age of judges. As a result, all judges who had continued exercising their functions beyond the age of 62 were notified of their imminent retirement. It is estimated that this change affected almost 10% of judges.¹⁵ Then, it changed the composition of the Supreme Court and, by establishing the new institution of the National Judicial Office, altered the process of managing courts and appointing new judges. Again, the current Polish governing majority has been following a similar path and, since the beginning of 2017, has been trying to carry out “reforms” of the justice system. The main aim of these reforms is to change the process of appointing new judges to be more dependent on the political will and to change the structure of the Supreme Court. In December 2017, the Parliament adopted amendments to the Act on the Supreme Court and the National Council of Judiciary in Poland which widened the political supervision over the highest top court in Poland and the administrative body which is supposed to protect the independence of judiciary. The Council is composed of among others 15 judges who used to be appointed by judges themselves. After the amendment, the Parliament appoints the judges-members of the Council. This change deeply influences the composition of the Council, but it may have impact on the process of appointing the new judges of the courts as the Council is responsible for carrying out this process. The Venice Commission in its opinion described the legislation as a “grave threat” that “puts at serious risk the independence of all parts of the Polish judiciary”.¹⁶

Further changes concern, among others, media freedom – in both countries the governing majority managed to take control over the management of public media and put it under political control. As a consequence, the public media turned into a propaganda tool, they repeat the governments’ messages and enhance their rhetoric. Both governing majorities have adopted hostile policies towards migrants and refugees, decreased the level of human rights protection and completely disregarded any warnings from the international community.¹⁷

The long list of similarities does not, however, end here. In both countries, the key reforms were adopted at the accelerated pace without a proper social consultation process. Furthermore, the governments of both countries, on a daily basis use similar, confrontational rhetoric aimed at specifically selected public enemies which include, among others, groups as opposition parties, judges, migrants and representatives of the civil society sector. This leads to further polarisation of the society and results in the petrification of the newly established order.

¹⁵ FIDH, Hungary: Democracy under threat. Six years of attacks against the rule of law, no. 684a, available at: https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf.

¹⁶ Venice Commission, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e).

¹⁷ See further e.g. Freedom in the world 2017, Freedom House, available at: https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf or Human Rights Watch, Annual Report 2016, available at: https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf.

In this context, the standing of the civil society and its development have not remained immune to these systemic changes. The rule of law backsliding embodied in the attacks on the judiciary, independent media and civil service et al. has a deep impact on limiting the operational space for the civil society in both countries. The mass changes in the entire system of the state have triggered dynamic processes of remodelling the civil society sphere and its organisations.

“This isn’t just an issue of the rule of law crisis. This is a change in the whole system of the state and NGOs have to realize that they work in a new regime.” (S-HU-1)

In this regard, the issue of how much the rule of law backsliding has hampered the work of civil society and how the organisations have responded to the new challenges relating to the process is an aspect of crucial importance.

Civil society organizations and their role in the democratic state

There is no one, widely accepted definition of the civil society. The definitions offered by academic literature vary from definition of an abstract nature, concentrating on the key aspects of the civil society, to those more pragmatic perceptions of the civil society, focusing on the key roles that the civil society has to play in a democratic state.

For instance, civil society has been conceptualized as the “organized expression of society’s values, a sphere of freedom in which individuals come together for debate and advocacy or a system of networks linking individuals in their pursuit of influence over community and political affairs.”¹⁸ In terms of actors in this context, the concept of civil society would “include all those voluntary and non-profit organizations which play an important role in giving voice to the concerns of citizens and in delivering services that meet people’s needs.”¹⁹

Maina Kiai, UN Special Rapporteur on peaceful assembly and associations, in his report of 2017 adopted the definition of the civil society as “embodying ‘forms’ (diverse associational relationships), embracing ‘norms’ (values that shape the ‘good society’ such as freedom, democracy, tolerance, cooperation), and engaging in ‘spaces’ (the public sphere where discussions, contestations can freely take place to hopefully achieve agreement on what is good for society).”²⁰ Wiktor Osiatyński, in turn, defined the civil society from the perspective of its relation to the entire state. In his opinion, the civil society is an autonomic subject able to counterbalance the state’s authority and allowing the society to manifest its interest and needs, unite around issues of common care and influence on the public decisions.²¹ In such a context,

¹⁸ Jocelyn Veteran, Emily Clough and Killian Clarke, Reclaiming the „Third sector” from „Civil Society”: A New Agenda for Development Studies, *Sociology of Development*, vol. 1, no. 1, 2015.

¹⁹ Beate Kohler-Koch & Christine Quittkat (2009) What is civil society and who represents civil society in the EU?— Results of an online survey among civil society experts, *Policy and Society*, 28:1, 11-22.

²⁰ Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 23 May 2017, available at: <http://freeassembly.net/reports/civil-society/>.

²¹ Wiktor Osiatyński, *Republika obywateli*, Warszawa, 2007.

civil society can also be defined as “a sphere of social interaction between economy, state and the intimate sphere, the sphere of associations, social movements and forms of public communication” and mobilization.²²

This wide spectrum of definitions of the civil society may cause, in practice, severe problems in defining whether an organisation claiming to represent its members or interests of the constituency actually can be perceived as a civil society organisation²³. Regardless, however, of the differences in defining the civil society, it is unquestionable that the state ruled by law and founded on values of liberal democracy cannot function properly without a space for an independent development of activity carried out by citizens in the name of public interest. Usually, such a role is played by non-governmental organisations (also known as civil society organisations or – in cases concerning the monitoring of the authorities’ actions – watchdog organisations).

This research paper focuses on a specific aspect of the organisation of the civil society which are non-governmental organisations (NGOs) perceived as independent from the state, working at the national or local level with any kind of public purpose, non-profit organisations whose role is to monitor the actions of the state. As with the concept of the civil society, the idea of a civil society organisation can be perceived from different perspectives and by applying different criteria (e.g. methods of work, target group and scope of their work). However, for the purpose of this research, the scope of the works of watchdog organisations should be investigated broadly, including not only monitoring of state authorities’ actions, but also strategic litigation, research and advocacy, as well as providing services to certain groups as these are the fields which may be most affected by the changes within the system of the state. Also, for the purpose of this paper, watchdog organisations are defined as organisations independent from the state providing to its members and supporters an opportunity to express their opinions and position regarding various public developments. Watchdog organisations can operate at both international and national levels.

NGOs play a vital role in maintaining democracy and the state ruled by law. By their monitoring of the state’s actions, collecting data and evidence, together with the independent media and judiciary, they hold the governments accountable.²⁴ Also, in post-communist countries such as Hungary and Poland, the NGOs established just after the collapse of the Berlin Wall helped in developing democratic standards and mainstreaming human rights in the general discourse.

²² Beate Kohler-Koch & Christine Quitkat (2009) What is civil society and who represents civil society in the EU?— Results of an online survey among civil society experts, *Policy and Society*, 28:1, 11-22.

²³ For example political parties or churches have some characteristic features of the civil society organisations – they are created upon the initiative of the individual persons or non-state authorities and represent the interests of their supporters, yet their agendas and spheres of work differ from the civil society organisations.

²⁴ See also: Israel Butler, *Participatory democracy under threat: Growing restrictions on the freedom of NGOs in the EU*, available at: https://drive.google.com/file/d/0B_W-Vna2eVNVOfk5VXUzeE9CdGM/view.

Furthermore, NGOs may also be representatives of different minority groups whose rights and freedoms are prone to violation by the state (in certain cases, civil society organisations can become an advocate of the rights of minority groups together with courts and ombudspersons may participate in the process of granting „the minorities ‘non-discrimination’ in effective access to rights, justice and democracy (...) Civil society organisations, and notably minority-led grass-roots organisations, can articulate the issues and challenges on the ground”²⁵). By providing legal aid, non-governmental organisations compensate for the deficiencies of state-run systems of legal aid and protect the rights of these groups whose needs might have been excluded from the mainstream policies. As tools for changing the public life, NGOs also use strategic litigation (both at the national and international levels) and advocacy, which includes participation in the monitoring and review mechanisms established by international organisations such as the UN or the Council of Europe proving to be reliable partners administration, decision makers and stakeholders. Furthermore, NGOs could also play an important role in processes of mobilising the society and raising social pressure on the decision makers.

Given their wide scope of operation and ability to influence the public opinion, NGOs could also be the key players in the process of resisting the rule of law backsliding. That is why, in both countries, NGOs has become yet another element that has to be changed in the process of creating the new order of the state.

Shrinking civil society space as one of the consequences of the rule of law backsliding

The rule of law backsliding has enhanced the process of the so-called shrinking civil society space. This term describes a situation in which the operational space for NGOs (understood as the capacity to function as an organization and perform their tasks) is being limited by the policies or legal amendments adopted by the government.²⁶ Some authors point at the repressive aspect of this phenomena, stating that “the term of shrinking civil society space can be understood as a concept or framework that captures the dynamic relationship between repressive methods and political struggle, including the ways in which political struggle responds to these methods to reclaim space, and the impact this response has upon how political struggles relate to one another”.²⁷

It is estimated that over the last several years, systemic violations of the freedom of assembly and association could be observed in several countries all over the world, leading to what

²⁵ Sergio Carrera, Elspeth Guild, Lina Vosyliūtė, Petra Bárd, Towards a Comprehensive EU Protection System for Minorities, Brussels: European Parliament (EP), 2017, p. 24, available at: <https://www.ceps.eu/publications/towards-comprehensive-eu-protection-system-minorities>.

²⁶ Chris van der Borgh, Carolijn Terwindt, Shrinking operational space of NGOs - a framework of analysis, Development in Practice, Volume 22, no 8, November 2012.

²⁷ Semanur Karaman et.al, On “shrinking space” a framing paper, Issue brief shrinking space, Transnational Institute, April 2017.

became called a “global crackdown” on the civil society.²⁸ During past four years, more than 60 countries across the globe have passed or drafted laws that curtail the activity of non-governmental and civil society organizations. Although the operational space for the civil society in many countries of the EU remains to a certain extent safeguarded, the research carried out by CIVICUS shows that the perception of the conditions of civic space has deteriorated since 2016.²⁹

It is difficult to create a comprehensive list of symptoms of shrinking civil society space. The symptoms may vary depending on the political context, legal framework and the stage of civil society development in each country. However, in general there are certain actions or policies which implemented separately or jointly can severely undermine the standing of NGOs and independency of their operational space. Among these actions are: administrative restrictions, stigmatisation of NGOs, limiting the space of dialogue, physical harassment and intimidation of civil society activists and criminalization of different forms of civil society engagement.³⁰ Recently carried out studies (e.g. the report prepared by Fundamental Rights Agency in 2017) revealed some other negative trends that can also be analysed in the context of shrinking civil society space – among them are limited capacity of civil society organizations which undermine their ability to work effectively or certain provisions that overburden NGOs with reporting and tax duties.³¹ Furthermore, imposing restrictions for freedom of expression or freedom of assemblies as well as decreasing space for online activism or capturing the space traditionally inhabited by NGOs can also be recognized as elements of the trend of shrinking civil society space.³²

In the project of “illiberal democracy”, which both governments in Poland and Hungary try to implement, there is very little room for NGOs standing for values which are not shared by the governing majority (among these values, there are human rights, rights of minorities, equal treatment or the rule of law). Therefore, civil society organisations are targeted in the same way as other key components of the democratic state ruled by law, such as the judiciary or independent media. Both governing majorities have adopted policy and legal amendments that have hampered or will effectively hamper the works of NGOs. However, contrary to the pieces of legislation that concerned the key elements of the state (such as the judiciary or media), the

²⁸ The Guardian, “Human rights groups face global crackdown ,not seen in a generation’, 26 August 2015, available at: <https://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation>.

²⁹ See further: CIVICS, Civic Space in Europe Survey, October 2016, available at: https://civilsocietyeuropedoteu.files.wordpress.com/2016/10/civicspaceineuropesurveyreport_2016.pdf.

³⁰ Chris van der Borgh, Carolijn Terwindt, Shrinking operational space of NGOs - a framework of analysis, Development in Practice, Volume 22, no 8, November 2012.

³¹ European Union Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, available at: <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu>.

³² Semanur Karaman et.al, On „shrinking space” a framing paper, Issue brief shrinking space, Transnational Institute, April 2017.

changes regulating the operational space for NGOs have a rather evolving nature³³ and seem to be a long-term strategy of silencing the civil society sector. Given the robust nature of the civil society sector as well as different types of civil initiatives, a complete limitation of the operational space for the civil society requires a systemic approach and coordinated actions. So far, it seems that both governing majority adopted strategies targeting certain selected NGOs with an exception to several cases in which they adopted some systemic changes.

In Poland and Hungary, the most important symptoms of the shrinking civil society space could be observed: attacks on NGOs (including changing narration around NGOs), limiting space for social consultations and public debate and restrictions in access to funding.



Changing narration around NGOs

In times of rule of law crisis, the NGOs face an unprecedented amount of criticism and stigmatisation in the public discussion. Stigmatisation and smear campaigns build on its basis are „commonly used to delegitimize human rights defenders and undermine their work”.³⁴ The main aim of such an orchestrated campaign is to deprive the NGOs, who used to be active in the public sphere, from their legitimacy to take part in e.g. decision making processes or public activity in the field relevant to their work. All of the Hungarian and Polish watchdog organisations’ activists interviewed for the purpose of this research pointed at the worsening atmosphere around their organisations and their work.

³³ For example , in Poland, it took almost one year to adopt the law changing the process of distributing public funds for NGOs, while e.g. the laws changing the works of the Constitutional Tribunal or the first reform of public media were adopted at accelerated pace – from 3 up to 5 days.

³⁴ Amnesty International, Human Rights Defenders Under Threat - a shrinking space for civil society, ACT/30/6011/2017.

“More and more often we’re asked questions like: who do you think you’re to interfere with the internal issues of Poland? What is your organisation doing? Why do you question the works of the government? Which foreign force inspires you?”. (S-PL-2)

“The situation of the watchdog organisations in Hungary has been constantly worsening over the last couple of years. We’ve been observing how much the changing climate surrounding NGOs and portraying them as foreign agents and enemies have influenced our work.” (PL-HU-2)

The change in the perception of NGOs is usually embodied in the official narration used by the governing majority and the public media, and then repeated in orchestrated and targeted smear campaigns. In all these instances, NGOs are usually presented as detached from reality, inspired by foreign governments or institutions, closely cooperating with political opposition. For example, in Hungary the anti-NGOs tone in the public rhetoric had been observed since Fidesz coming into power, however the full eruption of this narration started in 2014 with the infamous speech of Prime Minister Orbán in which he described NGOs as “political activists paid by foreigners.”³⁵ Later, this narration was combined with a campaign against a well-known philanthropist George Soros who supports numerous Hungarian NGOs. In 2017, within the national consultations on the “Soros Plan” run by the Hungarian government the NGOs Hungarian Helsinki Committee, one of the most prominent Hungarian organizations dealing with human rights protection, was directly mentioned in one of the questions and in a false context suggesting that the organization advocated for “lighter sentences for migrants for the crimes they commit”. In response to this, the Hungarian Helsinki Committee decided to sue the Cabinet Office of the Prime Minister.³⁶ The case has not been finally decided yet. In February 2018, the court of the first instance found that the Cabinet Office of the Prime Minister had violated the Hungarian Helsinki Committee’s right to good reputation.³⁷

So far, in Poland, the aggressive rhetoric towards NGOs has not developed to such an extent. Since 2016, however, there have been several examples of orchestrated smear campaigns against certain NGOs. One of such examples is a campaign run by the public media in the main news programme “Wiadomości” in 2016 suggesting that one organisation, led among others by the daughter of the former President of Poland, allegedly received donation from the public funds operated by the local government due to her personal ties with the city office administration.³⁸ The media reports were based on publicly available documents, yet still were

³⁵ The Budapest Beacon, Full text of Viktor Orbán’s speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, available at: <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

³⁶ Justin Spike, Hungarian Helsinki Committee sues propaganda ministry over National Consultation, available at: <https://budapestbeacon.com/hungarian-helsinki-committee-sues-propaganda-ministry-national-consultation/>.

³⁷ Hungarian Helsinki Committee, Helsinki Committee wins lawsuit against Cabinet Office over Stop Soros National Consultation, available at: <https://www.helsinki.hu/en/hhc-wins-lawsuit-against-cabinet/>.

³⁸ See further: Warso Z., Godzisz P. Bychawska-Siniarska D., Information on challenges faced by human rights defenders and civil society in Poland, November 2016, available at: <http://www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf>.

framed into a narration of an investigative journalism. The journalists by „revealing” the information on the financing of certain NGOs aimed at discrediting the activists and smear the work of their organizations. The National Broadcasting Council stated that the reports on NGOs “lacked information about the actual work of such organisations and their social role and also costs of their operations connected with the exercise of their statutory duties and involvement of NGO activists”.³⁹

Similar campaign targeted Akcja Demokracja, one of the leaders of the civil society’s massive protests against the reforms of the judiciary in 2017. The campaign run by the public media and far right press aimed at allegedly “uncovering” the sources of financing of the organisations (all information was publicly available at the organisation’s website) and suggesting that Akcja Demokracja implemented the priorities of the German government in Poland as two of its major donors have offices registered in Germany.⁴⁰

In some cases, the smear campaigns are followed by actions undertaken by law enforcements which may intensify the atmosphere of hostile environment for NGOs or even oppression. For example, in 2014, the Hungarian government started a campaign against the national operators of EEA/Norway Grants. The weeks of escalating tension related to audit controls and governmental accusations towards not only the operators of the grants, but also its beneficiaries, resulted in a police raid on Ökotárs office (one of the leading organisations in the NGOs consortium responsible for distribution of the grants).⁴¹ Eventually, almost six months later the court found the police raid as a violation of the law.⁴²

Such actions may have a chilling effect not only on the targeted organisations, but also other organisations working in the similar fields. The smear campaigns combined with actions carried out by state authorities and entities aim at creating the image of “suspicious” organisations who may become an undesired partner for their donors and supporters.⁴³ Furthermore, in case of organisations providing legal or psychological aid, such police raids may cause a chilling effect among their clients who seek aid offered in confidentiality and guaranteeing the protection of

³⁹ Helsinki Foundation for Human Rights, Regulator responds to HFHR’s complaint about TV evening news programme, available at: <http://www.hfhr.pl/en/regulator-responds-to-hfhrs-complaint-about-tv-evening-news-programme/>.

⁴⁰ Paweł Kościński, Akcja Demokracja broniła sądów. Teraz atakuje ją TVP, a poseł PiS donosi do prokuratury, Wyborcza.pl, 20 August 2017, available at: <http://wyborcza.pl/7,75398,22255187,akcja-demokracja-bronila-sadow-teraz-atakuje-ja-tvp-a-posel.html>.

⁴¹ Hungarian Helsinki Committee et al, Timeline of governmental attacks against Hungarian NGO sphere, available at: https://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hu_ngos_07042017.pdf.

⁴² Free Hungary, Court condemns police raid on independent NGO Ökotárs headquarter was illegal, available at: <http://freehungary.hu/index.php/56-hirek/3589-court-condemns-police-raid-on-independent-ngo-oekotars-headquarter-was-illegal>.

⁴³ See also: Norwegian Helsinki Committee, Hungary must provide space for civil society, Policy Paper, no 1/2016, available at: http://nhc.no/filestore/Publikasjoner/Policy_Paper/2016/NHC_PolicyPaper_1_2016_Hungaryspaceforcivilsociety.pdf.

personal data. Such actions, accompanied by media coverage, may lead to severe breach of public trust in these organisations. In a consequence, without carrying out systemic changes, certain NGOs may be pushed outside the mainstream of public life or may be forced to change the scope and methods of their work.

Limited space for dialogue

In both countries, with different frequency, yet very persistently, watchdog organisations are portrayed as an alien factor in the mechanism of the state. As a consequence, NGOs are not treated as a reliable partner for cooperation which is reflected in limiting the space for social consultations and cooperation between NGOs and authorities. Both in Hungary and Poland, key legislative changes were usually pushed at accelerated pace without any proper consultations with experts or stakeholders. The limited space for dialogue and consultations has several aspects including among others discrediting the position of NGOs and their role in the process of social consultations, tightening the schedule for social consultations and creating restrictions for NGOs in access to social consultations.⁴⁴ With the development of the rule of law backsliding, NGOs have been gradually deprived of the possibility to effectively participate in social consultations.

“Within last year we haven’t submitted any opinions to draft legislation. I think the entire process of social consultations has become a façade.” (S-PL-1)

One of the reasons for that is that many of the key legal acts are presented as private members’ bills, so the requirement to organise mandatory social consultations is bypassed. For example in Poland, each act introducing consecutive reforms of the Constitutional Tribunal,⁴⁵ the Act amending the Act on the Police⁴⁶ and the Act on the Prosecutor’s Office⁴⁷ were submitted to the Parliament as private bills of MPs. In the case of the Anti-terrorist Act, even though the government promised to launch a social consultation process, the draft was not consulted and,

⁴⁴ See also: Fundamental Rights Agency, Challenges facing civil society organizations working on human rights in the EU, 2018.

⁴⁵ Polish Parliament (Sejm), Poselski projekt ustawy o zmianie ustawy o Trybunale Konstytucyjnym, druk nr 12, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=12>, Poselski projekt ustawy o zmianie ustawy o Trybunale Konstytucyjnym, druk nr 122, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=122>, Poselski projekt ustawy o Trybunale Konstytucyjnym, druk nr 558, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=558>, Poselski projekt ustawy o statusie sędziów Trybunału Konstytucyjnego, druk nr 880, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=880>, Poselski projekt ustawy o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym, druk nr 963, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=963>, Poselski projekt ustawy - Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego, druk nr 1059, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1059>.

⁴⁶ Polish Parliament (Sejm), Poselski projekt ustawy o zmianie ustawy o Policji oraz niektórych innych ustaw, druk nr 154, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=154>.

⁴⁷ Polish Parliament (Sejm), Poselski projekt ustawy - Prawo o prokuraturze, druk nr 162 i druk nr 162-A, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=162>.

which is even more worrying, remained confidential for a few months.⁴⁸ The Civil Forum of Legislation stressed that between May and September 2016 very often the authorities responsible for organizing public consultations set very short deadlines for consultations (14 days) and only the first version of the draft law was subject to consultations. Furthermore, the remarks received during the consultations were not always published and the responsible authorities almost never responded to the received remarks.⁴⁹

In Hungary, the key pieces of legislation were also adopted in a way leaving no or very little possibility for NGOs to intervene or present their opinions. According to the research carried out by the Corruption Research Center Budapest the average number of days in which the consultation was opened varied between 4 and 8 days in 2011-2014, and in the case of five bills the deadline for giving opinions was the same days as the day the bill appeared on the website.⁵⁰ In this context, NGOs who tried to keep up with the pace of the Parliamentary works had to face the decision whether to continue their participation in the process.

“We tried to respond to the wave of legislation initiatives by our opinions, reports and participation in the public consultations. The change came in 2013 when we all realized that Fidesz not only did not have any willingness to work with us, but also doesn’t want us to work at all.” (S-HU-3)

At the same time, in Hungary there is a visible trend of weakening the institution of social consultations and distorting its nature. Since 2011, the Fidesz government has carried out four rounds of national consultations (two, the most famous ones were organized in 2017 under the titles “Stop Brussels” and “Stop Soros”). The nation-wide initiatives include questionnaires sent to eligible voters with manipulative questions on issues such as migration or international policies. The process of checking the results of the consultations seems also to be dubious - as the questionnaires are not a reliable tool and the consultations are not held in the formal framework of e.g. referendum (which would involve the requirement of more than 50% voter turnout) the final results may be interpreted according to the political will.⁵¹ In such a context – limiting access for civil society representatives to the consultations process and creating an illusionary framework for wide consultations – initiatives of national consultations give a false impression of factual involving citizens into decision making and serve only some specific political purposes.

⁴⁸ Helsinki Foundation for Human Rights, HFHR opinion on new antiterrorism law, available at: www.hfhr.pl/en/hfhr-opinion-on-new-antiterrorism-law/.

⁴⁹ Obywatelskie Forum Legislacji, Obserwacja praktyki procesu legislacyjnego w okresie od 16 maja do 10 września 2016 r., available at: www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Komunikat%20z%20VIII%20obserwacji.pdf.

⁵⁰ Corruption Research Center Budapest, Impact Assessments Public Consultations and Legislation in Hungary 2011-2014, available: http://www.crcb.eu/wp-content/uploads/2015/07/legislation_2014_report_150630.pdf.

⁵¹ Hungarian Spectrum, National consultations, 2017: „Let’s stop Brussels!”, available at: <http://hungarianspectrum.org/2017/04/02/national-consultation-2017-lets-stop-brussels/>.

Restrictions in access to funding

The limitation of the NGOs' operational space also has a more systemic aspect in the form of legal and policy changes severely affecting the works and the legal standing of NGOs. Both in Poland and Hungary, the governing majority adopted legislation affecting the process of financing NGOs. In Hungary, the issue of the financial standing of NGOs was widely discussed for at least three years when in 2014 the government initiated a campaign against the national operator of EEA/Norway grants, which resulted in a temporary suspension of the distribution of these funds. The state's audit office controlled not only the operator of the grants, but also the NGOs which received funding from this source. The investigation in this case took over one year and was terminated on the basis of the lack of a committed criminal offence.⁵² However, this case was just a prelude to the adoption in 2017 of the so-called Lex NGO which imposed restrictions on NGOs which receive funds from abroad. The law requires certain NGOs receiving over 23,000 EUR per year (or to be precise: twice the amount of the sum determined by the Act LIII of 2017 in Anti-Money Laundering and Financing of Terrorism) from abroad to register as an "organisations receiving support from abroad", display this label on their publications and websites and comply with numerous additional reporting obligations (including publishing the full list of NGOs' donors, including individuals). The law severely hampers the work of NGOs. It undermines the NGOs' credibility and may cause a chilling effect on any potential foreign donors.⁵³ In its opinion, the Venice Commission stated that "while on paper certain provisions requiring transparency of foreign funding may appear to be in line with the standards, the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic, raising a concern as to whether they breach the prohibition of discrimination, contrary to Article 14 ECHR."⁵⁴

It seems, however, that the strategy of targeting particular NGOs has not been completed yet. In the beginning of 2018, the Hungarian government has presented draft legislation which, if adopted, would limit the work of foreign funded NGOs even further. The draft laws aim at stigmatizing not only NGOs (especially those helping „illegal migrants”), but also specific individuals. In the light of the draft laws, organizations that receive foreign funding and provide aid to migrants and refugees would be required to register at court and any foreign donation would be subjected to a 25% tax. If an NGO fails to meet these requirements, the legal

⁵² Hungarian Helsinki Committee, Timelines of governmental attacks against NGOs, available at: <http://www.helsinki.hu/en/timeline-of-governmental-attacks-against-ngos/>.

⁵³ Hungarian Helsinki Committee, Analysis of the Bill on foreign funded organisations (LEX NGO), available at: <http://www.helsinki.hu/en/analysis-of-the-bill-on-foreign-funded-organisations-lexngo/>.

⁵⁴ Venice Commission, CDL-AD(2017)015-e Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e).

procedure against it would end in a fine of 200% of the foreign revenue or dissolution of the organization.⁵⁵

In Poland, the cuts in access to public funding have a more targeted approach. The government has limited access to public funds for certain NGOs, especially those dealing with migrants and refugees as well as helping victims of domestic violence. For example, in 2016, the Ministry of Interior announced that the call for proposals within the Asylum, Migration and Integration Fund was annulled. The Ministry explained its decision by stating that between the announcement of the call and presentation of its results significant changes had occurred in relation to migration and integration. Given that, the Ministry decided to announce two new calls for proposals. Altogether, the Ministry was supposed to distribute over 2,500,000 PLN (approx. 625,000 EUR).⁵⁶ The deadline in those two calls was set for June 2016 and the costs were eligible as of August 2016.

However, none of these calls have been resolved yet. This delay in resolving the calls has affected the NGOs' capacity to provide legal aid and support to migrants and refugees,⁵⁷ some of the NGOs have to significantly limit their work in this field. Furthermore, the government has also implemented policies targeting certain women's rights organisations. In October 2017, when on the day before the anniversary of the Black Protest (a mass social mobilisation organised in 2016 against the draft law on a complete abortion ban) police raided offices of women's rights organisations and collected their documentation and hardware. The police's actions were related to an investigation concerning distributing funds from the Ministry of Justice's Fund from which for years the organisations received support for their work for victims of domestic violence. However, after the change of the government in 2015, the organisations stopped receiving funds from this source and the Ministry's negative decisions missed proper explanations (in some cases, the Ministry stated that since these organisations helped only women victims of domestic violence it may be discriminatory towards men). The police raid was part of a bigger trend of curbing the operations of women's rights organizations.⁵⁸

⁵⁵ See further: Hungarian Helsinki Committee, Operation starve & strangle: how the government uses the law to repress Hungary's civic spirit?, available at: <https://www.helsinki.hu/wp-content/uploads/OPERATION-STARVE-AND-STRANGLE-01022018.pdf>.

⁵⁶ Ministry of Interior, Department of Boarder Policy and International Fund (Ministerstwo Spraw Wewnętrznych, Departament Polityki Granicznej i Funduszy Międzynarodowych), Dwa nowe nabory w ramach Funduszu Azylu, Migracji i Integracji, available at: <http://fundusze.mswia.gov.pl/ue/aktualnosci/13784,Dwa-nowe-nabory-w-ramach-Funduszu-Azylu-Migracji-i-Integracji.html>.

⁵⁷ Mazur N., MSWiA ma miliony na integrację cudzoziemców, ale w 2016 r. nie wydało na to ani złotówki, Gazeta Wyborcza, available at: <http://wyborcza.pl/7,75398,21216958,mswia-ma-miliony-na-integracie-cudzoziemcow-ale-w-2016-r-nie.html>.

⁵⁸ Helsinki Foundation for Human Rights, Offices of women's rights organisations searched by police – HFHR issues statement, available at: <http://www.hfhr.pl/en/offices-of-womens-rights-organisations-searched-by-police-hfhr-issues-statement/>.

Also, in 2017, the Polish governing majority adopted the law changing the process of distributing public funds operated at the national level. The Act on the National Institute of Freedom creates a new administrative body which will work under the supervision of the government and without any meaningful participation of the civil society. The Institute distributes the national public funds for NGOs (at the beginning the Institute will operate the former Fund of Social Initiatives), however the law fails to provide any objective and open framework for organising the calls for proposals free from the Institute's Director arbitrary and discretionary power in decision making. Even more, the law leaves a possibility for the Director of the Institute to distribute upon his discretionary decision certain part of Institute's annual budget to NGOs for their institutional development.⁵⁹ Eventually, the Institute will also be responsible for the distribution of EU funds operated at the national level. The lack of proper guarantees for transparency, equal treatment and participation of the civil society in this process raises concerns regarding the compliance of the provisions of this law with EU standards.

The results of both the Hungarian Lex NGO and the Polish Act on the National Institute of Freedom most probably will soon be visible in practice by leading to significant changes in the process of financing NGOs, especially those smaller and working at the regional and local level whose scope of work is not in line with the governmental politics. Most probably, these two laws will further deepen the already existing discrepancies in the financial situation in the civil sector in both countries.⁶⁰

Similar, yet not the same

Although in both countries the symptoms of the shrinking civil society space seem to be very similar, still there are some differences between the situation in these two countries especially when it comes to the scope and scale of certain deteriorating practices. First the most visible difference concerns the rhetoric used against NGOs. Smear campaigns against NGOs in Poland have not entered the phase as it is in Hungary right now. Although more and more often Polish NGOs have to face accusations of being "foreign agents" or "political rivals of the governing majority", still these attacks have not taken such a systemic form as it happens in Hungary. So far, the approach towards certain NGOs differs in these two countries. While in Hungary the governing majority seems to be targeting very specific NGOs (these helping with migrants and refugees or advocating for the rule of law), in Poland the governing majority puts the main

⁵⁹ Helsinki Foundation for Human Rights, HFHR opinion on National Freedom Institute Bill, available at: <http://www.hfhr.pl/en/hfhr-opinion-on-national-freedom-institute-bill/>.

⁶⁰ See further on the difficulties in financing the civil sector in Hungary and Poland: Vandor Peter et al. (ed), Civil Society in Europe: Challenges and opportunities, Erste Stiftung, Vienna March 2017 and EU-Russia Civil Society Forum, Report on the state of civil society in the EU and Russia, available at: http://eu-russia-csf.org/fileadmin/State_of_Civil_Society_Report/18_05_2017_RU-EU_Report_spaidai_Hyperlink_Spread.pdf.

pressure on dividing the civil society and marginalising the NGOs who are not in favour of the government.

By supporting newly established NGOs who roots for the Law and Justice government as well as promoting the networks of right and conservative organisations, the Polish governing majority attempts to create a division between righteous NGOs (these newly or relatively newly established) and liberal NGOs (those who are presented as the organisations who monopolised the third sector).⁶¹ The attempts to deep the divisions between the NGOs may be inspired not only by the governing majority or supporting it media, but also by the organisations themselves. For example, in 2017 the conservative NGO Ordo Iuris published a report on the works of Stefan Batory Foundation as an operator of the Norwegian grants in Poland. Ordo Iuris claimed that Batory Foundation's model of operation the grants was biased, missed due diligence and favored organisations from big cities, especially Warsaw.⁶² In response to that, Batory Foundation presented data which showed that within the process of operation the grants 667 NGOs were supported, and only 9% of all donated grants were carried out in Warsaw.⁶³

Another difference concerns the approach towards receiving foreign funding, especially this coming from the George Soros founded Open Society Foundation – one of the biggest donor organisation in the world. Although in Poland from the Open Society Foundation is used to discredit an NGO or its experts, the anti-Soros rhetoric has not been developed to an extent observed in Hungary. From the end of 2016, Fidesz government has been explicitly targeting Open Society Foundation and its grantees. For example, in 2017 Prime Minister Orbán said that during this years NGOs funded by the OSF will be „squeezed out”⁶⁴ while Fidesz's spokesperson accused NGOs of conspiring with terrorist organizations and human traffickers in an “absurd coalition”.⁶⁵ These are just two of many other similar examples showing the growth of the anti-Soros rhetoric over the years which serves to Hungarian political purposes, but it also aims at undermining the position of NGOs and marginalise their position in the public sphere.

Last but not least, the restrictions on access to financing for NGOs in Poland did not have a systemic form either (like e.g. Lex NGO adopted in Hungary in 2017), but had rather a form of decisions made by certain public authorities in cases concerning specific NGOs. However, soon this trend may evolve into more systemic strategy once the National Institute of Freedom starts its works.

⁶¹ See also: Ewa Kulik-Bielińska, Do czego prowadzą nas władze? Cel jest jasny, NGO.pl, available at: <http://opinie.ngo.pl/wiadomosc/2125948.html>.

⁶² Ordo Iuris, Raport Ordo Iuris: Fundusze norweskie tylko dla wybranych, available at: <http://www.ordoiuris.pl/wolnosci-obywatelskie/raport-ordo-iuris-fundusze-norweskie-tylko-dla-wybranych>.

⁶³ Stefan Batory Foundation, Oświadczenie ws. fałszywych zarzutów Fundacji Ordo Iuris, available at: http://www.batory.org.pl/aktualnosci/oswiadczenie_ws_falszywych_zarzutow_fundacji_ordo_iuris.

⁶⁴ Civil Society Europe, Civil Society Europe briefing on the state of Civic Space and Fundamental Rights in Hungary, available at: <https://euroalter.com/wp-content/uploads/2017/02/CSE-Hungary-Fact-Sheet-Final.pdf>.

⁶⁵ The Budapest Beacon, Kovács: NGOs conspiring with terrorist organizations and human traffickers, available at: <https://budapestbeacon.com/kovacs-ngos-conspiring-terrorist-organizations-human-traffickers/>.

The possible further developments

These differences, however, do not change the fact that the process of democratic backsliding in these two countries has revealed a certain pattern when it comes to limiting the work and impact of NGOs. In both cases, the governments have introduced legal regulations or policies that influence the work of NGOs and limit their operational space. These changes may be of different nature – from legal changes affecting the regulatory framework of NGOs work through policies directly targeting certain NGOs to increasing obstacles for their work. Regardless their scope and nature, these changes always aim at limiting the role of certain NGOs, reducing the scope of their activity and undermining their position in the public life. Given the fact that both governments have already concentrated in their hands tools which allow them to deeply influence the civil society, the independence of the civil society sector will remain prone to further violations in the future.

NGOs' response to the rule of law backsliding

NGOs' reaction to the rule of law backsliding has changed over the time. At the initial stage, NGOs tried to respond to it in a way they worked in previous years among others by issuing statements, opinions, analyses and calling upon the governing majority to withdraw from the proposed changes.

“We tried to respond to the wave of legislation initiatives by our opinions, reports and participation in the public consultations. The change came in 2013 when we all realized that Fidesz not only did not have any willingness to work with us, but also doesn't want us to work at all.” (S-HU-3)

“When the crisis started we were absolutely not prepared to respond to it – we didn't have staff nor financial capacity. I also felt that our opinions and participation in the legislative process wouldn't change anything. It took us some time to catch up with the pace of the works.” (S-PL-1)

In both cases, Hungary and Poland, it took some time for NGOs to realize that the crisis they faced is actually a beginning of the long process which will affect the entire system of the state and in a consequence will change the environment of work in the third sector. With the development of the rule of law backsliding, it was also become obvious that certain NGOs as well as certain types of their activity (like e.g. strategic litigation at the international level or providing aid to migrants and refugees) would no longer fit into the new vision of the state. This vision includes the supremacy of the “voice of the people” (interpreted only as election results) over the rule of law and liberal values and leaves no space for organisations independent from the main governing center. NGOs which were the most active and prominent in the field of among others human rights protection and monitoring state's action had to internalize that carrying out the same work and implementing the same methods of work may involve not only additional difficulties, but may jeopardies the development of their organization.

“We have realized that the government’s perception of NGOs has changed – if an NGO tries to do anything else than charity, e.g. advocacy or strategic litigation, then such an organization is not welcomed any more.” (S-HU-4)

“When the crisis started, we all faced the same dilemma – either we’ll reshape the methods of our work and try to refocus in order to be more effective, or we’ll keep under the radar. Regardless, this if you pretend that nothing has changed, you’d actually worsen the situation of your organization.” (S-HU-2)

The extensive scope of changes caused by the rule of law backsliding did not only influence the operational space for NGOs, but also forced them to rethink their methods of work and adjust to the new reality.

New methods of work

One of the direct consequences of undermining the independence of the judiciary in the process of the rule of law backsliding affected the NGOs capacity for strategic litigation and limiting or even closing some of the national avenues. For example in Poland, with the political take-over, the Constitutional Tribunal has lost its independence and the legitimacy of its work is no longer certain (see point 1). In 2017, the Helsinki Foundation for Human Rights issued a statement in which it said that in view of the lack of independence of the Constitutional Tribunal “the key role will be played by the jurisprudence of independent courts and international human rights protection bodies.”⁶⁶ In this context, strategic litigation carried out by NGOs has also gained an additional goal in trying to prove the Constitutional Tribunal’s ineffectiveness in proceedings at the international level e.g. before the European Court of Human Rights. On the other hand, as one of the interviewed activists stated, in Hungary, the international strategic litigation has provoked accusations that it is contrary to the best interest of the state and the NGOs who do litigate at this level are responsible for the fact that the Hungarian government has to pay significant compensations.

“The strategic litigation is portrayed as if our organization was against Hungary.” (S-HU-2)

Even more than before, NGOs in Hungary and Poland started joining their forces in documenting the actions undertaken by the governments and the violations of human rights and the rule of law. There are several purposes of these initiatives: from assessing the results of the implemented legal changes up to the documenting the scope of violations which may be important in the process of restoring safeguards of the rule of law.⁶⁷ For example, in 2016 in Poland the group of civil society organizations created the “Citizens Observatory of Democracy”

⁶⁶ Helsinki Foundation for Human Rights, Constitutional Tribunal: what next?, available at: <http://www.hfhr.pl/en/constitutional-tribunal-what-next/>.

⁶⁷ For example, Archiwum Osiatyńskiego, database of civil society analysis and opinions created in 2017, in its mission statement says „we register, describe and catalogue the chaos of rapid changes in the legal system and legal practice, violations of the Polish Constitution and lack of fulfillment Poland the international obligations which occurred since elections in 2015.” More information is available at: <https://archiwumosiatsynskiego.pl/debates-in-english/>.

– a database collecting opinions, reports and reactions of civil society organizations and other stakeholders to changes that affect civil rights and liberties, rule of law and the entire system of the state.⁶⁸ In Hungary, for the last couple of years four organizations – Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Transparency International Hungary and Eötvös Károly Policy Institute are documenting violations of rule law and attacks on civil society sector.⁶⁹

NGOs which used to work focusing on their field of expertise started to unite and build multi-disciplinary networks and coalitions. For example, in July 2017, Polish NGOs started to build a coalition calling for joining the protests against the planned reform of the judiciary – the call was supported by a wide range of NGOs of different backgrounds. These calls were repeated in November 2017 when NGOs joined forces in a wide coalition protesting against the new proposal for judiciary reform.⁷⁰ Also, in Hungary there is a visible trend of forming wide trans-sectional coalitions of NGOs. Drawing lessons from previous mobilizations, since 2017 Hungarian NGOs started forming an informal, working coalition whose aim is to tighten the cooperation between organizations.⁷¹

Also, most probably for the first time in the history of their work, Hungarian NGOs faced the necessity to deliberately not to comply with binding provisions as an act of civil disobedience. In 2017, 14 Hungarian NGOs decided not to follow the provisions of the newly adopted Lex NGO and not to register as “foreign agents” until this law is reviewed and approved by the Constitutional Tribunal and the European Court of Human Rights.⁷² The civil disobedience is also used by certain Polish NGOs, especially Citizens of Poland Foundation, who protest against the changes introduced to the Act on assemblies in 2017. These changes granted a priority to so-called “periodic assemblies”. The status of a “periodic assembly” is granted by the part of the government administration in the regions and can be granted to an assembly which aim is to among others commemorate an important event from the Polish history. If an assembly is granted this status none of others assemblies can be organized near to it. This institution was created to grant the priority to assembly organized by Law and Justice and their supporters assemblies in Warsaw organized on every 10 of each month to commemorate the air crash of Presidential plane in Smoleńsk in 2010. Regardless these restrictions and lack of the possibility

⁶⁸ See: Citizens Observatory of Democracy, available at: <http://citizensobservatory.pl/>.

⁶⁹ See: Hungarian Helsinki Committee, Analyses and positions, available at: <https://www.helsinki.hu/en/rule-of-law/analysis-positions/>.

⁷⁰ Helsinki Foundation for Human Rights, Free courts!, available at: <http://www.hfhr.pl/en/free-courts/>.

⁷¹ Stefánia Kapronczay, War on NGOs in Eastern Europe, International Journal on Human Rights, issue 26, available at: <http://sur.conectas.org/en/war-on-ngos-in-eastern-europe/>.

⁷² Hungarian Helsinki Committee, We will not register as foreign-funded organization, available at: https://www.helsinki.hu/en/we_will_not_register/.

to register their own assembly, the activists of the Citizens of Poland organize counter-demonstrations on each 10 day of the month.⁷³

Strengthening the “old” methods of work

While developing the new methods of work by NGOs seemed to be rather a response to the rule of law backsliding, then strengthening the traditional methods of work is rather a response to a parallel process of shrinking civil society space.

NGOs remaining under constant attack from either the governing majority or public media have had to develop and enhance both their communication and fundraising skills. The interviewed activists admitted that the on-going crisis has forced their organizations to focus more on the way they communicate and to start working more with their constituencies. Also, the lack of certainty as to funding has led the majority of the interviewed activists to develop strategy of direct fundraising. For example, in both countries the mechanism of 1% tax refund is available and in the recent years some organizations who managed to survive constant attacks and increasing pressure noted a trend of growing donation via 1% tax refund mechanism.⁷⁴ As some of the interviewees admitted, the increase in the might also be a consequence of the smear campaigns run by the public media, as more people have learnt about the existence and work of the NGOs in general. It is not possible, however, to recognize the trend of growing private donations as unequivocally positive. For Hungarian and Polish NGOs lack of sustainable funding and limiting access to public funds remains one of the biggest challenges in their activity. As both the Hungarian and Polish NGOs rely strongly on the access to public funds⁷⁵ (either distributed by central or local administration) any change in the policies of distributing these financial resources may deeply change the landscape of the civil sector.

Furthermore, due to the lack of available methods for advocacy at the national level, the NGOs from both countries have become more active at the EU and Council of Europe level. Many NGOs have had such experiences before, but in their cases it usually referred to the situation in other countries (such as the countries of the former Soviet block). Only after the rule of law crises reached their countries, the NGOs developed the work in this direction.

“Prior to 2010 we didn’t run any sort of international advocacy. However, after 2010 we have intensified our cooperation with the European Commission, DGs and the European

⁷³ Bartosz Kocejko, Obywatelskie nieposłuszeństwo w Polsce Kaczyńskiego, Błaszczaka i Ziobry. Czy da się obronić w sądzie?, *Oko.press*, available at: <https://oko.press/obywatelskie-nieposluszenstwo-polsce-kaczynskiego-blaszczaka-ziobry-da-sie-obronic-sadzie/>.

⁷⁴ For example: Átlátszó, Despite anti-NGO smear campaign by the government, Átlátszó increases number of supporters, available at: <https://english.atlatszo.hu/2017/09/18/despite-anti-ngo-smear-campaign-by-the-government-atlatszo-increases-number-of-supporters/>.

⁷⁵ EU-Russia Civil Society Forum, Report on the state of civil society in the EU and Russia, available at: http://eu-russia-csf.org/fileadmin/State_of_Civil_Society_Report/18_05_2017_RU-EU_Report_spaudai_Hyperlink_Spread.pdf.

Parliament. We also tried to participate in the on-going monitoring mechanisms run by the Council of Europe or the UN.” (S-HU-3)

Results

The rule of law backsliding which involved the piling difficulties for NGOs to operate has deepened the disproportions in the civil society sector even further. For small NGOs acting at the regional or local level, the problems with access to public funds has resulted in significant limitation of their works.⁷⁶ On the other hand, the relatively big national NGOs had to invest a lion share of their resources in developing the methods of work. Although it may seem that the rule of law backsliding has forced relative strengthening of some part of certain NGOs’ work capacity, it also remains a fact that the work under such circumstances severely overburdens NGOs. The staff of many watchdog organizations face the risk of burnout and, in the most severe cases (in which NGOs deal with particularly debated issues such as helping migrants and refugees or other minorities), also of personal attacks.

Furthermore, responding to the on-going rule of law backsliding process also involves setting new priorities for NGOs, which have to combine both their regular work (such e.g. providing legal aid, monitoring or educations) and monitoring the legal and policy changes concerning the system of the state. Also, NGOs have to face the challenge of reclaiming the sphere in the public discussion. Both in Poland and Hungary, the political discourse has become more aggressive and populist, which excludes any possibility for substantial discussions concerning the issues such as the rule of law or human rights. Another hindering aspect is that old, traditional NGOs are replaced in the discussion by relatively new NGOs which affirm the policies introduced by the government and manifest their support. These groups are usually portrayed as “real NGOs” protecting the real interest of the state.⁷⁷

“What we have been recently observing is the artificial polarization of the NGOs. In the government’s rhetoric the so-called leftist and liberal groups are confronted with the right and conservative groups. It causes an impression that the civil society should reflect the same polarization which is in the politics.” (S-PL-2)

⁷⁶ See further e.g. Warso Z., Godzisz P. Bychawska-Siniarska D., Information on challenges faced by human rights defenders and civil society in Poland, November 2016, available at: <http://www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf> or Aleksandra Szyłto, Już nie pomożemy ofiarom przemocy domowej. Centrum Praw Kobiet znów bez pieniędzy, Gazeta Wyborcza, available at: <http://wyborcza.pl/duzyformat/7,127290,21448198,juz-nie-pomozemy-ofiarom-przemocy-domowej-centrum-praw.html>.

⁷⁷ These organisations are also known as GONGO organisations. This term means can be described as government organized or non-governmental organisations which are set up or sponsored by a government to further its political interests and mimic the civic groups, see further: Hungarian Spectrum, Fidesz’s very own “NGOs” stuffed with public money, available at: <http://hungarianspectrum.org/tag/gongo/>.

Rule of law backsliding and shrinking space for NGOs – civil society’s response – selected examples			
Symptom	Example	Civil society’s reaction	Possible outcomes
Limiting operational space (as a result of rule of law backsliding)	Poland: changes in the functioning of the Constitutional Tribunal, lack of legal certainty of its decisions	Quitting the litigation before the Constitutional Tribunal Intensifying the strategic litigation before international courts	Judgment of the European Court of Human Rights proving the Constitutional Tribunal as non-effective remedy
Limiting operational space (as a result of shrinking civil society space)	Hungary: attacks on NGOs	Building multi-disciplinary coalitions and networks	Improving the cooperation within the third sector, enhancing the mass mobilization Possible emerging new social movements
Limiting space for dialogue (as a result of shrinking civil society space)	Poland: lack of proper social consultations	Creating new databases of expert information	Aggravating the information on the scope and scale of rule of law backsliding, creating a documentation of the crisis which may serve as a ground for restoring of rule of law safeguards
Restrictions in access to funding	Hungary: Lex NGO	Complying with the law or civil disobedience Challenging the law before the Constitutional Court and the European Court of Human Rights	Depending on the court’s decision

Last but not least, all the interviewed civil society activists admit that the governments of two countries are not yet done with the process of creating a new civil society and that further restrictions may still be on the way. The interviewed activists shared the same fear of further legal actions that may target specific organizations (among others starting the long process of audits or tax controls, initiation of criminal proceedings) which will hinder the condition of the entire civic sector and diminish the standards of cooperation with the civil society organizations for many years to come.

“My biggest fear is that after one or two terms of office of this government in power, we’ll see a massive exodus of civil society organizations. People won’t be working within civil society and others won’t want to work with civil society organizations. We’ll eventually let it go instead of continuing our work. By doing so, we’ll let the politicians be stupid.”
(S-PL-1)

Recommendations

The rule of law backsliding has effected the standing and works of national NGOs which have become the subject of attacks, smear campaigns and which are being deprived of their regular methods and tools of work.

In order to counter the negative effects, the European Union institutions have to recognize the problems occurring in certain aspects of the shrinking civil society space and apply dedicated solutions.

In general, in order to prevent the spreading of the process of the shrinking civil society space:

- The European Union should provide a mechanism for monitoring the situation in the civil society and its operational space as the freedom of operation of the civil society is the key element of a democratic state.

In terms of countering the **limiting space for dialogue** at the national level:

- European Commission should accelerate the works on the establishment of a comprehensive Union mechanism for democracy, the rule of law and fundamental rights.⁷⁸ As it is stated in point 10 of the European Parliament Report on Rule of Law, this mechanism should include civil society in the monitoring process as well as should include civic participation in the process of reviewing the protection of democracy, rule of law and fundamental rights in the Member States.
- European Commission should develop a mechanism for civil society organizations in providing additional information concerning violations of the rule of law or fundamental freedoms.⁷⁹ Such a mechanism could reflect the already established process of shadow reporting used in the UN Treaty bodies.

In terms of countering the restrictions in **access to funding** for NGOs:

- The European Union should adopt a new financial mechanism designed to provide financial support for civil society organizations working for human rights protection, rule of law and democracy. The fund should be operated independently of national authorities and its managing should take into consideration the hostile environment in which some of the NGOs work (like e.g. in Hungary). The fund should be dedicated to cover costs related to

⁷⁸ European Parliament, Report 10 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0283+0+DOC+XML+V0//EN&language=cs>.

⁷⁹ See also: Sergio Carrera, Julius Rostas and Lina Vosyliūtė, “Combating Institutional Anti-Gypsyism. Responses and promising practices in the EU and selected Member States”, CEPS, 2017/08, available at: https://www.ceps.eu/system/files/RR2017-08_AntiGypsyism.pdf.

these types of activity which are usually blocked or hampered by the rule of law backsliding such as monitoring, advocacy or strategic litigation.⁸⁰

- European Commission and European Parliament should ensure that civil society actors are meaningfully involved in the works of the steering and monitoring committees supervising the distribution of the EU funds at the national level.
- European Commission should closely monitor the process of recently adopted acts changing the distribution of public funds (Poland) and access to foreign funding (Hungary).

⁸⁰ This idea was firstly published by Israel Butler, “Participatory democracy under threat: growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, available at: https://drive.google.com/file/d/OB_W-Vna2eVNVOFk5VXUzeE9CdGM/view and Katarzyna Pełczyńska-Nałęcz, “A normative crisis. The need to protect democratic values in Europe”, Batory Foundation, available at: http://www.batory.org.pl/upload/files/pdf/rap_otw_eu/A%20normative%20crisis_Batory%20Foundation%2009_2017.pdf.

The CEPS Engage Fellowship Programme

CEPS launched the ENGAGE Fellowship Programme with the support of the Open Society Initiative for Europe (OSIFE). This tailor-made Programme connects academic, civil society and think tank actors from Central and Eastern European and Western Balkans countries with EU-level policy debates. It consists of a one-year programme providing a set of trainings, study visits, public events and a policy brief writing exercise. It culminated in the active participation of the selected fellows in the 2018 CEPS Ideas Lab.

The CEPS ENGAGE Fellowship takes a Rule of Law approach to the policy domains of Rights, Security and Economics.

The CEPS ENGAGE Fellowship Programme is coordinated by the CEPS Justice and Home Affairs Unit and counts with the involvement of several CEPS Senior Research Fellows from this Justice and Home Affairs Unit (Mr. Sergio Carrera), the Economic Policy Unit (Ms. Cinzia Alcidi) and the Foreign Policy Unit (Mr. Steven Blockmans).

For the period 2017-2018, five highly-qualified Fellowship members were selected:

- Ms. Petra Bárd, Visiting Professor, Central European University / Senior Researcher, National Institute of Criminology / Professor, ELTE School of Law, Budapest, Hungary
- Mr. Fisnik Korenica, Senior Research Fellow, Group for Legal and Political Studies, Pristina, Kosovo
- Mr. Marjan Nikolov, President, Centre for Economic Analysis / Docent, International Slavic University, Skopje, Former Yugoslav Republic of Macedonia
- Ms. Małgorzata Szuleka, Lawyer & Researcher, Helsinki Foundation for Human Rights, Warsaw, Poland
- Mr. Gjergji Vurmo, Programme Director and Researcher, Institute for Democracy and Mediation, Tirana, Albania

