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Beyond Voting Rights Suspension
Tailored Sanctions as Democracy Catalyst under
Article 7 TEU

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Abstract

Article 7 TEU empowers the Council to suspend certain rights derived from the application of the Treaties. The suspension of voting rights in the Council is one such example. This contribution examines which other rights can be suspended. It uses sanction theories and a textual and contextual analysis of the sanction provision contained in Article 7 TEU to assess the options the Council has, and develops guidelines and suggests improvements of the institutional framework for devising sanctions. The contribution argues for targeted sanctions against individuals and entities that form the political and economic basis of regimes deviating from the fundamental liberal-democratic values. The sanction must be tailored to the causes of the deviation in such a way that they can enhance democratic pluralism.

Keywords

Article 7 TEU; EU values; sanctions; democracy; rule of law; Hungary; Poland

Introduction

The suspension of voting rights of a Member State that seriously and persistently violates the fundamental values of our common enterprise is neither the only option nor a desirable one. The EU's discretion in devising sanctions is broad, and its institutions must use their sanctioning powers effectively and creatively to stop the proliferation of illiberal structures in its Eastern part before they spread further. The EU has the necessary powers to do so, and it is under obligation to its citizens to do so. It should start with identifying the economic bases of the Law and Justice Party (PiS) and Fidesz and hit hard. Simultaneously, the EU should find ways to correct deformed plurality by supporting liberal institutions such as independent media, non-governmental organizations, and universities.

In this contribution, I analyze the EU's options under the sanction provision of Article 7 TEU, and suggest a method and guidelines for devising the sanctions. After setting my research within the context of the Article 7 debate, I proceed to a textual analysis of the sanction provision followed by a contextual dimension focusing on the purpose of Article 7 as such. Thereafter, I examine the major political theories of sanctions that will help us understand how to achieve that objective. In the next step, I review institutional architecture for sanctioning and suggest improvements. The final two sections outline the principles that should govern the process of devising the sanction regime and identify different areas of rights that might be suspended. In the conclusion, I urge for sanctions tailored to the causes of deviation and political and societal structures in a target state.

I. The EU's Failure

In December 2017, the Commission backed by France and Germany launched Article 7 procedure against Poland.¹ At last. For several years, the politicians of a generation raised during the Cold War have been discarding Article 7 TEU as a nuclear option, that ought not to be used.² The EU policy-makers has repeatedly signaled that Article 7 does not provide them with a viable option to deal with the backsliding of some Member States from common European values.

The nuclear analogy is misleading. The concept of mutually assured destruction counsels against deploying such weapons. It is also the reason why misconduct on a lower scale might be tolerated. However, it applies only to those in possession of the weapon or those under a protection of the weapon holder. Hungary and Poland do not have a counter-weapon that would assure the EU's destruction at their disposal. The purpose of Article 7, within the nuclear paradigm, must then be to *deter* from wrongful conduct. If Article 7 were to create a deterrence effect, it *ought to* be used first.³ The Commission has taken the first step.

The hesitance of the EU to deal decisively with Viktor Orbán's gradual illiberal reforms in Hungary after the 2010 parliamentary elections have relaxed, or even inspired, others with similar

¹ European Commission – Press release, Rule of Law: European Commission acts to defend judicial independence in Poland, Dec. 20, 2017, at http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

² *J.M. Barroso*, State of the Union Speech, at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm, 2012.

³ The closing days of the WWII in the Pacific made it clear that only the use of atomic bomb would end Japan's determination to continue fighting; the existence of the weapon was not enough. For the posterity, the deterrence effect has been established through the actual use of the nuclear option. The reader might forgive me for using this example (which surely exceeds the scale of the problem we deal with here), given that it was not me who has resorted to nuclear weapon analogy, so tirelessly repeated in the discourse on Article 7 time and again.

political agendas; such as Jaroslaw Kaczynski's Law and Justice Party (PiS) after winning the 2015 presidential and parliamentary elections with a majority vote.

Although critics point to the ineffectiveness of the Article 7 procedure resulting from its cumbersome voting requirements,⁴ the high majorities required by Article 7 in each step of the procedure are not manifestly disproportional to the seriousness of the issue Article 7 aims to address. In the current EU-28, nine Member States, the European Parliament (acting by two-thirds majority of the votes cast, representing the majority of MEPs)⁵ or the Commission may initiate the procedure. Twenty-two Member States may conclude that there is a risk of serious breach of common values by a Member State.⁶ Again, a reasonable majority⁷ are required to prevent abuse of the mechanism.⁸ Thereafter, the European Council will decide unanimously, without counting the vote of the investigated Member State, on the existence of a serious and persistent breach of the common values. In the final stage, which is the object of this article, the Council, acting by a qualified majority, may suspend Member State's rights.

The requirement of unanimity in the European Council is considered the major hurdle in the process. The European Council must enlist support from regimes that interpret the common values of the Union differently than those that are shared by the majority of its members. Allow me a few remarks on the margins. Firstly, we shall consider a possibility to initiate a joint Article 7 procedure against two or more states if the merits of the case are similar and offended values identical. This will disqualify the regimes that are worried to be the next in line from vetoing the European Council's decision. Such an interpretation would require a thorough contextual analysis to overcome the obvious problem that the Article 7 refers to a procedure against "a Member State".

Secondly, the European Council's vote takes place in the concluding stage of the procedure. Passing through the Rule of Law Framework procedure and the steps required by Article 7(1), means that the EU must gain support from a vast majority of stakeholders including at least twenty-two of the Member States and the majority of the MEPs. It would place considerable pressure on the states opposing the measures, and consequently force them to reveal the reasons for their objections.

Thirdly, reaching the concluding stage of the Article 7 procedure may be beneficial even if the European Council's decision is eventually vetoed. It may afford additional legitimacy to the liberal opposition both in the deviating state and in the vetoing state(s), stimulate public debate, and increase support of the general public for regime change.

⁴ For an elaborate critique see e.g. *U. Sedelmeier*, Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, *Journal of European Public Policy* 2017, p. 337-351.

⁵ Art. 354 TFEU.

⁶ The investigated Member State is not counted in the calculation of the required one-third and fourth-fifths majorities. See Art. 354 TFEU.

⁷ Whether the required majority shall be 19, 22 or 24 states is a political decision. A constitutional analysis may only assess the minimum that would be required to prevent an abuse of the mechanism and the maximum that would make the mechanism manifestly unattainable.

⁸ The requirement that the European Parliament acts by two-thirds majority of the votes cast, representing the majority of MEPs is reasonable in light of majorities required for comparable instruments devised to neutralize or sanction constitution-threatening conduct such as presidential impeachment in several EU countries.

The investigated Member State is ensured basic rights of defense – by the requirement of the initiator of the procedure to submit a *reasoned* proposal and by the obligation of the Council to hear the investigated Member State (Art. 7(1) TEU).

The potential of Article 7 has been undermined since its inception. In 2000, the Member States mishandled the situation when the Freedom party (FPÖ) joined the Austrian government.⁹ They bypassed the new mechanism of Article 7 at the first possibility of its application.¹⁰ A decade thereafter, the EU, preoccupied with the Euro crisis and increased immigration, reacted sluggishly to the developments in Hungary and Poland.¹¹ Finally, EU representatives raised the threshold for launching the Article 7 procedure when they declared it as a nuclear option.¹²

One of the reasons why Article 7 has achieved the aura of Rubicon is the notion that its ultimate result would be the suspension of voting rights. Once I deconstruct the sanction provisions of Article 7, it will become clear that the EU has an array of better options for remedying the conduct of a deviating Member State.

Before turning to the textual analysis of Article 7, several preliminary observations must be considered. Firstly, human rights protection within the Union is relatively high in comparison with examples of states that have been sanctioned for human rights violation by the international community. Sanctions will affect these rights. Furthermore, the EU, by using the Article 7 procedure, will impose sanctions on its own citizens. A higher degree of scrutiny of direct and collateral damages that might be caused by sanctions to the general public is therefore necessary.

Secondly, Article 7 is not a political provision that provides political sanctions, but creates a legal regime. The common values contained in Article 2 TEU form an equivalent to a constitutional core which signifies the constitutional identity of the European political community. The target state is guaranteed, albeit limited, judicial protection; the fulfilment of the procedural requirements is reviewable by the Court of Justice. The fact that the sanctions are not imposed by a judicial organ does not make Article 7 a political mechanism. This regime cannot be compared to other situations of pure political accountability, such as the failure to deliver on election promises. In the case of Article 7, the position of the European Council, the Council, the Commission, and the European Parliament as agents are much clearer. If there is a “serious and persistent breach” by a Member State of the values enshrined in Article 2, the agents must act on behalf of EU citizens. The citizens have, at least, the right to be protected from a decision-making on the EU level, that could compromise Article 2 values (‘insulation’ rationale). Under an expansive reading of Article 7, the EU is obligated to its citizens to ensure that no public authority (on any level of governance) is manifestly arbitrary (‘political community’ rationale). The use of the word “may” in each of the stages of Article 7, does not give a cart blanche to Member States and EU institutions to ignore a breach of the values contained in Article 2. It provides them with flexibility as to the means for correcting the breach.

Finally, choosing an effective sanction presupposes that we have in-depth knowledge about the causes of a Member State’s deviation from the common values. Illiberal trends, caused by unfinished democratic revolutions, failed market economy transformation or recent challenges – from the Euro

⁹ M. Merlingen/C. Mudde/U. Sedelmeier, *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, *Journal of Common Market Studies*, 2001, p. 59-77; C. Leconte, *The Fragility of the EU as a ‘Community of Values’: Lessons from the Haider Affair*, *West European Politics*, 2005, p. 620-49.

¹⁰ The provision now contained in Art. 7 TEU has been introduced by the Amsterdam Treaty and were in force as of May 1999, five months before the 1999 Austrian elections, in which FPÖ came second. The mechanism did not include the first phase, the warning mechanism, which was introduced by the Nice Treaty few years later.

¹¹ See e.g. L. Pech/K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, *Cambridge Yearbook of European Legal Studies*, 2017, p. 3-47.

¹² Cf. also the introduction to the New EU Framework to strengthen the Rule of Law, which justified the introduction of effectively another step in Article 7 procedure with a milder language: “current EU mechanisms and procedures have not always been [understand: never] appropriate in ensuring an effective and timely response to threats to the rule of law.” Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, p. 2.

crisis and expansion of Russian and Chinese economic and political influence to immigration influx and terrorist attacks – have proliferated in the EU. Some member states have openly started to reconstruct their constitutional system on national-conservative grounds,¹³ others have silently adjusted their pre-liberal power structures to a new era,¹⁴ some have done so with occasional EU outcry,¹⁵ yet others have slid when attempting to co-opt the populist electorate¹⁶ or have deformed the political plurality in order to gain political and economic advantage and consequently laid down a system of patronage.¹⁷

A proper response under Article 7, in the form of tailored sanctions that are likely to bring a change in the objectionable behavior of a target state, requires a deep understanding of the causes of these trends and of the societal structure in that state. Especially, the senders of sanctions must determine which intrastate forces underpins the illiberal-prone regimes and reasons for failure of liberal forces to counteract these developments.

II. Deconstructing the Sanction Provision of Article 7

The third paragraph of Article 7 states that “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

¹³ The obvious examples are post-2010 Hungary and post-2015 Poland. *K.L. Scheppele*, Hungary’s Constitutional Revolution, Conscience of a Liberal Blog (Dec. 19, 2011), at <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution>; *B. Bugarič*, A crisis of constitutional democracy in post-Communist Europe: “Lands in-between” democracy and authoritarianism, *ICON*, 2015, p. 219-45; *M. Bánkúti/G. Halmai/K.L. Scheppele*, Disabling the Constitution, *J. Democracy*, 2012, p. 138-146.

¹⁴ See recent efforts to uncover the depth of the problem in Slovenia. *Bugarič* 2015, fn. 12 (comparing Slovenia and Hungary); *M. Avbelj*, Failed Democracy: The Slovenian Patria Case – (Non) Law in Context, SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462613, translation from Slovenian original *M. Avbelj*, Zadeva Patria – (ne)pravo v kontekstu, *Pravna praksa*, 2014; *P. Guasti/B. Dobovšek/B. Ažman*, Deficiencies in the Rule of Law in Slovenia in the Context of Central and Eastern Europe, *J. Crim. Justice & Security*, 2013, p. 175-190.

¹⁵ See the establishment of Cooperation and Verification Mechanism, an unprecedented rule of law monitoring mechanism, to assess rule of law deficiencies in Romania and Bulgaria that has become effective upon their accession to the EU. *D. Kochenov/L. Pech*, Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality, *European Constitutional Law Review*, 2015, p. 512-40; *M. A. Vachudova/A. Spendzharova*, The EU’s Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession, *SIEPS European Policy Analysis*, 2012. Cf. also contributions in *A. von Bogdandy/P. Sonnevend (eds.)*, *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, 2015.

¹⁶ Most notable example is the Haider case in Austria in 1999/2000, but cf. also policy shifts in French mainstream parties in reaction to an electorate increase of Le Pen’s National Front, France’s response to 2005 ethnic riots, its 2012 policies concerning Roma minority, or borders’ restrictions with Italy in response to immigration influx. For Austria, see contributions in *R. Wodak/A. Pelinka (eds.)*, *The Haider Phenomenon in Austria*, 2009. For France see e.g. *B.J. Kelley/C.J. Edwards*, France’s Roma Row: An Examination of the French Government’s Violation of EU and International Law, *Willamette J. Int’l L. & Dis. Res.*, 2017, p. 169-210; *M. des Neiges Léonard*, The Effects of Political Rhetoric on the Rise of Legitimized Racism in France: The Case of the 2005 French Riots, *Critical Sociology*, 2016, p. 1087-1107.

¹⁷ E.g. Italy in Berlusconi’s era and constraints on media plurality. Cf. *P. Ginsborg*, *Silvio Berlusconi: Television, Power and Patrimony*, 2005. Also, the Czech Republic’s experience has shown several instances in which Article 2 TEU values were compromised over the last five years or so. If put together, these incidences reveal cracks in a liberal democracy wall: midnight amnesty of President Klaus preventing prosecution of large-scale economic crimes of 1990s; his unilateral stalling of ratification of Lisbon Treaty and refusal to ratify the Article 136 TFEU Amendment resulting alongside the amnesty controversy into a high treason indictment against him; President Zeman’s selective refusal to appoint university professors; his tampering with constitutional process of government formation in 2013, bypassing the Parliament; a dubious economic and political influence of China and Russia in the Czech Republic; the landslide victory of populist ANO party in 2017 parliamentary elections, likely to form a minority government supported by an odd coalition of the Communists and the far-right SPD.

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 this Treaty shall in any case continue to be binding on that State.”

Only *certain* rights can be suspended. If all the rights of a deviating Member State are suspended, the result would equal to expulsion of the state from the EU. This scenario is not legally possible.

Rights can only be *suspended*. Therefore, the suspended rights must be restorable. The sanctions placed on a deviating state cannot deprive the state from exercising these rights after the sanctions are lifted.

Only rights “*deriving from the application of the Treaties to the Member State*” in question can be suspended, that is only the rights that EU membership has created are subject to the provision of Article 7. From the general definition of “application of the Treaties” (in connection to structural features of EU law, such as direct effect and supremacy) it can be assumed that Article 7 also includes the rights afforded by secondary EU law.

The requirement that “*the possible consequences of such suspension on the rights and obligations of natural and legal persons*” must be taken into account, limits the range and depth of sanctions. The words “take into account” direct the attention to proportionality, but only in respect to “rights and obligations of natural and legal persons.” From all the possible sanctions that satisfy the desired goal, those sanctions that have the least negative consequences for the rights and obligations of natural and legal persons will be preferred. Besides this special requirement of proportionality, the general principle of proportionality will apply (see part V).

Article 7 states that the obligations in the Treaty remain binding. A reciprocity recourse is not possible. For instance, withdrawing disbursement of EU funds to deviating state does not mean that the sanctioned state can stop paying its share into the EU budget.

Voting rights suspension is only one of the possible sanctions. The range of sanctions available are limited by the requirement that the object of sanctions must be suspendible rights derived from the application of the Treaty.

Whose rights may be suspended? The provision of Article 7 para. 3 TEU does not refer to “Member State’s rights”, but to rights deriving from the Treaty. Who the beneficiary of the rights is does not matter. It could be either a Member State or individuals. Article 7 therefore allows for the suspension of individual rights. A corrective, I will introduce it in the next section, is that the suspension of rights must be able to alter the objectionable policy of target state. This imposes limits on the choice of rights that can be suspended.

A suspension of rights derived from the application of EU Treaties (that is afforded by the existence of the Treaties) is only possible on the basis of the Treaties, and the secondary law authorized by the Treaties. Of course, Article 7 TEU is only one of many instances where the Treaties permit sanctions or suspension of certain rights.¹⁸ The point being that the Article 7 TEU procedure cannot be substituted by coordinated bilateral or multilateral actions that are not authorized by the Treaties and have the effect of suspending rights derived from the Treaties. In such cases, the sanctioned state could bring an infringement action against the senders of sanctions.¹⁹

¹⁸ Most importantly Art. 260 TFEU. Cf. also sanctions within the EMU – Art. 126/11 TFEU concerning excessive government deficit authorizes sanctions ranging from “inviting” the EIB to reconsider its lending policy to imposing fines; the Excessive Imbalance Procedure may lead to gradual sanctions, ranging from an interest-bearing deposit to annual fines; etc.

¹⁹ Several commentators urged Austria to turn to the CJEU against concerted sanctions imposed by fourteen Member States, either dissimulating that their decision was in fact a decision of the Council or pleading breach of loyalty clause

III. Purpose of Article 7

1. A Sanction Regime

Article 7 does not speak of ‘sanctions.’ The term in international relations theory, as well as in international law scholarship, has never been meant to signify a punishment. It refers to a policy of the sender state to alter, through a negative incentive, the behavior of the target state.²⁰ The general understanding of the scholarship on Article 7 and rule of law seems to be the same. The aim of the mechanism is to alter the behavior of a deviating Member State. In this context, the use of the term ‘sanction’ in connection to Article 7 is warranted. The term ‘suspension of rights’ simply suggests a limitation as to what kind of sanctions can be imposed.

2. Limited Reading of Article 7: Insulation of Deviating State from EU Decision-Making

The comprehension of Article 7, including its legislative history and Copenhagen criteria origins,²¹ is not straightforward. The only example of possible sanctions mentioned by para. 3 of Article 7 is a suspension of voting rights. We may reasonably construe a limited understanding of Article 7 as a mechanism to insulate the EU from the impact of a Member State that deviates from the common values.²² The objective is that the EU functioning, mainly its decision-making, is not compromised by the participation of the deviating state, given that the Member State governments are EU co-legislators and sometime sole legislators. Such comprehension of Article 7 would have a profound impact on the range of possible sanctions. The principle of proportionality would require only such sanctions that are necessary to insulate EU decision-making from the influence of a deviating state that attempts to expand its different values on the EU as a whole. The relative decision-making power of such state would have to be taken into account alongside, perhaps, its policy preferences at the EU level and coalition potential.

3. Expansive reading of Article 7: Protection of EU Citizens

Three structural arguments can be made in favor of an expansive reading of Article 7. Firstly, the EU relies, in a vast majority of cases, on Member State institutions for implementation, application, and enforcement of EU law. In order for these institutions to fulfil their European mandates, they must act in accordance with the values contained in Article 2 TEU. State institutions apply and enforce EU law in situations that often involve other Member States’ natural and legal persons. Both in Hungary and Poland, the objectionable policy has included an attack on the independency of courts. In Hungary, several instances were recorded of pressure on the judiciary to alter its decisions involving interpretation and application of EU law.

Secondly, the original aim of the Article 7 mechanism must have been to eventually resolve the deadlock. The suspension of rights is not intended to insulate the EU indefinitely from a deviating

(Contd.) _____

by the fourteen Member States towards Austria. The Austrian government decided to wait for an early end of the sanctions rather than to escalate the issue through a legal battle. See *G. Winkler*, *Europa quo vadis. Die Anatomie eines europäischen Willküraktes*, *Zeitschrift für öffentliches Recht*, 2000, p. 231-68, 259; *E. Regan*, *Are EU Sanctions Against Austria Legal?*, *Zeitschrift für öffentliches Recht*, 2000, p. 323-36, 331.

²⁰ *G.C. Hufbauer/J.J. Schott/K.A. Elliot/B. Oegg*, *Economic Sanctions reconsidered*, 3rd ed., 2007, 65 ff.

²¹ *W. Sadurski*, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jorg Haider*, *Colum. J. Eur. L.*, 2010, p. 385-426.

²² Cf. *J.-W. Müller*, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, *European Law Journal* 2015, p. 141-160, 144.

Member State, but to pressure the state to alter its objectionable policy. The term ‘suspension of rights’ itself suggests temporality.

Thirdly and most importantly, the EU has a constitutional quality. Not because the Court of Justice said so, but because it has been practiced as such by the vast majority of officials for a considerable time. Scholars differ in assessing the depth of such constitutional quality, but nevertheless, the majority would agree that the values of Article 2 TEU create normative expectations for EU citizens, including those with Hungarian or Polish citizenship. Hence, Article 7 protects, to a certain degree depending on our understanding of how deep the EU constitutional quality goes, these citizens against a Member State’s parliamentary majority that encroaches on the values of Article 2 TEU.

IV. Political Theory of Sanctions and Article 7

1. Mechanisms Through Which Sanctions Operate

The expansive reading of Article 7 suggest that the sanctions are meant to achieve the same aim as international sanctions; that is to eventually change the objectionable behavior of target state. Crawford and Klotz divide the tools through which sanctions aim to influence the target state’s actions into four categories: normative communication, compellance, resource denial, and political fracture.²³ By imposing sanctions, the sender states morally disapprove the target state’s policy and hope that the domestic pressure would force the state authorities to change the objectionable policy (normative communication).²⁴ The logic behind the compellance is that by imposing costs on the state’s objectionable policy, the cost-benefit analysis would prompt the rational state elite to change their policy. The resource denial mechanism operates by targeting resources that are needed to sustain a state’s objectionable behavior. Finally, political fracture is the most intrusive mechanism. Here, the objective of the sanctions is to function as a catalyst of a legitimacy crisis. The crisis should stimulate political opposition, create ruptures in the regime base and eventually bring a switch of a part of regime supporters to an opposition, resulting in a change of regime.

2. From State as a Black Box to in-depth Analysis of its Political, Economic, and Social Structures

The move to targeted (or smart) sanctions in the 1990s was not originally driven by the desire to increase the effectiveness of sanctions, but to minimize their impact on the population of target state.²⁵ The United Nations shifted their focus towards individuals and entities whose actions threatened international peace and security, and towards the economic sectors that made these actions possible. Early data indicated that targeted sanctions were, in fact, less effective than comprehensive sanctions. The demand for more creative sanctioning mechanisms that would work against non-state transnationally-operating actors prompted by the 9/11 terrorist attacks on the United States has brought new impetus to sanctions research. Traditionally IR theories failed in explaining how sanctions (do not) work, and offered limited counsel to the decision-makers that devised targeted sanctions. Their focus on aggregated state interests (simplified in fact into leaders’ preferences) has been inadequate for projecting sanctions’ impact in the internal affairs of target states.

²³ N.C. Crawford/A. Klotz, *How Sanctions Work: A Framework for Analysis*, in: N.C. Crawford/A. Klotz (ed.), *How Sanctions Work: Lessons from South Africa*, 1999, p. 25 ff.

²⁴ Cf. F. Giumelli, *The Success of Sanctions: Lesson Learned from the EU Experience*, 2014, p. 12 and 135 ff.

²⁵ The international public outcry over humanitarian consequences of comprehensive sanctions imposed on Iraq following its invasion to Kuwait in 1990 made the United Nations to rethink its approach. Since 1994 no new sanctions imposed by the UN have included comprehensive economic sanctions. See A. Pellet/A. Miron, *Sanctions*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, 2012, Vol. IX, 1, 6-7, para 29 ff.

The liberal theory's most promising contribution to sanction research is coalitional liberalism, according to which a state's international behavior is a result of interactions among domestic interest groups.²⁶ It relies predominantly on the compellence rationale following the assumption of the liberal theory that rational utility-maximizing actors would change (or would be forced to change by a domestic alliance that underpins the regime) an objectionable state's policy if the costs of keeping the policy imposed by the sanctions outweigh its benefits.²⁷

A rational utility-maximizing actor is also at the center of public choice theory of sanctions. According to the public choice theory, the public interest is a result of the aggregated individual interests and must therefore be Pareto improving. It is unlikely that a new policy will be favorable to all, therefore concessions to opposing individuals are made.²⁸ For sanctions research, it implies that the objectionable policy has a definable structure of support set in the marketplace. The theory shifts the focus from the government elite to various kinds of domestic groups (whose preferences are, again, defined as aggregated individual preferences) and their capacity to influence government policy. Major intrastate actors are defined as rent-seeking groupings of individuals (various producers' and consumers' groups, state employees, etc.).²⁹ These social groups compete to influence state policies. "Because they derive differential utility from any given policy, they have different 'demand curves'."³⁰ When an equilibrium is reached, a policy is supplied. Sanctions must be designed in such a way that their effect shift the demand curves of the competing social groups and set a new equilibrium in which the objectionable policy is replaced by a new one.³¹

One of the major flaws of the public choice theory of sanctions is its perception of state as neutral broker between interest groups. In fact, these groups do not have an equal access to state. Also, the public choice theorists underestimate ideological drivers of policy formation since their intellectual framework treats ideology simply as goods exchangeable in the marketplace.

Although policies depending on shifting demand curves shall be inherently unstable, empirical research has shown that institutions were able to produce stable policies. Shepsle calls it a 'structure-induced equilibrium': what public choice theorists consider free competition of social groups is in fact largely defined by an overall structure of decision-making process.³² Consequently, attention must be drawn to how actors design "institutions to secure mutual gains, and how those institutions change or persist over time."³³ For sanctions theory, it means to define structure-induced equilibria in different institutional settings and arrive at reasonable amount of regime types. The regime types differ according to how broad coalition they need for sustaining themselves. For instance, democracies shall

²⁶ A. Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, International Organizations, 1997, p. 513-553.

²⁷ E. Solingen, *Introduction: The domestic Distributional Effects of Sanctions and Positive Inducements*, in: E. Solingen (ed.), *Sanctions, Statecraft, and Nuclear Proliferation*, 2012.

²⁸ J.M. Buchanan/G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, 1962. Cf. also Nozick, R., *Anarchy, State, and Utopia*, 2001 (on incorporating the independents).

²⁹ W.H. Kaempfer/A.D. Lowenberg, *International Economic Sanctions: A Public Choice Approach*, 1992. T.C. Morgan, *Clinton's Chinese Puzzle: Domestic Politics and the Effectiveness of Economic Sanctions*. *Issues and Studies*, 1995, p. 19-45.

³⁰ E. Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work*, 2015, p. 26.

³¹ W.H. Kaempfer/A.D. Lowenberg, *The Theory of International Economic Sanctions: A Public Choice Approach*, *American Economic Review*, 1988, p. 786-793, 790-2.

³² K.A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in: H. Weisberg (ed.), *Political Science; The Science of Politics*, 1986, p. 51-81.

³³ M.A. Pollack, *The New Institutionalisms and European Integration*, in: A. Wiener/T. Diez, *European Integration Theory*, 2nd ed., 2009, p. 125-143, 126.

be more vulnerable to sanctions than autocracies because they involve broader coalitions.³⁴ According to the institutionalists, leaders pursue minimum-winning coalitions, and a country's politics will define how broad such coalition must be. Autocracies' lack of representative institutions narrows down the minimum-winning coalition because most people are prevented from influencing the government's decisions. Therefore, autocratic regimes can withstand sanctions by diverting scarce resources from the general public to their narrow supporting coalition.³⁵

Institutionalist's' attempts to refine their crude democracy-autocracy dichotomy into a more nuance categorization have largely failed on empirical grounds.³⁶ For example, emerging illiberal democracies within the EU can sustain considerable outside pressure due to broad popular support, while some traditional democracies rely on increasingly narrower political coalitions because a considerable part of the political space is 'blocked' by protest parties. An evaluation of institutional structure cannot predict how sanctions will affect a regime without taking into account societal, religious, and economic structures, resources availability, foreign partnerships, etc.

The insights of coalitional liberalism, public choice theory of sanctions, and regime-oriented institutionalism has been synthesized by Blanchard and Ripsman³⁷ in an approach reviving Max Weber's assumptions on state-society relationships.³⁸ For neo-Weberians, the state is not a neutral broker that mediates between the interests of different social groups. There is a substantial capacity of states to "implement official goals, especially over the actual or potential opposition of powerful social groups or in the face of recalcitrant socioeconomic circumstances."³⁹ Applied to sanctions design, senders of sanctions must analyze domestic political institutions and structures of the target state to realize which groups have access to state and which groups' interests the state can ignore.⁴⁰ Three institutional attributes determine the robustness of state autonomy or 'stateness': decision-making autonomy ("structural ability of the foreign policy executive to select and implement policies" despite domestic opposition), state capacity ("policy resources available [...] to co-opt or coerce key societal groups"), and legitimacy (degree to which domestic groups defer to the leader's right to rule, i.e. his/her authority).⁴¹ The higher the stateness, the more the state is able to diffuse, divert, or overcome the impact of sanctions.

Neo-Weberians have been criticized for approaching the state autonomy in isolation from state-society dynamics. What they understand as capacity or resources of the state *per se* are in fact the results of a lengthy power struggle among various social forces within the state. For the state is a "complex and constituted set of relationships between frameworks of political authority and the international political economy, domestic social forces, and the broader ideational notions of

³⁴ S. Allen, *The Determinants of Economic Sanctions Success and Failure*, International Interactions, 2005, p. 117-138.

³⁵ D. Lektzian/M. Souva, *An Institutional Theory of Sanctions Onset and Success*, Journal of Conflict Resolution, 2007, p. 848-871, 852-3.

³⁶ As Jones points out, the U.S. president can be elected by just one quarter of the population, while Cuba's Castro regime have survived US sanctions only by mobilizing enormous popular support. Jones 2015, fn. 29, p. 31.

³⁷ J.-M. Blanchard/N.M. Ripsman, *Asking the Right Question: When Do Economic Sanctions Work Best?*, Security Studies, 1999, p. 219-253; J.-M. Blanchard/N.M. Ripsman, *A Political Theory of Economic Statecraft*, Foreign Policy Analysis, 2008, p. 371-398.

³⁸ M. Weber, *Wirtschaft und Gesellschaft*, 1922. For English translation of Part I see M. Weber, *The theory of social and economic organisation*, 1947.

³⁹ T. Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in: P. Evans/D. Rueschemeyer/T. Skocpol (eds.), *Bringing the State Back In*, 1985, p. 3-37, 9.

⁴⁰ Blanchard/Ripsman 1999, fn. 36.

⁴¹ Id. at 378-9.

authority...”.⁴² The social power relations are dynamic, allowing for new patterns to emerge. This approach builds on Gramscian state theory.⁴³ “[S]tate power is fundamentally a social relation. That is, rather than existing as a ‘thing’ independent of society, state institutions and capacities are condensations of historically specific, dynamically evolving relationships between social forces.”⁴⁴ The ruling elites must forge relatively broad coalitions of socio-political forces to capture state power. Subsequently, dominant coalitions reconfigure state institutions and the allocation of resources to maintain the power. Each coalition is composed of a number of groups, which may form new coalitions or shift their allegiance to opposition coalitions if their interests are harmed by sanctions.

Jones illustrates how sanctions work within the Gramscian framework in an example of South Africa during the apartheid regime. Sanctions at first helped the ruling elite to hold their power. The reason was that arms and oil embargoes pushed the state-controlled economy to develop new industrial capacities, through which the ruling coalition could co-opt rising social forces. Only the economic downturn in the 1980s forced the state to let the business outgrow state patronage, who, as sanctions bit, realized that it was in their best interest to end the racial-social conflict.⁴⁵

The overview of major sanctions theories developed from international relations, economic, and political science theories indicates the specificity of sanction research. Devising successful sanctions requires a complex understanding of the material, institutional, and ideational bases of power. Bare knowledge about intrastate decision-making processes is insufficient. The challenge is to locate the weakest link in a coalition supporting the state’s objectionable policy, with the potential to change the balance of power, and devise incentives that would direct the behavior of the selected group in a desired way. Jones proposes to proceed in three steps: first, to identify socio-political coalitions contesting state power and the political economy context that structures them; second, to assess the economic impacts of sanctions and their distribution across societal groups; and third, to examine the strategic response of key societal forces and their political consequences.⁴⁶

V. Sanctioning Principles

The EU institutional framework aims at promoting human dignity, freedom, democracy, equality, the rule of law and respect for human rights (values).⁴⁷ According to the Treaty, these values are best attained in a “society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (structural conditions).⁴⁸ When these values are seriously and persistently breached over a period of several domestic elections, it indicates that the safeguards built into a liberal-democratic system failed, and that the structural conditions have been deformed. Sanctions imposed under Article 7 must therefore aim at reforming the structural conditions that allows the society to realize the full potential of the values.

⁴² K. Jayasuriya, *Beyond Institutional Fetishism: From the Developmental to the Regulatory State*, *New Political Economy*, 2005, p. 381-387, 383.

⁴³ A. Gramsci, *Prison Notebooks* (transl. by J. Buttigieg, A. Callari), Vol. 1-3, 2007; N. Poulantzas, *State, Power, Socialism*, 1976; B. Jessop, *State Power: A Strategic-Relational Approach*, 2008.

⁴⁴ Jones 2015, fn. 29, p. 39.

⁴⁵ Id. at 10 and 52 ff.

⁴⁶ Id. at 42-46.

⁴⁷ Art. 3(1) TEU and Art. 13 TEU in connection with Art. 2 TEU.

⁴⁸ Art. 2 TEU.

1. Democracy-inbound

The weakening of the fundamental structures of a liberal-democratic state, such as independent and values-oriented constitutional review of executive and legislative actions, objective reporting by media independent of the government, and critical scientific research, impedes the voters' ability to form an informed opinion within the boundaries of a liberal-philosophy framework. The examples of Hungary and Poland reveal a pattern for dismantling a pluralist system. After a landslide victory in general elections, the winning party elite controls both the executive and the legislative bodies. The constitutional court becomes the first target; then comes a subjugation of news media; and finally, a containment of NGOs and universities, control of foreign capital flow into political activities and the establishment of political patronage over major domestic economic actors. This process disrupts 'democratic equality' understood as an equal opportunity of political actors for influencing the electorate. The first sanctioning principle, which I call 'democracy-inbound', requires the sanctions to aim at restoring democratic equality. The focal point, when devising sanctions, must be on democracy, not on the rule of law. The rule-of-law approach to the problem, for instance in Poland, blinds us to see the roots of the deviation.⁴⁹ We shall not ask how the assault on constitutional court have occurred, but why.⁵⁰

2. Effectiveness

The principle of the effectiveness of law is one of the cornerstones of the CJEU's jurisprudence.⁵¹ The Treaty further emphasizes the efficient functioning of EU institutions and the effectiveness of their policies and actions.⁵² An effective sanction design must fulfil two goals: first, the EU must opt for such sanctions that are able, through a chain of actions, to alter the objectionable policy of target state. To achieve that, the EU must employ a state of the art sanction theory and apply it on the target state's power structures. Second, the principle of effectiveness requires a thorough examination of all the options available to the target state that may neutralize the sanctions' impact. Sanctioned states have proved to be creative in busting its sanctions. Third states and individuals line up, immediately after the introduction of sanctions, to benefit from a premium the sanctioned state must pay (either in economic or political terms) to bypass the sanctions.⁵³ For instance, cutting EU funds to Hungary may create opportunities for Russia to increase its financial and political presence. Russia has been gradually filling the void created by the rupture between Hungary and the EU, using the far-right

⁴⁹ Despite the Article 7 debate being understood as a 'great rule of law debate', a good number of scholars perceive the rule of law in material, not formal sense, with democracy being the major material corrective.

⁵⁰ Then we see a very different story, a remake of 'midnight judges' story during the transition of power from Federalists to Jeffersonian Democrats. This, however, does not legitimize in any way the response of Kaczynski's regime.

⁵¹ See e.g. A. von Bogdandy, *Founding Principles*, in: A. von Bogdandy/J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed., 2009, p. 11-54, 29 ff.; L. Tichý/M. Potacs/T. Dumbrovský (eds.), *Effet Utile*, 2014.

⁵² TEU Preamble; Art. 13 TEU.

⁵³ Bryan Early gives an example of sanctions against Iran. When the United States seemed to finally succeed in isolating Iran from the global financial system helped by the EU cutting Iran's access to SWIFT, Iran started selling its natural gas to Turkey in return for Turkish lira, for which gold was bought in Turkey and shipped to Dubai. In order to comply with UAE's customs rules, gold bricks were brought into Dubai by individuals. For instance, "\$1.45 bn of Turkey's August [2012] gold exports were shipped through the customs office at Ataturk airport's passenger lounge." In Dubai, the gold vanished in over 8.000 Iranian-owned business and 'clandestinely' (over 200 ships leaving daily) shipped into Iran. B.R. Early, *Busted Sanctions: Explaining Why Economic Sanctions Fail*, 2015, 1-2.

Jobbik party, or an expansion of Paks nuclear plant,⁵⁴ eventually overcoming Orbán's initial reluctance to engage in closer relations.⁵⁵

3. Proportionality

The sanction provision of Article 7 is subject to the general and special obligations of proportionality. The general three-part proportionality test guides the intellectual process of devising sanctions: the measure is suitable to change the objectionable policy of the target state; the objectionable policy cannot be changed by a less intrusive measure (the measure is necessary); and even if there is no less intrusive mean of achieving the aim, the measure does not have an excessive effect on the target state's rights.⁵⁶

Senders of sanctions also have a special obligation of proportionality. Article 7 requires the Council to "take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons." The special obligation qualifies the third part of general proportionality test. Also, since the provision does not oblige the Council to do everything possible to avoid negative consequences for natural and legal persons, but only to take them into account, the construction of the provision suggests that the senders of sanctions *may*, on the one hand, target individuals (natural and legal persons)⁵⁷ and, on the other hand must limit possible *collateral* damage that the sanctions will inevitably cause to persons that are not the direct object of sanctions.

4. Beneficiary-focus

From the extensive reading of Article 7, which I mentioned in part III, it follows that the purpose of Article 7 is to ensure that exercise of public power within the territory of the EU respects the fundamental values listed in Article 2 TEU. Many decisions of national authorities have effect in other EU Member States without further conditions, from judicial decisions in civil and criminal matters, including issuance of a European Arrest Warrant, to administrative decisions, certifications of quality and qualification, etc. Natural and legal persons residing in the EU, who are not citizens or entities incorporated in the deviating state, might be subject to the decisions of public authorities of such state on a regular basis and to an extent incomparable with other regions. The application of both EU law and national law, their effects, and their subjects are intertwined. It is near to impossible to quarantine a deviating Member State and leave it to 'its' citizens to deal with the problem.

The ultimate beneficiaries of Article 7 are therefore natural and legal persons, in particular EU citizens and EU incorporated firms, regardless of their Member State citizenship or residence. They legitimately expect that fundamental standards in the exercise of public power anywhere in the EU are adhered to. The beneficiary-focus principle requires, first, to realize who is the beneficiary of the sanction provision of Article 7, and, second, to devise sanctions in the way in which they are capable to better the position of beneficiary. It is misleading to ask whether Article 7 should protect democracy inside a Member State and whether it shall protect, for instance, Polish citizens against its government.

⁵⁴ In March 2017, Russia announced it would finance in credit 100% of the costs (around €14bn). *A. Byrne/N. Buckley*, EU approves Hungary's Russian-financed nuclear station, *Financial Times*, March 6, 2017, at <https://www.ft.com/content/0478d38a-028a-11e7-ace0-1ce02ef0def9>.

⁵⁵ Orbán, alongside Czech President Zeman, emerged as the most vocal critics of EU sanctions against Russia.

⁵⁶ *AG Van Gerven*, Opinion of 11 June 1991 in Case C-159/90 (SPUC/ Grogan). Cf. also *G. de Búrca*, The Principle of Proportionality and its Application in EC Law, *Yearbook of European Law*, 1993, p. 105-150, 113; *P. Craig*, *EU Administrative Law*, 2012, 2nd ed., ch. 19-20.

⁵⁷ Cf. *W.M. Reisman/D.L. Stevick*, The Applicability of International Law Standards to United Nations Economic Sanctions Programmes, *European journal of international law*, 1998, p. 86-141, 129 ff. (functioning of principles of necessity and proportionality in international law).

As long as a Member State does not leave the EU by way of Article 50 TEU procedure, it is a *federal* matter (due to structural reasons mentioned above) to ensure that the exercise of public authority anywhere in the Union, and on any level of government (subject to subsidiarity)⁵⁸ is in compliance with the basic standards that follow from the values listed in Article 2 TEU.

VI. EU Institutional Architecture for Sanctioning

Since the introduction of CFSP in the Maastricht Treaty, the European Union has accumulated considerable experience with sanctioning third states, non-state groups, and individuals. Currently, the EU consolidated sanction list contains some forty states and a number of terrorist organizations and individuals using various tools from arms embargoes, embargoes on nuclear and oil-extracting technologies, trade restrictions, freezing of funds and economic resources, travel bans, to embargoes on goods that can be used for human trafficking or illegal exports.⁵⁹ A dedicated body of the Commission, the Service for Foreign Policy Instruments (FPI), is responsible for preparing a proposal for regulation imposing sanctions for the Council, discussing the proposal with Member States' experts,⁶⁰ and facilitating sanctions' implementation within the EU, including issues of interpretation raised by economic operators, and reviewing of listings on the sanction lists.⁶¹

The FPI's know-how in sanctioning must be combined with the expertise of the European Union Agency for Fundamental Rights (FRA) and to some extent, its predecessors, the European Monitoring Centre for Racism and Xenophobia and the EU Network of Independent Experts on Fundamental Rights.⁶² In any stage of the Article 7 process, the Agency is empowered to provide the EU institutions and the Member States with assistance and expertise. The question of the FRA's competence in regards to Article 7 has been contentious.⁶³ The Agency's jurisdiction is limited to assistance and expertise relating to fundamental rights when EU institutions or Member States implement the EU law "in order to support them when they take measures or formulate courses of action [...] to fully respect fundamental rights."⁶⁴ Article 7 gives the EU the competence to initiate an Article 7 procedure by a *reasoned* opinion, to *determine* that there is a risk of serious breach of Article 2 TEU values, to *determine* that there has been breach of the values, and consequently *sanction* a Member State that breaches these values. These steps are an implementation of EU law involving fundamental rights (the ones that are at risk of breach or being breached, and the fundamental rights that might be affected by sanctions). The Agency is therefore empowered to assist the EU institutions with collecting and analyzing data on fundamental rights protection in the Member State in question and supply evidence

⁵⁸ All Member States institutions are bound by Article 2 TEU, which must form a part of constitutional courts' review standard. Only when a Member State's highest judiciary fails to correct a structural deviation from Article 2 values, the federal organ will step in. Subsidiarity is embedded in Article 7 by way of the threshold (serious and persistent breach) which must be surpassed before sanctions are imposed. Once the threshold is surpassed, subsidiarity does not apply anymore. Therefore, subsidiarity is not one of the sanctioning principles.

⁵⁹ EU Restrictive measures (sanctions) in force (Regulations based on Art. 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy) as of August, 4, 2017, at https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-08-04.pdf.

⁶⁰ RELEX Working Party. In 2004, a special formation of RELEX working party for sanctions was created to share best practice and to revise and implement common guidelines for EU sanction regimes.

⁶¹ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 139, 9.

⁶² The Network existed between 2002-2006. However, it has been criticized for ideological biases, its modus operandi, and lack of genuine legal expertise.

⁶³ *Sadurski* 2010, fn. 20, p. 419 ff.

⁶⁴ Art. 2 of the Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 1.

on fundamental rights violations that might indicate a clear risk of a serious breach of fundamental rights and, subsequently, a serious and persistent breach of fundamental rights corresponding to Article 2 TEU values (access to justice, gender and minority discrimination, right to vote, human dignity, etc.).⁶⁵ In the sanctioning phase of Article 7 procedure, the Agency can assist the Council with conducting research on structural problems that have made the breach of fundamental rights possible and indicate possible ways to correct the situation, as well as pointing out consequences of sanctions for the fundamental rights of natural and legal persons.⁶⁶

The EU may also build on its experience with evaluating state compliance with Article 2 TEU values during the accession process with Central and Eastern European states,⁶⁷ and in particular the experience with the Mechanism for Cooperation and Verification for Bulgaria and Romania (CVM) that provides for post-accession reviews of progress of intrastate reforms of judicial and law enforcement institutions and processes.⁶⁸ The European Parliament has repeatedly called for the introduction of regular assessments of all Member States' compliance with EU fundamental values.⁶⁹ The introduction of the EU Framework to strengthen the Rule of Law has brought some flexibility into the Article 7 process (although it is not its formal part).⁷⁰ In the case of Hungary and Poland, the introduction of the Framework might have been self-defeating since it has signaled certain quandary on the side of EU institutions concerning the use of Article 7, regardless the fact that the latter procedure was eventually initiated.⁷¹ It may prove useful for the future. By putting the Commission in charge, the Framework may help it with gathering evidence in cooperation with the FRA, the

⁶⁵ Art. 2 TEU lists "human rights" as one of the values. All the other values such as democracy, rule of law, equality, etc. are also translatable into fundamental rights.

⁶⁶ The FRA specific objectives are set every five years by the Council on a proposal from the Commission and after consulting the EP. For the current framework see the Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022, OJ L 326, 1. The Council missed the opportunity to involve the FRA explicitly into the Article 7 process.

⁶⁷ Art. 49 TEU. C. Hillion, *The Copenhagen Criteria and their Progeny*, in: C. Hillion (ed.), *EU Enlargement: A Legal Approach*, 2004, p. 1-22.

⁶⁸ Arts. 37-38 of the Act of Accession of Bulgaria and Romania. M.A. Vachudova/A. Spendzharova, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*, European Policy Analysis, SIEPS, 2012.

⁶⁹ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (based on the Tavares Report); European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (based on Louis Michel Report); European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law (based on Kinga Göncz Report); European Parliament resolution of 10 June 2015 on the situation in Hungary; European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union.

⁷⁰ Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final.

⁷¹ The first Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ L 217, 53 and the second Commission Recommendation (EU) 2017/146 of 21 December 2016, OJ L 22, 65 have not made Poland to rectify the structural problems. The Commission concluded that "there is a situation of a systemic threat to the rule of law in Poland" (Rec. 2016/1374, par. 72). In July 2017, the Commission sent already a third set of recommendations to Poland (Commission Recommendation (EU) 2017/1520 of 26 July 2017, OJ L 228, 19) and threatened it with initiating the Article 7 procedure if the situation were not to improve within a month. Cf. also European Parliament resolution condemning the "serious violations" of the rule of law in Poland and calling for initiation of the Article 7 procedure (European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland). The Commission finally started the procedure in December 2017.

In case of Hungary, the Commission has not even initiated a dialogue under its Rule of Law Framework, despite being called to do so repeatedly by the European Parliament (e.g. EP resolutions of 10 June 2015 and 16 December 2015 on the situation in Hungary).

European Parliament, and the Venice Commission,⁷² identifying the causes of systemic problems in deviating state(s), and increasing European public awareness⁷³ that could place pressure on Member States reluctant to support the Article 7 process. The Commission, as one of the initiators of Article 7, may serve as a prosecutor that submits a well-built case against a Member State to the Council.

EU institutional architecture for sanctioning must improve its review process for the purposes of Article 7 sanctions. In the area of external sanctioning, targeted individuals and entities are notified by letter or by means of a notice in the EU Official Journal. They may submit a request, supported by evidence, to the Council to reconsider their listing, and eventually file an annulment action against the listing decision before the General Court. The Court of Justice repeatedly criticized EU institutions for their failure to develop sufficient due process standards in the instances where individuals are targeted. In the 2014 decision in *Yusef v Commission*, the General Court held that the Commission failed to follow the procedures set down in the *Kadi* cases.⁷⁴ In particular, the Commission bound itself to the findings of the U.N. Sanctions Committee, instead of reviewing the findings independently.⁷⁵ Albeit in sanctioning under Article 7, the issue of UN-EU jurisdiction overlap is obsolete, the anti-terrorism sanctions listing cases set the standard for targeted sanctions against individuals as far as the scope of evidence, its publicity, burden of proof, and right of rebuttal are concerned.

VII. What Rights Can Be Suspended?

Sanctions can take myriads of forms. The Union may, for instance, blacklist individuals and entities that form economic bases of deviating regimes and ban them from participating in EU co-funded projects, submit exports of selected entities to common tariff for third countries, ban candidates of government parties from participating in elections to the European Parliament, refuse individuals nominated by the deviating states to EU posts, require visas for selected individuals to enter other Member States, cease to recognize judicial decisions in civil matters originating in these countries, etc.

The challenge is to find such sanction mix that would be able to correct a deformation of political pluralism (the structural conditions) in a deviating Member State that allows the regime to stay in power and dismantle independent control of its power step by step. Such positive sanctions ideally include options to increase the influence of independent media, the freedom of scientific research, and the voice of liberal opposition.

In the last part of my contribution, I can only sketch major areas of possible sanctions. ‘Rights deriving from the application of the Treaties’ include rights afforded by both primary law and

⁷² The Opinion of the Venice Commission no. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, March 11, 2016 has supplied an independent (understand outside-EU) legal in-depth analysis of the rule of law shortcomings in Poland that aligned with the conclusions of the European Commission. Cf. also Opinion of the Venice Commission no. 889/2017 on the Draft Law on the Transparency of Organizations Receiving Support from Abroad, Hungary, June 20 2017. For a cooperation between the FRA and the Council of Europe in general see the 2008 Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe (OJ L 186, 7).

⁷³ To achieve such effect presupposes access of the public to the outcomes of the dialogue between the Commission and the state under review. In the first employment of the new Framework, the Commission, however, kept its Rule of Law Opinion on the situation in Poland of June 1, 2016, a result of an “intensive dialogue” with Polish authorities initiated in January 2016, confidential. Press Release, Commission adopts Rule of Law Opinion on the situation in Poland, June 1, 2016, at http://europa.eu/rapid/press-release_IP-16-2015_en.htm.

⁷⁴ Joined Cases C-402/05 P and C-415/05 (Kadi I), ECLI:EU:C:2008:461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Kadi II), ECLI:EU:C:2013:518 (holding that none of the reasons given by the UN Sanctions Committee in its summary of reasons was substantiated and since no other evidence has been produced to the Court, the listing of Mr. Kadi could not be justified).

⁷⁵ Case T-306/10 *Yusef v Commission*, ECLI:EU:T:2014:141.

secondary law. After this initial research on the Council's options in selecting the appropriate sanctions, experts in different areas of EU law will have to step in and analyze concrete examples, their impact on rights of others, and their international law limits.

1. Targeting Individuals

The decision of the European Council on the existence of a breach of EU values is directed against a concrete Member State. Consequently, targeted individuals and entities must have legal or substantive relations to that Member State (citizenship, long-term residency, incorporation in the deviating Member State, conducting majority of their business in the Member State). EU citizenship is not a condition as long as targeted individuals and entities benefit from the rights derived from the application of the Treaties. The principle of proportionality further requires that it must be established that a targeted individual's or entity's conduct contributes to the state authorities' breach of the Article 2 TEU values. The test should not be burdensome, because the principle of proportionality must be balanced against the principle of effectiveness.⁷⁶

2. Political Rights

Suspension of political rights involves, first of all, the suspension of participation in the functioning of EU institutions, especially the right to vote. This is primarily based on the insulation rationale. Representatives of a regime that does not respect the same set of fundamental values as the rest of the EU should not co-create laws and policies for EU citizens. From this point of view, a suspension of voting rights in the Council would be insufficient. A deviating Member State participates in EU decision-making through the European Council and its representatives in the European Parliament. Moreover, despite a requirement of independence, the Member State is likely to use its nomination and appointment powers to insert its like-minded candidates into the European Commission, the CJEU, and other EU institutions and its agencies.

Insulating rationale that supports a suspension of voting rights in the Council as a preferable sanction is further undermined by the fact that a single Member State, however big, does not have enough power to meaningfully effect EU decision-making, given that the areas requiring unanimity have been significantly narrowed down and the coalition potential of a deviating state is low.⁷⁷ In the European Parliament, on the other hand, a Member State's influence might be amplified. Despite Fidesz having only eleven seats in the 8th Parliament (fourteen seats in the previous Parliament), its good standing within the European Peoples Party (EPP)⁷⁸ has been an important factor in moderating the EU's response to Hungary's assault on liberal statehood.⁷⁹ The EPP's public record includes voting

⁷⁶ Moreover, Article 7 explicitly allows a sanction that limit rights of persons irrespective of their contribution to the breach of EU values: a suspension of voting rights affects the right to vote of all citizens of a deviating state.

⁷⁷ Coalition potential of a deviating state shall be in theory low as other states try to avoid to be tainted by cooperating with a state having serious issues respecting fundamental values. If there are states willing to cooperate with such state on a permanent basis (so that we can even think of the possibility of uploading illiberal values on EU level through its law making), it is very unlikely that the Article 7 procedure will reach the sanction phase at all (due to the requirement of unanimity for the European Council's assessment of existence of values' breach).

⁷⁸ In the 7th European Parliament (2009-14), the balance of power between two major ideological groups was 274 seats for the EPP and 183 for Social Democrats. In the 8th Parliament (2014-19), the EPP has 221 seats and Social Democrats 191 seats.

⁷⁹ See *P. Müller/R. Neukirch/C. Schröder/C. Schult*, *Booming Silence: Europe's Conservatives Fail to Criticize Hungary*, Spiegel Online, January 24, 2012, at <http://www.spiegel.de/international/europe/booming-silence-europe-s-conservatives-fail-to-criticize-hungary-a-810863.html>. Silvio Berlusconi also benefitted from the EPP's tolerance to its politically valued members. Id.

against the 2013 Tavares report,⁸⁰ and the EPP president Daul's endorsement of Orbán during the 2014 Hungarian parliamentary election campaign. Fidesz's position might have weakened since.⁸¹ Yet, the balance of power between the EPP and the Social Democrats, which has narrowed down to thirty votes in the 8th Parliament, is favorable to outcasts within the major blocks.⁸² The PiS has been less successful. Its parliamentary group, the Alliance of Conservatives and Reformists in Europe (ACRE), is on the fringes of EP decision-making. Still, being in control together with British Conservatives of ACRE parliamentary group amplifies PiS's influence.⁸³

A further problem is that a suspension of voting rights will not apply to Treaty revisions.⁸⁴

For any meaningful attempt at insulating the EU from the influence of a deviating state, sanctions will have to target the EU institutions in a complex way. Besides suspending voting rights, as well as the right to participate in the functioning of the Council, the Council may suspend the right of a Member State to participate in the meetings of the European Council, suspend the right to stand in the European elections, suspend the right to suggest a candidate for a member of the Commission⁸⁵ and suspend the right to participate in appointing members of the Court of Justice (Judges and Advocates General), General Court, and specialized courts.⁸⁶

A suspension of political rights is not limited to the right to stand for office, but also includes citizens' rights to vote in the European elections and the right of resident non-nationals to vote and stand as candidates in municipal elections (although a purpose of suspending the latter right is dubious).

Use of these sanctions may be prevented by the principle of separation of powers. Critics may argue that the Council cannot impose sanctions that encroach on the functioning of other EU institutions. This argument is strengthened by lower procedural requirements for imposing sanctions once the existence of a serious and persistent breach by a Member State of Article 2 TEU values has been determined. In the sanction stage of the Article 7 mechanism, the Council acts alone (neither the European Council, nor the Parliament, nor the Commission are involved) and the qualified majority suffices for suspension of rights.

Such an argument is not warranted. The European Parliament must consent to both determining the risk of breach of Article 2 values, and subsequently the existence of the breach. The Commission should assume a role of prosecutor initiating both of these procedures and be responsible for the submission of a well-built case against a Member State. Its proposal initiating the procedure leading to the determination of existence of breach of the values must include an in-depth analysis of the causes of the breach and identification of persons and institutions responsible for the breach. Since, under such an approach, the European Council will assume a role of an independent evaluator of the evidence submitted by the Commission and the defense of the investigated Member State, the

⁸⁰ European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary, 25 June 2013 (the Tavares Report).

⁸¹ In a recent resolution of the European Parliament calling upon the Civil Liberties Committee to draw up a report on the situation in Poland, the votes from EPP members secured the majority (European Parliament resolution of 17 May 2017 on the situation in Hungary). One of the reasons for declining support within the EPP for Viktor Orbán was Fidesz's opposition to Jean-Claude Juncker, the official candidate of the EPP, for the Presidency of the Commission.

⁸² Consider the scenario that Forza Italia and Fidesz are removed from the EPP caucus. Consequently, the EPP would lose the majority to Social Democrats.

⁸³ ACRE has 50 seats.

⁸⁴ Cf. Art. 48(4) TEU.

⁸⁵ Art. 17(7) TEU. Cf. also Art. 17(3) TEU (requiring that members of the Commission shall be chosen on the grounds of their "European commitment").

⁸⁶ Art. 253 and 254 TFEU.

Commission will be also responsible, due to its institutional capacities (namely the FPI) and available assistance from the FRA, for devising sanctions. In such a case, the consent of the European Parliament required in key stages of the procedure will include proposed sanctions as well.⁸⁷ When deciding on sanction mix, the Council will be bound by the decision of the European Council regarding the determination of the existence of value breach, in which the European Council will specify whether and how it differs from the Commission's proposal. The Council will then simply implement the decision of the European Council by opting for such sanction mix for such period as will be appropriate regarding the evidence the European Council considers proven after examining the Commission's proposal and hearing the investigated Member State.

Furthermore, the Court of Justice will most likely have its say in the procedure. Firstly, Article 269 TFEU empowers the Court to examine, upon a petition of the Member State, against which the procedure is held, whether the 'procedural stipulations' of Article 7 were respected in the decisions of the European Council and the Council. The meaning and extent of 'procedural stipulations' must be examined by the Court itself. And secondly, targeted individuals may bring the decisions adopted within the Article 7 procedure to the Court under the annulment procedure. The Member State in question would not sustain the standing since the Article 269 TFEU procedure is special to the annulment procedure.⁸⁸

The Council, subject to the principles outlined in Part V of this contribution, seems to be authorized by Article 7 to suspend a right to participate in EU institutions for nationals of a target Member State *en bloc*. Such a general ban would prevent nationals of a deviating state to be involved in the functioning of the European Central Bank, European System of Central Banks, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and EU agencies. The ban may also include bureaucracies of the Commission and other institutions' apparatus. The general ban to participate in EU institutions does not fall within political rights suspension anymore. It is rather a suspension of the right not to be discriminated based on nationality. Its rationale, if combined with comprehensive suspension of economic rights, is to cause a collapse of deviating regime (political fracture).⁸⁹ The general ban will, however, hardly pass a proportionality test and will be in conflict with most of the other principles.

3. Economic Rights

Insulating sanctions (suspension of various rights to participate in the EU decision-making) are highly unlikely to change the objectionable behavior of a target state and would, if not combined with other sanctions, fail the effectiveness and the democracy-inbound principles. Suspension of economic rights, especially if targeting the economic base of the regime, can be more effective.

⁸⁷ The EP can use its 'power of consent' in order to negotiate with the Commission its proposal for sanctions. The EP has a considerable experience with using this strategy.

⁸⁸ Cf. Case 247/87 *Star Fruit v Commission*, ECLI:EU:C:1989:58 (holding that the petitioner cannot use the annulment procedure to bypass its lack of standing in the infringement procedure).

⁸⁹ Sanctions under Article 7 are not restricted by the scope of the European Convention of Human Rights, since the EU is not a party to the Convention. The incorporation of Convention rights as general principles, as well as the rights guaranteed by the EU Charter of Fundamental Rights do not limit the scope of sanctions, since Article 7 explicitly allows suspension of rights. Both, the Charter and the general principles in the meaning of Art. 6(3) TEU, will play a role in general and special proportionality tests of imposed sanctions only.

The EU has two major options regarding economic sanctions that fulfil the definition of suspension of rights derived from the Treaties – suspension of free movement rights and suspension of EU funds.⁹⁰ Both options can be used in a targeted way.

Several scholars suggested to apply economic sanctions outside the Article 7 framework. Jan-Werner Müller's recommends to create a Copenhagen Commission empowered to investigate the situation of fundamental values breach. Based on the findings of the Copenhagen Commission, the European Commission will be required, for instance, to cut EU funds or impose significant fines.⁹¹ In theory, there is no reason to consider an investigation conducted by the European Commission to be biased, so that a new institution would be required. As I argued above, the Commission may use the expertise of the Fundamental Rights Agency to gather and analyze evidence of the values breach. Article 7 does not allow imposing outright fines, since the sanction must be a suspension of a certain right and for such an option, a new mechanism would have to be created as Müller suggests.

The experience with fines imposed by Court of Justice for non-compliance with its judgment regarding the infringement of Treaties shows that Member States are able to stall the payments for decades. If one considers that it takes about nine years from the infringement action to the Court's decision imposing fines, then the ineffectiveness of the procedure is alarming.⁹² It can be assumed that if fines are imposed, through whatever procedure, for a fundamental values breach (meaning there is a deep structural problem in the Member State in question), it will be self-defeating for the EU as the target state will just ignore it. The solution might be to deduct the fines from EU funds allocated to that Member State.

The infringement proceeding, supposing the fines for non-compliance with the judgment are imposed immediately after a reasonable deadline for correction of the infringement expires, has not proved to be a good venue. The reasons are a limitation of the Court as to what its judgment can achieve, but more importantly there has been a hesitation of the Court to be dragged into internal politics of a Member State and forced to evaluate the constitutional framework of such Member State.⁹³ The court can be forced to deal with the problem directly (and not through proxy issues) if infringement of Article 2 TEU is pled. Kim Lane Scheppele argued for rephrasing the infringement procedure to provide for an option of systemic infringement actions that would bundle several violations and use Article 2 TEU or Article 4 TEU (sincere cooperation) in connection with the Charter of Fundamental Rights as their basis.⁹⁴ However, as unfortunate as it might be that Article 7 TEU is cumbersome due to the unanimity requirement in its key stage, the constitutional legislator opted for this option. It cannot be bypassed without good reason.

⁹⁰ Cf. the possibility to cut Cohesion Funds in case of excessive government deficit according to Art. 4 of the Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund, OJ L 210, 79 (repealed by Regulation (EU) No 1300/2013 of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund, OJ L 347, 281).

⁹¹ Müller 2015, fn. 21 at 150-1.

⁹² B. Jack, Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?, Eur. L.J., 2013, p. 404-421.

⁹³ Cf. ECJ, Case C-286/12 (Commission v. Hungary), ECLI:EU:C:2012:687 (the Court found Hungary's laws on compulsory retirement of judges discriminatory by age, but the judgment could not restore the judges into their positions). See G. Halmai, Much Ado About Nothing? Legal and Political Schooling for the Hungarian Government, Verfassungsblog, April 29, 2017, at <http://verfassungsblog.de/much-ado-about-nothing-legal-and-political-schooling-for-the-hungarian-government-on/>.

⁹⁴ K.L. Scheppele, Enforcing the Basic Principles of EU Law through Systemic Infringement Actions, in: C. Closa/D. Kochenov (eds.), Reinforcing Rule of Law Oversight in the European Union, 2016, p. 105-132.

Suspending payments from EU funds to a Member State found in breach of fundamental values under Article 7 is the preferred way.⁹⁵ In order to increase the effectiveness of this sanction and subsequently pass the proportionality test, I suggest targeted sanctions. Firstly, the Commission as preferred initiator of Article 7 procedure will deconstruct a target regime's political and economic structure and identify key individuals and entities. Then, the EU will, instead of paying the funds to the state and the state redistributing the funds based on calls for concrete projects within announced funding programs, temporarily fund concrete programs directly based on applications from individuals and entities and will not approve any funding for blacklisted individuals and entities.⁹⁶

A suspension of free movement rights can assume various forms. It shall be again targeted. For instance, export of blacklisted entities can be subjected to the common tariff set for third countries. Free movement of services provided by blacklisted entities can be limited by the condition that the service provider must be incorporated in a Member State that is not subject to Article 7 sanctions. Certifications of quality may be required to fulfil requirements of a Member State in which it is marketed. Workers from a sanctioned Member State can be required to apply for a working permit. The EU rights of posted workers can be suspended. Free movement of finances may be restricted.

The EU can also refuse guarantees for European Investment Bank's loans to a sanctioned state. It may deny a right of targeted individuals to buy property in another Member State, etc.

4. Other Rights

Suspension of other than political and economic rights may include a suspension of automatic recognition of judicial decisions in other Member States. This option falls within the insulating category of sanctions. A Member States' tempering with the domestic judiciary raises the question of legitimacy of all judicial outcomes and their possible effect on nationals in other Member States. The Council may also suspend the recognition of qualifications if education institutions, their curriculum, research, and staff is corrupted by ideological views of a Member State found in breach of fundamental values.

The Council can further suspend the rights deriving from the Schengen acquis. Targeted individuals may be banned from traveling to other EU states or be subject to an administrative procedure of a type of granting a visa. However, effective enforcement of such sanctions would require reinstating border controls, which may be disproportionate.

Further research shall focus on possibilities of direct financial assistance to independent media, non-government-controlled universities, opposition parties, and civil society advocates, which would fall within the 'suspension of rights' condition of Article 7. Direct distribution of EU funds (constructed as selective suspension of a right to EU funds) might be an option for some of the institutions mentioned.

⁹⁵ See Letter by the foreign ministers of Germany, the Netherlands, Finland and Denmark to the European Commission, March 6, 2013; at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>

⁹⁶ The requirement that a Member State must co-finance a funded project would be suspended as well. This solution will allow the EU to channel the funds into projects that are able to reform the structural conditions necessary for Article 2 TEU values to function.

Conclusion: From Voting Rights Suspension to Tailored Sanctions

The Union failed and it is failing again. Creeping deviation of an entire region from liberal-democratic, common values is not a coincidence. The two most visible proponents, PiS and Fidesz, have stopped pretending to cherish these values, and declared that they want to restructure their political, economic, and social structures on a different political philosophy. Both parties command electoral majorities. If they continue winning future elections, they will secure a loyal constitutional court, presidency, central bank, media, and universities through their appointment and funding powers in a less contestable way. The case of Hungary has already proven that to some extent. But in the shadows of the excesses of Hungary's and Poland's legislatures stands the rest of Eastern Enlargement states with few exceptions. We should ask why Viktor Orbán has turned from a liberal to his current self and why so many others in the region follow the suit. But first the trend must be stopped and the EU must prove to its citizens that the fundamental values are indeed fundamental, warranting the imposition of Article 7 sanctions.

The Commission, assuming the role of prosecutor in the Article 7 procedure, should in cooperation with the Council and the European Parliament focus on devising such sanction mix, which effects enhances the possibility of public to realize the danger of an illiberal turn and liberal forces to take over. Insulating sanctions, such as the suspension of voting rights, are unable to fulfil this aim. Sanctions should not target an entire Member State but focus on selected individuals and entities. They should be like a surgical intervention, carefully cutting away those parts of political and economic structures that underpin the regime. Simultaneously, the EU must be careful not to create a space for other illiberal states to step in to fill the commercial gap caused by sanctions and the political vacuum that might result from a backlash of sanctioned state against the EU and its Member States.⁹⁷

The first step requires a proper diagnosis of deviation. In the second step, the EU must ask what measures can remedy the roots of the deviation. In the third step, it must find concrete options in the EU legal order (rights to be suspended) that can fulfil this goal. In the next step, it must combine the rights selected for suspension into a complex sanction regime, tailored to the causes of deviation and political and economic structure of the Member State in breach. Finally, the EU must test the devised sanction regime against the democracy-inbound, effectiveness, proportionality (general and special), and beneficiary-focus principles and correct the sanction regime accordingly.

A use of proper theory is, from a legal point of view, required by not only the effectiveness principle, but also the other three principles. Gramscian analysis of state-society relationship offers a valuable assistance to senders of sanctions in isolating the forces that are vital for the state elite to stay in power in the long term. Its ideological charge shall not be deterring since it serves for diagnosis, not solution.

⁹⁷ Russian and Chinese economic and political influence in the CEE and the Balkans has been steadily on the rise. Cf. Russian involvement in Paks nuclear plant's extension project, gas pipelines projects Tesla Stream and TurkStream or China-led 16+1 cooperation with 16 CEE countries launched in 2012 that includes e.g. a construction of 350km long high-speed rail line from Belgrade to Budapest. *E. Zalan*, Hungary-Serbia railway launched at China summit, *EUobserver*, Nov. 29, 2017.

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