

## CAUGHT IN THE GREY AREA BETWEEN EUROPEAN ECONOMIC COMMUNITY AND EUROPEAN FEDERATION?

*Uncertain limits of EU jurisdiction in matters concerning EU values*

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**Abstract.** During the last decade of the EU history there has been an unprecedented increase of illiberal tendencies among certain EU Members – most notably Poland and Hungary, which in turn lead to violation of the values enshrined in Article 2 TEU. The present paper is brief attempt to determine whether the EU has any legal powers to confront rogue EU Members, which violate the rule of law and what these powers are.

**Keywords:** Solange doctrine, Reverse Solange doctrine, EU competences, rule of law, Article 7 of TEU.

### I. INTRODUCTION

It is no exaggeration to state that the recent years in certain European countries were marked by radicalization of there legal regulations. Quite importantly the changes usually concern the same time legal norms crucial to the functioning of the State, which in turn have bearing on the protection of human rights and compliance with EU law. Notable examples in this respect are those of Hungary and Poland. In cases of those two countries, their legal developments led to EU's institutions expressing concerns over certain aspects of Member States' policies, which in turn resulted in triggering procedures provided for such situations – among others the procedure enshrined in Article 7 TEU. Understandably actions of the above-mentioned States on one hand, and reactions of European institutions on the other, led to a heated political debate on the subject, where the frontiers of Member States' sovereignty lie. What the author finds to be lacking, however, is an objective analysis of the legal interplay between the EU and the Member States, which could allow, political views aside, to answer the above question.

It is thus necessary to ascertain what exactly are the limits of the EU "jurisdiction" and its competences, especially in such delicate matters as regulations of fundamental aspects of the functioning of Member States (such as judicial system or media) and their compliance with the rule of law, which after all mostly remain within a domain of States' constitutional order. States that find themselves at odds with the EU do protest that their actions are internal matters, within their margin of appreciation, and most importantly well outside of competences vested in the Union. The Union, on the other hand, argues that this notwithstanding, certain core values of EU (rule of law primarily) have to be safeguarded because otherwise there can be no effectiveness to EU law. From that vantage

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point, it is said that assessment of how the Member States are organized especially in the matters of the justice system is open for ECJ and other EU authorities. That situation may cause a veritable legal dispute over authority, since, in the end, it may happen that both ECJ and competent national courts will be assessing these matters and will come to different conclusions.

The proposed analysis will depart from the scope of EU competences, perceived with regard to the principle of conferral (as envisaged in Articles 4 and 5 TEU) but also taking into account principles of EU law identified by ECJ – such as the principle of effectiveness, principle of EU law primacy and last but not least – a more recent concept of European citizenship. This analysis will then lead to the “reverse SOLANGE doctrine” (as opposed to widely accepted SOLANGE doctrine), which posits that under ordinary circumstances, protection of the substance of EU citizens’ rights (and of the essence of fundamental rights) is left to national law. This, however, can be ‘reversed’ in cases of ‘systemic’ failure in national law, which allows EU authorities to control the compliance of national law and its application with the values, all Member States obligated themselves to uphold as well fundamental rights. The author will critically assess the merits of this doctrine, its scope, and possible use of it by the ECJ.

The author posits that this doctrine also merits assessment from an unorthodox angle, namely from the perspective of international public law and most importantly the Vienna Convention on the Law of Treaties. The reason is that the EU is at its core a very special, but still an international treaty, binding its Parties as all other international agreements do. The legal issue at hand observed from that point of view will offer an answer, as to how to reconcile EU legal actions against “rogue” Member States with their sovereignty, and how to address the viability of the “Reverse SOLANGE doctrine”.

Finally and more generally the proposed research should be able to shed some light, as to where exactly the EU finds itself on its way on a scale between the “simple” economic community and the United States of Europe, how it can be changed and what are its likely lines of development.

## II. ILLIBERAL DEMOCRACY

The last decade of European political history was marked by the rising popularity of the so-called illiberal model democracy (Sajó, 2019, p. 396). Oxymoronic as this term may sound, it remains the fact that this term of illiberal democracy is being used by architects of certain political structures. Most notably it was utilized by Victor Orban (Orban, 2014), who expressly declared in 2014 that he would like to build an illiberal state – i.e. a non-liberal state. Such a state, as he explained, would not deny foundational values of liberalism, as freedom, etc, but it would not make this ideology of liberalism a central element of state organization, proposing instead a specific, national-oriented approach in its stead.

The concept of illiberal democracy is by no means a new one, although before the last decade it had remained as an untried alternative among EU Members. The main premise of this model of democracy is that liberalism is not a prerequisite or a condition of democratic rule. An outright formulation of this thought came first from F. Zakaria (Zakaria, 1998), who noted that there are many

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democratic systems (i.e. such in which those who govern a State are elected in a free and common vote and enjoy social legitimization), but whose political systems are not marked by the rule of law, separation of powers, and the protection of basic liberties such as speech, assembly, religion, and property (i.e. core characteristics of a liberal state). While the above-mentioned values did coincide with the emergence and development of democracies in Western Europe it is not so in other parts of the world, most notably in Russia, Belarus, or certain States in Latin America (Smith, 2009). The rationale for the development of this type of democracy are manifold, but curiously, among many three main ones are indicated. Firstly, that modern nation-states lead are inherently at odds with the idea of universal equality that characterizes liberalism (since they differentiate between the nationals, and the foreigners (Mestrovic, 2004)), further, that unrestrained capitalism leads to such wealth disparities that it does not promote the safeguarding of human rights (at least not without state's intervention). Finally, it is said that traditional morality and hierarchical social structures prevent societies from embracing liberal values (Ramet, 2007) one of the reasons are incompatibility between liberal state values and free-market capitalism (Ramet, 2007).

These remarks seem to explain why the growing popularity of right-wing values in Europe comes hand in hand with an awakened interest in the model of illiberal democracy and the criticism of liberalism.

### III. CHALLENGES TO THE RULE OF LAW. TIMELINE

The two notable examples of EU Members which little by little gravitate towards the illiberal democracy model are undoubtedly Hungary and Poland, with Hungary being the pioneer and Poland the follower (Sajó, 2019, p. 399; Morillas, 2017, p. 31–45, 55–67). Characteristics of illiberal democracy logically bring those states, which adopt it, to clash with EU values enshrined in Article 2 TEU and most importantly with the rule of law, since those values are inherent to the model of liberal democracy.

As the present paper aims to address the possible solution to this clash of values within the current legal framework, a recapitulation of the stages of this clash and so-far reactions of its actors would not be without merit for the proposed analysis. Naturally given the paper's scope, the analysis will have to be summary.

In the case of Hungary, all began in 2010 with the coming to power by the Fidesz political party with Victor Orban, as its president. During the years preceding this triumph, Fidesz's program and rhetoric radicalized from conservative narrative of the family, nation, and god to a more strident form of ethno-nationalism that for its critics had overtones of anti-Semitism, intolerance and an ethnically exclusive form of Hungarian national (Marsovszky, 2010). Such rhetoric met with surprisingly extensive acceptance from the society, which, as is theorized was triggered by Hungarians' disenchantment with the government, capitalistic system and typical for Hungarian society social distrust and resulted in Fidesz securing the majority of 66% in the Parliament and allowing it to alter Hungarian's Constitution. As a result of changes enacted in 2012, Constitutional Tribunal was stripped of much of its jurisdiction and was staffed with government loyalists. Even before that, in 2011 new

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institution was created, namely the National Judicial Office which practically nullified judicial self-government. Finally, the retirement age of judges was lowered, which, although declared contrary to EU law (ECJ, C-286/12, *Commission v. Hungary*), allowed the government to appoint new, more dependable members of the judiciary, also within Hungarian Supreme Court. Thus the party removed the preexisting system of checks and balances, gaining thus freedom to change the law, as it saw fit. Along with these developments Fidesz appointed its members or ex-members to highest positions in the State (including the positions of the chief prosecutor, President of the Supreme Court, and the chairman of the State Audit Office).

Also, although outwardly cooperating with many international organizations in the years 2010–2020 Fidesz was gradually striving to realize the vision of illiberal states. Among the liberties, which were curbed, one has to indicate freedom of media and speech (Lendvai, 2012), by the way of creating the Media Council loyal to the government and limiting journalistic freedom; right to privacy (ECHR, Szabó and Vissy v. Hungary), right of association and religion (ECHR, Magyar Keresztény Mennonita Egyház and Others v. Hungary); academic freedom; freedom of migrants (ECHR, Ilias and Ahmed v. Hungary), right to equal treatment also for foreigners and racial minorities (Council of Europe: Commissioner for Human Rights, 2014). With the outbreak of the coronavirus pandemic, in the Prime Minister, Victor Orban was granted emergency powers, which allowed to change the law with executive decrees, instead of bills adopted by the Parliaments. As of now, the powers are already revoked, but it is noted that the emergency power can easily be regranted (HCLU, Amnesty International, Hungarian Helsinki Committee, 2020). The last development of note was the judgment by ECJ, in which the Court contested the way, in which Hungary handles refugees (ECJ, C-924/19, C-925/19, FMS, FNZ SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság). According to the Prime Minister of this Member State, this judgment will not be honored as it is contrary to the superior legal act, namely Hungarian Constitution (Bloomberg, Orban Rejects EU Ruling on Asylum Seekers in New Test for Bloc, 2020).

The developments in Poland were quite similar to the above described, and also began with the securing of the parliamentary majority by Law and Justice political party in 2015, coinciding with the election of President Andrzej Duda, appointed by the same party. The key difference between the Polish and Hungarian situation is the fact that the Polish governing party did not gain the majority necessary to alter the Constitution, and because of that it had to operate under limitations of the one being in force since 1997. This, however, did not prevent the politicization of the Polish Constitutional Tribunal and limitation of judges' self-government, especially since the party, backed up by the President could pass any standard bill. The process of subordination of judges did not proceed quite as smoothly as it did in Hungary. Firstly, the changes of retirement age did not allow to restaff the Supreme Court in Poland, as they were quickly counteracted by its judges and soon after declared contrary with the EU law (ECJ, C-192/18, *Commission v. Poland*). Also, there was a considerably negative social response to governments' attempts at limiting independence, which could have factored it in a less radical approach by the governing party. This notwithstanding the judicial system is far less independent than before the year 2015. The governing party was able

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to appoint loyal presidents of the courts, including the president of the Supreme Court (although this took 2 years of legal and political strife). Besides that, certain judges who have been vocal about their discontent with enacted changes have been reported to be persecuted on disciplinary grounds and to even worse by the new Disciplinary Chamber of the Supreme Court created and staffed under the scrutiny of the governing party by subordinated National Council of Judiciary (ECJ, *Commission v. Poland*, C-791/19). Apart from attempted and partially completed erosion of judiciary system in Poland, the last 5 years were marked by increasing disrespect toward the rule of law (including respect for national and supranational courts' judgments), decreasing quality of law, the subordination of national public media and growing discrimination of certain social groups (most notably LGBT people).

During the above-mentioned developments in both Hungary and Poland, international organizations and the EU were not inactive. As this paper concerns the EU's relationship with its Members, only its reactions will be covered. As for Hungary in the years of power consolidation by Fidesz (European Parliament, 2012; European Parliament, 2013; European Parliament, 2015); European Parliament, 2017), numerous resolutions were adopted, which indicated in detail specific shortcomings concerning compliance with the EU values by Hungary and demanded it to address them.

Finally, procedures enshrined in Article 7 TEU need to be mentioned. Curiously enough it was against Poland, and not Hungary, that EU first formally triggered this procedure aiming at determining that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 (EP Resolution, 2017). Similar steps were soon after triggered against Hungary (EP Resolution, 2018). Both are currently slowly progressing and currently find themselves at the stage of hearings of each respective Member State. In not so many words, this means that so far the implemented measures have proved less than successful, especially given the fact that they did little to change policy courses of EU rogue States.

Certain aspects of policy changes described above were also the subject of judicial review by the ECJ (ECHR, *Szabó and Vissy v. Hungary*). As indicated before, judgments rendered in those cases, especially since they concern so-called "constitutional identity" of Poland and Hungary, have been widely criticized by their respective government both from a material as well as jurisdictional point, as it is said that ECJ cannot assess these parts of the legal system which traditionally belong to the domain of constitutional matters (ECJ, C-791/19, *Commission v. Poland*). This attitude of these Members States means in turn that implementation of those judgments if at all happens, happens reluctantly and half-heartedly.

#### IV. EU COMPETENCES

The above problem truly comes down to a general issue concerning the European Union legal system. Namely that it's plagued by an inconsistency arising from projecting upon the Union their most ambitious aims and ideals without giving the Union sufficient capacity to achieve them. Among others, the Union is charged with protecting fundamental rights and other components of liberal state

without, at least formally, being allocated the corresponding competence to ensure such protection (Azoulai, 2014) and even, as follows from the Article 4 (see below), being expressly forbidding EU from interfering with most crucial aspects of their policies.

To back up the above-mentioned statement, one has to consider both Articles 4 and 5 of the TEU. According to the Article 5, the limits of Union's competences are governed by the principle of conferral, under which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Moreover, the EU may use its competences only insofar, as such use is in line with the principles of subsidiarity and proportionality. What is crucial and what was constantly underlined in the evolution of TEU (ECJ, C-155/91, *Commission v. Council*) is that the Union does not have the competence to declare its competences (so-called *Kompetenz-Kompetenz*) (Blumann, Dubouis, 2010).

To complete the picture of the competencies it has to be noted that the Treaty indicates at the sphere of competences of Member States that cannot be interfered with by the EU law (Di Salvatore, 2008). According to Article 4 TEU, the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. From this follows that the EU competences whatever in particular they are, find their limits at the moment when they could encroach on the constitutional order of a Member State. This means in turn that the EU cannot issue any binding regulation which could change the above-indicated sphere of exclusive competences of Member States.

The above provisions cannot, however, be read in separation from the other parts of the Treaty. Both its preamble and Article 2 indicate that membership in the EU requires not just any national identity, but identity being and Members States' fundamental structure being in line with goals of EU (Blanke, Mangiameli (eds.), 2013). The main question remains, however, which authority is competent to assess whether a Member State's national identity conforms with EU values. Apart from procedure enshrined in Article 7 (which rightly so is called a nuclear option, and of political reason may not be employed, even it from the legal point of view it would be completely justified (Buchmaier, 2019), on the one hand, one could indicate ECJ, as the sole judicial body created to verify Member States against the obligations arising from Treaties. On the other hand exactly here lies the issue – constitutional measures adopted by the Members States are not, as stated before, within the scope of the Treaties, and thus it might be stated that it is constitutional tribunals of each state that are exclusively competent to conduct any review thereof. But this on the other hand would violate the jurisdictional exclusivity of ECJ and Member States' obligation not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than designed in the treaties. From this brief analysis, it follows that Treaties themselves do not give a clear-cut answer as to how to resolve this jurisdictional conundrum. The solution must then lie in functional interpretation of treaties or in principles of international law, to which EU treaties doubtless belong.

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## V. EU LAW EFFECTIVENESS AND PRIMACY PRINCIPLES – “REVERSED” SOLANGE DOCTRINE

For many years doctrine has been established concerning the limits of EU competences and exclusive jurisdiction of ECJ in those cases, in which EU law is contrary to fundamental human rights, i.e. one of the key elements of a liberal state. The doctrine was first developed in several judgments rendered by the German Constitutional Court (Federal Constitutional Court of Germany, 1974, 1986, 1993, 2009) and was named “SOLANGE doctrine”, where “solange” means “as long as”. According to the doctrine, as long as European Union ensures effective protection of fundamental rights substantially similar to the protection of fundamental rights required unconditionally by the Member States’ Constitution, and in so far as they generally safeguard the essential content of those fundamental rights, the constitutional courts of respective Member States should not exercise its jurisdiction to review such legislation European Union by the standard of the fundamental rights contained in the constitutions (Haratsch, 2006). This doctrine was first formulated through stages of development of the European Community when its reliance on a highly developed corpus of human rights doctrine was neither foreseeable nor certain. Now, as the treaties expressly accept the Charter of Fundamental Rights as part of primary EU law and accept at the minimum the standard of human rights protection on par with the standard envisaged by the European Court of Human Rights, the application of Solange doctrine, although possible, is not very likely.

What seems more interesting and much more practical would be the possibility of employing the logic of SOLANGE doctrine in reverse. Namely, the idea would be to honor Member States’ exclusive jurisdiction over constitutional matters under all ordinary circumstances and only in case of systemic danger of fundamental rights would there arise a possibility for the EU institution to step in and challenge Member States’ constitution clashing with EU values listed in Article 2 TEU (Bogdandy et. al., 2012; Bogdandy et. al., 2015).

Naturally, one could argue that such competence has not been vested in the EU and that a judicial review employing “reverse SOLANGE doctrine” would constitute an *ultra vires* act on the part of EU institutions. However, such a conclusion would be, from my point of view, premature.

There are actually legal arguments and reasons that suggest that despite the lack of express competence, the EU does dispose of competence to make use of “reverse SOLANGE doctrine”. First of all, it has to be noted that upon signing of the Lisbon Treaty, as mentioned before, the status of the Charter of Fundamental Rights was elevated to the level on par with that of the EU Treaties. Although according to the Article 51 of the Charter this legal act does not confer on the EU any new competencies, it seems that as long as rights declared by the Charter are simply extensions or clarifications of existing provisions within treaties, ECJ operates strictly within its prescribed competences even if by virtue of functional, dynamic and truly liberal interpretation of the law (similar to the one adopted for long by the ECHR) (Lenaerts, 2012). There exists precedent of such an approach and namely in the judgment (ECJ, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, C-64/16), then repeated in the judgment concerning the situation of the Polish judiciary, which was

described earlier (ECJ, *Commission v. Poland*, C-619/18). In this light, the ECJ may act and intervene in those cases when the fundamental rights of people are in jeopardy. In other words, it can, as an *ultima ratio* measure gain jurisdiction over those parts of constitutional systems of Member States which cannot be reconciled with the essence of those rights.

Next, although it does not follow from the Treaties, for years it has been established that the European law relies on the principles of primacy of EU law, as well as the principle of efficiency. According to the first one, the obligations of the Member States that arise for them from EU law would be incomplete, if Member States could override them with the national provisions (ECJ, *Costa v. ENEL*, 6/64). Therefore the national legislation cannot prevail over EU law. In 1970 this thought was followed by the ECJ to the extent of expressly confirming priority of EU law over provisions of a national constitution, including those, which guarantee fundamental rights (ECJ, *Internationale Handelsgesellschaft*, 11/70).

The next principle, i.e. principle of efficiency states that national rules may not 'have either the object or the effect of creating an obstacle to the enjoyment of EU rights, including fundamental rights'. The exact scope of this rule and the protection of fundamental law in this context is still evolving. It is evident from the rich case law of ECJ. An example of this strand of jurisprudence is e.g. *Zambrano* case. Thereafter, Member State actions are prohibited from issuing regulations impairing 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Although the precise meaning of the 'genuine enjoyment' and 'European citizenship' is yet to be determined, this case showed the importance of the principle of effectiveness in their delimitation on one hand, and the competence on the part of ECJ to put such regulations to judicial review.

From my point of view, the two above mentioned principles, when considered jointly, form a strong basis to back up the employment of 'SOLANGE reversed doctrine'. On the basis of the primacy rule, in all matters concerning EU law, that very law, according to the sole interpreter of it – ECJ, triumphs over national law, including constitutions. Because 'matters concerning EU law' have to be interpreted as including all such provisions which form an obstacle to fully realizing fundamental law prescribed by the EU, it clearly follows that whenever constitutional or fundamental order of a Member State forms such an obstacle, ECJ is, by all means, competent to intervene. Of course, given that the EU has to operate under the rules of proportionality and subsidiarity, such an intervention has to be undertaken as a last resort. Hence, ECJ must ensure that its inevitable in such a case violation of the national identity of a Member State can occur, only when there is a systemic failure to comply with the values of the EU. This, as explained before, is the whole premise behind the 'reverse SOLANGE doctrine' and is fully supported by the *acquis Communautaire* up to date.

## VI. EU COMPETENCES THROUGH THE LENS OF VCLT

As signaled before, EU treaties form a part of a larger corpus of international law, i.e. treaty law, even the treaties in question are distinct among others. From that follows that all rules concerning treaties equally apply to the TEU and TFEU. The main legal act in the international law that covers



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most important matters concerning the signing of treaties and their execution is the Vienna Convention on the law of treaties (VCLT), which entered into force in 1980. It is worth noting that almost all State Members of the EU are parties to this convention and because of that rules stipulated in the VCLT will apply to the European treaties.

Viewing TEU and TFEU as international treaties, Article 2 TEU can be perceived from a different viewpoint. While traditionally regarded as purely declaratory (Schorkopf, 2000), the wording of this norm clearly has another, more profound meaning. It starts by listing all of EU values and then goes on to say that they are common to the Member States. It can be easily noticed that such a phrase does not only contain a declaration but also an obligation addressed at the Member States to preserve their compliance with those values (Blanke, Mangiameli (eds.), 2013), which are after all the main conditions necessary to gain access to the EU in the first place.

Having established that Article 2 forms an obligation in the sense of VCLT, it is clear that it also can be breached. For such cases, the Vienna Convention does stipulate in Article 27 that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Dörr, Schmalenbach, 2018). This finds a curious application to the conundrum addressed in this paper. On the basis of this provision the national regulations, constitution including, are irrelevant to an assessment of a breach of a treaty. In other words, ECJ (granted the jurisdiction over the issues arising from a treaty) is given the right to determine that there has been a violation of EU values on the part of a Member State and can do that even if this violation resulted from changes in the constitutional order of the Member State in violation.

Of course, such a decision rendered by ECJ may be disregarded by the Member State that it concerns, or it can be deemed *ultra vires* act under the EU treaties, and the EU does not really have any legal instruments to counter such a stance (except for Article 7). This, however, is a question of enforcement (Jakab, Kochenov, 2015) but does not change the fact that purely from the international law standpoint, EU institutions can freely assess compliance of Member State's legal systems with EU values. This statement is based on the current version of EU treaties and even without sophisticated legal interpretation presented in the previous subparagraph. This, in turn, seems to support the possibility to use *Reverse Solange doctrine* by the EU institutions.

## VII. CONCLUSION

Naturally, given the limited scope of this paper, all dimensions of EU competences concerning Member States not complying with EU values cannot be explored. However, from short the analysis proposed therein, there can remain little doubt that legally speaking EU institutions and ECJ, in particular, may and should interfere into the internal affairs of its Member States, whenever these internal affairs may endanger the core of fundamental rights of EU citizens and all other people being within borders of this organization. They may do so, because of the elevated status of the EU charter, principles of efficiency, and primacy of EU law and because of the way, in which international law disregards all internally based excuses for violating international obligations. They should do so

because the EU's commendable ambitions are to create and uphold not only economic union but the so-called union of law and form an organization more akin to a federal state than a loose economic community that EU was at its inception. It remains to be seen, whether these legal possibilities will be explored and to what extent they will prove successful in addressing systemic failure of upholding EU values in case of those countries, where failure comes democratically elected governments but whose goals and actions cannot be deemed as legitimate or even acceptable.

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