



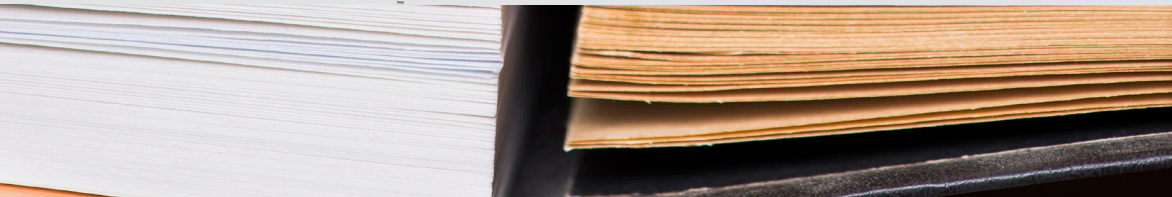
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Value conditionality as a new
EU mechanism used against
autocratizing Hungary

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Table of Contents

| | |
|---|----------------------|
| A. Introduction | D 1 |
| B. The Rule of Law Conditionality Mechanism | D 3 |
| C. The Use of the Charter of Fundamental Rights | D 12 |
| D. Counterarguments to Value Conditionality | D 16 |
| E. Conclusion | D 18 |

A. Introduction

Hungary has first received international attention as one of the first and most thorough political transitions after 1989, which, due to 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. The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all together at the same time.² Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a ‘rule of law’ document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubberstamped the comprehensive amendment to the Constitution, which went into effect on 23 October, 1990, the anniversary of the 1956 revolution.

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

² The terms ‘single’ and ‘dual’ transitions are used in Przeworski. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. See Offe.

Twenty years later, the same country became the first, and probably the model case, of backsliding to an illiberal system dismantling the rule of law. Both Freedom House and the Varieties of Democracy Project have tracked Hungary as it has passed from a 'consolidated' liberal democracy in 2010 into the status of a 'hybrid regime'³ or an 'electoral autocracy'.⁴ The 2024 Rule of Law Index of the World Justice Project⁵ ranked Hungary last out of 31 selected countries of the European Union, the European Free Trade Association (EFTA), and North America. The country is no longer a constitutional democracy able to ensure a peaceful rotation of power. Why was the EU, whose foundation is the values of democracy and the rule of law, unable to intercept the process for one of its own members? Hungary's transition into an authoritarian state was first and foremost facilitated by willing autocrats and fragile domestic democratic institutions, including the disproportional election system and easy amendment rule of the constitution. But the EU has also failed to force its Member State to comply with its original admission criteria. This calls for a strong democratic opposition in the country, but also for self-reflection from the EU that, despite being built on the values of democracy and the rule of law, was unable to intercept the rise of authoritarianism in Hungary.

The current Hungarian state of affairs was made possible by the governing Fidesz party's 2010 electoral victory. Due to the disproportional electoral system, Fidesz, with a slight majority of the votes, received two-thirds of the seats. This allowed them to enact a new constitution without the votes of the weak opposition parties. Hungary, not even a Republic in its name anymore, according to the new Fundamental Law and proudly announced by PM Orbán, became an 'illiberal state,' which abolished all checks on the government's power, like the independence of the Constitutional Court or ordinary judiciary, and does not guarantee fundamental rights, such as freedom of the media or religious freedom.

Hungary's constitutional transformations obviously matter to Hungary. But the country's backsliding to an authoritarian state, the re-emergence of right-wing 'national identity,' the development of illiberalism as an alternative ideology, the populist appeal to voters, and the inability of transnational institutions to halt domestic democratic decline also pose challenges to the European Union and beyond. Orbán's regime is often described as 'populist' or 'illiberal.' But reference to the 'pure people' distinguishing them from the 'corrupt elite' is rethoric by a nationalist elite, which is much more corrupt than its prede-

³ <<https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade>>.

⁴ <https://www.v-dem.net/media/filer_public/de/39/de39af54-0bc5-4421-89ae-fb20dcc53dba/democracy_report.pdf>.

⁵ <<https://worldjusticeproject.org/rule-of-law-index/global/2024/Hungary/>>.

cessor has ever been, and ‘illiberalism’ covers antidemocrats, whose ideas are authoritarian to their core. Therefore, instead of using the unhelpful concepts of populism or illiberalism to characterize the current Hungarian regime, it is better to call it by its name: autocracy. In this authoritarian system, the institutions of a constitutional state (such as the Constitutional Court, ombudsman, and judicial or media councils) still exist, but their power is very limited. Furthermore, while, as in many autocratic regimes, fundamental rights are listed in the constitution, the institutional guarantees of these rights are endangered through the lack of an independent judiciary and Constitutional Court.

In other words, although Hungary became a liberal democracy on an institutional level after 1989, the consolidation of the system on a behavioral level was always very fragile. If one considers liberalism as not merely a limit on the public power of the majority, but also as a concept that encompasses the constitutive precondition of democracy — the rule of law, checks and balances, and guaranteed fundamental rights — then Hungary is not a liberal democracy anymore. Ever since the victory of the current governing party, almost all public power has been in the hands of the representatives of one party.

In this paper I raise the question of whether whether after almost one and a half decade of unsuccessful use of traditional EU mechanisms, such as infringement actions, or even Article 7 to force an autocratizing member state, it is time for the EU to use values conditionality. Here I’ll investigate the origins and successes of two such new tools: the Rule of Law Conditionality Mechanism and the use of the Charter of Fundamental Rights for the same purposes.

B. The Rule of Law Conditionality Mechanism

During the EU’s long and mostly unsuccessful struggle to bring Viktor Orbán’s government into compliance since he came to power in 2010, occasionally the European Commission has put on hold some EU funding to Hungary. This happened in 2013 after the Hungarian Parliament enacted the Fourth Amendment to the new Fundamental Law, finally dismantling the Constitutional Court and other checks and balances on governmental power. But the official reason for this suspension was not the grave violation of the rule of law, but some alleged irregularities in the way development subsidies had been managed by Budapest.⁶

⁶ <<https://www.ft.com/content/9b85c228-04f1-11e3-9e71-00144feab7de>>.

Real financial sanctions were proposed against Hungary (and Poland) in mid-August 2016 by two German members of the European Parliament. Ingeborg Gräßle, a Christian-Democrat MEP and the head of the Parliament's committee on budgetary control suggested: "There needs to be stronger rules for the disbursement of funds...Countries that don't respect EU laws, or countries that don't participate enough in the resettlement of migrants or the registration of refugees, should be deprived of funds." Vice president of the Parliament, the Liberal Alexander Graf Lambsdorff, singled out Poland and Hungary as net recipients of EU funds that have been flouting EU values by saying: "The federal government must ensure, when the EU budget is reviewed this fall, that EU countries that are net recipients, such as Poland and Hungary, show more solidarity in [on] the issue of refugees and also respect European values."⁷ Similarly, then-Austrian Chancellor, Christian Kern said that "If countries continue to duck away from resolving the issue of migration, they will no longer be able to receive net payments of billions from Brussels," arguing that "solidarity is not a one-way street."⁸ Also, French presidential candidate Emmanuel Macron stated that "You cannot have a European Union which argues over every single decimal place on the issue of budgets with each country, and which, when you have an EU member which acts like Poland or Hungary on issues linked to universities and learning, or refugees, or fundamental values, decides to do nothing."⁹ Vivian Reding, member of the European Parliament and former EU commissioner for justice and fundamental rights declared: "This would be the most effective way to influence the behavior of a government like the Pol-

⁷ <<http://www.welt.de/politik/ausland/article157586134/Deutschland-ist-Zahlmeister-in-Europa.html>>. Hungary has received enormous EU cohesion funds sums during the period Orbán has been in power. The country has received as much as 6-7% of its GDP as inflows from the various cohesion and structural funds of the Union since 2010. This has generated an average GDP growth of around 3%, which according to a KPMG study commissioned by the government, would have been zero without the EU transfers. This means that without the cohesion and structural fund transfers, Hungary would have no autonomous economic growth. See Zoltán Pogátsa, 'The Political Economy of Illiberal Democracy', Social Europe (20 November 2017). That is why it is nothing but political propaganda when Viktor Orbán claims that Hungary does not need EU money. See his interview in the Hungarian Public Radio on 22 December 2017. <http://hvg.hu/gazdasag/20171222_orban_magyarorszag_nincs_raszorulva_senkinek_a_penzere>.

⁸ 'Austria calls for less money for EU states opposing refugee distribution', Deutsche Welle, 8 March 2017. <<http://www.dw.com/en/austria-calls-for-less-money-for-eu-states-opposing-refugee-distribution/a-37848662>>.

⁹ Pierre Bertrand, 'France's Macron wants sanctions on Poland, others, for violating EU principles', Euronews (28 April 2017). <<http://www.euronews.com/2017/04/28/france-s-macron-wants-sanctions-on-poland-others-for-violating-eu-principles>>.

ish one – making a link with the money. It's the only thing they understand.”¹⁰ Gajus Scheltema, then-ambassador of the Netherlands to Hungary, referring to the Hungarian government in an interview, claimed: “The argument over what happens with our money is indeed growing ever fiercer. We can't finance corruption, and we can't keep a corrupt regime alive.”¹¹

First-hand proof of governmental corruption, also mentioned in the Sargentini report, has been provided by OLAF, the EU's anti-fraud office, following an investigation in Hungary, which found serious irregularities related to street-lighting contracts awarded to a company that had been owned by Orbán's son-in-law, István Tiborcz. OLAF has called on the European Commission to claw back more than €40m of EU funds spent on lighting projects.¹² But since Hungary was among the eight Member States that declined to take part in the EU prosecution service, which was created in 2017, the criminal investigation of the matters depends on the Hungarian prosecutors office, led by Fidesz loyalists. Hence, one obvious measure would be to oblige Hungary to join the EU prosecutor service if it wants to continue to receive EU funds.

In 2017 the European Parliament linked the monitoring of EU funds in Hungary with the government's disrespect of EU values and policies, for instance on migration and refugees. After a debate on Hungary at the plenary session on 26 April 2017, the Parliament stated in a resolution that “recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values”.¹³ Therefore, the resolution calls for: “a) the launching of Article 7(1). MEPs instruct the LIBE Committee to draw up a formal resolution for a plenary vote, b) the Hungarian Government to repeal laws tightening rules against

¹⁰ Jonathan Stearns, ‘Europe's Eastern Rebels Expose Next Fault Line for EU Leaders’, Bloomberg (30 July 2017). <<https://www.bloomberg.com/news/articles/2017-07-30/europe-s-eastern-rebels-expose-next-fault-line-for-eu-leaders>>.

¹¹ <<http://hungarianspectrum.org/2017/08/31/ambassador-scheltema-we-mustnt-keep-a-corrupt-regime-alive/>>.

¹² <<https://www.theguardian.com/world/2018/feb/12/orban-allies-could-use-eu-as-cash-register-meps-say>>.

¹³ The resolution was adopted by 393 votes to 221 with 64 abstentions, which means some members of European Peoples Party (EPP), the party group of Fidesz, the Hungarian governing party, did not vote against the resolution. Manfred Weber, the president of the EPP-group also harshly criticized the Lex CEU. According to its press-release “the EPP wants the CEU to remain open, deadlines suspended and dialogue with the US to begin”. The EPP also stressed that “NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected”. <<http://www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency/>>.

asylum-seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution, and finally c) the European Commission to strictly monitor the use of EU funds by the Hungarian Government".¹⁴ 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."¹⁵

The German Government went even further regarding the latter call of the Parliament by suggesting linking receipts of EU cohesion funds to respect for democratic principles.¹⁶ The proposal was drafted explicitly with the situation in Poland in mind, as it has been allocated a total of €86 billion from various EU cohesion funds for the period 2014-2020 and would, under normal circumstances, expect substantial funds in the next budget cycle as well.¹⁷ Germany, together with Austria and Italy, has also repeatedly argued that spending conditionality should be used to discourage Member States' non-compliance with the EU migration and asylum acquis, in particular with the Council's refugee relocation plan.¹⁸

Also, 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 law.¹⁹ Similarly, Commissioner Jourová argued

¹⁴ <<http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7>>.

¹⁵ Reflection Paper on the Future of EU Finances. European Commission, 28 June 2017, <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finance_en.pdf>.

¹⁶ <<http://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers/>>.

¹⁷ See e.g. the data available here: <<https://cohesiondata.ec.europa.eu/>>. Poland has for instance been allocated ESIF funding of €86 billion representing an average of €2,265 per person over the period 2014-2020. Cited by Laurent Pech and Kim Lane Scheppele, 'Rule of Law Backsliding in the EU: Learning from Past and Present Failures to Prevent Illiberal Regimes from Consolidating within the EU', Cambridge Yearbook of European Legal Studies (2017).

¹⁸ 'Germany supports cutting EU funds to countries that refuse refugee quotas', *Business Insider*, 15 September 2015; Austria Threatens EU Funding Cuts over Hungary's Hard Line on Refugees!, *The Guardian* (8 March 2017); 'Italy Threatens Hungary: EU Countries Who Reject Migrant Quota Should Have Funding Cut', *Express.co.uk* (12 October 2016).

¹⁹ <<https://euobserver.com/institutional/138063>>.

for such a new conditionality requirement: “We need to ensure that EU funds bring a positive impact and contribute more generally to promoting 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.”²⁰ In October 2017, Jurov 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.”²¹ 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 government.²²

Similarly, a policy paper of the Centre for European reform suggested 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 organizations²³ – if there are still such independent organizations, I would add.

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.”²⁴ Even after the Commission decided to trigger Article 7 (1) procedure against Poland, which put the

²⁰ ‘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, Speech/17/403.

²¹ <<https://euobserver.com/political/139720>>.

²² <<http://hungarianspectrum.org/2017/11/28/open-letter-to-jean-claude-juncker/>>.

²³ Jasna Selih with Ian Bond and Carl Dolan, ‘Can EU Funds Promote the Rule of Law in Europe?’, Centre for European Reform (November 2017).

²⁴ <<http://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/>>.

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.”²⁵

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.²⁶ 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 principles.²⁷ 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”.²⁸

The usual argument against such kinds of financial sanctions is that they 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.²⁹ 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 member state with an authoritarian national government.³⁰ But why not consider the scenario that those regions and citizens taken hostage by their own elected officials, who do not want to suffer due to the loss of EU funds because of their authoritarian

²⁵ <https://www.politico.eu/article/eu-commission-president-jean-claude-juncker-rejects-cutting-eu-funds-to-poland/?utm_content=buffer9a7fd&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer&utm_impression=true>.

²⁶ <http://europa.eu/rapid/press-release_IP-18-745_en.htm>.

²⁷ <<https://www.ft.com/content/abb50ada-1664-11e8-9376-4a6390addb44>>.

²⁸ <<https://www.ft.com/content/d6ef7412-157c-11e8-9376-4a6390addb44>>.

²⁹ 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. Similarly, former Commissioner László Andor argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. <<http://www.progressiveeconomy.eu/sites/default/files/LA-cohesion-final.pdf>>.

³⁰ <<http://www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html>>.

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 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.³¹

Outside the scope of an Article 7 procedure, Prime Minister Orbán claims that linking EU funds to political conditions goes against the EU treaties.³² But one can argue that the Common Provision Regulation³³ 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 a condition for receiving money.³⁴ Article 6 of the Regulation requires 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".³⁵ Of course the Regulation can relatively easily be amended, but I do not think that it 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 fulfill 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 of whether the captured courts in Hungary (or again in Poland for that matter) qualify as 'courts' under Article 19 TEU.³⁶ Arti-

³¹ <<https://www.euronews.com/2018/09/13/exclusive-poll-what-do-hungarians-think-of-the-european-parliament-s-vote-to-trigger-artic>>.

³² "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/>>.

³³ Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1303>>.

³⁴ See a similar argument Israel Butler, 'To Halt Poland's PiS, Go for the Euros', *LibertiesEU*, August 2, 2017. <<https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros>>.

³⁵ See Michel Waelbroeck and Peter Oliver, 'Enforcing the Rule of Law in the EU: What Can be done about Hungary and Poland?', <<https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/>>.

³⁶ 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

cle 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 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."³⁷

Finally, in May 2018 the European Commission proposed a new Conditionality Regulation³⁸ for the Parliament and the Council with the purpose to condition the distribution of EU money on compliance with the rule of law, so that EU money no longer funded national authoritarian governments such as Hungary's. But the law-making process changed the regulation to become much harder to trigger and more limited in what it can reach. In fact, the term 'rule of law' is not even included in the regulation's current title. This first 'compro-

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 Michal Ovádek, 'Has the CJEU Reconfigured the EU Constitutional Order?', *Verfassungsblog* (28 February 2018). <<https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>>.

³⁷ <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0240&from=EN>>.

³⁸ <[https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2018\)324&lang=EN](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2018)324&lang=EN)>.

mise³⁹ in September 2020 was a consequence of Germany's effort to protect Fidesz member of the European People's Party's (EPP) fraction in the European Parliament, partly because of the strong economic interests of Germany in Hungary, such as the German car industry. The Hungarian and the Polish governments wanted to get rid of the conditionality regulation altogether and threatened to veto the EU's Multiannual Financial Framework—the next seven-year budget of the Union—and the Recovery plan package, which aimed at healing the damages caused by the COVID-19 pandemic. The threat of veto changed the political mood in the EU; the determined position of the Netherlands, the Nordic countries, and the European Parliament pushed the German presidency to soften its initial conciliatory attitude towards Hungary (and Poland). Thanks to this push, the budgetary conditionality was adopted. Even though it does not explicitly protect the rule of law, it does protect the Union budget in cases when funds have already been misspent.

Although the subject of blackmail through veto has disappeared with the adoption of the Conditionality Regulation, the European Council made another compromise on December 10, 2020 by adopting the EUCO Conclusion,⁴⁰ again brokered by the German Presidency with the Hungarian and the Polish government. Even though the Conclusion is non-binding, it certainly has effects, practically suspending the application of the Regulation by allowing Member States to challenge it before the Court of Justice of the European Union. On March 10, 2021 as expected, the Hungarian government (along with its Polish counterpart) challenged the Regulation.⁴¹ This provided the opportunity for the Hungarian 'mafia state' to keep misusing EU funds for the benefit of Orbán's oligarchs and his own family and avoid triggering the Regulation before the 2022 parliamentary elections.

Indeed, although on 16 February 2022 the CJEU dismissed all the claims of the Hungarian (and the Polish) government(s), and in early March also the European Council finalised the guideline binding the Commission as to how to apply the Regulation, the Commission only triggered the conditionality mechanism on 27 April 2022, after Fidesz won its fourth consecutive parliamentary election, again with a two-third majority. Surprisingly, on 18 September 2022 the Commission proposed to suspend 65% of three targeted cohesion funds, and also requested the implementation of 17 key measures regarding compliance with important corruption and rule of law requirements. Additionally, Hungary has to meet 10 conditions, partly on judicial independence on order

³⁹ <<https://twitter.com/ProfPech/status/1310854116919463936?s=20>>.

⁴⁰ <<https://data.consilium.europa.eu/doc/document/ST-22-2020-INIT/en/pdf>>.

⁴¹ <<https://www.politico.eu/article/hungary-poland-to-brussels-see-you-in-court/>>.

to receive the allocated money under the Recovery Fund (RRF). This meant that the Hungarian government would have lost all recovery money for good should no agreement have been reached with the Commission by the end of 2022 about the implementation of these 27 'super milestones'. On 30 November the Commission assessed that the Hungarian government had not fulfilled its promise to implement the 17 anti-corruption measures, hence it recommended to the Council to suspend 7.5 billion Euros of the country's Cohesion Funds. Although the Hungarian government has not complied with the 10 rule of law requirements, the Commission approved Hungary's Recovery Plan, but proposed to the Council to put a freeze on an additional 5.8 billion Euros from Hungary's 2022 allocation under the RFF, due to the remaining concerns.⁴² On 12 December 2022 the Council with a qualified majority blocked 6.3 billion Euros of the three Cohesion Funds to Hungary instead of the 7.5 billion proposed by the Commission, and has approved the RFF money on the condition of satisfying the milestones later.

C. The Use of the Charter of Fundamental Rights

In this part I raise the question, whether the EU Charter of Fundamental Rights in general, and its Article 47 in particular can impose obligations on authorities of Member States, which, as Hungary (and Poland) otherwise are reluctant to guarantee effective judicial protection, the right to effective remedy and to a fair trial. In other words, whether the Charter provision can act as a limit to the national procedural autonomy⁴³ of Member States, in which this autonomy is misused for the sake of disrespecting judicial independence⁴⁴ and the rule of law altogether. Can Article 47 CFREU help where national ordinary and constitutional courts fail to provide effective judicial protection, and are reluctant or unwilling to engage in dialogue with European courts?

First I investigate the original and the changed aim of the Charter's Article 51 to make sure that Member States respect fundamental right. According to the literal, rather restrictive interpretation of Article 51(1) CFR, the Charter does

⁴² Kim Lane Scheppele, R. Daniel Kelemen, John Morijn, *The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary*, VerfBlog, 2022/12/01, <<https://verfassungsblog.de/the-good-the-bad-and-the-ugly-2/>>.

⁴³ See Matteo Bonelli, Article 47 of the Charter, Effective Judicial Protection and the (Procedural)Autonomy of the Member States, in Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, Volume 1. The Court of Justice's Perspective, (Hart 2022) (hereafter Bonelli, Article 47) 79-96.

⁴⁴ See Michal Krajewski, *The EU Right to an Independent Judge: How Much Consensus Across the EU?*, in Bonelli, Article 47' (note 43) 59-78.

not apply to cases, where Member States do not implement EU law, but act in a purely domestic matter: “[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” Article 51(2) further stresses that the “Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.” This means that the Charter is predominantly applicable to EU institutions, and does not want to protect fundamental rights provided by the Member States’ constitutions. This interpretation has been confirmed by the current President of the European Court of Justice (ECJ), Koen Lenaerts as well: “[f]rom the fact that the Charter is now legally binding it does not follow that the EU has become a ‘human rights organisation’ or that the ECJ has become ‘a second European Court on Human Rights’ (ECtHR).”⁴⁵

This narrow interpretation has firstly been challenged by Advocate General Miguel Maduro in his 2008 opinion in the case *Centro Europa*. Maduro indicated that a citizen of a Member State, in response to a substantial breach of the rights, laid down in the Charter of Fundamental Rights may invoke against his/her state the protection of the Charter on the basis of European citizenship.⁴⁶ After the newly elected government of Viktor Orbán enacted a new media law dismantling freedom of the media in Hungary in 2010, Armin von Bogdandy and his colleagues published the so-called ‘reverse Solange’ academic proposal.⁴⁷ The line of thought advanced in the proposal argues that commitment to protect fundamental rights expressed in Article 2 of the Treaty on European Union may be invoked by any citizen in the court of a member state in opposition to such measures by the given member state that substantially violate fundamental rights. This right, which stems from Union citizenship, is derived by the authors from the practice of the European Court of Justice, especially the *Ruiz Zambrano* judgment, which stated that any measures by a member state “[w]hich have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union violate Article 20 of the Treaty on the Functioning of the European Union (TFEU), which creates Union citizenship and its

⁴⁵ Cf. Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8(3) *European Constitutional Law Review*, 375, 377.

⁴⁶ See: Opinion of Advocate General Poiares Maduro, delivered on 12 September 2007, Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni* and *Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni*.

⁴⁷ A. von Bogdandy, & M. Kottmann & C. Antpöhler & J. Dickschen & S. Hentrei & M. Smrkolj, ‘Reverse Solange. Protecting European Media Freedom Against EU Member States’ (2012), *Common Market Law Review*, Volume 49.

component rights.”⁴⁸ The Åkerberg Fransson judgment⁴⁹ from 2013 also made it clear that the ECJ has moved away from the former literal interpretation by arguing that any material link and potential law-making are sufficient for the application of the Charter, provided that the case comes under the scope of EU law underpinned by certain EU regulation.⁵⁰

Those arguing against the literal interpretation of Article 51 of the Charter, taking into account that a Treaty change is not a viable solution favour the creative reinterpretation of

Article 51(1), which can make the Charter also applicable in purely domestic cases.⁵¹

The CJEU’s jurisprudence of Article 47 CFREU has impacted domestic asylum and migration procedures before Hungarian national authorities. In 2020, the CJEU dealt with a situation of de facto detention of asylum seekers in the transit zone at the border between Hungary and Serbia.⁵² Unlike the European Court of Human Rights in an earlier judgment (Judgment of 21 November 2019 in Case No 47287/1 Ilias and Ahmed v Hungary) that the stay of third-country nationals in these transit zones constitutes a deprivation of liberty (FMS and others, para 231; See also Case C-808/18 Commission v Hungary EU:C:2020:1029). Moreover, the CJEU also stated that national legislation, which does not guarantee any judicial review of the lawfulness of an administrative decision ordering the detention of an asylum seeker or an illegally resident third-country national not only constitutes an infringement of Ar-

⁴⁸ C-34/09. Ruiz Zambrano, paragraph 42.

⁴⁹ Case C-617/10 Åkerberg Fransson, ECLI:EU:C:2013:105, judgement of 26 February 2013.

⁵⁰ In the case *Sándor Nagy and others*, [50] decided in the same year the ECJ found the case to be inadmissible. The case concerned the Hungarian law, which permitted the dismissal of civil servants without justification. Despite the fact that this was clearly irreconcilable with Article 30 of the Charter, which provides that “[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices”, the ECJ found that the impugned legislation was not part of Hungary’s implementing EU law, and thus, Article 51 precluded the application of the Charter.

⁵¹ András Jakab, ‘The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States’, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016). Also more recently A. Jakab and L. Kirchmair, *Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights*, *Cambridge Yearbook of European Studies* (2022) 1-23.

⁵² See Marcelle Reneman, *No Turning Back? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter*, in Matteo Bonelli Mariolina Eliantonio and Giulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, Volume 1. *The Court of Justice’s Perspective*, (Hart 2022) 137-154, at 141-142.

ticles 9(3) Reception Conditions Directive and 15(2) Return Directive but also undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter. As a consequence of the CJEU judgments the Hungarian Parliament hasn't been amended the legislation, and the authorities continue to implement the law and summarily remove asylum seekers to Serbia, denying them the opportunity to apply for asylum in Hungary.⁵³ However, in February 2021, the Minister of Justice asked the Constitutional Court to rule that the judgment could not be enforced as its implementation would breach Hungary's constitutional identity. Although the Constitutional Court refrained from expressly taking a stance on the implementation question in its 10 December 2021 decision, it offered a lifeline for the government by ruling that when the "fundamental right to self-determination stemming from one's traditional social environment" is violated, Hungary should have the right to temporarily not apply EU law.⁵⁴ On 12 November, the Commission referred Hungary to the CJEU over its failure to comply with Court judgment.⁵⁵

All in all, while Article 47 CFREU played a limited role in guaranteeing effective judicial protection, but as we could see with an even more reduced impact in backsliding Member States, such as Hungary (or Poland for that matter).

Suddenly on 22 December 2022 the EU Commission announced that all money, around 22 billion Euros from the Cohesion Fund will not be paid to Hungary, because of its violations of the EU Charter of Fundamental Rights.⁵⁶ The violations concerned Hungary's discriminatory laws that affect the judicial system, rights of LGBT persons, academic freedoms and the rights of refugees. The EU Commission sees this as a violation of the Common Provisions Regulation. The procedure is independent of the 6.3 billion already frozen ten days earlier under the rule of law mechanism to be discussed next in this paper.

⁵³ COMMUNICATION In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by the Hungarian Helsinki Committee.

⁵⁴ For a detailed discussion of the judgment see: Zsolt Szekeres, Don't be fooled: Hungarian court ruling didn't allow pushbacks, <<https://www.euronews.com/2021/12/16/don-t-be-fooled-hungarian-court-ruling-didn-t-allow-pushbacks-view>>.

⁵⁵ <https://ec.europa.eu/commission/presscorner/detail/EN/IP_21_5801>.

⁵⁶ The EU Commission's communication can be found at the following link: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801>.

D. 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 caution⁵⁷. 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 Scheppele⁵⁸, 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

⁵⁷ A. von Bogdandy, Fundamentals on Defending European Values, *verfassungsblog*, 12 November, 2019. <<https://verfassungsblog.de/fundamentals-on-defending-european-values/>>.

⁵⁸ 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/>>.

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 choices⁵⁹.

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.”⁶⁰

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.

⁵⁹ <<https://www.osce.org/odihr/elections/hungary>>.

⁶⁰ <<https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/>>.

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'.⁶¹ 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".⁶² 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.

E. 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 almost fifteen 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.

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

⁶¹ Decision 22/2016 AB of the Constitutional Court of Hungary, para [68]. For a detailed analysis of the decision, see Gábor 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* (2018) 23-42.

⁶² *Ibid.*

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 discussed here 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. Unfortunately, the newly introduced economic conditionality mechanism has still not changed the authoritarian regime in Hungary, but this and the use of the Charter of Fundamental Rights of the EU seem to provide the only way for the discontinuation of the previous unprincipled protection of Hungary's autocratic government and the start of serious enforcement of the values of democracy, the rule of law, and fundamental rights that makes up the EU's ideological foundation. The consequential use of value conditionality is also the EU's interest, because otherwise it is doomed to fail as a value community, and may fall apart altogether as a result. But this isn't only in the EU's interest, but also that of Hungary, where also due to the worsening economic situation partly caused by the EU sanctions sooner or later the population may realize the disadvantages of the use of the value conditionality for their own country.

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