

THE FALL OF THE RULE OF LAW IN HUNGARY AND THE COMPLICITY OF THE EU

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Abstract

Hungary was one of the first and most thorough political transitions after 1989, which due the negotiated 'rule of law revolution'¹ provided all the institutional elements of liberal constitutional democracy: rule of law, checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably the model case, of backsliding to an illiberal system dismantling the rule of law. The current Hungarian state of affairs was made possible by the governing Fidesz party's 2010 electoral victory, called by Prime Minister and party leader Viktor Orbán as a 'revolution of the ballot boxes.' As I will argue in this paper the European Union is also complicit in tolerating the first authoritarian member state of the European Union

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¹ See the term used by the first Constitutional Court in its decision 11/1992. (III. 5.) AB.

1. The Rule of Law ‘Counter-Revolution’ of 2010

Prior to the 2010 elections Viktor Orbán did not hide his intention to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, he predicted that there was *“a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able [to] formulate national policy, not through constant debates but through a natural representation of interests”*. Orbán’s vision for a new constitutional order—one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfill this plan: they do not recognize the separation of powers, and do not guarantee fundamental rights. Therefore, the new Hungary (not even a Republic in its name anymore) cannot be considered a liberal constitutional democracy governed by the rule of law.

Before January 1, 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal—or supermajority—laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws affect the laws on freedom of information, prosecutions, nationalities, family protections, independence of the judiciary, status of churches, functioning of the Constitutional Court, and elections to Parliament. In the last days of 2011, Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking, and for the future of human rights in Hungary. The independence of the judiciary was dealt with the constitutional amendment, which changed the appointment and reassignment process for judges. The Transitory Provisions to the Fundamental Law reduced the retirement age for judges on ordinary courts from seventy to sixty-two, starting on

the day the new constitution went into effect. This change forced somewhere around 274 judges into early retirement. Those judges include six of the twenty court presidents at the county level, four of the five appeals court presidents, and twenty of the eighty Supreme Court judges.

According to the cardinal law on the status of the churches the power to designate legally recognized churches is vested in Parliament itself. The law has listed fourteen legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (such as tax exemptions and the ability to operate state-subsidized religious schools). As a result, the vast majority of previously registered churches have been deprived of their status as legal entities.

On March 11, 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe, and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions—which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. This made it possible for Prime Minister Orbán to raise the possibility of the reintroduction of the death penalty, declared

unconstitutional by the Constitutional Court in 1990, or threaten with retroactive political justice despite a 1992 ban by the Court. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaty of the European Union and the European Convention on Human Rights.

By 2013 the Hungarian system of governance became populist, illiberal, and undemocratic, which was Prime Minister Orbán's openly stated intention². The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacements, because both the internal and the external democratic defense mechanisms against the abuse of constitutional tools failed. The internal ones (constitutional courts, judiciary) failed because the new regime managed to abolish all checks on its power, and the international ones, such as the EU toolkits, failed mostly due to the lack of a joint political will to use them.

² In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature". Citing as models he added: "We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world [...] Today, the stars of international analyses are Singapore, China, India, Turkey, Russia [...] and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are [...] parting ways with Western European dogmas, making ourselves independent from them [...] If we look at civil organizations in Hungary [...] we have to deal with paid political activists here [...] They would like to exercise influence [...] on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of it being a liberal state, that we should make it clear, that these are not civilians [...] opposing us, but political activists attempting to promote foreign interests [...] This is about the ongoing reorganization of **the** Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests". Full text of Viktor Orbán's speech at Băile Tușnad of 26 July 2014," *Budapest Beacon*, July 29, 2014 at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

2. EU Attempts to Cope with the Rule of Law Situation in Hungary

The new constitutional system was the subject of a report for the European Parliament prepared by its Committee on Civil Liberties, Justice and Home Affairs (LIBE), adopted on 3 July 2013³. With its acceptance of the Tavares Report (named after Rui Tavares, a Portuguese MEP at that time) the European Parliament has called for a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on *"the equal treatment due to Hungary"*. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: *"We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain"*. The resolution argues that the European Parliament exceeded its jurisdiction by passing the report and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government *"not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families"*. These words very much reflect the Orbán-government's view of 'national freedom', the

³ www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN

liberty of the state (or the nation) to determine its own laws: “*This is why we are writing our own constitution [...] And we don't want any unsolicited help from strangers who are keen to guide us [...] Hungary must turn on its own axis*”⁴.

Encouraged by the Tavares report, then-Commission President Barroso also proposed a European mechanism to be “*activated as in situations where there is a serious, systemic risk to the Rule of Law*”⁵. Commission Vice-President Reding, too, announced that the Commission would present a new policy communication⁶.

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013. The government’s reasoning states that the amendment aims to “*finish the constitutional debates at international forum*” (meaning with European Union – G.H.). A statement from the Prime Minister’s Office said: “*The government wants to do away with those [...] problems which have served as an excuse for attacks on Hungary*”. But this minor political concession does not really mean that the Hungarian government demonstrated respect for the formal rule of law, as some commentators rightly argue⁷.

As none of the suggested elements have worked effectively in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council

⁴ For the original, Hungarian-language text of Orbán’s speech, entitled *Nem leszünk gyarmat!* (We won’t be a colony anymore!) see e.g. www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat. The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, available at <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.

⁵ J.M.D. Barroso, *State of the Union address 2013*, Plenary session of the European Parliament, Strasbourg, 1 September 2013.

⁶ V. Reding, *The EU and the Rule of Law. What Next?*, Centre for European Policy Studies, Brussels: 4 September 2013.

⁷ A. von Bogdandy, *How to Protect European Values in the Polish Constitutional Crisis*, www.verfassungsblog.de (2016).

to strengthen the rule of law in the Member States⁸. This framework is supposed to be complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including many court presidents and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in *Commission v. Hungary* established the violation of EU law⁹, but unfortunately the decision was not able to reinstate the dismissed judges into their original positions, nor could it stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms. Even though the Commission formulated the petition, the ECJ apparently wanted to stay away from Hungarian internal politics or had an extremely conservative reading of EU competences and legal bases, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State¹⁰. This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action¹¹.

The new framework allowed the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and

⁸ Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law.

⁹ ECJ, 6 November 2012, Case C-286/12.

¹⁰ For the detailed facts of the case and the assessment of the ECJ judgement see G Halmai, *The Case of the Retirement Age of Hungarian Judges*, in F. Nicola, B. Davies (eds.), *EU Law Stories*, (2017), 471-488.

¹¹ See K. Scheppele, *EU can still block Hungary's veto on Polish sanctions*, www.politico.eu (2016).

allows the Commission to enter into a structured dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 are used. The Framework process is designed as a three-step procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response of the member country to the Commission's recommendations.

The first step to use the new Rule of Law Framework was not taken against Hungary, but against Poland in early January 2016, and also Article 7 was triggered by the European Commission already in December 2017, even though the backsliding in Poland has only started in 2016, and haven't yet reached the level of Hungary. The main reason for this difference was that the governing Fidesz party delivers votes to the European People's Party (EPP), the largest faction at EP, while the Polish governing party, PiS belongs to the smaller fraction of the European Conservatives and Reformists¹².

Finally, on 12 September 2018 the European Parliament – the first time ever – launched Article 7 TEU proceedings against a Member States' government. The MEPs by 448 votes for to 197 against and with 48 abstentions adopted the report prepared by Judith Sargentini denouncing the many violation of EU values by Viktor Orbán's government.

With the adoption of the Sargentini report the unequal treatment of the two rogue Member States had changed, mostly due to the fact that 115 out of the 218 MEPs of EPP also voted against the Orbán government. The change of EPP's view on Orbán has been foreseen after the unexpected announcement of EPP's leader, Manfred Weber to support the report. Weber, who, was considered earlier as one of the main supporters of Orbán¹³.

¹² See this conclusion in R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 *Gov. & Opp. Int'l J. Comp. Pol.* 2 (2017).

¹³ The reason for Weber's changed attitude could be that two weeks before the vote he was supported by Chancellor Merkel as Spitzenkandidat for the Presidency of the European Commission in the 2019 EP election

After the parliamentary vote Weber even challenged leaders of the Member States in the Council to take a stance on Orbán's domestic policies, after MEPs 'did their job' in triggering Article 7 process¹⁴.

In his speech, prior to the vote Orbán threatened the that time European Parliament with a new composition after the 2019 elections, when anti-migrant populist parties can even have the lead, and form the European Commission: "*We need a new European Commission that is committed to the defense of Europe's borders*"¹⁵. This threat must have been one of the reasons for the majority of EPP that despite their vote for the Sargentini report they did not want to kick out Orbán's Fidesz from the party family before the 2019 parliamentary elections. Even though the EP elections did not bring the expected victory of the populists, and EPP at least suspended Fidesz' membership, the commitment of the newly elected European institutions¹⁶ did not make it more likely that the Council with the necessary 4/5 of the votes will follow the proposal of the Parliament by determining the existence of a clear risk of a serious breach Hungary of the values on which the Union is founded. The corrective arm of Article 7, which can lead to sanctions against the Member State, including the suspension of the voting rights of the representative of that government in the Council, can even be vetoed by any Member State¹⁷.

This scepticism has been confirmed by the fact that the first Council hearing occurred on 16 September 2019, more than one year after the parliamentary decision thanks to the Finnish presidency. The Parliament was denied the opportunity to present

¹⁴ Weber challenges European leaders over Hungarian rights, Financial Times, 16 September 2018. www.ft.com/content/e353ba68-b993-11e8-94b2-17176fbf93f5

¹⁵ *Ibidem*.

¹⁶ Besides the fact that Frans Timmermans who was instrumental to trigger Article 7 against both Poland and Hungary did not get the rule of law portfolio in the new Commission, in her first speech in the European Parliament of Ursula von der Leyen, the newly elected Commission president stated regarding these procedures that "*We must all learn that full rule of law is always our goal, but nobody's perfect.*" <https://euobserver.com/news/145504>

¹⁷ The votes on the Sargentini report have shown that besides the Polish government, which already committed itself to veto any possible sanctions against Hungary, there are other governments, which would be reluctant to vote for sanctions, for instance that of the UK.

its Reasoned Proposal with the Commission being asked instead to provide a factual update on the relevant infringement procedures against Hungary¹⁸.

To sum up the impact of the Parliamentary resolution, it came too late, several years after the Orbán government's actions already represented a 'clear risk of a serious breach of the values on which the Union is founded.' Launching Article 7 meant also too little, because besides the important political function of naming and shaming Hungary as a violator of EU values, the chances to reach the corrective arm of the procedure are extremely low¹⁹. Hence, one can argue that instead of Article 7 alternative means from the toolkits of the EU may be more effective²⁰. Infringement actions as alternatives did not really work so far in the case of Hungary but cutting off EU structural funds for regional development or other forms of assistance as a value conditionality approach was not really tried as of yet²¹.

The Commission's Reflection Paper on the Future of EU Finances, published on 28 June 2017, states: "*Respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget*"²².

Günther Öttinger, the German budget commissioner of the European Commission, said that EU funds could become conditional after 2020, depending on the respect for the rule of

¹⁸ About the delayed procedure of the Council see Laurent Pech's contribution to this volume.

¹⁹ See the same assessment of the vote by S. Carrera & P. Bárd, *The European Parliament Vote on Article 7 TEU against the Hungarian government: Too Late, Too Little, Too Political?*, www.ceps.eu

²⁰ Klaus Bachmann argues for using alternative tools instead of Article 7. See K. Bachmann, *Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary*, www.verfassungsblog.de (2018)

²¹ See a detailed analysis in G. Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, 11 Hague J. Rule Law 171-188 (2018).

²² Reflection Paper on the Future of EU Finances. European Commission, 28 June 2017, at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finances_en.pdf

law²³. Similarly, Commissioner Jourová argued for such a new conditionality requirement: *“We need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU’s fundamental rights and values. That is why I intend to explore the possibility to strengthen the ‘fundamental rights and values conditionality’ of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds”*²⁴. In October 2017, Jourová linked again EU funds to rule of law, by saying that *“We need to make better use of EU funds for upholding the rule of law [...] In my personal view we should consider creating stronger conditionality between the rule of law and the cohesion funds”*²⁵. On 23 November 2017, Hans Eichel, co-founder and former chairman of G20, former Minister of Finance of Germany, and Pascal Lamy, former European Commissioner, also on behalf of former European Commissioners Franz Fischler and Yannis Peleokrassas sent an open letter to Jean-Claude Juncker, President of the European Commission, asking the European Commission to temporarily suspend payment of all EU funding to Hungary, with the exception of funding provided directly by the Commission, i.e. without the intermediary role of the Hungarian government²⁶.

Similarly, a recent policy paper of the Centre for European reform suggests that for more serious breaches, the Commission could suspend disbursement of funds, and step up monitoring and verification. In doing so, it would have to ensure that the poorer regions and vulnerable groups did not suffer disproportionate harm from measures designed to have an impact on governments that ignore EU values and the rule of law. Funding, the Centre recommends, could be directed away from governments and go directly to enterprises or be disbursed by civil society organizations²⁷ - if there are still such independent organizations, I would add.

²³ <https://euobserver.com/institutional/138063>

²⁴ ‘10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law, Vienna, 28 February 2017.

²⁵ <https://euobserver.com/political/139720>

²⁶ See above all <http://hungarianspectrum.org/2017/11/28/open-letter-to-jean-claude-juncker>

²⁷ J Selih, I. Bond & C. Dolan, *Can EU Funds Promote the Rule of Law in Europe?*, Centre for European Reform (2017).

On the other hand, former Commission President Juncker said that net recipients of EU funds may resent being penalized financially for actions that net contributors could carry out with impunity. Therefore, he expressed concerns about tying the rule of law to structural funds, which he claimed could be “*poison for the continent*”, and “*divide the European Union*”²⁸. Even after the Commission decided to trigger Article 7 (1) procedure against Poland, which put the country on a path that could ultimately lead to sanctions, Juncker said that he preferred that the EU and Poland hold “*sensible discussions with each other, without moving into threatening gestures*”²⁹.

In mid-February 2018, the European Commission published its Communication on A New, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020 as a contribution to the Informal Leaders’ meeting³⁰. The Communication points out that “*as part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty and in particular to the state of the rule of law in Member States*”. At the same time the German government has circulated a draft white paper to other EU Member States proposing to link cohesion funds to respect for EU solidarity principles³¹. Germany wants more of the EU’s next multiannual budget to be tied to respect for core EU policies and values, including the rule of law and migration. This plan would be a big departure from traditional uses of the structural funds, which have had a heavy focus on infrastructure projects as well as education and training for EU nationals. The Polish government attacked the plan “*because it could lead to limitation of member states’ rights guarded by the EU Treaty*”³².

The usual argument against such kind of financial sanctions is that it would punish the people of Hungary (or Poland for that matter), instead of their leaders, pushing them further away from

²⁸ See www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison

²⁹ *Ibidem*.

³⁰ http://europa.eu/rapid/press-release_IP-18-745_en.htm

³¹ www.ft.com/content/abb50ada-1664-11e8-9376-4a6390adb44

³² www.ft.com/content/d6ef7412-157c-11e8-9376-4a6390adb44

the EU, and into the arms of their illiberal governments³³. Also academic critics point out that the proposal, if implemented, could undermine the European citizens' union by leaving behind those citizens who have the misfortune to live in a members state with an authoritarian national government³⁴. But why not consider the scenario that those regions and citizens taken hostage by their own elected officials, and who do not want to suffer due to the loss of EU funds because of their authoritarian leaders, will be emboldened to stand up against such governments, and vote them out of office, probably even if the election system isn't fair, as is the case in Hungary now. A recent proof that the European Union is still important for the Hungarian voters is the result of a pool conducted right after the European Parliament's vote to trigger Article 7, 56% of the respondents answered "yes" when asked if the European Parliament's decision on the Sargentini report was fair, and just 24% responded "no." Some 53% of the respondents said the negative vote was only about the Hungarian government, while more than 12% saw it as being about the whole country, and 16% thought it was about both³⁵.

Outside the scope of an Article 7 procedure, Prime Minister Orbán claims that linking EU funds to political conditions goes against the EU treaties³⁶. But one can argue that the Common Provision Regulation³⁷ that regulates the European Structural and Investment Funds (which combines five funds, including the Cohesion Fund) requires governments to respect the rule of law as

³³ See this argument by Danuta Hübner, Chair of the European Parliament's Committee on Constitutional Affairs. www.euronews.com/2017/12/29/view-eu-must-not-surrender-to-illiberal-forces. Former Commissioner László Andor similarly argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. See to this end www.progressiveeconomy.eu/sites/default/files/LA-cohesion-final.pdf

³⁴ Having regard to this aspect see e.g. www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html

³⁵ www.euronews.com/2018/09/13/exclusive-poll-what-do-hungarians-think-of-the-european-parliament-s-vote-to-trigger-artic

³⁶ "The EU is based on treaties, and there is nothing in there that would create this possibility [of linking funds to the rule of law]", Viktor Orbán said in an interview. See <https://berlinpolicyjournal.com/trouble-ahead>

³⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303> Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013.

a condition for receiving money³⁸. Article 6 of the Regulation require governments to ensure that funds are spent in accordance with EU and national law. The provision reads: “*Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application*”. Some scholars argue that the Regulation should expressly specify the rule of law as forming part of “*applicable Union law*”³⁹. Of course, the Regulation can relatively easily be amended, but I do not think that is even necessary to acknowledge that the rule of law, as part of Article 2 TEU, is applicable primary Union law. In my view, if a member state does meet these requirements, it does not fulfil the legal conditions of the funds, and consequently cannot get them. Independent courts can be considered as essential institutions conditions, and one could certainly raise the question whether the captured courts in Hungary (or again in Poland for that matter) qualify as ‘courts’ under Article 19 TEU⁴⁰. Article 30 of the EU’s Financial Regulation (966/2012) states, among other things, that EU “*funds shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness*”. Also, according to this regulation, “*The principle of efficiency concerns the best relationship between resources employed and results achieved*”. Furthermore, according to Financial Regulations, “*The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results*”. Finally, according to Article 59 (2) of the Financial Regulation, “*When executing tasks relating to the implementation of the budget, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the Union’s financial interests*”.

According to the EU’s Regulation on European code of conducts on partnership in the framework of the European

³⁸ See a similar argument I. Butler, *To Halt Poland’s PiS, Go for the Euros, Liberties* EU news, (2017).

³⁹ See M. Waelbroeck & P. Oliver, *Enforcing the Rule of Law in the EU: What Can be done about Hungary and Poland?*, www.blogdroiteuropeen.com (2018).

⁴⁰ The judgment of the Grand Chamber of the Court of Justice of the EU from 27 February 2018 in *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* suggests that the EU principle of judicial independence may be relied upon irrespective of whether the relevant national measure implements EU law. About the innovative nature of the judgment see M. Ovádek, *Has the CJEU Reconfigured the EU Constitutional Order?*, www.verfassungsblog.de (2018).

Structural and Investment Funds (240/2014), the governments of the member states must closely cooperate with “bodies representing civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation”. They should also “examine the need to make use of technical assistance in order to support the strengthening of the institutional capacity of partners, in particular as regards small local authorities, economic and social partners and non-governmental organisations, in order to help them so that they can effectively participate in the preparation, implementation, monitoring and evaluation of the programmes”⁴¹.

3. Counterarguments to Value Conditionality

Not everyone in the European constitutional law literature agrees with the desirability of the EU rule of law conditionality measures. In his contribution to this issue as well as to a debate at the Rule of Law in the EU, Armin von Bogdandy counseled caution⁴². He argues that although the Treaty on European Union may have included legally operative fundamental principles that are the ‘true foundations of the common European house,’ but enforcing these principles strictly could bring the house down. Von Bogdandy darkly recalls Carl Schmitt’s warning about a ‘tyranny of values’ which, he reminds us, is ‘a defense of values which destroys the very values it aims to protect.’

As von Bogdandy argues, there are important values on the other side. Under Article 4(2) TEU, the EU must respect domestic democracy and constitutional identity – and this commitment requires the EU to tolerate normative pluralism. Moreover, the EU has always stood for peace, and attempting to enforce a common set of values too strongly at a delicate moment may lead to explosive conflict. While von Bogdandy recognizes that the EU cannot exist without a common foundation of values and he acknowledges that Article 7 TEU is a cumbersome mechanism for enforcement of those values that requires supplementation, the

⁴¹ A. von Bogdandy’s full text is now available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0240&from=EN>

⁴² See above all A. von Bogdandy, *Fundamentals on Defending European Values*, www.verfassungsblog.de (2019).

thought of the EU pressing a Member State to conform to EU values when it is determined to head in a different direction nonetheless makes him queasy.

As we argued in a response co-authored by Kim Lane Scheppele⁴³, von Bogdandy's arguments are wise in normal times. But we no longer live in normal times. The current governments of at least two Member States, Hungary and Poland, are engaged in normative freelancing with the explicit aim of making future democratic rotation impossible, so the self-correction mechanisms on which previous 'normal times' have relied will no longer work.

Take Hungary, which is no longer a democratic state because its citizens can no longer change the government when they so desire. In 2010, Prime Minister Viktor Orbán's Fidesz party came to power with an absolute majority of the votes in a free and fair election, but due to the inherited disproportionate election system, the 53% of the vote gained by Fidesz turned into 67% of the parliamentary seats. Under the Hungarian constitution that Orbán also inherited, a single two-thirds vote in the unicameral parliament could change the constitution as well as the so-called 'two-thirds laws' that governed important aspects of Hungary's basic governmental structure and human rights. Orbán's constitutional majority allowed him to govern without legal constraint, and he won this constitutional majority again in 2014 and 2018. But Orbán has won such overwhelming victories through election law tricks. In December 2011, the Parliament enacted a controversial election law that gerrymandered all-new electoral districts. In 2013, another new election law made the electoral system even more disproportionate, by increasing the proportion of single-member constituency mandates and eliminating the second round run-off in these constituencies so that the seats could be won by much less than a majority vote. The law also introduced 'winner-compensation,' which favored the governing party in the tallying of party list votes and managed to suppress the vote of ex-pats who had left under pressures from Orbán's tightening control while allowing in the votes of new citizens in the neighboring states who backed Orbán. With this rigged electoral system Fidesz was able to renew its two-thirds

⁴³ K.L. Scheppele & G. Halmai, *The Tyranny of Values or the Tyranny of One-Party State*, www.verfassungsblog.de (2019)

majority both in 2014 and 2018 with less than a majority of the popular vote.

The OSCE election observers were very critical of both the 2014 and 2018 elections, noting that “*overlap between state and ruling party resources*”, as well as opaque campaign finance, media bias, and “*intimidating and xenophobic rhetoric*” also hampered voters’ ability to make informed choices⁴⁴.

Beyond rigging the electoral law, Fidesz made the playing field even more uneven by dismantling independent media and threatening civil society, as well as opposition parties. As Steven Levitsky and Lucan Way have argued: “*Clearly, Hungary is not a democracy [...] Orbán’s Hungary is a prime example of a competitive autocracy with an uneven playing field*”⁴⁵.

Rousseau may have inspired Carl Schmitt’s concept of democracy, but the mysterious ‘general will’ is now used by autocratic nationalists like Viktor Orbán to build an ‘illiberal democracy’ that he claims Hungarians support. Illiberalism is highly critical towards all democratic values, including those currently enshrined in Article 2 TEU as well as in Article 4(2) TEU. Orbán’s isn’t merely illiberal in not respecting human dignity, minorities’ and individual’s rights, the rule of law and separation of powers, but he isn’t democratic either, because the outcome of the elections are foreordained.

Orbán’s Hungary isn’t only a ‘pseudo-democracy,’ but it also abuses the concept of national identity protected in Article 4(2) TEU. From the very beginning, the government of Viktor Orbán has justified non-compliance with the values enshrined in Article 2 TEU by referring to national sovereignty. Nowhere has this been clearer than when the government refused to accept refugees in the giant migration of 2015, and also refused to cooperate with the European relocation plan for refugees after that. After a failed referendum in which the Hungarian public refused to support the Orbán government in sufficient numbers as it sought a public rubber-stamp for its rejection of refugees, the packed Constitutional Court came to the rescue of Hungary’s

⁴⁴ www.osce.org/odihr/elections/hungary

⁴⁵ See www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/

policies on migration by asserting that they were part of the country's constitutional identity.

The Constitutional Court in its decision held that 'the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty'⁴⁶. Therefore, the Court argued "*the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State*"⁴⁷. This abuse of constitutional identity was aimed at rejecting the joint European solution to the refugee crisis and clearly flouted common European values, such as solidarity.

In a more recent decision, the Constitutional Court by ruling that the criminalization of 'facilitating illegal immigration' does not violate the Fundamental Law again referred to the constitutional requirement to protect Hungary's sovereignty and constitutional identity to justify this clear violation of freedom of association and freedom of expression hiding behind the alleged obligation to protect Schengen borders against 'masses entering [the EU] uncontrollably and illegitimately.'⁴⁸ The Commission has brought several infringement actions against Hungary for its handling of asylum claims and for its mistreatment of claimants, but the Hungarian government rejects all 'interference' from Brussels on this point by abusing the concept of constitutional identity.

4. Conclusion

This paper tried to prove that in the rule of law backsliding in Hungary in a non-democratic system with authoritarian tendencies. The last nine years of this development have shown that EU's the traditional mechanism of the infringement procedure did not work, and neither the triggered Article 7

⁴⁶ Decision 22/2016 AB of the Constitutional Court of Hungary, para [68]. For a detailed analysis of the decision, see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, 43 Rev. of Cen'l & East Eur. L. 23-42 (2018).

⁴⁷ *Ibidem*.

⁴⁸ See N. Chronowski & G. Halmai, *Human Dignity for Good Hungarians Only*, www.verfassungsblog.de (2019).

procedure nor the most recent attempts of the outgoing European Commission on the EU Rule of Law Toolbox⁴⁹ published on 3 April 2019 and the Rule of Law Review Cycle⁵⁰ announced on 17 July 2019, not to speak about the mentioned rather decreased commitment of the new European Commission seem to force the governments to end the breach of European values.

I think that to keep the vision of Europe as a value community, makes it inevitable to enforce the joint values of the rule of law, democracy and fundamental rights in every Member States. For this reason, the more consequent use of certain traditional tools, such as infringement procedures also for the breach of values enshrined in Article 2 TEU, or even triggering Article 7 for that matter are important, because if democracy is hijacked, courts are captured, rights are threatened and the EU is disrespected by a Member State government, the sincere cooperation guaranteed in Article 4(3) cannot be guaranteed. But at the same time, new means of value conditionality should also be activated, such as cutting funds for member states that do not comply with certain basic institutional requirements of the rule of law. Probably a good sign for doing so is that after triggering Article 7 against Hungary French President Macron, clearly referring to Hungary, said that *“countries that don't want more Frontex or solidarity will leave Schengen. Countries that don't want more Europe will no longer touch structural funds”*⁵¹. Also, the European Parliament is preparing a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. As I have argued, this is possible through implementing the Common Provision Regulation, and can be carried out on a case-by-case basis. Putting

⁴⁹ See EU Rule of Law Toolbox at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en. About the assessment of this Communication see L Pech & D. Kochenov, *Strengthening the Rule of Law within the European Union. Diagnoses, recommendations, and what to avoid. Policy Brief*, RECONNECT (2019)

⁵⁰ See <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-343-F1-EN-MAIN-PART-1.PDF>. For a critique of this follow up Communication, L. Pech, D. Kochenov, B. Grabowska-Moroz & J. Grogan, *The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, www.verfassungsblog.de (2019).

⁵¹ www.politico.eu/article/emmanuel-macron-eu-migration-frontex-holdouts-hungary-viktor-orban-should-be-booted-out-of-schengen

conditionality into the Multiannual Financial Framework after the 2020 budget period is another potential avenue to enforce compliance with joint values. It will surely be both difficult and unpleasant for the EU to try to enforce its values. But the rule of law crisis requires difficult and determined action in order for the European Union to function.