Rescue Package for Fundamental Rights: Comments by WOJCIECH SADURSKI

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The Hungarian debacle is both a challenge and an opportunity for the EU.

It is a *challenge*, because for the first time the EU faces the situation of one of its member states so blatantly and clearly violating certain principles of democracy and human rights protection, taken for granted as part of the moral values upon which the EU is built. (The first time, because the “Haider affair”, often invoked in this context, cannot be seen as a precedent, for reasons mentioned below.)

But it is also an *opportunity*. An opportunity for the EU to demonstrate that it takes its values seriously, and to use the tool-kit that it has provided itself with for precisely such occasions. By doing so, the EU will show that the enhanced Article 7 mechanism (which, after Nice, and as reaffirmed in Lisbon treaty, includes also the preventive measures) is not a dead letter, and is a device which may be applied, when necessary. It is also an opportunity for us, lawyers, to think hard about how the EU should react to such breaches by nation states, when they cannot be seen as committed in the process of implementation of the EU law but rather violate the vague values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.

Vague – but not meaningless. Their vagueness makes them probably an insurmountable obstacle for employing a purely judicial response; hence the problems with the “Heidelberg” proposal of “reverse Solange” made by Armin von Bogdandy and his team.

I share the misgivings of a number of commentators, including Peter Lindseth, Daniel Thym and Anna Katharina Mangold about trying to find a purely legal remedy to an essentially political problem. But it should not be an obstacle for a fundamentally *political* action by the EU, as envisaged by Article 7. In fact, this is precisely what the Article 7 mechanism is for.

I agree with Mattias Kumm that “it is regrettable, even scandalous, that Art. 7 of the TEU requires unanimity (rather than, say, a supermajority) to determine that a serious threat to human rights exists in a Member State, a precondition for imposing any remedies”. But I do not see why the weaker ingredient of Article 7, namely the preventive (or warning) mechanism provided for by Art.7.1 cannot be applied here. (In fact, Commissioner Neelie Kroes recently hinted at such possibility, though the press release refers to Article 7 in general, without indicating which part of it would be engaged)

Let me recall that the preventive mechanism can be initiated by one-third of the member States, or the Commission, or the European Parliament – so no consensus is required at the stage of the initiative, while the end-result of this procedure, namely a determination of a 'clear risk of a serious breach' of Article 2 principles requires a majority of four-fifths of the Council plus consent of the European Parliament. Even if one-third of member states is unlikely to be motivated to act to initiate the procedure (which does not mean that the concerned citizens in member states should not pressure their governments to do so), and if the Commission is unlikely to act (even though the statement by Commissioner Kroes suggests that it may), the European Parliament may be the best forum in which a serious debate leading up to such a trigger may be launched. In fact, the Parliament is an eminently legitimate body in which serious concerns expressed by the European citizenry about the state of affairs in one of its members should be expressed – and not just vented but also channelled towards procedures set up by the Treaty to respond to such states of affairs. Of course the arguments by MEPs calling for a tough stance on Hungary will be countered by those who will banalize or even defend what happens there – but this is as it should be, in a democratic polity.

Legal history surrounding the origins of the enhanced Article 7 (that is, including the preventive mechanism) suggests to me that today's Hungary is precisely the sort of scenarios which were envisaged by its makers as calling for its use. The warning/preventive mechanism was introduced after, and largely in the response to, the "Haider affair" in 2000. That is partly why the analogies between Haider affair and the current Hungarian situation are not legitimate: the EU in 2000 did not have a more flexible (compared to the sanctioning mechanism) instrument of reacting to such situations: it only had a sledgehammer in the form of Article 7 *sanctions*. That is why the meek sanctions against Austria in 2000 were not, strictly speaking, undertaken by the EU but by individual 14 member states against the fifteenth state. And let us remember that, what happened in Austria in the beginning of 2000 was nowhere near as dramatic as what is happening now in Hungary. After all, all that was happening there were the *words* – to be sure, outrageous and totally condemnable words uttered by the leader of a minor coalition partner, but not real facts "on the ground", as in the Hungarian laws and practice of restringing freedom of the press, gerrymandering in the electoral process in order to entrench the ruling party, playing around with the independence of central bank etc.

While the "Haider affair" was an immediate trigger of the enhancement of Article 7 mechanism in Nice, in fact it was the forthcoming Eastern enlargement which was a factor (even if not *the* factor) which motivated EU decision-makers to equip themselves with a more flexible and sophisticated tool-kit of reacting to such circumstances, which were seen likely to occur within the new, post-communist member states of the union. I tell this story in some detail in my article "Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider", *Columbia Journal of European Law* 16 (2010): 385-426), and I wish to refer the readers to that article of mine. Just a few quotations. In the run-up to Amsterdam Treaty, and in the context of proposing a sanctioning mechanism (which was later to become Article 7), a Reflection Group set up by the Council declared in 1995: "It is generally felt … that during the current process of European construction, *and above all in the run-*

up to enlargement, there is an urgent need to ensure full observance of fundamental rights, both in relations between the Union and member States and between States and individuals" (emphasis added). After the sanctioning mechanism was introduced, the need to accompany it with a preventive mechanism was similarly argued. The French Commissioner Michel Barnier, who was a string proponent of enhancing Article 7 with a preventive mechanism ("a preventive political dialogue", as he euphemistically termed it), said in the European Parliament in April 2000: "As we all know, it is sometimes necessary to state the obvious, for all the current Member States, *and all those, which are preparing to join the Union*. Because democracy and respect for citizens' rights must never be taken for granted, but fought for and defended" (emphasis added).

For more of these statements, and for placing them in a broader context I have to refer the readers to my article. The point I am trying to make here is that what had been then anticipated – with a dose of realism – has just happened. One of the new member states, with a very thin constitutional-democratic structure and a fragile rule-of-law, once it has emerged from the tough accession-oriented conditionality process has become a stage of a major backlash – and the EU is facing a dilemma: pretend that nothing has happened (after all, not only Orbán, but in the past also Berlusconi… etc), relegate the matter to a purely judicial processes (which, notwithstanding the ambitious "Heidelberg proposal", I am afraid will not work), or use the political mechanism of Article 7.1 which was designed precisely for these purposes.

Andrew Williams once opined that the use of Article 7 mechanism "would be catastrophic. Even its possible application would set in train disastrous events that might undo the very fabric of the Union" (Andrew Williams, "The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iran", *European Law Review* 31 (2006) 3 at 26-27). I disagree, and believe that the contrary is true. If the EU does not resort to these measures now, no one will take them seriously in the future, and the EU will descend back to its lamentable double standards: tough on applicant states, toothless with regard to members. For, if not now – when? What else may happen in a member state which may be properly seen as "a clear risk of a serious breach" of principles of democracy, human rights and the rule of law?

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