



The European Parliament vote on Article 7 TEU against the Hungarian government

Too late, too little, too political?

Sergio Carrera and Petra Bárd

12th September 2018 saw [the European Parliament \(EP\) vote in favour](#) of launching Article 7 TEU proceedings against the Hungarian government on the basis of a [European Parliament Report](#) prepared by MEP Judit Sargentini. Published on 4th July 2018, the Report provided evidence raising serious rule of law concerns about Viktor Orbán's government. Earlier the same day, the President of the European Commission, Jean-Claude Juncker expressed concerns in his [speech on the State of the Union](#) about the developments in some EU member states and, clearly having the Hungarian government in mind, emphasized that Article 7 "must be applied whenever the rule of law is threatened".

Much controversy has emerged following the EP vote, along with a great deal of confusion about the actual significance, scope and implications of this decision, all of which require clarification. The vote is a very welcome marker of the EU's commitment to upholding its founding principles in relation to member state governments. It constitutes a clear warning for Viktor Orbán's government from the main European institution directly representing European citizens at EU level.

The Parliament's vote constitutes only a preliminary step in effectively addressing and repairing the ongoing systemic challenges to the rule of law in Hungary. It also comes too late and can be expected to have little short-term impact, as the procedure it triggers is very much based on political considerations. If anything, the controversy highlights the inherent structural flaws that render the current procedures and tools available to the European institutions less than fully effective in countering threats to the rule of law in countries once they have acceded to

Sergio Carrera is Senior Research Fellow and Head of Justice and Home Affairs Programme at CEPS. He is also Part-Time Professor at the Migration Policy Centre (MPC) in the European University Institute (EUI) in Florence (Italy). He is also Visiting Professor at the Paris School of International Affairs (PSIA) at Sciences Po (France). Petra Bárd is Associate Professor, Eötvös Loránd University, Budapest; Visiting Faculty, Central European University (CEU), Budapest; and Visiting Professor, Goethe University, Frankfurt.

CEPS Commentaries offer concise, policy-oriented insights into topical issues in European affairs. As an institution, CEPS takes no official position on questions of EU policy. The views expressed are attributable only to the author and not to any institution with which he is associated.

Available for free downloading from the CEPS website (www.ceps.eu) • © CEPS 2018

the Union. It is therefore time for the EU to equip itself with a robust EU Periodic Review, which would secure a permanent and comparative assessment – based on independent evidence – of compliance with the democratic rule of law and fundamental rights commitments by all member states.

Too late

The decision to start Article 7 TEU proceedings against the Hungarian government has come long after evidence of serious and systemic threats to the rule of law in the country became [overwhelming](#). Since coming to power in 2010, the Orbán government has actively and strategically engaged in major constitutional [re-design](#) in the country.

First it paved the way with a well-thought through process of deconstructing checks and balances. The independence of the judiciary has been compromised in numerous ways. By introducing new age limits for retirement with immediate effect, 27% of Supreme Court judges and more than 50 % of appeal court presidents were removed, and the positions were filled by lawyers loyal to the government. The President of the Supreme Court was removed from office in an irregular manner, condemned by the [European Court of Human Rights](#). Since 2010, the power and independence of the Hungarian Constitutional Court have been diminished. The ombudsman system, with one general and several specialised parliamentary representatives for various human rights, has ceased to exist.

The curtailment of media diversity has been a well-documented step in neutering criticism of government policies. However academic freedom has also been severely jeopardized. Perhaps the attacks against the [CEU](#) are best known – with an [infringement proceeding](#) pending. But freedom of thought is also challenged in the way funds for state universities are distributed, attempts to impose government influence on the [Hungarian Academy of Sciences](#) and the government's witch hunt against [gender studies](#). In the past year, the government has engaged in the criminalisation of civil society. New laws, notably the '[Stop Soros Legislative Package](#)', are subjecting them to extraordinary tax procedures, stigmatising those with external support and penalising anyone providing humanitarian assistance to asylum seekers and irregular immigrants.

State capture is achieved through patronage and clientelism: both high positions in state institutions and beyond are given to allies in return for party loyalty, and also public funds – including EU subsidies – are used to build and strengthen the illiberal regime and create a new economic elite. Corruption is not only on a different scale, it is also qualitatively different from that in democratic countries where the rule of law holds sway: Hungary is contaminated by institutionalised corruption to a degree that public institutions are rendered incapable of fulfilling public goals; instead they exclusively serve the interests of those in power. Hungary's dubious [golden visa scheme](#), the serious [irregularities](#) found by the European Anti-Fraud Office in relation to companies co-owned by Orbán's son-in-law, are just some of the more obvious examples of clientelism and corruption.

Too little

Article 7 TEU is notorious for its burdensome and procedurally ineffective nature. It consists of a *preventive* arm (determining a clear risk of a breach of the rule of law) and a *corrective* dimension (determining a serious and persistent breach). It is only within the scope of this second dimension that the provision foresees the possibility to apply sanctions to the EU member state concerned. Sanctions may include, but are not limited to, suspension of voting rights inside the Council. While this is the first time that the EP has called on the Council to put the Article 7 TEU procedure in motion and to address a systematic threat to EU values in a specific EU country, the impact of the vote should however not be overestimated.

The EP's vote is just a preliminary step towards the opening of Article 7's preventive arm. The vote merely constitutes a formal invitation to the Council to open up a procedure to ascertain whether there is actually a real risk that the Hungarian government is breaching the rule of law. It is by no means a decision concluding that this is in fact the case. It is now entirely up to EU member state governments in the Council to decide whether to respond to the Parliament's invitation and start the procedure. In addition, the provisions of Article 7 set a too high threshold inside the Council in order to activate the procedure: a four-fifths majority is needed to invoke the preventive arm, whereas the corrective arm can be vetoed by any member state. It is therefore plausible that the Parliament's vote will lead to very little in practice.

As documented above, it is striking that a first decisive move has taken so many years. The rule of law challenges in Hungary and Poland have been qualitatively very similar and closely interrelated, in many respects even mimicking each other. Yet the European Commission has remained in official disengagement on 'rule of law matters' from the Hungarian government, while openly implementing since 2016 a structured dialogue with Polish authorities, in the scope of the so-called [EU Framework to Strengthen the Rule of Law](#). This EU Framework was [criticised](#) at the outset in 2015 for treating member states differently and the Commission's inaction in respect of Hungary was questioned in [early 2016](#).

Though the case of Poland has illustrated the ineffectiveness of this 'pre-Article 7 procedure' in preventing the emergence of a systemic threat to the rule of law – as testified by several Opinions of the [Venice Commission of the Council of Europe](#) indicating that instead threats to the rule of law in Poland escalated over the past two years, the European Commission's subsequent activation of Article 7 TEU against Poland only accentuated the differential treatment. While it is true that the Commission launched a whole series of much needed infringement procedures against the Hungarian government, they by no means deal with the root causes of the challenges to the rule of law in the country.

Too political

The Article 7 TEU procedure leaves the decision to start investigating the legality of EU member states' actions in light of EU values entirely in the hands of a political decision by Parliament, the European Commission or a majority of member states. Even the instigation of the

procedure is highly politicized: the recent support in the EP for opening an Article 7 TEU procedure against Hungary cannot be understood without taking into account the race for the Presidency of the next European Commission and the role of the [European People's Party \(EPP\) leader](#) in that context.

It is furthermore left entirely in the Council's hands to assess and decide whether a member state displays a risk or an actual threat to the rule of law that could put European integration and cooperation in jeopardy. There is no independent evaluation, or any judicial scrutiny of the procedure with no role attributed to the Court of Justice of the EU in Luxembourg regarding Article 7 TEU outputs. The above-mentioned EU Framework leaves the Commission too much discretion in dealing or proceeding with the envisaged procedure, or taking any further follow-up steps. The Commission has no formal role attributed by the Treaties once the Article 7 procedure is opened, leaving the affair solely to inter-governmental closed-doors business.

Both the underlying assessment under the Rule of Law Framework and Article 7 TEU procedure lack independence, impartiality and legal rigour. They also do not ensure equality of treatment among all EU member states. Risks and outstanding issues on the rule of law are not only visible in countries like Poland and Hungary, but an ongoing challenge at different scales and degrees across the Union. Cases in point are [Malta](#) and [Bulgaria](#).

Orbán has qualified the EP's vote as a "[fraud](#)" and a "[petty revenge](#)" for its hard-line migration policy. However, this is disingenuous. The vote of 12 September 2018 is *not* about migration policy. Rather, most of the rule of law concerns documented in the EP report (corruption and conflicts of interest, threats to academic freedom and freedom of assembly as well as the functioning of the constitutional and electoral system and judicial independence) directly and intimately affect the rights and interests of Hungarian citizens.

Priorities for the way forward

A key priority for the period of EU inter-institutional renewal expected to begin during 2019 should be to de-politicise and further strengthen the EU rule of law procedures and tools. The EU should equip itself with a permanent, comparative and [periodic qualitative assessment](#) of compliance with Article 2 TEU principles and the EU Charter of Fundamental Rights. This could follow the model of the [United Nations \(UN\) Universal Periodic Review](#).

A new EU Periodic Review on Democracy, Rule of Law and Fundamental Rights should be established covering *all* EU member states and be based on a regular and independent assessment of all relevant existing international sources of evidence on compliance with EU values. It should be accompanied by a new [EU Rule of Law Commission](#) of high-level personalities and experts – following the template of the Council of Europe Venice Commission – which would autonomously assess these issues and challenges in the context of EU specificities and the fields of competence laid down in the Treaties and the EU Charter of Fundamental Rights. No Treaty change would be required to implement these proposals.

Moreover, current obstacles for making Article 7 TEU operational should be re-designed so as to secure its effectiveness and legitimacy. The procedural weight of Council voting requirements under Article 7 TEU should be reduced. The outputs of the preventive and corrective arm in Article 7 TEU should also be subjected to the judicial oversight of the Luxembourg Court. Such improvements would call for Treaty change.

Rule of law backsliding is not exclusively a member state matter. Beyond harming the nationals of the country concerned, Union citizens residing in that country are also detrimentally affected. The lack of limitations on 'illiberal practices' may encourage other member state governments to follow suit. Moreover, all EU citizens may suffer to some extent from the participation of that member state in the EU's decision-making mechanisms. At the very least, the legitimacy of the Union's decision-making process will be jeopardised.

For EU law to be operational and trust-based, whether in the context of the single market or in the Area of Freedom, Security and Justice, certain presumptions must hold and not be taken for granted. This is the case in respect of the presupposition that after accession to the EU, all member states are democratic countries based on the rule of law and compliant with fundamental rights, where legal disputes are resolved by an independent judiciary, equality of the law applies to everyone, contracts are enforced and infringements of human rights are remedied.

If EU institutions do not respond meaningfully to rule of law backsliding and systematic violations of EU values, this will weaken the very fabric of the EU legal order and challenge the nature of the European integration project as we know it.