Ákos Bence Gát

A Critical Analysis of EU Policy on the Rule of Law: Facts, Challenges, Dilemmas

The aim of this paper is to review how and through what steps the rule of law became a central element of the EU's institutional and political jargon, around which a new EU policy was built. During the 2011 Hungarian EU Presidency, the EU had no policy on the rule of law, but due to the specific Hungarian and European political context, this period laid the foundations for the subsequent, continuously expanding EU rule of law toolbox. The experience of the application of the Conditionality Regulation and the protracted negotiations over the disbursement of funds due to Hungary from the Recovery Fund also highlight the importance of the policy on the rule of law. Through this policy, the EU's central institutional and political powers seek to exert an increasing influence on internal politics, including economic and social policies of the Member States. Hungary, as one of the main Member States in the crosshairs of EU policy on the rule of law, is directly affected by its future development. However, it would be in the interest of the European Union as a whole, not only Hungary, to rethink this controversial policy.

Introduction

The notion of the rule of law is used in the debates between the various, mainly supranational institutions of the European Union and certain Member States. The issue is often permeated by heated political context. As a result, the European public in general, as well academics and experts are now generally aware of the existence of the rule of law debate in the EU. However, fewer people are aware of how exactly the concept of the rule of law has become the subject of new EU public policy over the last decade.

I have pointed out in detail in previous academic works that the institutional and political construction of the EU around the concept of the rule of law bears the classic features of policy building. Public policy is "the programme of action of one or more public or governmental authorities".[1] The definition is also applicable to policy on the rule of law, as since 2011 a number of reports, resolutions, official documents and academic articles have shaped the agenda for action on the rule of law that the European Union institutions continue to pursue today.[2]

And under this programme, a number of new instruments have been institutionalised in the European Union through which the EU institutions can subject Member States to ever wider scrutiny and, more recently, sanctions for alleged failures or potential failures in the rule of law.

[1] Hassenteufel 2011: 7.

[2] For more on the public policy nature of EU institutional action built around the European rule of law debate, see Gát 2021a; Gát 2021b: 9–10, 31–33, 255–261.

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Historical development of the EU policy on the rule of law

Two distinct phases in the historical development of EU policy on the rule of law can be distinguished. On the one hand, looking further back in time, it is possible to see how the concept of the rule of law emerged in the EU Treaties and how the idea that the rule of law in the Member States could become an issue for the EU to examine has gained ground in principle. On the other hand, a look at the recent past, covering the last 13 years, shows how the EU action in the name of the rule of law became a real policy matter, and how it has been institutionalised.

The emergence of the concept of fundamental rights and the rule of law in the EU Treaties

As far as the EU Treaties are concerned, the first literal references to the rule of law appeared in the Maastricht Treaty[3] signed in 1992, which means only thirty-five years after the founding of the European Communities.[4] The Maastricht Treaty mentions the rule of law three times. First, in the Preamble, it confirms the commitment of the Member States to the principle of the rule of law.[5] Then, already in the normative part of the Treaty, there is a reference to the rule of law in relation to third countries outside the Union. One of the purposes of development cooperation with these countries under the Treaty is to contribute to the development and strengthening of the rule of law.[6] Lastly, the reference to the rule of law is also reflected in the article of the Treaty relating to the common foreign and security policy, which states that one of the objectives of foreign and security policy is to "develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".[7] This illustrates that in the early 1990s, when the Maastricht Treaty was drawn up, the issue of the rule of law was not yet being addressed in relation to EU Member States but to third countries.

The Treaty of Amsterdam,[8] signed in 1997, is the first Treaty to explicitly deal with the topic of the rule of law in relation to the Member States. The Treaty already mentions the rule of law as a fundamental principle of the Union, common to the Member States.[9]

An even more important change introduced by the Treaty of Amsterdam is that, for the first time in the history of the Union, the Treaty introduces the idea that the EU can examine whether

3 Date of signature: 7 February 1992, entry into force: 1 November 1993.
4 In a similar sense, see Pócza 2019: 141–158.
5 Maastricht Treaty: preamble.
6 Maastricht Treaty: Article 130 U, paragraph 2.
7 Maastricht Treaty: Article J.1.
8 Date of signature: 2 October 1997, date of entry into force: 1 May 1999.
9 Amsterdam Treaty: Article 1(8).

Member States respect the principles enshrined in the Treaty, including the rule of law.[10] The Treaty of Amsterdam also foresees that if shortcomings are found in these areas, certain rights of the Member State concerned, ultimately the right to vote, may be suspended. This passage is the ancestor of the current Article 7 of the Treaty on European Union. It is worth noting that it was first inserted in the Treaty forty years after the founding of the European Communities.

The Treaty of Amsterdam was amended in this way because of the prospects for enlargement of the European Union in Central and Eastern Europe. From a Western point of view, in these countries which recently liberated from communist dictatorship, democratic values and the rule of law were not as firmly established as in Western Europe. This perception is reflected in the Commission's 2003 communication on the application of Article 7, which identifies the forthcoming enlargement of the Union as the main reason for examining the Member States' respect for democracy and fundamental rights.[11] There are also references in academic literature which confirm this statement, for example the chapter on the origins of Article 7 TEU in the commentary on the Treaty by Hermann-Josef Blanke and Stelio Mangiameli,[12] and Bertrand Mathieu's *Law against Democracy?* In the latter, the author points out, that a sceptical approach towards the Central and Eastern European Member States still prevails in Western Europe.[13] A contradictory situation has emerged. The suspicious attitude towards the 'new' Member States is rooted in their totalitarian past. However, this approach ignores the fact that dictatorial regimes were imposed on these countries from outside, while their current constitutional rules do not allow for such a 'deviation'. In fact, in Hungary, consolidating the rule of law was one of the most important objectives after the change of regime. The Constitutional Court treated this objective as the highest priority, which sometimes even led to the omnipotence of the concept of the rule of law.[14]

The Treaty of Nice[15] signed in 2001 continued the trend set by the Treaty of Amsterdam. Among other things, the Treaty of Nice supplemented the procedure established by the Treaty of Amsterdam by introducing an early warning mechanism, which enabled the European Union to take action against a Member State not only in the event of a serious breach of fundamental principles being established, but also in the event of a "clear risk" of a breach of these principles. This new, additional procedure does not provide for sanctions, but only allows the Council to adopt "recommendations" to the Member State in question to put an end to the situation that threatens the rule of law.[16]

Following the last treaty change by the Lisbon Treaty signed in 2007, the current Article 7 TEU essentially retained the solutions set out in the Treaties of Amsterdam

[10] Amsterdam Treaty: Article F.1.
[11] European Commission 2003: 4.
[12] Blanke–Mangiameli 2013: 356.
[13] Mathieu 2017: 131.
[14] For a contemporary analysis of the strengthening of the rule of law, see Varga 2021. For more details on the excessive use of the concept of the rule of law, see Varga Zs. 2019.
[15] Date of signature: 26 February 2001, date of entry into force: 1 February 2003.
[16] Treaty of Nice: Article 1.

and Nice. Currently two types of procedure exist. The first type of procedure, under Article 7(1), makes it possible to establish that there is a clear risk of a serious breach of the values listed in Article 2 TEU and to formulate non-binding recommendations. The procedure can be launched at the initiative of the European Commission, the European Parliament or one third of the Member States. A clear risk of a serious breach then requires a four-fifths majority in the Council and the consent of the European Parliament.

The second type of procedure, under Article 7(2), can already be used to establish a serious and persistent breach of the values listed in Article 2 TEU. This procedure can only be initiated by the Council or the Commission, not by Parliament. The adoption of a final decision, which may already entail sanctions against the Member State concerned, requires the unanimous vote of the Heads of State or Government of the Member States (except for the Member State concerned) and the consent of the Parliament.

Until now, there have been two Article 7 proceedings in the history of the Union, both under paragraph 1. The European Commission initiated the procedure against Poland on 20 December 2017[17] and one year later the European Parliament initiated it against Hungary with its Sargentini resolution of 12 September 2018.[18] In the context of the proceedings, which have now been ongoing for six and five years respectively, hearings have been organised several times in the Council on the Member States concerned. However, in neither case the Council has come to a decision.

Over the last decade or more, the Brussels establishment has been trying to handle the Member States concerned through other methods. Instead of using treaty provisions, the EU institutions have sought to create alternative instruments to put Member States under surveillance in the name of the rule of law. In the next section, I will briefly review these instruments, which have led to the institutionalisation of the policy on the rule of law.

The institutionalisation of the EU's policy on the rule of law

The Commission's rule of law framework

The first rule of law instrument was created by the Commission in 2014 and became known as the new EU framework to strengthen the rule of law (the "rule of law framework"). The Commission announced in its Communication of 11 March 2014 that it considers it necessary to create a new instrument that can also address cases "of concern" that fall outside the scope of EU law and where, therefore, it cannot launch infringement proceedings under Article 258 TFEU.[19] However, in designing the new instrument, the Commission did not depart significantly from the model of infringement procedures. Under the rule of law framework, the Commission can question the different national governments in a structured dialogue similar to the one applied in case of infringement procedures.

[17] European Commission 2017b.
[18] European Parliament 2018.
[19] European Commission 2014.

What distinguishes the rule of law framework from infringement procedures is the absence of a judicial phase in the latter, i.e. the Commission cannot refer Member States with which it still has disagreements to the Court of Justice of the European Union after the dialogue has been concluded. The absence of a judicial component also means that the procedure cannot be sanctioned. While in the case of infringement proceedings, the Court of Justice can condemn the Member State and order it to change its national legislation or practices in line with the Commission's expectations and impose a fine, there is no possibility of imposing a similar coercive sanction in the context of the rule of law framework.

Although the Commission's rule of law framework is a pioneer in the creation of a supranational "rule of law" oversight instrument over Member States, it has only been used once by the Commission. Under this mechanism, the Commission launched a procedure against Poland on 13 January 2016, mainly because of concerns about the independence of the Polish judiciary.[20] However, the Commission failed to persuade Poland to change the practices criticised under the rule of law framework. Therefore, it concluded the procedure by launching Article 7 proceedings against Poland almost two years later.

The Council's rule of law dialogue

A few months after the Commission Communication on the rule of law framework, the Council introduced the so-called annual rule of law dialogue. On the basis of a press release of 16 December 2014, the Council wished to address the rule of law in an annual general political dialogue, while preserving the sovereignty of the Member States and fully respecting the rules on the division of competences in the EU Treaties.[21]

However, the Council's dialogue on the rule of law has undergone a significant transformation over the years. In the beginning, for example during the 2015 Rule of Law Dialogue, Member States did not examine each other's rule of law situation but had a general exchange of views on a selected rule of law topic.[22] From the second half of 2020, at the initiative of the German EU Presidency, the main rule of law developments in the Member States, identified as an additional component to the general dialogue, started to be discussed in the General Affairs Council.[23] The Council's rule of law instrument, originally intended as an alternative instrument to supranational rule of law control, ended up by embracing the trend in the supranational institutions of the Union and started looking at the rule of law in individual Member States.

[20] European Commission 2016.
[21] Council of the European Union 2014b.
[22] Council of the European Union 2016.
[23] Wahl 2020.

The European Parliament's proposal for a rule of law mechanism

The left-wing majority in the European Parliament, as one of the main proponents of the rule of law policy, was not satisfied with the Commission's and the Council's instruments on the rule of law. The European Parliament adopted a resolution on 25 October 2016, following a report signed by Liberal MEP Sophia in't Veld (ALDE/Renew Europe), proposing a much more comprehensive rule of law monitoring system than the Commission and Council mechanisms. Like the Commission, the Parliament wanted to create a framework for an investigative procedure outside Article 7 TEU, which is effectively its precursor. However, unlike the Commission's rule of law mechanism, the so-called EU mechanism for democracy, the rule of law and fundamental rights proposed by the Parliament[24] was not intended to be used "on an ad hoc basis" against a country "if necessary", but envisaged regular annual monitoring of all Member States. The resolution outlined the structure of the mechanism, in which the Parliament and the various NGOs and civil society organisations would have a much more prominent role than in the Commission's mechanism. It outlined a number of possible outcomes depending on the findings of the mechanism, including the possibility of triggering Article 7, as in the Commission's rule of law framework.

Since Parliament's proposal would have required a legislative procedure, and the Commission alone has the power of initiative in this respect in the European Union's institutional system, the proposal of the Parliament was not implemented in the absence of the Commission's support. On 17 January 2017, the Commission responded to the Parliament's request in a formal communication, stating that it had serious doubts about the necessity and feasibility of the mechanism. In fact, it has questioned the legality of some elements of the proposal and raised concerns about institutional legitimacy and accountability.[25]

The Commission's response to the European Parliament's proposal shows that the EU institutions are also competing with each other on the margins of the rule of law debate. Their aim is to use this issue to strengthen their power. In the different procedures that they proposed to supervise the rule of law, the European Commission and the Parliament each sought to strengthen its own powers, while, at the same time, they criticised each other's proposals.[26] I will further illustrate this phenomenon in the next section where I will discuss the annual rule of law reporting system of the Commission.

[24] European Parliament 2016.
[25] European Commission 2017a.
[26] See in more detail Gát 2021b: 96–106.

The Commission's annual Rule of Law Report

The European Parliament's proposal, which never became reality due to the above mentioned reasons, did have however an impact on the thinking of the EU institutions. Two years after the refusal by the Commission, the Commission itself came forward in 2019 with a proposal for a systematic annual rule of law audit of all Member States. The first annual rule of law report was published in September 2020, in which the Commission assessed each Member State individually in four pre-defined rule of law-related thematic areas.[27]

While the Commission's annual reporting system is very similar to the proposal made by the Parliament in 2016, there are also significant differences between the two. While in its 2016 proposal, the Parliament wanted to give a prominent role to itself and to a so-called independent panel of experts, the Commission plays the main role in the Commission's annual rule of law reporting system. In contrast to the Parliament's proposal, the Commission staff assesses the different Member States in the annual rule of law report. The spectrum of the assessment is also much narrower, limited to the judicial system, anti-corruption, media pluralism and other institutional issues related to checks and balances. All this shows that the Commission wished to retain its room for manoeuvre in assessing Member States' compliance with the rule of law and did not want to give up this leverage to the benefit of other institutions, in particular the European Parliament. Although the Commission's annual report on the rule of law still does not fully meet Parliament's expectations,[28] the Commission has been producing its annual rule of law report since 2020.

"Rule of law" conditionality regulation

Other instruments of EU rule of law policy include the rule of law conditionality regulation, which allows the Council to suspend EU funds due to Member States on a proposal from the Commission. On 2 May 2018, the European Commission presented a proposal for 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 part of the Union's Multiannual Financial Framework (MFF) package for 2021 to 2027.[29] It was on the basis of this proposal that, after several amendments, the Regulation "on a general regime of conditionality for the protection of the Union budget" (hereinafter the conditionality Regulation or the Regulation), published in the Official Journal of the European Union on 16 December 2020, was adopted.[30] The Regulation was unusually accompanied by interpretative

[27] European Commission 2020a.
[28] European Parliament 2020b.
[29] European Commission 2018.
[30] Regulation (EU, Euratom) No 2020/2092/EU of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

provisions in the conclusions of the European Council of 16 December 2020. The highly controversial nature of the text adopted is also reflected in the fact that Hungary and Poland have subsequently sought its annulment before the Court of Justice of the European Union (hereinafter "the Court"). Although the Court of Justice eventually dismissed the Hungarian and Polish appeals, the Regulation still raises significant dilemmas, which will be discussed later in this paper.

It is worth noting at the outset that the conditionality regulation has been a major victory for the political and institutional forces pushing for EU control of the rule of law over the Member States. Their long-held aim was to enable the EU institutions to exert pressure on Member States not only through political but also through financial means. Although the idea of financial sanctions linked to the rule of law was still a very bold idea in the early 2010s, and therefore not included in the first rule of law instruments, it was present in the political arena from the very beginning of the rule of law debate. This is illustrated, for example, by the letter addressed by the Foreign Ministers of Germany, Denmark, Finland and the Netherlands to the President of the European Commission on 6 March 2013.[31] These foreign ministers, including Frans Timmermans, who later became EU Commissioner for the Rule of Law and then stood as the European Socialist front-runner in the EP elections, called for the EU to introduce a rule of law mechanism against Member States as soon as possible. The letter also said that "as a last resort, the suspension of EU funding should be possible". This idea was implemented in the 2020 conditionality regulation.

The regulation allows the Council to take action at the initiative of the Commission if it is established that "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way".[32] Under the Regulation, the Commission can raise concerns about a Member State and ask it to remedy issues it considers problematic. If the Commission and the Member State cannot reach agreement on the issues raised, the Commission may propose measures under the regulation, which it will submit to the Council. The Council, acting by a qualified majority, decides on the Commission's proposals for action and may adopt, reject or amend them.

As for now, the mechanism has been launched only once in the EU's history. On 25 April 2022, two days after the Hungarian parliamentary elections, Commission President Ursula von der Leyen announced that the conditionality regulation would be applied to Hungary.[33] Negotiations between the Commission and Hungary have started in the framework of the procedure. Although the Hungarian Government has taken a number of measures to address the concerns of the EU body, the Commission has proposed the partial suspension of certain EU funds, which was voted by the Council on

[31] Letter from the Foreign Ministers of Germany, the Netherlands, Finland and Denmark to the President of the European Commission, 6 March 2013.
[32] Regulation (EU, Euratom) No 2020/2092/EU Article 4(1).
[33] Judi 2022.

12 December 2022.[34] The various procedural steps were preceded by complex political and diplomatic negotiations.[35] Negotiations between the parties are still ongoing but have not yet reached a settlement. With the European Parliament elections approaching, there is a growing likelihood that a full resolution of the problem will be postponed to the next institutional cycle, even if there are occasional press reports suggesting that a partial agreement is in the offing.

EU policy on the rule of law policy in the context of the 2011 Hungarian EU Presidency

The relationship between the European Union's rule of law policy and the Hungarian EU Presidency in the first half of 2011 is complex. On the one hand, the protection of the rule of law in the EU was not among the policy priorities of the Hungarian Presidency. The reason is simple, and can be traced back not to the thinking of the Hungarian Presidency, but to the political context of the period. In the early 2010s, the issue of rule of law control over Member States was quite simply not yet on the political and institutional agenda of the European Union. The issue of the rule of law, which is now a mainstream issue in the thinking of the institutions, and which permeates many debates and resolutions in the European Parliament, was not the subject of political reflection at a level that would have justified any EU Presidency addressing the issue.

This is not to say that the dilemma of what the European Union can do when it has concerns about the political orientation of a Member State has never arisen before. Indeed, in Western Europe, the case of Jörg Haider's party (FPÖ) entering the Austrian government coalition following the Austrian parliamentary elections of October 1999 has already caused a stir. However, in that specific case, the EU Member States expressed their displeasure and tried to put pressure on Austria through traditional bilateral diplomatic channels rather than through EU-level instruments. The Haider episode thus did not lead to the EU institutional politicisation of the rule of law issue.

It is also a misconception that EU Member States would have learned from this case and enshrined the ancestor of the Article 7 procedure in the Treaty. Indeed, chronologically speaking, Haider's accession to power could not have influenced the introduction of the rule of law procedure, which is the predecessor of Article 7, since it was introduced by the Treaty of Amsterdam signed on 2 October 1997, two years before the Austrian elections and the formation of the government in question. This episode could only have influenced the Treaty of Nice, which, as we have seen above, added to the rule of law procedure an element which now allowed Member States not only to establish a breach of EU values but also to declare a clear risk of such a breach.

The Treaty of Amsterdam's clause on the control of the rule of law over Member States only proves that, as I have explained in detail above, potential political concerns

[34] Council of the European Union 2022.
[35] Gát 2022a; Gát 2022b; Gát 2022c; Gát 2022d.

over the respect of fundamental rights and EU values in Central and Eastern European Member States has already been raised in the European Union earlier. A closer look at the historical context suggests that the phenomenon may be most closely linked to the mistrust of the Central and Eastern European Member States, whose prospects of EU accession were already a major issue on the European political agenda in the late 1990s and early 2000s, i.e. at the time of the Amsterdam Treaty.[36] In this way, the core of the rule of law control of Member States was already present before the 2011 Hungarian EU Presidency, but without the issue being the subject of much public attention and political action.

However, EU policy on the rule of law has a different, special tie with the Hungarian EU Presidency in the first half of 2011. It is a fact that the rule of law issue appeared first on the European political agenda during that period, essentially as part of the political attack on the Hungarian Government.

The issue of the rule of law has been politicised by European left-wing political forces since the early days of the Hungarian Presidency. Viktor Orbán, as the leader of the Member State holding the rotating presidency of the Council, attended the plenary session of the Parliament in Strasbourg on 18 January 2011, in line with EU practice, to present the country's programme for the EU. However, the programme itself received little attention during the session, as the European Parliament's left-liberal MEPs launched a series of strong attacks on the Hungarian Prime Minister. Referring to the new Hungarian media law adopted in December 2010, they claimed that freedom of expression and democratic principles were in danger in Hungary.[37] Thus, the agenda item originally dedicated to the presentation of the Hungarian Presidency's programme quickly turned into a heated debate on the "situation in Hungary".

Daniel Cohn-Bendit, then leader of the Greens, for example, criticised the Hungarian Prime Minister in a personal tone, saying that Viktor Orbán was "on the way to becoming a European Chávez, a national populist who does not understand the essence and structure of democracy".[38] The tone of the very heated debate was already set by numerous MEPs welcoming the Hungarian Prime Minister in the meeting room with tapes over their mouths, holding up blank pages which were intended to symbolise the front pages of the newspapers which they thought were being threatened by censorship in Hungary. The start of the Hungarian Presidency was also overshadowed by the fact that in December 2010 and January 2011, several Hungarian newspapers published blank front pages or front pages demanding media freedom in protest against the media law.[39] In parallel, critical articles appeared in the Western European media, for example "Heavy Burden for the

[36] Gát 2021a.
[37] Act CLXXXV of 2010 on Media Services and Mass Communications. For a comprehensive expert analysis of the media law debates see Koltay–Lapsánszky 2011.
[38] Speech by Daniel Cohn-Bendit in the European Parliament on 18 January 2011.
[39] Médiafigyelő 2010; Origo 2011.

Hungarian Presidency",[40] "Authoritarian Putrefaction",[41] "The Putinisation of Hungary",[42] "Hungary: Freedoms Trampled on by Authority".[43] Major international NGOs such as Amnesty International[44] or Human Rights Watch,[45] as well as several Hungarian NGOs such as the Hungarian Civil Liberties Union (Társaság a Szabadságjogokért)[46] have also criticised the new legislation.

During the 2011 Hungarian EU Presidency, the political debates launched by the left wing of the European Parliament[47] provided the impetus for the politicisation of the concept of the rule of law in the EU arena. The successive resolutions adopted by the European Parliament[48] ensured that the issue remained permanently on the European political agenda and contributed greatly to its institutionalisation, as described in the previous point.

Current state of play and challenges of EU policy on the rule of law

While the EU's policy on the rule of law has become a robust policy through institutionalisation, it raises a number of dilemmas of principle and practice that call into question its long-term sustainability.

Objectivity should be an essential element of a system of instruments that is allegedly meant to defend the rule of law against political arbitrariness. However, the primary challenge for rule of law policy is that it is highly exposed to political will.

EU institutions conduct rule of law investigations in the name of legal principles, but the procedures are political in nature. On the one hand, by the rule of law tools, EU institutions always scrutinise the political measures of national governments and parliamentary decisions, so the issues under scrutiny are largely political in nature. On the other hand, the main actors in the procedures – the European Commission, the European Parliament and the Council – are not neutral institutional fora but political bodies. It follows that political considerations, rather than objectivity, play a key role in their decisions.

The contradictions we can observe in the use of rule of law instruments also reflect the incapacity of the policy on the rule of law to function based on objectivity. It is not clear, for example, on what basis the Commission decided to apply its rule of law framework only to Poland? How is it possible that the European Parliament has launched the Article 7

40 Deutschlandfunk Kultur 2011.
41 Welt 2010.
42 The Washington Post 2010.
43 Le Monde 2011.
44 Amnesty International 2011.
45 Human Rights Watch 2011.
46 TASZ 2011.
47 See, for example, the results of the vote on the European Parliament resolution of 10 March 2011 on the Hungarian media law.
48 European Parliament 2011a; European Parliament 2011b; European Parliament 2012; European Parliament 2013.

procedure against Hungary, while the Commission did not do so and did not even examine Hungary under the rule of law framework? How to explain that the Commission then started the conditionality mechanism against Hungary, while it did not apply it to Poland? If we stick only to Hungary and Poland, the two countries usually targeted by policy on the rule of law, we can observe such kinds of contradictions. Should EU institutions evaluate the situation of the rule of law in Member States based on objective criterion and using the same standard for all, they should not come to contradictory results.

These dilemmas show that the political bodies involved in rule of law policy do not decide on the basis of an objective, coherent legal logic, but on a discretionary basis.

On this point, it is noteworthy that Parliament itself has criticised the Commission's discretionary powers in applying the rule of law framework. In its above-mentioned resolution of 2016, Parliament justified its proposal for an annual rule of law inquiry to be extended to all countries precisely on the grounds that the 2014 rule of law framework gave the Commission too much discretion as to which Member States to include in the inquiry.

In practice, however, it has become clear that the annual rule of law reporting system alone cannot address either the concerns about the lack of objectivity. The fact that the Commission now scrutinises all Member States annually does not necessarily mean that it applies the same standards and rigour to all of them. An emblematic example of this is that the Commission, in its first annual report on the rule of law, expressed concern that the powers of the National Judiciary Council in Hungary were not broad enough, while it did not blame Luxembourg for the fact that no such institution existed in the country. What is more, Luxembourg has been praised and commended for the fact that its Parliament was about to consider setting up a Council of the Judiciary.[49]

Practice shows, that it is highly questionable whether the Commission intends to apply equal standards in rule of law procedures at all. But even if there were the political and institutional will to do so, it is questionable how Commission officials could successfully examine different constitutional systems according to the same standards. This is a major challenge even for bodies like the Venice Commission, which are made up of professionals with extensive expertise in public law and a long professional track record.

Another major challenge for European integration is the export of national domestic policy debates to the European Parliament through the policy on the rule of law. This is because the debates in the national and European political arenas have different consequences.

At the national level, the government and the ruling parties are criticised by national MPs in opposition, whom the national electorate mandated to do so. This is the most basic and natural part of democracy. In contrast, when they debate on the governmental measures of a Member State in the European Parliament, the national government or MEPs belonging to the same political majority than the national government, are confronted by politicians from other European countries, and possibly by politicians

[49] European Commission 2020b; European Commission: 2020c.

belonging to the ruling political majority of these countries. This means that the European Parliament can indirectly bring the political leaderships of different European countries face to face on their domestic policy issues. On the one hand, this situation raises the question of the legitimacy of foreign politicians to intervene in the domestic politics of another country. On the other hand, the constant debate on each other's domestic policies creates tensions between Member States. This runs counter to the EU's basic idea that the EU institutional system should promote mutual respect and peaceful cooperation between European nations.

At present, the debate on the rule of law in Europe is generally focused on governmental measures in Central and Eastern Europe, including Poland and Hungary. However, the generalisation and extension of the policy on the rule of law to all Member States, for example through the annual rule of law reporting system, risks increasing the chance of future confrontation between Member States. "Is it really necessary to turn us into a theatre for settling national political battles?" – asked French politician Joseph Daul, then President of the EPP Group in the EP, in March 2011 during one of the first debates on Hungary in the European Parliament. It is interesting to note that what was once a rhetorical question has now become a reality, a daily practice, to the extent that some MEPs have specialised in commenting on domestic political developments in other countries.[50]

In addition to these problems of principle, the EU's policy on the rule of law also raises significant legal concerns. The scepticism by which the Council received the Commission's 2014 rule of law framework illustrates this fact. One can still read online a highly critical legal opinion issued by the Legal Service of the Council on 27 May 2014. In this study, the legal experts demonstrate clearly that the Commission had neither the legal basis nor the powers to establish rule of law control over Member States.[51] One of the main arguments of the Legal Service is that the Commission's rule of law framework is an instrument that circumvents the procedure under Article 7 TEU.

In the interinstitutional dispute, the Commission defended with the main argument that the rule of law framework is not a circumvention of Article 7, but an internal tool for the Commission to assess whether it is necessary to open Article 7 proceedings against a Member State or not. However, according to the Council Legal Service, "respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU". The opinion also adds that "the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them".

This opinion highlighted a fundamental legal problem with the EU's rule of law control over Member States. Nevertheless, subsequent rule of law instruments, apart from the

[50] See for example the twitter posts of German Green Party MEP Daniel Freund [@daniel_freund]. Online: https://twitter.com/daniel_freund

[51] Council of the European Union 2014a.

initial form of the Council's rule of law dialogue, have failed to resolve this dilemma. In fact, the problem has only got worse as EU institutions have put in place more and more extensive rule of law tools.

This is particularly the case with the conditionality regulation, which already has significant legal, financial and economic consequences for the Member State concerned. As already mentioned, Hungary and Poland have challenged the Regulation before the Court of Justice of the European Union. In its judgment of 16 February 2022, the Court of Justice rejected the claims of the two countries.[52] However, the decision is questionable, especially if one takes into account the political context in which the Regulation was adopted, which the Court simply ignored.

As I have explained in detail in previous studies, the Court of Justice validated the Regulation arguing that it aimed to protect the budget of the Union and not to sanction breaches of the rule of law. By doing so, the Court obviously did not take into account the real political purpose of the Regulation.[53] The judgment interprets the conditionality Regulation as an instrument exclusively to protect the Union's budget, while in the political arena and in the public discourse the advocates of the Regulation openly presented as a victory the fact that the EU can from now on financially sanction Member States, which are allegedly in breach of the rule of law. The court ignored the fact that the Regulation was explicitly designed with the political aim of adding a financial sanctioning tool to the EU's rule of law toolbox.

It is all the more outstanding that this potential double reading of the conditionality regulation have been also confirmed by the Advocate General's opinion preceding the Court's judgment.[54] Although the Advocate General himself ultimately argued in favour of the budgetary protection nature of the Regulation and thus the rejection of the Polish–Hungarian claims, its reasoning had a virtue: unlike the judges of the Court, he did not remain silent on the possible double interpretation of the regulation. He also stated that if the Regulation were a rule of law sanctioning instrument it would not have a proper legal basis.

The economic and social impact of the policy on the rule of law

In recent years, advocates of the policy on the rule of law also made economic arguments for their policy. However, despite some arguments which could sound logic in theory, the reality is that the policy on the rule of law is actually threatening the economies of the Member States and the EU, rather than strengthening them.

Promoters of the policy on the rule of law argue that a well-functioning, stable legal system based on a strong rule of law are necessary for the economy to function properly. Failure to achieve these conditions in a Member State leads to the erosion of the economy.

[52] Court of Justice of the European Union 2022.
[53] Gát 2023: 95–109.
[54] Court of Justice of the European Union 2021.

That is why, the EU needs to exercise control over the rule of law in the Member States also to ensure a well-functioning economic system in the EU.

However, there is a fundamental contradiction if we take the example of Hungary. The EU wants to extend its rule of law control over the country, when its economy is actually showing significant improvement. Since 2010, the Hungarian economy has improved its performance, with outstanding results not only in terms of GDP growth and public debt, but also in terms of unemployment, poverty risk and demographics.[55] Indicators of the Hungarian economy show that actually the current Hungarian legal system allows for a smother operation of the state. If the logic of interrelation between economy and rule of law is true, Hungarian economic data suggest that the rule of law in Hungary is improving, not deteriorating. In this case, why does the EU seek for exercising more and more control over the country?

A further question is to what extent the issues raised in the context of the EU's policy on the rule of law, which are usually motivated by politics and ideology, actually affect the economic environment. For example, it is not clear to what extent the Hungarian migration policy can be linked to European economic and financial questions. Yet, this topic received particular attention in the Sargentini report by which the EP triggered the Article 7 procedure against Hungary.[56] Another question would be to what extent a country's position on gender ideology is in relation with the financial and economic interests of the Union. How could the Hungarian Child Protection Act become a horizontal enabling condition for Hungary's access to EU funds?[57]

The issue of corruption raised in the rule of law reports is one that can still be meaningfully linked to the issue of the economy. In this respect, however, it is not clear to what extent rule of law instruments such as the conditionality regulation can provide a stronger guarantee against fraud against the EU budget than the existing EU financial control mechanisms operated by the OLAF (European Anti-Fraud Office). All this suggest, that the economic argument in favour of the EU policy on the rule of law is rather a pseudo argument than one standing on facts.

In contrast, the negative consequences of the policy on the rule of law for the economy are direct and tangible. The suspension or withdrawal of EU funds, used as a tool in the conditionality regulation, has a clear and quantifiable negative impact on the Member State. In the case of Hungary, the Commission proposed in its Communication of 18 September 2022 to suspend 65% of commitments for three operational programmes under the Cohesion Policy. Following negotiations in autumn 2022 in the framework of which Hungary made important concessions, and request coming from the Council, the Commission later reduced the proposed amount to be suspended. However, it still represents a considerable budget commitment of around €6.3 billion.[58] These figures speak for themselves and demonstrate that the application of the conditionality regulation

[55] See data referred to in the article of Gát 2022e.
[56] European Parliament 2018.
[57] European Commission 2022.
[58] Council of the European Union 2022.

actually has the potential to cause a significant damage to the economy of the targeted Member State, rather than contributing in any way to its development and prosperity.

What is more, the historical context in which budgetary sanctions related to the rule of law are applied, further aggravates their harmful economic effects on EU countries. In the framework of the conditionality regulation, the EU decided to cut funds to Hungary at a time when countries across Europe are facing a severe energy crisis and record inflation. In a similarly difficult context of the Coronavirus pandemic, the European Commission did not disburse the funds due to Hungary and Poland, even though these Member States have suffered the same pandemic as the rest of the EU.

Moreover, the financial sanctions regime of the EU's rule of law policy poses asymmetric threat to different EU Member States. As the main beneficiaries of EU funds are countries of Central and Eastern Europe that joined the EU more recently, it is mainly these countries that could be affected by the withdrawal of the funds.

Finally, establishing a relation between policy on the rule of law and the disbursement of EU funds poses a major threat to the complex economic balance within the Union. Currently, the EU is based on market sharing and financial mechanisms that make it in the interests of all countries (both the economically less and more advanced countries) to realise a strong economic cooperation within the EU. In short, the less developed countries opened their markets to capital-intensive companies from the more developed, typically Western European Member States. At the same time, by embracing the EU's acquis communautaire, they have renounced to a number of classic tools in the hand of the state to boost national economy and strengthen national companies. In return, the European Union has created a cohesion policy, which seeks to help the less economically developed Member States catch up in the foreseeable future through EU funds. This is the basic deal to ensure fair economic balance within the EU.

However, the new disciplining function of EU funds as a result of EU policy on the rule of law, has put at risk the original function of EU funds described above. Indeed, if a Member State does not receive all or part of its EU funds for a significant period of time, it will sooner or later have no interest in maintaining the economic concessions it has made in return.[59]

The EU's policy on the rule of law has also a significant potential to bring transformation into the social structures of the Member States. In previous analyses, I have demonstrated in detail how the policy on the rule of law changes the balance of power within the Union. It contributes to overriding the rules on the division of powers between the Member States and the European Union.[60] Through policy on the rule of law, the EU tries to intervene more and more in social questions which are traditionally reserved to the Member States. Whereas the EU used to be based on the motto "united in diversity", there is now a growing tendency towards social uniformity through claims in the name of the rule of law and other European fundamental values.

[59] See, for example, the statement of András Schiffer, lawyer and former president of the LMP party, of 3 August 2023 (Hír TV 2023).
[60] Gát 2021b: 244–254.

This is the case, for example, with migration. The political forces currently in a hegemonic position in the European Union are seeking to oblige Member States to admit migrants on a regular basis under a quota system. However, a steady flow of immigration would sooner or later lead to a transformation of the structure of the society of some Member States. As the example of the Western European countries shows, mass immigration leads to a multicultural society, which is different from the current social structure of many Member States.

As I have mentioned it previously, the sceptical stance on migration often figures in the documents criticising the situation of the rule of law in a Member State. Pro-migration claims are translated into the language of the rule of law. According to the rule of law narrative, the Member States should promote a diverse, inclusive and open society that sets the rights of refugees and migrants as a top priority. Although the language is different, the goal is the same, and at the end of the day it results in the promotion and enforcement of a multicultural social structure.

The situation is similar for the highly sensitive gender issues, which are also a top priority for the EU's political and institutional power centres. Whereas in the past, international and supranational institutions traditionally let states a wide margin of manoeuvre on these issues, nowadays a progressive understanding of the concept of the family has become a fundamental requirement. Irrespective of the fact that the Member States have not conferred powers on the EU in this area in the EU Treaties, we are witnessing increasing political pressure from the EU institutions, largely through the policy on the rule of law.

The necessary reform of the EU's policy on the rule of law

Hungary is one of the main targets of the EU's policy on the rule of law, which makes its positions special at first sight. However, looking at the question more closely, Hungary's interests regarding future development of the policy on the rule of law may well coincide with those of the EU as a whole.

It would be essential not only for Hungary, but also for the EU, that the EU institutions do not approach the constitutional notion of the rule of law through a political lens. Objectivity should be the primary criterion in discussions on the rule of law. Any component of the policy on the rule of law that leaves room for politics in judging rule of law issues should be removed.

However, since the rule of law policy, both in terms of its actors, its procedural methods and its results, is inherently and deeply permeated by politics, it is questionable whether the system can still be reformed at all, or whether it might be more appropriate to abolish the current toolbox and, if necessary, to develop a completely new system following a new methodology. This does not mean that the ideal of the rule of law is not important in the European Union. On the contrary, the prestige of this fundamental principle of constitutional law could be restored if it were approached in a more balanced, fair and objective way. The ideal of the rule of law has its place in the community of

values of the European Union. Member States must be able to engage in dialogue on its content, implementation and challenges, while respecting each other's specific historical and cultural traditions, national identities and fundamental political and constitutional arrangements, in accordance with Article 4 TEU.

In addition to the above, it would be important to add a new dimension to the EU's rule of law discussion. EU institutions must respect the values enshrined in Article 2 TEU, including the ideal of the rule of law. Indeed, they are the primary addresses of these rules. For this reason, decision-makers should consider the establishment of a rule of law mechanism that assesses the functioning of the EU institutions themselves. Although the current EU policy on the rule of law focuses exclusively on the situation of the rule of law in the Member States, a rule of law mechanism that scrutinises the EU institutions would be in line with the original historical development of the EU.

In fact, this proposal would not mean a revolution, but a return to the treaties and to the traditional development trends of fundamental rights protection in the EU. For decades, the European Union (and its predecessor, the European Communities) has debated how to ensure that the protection of fundamental rights is guaranteed at the same level in the workings of EU institutions as in the constitutional systems of the Member States.

This dilemma led to emblematic court judgments. The German Constitutional Court's "Solange I" judgment of 29 May 1974 highlighted the shortcomings of the EU's fundamental rights protection.[61] In response to this judgment, the Court of Justice sought for the first time to compensate for the lack of treaty protection of fundamental rights by stating that the protection of fundamental rights is part of the "general principles of Community law". The Court of Justice derived this affirmation from the constitutional traditions of the Member States. This in itself shows that the legal principles, nowadays referred to as EU values, which the supranational institutions of the Union are increasingly calling the Member States to account for, are all derived from, and not superior to the constitutional traditions of the Member States.

The German Constitutional Court was only beginning to find European protection of fundamental rights reassuring in its "Solange II" decision of 22 October 1986, i.e. almost thirty years after the Treaty of Rome, which started European integration.[62] By this decision, it softened its earlier jurisprudence and assumed that the protection afforded by the European Court of Justice could be considered equivalent to German constitutional protection.

In the meantime, as we have seen, various principles have gradually appeared in the EU's founding treaties, which, since the Lisbon Treaty, are referred to as "values" in the Treaty on European Union. However, it is important to emphasise once again that these values were originally included in the Treaty in order to create fundamental rights guarantees against the EU institutions, not against the Member States. The development of a rule of law mechanism to monitor the rule of law functioning of the EU institutions would therefore follow naturally from the historical development of the Union.

[61] BVerfG (1974): Solange I (2 BvL 52/71), judgment of the BVerfG of 29 May 1974.
[62] BVerfG (1986): Solange II (2 BvR 197/83), judgment of the BVerfG of 22 October 1986.

Conclusion

The study reviewed the process through which the European Union's policy on the rule of law has evolved. I demonstrated that the concept of the rule of law made it into the text of the treaties relatively late, with the Maastricht Treaty. The basis for an EU control of the rule of law in the Member States appeared even later, by the Treaty of Amsterdam. Finally, it was not until the 2010s that an EU policy has begun to emerge around the notion of the rule of law.

The appearance of the rule of law on the EU political agenda is in a special relation with the 2011 Hungarian EU Presidency. The rule of law could not be among the priorities of the Presidency, as it was not a straightforward topic of EU politics that time. What makes the link however is that the left-wing of the European Parliament seized the opportunity of the Presidency to sharply criticise Hungarian domestic political developments under the new right-wing Hungarian Government. These criticisms were partly based on alleged breaches against the rule of law. They then pinned the topic on the EU's political and institutional agenda. Over the years, EU institutions successively adopted various 'rule of law' instruments, by which the EU policy on the rule of law became institutionalised.

However, the inherent contradictions in EU policy on the rule of law challenge the European Union. The policy is based on highly subjective elements, whereas any examination of the rule of law would by its very nature require a high degree of objectivity. There are also serious concerns about the legal basis for an increasingly robust policy. These dilemmas should be resolved because of the increasing legal, economic and social impact of the different rule of law mechanisms on the Member States and on the workings of the EU itself. A complete rethinking and reform of the EU policy on the rule of law would therefore not only be in Hungary's interest. It would also be important for the preservation of the unity and harmonious functioning of the European Union.

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