

THE RULE OF LAW UNDER THREAT: WHAT CAN EUROPE DO?

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Polish Prime Minister Beata Szydło and Hungarian Prime Minister Viktor Orbán ©European Union 2016 - European Parliament

The anti-Soros campaign orchestrated by Prime Minister Viktor Orbán is only the latest challenge to the rule of law by the Hungarian government. As in the Polish case, the European institutions are confronted with violations of the democratic principles underlying membership of the European Union. In a climate of mutual distrust, other EU states could be tempted to follow suit, while the Commission remains paralysed. The notorious article 7 of the European Treaty, which can deprive a member state of its voting rights in the EU, remains so impracticable as to have no deterrent effect.

On the international political scene, the European Union (EU) is generally considered as a “soft power”. This concept, coined by the American political scientist Joseph Nye in 1990 in opposition to “hard power”, eludes easy definition. Though its general thrust is clear enough: Hard or “muscular power” should be distinguished from the soft power of persuasion or influence. For Nye, these two forces were embodied by the United States and Europe respectively. Since then, other actors have emerged as “hard powers”, most notably China and Putin’s Russia, but the EU remained the softly-spoken, powerless giant it has always been.

Its power is nevertheless very real, and it rests essentially on two pillars: trade, where the EU is global leader, and the values it represents, which act as both the glue that keeps together the member states and a constitutive element of the model the EU strives to project globally. This model revolves around a free, peaceful parliamentary democracy, deeply committed to the separation of powers.

Respecting these values is a precondition for membership of the European club, as laid down in Article 2 of the Treaty on European Union (TEU): “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law

and respect for human rights, including the rights of persons belonging to minorities. . . . These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

It is difficult to make this message heard in a world where, for a variety of historical, economic and political reasons, a large part of the population has to live with arbitrary authority, its freedom controlled from above. This is all the more salient when, within a EU defining itself as a “community of values”, certain member states betray their commitments and openly flout the values espoused in article 2 of the Treaty.

Given the foreseeable enlargement of the EU to the Eastern countries liberated from the communist yoke, this risk was taken into account in the drafting of the Treaty of Amsterdam, which was signed in October 1997. One article provides for heavy penalties for any member state that is guilty of a “serious and persistent breach” of the values underpinning the rule of law. This stipulation has remained virtually unchanged, becoming the current article 7 of the Treaty of Lisbon – an article often mentioned of late in connection with policies pursued in Hungary and Poland but that has so far never been implemented.

These issues already came to the fore in 1999, when after a general election in Austria the conservative ÖVP joined forces with Jörg Haider's far-right FPÖ to form a government. The concerns of the then fourteen EU partner states of Austria were many, yet it was not possible to refer to the stipulations of the Treaty of Amsterdam, which would have amounted to meting out a preventive punishment to Austria. The fourteen therefore agreed to introduce bilateral diplomatic sanctions against Vienna. The decision taken in February 2000 had little effect, and the sanctions were lifted in September that same year.

The fact that article 7 has so far never been triggered has also to do with two of its (related) drawbacks. Since it provides for sanctions that may include the suspension of voting rights of the offending state, the article is sometimes compared to a "nuclear option" not to be used lightly. In light of the severe consequences, the drafters of Article 7 have made sure that it can only be triggered after a complex procedure requiring the unanimity of the EU member states. In other words, if just one other country supports the incriminated state, which does not take part in the vote and does not count toward the relevant majority, the procedure stalls and article 7 remains a blunt weapon.

It is worth recalling the various stages of the sanction procedure, as described in the Treaty. Prior to the implementation of any sanctions, a preventive mechanism kicks in, which was added to the Treaty of Nice (2000) in response to the Austrian incident. It serves to determine whether "there is a clear risk of a serious breach" by a member state of EU core principles.

This requires a proposal by one third of the Member States, by the European Parliament or by the Commission, which, if it wins the approval of MEPs, would be followed by a decision in the Council of Ministers acting by a majority of four fifths of its members (that is 22 member states, 21 after Brexit).

This procedure is accompanied by a dialogue between the European institutions, the partner states, and the country failing to meet its obligation, possibly resulting in policy recommendations.

Sanctions can be imposed if the existence, and not only the risk, of a "serious and persistent breach" by a member state of EU values is clearly established. Such a decision is taken at the top of the European hierarchy. It calls for unanimity in the European Council (bringing together heads of state and government), acting "on the proposal of one third of the member states or the European Commission and after obtaining the consent of the European Parliament."

If and when this has been done, the European Council may decide, by a qualified majority, to strip the offending member state of some of its rights, including its voting rights. Since the Treaty does not provide for the possibility of excluding a state from the EU, depriving a member of its voting rights is the sanction that comes closest to an expulsion. However, such a decision is not irreversible: If the situation changes, the European Council, acting by a qualified majority, can modify or end the measures it has taken.

Designed to deter EU member states from any serious and lasting infringement of the rule of law, article 7 has not lived up to its original intent. The gravity of the measures is such, and the required unanimity so unlikely that its deterrent effects have run counter to its stated aim. The European Commission realised this: In September 2012, its president – at the time José Manuel Barroso – declared to the European Parliament "We need a better developed set of instruments – not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of article 7 of the Treaty."

As a result, in March 2014, the Commission defined "a new framework to ensure an effective and coherent protection of the rule of law in all member states". The text specifies the three stage-process established by this new framework to maintain, or return to, the rule of law in the member state where it is considered under threat: a Commission assessment, a Commission recommendation and a follow-up to the recommendation. The explanatory part of the communication is very explicit, in particular concerning the indispensable independence of the judiciary: "Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process."

As far as democratic procedures and the rule of law are concerned, two EU countries give reason to worry: Hungary, accused of undermining democracy in a resolution of the European Parliament adopted in May 2017, and Poland, a country which, on 19 July, elicited the following comment from Frans Timmermans, first Vice-President of the Commission in charge of the portfolio for the Rule of Law and the Charter of Fundamental Rights: The four legislative measures envisaged by the Polish government concerning its reform of the judicial system "considerably increase the systemic threat to the rule of law in Poland. Each individual law, if adopted, would seriously erode the independence of the Polish judiciary." More than a

little dismayed, Timmermans even raised the possibility of invoking against Poland the famous article 7 of the Treaty.

Timmermans' frustration is justified. In early 2016, the Commission initiated a procedure against Warsaw in an effort to "preserve the rule of law", yielding no results. The Commission has issued a growing number of warnings ever since, threatening and even launching an infringement procedure. Warsaw has refused to address the requests and injunctions. Using the full force of the article proved impossible; in fact, the possibility of action has not even been seriously discussed.

Given the current power balance, the invocation of article 7 would indeed have no chance of being adopted because Hungary and Poland, who support each other, would veto it and therefore make it impossible for the Council to vote unanimously. Unless, that is, both would be subject to infringement procedures at the same time. As the incriminated countries cannot

take part in the vote, an unanimous decision by the other member states would at least be conceivable. This hypothesis, however, is not very realistic. As it stands, the EU is resigned to its own powerlessness.

This is why in several capitals as well as in Brussels, politicians are beginning to moot the idea of penalising unruly students in the EU classroom. The granting of EU funds could be made conditional on the respect of European values. For the programming period 2014-2020 Poland is expected to receive 73 billion euros of EU aid (excluding agricultural policy), or about 17% of its annual GDP. A reduction in these lavish benefits in future years would certainly make itself felt in Warsaw. In this respect, such an approach might be more effective than forever dangling the threat of an article 7 that will perhaps never be invoked. Yet it remains to be seen whether financial sanctions could be anything other than a verbal threat and how the population would react.

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