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## The Fall of the Rule of Law in Hungary and the Complicity of the EU

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Hungary has been one of the first and most thorough political transitions after 1989, which due the negotiated ‘rule of law revolution’<sup>1</sup> 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.

### 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.

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

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.

By 2013 the Hungarian system of governance became populist, illiberal, and undemocratic, which was Prime Minister Orbán's openly stated intention.<sup>2</sup> 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.

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

After many years of hesitation, on 12 September 2018 the European Parliament – the first time ever - launched Article 7 TEU proceedings against a Member States' government. But this Parliamentary resolution 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 low<sup>3</sup>. Hence, one can argue that instead of

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<sup>2</sup> 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. . . . [T]hey 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." See Viktor Orbán, "Full Text of Viktor Orbán's speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014," *Budapest Beacon*, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

<sup>3</sup> See the same assessment of the vote by Sergio Carrera and Petra Bárd, 'The European Parliament Vote on Article 7 TEU against the Hungarian government: Too Late, Too Little, Too Political?'

Article 7 alternative means from the toolkits of the EU may be more effective<sup>4</sup>. 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 yet<sup>5</sup>.

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' meeting.<sup>6</sup> 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”.

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 the EU, and into the arms of their illiberal governments.<sup>7</sup> 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 government.<sup>8</sup> 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 poll conducted right after the European Parliament's vote to trigger Article 7, 56% of the respondents answered “yes” when asked if the European

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<https://www.ceps.eu/publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little>

<sup>4</sup> Klaus Bachmann argues for using alternative tools instead of Article 7. See Klaus Bachmann, 'Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary', *verfassungsblog*, (17 September 2018), <https://verfassungsblog.de/beyond-the-spectacle-the-european-parliaments-article-7-teu-decision-on-hungary/>

<sup>5</sup> See a detailed analysis of this possibility in Gábor Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, *Hague Journal of Rule of Law* (June 2018).

<sup>6</sup> [http://europa.eu/rapid/press-release\\_IP-18-745\\_en.htm](http://europa.eu/rapid/press-release_IP-18-745_en.htm)

<sup>7</sup> 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](http://www.euronews.com/2017/12/29/view-eu-must-not-surrender-to-illiberal-forces). Similarly, former Commissioner László Andor argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. <http://www.progressiveconomy.eu/sites/default/files/LA-cohesion-final.pdf>

<sup>8</sup> <http://www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html>

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 both.<sup>9</sup>

## 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 a debate at the Rule of Law in the EU, Armin von Bogdandy counseled caution<sup>10</sup>. 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 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 Scheppele<sup>11</sup>, von Bogdandy's arguments are wise in normal times. But we no longer live in normal times. The current governments of at

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<sup>9</sup> <https://www.euronews.com/2018/09/13/exclusive-poll-what-do-hungarians-think-of-the-european-parliament-s-vote-to-trigger-artic>

<sup>10</sup> A. von Bogdandy, Fundamentals on Defending European Values, *verfassungsblog*, 12 November, 2019. <https://verfassungsblog.de/fundamentals-on-defending-european-values/>

<sup>11</sup> K.L. Scheppele and G. Halmai, The Tyranny of Values or the Tyranny of One-Party State, *verfassungsblog*, 25 November, 2019. <https://verfassungsblog.de/the-tyranny-of-values-or-the-tyranny-of-one-party-states/>

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 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 choices<sup>12</sup>.

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

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<sup>12</sup> <https://www.osce.org/odihr/elections/hungary>

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.”<sup>13</sup>

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 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’.<sup>14</sup> 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

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<sup>13</sup> <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/>

<sup>14</sup> 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 Review of Central and East European Law 23-42 (2018).

State”.<sup>15</sup> 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.

## Conclusion

This paper tried to prove that the rule of law backsliding in Hungary happens 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 procedure nor the most recent attempts of the outgoing European Commission on the EU Rule of Law Toolbox<sup>16</sup> published on 3 April 2019 and the Rule of Law Review Cycle<sup>17</sup> 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.

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<sup>15</sup> *Ibid.*

<sup>16</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu\\_en](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 Laurent Pech, Dimitry Kochenov, Strengthening the Rule of Law within the European Union. Diagnoses, recommendations, and what to avoid. Policy Brief (June 2019), RECONNECT — Reconciling Europe with its Citizens through Democracy and Rule of Law, <https://poseidon01.ssrn.com/delivery.php?ID=781006013127073085083065107126091109058027047084089074075020095109111111010082064076100027018126119126005097096021004101075064106017028001034084000127073000083011048064000073082124111012122002078081088125077017122068125075096122025106123065098104026&EXT=pdf>

<sup>17</sup> <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-343-F1-EN-MAIN-PART-1.PDF>. See the critique of this follow up Communication Laurent Pech, Dimitry Kochenov, Barbara Grabowska-Moroz, Joelle Grogan, The Commission’s Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism, Verfassungsblog (5 September 2019), <https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/>