

Ákos Bence Gát

## Perspectives of the European Rule of Law Debate – Is There a Place for Appeasement?

This study examines the impact of EU policy regarding the rule of law on the present and future of political unity within the European Union. The central question is whether the current political fault lines will remain with us for the foreseeable future and continue to widen, or whether there are possible ways out of the current divisive EU debate on the rule of law. The analysis evaluates more than a decade of EU political debate related to the matter of the rule of law and outlines possible scenarios for the future.

### Introduction

Since the early 2010s, certain political and institutional actors in the European Union have been increasingly critical of the policies of some of its Member States. Initially, criticisms were levelled at measures taken by the Hungarian Government, while later the EU started to question the existence of the rule of law in Hungary in general and later in other Member States, notably Poland. More than a decade after the emergence of these debates on the rule of law, it is important to analyse what can be expected in the future. Can the controversies surrounding the rule of law continue to be an integral part of the EU's political and institutional agenda, or can we expect a shift towards 'reconciliation'?

To explore the answers and possible future scenarios, this paper first reviews how EU policy on the rule of law has been institutionalised. It then explores some reasons why the rule of law debate might persist in the coming years. Finally, it will also outline some possible alternative scenarios that could lead to an easing of the controversy.

### **The trend: An ever-broader policy on the rule of law**

The 2010s saw the emergence of a new EU policy built around the notion of the rule of law in the European Union, whereby the EU institutions have successively put in place instruments to bring Member States under ever wider scrutiny.<sup>1</sup>

The first such instrument was set up by the Commission in 2014 and was called the new EU framework to strengthen the rule of law (the rule of law framework).<sup>2</sup> The rule of law framework is the Commission's existing instrument, based on the analogy of the procedural structure known from infringement procedures. As in the infringement procedure, the rule of law framework organises a structured dialogue between the Member

<sup>1</sup> GÁT 2021a: 9–10.

<sup>2</sup> European Commission 2014.

State concerned and the European Commission. However, there are significant differences between the rule of law framework and the infringement procedure as regards the possible outcomes if no agreement is reached between the Commission and the Member State during the phase of the dialogue. For infringement procedures, the dialogue phase is followed by the dispute coming before the Court of Justice of the European Union, whereas in the rule of law framework, this judicial phase is completely missing. This also leads to significant differences in the sanctions that can be imposed. If infringement procedures are initiated, the Court of Justice can condemn the Member State, order it to change its national legislation or practice in line with the Commission's expectations and impose financial sanctions (in lump sum and/or daily penalty payment form). No similar legal sanction can be applied in the rule of law framework, in the absence of which the Commission can only exert pressure by threatening to initiate one of the procedures under Article 7 TEU against the Member State concerned.

This first pioneering rule of law mechanism raised legal problems from the outset. On 27 May 2014, the Legal Service of the Council of the European Union warned of the illegality of the rule of law framework in a clear and precise legal opinion it issued, stating that the Commission had neither the legal basis nor the power to establish it.<sup>3</sup>

Following the creation of the Commission's rule of law framework, in 2014 the Council established the so-called Annual Rule of Law Dialogue, which was intended as a more modest instrument than the Commission's rule of law procedure, and more respectful of Member States' sovereignty. The Council announced in a communication on 16 December 2014 that it would organise a political dialogue between member states every year to promote and defend the rule of law. It stressed that "this dialogue will be based on the principles of objectivity, non-discrimination and equal treatment of all Member States". It also stated that this mechanism "will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures, [...] and their essential State functions". The Council has thus shown that it does not wish to remove the rule of law topic completely from the European political agenda, but has also indicated that the European Union's scrutiny of the rule of law in relation to the Member States must be kept within strict limits, by limiting it to an intergovernmental dialogue which respects the competences, equality and sovereignty of the Member States.

Over the years, the Council's Rule of Law Dialogue has undergone a major transformation. In the beginning, for example during the 2015 Rule of Law Dialogue, Member States did not examine the situation of the rule of law in specific EU countries, but had a general exchange of views on a selected topic related to the rule of law.<sup>4</sup> From the second half of 2020, however, at the initiative of the German Presidency, the main rule of law developments of Member States, identified as an additional component to the general dialogue, started to be discussed in the General Affairs Council (GAC).<sup>5</sup>

<sup>3</sup> Council of the European Union 2014.

<sup>4</sup> Council of the European Union 2016.

<sup>5</sup> WAHL 2020.

Following the Commission and the Council, the European Parliament also put forward its own proposal for an instrument through which the EU could monitor Member States in the name of the rule of law. Similarly to the Commission's rule of law framework, the Parliament also proposed an investigation procedure outside Article 7 TEU, which would have been used prior to the application of this article.<sup>6</sup> However, unlike the Commission's rule of law framework, the so-called EU mechanism on democracy, the rule of law and fundamental rights suggested by the EP in its resolution of 25 October 2016 was not intended to be used only in specific instances when a Member State would threaten the rule of law. Instead, the EP envisaged regular, annual monitoring of all Member States. The EP resolution envisaged the EP and the various NGOs and civil society organisations playing a much more prominent role in the mechanism than they do in the Commission's rule of law framework. Depending on the findings of the mechanism, the EP envisaged a number of possible outcomes, including the possibility of triggering Article 7.

The Parliament's proposal would have required a legislative initiative by the Commission in order to be implemented. The Commission, however, refused to provide one. In a formal communication on 17 January 2017, the Commission questioned the necessity and feasibility of the mechanism proposed by the Parliament, stating that "some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability".<sup>7</sup>

The Commission later reconsidered its initial rejection of an annual monitoring system and in 2019 decided to set up an annual rule of law reporting system similar to the one proposed by the Parliament. The first annual rule of law report was published in September 2020, in which the Commission assessed each member state individually on four pre-defined criteria, namely the judicial system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances.<sup>8</sup>

Although the annual reporting system is quite similar to the Parliament's proposal, it would be premature to conclude that the Commission has met the European Parliament's requirements by introducing it. There are substantial differences between the system of the annual rule of law mechanism as previously proposed by the Parliament and the Commission's annual reporting system on the rule of law. While the Parliament's 2016 proposal sought to give a significant role to the Parliament itself and to a so-called independent expert panel, these features are absent from the Commission's annual rule of law reporting system. This shows that the Commission wished to retain its room for manoeuvre in the assessment of the rule of law in the Member States and did not want to give up this leverage to the advantage of other bodies and in particular the European Parliament. The partly critical EP resolution adopted on 7 October 2020, one week after the publication of the Commission's first annual rule of law report, demonstrated that

<sup>6</sup> European Parliament 2016.

<sup>7</sup> European Commission 2017.

<sup>8</sup> European Commission 2020.

the Parliament remains at loggerheads with the Commission on this issue.<sup>9</sup> Despite Parliament's criticisms, the Commission has published its annual Rule of Law Report since 2020, and it is now an established element of the EU's rule of law toolbox.

Another tool of EU policy on the rule of law is the rule of law conditionality regulation, which allows the Council to withdraw EU funds from member states based 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 from 2021 to 2027.<sup>10</sup> It was on the basis of this proposal that, after significant amendment, 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.<sup>11</sup> Unusually, the Regulation was accompanied by "interpretative provisions" that were included in the conclusions of the European Council of 16 December 2020. The highly controversial nature of the text adopted is also reflected by the fact that Hungary and Poland subsequently sought its annulment before the Court of Justice. Although the Court of Justice dismissed the Polish and Hungarian actions in its judgment of 16 February 2022,<sup>12</sup> the extensive legal and political controversy surrounding the creation and application of the Regulation has made it one of the most controversial pieces of legislation in the history of the European Union to date.

The problem lies in the ambiguous reading of the regulation. It is not clear whether budget conditionality is a new, sanctioning instrument of the broader policy on the rule of law or an instrument designed to protect the EU budget.

The conditionality regulation, if it is conceived as a sanctioning instrument, complements the existing instruments of EU policy on the rule of law. According to this logic, the EU institutions were able to formulate criticisms and related claims against individual Member States through the previously established rule of law instruments, but could only enforce them through political pressure. The effectiveness of this kind of pressure was limited, which is why the proposed conditionality regulation was adopted, which now allows also for financial pressure to be applied to Member States.

If, however, conditionality regulation is conceived of as a budget protection mechanism, it does not relate to the previous rule of law mechanisms, but is instead a means of protecting the EU budget and a way of remedying possible damage to it. In order to be activated, it is necessary to establish which Member State has committed a breach of the rule of law which affects the EU budget. It is not sufficient to establish that there are problems of the rule of law in general in the Member State concerned, but it is necessary to demonstrate which anomalies in the rule of law are causing damage to the EU budget.

<sup>9</sup> European Parliament 2020.

<sup>10</sup> European Commission 2018.

<sup>11</sup> Regulation (EU, Euratom) 2020/2092 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.

<sup>12</sup> Judgment of the Court of Justice of the European Union (Full Court) of 16 February 2022 in Case C-156/21, Hungary vs. European Parliament, Council of the European Union.

No sanction can be applied without a link being established with a damage caused to the budget. This means that the purpose of conditionality regulation, in this case, is not to exert financial pressure for various political purposes, but to sanction breaches of the EU budget.

In essence, the controversy over the conditionality regulation stems from the intermingling of the two approaches.<sup>13</sup> This phenomenon can be explained by the fact that introducing a new instrument linking EU policy on the rule of law to direct financial sanctions would have faced legal problems and it was therefore introduced by a round-about route, invoking another legal basis, notably the protection of the EU budget. This conclusion can also be confirmed by the fact that, although the arguments for the validity of the regulation have been based on the protection of the budget in proceedings before the Court of Justice, in everyday political debates politicians make it clear that they see the regulation as a sanctioning instrument against Member States who allegedly violate the rule of law. The conditionality mechanism has also been identified in academic analyses as a key element of the EU's rule of law toolbox, with some authors explicitly concluding that the conditionality procedure is the most effective instrument to enforce the rule of law.<sup>14</sup> The European Parliament kept the Commission under constant pressure throughout 2021, calling for the immediate application of the Regulation to Hungary and Poland. However, the Commission only launched proceedings against Hungary under the Regulation in 2022, awaiting the outcome of the ECJ ruling and, not least, the Hungarian parliamentary elections.

This suggests that, although the EU's rule of law toolbox is not coherent and bears the hallmarks of competition between EU institutions, the EU's policy on the rule of law has become increasingly extensive in the 2010s. EU debates on the rule of law, which were initially ad hoc political debates on various topical policy issues, have now become institutionalised and take the form of an ever-broader policy on the rule of law. The above trend towards institutionalisation clearly favours the survival of the EU's policy on the rule of law and suggests that it has become a permanent element of the EU's political and institutional agenda. Since 2017 and 2018, Article 7 procedures have been ongoing against Poland and Hungary, which means that the Council has to deal with the rule of law question on a recurrent basis, and in this way, it also helps to keep the rule of law topic on the institutional agenda.

This trend is also reinforced by the increasing number of references to the rule of law in the case law of the European Court of Justice since the second half of the 2010s.<sup>15</sup> In recent years, the Court has delivered a number of judgments in favour of the Commission in disputes between the Commission and individual Member States on the rule of law.<sup>16</sup> The extensive use of references to the rule of law in EU lawsuits has raised doubts even

<sup>13</sup> On the two opposite interpretation of the conditionality regulation see in addition MAVROULI 2022: 281.

<sup>14</sup> BÁRD et al. 2022.

<sup>15</sup> GÁT 2021a: 161–211.

<sup>16</sup> Judgment of the Court of Justice of the European Union (Grand Chamber) of 25 July 2018 in Case C-216/18 PPU, LM; Judgment of the Court of Justice of the European Union (Grand Chamber) of 24 June 2019 in Case C-619/18, European Commission vs. Republic of Poland; Judgment of the Court of Justice

in the minds of authors who usually support the EU in its competence struggles with the Member States and in rule of law disputes. There is a risk that the ECJ could abusively use the notion of the rule of law to support its decisions and reject, without advancing concrete counter-arguments, those legal arguments which could challenge its reasoning.<sup>17</sup>

Notwithstanding existing trends of EU policy on the rule of law, institutions and public policies can be transformed if there is political will to do so. In the following sections, I will therefore examine what other factors might influence the persistence or de-intensification of the rule of law debate.

### **Frozen divisions: Deeper fault lines in the background of EU policy on the rule of law**

The deeper theoretical and ideological fault lines behind rule of law debates are intensifying rather than fading away, which increases the likelihood of the persistence of EU policy on the rule of law.

One such fault line is the opposition between the supporters of the idea of a federal Europe and the supporters of a Europe of Nations. Although the EU Treaty enshrines the objective of an ever-closer union (Article 1 TEU), the Treaty makes it clear that the European Union is founded on the principle of conferral, which means that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties (Articles 4 to 5 TEU). It also stipulates that the European Union shall respect the national identities of the Member States, inherent in their fundamental political and constitutional structures (Article 4 TEU).

Supranational institutions interested in reinforcing the federalist features of the European Union, as well as politicians who follow a federalist ideology, can use the policy on the rule of law as a tool to alter the current division of powers between the Union and the Member States without amending the Treaties and to take away, in practice, powers from the Member States. As the legal order of all EU countries is based on fundamental rights and the rule of law, all national policy measures can be directly or indirectly traced back to a fundamental right or rule of law issue. It is sufficient to make a superficial link between a national policy measure and the rule of law to make the EU's rule of law toolbox politically applicable against a given national policy measure. As a result, in practice the European Union can not only intervene on issues where it has formal competence, but can also, without limitation, initiate a debate on any policy in a Member State – including on constitutional or family policy issues.<sup>18</sup> Through its

of the European Union (Grand Chamber) of 19 November 2019 in joined Cases C-585/18, C-624/18 and C-625/18.

<sup>17</sup> KOCHENOV 2020: 5–6. For previous scientific literature on the risk of an abusive use of the term “rule of law” see VARGA Zs. 2019; MATHIEU 2018.

<sup>18</sup> See the EU debates around the adoption of the Fundamental Law in the early 2010s, or more recently the debates around Act LXXIX of 2021 on tougher action against paedophile criminals and amending certain laws to protect children.

institutionalised rule of law toolbox, the EU can request a change of national policy according to its own criteria.

In this way, policy on the rule of law is linked to EU federalism, and as the latter grows in intensity, so does the policy on the rule of law become an increasingly widely used instrument. Current trends suggest that federalism is becoming increasingly strong in the European Union. The European Union, based on equality and mutual respect between Member States, is increasingly out of balance. The EU institutional system, which was originally intended to ensure peaceful cooperation between Member States, is increasingly giving way to the ideological objective of a federal superstate that would bring European countries under broad central control.

One example of the everyday political presence of the idea of federalism is the existence of the Spinelli Group, composed of MEPs whose mission is to fight nationalism and intergovernmentalism, and to create a federal Europe.<sup>19</sup> The Conference on the Future of Europe, which took place from 10 March 2021 to 9 May 2022, also demonstrated the strong presence of federalist tendencies.<sup>20</sup> The structure of the conference, the questions put to European citizens and the drafting of its conclusions clearly indicate the presence of a significant lobby trying to push the EU towards federalism. The conclusions of the conference include proposals on topics such as the abolition of unanimity in EU decision-making, the further development of rule of law instruments, the direct election of the President of the European Commission, and the introduction of transnational lists in European Parliament elections.<sup>21</sup> Another sign that federalism has strong political support can be found in the official program of the German Government adopted at the end of 2021, which foresees the transformation of the European Union into a federal state.<sup>22</sup> Overall, it can be concluded that the presence of a pronounced divide between proponents of a federal Europe and supporters of a Europe of Nations is conducive to the persistence of the rule of law debate.

Another constant driving force of EU policy on the rule of law is the conflict between the social-liberal left and the conservative right. The EU's policy on the rule of law was clearly initiated and developed by the European Left, which placed the inherent constitutional notion of the rule of law at the centre of daily political battles.<sup>23</sup> By systematically formulating rule of law accusations against the right-wing conservative governments of Hungary and later of Poland, it managed to stigmatise them and thereby create an asymmetrical situation in its favour.

In the European rule of law debates the two opposing political sides do not stand on an equal footing. Due to their inherent structures, such debates favour the left-wing side which has hence been able to shape the Union's policy on the rule of law, and which usually places such debates on the European Union's agenda. This side is on the offensive, while the conservative side starts from a defensive and tactically much less favourable

<sup>19</sup> The Spinelli Group in the European Parliament 2020.

<sup>20</sup> Conference on the Future of Europe 2022.

<sup>21</sup> Conference on the Future of Europe 2022.

<sup>22</sup> Kiss J. 2021.

<sup>23</sup> GÁT 2021a: 213–222.

position. While the left-wing, by developing policy on the rule of law, is free to attack at any time, the energy of the group forced to defend itself, typically the conservative side, is consumed by responding to the allegations raised against it. Because of the positive cognitive and constitutional connotations of the expression “rule of law” in these debates, only the “supporters of the rule of law”, i.e. the left-wing, are seen to be fighting for a “noble cause” against “guilty” conservative forces. In this interpretative framework, right-wing formations systematically accused of breaching the rule of law are hardly able to take on their political rivals.

Step by step, the European left has succeeded in institutionalising the debate on the rule of law and making it a dominant issue in European party politics in the 2010s. The practical success of this tactic is demonstrated by the fact that, by conducting the rule of law debates over Hungary and its ruling Fidesz party, it has succeeded first in dividing and then, with Fidesz leaving, in weakening the Group of the European People’s Party (EPP) which lost a number of its MEPs. Although the EPP has managed to escape the grip of the left by breaking away from Fidesz, the remaining right-wing groups in the European Parliament will continue to be accused of pursuing anti-rule of law policies. The conflict between the left and the right is unlikely to disappear in the coming years, and is likely to intensify as the European elections approach. Taking all this into consideration, the rule of law debate is unlikely to die down in this respect either.

The third major fault line is the conflict between liberal and democratic principles, which is also linked to the rule of law debate. Both the democratic and liberal principles are important guiding principles for modern constitutional states, but they are also principles that are necessarily contradictory by their very nature. While “democracy” refers to the source of legitimacy, “liberalism” refers to the way power is organised. Democracy means that the source of political power is the people, who exercise their power through their elected representatives. The idea of democracy presupposes the full capacity of the people, and thus of the political majority representing the people, to act. However, if democratic power were not limited, the people, or more precisely the majority representing them, could do anything. Therefore, liberalism, as an idea that corrects democracy, imposes limits on the freedom of action of the political majority, and thus of the people, in order to avoid abuses of power. On the one hand, it separates the branches of power and creates a system in which each branch controls the other, since, as Montesquieu wrote, “only power can set limits to power”.<sup>24</sup> On the other hand, as a further constraint on democracy, it requires political power to respect the fundamental freedoms of individuals. Liberalism is thus a restrictive, corrective principle of democracy. Consequently, giving excessive importance to the liberal principle may even lead to the weakening of democracy, since the will of the people may not prevail after a while because of the overreaching institutional checks built into the system.<sup>25</sup>

This dilemma is also at the heart of the debate on the rule of law. In many cases, in proceedings against Hungary, the EU institutions question the decisions taken by the

<sup>24</sup> MONTESQUIEU 2000.

<sup>25</sup> MATHIEU 2018: 111.



Hungarian parliamentary or sometimes a constitutional majority on the basis of the democratic principle, invoking the rule of law and fundamental rights, i.e. the liberal principle. The European Union speaks out against democratically validated decisions taken by Member States in the name of liberalism and clearly favours the latter aspect. This can be perceived in the European Parliament's resolution of 10 March 2011, in which it warned against "the risk of the tyranny of the majority" in relation to Hungary.<sup>26</sup> This is also reflected by the fact that, in the early 2010s, in the debate between the Hungarian Constitutional Assembly and the Constitutional Court on the content of the Constitution, the EU favoured the Constitutional Court as an independent institution, over the will of the majority. This also explains why the Sargentini Report led the European Parliament to launch the Article 7 procedure against Hungary in 2018, a few months after its parliamentary elections, and why Commission President Ursula von der Leyen announced two days after the 2022 parliamentary elections that the rule of law conditionality regulation would be applied to Hungary.<sup>27</sup> The above examples suggest that the rule of law procedures can be used to act against democratically made decisions and as a retaliation against popular will that decides in the "wrong" direction. So far, there has been no sign of any challenge to the omnipotence of the liberal principle in the EU, which will inevitably lead to further conflicts with democratic decision-making in the Member States. This is also likely to contribute to the continuation of the debate on the rule of law.

If the persistence of deeper internal divisions in the European Union does not have a positive impact on the future of the rule of law disputes between the Union and specific Member States, it remains to be seen whether other factors could lead to an easing of the situation.

### **Scenarios for appeasement and their realities**

Since it can be concluded from what was argued above that the policy on the rule of law is primarily driven by politicians and political institutions, in this last section I will examine what political changes could possibly lead to a de-escalation or closure of the rule of law debate.

If political changes were to take place in Europe that would bring the EU institutions and the leadership of the countries usually targeted by accusations of breaching the rule of law into political alignment, the rule of law debate could be resolved in a short period of time.

This could hypothetically happen in three possible circumstances. Firstly, it might occur if the right-wing conservative side were to win a majority in the European arena in the European Parliament elections, or if the political composition of the European Council and the Council were to change towards such a majority in the various national elections, this would also force the European Commission to change its policy. Secondly, if the

<sup>26</sup> European Parliament 2011.

<sup>27</sup> JUDI 2022.

political leadership of the countries that have been criticised were to change as a result of national elections and the countries that today belong to the conservative camp were to adopt a left-liberal political stance that is in line with the EU institutions. Thirdly, if there were to be an unexpected turn of events that would override the rule of law debate, or at least significantly push it down the political and institutional priority list.

As far as the balance of power at the European political level is concerned, the European Parliament elections are due in 2024, which represents the next opportunity for the conservatives to gain a majority in the European Parliament. With the departure of the Hungarian Fidesz party from the EPP Group on 3 March 2021, a major process of transformation was set in motion in the pan-European party political arena, the outcome of which cannot yet be predicted. The question is whether Fidesz can mediate the unification of the ECR and ID groups in the right-wing and whether such a grouping will be able to win at least a relative majority in the 2024–2029 term. Even if such a scenario were to occur, it is unlikely to have an immediate impact on the European institutions socialised within the framework of a political majority of a different orientation.

In terms of the political orientation of the Member States, as mentioned above, the German legislative elections of 2021 have further reinforced the federalist tendency of the EU that has given additional impulse to its current policy on the rule of law. The French presidential elections of 2022 saw a move towards continuity with the re-election of President Macron for a five-year term, even if the subsequent legislative elections saw the right-wing National Rally party achieve a historic victory. In the Hungarian political arena, there is also continuity, with Fidesz–KDNP again winning a two-thirds majority in the parliamentary elections in 2022. The composition of the Hungarian political scene has not evolved in a way that is favourable to the Brussels mainstream, so this cannot lead to the end of the existing European disputes either. Meanwhile, in some countries of the EU, a shift to the right could be seen at the end of 2022, with the right winning the most votes in Sweden and Italy. This phenomenon, although it has slightly nuanced the political balance of power in Europe, does not yet represent a radical change. A key issue for the future will be the outcome of the 2023 legislative elections in Poland, as this country has found itself, along with Hungary, at the centre of European rule of law criticism.

As for possible unexpected developments that could have an impact on the rule of law debate, potentially overriding the original fault lines, the Russian–Ukrainian war which started in February 2022 is an example of how such unexpected developments can occur at any moment. We might instinctively think that the war in Ukraine, which has put a real, fundamental problem on the European political agenda, might draw the attention of European policy-makers away from ideological debates. The external threat to the EU can be sobering and can contribute to ending internal divisions. Even if political disagreements do not disappear, they can be rendered less significant by a more tangible problem. The war crisis can strengthen the Union's internal cohesion, bring Member States and EU institutions together in times of trouble, and finally refocus them on what unites European countries rather than on what divides them. It would seem logical if the rule of law disputes with Poland and Hungary were to lose intensity, given that the two

countries bordering Ukraine are particularly vulnerable to the war. Other authors have also suggested, albeit with a negative tone, that the war could lead to a relaxation of the EU institutions' criticisms of Hungary and Poland and that the rule of law debate could be pushed into the background.<sup>28</sup>

The example of Poland has shown, at least for a short period, that a positive shift can be achieved not only in principle but also in practice. Poland adopted a tough stance towards Russia, which was in line with the position of the European mainstream. This phenomenon had an impact on the general European perception of Poland and placed the rule of law debate in parenthesis, at least for a short time. This was reflected by the fact that the European Commission adopted on 1 June 2022 the National Recovery Plan of Poland. This step was necessary for the country to receive its share of the Recovery and Resilience Facility (RRF) fund, created to help national economies recover from the economic crisis caused by the Covid-19 pandemic.<sup>29</sup> However, the picture is nuanced by the fact that critical voices from the College of Commissioners and experts emerged soon after the agreement<sup>30</sup> and the amount due to Poland has still not been disbursed. In fact, not only politicians but also some experts from academia are continuing to lobby for the withdrawal of the money due to Hungary and Poland from the RRF.<sup>31</sup>

In the case of Hungary, the war has not diverted the debate on the rule of law from its usual course. Citing its specific economic and geopolitical situation, the Government of Hungary has not followed the European mainstream's political position on the war. The Hungarian Government is critical of the economic sanctions imposed on Russia because it considers that this policy causes extreme economic difficulties in Europe. Instead, it prefers to promote peace rather than entering into a logic of Europe winning the war at all costs. In relation to Hungary, the softening of rule of law criticism seen in Poland has thus not been felt. However, it is also worth noting that Hungary, as a country bordering Ukraine, has been at the forefront in welcoming Ukrainian refugees and helping the victims of war. This could have resulted in a positive shift in the country's image, or at least the additional burden of caring for refugees could have created a political and moral obligation for the European institutions not to consider cutting off EU funding to Hungary in this situation.

However, the humanitarian aid and pro-peace stance has for now been lost in the noise of the strident war rhetoric against Russia. In the present conflict, the European Union, unusually for its tradition, is not attaching importance to the humanitarian aspects of the war and the promotion of peace negotiations, but is behaving instead as a quasi-belligerent. In this set-up, the very fact that Hungary does not wish to support the rhetoric of war is already provoking resentment. Instead of dying down, the debate on the rule of law is burning ever brighter. For example, the European Parliament's resolution of 15 September 2022 on the state of the rule of law in Hungary now includes

<sup>28</sup> BÁRD et al. 2021: 39–43.

<sup>29</sup> European Commission 2022.

<sup>30</sup> BAYER 2022; BÁRD–KOCHENOV 2021: 43.

<sup>31</sup> See ALEMANNI et al. 2021.

the country's position in the Council on the Russia–Ukraine war in the list of rule of law charges against Hungary.<sup>32</sup>

Although, in a time of crisis affecting all the countries of the Union, the strengthening of internal cohesion might seem to be a logical consequence, experience shows that this logic does not necessarily apply in the European Union. The Community was hit by two major crises in the last decade, neither of which diminished the vehemence of the EU's political debates.

The migration crisis that erupted in 2015 did not lead to EU unity, but instead brought to the forefront the ideological differences within the EU. Since then, the conflict between the proponents of a Federal Europe on the one hand, who largely believe in allowing and promoting migration and a multicultural society, and those wishing to maintain a Europe based on strong Member States and according importance to national identity on the other hand, has become even more visible.

The crisis caused by the Covid-19 pandemic that hit the world, including Europe, in 2020 has not reduced the intensity of political battles within the EU either. It is this experience that is perhaps the main cause for pessimism. During the migration crisis, opinions were divided on the extent to which immigration posed a threat to Europe, and indeed this issue was essentially at the heart of the debate. Therefore, by its very nature, the advent of this crisis increased, rather than reduced, divisions within the Union. The Covid-19 pandemic, however, put Europe under a different kind of pressure, one that could justifiably be expected to bring the Member States together. In this situation, there was no question that the virus posed a serious threat to all countries, as the disease does not discriminate according to nationality, political ideology or geopolitical location.

The common exposure to the coronavirus could have been expected to have increased political solidarity within the European Union, but this logic did not apply. When all countries were in trouble and extraordinary measures were imposed across Europe, the EU political pressure on Hungary and Poland increased rather than decreased. While EU decision-making was temporarily blocked, some EU politicians spent their time attacking the measures introduced in Hungary and Poland to tackle the pandemic.<sup>33</sup> This was particularly striking in the European Parliament, where many MEPs seemed to use directing heavy criticism against Hungary as a way of showing their importance and remaining at the centre of media interest even during the European Parliament's temporary shutdown when legislative work was suspended. The EP's majority launched a political offensive against the Hungarian Covid-19 emergency law with unprecedented speed.

All this leads to the conclusion that, while it can never be ruled out that extraordinary events might override EU political priorities and that, in some cases, the rule of law debate may lose intensity as priorities shift, there is no sign of a major change in the political scene in the near future that could lead to a cooling of the debate.

<sup>32</sup> European Parliament 2022.

<sup>33</sup> GÁT 2021b: 347.

## Conclusion

Since the beginning of the 2010s, the rule of law debate has been on the European political agenda with increasing intensity. What started as ad hoc debates have become institutionalised over the years. Today, the European Union has a wide range of ‘rule of law’ instruments at its disposal, through which it can exert increasing pressure on Member States. Key elements of this toolbox are the Commission’s rule of law framework which was later supplemented by its annual rule of law report. It also includes the Council’s Annual Rule of Law Dialogue and the European Parliament’s initiatives on the annual rule of law monitoring system, which have not yet entered into force but which are already influencing policy on the rule of law. Finally, there is the controversial rule of law conditionality regulation, through which EU funds can be withdrawn from Member States. The institutionalised instruments of the policy on the rule of law are in themselves conducive to making the rule of law debate a permanent part of the institutional and political life of the Union. The deeper internal European political fault lines underlying the policy on the rule of law also foretell the persistence of a situation of conflict between the EU institutions and certain Member States. The dichotomy between federalism and national sovereignty, the eternal political opposition between conservatives and liberals, as well as the competition between the democratic principle and the liberal principle are constant drivers of European politics and are also closely linked to the rule of law debate and are likely to continue feeding future debates. A political shift in European politics, which could override or even eliminate the current rule of law debates, cannot be completely ruled out. In this respect, however, after taking into account a number of realistic possible influencing factors, I have concluded in this study that, on the basis of current political trends, no substantive change is yet in the offing.

## References

- ALEMANNI, Alberto – MORIJN, John – PECH, Laurent – SARMIENTO, Daniel (2021): 6 Reasons Why the EU Should Use the Approval of National Recovery and Resilience Plans to Enforce the Rule of Law in Hungary and Poland. *The Good Lobby*, 30 August 2021. Online: [www.thegoodlobby.eu/2021/08/30/6-reasons-why-eu-should-use-the-approval-of-national-recovery-and-resilience-plans-to-enforce-the-rule-of-law-in-hungary-and-poland/](http://www.thegoodlobby.eu/2021/08/30/6-reasons-why-eu-should-use-the-approval-of-national-recovery-and-resilience-plans-to-enforce-the-rule-of-law-in-hungary-and-poland/)
- BAYER, Lili (2022): Amid Commission Rebellion, von der Leyen Defends Polish Recovery Cash Plan. *Politico*, 02 June 2022. Online: [www.politico.eu/article/amid-commission-rebellion-von-der-leyen-defends-polish-recovery-cash-plan/](http://www.politico.eu/article/amid-commission-rebellion-von-der-leyen-defends-polish-recovery-cash-plan/)
- BÁRD, Petra – CHRONOWSKI, Nóra – FLECK, Zoltán – KOVÁCS, Ágnes – KÖRTVÉLYESI, Zsolt – MÉSZÁROS, Gábor (2022): Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit. *MTA Law Working Papers*, 8. Online: <https://jog.tk.hu/mtalwp/is-the-eu-toothless-an-assessment-of-the-eu-rule-of-law-enforcement-toolkit>
- BÁRD Petra – KOCHENOV, Dimitry V. (2021): War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening. *European Law Journal*, 27(1–3), 39–49. Online: <https://doi.org/10.1111/eulj.12435>

- Conference on the Future of Europe (2022): *Report on the Final Outcome*, 09 May 2022. Online: [www.consilium.europa.eu/hu/policies/conference-on-the-future-of-europe/](http://www.consilium.europa.eu/hu/policies/conference-on-the-future-of-europe/)
- GÁT, Ákos Bence (2021a): *Az európai uniós jogállamiság-közpolitika kialakulásának átfogó jogi és politikatudományi elemzése*. PhD dissertation. Budapest: Nemzeti Közszerológati Egyetem Közigazgatás-tudományi Doktori Iskola. Online: [https://tudasportal.uni-nke.hu/xmlui/static/pdfjs/web/viewer.html?file=https://tudasportal.uni-nke.hu/xmlui/bitstream/handle/20.500.12944/17785/gat\\_akos\\_bence\\_doktori\\_ertekezes.pdf?sequence=1&isAl](https://tudasportal.uni-nke.hu/xmlui/static/pdfjs/web/viewer.html?file=https://tudasportal.uni-nke.hu/xmlui/bitstream/handle/20.500.12944/17785/gat_akos_bence_doktori_ertekezes.pdf?sequence=1&isAl)
- GÁT, Ákos Bence (2021b): Az uniós jogállamiság-politika koronavírus tesztje. In KOLTAY, András – TÖRÖK, Bernát (eds.): *A járvány sújtotta társadalom*. Budapest: Ludovika.
- JUDI, Tamara (2022): Ursula von der Leyen bejelentette, indul a jogállamisági mechanizmus hazánkkal szemben. *Magyar Nemzet*, 05 April 2022. Online: <https://magyarnemzet.hu/kulfold/2022/04/ursula-von-der-leyen-bejelentette-indul-a-jogallamisagi-mechanizmus-hazankkal-szemben>
- KISS J., László (2021): A német koalíciós szerződés szerint az EU föderális szövetségi állammá válik. *Index*, 17 December 2021. Online: <https://index.hu/velemenyt/2021/12/17/-vilagbelpolitika-avagy-kulpolitika-mint-klimapolitika/>
- KOCHENOV, Dimitry V. (2020): Rule of Law as a Tool to Claim Supremacy. *Reconnect, Working Paper*, No. 9, September 2020. Online: [https://reconnect-europe.eu/wp-content/uploads/2020/09/RECONNECT\\_WP9\\_Kochenov.pdf](https://reconnect-europe.eu/wp-content/uploads/2020/09/RECONNECT_WP9_Kochenov.pdf)
- MATHIEU, Bertrand (2018): *A jog a demokrácia ellen?* Budapest: Századvég.
- MAVROULI, Roila (2022): The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation. *European Papers*, 7(1), 275–286. Online: <https://doi.org/10.15166/2499-8249/559>
- MONTESQUIEU (2000): *A törvények szelleméről*. XI. könyv, 4. fejezet. Budapest: Osiris.
- The Spinelli Group in the European Parliament (2020): *List of MEPs supporting The Spinelli Group in the Parliament*. Online: [www.federalists.eu/fileadmin/files\\_uf/Spinelli\\_Group\\_Page/List\\_of\\_signatures\\_25052020\\_AC.pdf](http://www.federalists.eu/fileadmin/files_uf/Spinelli_Group_Page/List_of_signatures_25052020_AC.pdf)
- VARGA Zs., András (2019): *From Ideal to Idol? The Concept of the Rule of Law*. Budapest: Dialóg Campus.
- WAHL, Thomas (2020): Council Launches Rule of Law Dialogue. *Eucrim*, 08 December 2020. Online: <https://eucrim.eu/news/council-launches-rule-law-dialogue/>

### *Legal sources*

- Council of the European Union (2014): *Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties*. Online: <https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en>
- Council of the European Union (2016): *Opinion of the Legal Service: Presidency Non-paper for the Council (General Affairs) on 24 May 2016 – Rule of Law Dialogue*. Online: <https://data.consilium.europa.eu/doc/document/ST-8774-2016-INIT/en/pdf>
- European Commission (2014): *Communication from the Commission to the European Parliament and the Council. A New EU Framework to Strengthen the Rule of Law*. COM (2014) 0158 final, 11 March 2014. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>

- European Commission (2017): *Suite donnée à la résolution du Parlement européen contenant des recommandations à la Commission sur la création d'un mécanisme de l'Union pour la démocratie, l'état de droit et les droits fondamentaux*, 17 January 2017. Online: [www.europarl.europa.eu/oeil/spdoc.do?i=27630&j=0&l=fr](http://www.europarl.europa.eu/oeil/spdoc.do?i=27630&j=0&l=fr)
- European Commission (2018): *Proposal for a Regulation of the European Parliament and the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States*. COM (2018) 324 final, 2 May 2018. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324&from=HU>
- European Commission (2020): *European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report*. Online: [https://ec.europa.eu/info/files/2020-rule-law-report-methodology\\_en](https://ec.europa.eu/info/files/2020-rule-law-report-methodology_en)
- European Parliament (2011): *European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012)*. Online: [www.europarl.europa.eu/doceo/document/TA-7-2013-0315\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-7-2013-0315_EN.html)
- European Parliament (2016): *European Parliament Resolution of 25 October 2016 with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*. Online: [www.europarl.europa.eu/doceo/document/TA-8-2016-0409\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2016-0409_EN.html)
- European Parliament (2020): *European Parliament Resolution of 7 October 2020 on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*. Online: [www.europarl.europa.eu/doceo/document/TA-9-2020-0251\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-9-2020-0251_EN.html)
- European Parliament (2022): *European Parliament Resolution of 15 September 2022 on the Proposal for a Council Decision Determining, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded*. Online: [www.europarl.europa.eu/doceo/document/TA-9-2022-0324\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.html)
- Judgment of the Court of Justice of the European Union (Full Court) of 16 February 2022 in Case C-156/21, Hungary vs. European Parliament, Council of the European Union. Online: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6494977>
- Judgment of the Court of Justice of the European Union (Grand Chamber) of 25 July 2018 in Case C-216/18 PPU, LM. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0216>
- Judgment of the Court of Justice of the European Union (Grand Chamber) of 24 June 2019 in Case C-619/18, European Commission vs. Republic of Poland. Online: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=79>
- Judgment of the Court of Justice of the European Union (Grand Chamber) of 19 November 2019 in joined Cases C-585/18, C-624/18 and C-625/18. Online: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15595550>
- Regulation (EU, Euratom) 2020/2092 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. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020R2092&from=HU>