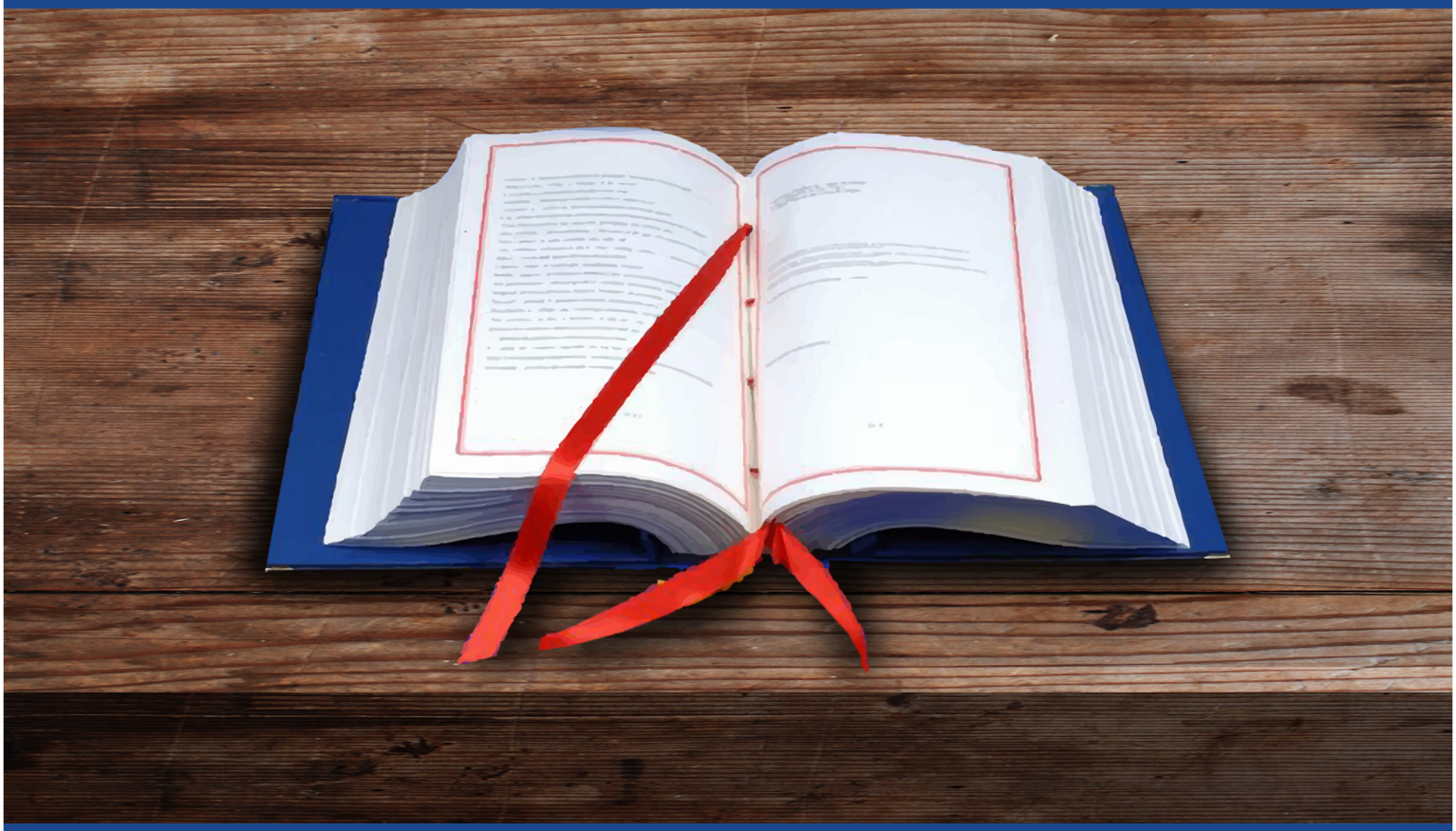
THE RULE OF LAW DEBATE VS CONFRONTATION OF WORLDVIEWS

Hungary and Article 7



CENTER FOR
FUNDAMENTAL RIGHTS

The Rule of Law Debate vs Confrontation of Worldviews

Hungary and Article 7

It is the opinion of the Centre for Fundamental Rights that EU rules governing the "rule of law procedure" launched by the European Parliament are extremely vague and ambiguous and as a result we see a clear danger that, as the process drags along, institutional instability within the EU will increase and conflicts between the EU institutions and the member states will become more acute. The most controversial aspects of the procedure are listed here:

- **The final vote on the "Sargentini Report" created some controversy with the voting procedure applied therein, as the "present" votes cast should have been counted but were not. If that is correct the European Parliament's resolution is null and void on procedural grounds. At the time of writing the vote is being contested at the Court of Justice of the European Union.**

- **The procedure under Article 7 is initiated based on a "risk" of a breach of the "EU values" enumerated in Article 2 of the Treaty on the European Union. However these "values" (democracy, rule of law, tolerance etc.) are terms of political philosophy and lack clear legal, normative substance or definition. Their application in a legal process leaves the door wide open for political interpretations and an unlawful intrusion of the EU into matters of constitutional and national sovereignty. Therefore what we have here isn't a debate over the rule of law - it is a debate over national sovereignty and involves the question pertaining to the hierarchical relationship between "EU values" and national identity which is protected under the EU treaties.**

- **The deepest legal problem however, arises from the procedural mechanism described in Article 7. There is a milder "prevention or control mechanism" and a harsher "sanctions mechanism". One possible interpretation is that the two mechanisms build on each other and the "prevention mechanism" is the first step towards the "sanctions mechanism". Another possible interpretation states that the two procedures are entirely separate from each other, they are two mechanisms and consequently the "prevention mechanism" can never turn into the "sanctions mechanism" which, if it is to be applied, must be (re-)initiated.**

- **Beyond the above, it should be underlined that the enumerated institutions entitled to launch the two mechanisms are not identical. While the "prevention mechanism" can be initiated by the European Parliament, the "sanctions mechanism" cannot be. What follows is that the process started by the "Sargentini Report" cannot lead to a suspension of Hungary's voting rights in the European Council or other sanctions, as those are consequences of the "sanctions mechanism" which can only be initiated by one third of the member states or by the European Commission.**

We can conclude that although the majority in the European Parliament aimed to counter a perceived disruption of EU values through the Sargentini Report, the resulting procedure raises far more and deeper questions about the European Union itself than what it can hope to answer. It does however, draw attention to the fact that there exist, in parallel, differing attitudes to and interpretations of EU competences, national identity and democracy itself within the member states and the European Union.

On September 12 2018, The European Parliament, in a vote whose procedural legitimacy faces an unresolved challenge at the time of the writing of this report, called on the Council of the European Union to determine under Article 7 of the Treaty on the European Union that there is a clear risk of a serious breach by Hungary of the values of the European Union. The formal basis in material law for launching this hitherto never applied procedure is a breach of the provisions of Article 2: an enumeration of the "values of the European Union" - such as democracy, freedom or the rule of law - without a clear, legally tangible normative substance. And this is the aspect of the procedure that leads to one of the most profound problems with it: the procedure refers to categories of political philosophy that may have certain aspects and attributes that are clearly identifiable (although of course the member states have differing systems of elections or justice from state to state) but these "values" lack an accepted, uniform EU-wide definition. Because these "values" are quite intangible, difficult to get a clear legal handle on and are more philosophical terms than anything else, bringing a member state to book on account of them or even a procedure with such an aim alone, leaves the door wide open for politically motivated interpretations and hides an essentially political process of drawing lines and distinctions behind a notionally legal process. This duality of legal strappings and a political substance/debate leads to the conclusion that although formally there is a "procedure on the rule of law" the real debate or difference of opinion pertains to the constitutional identities of the member states and the substantive core of the disagreement is the conflict between national sovereignty and the competences conferred by member states on the European Union. In other words, the true motivation behind the argument is a difference of worldviews in these matters.

These tensions become more pronounced if we contrast the wording of the treaties on the European Union and the interpretations of EU political institutions regarding the action radius of their jurisdictions. One of the basic "rules of conduct" within the European Union is the principle of subsidiarity and a limited transfer of competency as "..the Union shall act only within the limits of the competences conferred upon it by the Member States" and thus "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". This resonates with the rule regarding the constitutions of the member states which explicitly provides that member states do not confer sovereignty, merely competences deriving from sovereignty that they intend to exercise in common with other member states through the institutions of the European Union. With regard to the above (as well as causing controversy regarding Articles 2&7) there is a treaty provision of paramount importance which states that the Union respects the national identities of the member states of which the keystones are the political and constitutional order and territorial integrity of the above mentioned. Essentially, the 7th Amendment of the Fundamental Law (Hungarian Constitution) introduced this principle into the Hungarian constitutional framework as a limit to the exercise of EU jurisdiction.

While the Court of Justice of the European Union has, on several occasions, touched on "national identity" and on its potential consequences it hasn't identified a general system of criteria in this field beyond certain details. The political institutions of the European Union showed no such forbearance. The European Commission, and on its trail the European Parliament (for instance in the Sargentini Report) explicitly considers Article 7 as applicable to competences that were never conferred on the European Union by member states. Therefore interpretations of the "values" enumerated in Article 2 and of the procedure stemming from said "values" (described under Article 7), that move beyond competences conferred on the European Union and, as such, constitute a form of creeping legislation, go counter to basic principles declared elsewhere in the European Union treaties.

Considering what was said above we can approach the ideological disagreement from a legal point of view thusly: while some organizations promoting a federal direction for the future of the European Union consider the "values" listed in Article 2 to be above and superior to national identity, at the same time member states who are skeptical towards further federalization of the European Union (and steps taken in such a direction i.e. the attempts to normalize mass, illegal migration) as well as some constitutional courts of the member states clearly approach the principles of subsidiarity, limited conferral of competences, national identity and basic constitutional order espoused in EU and national law as constraints upon EU jurisdiction and competences. It is this Center's opinion that the ambiguity with regard to such fundamental concepts touching on the relationship between the Union and the constitutional framework of the member states and especially the use of such lack of clarity, in conflicts that are basically political in nature but are masked in a legal veil, will not contribute to the clarification of these matters but instead will increase tensions and instability.

The History of Article 7

However, it is not merely Article 2 and other provisions of the EU treaties that open the door to various conflicting interpretations but also the procedural rules of Article 7. The source of the controversy is that, in its present form, the article contains a "prevention/control" and a "sanctions" mechanism (the procedure initiated by the European Parliament against Hungary falls squarely in the first category. The first mechanism is merely that the Council of the European Union made up of the ministers of the member states may determine that a clear risk of a breach of the European Union's values is present in a member state. The second allows the European Council, made up of the heads of government and state of the member states, to determine the existence of a serious and persistent breach of EU values (not only the risk of a breach but the actual fact of a breach) in a given member state. Having taken into account the history of the development of the EU treaties and the individual paragraphs within Article 7 two separate and conflicting interpretations arise: according to one the two above mentioned mechanisms build upon each other in the manner of a step ladder, but according to the other the two mechanisms are entirely separate and one can't lead to the other or be combined with the other, at least the procedure originating in the European Parliament can never end in the application of the "sanctions" mechanism.

Given that the original intent behind the creation of the European Community was motivated by economic considerations the European Union's and its predecessors' treaty documents lacked any political declarations of shared values or mechanisms for bringing violations of said values to account for a considerable duration of the integration. The first symbolic reference to the "promotion of democracy based on fundamental rights" was in the preamble of the Single European Act (SEA) but without normative substance or en enforcement mechanism. In 1992, the Maastricht Treaty no longer merely declares the need to protect democratic principles but places it among its provisions – in the same paragraph with the need for the protection of national identity. However no details are given. Beginning in the mid-90s the intensification of accession talks with the former Communist states of Central Europe and the "fear" and apprehension the "old member states" felt towards "undemocratic traditions" in the aspiring states often going back to the pre WW2 era brought about the need for the EU to set political conditions beyond economic ones for the prospective members and a mechanism to enforce those. It was pursuant to the 1995 recommendation of an EU debate group that the procedure known today as the "sanctions mechanism" was adopted into the Amsterdam Treaty signed in 1997. At the same time the future Article 2 began to take its shape as well. Somewhat surprisingly it was a "western country", Austria, where the possible application of the "sanctions mechanism" first became a realistic prospect when the Austrian People's Party (ÖVP) entered into a

coalition with Jörg Heider's Freedom Party (FPÖ) in 1999. Although the (ultimately failed) sanctions were applied on a bilateral rather than EU basis the event prompted the introduction of the above mentioned "prevention/control mechanism" in addition or parallel to the "sanctions mechanism" into the Treaty of Nice in 2001. This concept was then adopted by the Lisbon Treaty. It is then evident that the procedure (or procedures) in question were not created as a uniform legislative act with a single legislative intent and it follows that it is impossible to determine if the original intent was to create the "prevention/control mechanism" as a precursor to the "sanctions mechanism" or as a less intrusive alternative to it in case of necessity.

The Substance of Article 7

It is worthwhile to take a closer look at Article 7, which contains 5 paragraphs.

Paragraph 1 states that on a reasoned proposal by one third of the member states, by the European Parliament or by the European Commission, the Council may determine that there is a clear risk that a member state may be in breach of "EU values". Before making such a determination the Council will hear the member state in question, may make recommendations to it after which the determination requires a majority of four fifth of its members. Later the Council monitors if the grounds for such a determination persist. Even at this point in the procedure questions arise (much like with the debate around the "present" votes during the final vote for the Sargentini report): although the paragraph explicitly requires the Council to obtain the consent of the European Parliament, it is not evident if that requirement persists in the form of a second vote even if the procedure was initiated by the European Parliament. It is also unclear what details and timeframe apply to the "hearing period" preceding and the "monitoring period" following the determination by the Council.

Paragraph 2 again states that on a reasoned proposal by one third of the member states or by the European Commission (but no mention of the European Parliament here!) the European Council, again requiring an vague "consent of the European Parliament" and after taking into consideration the observations of the member state in question, can, by a unanimous decision, determine that a serious and persistent breach of "EU values" exists in the member state. This paragraph, despite operating with some terms identical to paragraph 1 (i.e. "member state in question") never specifically refers to paragraph 1 or to (any of the elements of) the procedure there described.

Of course it is possible, on a logical or systemic basic, to maintain that, the above notwithstanding, the contents of the two paragraphs describe two steps of a single procedure, but that gives rise to several new procedural problems: if the Council determines under paragraph 1 that there is a risk, why then is there a necessity under paragraph 2 to re-initiate the stricter procedure again – and why is the European Parliament excluded from the circle of potential initiators? Why doesn't the "control mechanism" turn automatically into the "sanctions mechanism" when the Council registers during the monitoring phase following its determination made under paragraph 1 that the causes of the risk to "EU values" persist? A possible answer, of course, is that paragraph 1 came later. It was inserted into the body of what became Article 7 after paragraph 2 was already present. However such an answer strengthens the interpretation that the procedure described in paragraph 1 isn't the first step towards that of paragraph2 but an entirely separate mechanism designed to deter bad behavior – leading to the conclusion that the "sanctions mechanism" requires a new initiation/proposal process or perhaps that one third of the member states and the European Commission can bypass paragraph 1 entirely and turn directly to the European Council under paragraph 2. Even if we consider the procedures described in paragraph 1 and paragraph 2 somehow combined or subject to being potentially combined (for instance due to that fact that in both cases one third of the member states and the

European Commission act as initiators) it seems self-evident that the European Parliament can only act as initiator under paragraph 1 and thus the procedure initiated by it cannot result in consequences arising from paragraph 2 or paragraphs pursuant to it.

We can only agree with Andrew Williams's conclusions reached 12 years ago: the initiation of the rule of law mechanism is catastrophic. Even the threat of its potential application might lead to a series of events which would tear into the fabric binding together the Union. The notion of the "separateness" of the two procedures is further supported by the rest of the paragraphs in Article 7. None of the succeeding paragraphs refer to paragraph 1, neither paragraph 3 dealing with the application of sanctions by the Council, including the suspension of voting rights, nor paragraph 4 detailing the lifting of the sanctions, not paragraph 5 discussing voting procedures. And yet paragraph 3 refers to paragraph 2 and paragraph 4 refers to paragraph 3. What follows is clear: paragraph 1 stands alone, quite separate from the sanctions mechanism stemming from and based on paragraph 2 which is intertwined with paragraph 3 and paragraph 4.

The interpretation of Article 7 is quite controversial from both political and legal standpoints; there is no consensus among legal scholars or the "interested public" or politicians. The answer to the mystery probably lies in the fact that, despite the conclusions drawn from the Haider affair or the highly motivated atmosphere of the EU enlargement era, at the time of the devising of Article 7 and its precursors nobody realistically expected this "nuclear option" to ever be seriously contemplated, never mind for political reasons. And as a result the authors of Article 7 never paid due attention (or owing to the absurdity of its application, never dared to set a detailed roadmap) to a clear procedural mechanism.

We can only agree with Andrew Williams's conclusions reached 12 years ago: the initiation of the rule of law mechanism is catastrophic. Even the threat of its potential application might lead to a series of events which would tear into the fabric binding together the Union.

1 Report on a proposal calling on the Council to determine, 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 (2017/2131(INL)) (AKA Sargentini Report) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN#title3

2 Article 2
„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."

3 Due to the abstract nature of the terms enumerated in Article 2 such a definition is probably unattainable.

4 See Article 4 paragraph 1 and Article 5 paragraph 1-2

5 See The Fundamental Law of Hungary (Constitution) Article E paragraph 2

6 Article 4 paragraph 2
"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. In particular, national security remains the sole responsibility of each Member State."

7 „ The exercise of its powers pursuant to this Section shall be consistent with the fundamental rights and freedoms laid down in the Basic Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation."

8 See Giacomo Di Frederico: Identifying constitutional identities in the case law of the Court of Justice of the European Union 7 https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf

9 See „The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act auton omously". Commission Communication to the Council and the European Parliament on Article 7 of the Treaty on Euro pean Union: Respect for and Promotion of the Values on Which the Union is Based, COM(2003) 606 final (Oct. 15, 2003) „The scope of Article 7 is broad, giving the EU institutions the ability to act not only within the limited framework of the areas covered by EU law but also in the event of a breach in an area where the Member States act autonomously". Commission Communication on the Fundamental Rights Agency – Public Consultation Document COM(2004) 693 final https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0693&from=EN

10 See especially the practice of the Constitutional Court of Hungary pertaining to the "presumption of retained sovereignty". Consti tutional Court Ruling {60} 22/2016 (Dec 5th) and the reasoning attached to the Ruling 3130/2016 (Jun 29th)

11 Article 7
„1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed."

12 Beyond the 1993, not overly detailed, Copenhagen criteria. Later, the European Commission applied the political criteria in an ad-hoc manner during accession talks.

13 Andrew Williams: Article 7 TEU, the Fundamental Rights Agency andthe UK's Invasion of Iran. In: European Law Review, 2006/3