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Recent developments in the Rule of Law crisis in Poland and Hungary

Key words: liberal, material model of democracy, so-called illiberal model of democracy, enforcement of EU values, *Rule of Law Framework*, requirement of “conditionality”

Summary. The article deals with recent, repeated Rule of Law violations in Poland and Hungary and how the EU has dealt with them, or ought to deal with them in the future. Specific measures are recommended particularly in the budget process, where the new requirement of “conditionality” should be made use of. The impact of the war in Ukraine and the different attitudes of Poland and Hungary towards the Russian invasion on the rule of law crisis is taken into account.

Ostatnie wydarzenia związane z kryzysem praworządności w Polsce i na Węgrzech

Słowa kluczowe: liberalny i materialny model demokracji, tzw. nieliberalny model demokracji, ochrona wartości UE, ramy na rzecz umocnienia praworządności, mechanizm warunkowości

Streszczenie. Artykuł dotyczy niedawnych, powtarzających się naruszeń praworządności w Polsce i na Węgrzech oraz tego, jak UE poradziła sobie z nimi lub powinna sobie z nimi poradzić w przyszłości. Konkretnie środki są zalecane zwłaszcza w procesie budżetowym, w którym należy wykorzystać nowy wymóg „warunkowości”. Uwzględniono wpływ wojny na Ukrainie oraz różne postawy Polski i Węgier wobec rosyjskiej inwazji w Ukrainie na kryzys praworządności.

Background and Introduction

This article will focus on the most recent developments in the so-called rule of law crisis in Central and Eastern Europe and notably Hungary and Poland, taking into account the latest judgments from the European Court of Justice (CJEU), as well as the impact of the war in Ukraine. As a background, a few words will be said about the concept of democracy that the EU adheres to today and will be pursuing in the future.¹

¹ For a fuller view on that particular perspective, see Nergelius, Why the Rule of Law Can Never be Part of an ‘Illiberal’ Democracy, in A. Bakardjieva Engelbrekt/A. Moberg/J. Nergelius (eds.), *Rule of Law in the EU – 30 Years after the Fall of the Berlin Wall*, Swedish Studies in Eu-

The analysis is made against the somewhat sinister background of what the Hungarian Prime Minister Viktor Orbán in 2014 advocated as being an “illiberal democracy”, that would in his view respond to contemporary challenges such as migration and terrorism in a better way than the traditional, liberal and pluralist democracy.² A very important part of the background is of course also the deep conflict of values that has, at least for the last ten years, characterized the whole western world and of which the Russian attack on Ukraine in February 2022 is in a way a logical continuation or peak.

This crisis or clash of values did probably start in Hungary in 2010, with the great or even landslide electoral victory of the *Fidesz* party in Hungary, that won a majority of two thirds of the members in the Parliament and immediately began to use that huge majority in order to appoint new judges and chief executives for various public bodies. Without any doubt, Orbán’s ideas have inspired authoritarian, populist right-wing leaders in other parts of the world. My view presented below, however, is that after the introduction into the EU Treaty, gradually since 1993, of ideals such as human rights, democracy and rule of law, EU is bound – or has in fact bound itself – to a liberal, *material* model of democracy, based in particular on rule of law and human rights. While Orbán’s so-called illiberal model is based on nothing else – and respects nothing else – than the will of the alleged sovereign “people”, that is here given an almost mythical status, the liberal model of democracy currently prevailing in the EU requires that values such as human rights and rule of law are respected if democracy may be said to exist at all.

While the former “vision, emphasizing no other traditional democratic value than popular sovereignty itself, may with some good will be called a formal view of democracy, the view enshrined in Articles 2, 6 and 7 TEU is definitely a material one. This clash of values within the EU itself is likely to lead to a huge, maybe even dramatic conflict between the majority of EU Member States and the more authoritarian ones, the outcome of which is hard to predict. The low-intensive battle between the two colliding views at the EU summit in July 2020 was probably just a first glimpse of what may be expected in the future. At the same time, after the Russian attack on Ukraine and the very different positions taken by Hungary and Poland in relation to the war, there are now clear signs of a nuanced attitude from the EU institutions, where Hungary and Poland are no longer seen as identical.

ropean Law, vol. 15, Oxford 2021 (Bloomsbury) at p. 75–85, of which this article may be seen as an updated version, taking events until the end of April 2022 into account.

² The full text of Orbán’s speech, held at Tusnáföld in Romania on 26 July 2014, is available at <https://budapestbeacon.com>.

Here in this chapter, however, some solutions will eventually be suggested, based on the assumption that in the long run, it will be better for the EU to cling or stick to its basic idea(l)s of democracy, rule of law and human rights than to yield to populist temptations and allow Member States a wide discretion in such crucial matters.

The current legal framework

One clear aspect of the value crisis that distinguishes it from other current crises, in connection not least with the refugee crisis, is that it is of a highly legal nature, which means that some legal issues need to be clarified here. For instance, when Hungary announced in 2015 that it refused to take part in a common asylum policy and then brought a case to the CJEU together with Slovakia, followed by a legally doubtful referendum on the reception of refugees in October 2016, the mixture between legal and political measures in this area became clearer than ever, since this must be seen to amount to a basic challenge against the supremacy of EU law and against the principle of solidarity and loyalty that follows from art. 4(3) of the Treaty of the European Union (TEU). How can we today, some five years later, analyze the consequences of this unpredicted, unforeseen and deeply problematic situation?

The rule of law took place in the EU Treaty for the first time in 1993, when the three European Communities were changed into one European Union. At the entry into force of the Amsterdam Treaty, on 1 May 1999, the former Article F was changed into two new articles (Arts. 6 and 7 TEU) and the rule of law was made a principle upon which the Union was founded. The rule of law was, above all, instrumental in the context of the Eastward enlargement of the Union, since it was a pillar of the Copenhagen criteria, adopted in 1993 as the basic preconditions for states wanting to become EU members.

Since the entry into force of the Lisbon Treaty in 2009, the founding principles have been moved from Article 6 TEU to Article 2 TEU. Article 7 TEU contains the procedure envisaged for the protection of the values in Article 2 TEU, which means that the two articles together form the EU's main mechanism for the protection of rule of law in the Member States.

It may be noted that a widespread discussion on the application of Article 7 TEU (that was by then Art. 6) took place already in 2000, when a majority of the Member States appeared to be willing to introduce some very mild and, in reality, informal sanctions against Austria, due to the fact that the right-wing populist party FPÖ had joined the Austrian government. For a number of reasons though

(the most important being that Austria had in fact not violated any of the said values), the rather bizarre measures initiated at the time, such as refusals from other Member State governments to shake the hands of Austrian ministers or let them join common photo sessions, quickly ended.³

Still, for some time, all the other Member States refused to cooperate with the Austrian government, since it included members of FPÖ, though Austria had not (yet) violated any of the principles in Article 6 (1) TEU. This lack of legal clarity was addressed in the following treaty revision in 2000 (Nice Treaty), when Article 7 TEU was changed to include the possibility of determining the existence of both a breach and a clear risk of a serious breach. This is, in other words, the current legal point of departure.

The conflict on values within the eu (and the western world)

However, if we view the situation in a somewhat wider context, it is obvious that there is in fact a much wider crisis, that may here be referred to as a crisis of values, characterized by fundamental conflicts of values between different EU Member States and, even more, between different ideologies and ideological camps in the EU and the whole Western world.

This rather deep conflict of values, which is at the core of this article, is centered but not limited to Eastern Europe. As I will try to show at the end of this article, the war in Ukraine is in some way a logical consequence of the accelerated lack of faith in traditional western values that has now for a decade permeated Europe, though it has of course also other reasons, such as pure Russian imperialism.

The urgent refugee crisis that started in 2015 did increased this value crisis and has also led to a clear division between the North and Western EU Member States, on the one hand, and on the other most of the Eastern ones, who simply refuse to accept or host refugees from Africa and the Middle East. In 2015, Hungary and Slovakia even brought a case to the European Court of Justice (CJEU) questioning an EU decision on redistribution or repartition of refugee quotas (a case, or rather joined cases (C-643/15 and 647/15), which they eventually lost, through a judgment in September 2017).⁴ In the period while the outcome of that case was

³ This was partly also due to a report from three so-called 'wise men', former Finnish President Ahtisaari, former Spanish Foreign Minister Oreja and German law professor Jochen Frowein, published in September 2000 (Report by Martti Ahtisaari, Jochen Frowein, and Marelino Oreja, adopted in Paris on 8 September 2000, [92] ('Report') <<http://www.virtual-institute.de/en/BerichtEU/index.cfm>> at 12 December 2000.)

⁴ ECLI:EU:C:2017:631.

pending, but also afterwards, the EU has unfortunately not been able to advance significantly in this area.

A majority of EU states is also critical towards the authoritarian tendencies in countries such as Hungary and Poland. A crucial question for the future, then, is whether they should use the existing mechanisms of the EU treaties, such as qualified majority voting (QMV) in the Council and increased control of Member States who seem to ignore the rule of law, to enforce more liberal values on reluctant states, who seem to prefer an authoritarian model of society.⁵ How is that goal best achieved? And may authoritarian states even remain members of the EU under the current treaties?

Thus, the questions are these: Which possibilities do the EU treaties offer for a qualified majority of Member States (or rather, Member States who hold a qualified majority in the Council) to “curb” a minority of reluctant Member States, who seem to question and openly challenge the basic democratic ideals of the Union? It is interesting that now, since the war in Ukraine started and the obvious difference in attitude towards fascist Russia between Poland and Hungary is clear for everyone to see, also the EU Commission is starting to put harder pressure on Hungary while loosening its grip on Poland. Thus, at least in relation to the EU institutions, Poland has benefited from its tough line against Russia and its generosity towards Ukrainian refugees.

Once again, the event that in my view marked the beginning of the above described crisis or clash of values within the EU, was the landslide electoral victory in 2010 of the *Fidesz* party in Hungary, that won a majority of two thirds of the members in the Parliament. The initial moves of the *Fidesz* government to appoint new judges and chief executives for various public bodies were then followed by a new media law as well as a new constitution in 2011 and then also a decision to force all the judges at the age of 62 years or older into retiring. The media law strengthened the government’s control over all state media and the new Constitution has a remarkably nationalistic language and approach, while also curtailing the independence of the judicial system and huge parts of the public administration.⁶ In many respects, that is where the global right-wing populist movement that has since then shocked the Western world with such force must be said to have started.

⁵ In Art. 238 sect. 2-3 TFEU, qualified majority is defined as 72 % of the Member States, representing at least 65 % of the Union’s population or, when not all the Member States are participating, 55 % of the Member States representing at least 65 % of the Union’s population.

⁶ For an overview, see Nergelius, J., ‘The Hungarian Constitution of 2012 and Its Protection of Fundamental Rights’, Sieps (Epa) 2012:3, Stockholm, 2012. A more general perspective on the development, from 2010 until 2014, in Hungary and Romania, is provided in Bogdandy, A. von and Sonnavend, P., *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania*, Oxford/Portland, 2015.

These and other assaults on the rule of law and other crucial values stated in Articles 6 and 7 TEU did of course cause a number of reactions from the EU. Among the actions initiated by the EU, it may be noted that the EU Commission brought a case against Hungary concerning the forced retirement of judges older than 62 years to the CJEU, who found in 2012 that this amounted to unlawful discrimination on grounds of age (C-286/12). We may also point to the Opinion of AG Sharpston from October 2019, criticising Hungary, Poland and the Czech Republic for refusing to comply with the provisional mechanism for mandatory relocation of asylum seekers and the CJEU's judgment against these states of 2 April 2020.⁷ As late as in June 2020, the CJEU found that Hungary has violated EU law by striking down on the financing of NGO's and other civil organisations.⁸

As already noted, the CJEU found in 2012, when the EU Commission brought a case against Hungary concerning the forced retirement of judges older than 62 years, that this amounted to unlawful discrimination on grounds of age.⁹ Here, however, it seems that the Commission did deliberately choose that quite technical approach, with claims of an alleged treaty violation according to Article 258 TFEU, rather than claiming that the basic, fundamental principle of the rule of law was actually violated. In fact, the EU until very recently refrained from invoking Articles 6 and 7 TEU, according to which a Member State that does not respect the rule of law and/or other key values of the European integration (such as democracy, human rights, human dignity, freedom, equality, by reference to Art. 2 TEU) may temporarily lose some of its rights as a member, including the right to vote in the EU Council. Such a harsh measure against a Member State, that has to be decided upon by all the others, would of course be controversial for a number of reasons, but may in the long run be hard to avoid should one or a number of Member States repeatedly and almost provocatively – as has been the case in recent years – show that they do not want, and have in fact no wish whatsoever, to respect those basic values. And today, this looks more likely to happen for Hungary than for Poland, though the EU Commission initially seemed to give priority to strike down on Poland, oddly as it may seem.

Legal obstacles for actions against failing member states

Sadly enough, in the discussions that have occurred since 2010, concerning the situation in Hungary but, at times, also in, for example, Romania and, since early

⁷ The AG Opinion of 31 October 2019 and judgment 2 April 2020, Joined Cases C-715/17, 718/17 and 719/17. ECLI:EU:C:2020:257.

⁸ C-78/18, Commission v. Hungary.

⁹ C-286/12.

2016, not least in relation to Poland, governments have expressed profound doubts concerning the very *validity* of key European values such as the rule of law and human rights.¹⁰ This is something new and unforeseen in the history of the EU. It is thus no wonder that, since 2010, Hungary has been in the focus of this whole conflict, which has been escalating ever since 2011, at least from a political point of view.¹¹ From the legal point of view, anyhow, it seems very clear that Hungary has not complied with the key values of European integration (cfr. Art. 2 TEU).

Ever since 2011, it has been discussed when the threshold, in this respect, will be passed in relation to Hungary or rather when Article 7 must be activated if it is to have any real significance at all. Since 2015, also the resistance from Hungary and a few other Member States to the existing or proposed EU policy on refugees has added fuel to the fire, while the development in Poland, with its new conservative government, for a long time seemed to be almost a copy of what happened in Hungary a few years before.

A decision of the EU eventually to react against a Member State that is allegedly failing in this respect would, according to Article 7 TEU, have to be carried out in two steps. First, the Council must establish, with a majority of four fifths of the other Member States, that a clear risk exists that a Member State does really violate the basic values that are stated in Article 2 TEU. After that, the Council may unanimously (the failing state in question again not participating) declare that the state thus identified does in fact, in a serious and persistent manner, ignore these values.

In hindsight, the EU certainly took its time before reacting sharply to what happened in Hungary. Concerning Poland, on the other hand, the Commission initiated a dialogue with the then new Polish government already in January 2016.

Since March 2014, the EU Commission has at its disposal a new instrument for this and other current dialogues of the same kind with the Member States, namely the so-called *Rule of Law Framework*.¹² The main purpose of this instrument seems to be to make it possible for the EU Commission to start a dialogue with a Member State, based on critical observations of the development in the country

¹⁰ The most well-known statement with such a significance was probably the one made by the Hungarian Prime Minister, Viktor Orbán, who, in 2014, advocated an 'illiberal democracy' that would, in his view, respond to contemporary challenges such as migration and terrorism in a better way than the traditional, liberal and pluralist democracy. The full text of the speech, held at Tusnáfördö on 26 July 2014, is available at <https://budapestbeacon.com>.

¹¹ At the same time, there has been an intense legal discussion on the accession of the EU to the European Convention on Human Rights, particularly after the Opinion of the CJEU in December 2014 stating that such an accession would not be legally possible (Opinion 2/13). Still, the question when the majority of the EU Member States may wish to react against one or a few Member States who do, in fact, violate fundamental rights is, in fact, wider and more dramatic and, probably, also more urgent.

¹² COM (2014) 158.

in question, without having immediately to resort to the controversial and politically difficult procedure envisaged in Article 7 TEU. (In fact, the actual use of the procedure in Article 7(2) and (3) whereby a Member State might lose its vote in the Council does now seem more remote than ever, since Hungary has promised to use its veto in case of a vote on Poland and Poland has made a similar declaration concerning Hungary.)

It is hard to say whether the rather imminent use of this mechanism in relation to Poland, as opposed to the quite passive attitude initially shown towards Hungary, was due to the simple fact that the Commission thought that the Polish government would be more inclined towards constructive dialogue than the Hungarian one. There may also be other reasons, such as the fact that Hungary adopted a new constitution in 2011, after which Hungary did not violate its own, national rules as evidently as Poland has done since 2016. Nevertheless, the difference in the (strength of) reaction from the EU against the two countries was striking. And regardless of the Commission's reasons for its somewhat different approach to the two countries, it should also be noted that the Polish government has during the entire "dialogue" refused to provide the Commission with sufficient answers and full information. During this whole time, Poland has treated the Commission quite arrogantly, stating that it acts in accordance with its own Constitution (or rather the government's own interpretation thereof) and sometimes even responding to the Commission in Polish. In fact, when the Commission decided finally to present a reasoned proposal to the Council on 20 December 2017,¹³ it was partly due to the failure of the Polish authorities to engage 'in a constructive dialogue in the context of the Rule of Law Framework'.¹⁴ This somewhat arrogant attitude from

¹³ Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, COM(2017) 835 final, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 20 December 2017. On the same day, the Commission also referred an infringement case against Poland to the CJEU, C-192/18, *European Commission v Republic of Poland*, Judgment 5 November 2019 (ECLI:EU:C:2019:924) where the Commission contended that Poland had failed to fulfil its obligations under the treaties on two accounts. It thus held that Poland had breached its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the EU Parliament and Council of 5 July 2006 relative to the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and work, by introducing a retirement age of 60 for women and 65 for men for judges of the ordinary courts, public prosecutors and judges of the Supreme Court, and, secondly, that Poland had 'failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, by lowering, in Article 13(1) of the Amending Law of July 2017, the retirement age of judges of the ordinary courts, while at the same time vesting the Minister of Justice with a discretion to prolong the period of active service of individual ordinary court judges under Article 1(26)(b) and (c) of the same law'. CJEU agreed with this view.

¹⁴ See the European Commission, the press release 'Rule of Law: European Commission acts to defend judicial independence in Poland', 2017, IP-17-5367.

the Polish government may actually also have made the Commission more eager to bring cases against Poland before the CJEU.¹⁵ Furthermore, we may note that in April 2020, the Commission wrote a very critical letter to the Polish government, criticizing the highly controversial judicial law of 2020 that is said to be “silencing” judges. Here, the Commission clearly declared that unless changes in the law were made within two months, a new case would be brought to CJEU.¹⁶

Alternative routes for enforcement of eu values

As mentioned above, the EU until very recently refrained from invoking Article 7 TEU, according to which a Member State that does not respect the rule of law and/or other key values of the European integration may temporarily lose some of its rights as a member, including the right to vote in the EU Council, against Hungary or Poland. The same was true for Articles 2 and 6 of TEU. Here, however, we have seen a clear change in recent years, when arguments based on these values have been invoked against these two countries in a number of cases, notably by the EU Commission. Apart from the cases C-619/18, concerning the law on the Polish Supreme Court¹⁷ and the similar C-192/18¹⁸, we may here also point to the judgment against Hungary, Poland and the Czech Republic for refusing to comply with the provisional mechanism for mandatory relocation of asylum seekers of 2 April 2020.¹⁹ Also the highly controversial Hungarian law of 2020, giving the government more or less unlimited powers in the wake of the corona crisis – but without time limits – has given rise to heated debates within the EU²⁰, though the

¹⁵ Apart from C-192/18, *European Commission v Republic of Poland*, Judgment 5 November 2019 (ECLI:EU:C:2019:924), mentioned above in fn. 11, we may here also point to C-619/18, concerning the law on the Polish Supreme Court (Judgment 24 June 2019, ECLI:EU:C:2019:531) and the similar C-192/18 with a judgment on 5 December 2019 (ECLI:EU:C:2019:924). Also here Poland was found to have violated Article 19(1) TEU, on similar grounds as in the previous case. Finally, we may mention C-216/18, *PPU v Minister for Justice and Equality*, where the Irish High Court was in doubt on whether an alleged criminal could be extradited to Poland according to the European Arrest Warrant (EAW), given the risk that he would not enjoy a fair trial within the Polish legal system. The CJEU basically stated that such decisions by courts in other Member States will need to be based on the circumstances in the individual case; in other words, the general, unconditional obligation for national authorities to obey the EAW seems to have been suspended in relation to Poland.

¹⁶ IP/20/772, EU Commission, Press Release. – The law was originally adopted in December 2019, but entered into force in February 2020. See in this relation also the interim decision of 8 April 2020 in the case C-791/19, pending.

¹⁷ Judgment 24 June 2019, ECLI:EU:C:2019:531.

¹⁸ Judgment 5 December 2019, ECLI:EU:C:2019:924.

¹⁹ See the AG Opinion (Sharpston) of 31 October 2019 and Judgment 2 April 2020, cases C-715/17, 718/17 and 719/17.

²⁰ E.g. the heated debates in the EU Parliament in April and May 2020, that have now led the Parliament to ask for economic sanctions against Hungary. See Press Release 14 May 2020, 20200512IPR78917.

Commission did here choose to await further developments before taking action. Nevertheless, an eventual legal action before the CJEU was likely also here, but this particular act of legislation was abolished in June 2020.

Thus, the EU institutions now clearly are less hesitant than just a few years ago to invoke the values enshrined in Art. 2 TEU and to apply them in specific, concrete legal cases against EU Member States who fail to respect them. This is also highly logical, given that Art. 2 as well as Articles 6 and 7 TEU are all based on the idea of a *liberal* democracy, with a clear emphasis on rule of law and human rights. We may thus say that the EU, or at least its leading institutions such as the Commission, Parliament and CJEU, is now returning to, or rather for the first time trying to live up to the standard that it has set for itself and all its activities in the treaties. It is also important to underline that from the perspective of human rights and rule of law, the situation in Hungary and Poland today is far worse – and actually totally different – than in Austria twenty years ago. From the viewpoint of Europe’s authoritarian populists, what happened in Austria in 2000, when FPÖ temporarily joined the government without causing any real harm to rule of law or human rights, was just an appetizer, a “warm-up” for what is now happening in Hungary and Poland (and may happen in other countries as well). Once again, it is highly regrettable that the EU didn’t react quicker against the authoritarian development in Hungary, that was clearly visible already in 2011. But as always, late is better than never.

The most recent occasion where a majority of the Member States of the EU, including in fact all of its economic “net contributors”, tried to impose new conditions on notorious “rule of law-violators” such as Hungary and Poland was at the Special Meeting of the European Council in Brussels in July 2020 – the so-called corona summit, followed up at the meeting of the European Council in Brussels in December 2020. In the conclusions from the corona summit²¹, a connection was finally made between the right to receive financial support from the EU and the obligation to respect rule of law. The two relevant paragraphs read as follows:

“22. The Union’s financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU.

The European Council underlines the importance of the protection of the Union’s financial interests. The European Council underlines the importance of the respect of the rule of law.

23. Based on this background, a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority.

The European Council will revert rapidly to the matter.”

²¹ EUCO 10/20, CO EUR 8, CONCL 4, 21 July 2020.

After the summit, these provisions were criticized for being too vague. A previous version of the text is supposed to have been somewhat clearer, but this is not entirely clear. What may be a problem here, however, is the idea is to create a link between EU funding and the respect for rule of law. The Commission argues that respect for the rule of law is an essential precondition also for sound financial management and effective EU funding and therefore has for a long time argued for “a new mechanism to protect the EU budget from financial risks linked to generalized deficiencies as regards the rule of law”.²² The idea, then, is that if such deficiencies impair or threaten to impair sound financial management or the protection of the financial interests of the Union, EU funding may be stopped. Such a decision is to be proposed by the Commission and then adopted by the Council through QMV. This new procedure may be seen as quite radical as such, but at the same time, less than before is said about the possibilities to stop support to a Member State due to violations of human rights or rule of law as such, for their own sake, so to speak.²³ It may be noted that the possible negative economic effects of rule of law violations are perhaps sometimes hard to prove. Certainly, a relationship between rule of law and economic development and prosperity does exist, as clearly proved by many leading economic scholars such as Coase and others²⁴, but nevertheless, the “conditionality criterion” should perhaps be upheld for its own sake rather than be seen as a part of or complement to “the Union’s financial interest”.

The agreement finally reached in December 2020 was, unfortunately, not much clearer and has led to heated discussions among EU lawyers. In short, it means that payments from the EU budget to countries violating rule of law may be stopped, according to the new term “conditionality”, which means that this can only happen when the Union’s economical interests are jeopardised. This connection between rule of law and economic result has been severely criticised after the agreement in December 2020²⁵, where the criteria for withholding aid were made somewhat more precise and a possibility for CJEU to decide when the principle of rule of law had really been violated was introduced.

²² *Ibidem*.

²³ This deficiency is perhaps even clearer in the final version of the so-called Regulation on a General Regime of Conditionality for the Protection of the Union Budget that was finally agreed upon by the Parliament and the Council in December 2020 (2018/0136 (COD), PE-CONS 64/20, PE-64-2020-INIT). The exact scope of the now enacted rule, in relation to future violations of rule of law from EU Member States, will be viewed with considerable interest, to say the least.

²⁴ See e.g. Coase, *The Problem of Social Cost*, *Journal of Law and Economics* 1960 p. 1-44 or Douglass North, *The Rise of the Western World: A New Economic History*, Cambridge 1973.

²⁵ EUCO 22/20, CO EUR 17, CONCL 8 samt förordning 2020/2092.

Nevertheless, Poland and Hungary were still unhappy and thus brought joined cases to the CJEU on the alleged illegality of the agreement in January 2021.²⁶ As expected, the court rejected these complaints in February 2022, stressing that the requirement of conditionality and respect for “the sound financial management of the Union budget” is also a sign of solidarity between the EU Member States.²⁷ However, also future decisions from the EU Commission to actually withhold money to a state violating rule of law – that has actually been initiated in April 2022 – are likely to be challenged before the CJEU, which shows how fragile this compromise on “conditionality” really is.

This judgment came just a day and a week before the Russian attack on Ukraine. Although all EU Member States were initially able to decide quickly on joint sanctions against Russia and on receiving refugees from Ukraine, the difference between Poland and Hungary in relation to Russia soon became evident. Hungary receives refugees reluctantly and only thorough efforts by NGO’s, while Poland has received two million refugees. Poland is tough in its rhetoric against Russia and wants to send arms to Ukraine, while Hungary is undoubtedly the most Russian-friendly EU Member State. Orban even managed to win a parliamentary election in April 2022 by stressing the economic advantages of not taking side between Russia and Ukraine. Hungary, as the only EU Member State, wants to comply with the Russian demand for paying its gas with Russian currency, while Poland had its gas supplies cut off that same month.

This cynical Hungarian approach, which obviously illustrates the ideological friendship between the two dictators Orban and Putin, has however not won Hungary any new friends in Brussels or elsewhere in the EU. At the same time, the ideologically clear Polish position is met with sympathy throughout Europe and seems to give Poland at least a temporary “holiday” from the rule of law conflict. Thus, it is a sign of the new times that the EU Commission in April 2022 decided to trigger its rule of law mechanism for the first time only against Hungary, while not mentioning Poland.²⁸ The outcome of this process, that starts with a friendly letter to the Hungarian government, remains to be seen of course. The criticism against the conditionality requirement, and thus the need for the Commission to show a real impact of alleged rule of law violations on the EU budget, is already clearly visible.²⁹

²⁶ C-156/21, Hungary v. Parliament and Council, as well as C-157/21, Poland v. Parliament and Council.

²⁷ Ibid. Judgments 16 February 2022.

²⁸ <https://www.theguardian.com/world/2022/apr/05/european-commission-launches-rule-of-law-disciplinary-procedure-against-hungary>

²⁹ Ditto.

Conclusions

To sum up, then: At least as long as a clear majority of the EU Member States do still believe in the basic values enshrined in art. 2 TEU, it is in my view, in an ever more turbulent world, a good idea for the EU to protect and promote them, in spite of the short-term costs involved. In the long run, a steady and consistent stand in those value conflicts is likely to pay off and lead not only to a greater respect worldwide, but also to the EU finding itself, its own soul so to speak – which will then make it easier for the Union to deal with future conflicts of the same kind. And the fact that Poland is now met with more sympathy from the EU than for a long time is mainly due to the fact that at least in relation to Russia and Ukraine, it does now stand up for those values, perhaps more so than any other EU Member State – while Hungary has chosen a totally different path. This is not surprising for those who have followed the rule of law conflict for some time and observed the obvious differences between Poland and Hungary. Now, however, these differences may for the first time have real political and legal consequences.

The EU will quite simply be stronger and enjoy more “soft power” throughout the world if it does not lose sight of its core values. Such a stand is also likely to promote the unity between those Member States who will now refuse to back down in this crucial conflict.

References

- Ahtisaari, Martti / Jochen Frowein / Marelino Oreja, General Conclusions of the Report covering the Austrian Government's Commitment to the Common European Values and the Evolution of the Political Nature of the FPÖ, adopted in Paris on 8 September 2000, in: *Rivista di Studi Politici Internazionali*, Vol. 67, No. 4 (268) (Ottobre-Dicembre 2000), pp. 651–653, <https://www.jstor.org/stable/42738491>
- Bogdandy, A. von / P. Sonnavend, *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania*, Oxford/Portland, 2015.
- Coase, R.H., The Problem of Social Cost, *Journal of Law and Economics* 1960 p. 1–44.
- European Commission, ‘Rule of Law: European Commission acts to defend judicial independence in Poland’, 2017, IP-17-5367, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367 (access on 22nd November 2023)
- European Commission, Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, *Official Journal of the European Union*, L 17/50, 23.1.2018 (access on 22nd November 2023)
- European Commission, Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland, Brussels, 29th April 2020 IP/20/772.
- European Commission, Hungary's emergency measures: MEPs ask EU to impose sanctions and stop payments, 14th May 2020, 20200512IPR78917

Nergelius, J., The Hungarian Constitution of 2012 and Its Protection of Fundamental Rights, *Sieps (Epa)* 2012:3, Stockholm, 2012.

Nergelius, J., Why the Rule of Law Can Never be Part of an 'Illiberal' Democracy, in: A. Bakardjieva Engelbrekt/A. Moberg/J. Nergelius (eds.), *Rule of Law in the EU – 30 Years after the Fall of the Berlin Wall*, Swedish Studies in European Law, vol. 15, Oxford 2021 (Bloomsbury).

North, Douglass C., *The Rise of the Western World: A New Economic History*, Cambridge 1973.