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Targeted Incremental Economic Responses to Democratic Backsliding in the EU

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Abstract

Some EU member states are becoming less democratic. The procedure in Article 7 TEU is widely criticised for being ineffective to respond to this development. This brief argues that Article 7 is not only ineffective but also normatively incoherent. Furthermore, by continuing to fund backsliding member states, the EU itself becomes complicit. For these reasons, the EU must develop targeted and incremental economic responses.

Introduction

It can no longer be taken for granted that EU member states are on a forward trajectory in terms of democracy and the

rule of law. In the 2019 edition of the Freedom in the World Index,¹ Hungary dropped below the threshold democratic indicators required to be categorised a 'Free' country – the first EU member state ever to do so. Other member states, particularly Poland under the leadership of the Law and Justice Party (PiS), are also backsliding on democracy and the rule of law. Yet Article 2 of the Treaty on European Union (TEU), the core legal document of European integration, clearly states: *"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."*²

¹ Freedom in the World Index 2019 (Freedom House 2019). Available at: https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf

² Article 2, Treaty on European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN>

This commitment raises the question of what the EU should do to guarantee the democratic character of EU member states.

The TEU has a mechanism to deal with this – Article 7. Article 7 proceedings have been started against both Poland and Hungary for breaches of Article 2 values. However, because Article 7.2 requires the unanimity of the European Council at ascertaining a serious and persistent breach of Article 2 values, a simple alliance between two member states (e.g. Poland and Hungary) is sufficient to block any sanction. Another element that blocks the efficacy of Article 7 is the fact that the type of sanction it proposes is a slow, blunt instrument. As such, it is unlikely ever to be used.³

Commentators have proposed a range of new responses to democratic and rule of law backsliding in the EU. Some of these look at developing quicker responses and complementing political sanctions with economic ones.⁴ The European Commission also recognised the difficulties with the Article 7 procedure in 2013 and proposed an additional mechanism, adopted in 2014, known as the ‘Rule of Law Framework’; however, this merely adds additional steps of monitoring and dialogue before the Article 7 procedure. This extended procedure exacerbates a problem already inherent in the Article 7 procedure – that it is slow – so it is hard to see how the Rule of Law Framework has met criticisms made of Article 7.

Article 7 is not only ineffective, it is also incoherent

One aspect of Article 7 has not received enough attention: Article 7 is not only

ineffective, but it is also *normatively incoherent* in that it is in conflict with democratic equality and violates a minimum democratic standard whereby all who are legally subject to a law ought to have a formally equal stake in its authorisation.⁵

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Article 7.3 stipulates the possible sanction of a member state of the EU determined to be in ‘serious and persistent breach’ of one of the values referred to in Article 2, namely, the suspension of ‘certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council’.⁶ EU fundamental values include ‘the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’.⁷

What would it mean to respect the values of democracy and equality? At the level of individual citizens of a democratic state, a minimal democratic standard holds that all those legally and permanently subject to a legally binding rule or policy (in short, a law) ought to have an equal stake in co-authorising that law. In democratic theory, this standard is known as the ‘All Subjected Principle.’

³ Oliver and Stefanelli 2016.

⁴ e.g. Pech and Scheppele 2017; Kochenov 2015; Kochenov and Pech 2016.

⁵ Theuns 2020.

⁶ TEU, Article 7.3.

⁷ TEU, Article 2.

This is not the only standard in the literature in democratic theory over the legitimate boundaries of a democratic community. Some argue that democratic equality requires that all those ‘affected’ by a decision ought to have an equal stake in it⁸ or that all those ‘coerced’ by a law ought to be able to co-authorise that law.⁹ However, crucially, the All-Subjected Principle constitutes the *minimal criterion* for inclusion amongst these views; most other dominant criteria would include *many more* persons.¹⁰ Thus, if a more expansive principle of inclusion is correct, this critique of the normative incoherence of Article 7 is all the stronger.

The case for the normative incoherence of Article 7 in light of the Article 2 fundamental values of democracy and equality is straightforward with the All Subjected Principle in mind. Were the sanction in Article 7.3 to be activated against a member state such that the state in question loses its right to vote in the Council, that state could not legitimately be subjected to (otherwise legally authoritative) decisions of the Council. Yet, Article 7.4 states explicitly that, for such a disenfranchised state, ‘The obligations [...] under this Treaty shall, in any case, continue to be binding’.¹¹ Those obligations include being bound by those Council decisions a sanctioned state can no longer vote on as a direct consequence of their sanction, thus violating the All Subjected Principle.

However, the EU doing nothing about democratic backsliding in its member states is *also* problematic from a democratic point of view. If a member state backslides on democracy and the rule of law, it will taint

the democratic quality of EU decision-making. Doing nothing were an EU member state to become frankly autocratic would, of course, be even worse.

How then can the EU ensure it remains a polity that can affirm its commitment to, *inter alia*, democracy, equality and the rule of law? Jan-Werner Müller has noted that there are only two ways out of this dilemma.¹² Either 1) the EU must become more proactive in regulating, through negative and positive conditionality mechanisms, member states’ commitment to fundamental values or, 2) the EU must formalise a procedure by which member states that fall in serious and persistent breach of Article 2 values can be expelled from the Union. The next section focuses on one strategy for better regulating commitment to democratic norms and values in EU member states – targeted economic conditionality.

We need more targeted incremental responses

Tying economic conditionality mechanisms – whether in the sense of positive incentives (more funding) or negative sanctions (e.g. fines, or the withdrawal of allocated EU structural funds) – to member state’s performance on democracy and rule of law indicators seems to be a no-brainer. The EU’s primary power and an unquestionable aggregate benefit to its member states is the single market. Indeed, the bulk of EU law is geared towards guaranteeing the four market freedoms (freedom of movement of goods, capital, people and services). It seems appropriate that those member states not playing by the rules could see themselves locked out

⁸ Goodin, 2007.

⁹ López- Guerra, 2005.

¹⁰ (e.g. Good in 2007; Abizadeh 2008.

¹¹ TEU, 2012: Article 7.3

¹² Müller 2015: 145-146.

of part of their share in the benefits of EU legal, political and economic integration.

Economic conditionality also has the advantage of being very fine-grained – initial and justified concerns over a member state backsliding on Article 2 values could be met with minor and temporary freezes to that country’s full access to structural and investment funds, with funds to be released when the concerns are addressed. Graver instances of backsliding could potentially be met by more severe and longer-lasting economic sanctions, including, eventually, large-scale fines and limitations on the access of those state’s economies to the EU single market.

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Furthermore, such responses can be targeted so that the impact on prodemocratic actors in the backsliding state would be minimised and the impact on the agents of backsliding maximised. This could increase the efficacy of such mechanisms, but also lessened the injustice of broad-brush sanctions on those not responsible for violating fundamental values.

Hopefully, incremental and targeted measures such as these may have the effect either of watering down support for the backsliding regime or stimulating democracy and rule of law reform by those states. However, the normative urgency of taking such actions in the face of backsliding is not contingent on their

instrumental success at bringing about an end to the state’s backsliding trajectories. This is because, where a member state is in serious and persistent breach of EU fundamental values such as democracy and the rule of law, and yet continues to receive large-scale economic benefits from the EU in terms of trade advantages and structural funds, the EU can be said to be *complicit* in that state’s backsliding.

By complicity is meant the normative wrong whereby an agent enables, induces, encourages, permits, or inadequately fails to prevent another wrong. In the case of the above argument, the complicity in question rests in part on EU inaction in the face of democratic and rule of law backsliding, but also on the EU enabling populist autocratising projects by subsidising, on a large scale, the economies of countries undergoing processes of de-democratisation – R. Daniel Kelemen calls this the second pillar of ‘Europe’s authoritarian equilibrium’.¹³

One question that remains, however, is whether or not economic conditionality mechanisms tied to democratic and rule of law backsliding would themselves be normatively coherent with the values the EU professes to hold in Article 2. The value of equality in particular may give us pause. Clearly, selecting certain member states for economic sanctions, or making their enjoyment of certain structural funds conditional on their reforming certain practices that put them at risk of a serious breach of EU fundamental values, is treating them unequally to other member states not subject to such limitations. Is this an affront to their equality? No. Or at least, not necessarily.

The relevant equality here is not that member states are treated equally, in the

¹³ Kelemen, 2020.

sense of being treated in the same way. Rather, it is important that all member states are equally subjected to the same framework of rules that leads to conditionality mechanisms being imposed in specified cases of democratic and rule of law backsliding. To see this, it is helpful to think of a citizen's equality before the law, which works in much the same way. There is no affront to equality when an individual, because of law-breaking behavior, is exposed to penal sanctions as long as all citizens who would be found culpable of breaking such laws would be exposed to those sanctions. An affront to equality would be the existence of a certain class of people who are 'above the law.' Similarly, treating backsliding states differently from states who are not backsliding is not in conflict with the value of equality provided that the conditionality would apply equally to all member states were they themselves to backslide.

Conclusion

This brief has made the case that the current legal procedure outlined in Article 7 of the Treaty on European Union is not only ineffective *qua* slow, blunt, and procedurally inadequate due to the unanimity demand, but also normatively incoherent. This is because it is in conflict with the fundamental democratic principle that all those subjected to a legally authoritative decision ought to have a state in its authorisation.

An economic conditionality mechanism to respond to rule of law and democratic backsliding is, in contrast, not only legitimate and appropriate, but also sometimes normatively required in light of EU complicity with autocratisation. Moreover, it is feasible in light of the competencies of the EU and the scope of its activities and is at least potentially

normatively coherent with EU fundamental values. Consequently, the EU should urgently pivot away from the Article 7 procedures and towards exploring incremental and targeted economic responses to democratic and rule of law backsliding. If and when possible, the EU should also reform the Article 7 procedure to bring it into line with fundamental democratic values.

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