

**POLICY
GAPS
REVIEW**

POLICY GAPS REVIEW: ASSESSMENT OF GAPS IN EU RESPONSE TO FUNDAMENTAL RIGHTS VIOLATIONS

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 2, Treaty on European Union (TEU)

Article 2 has a prominent place in the EU treaties, yet a vast gap exists between the rights guaranteed by the EU and the exercise of these rights. Unclear laws, disempowerment or fear of reprisal can prevent people from knowing and enjoying their rights.

In the past five years people across the EU have seen large scale attacks on social and cultural rights, discrimination, attacks and violence against minorities, mass surveillance, and challenges to democratic rights.

Of particular concern have been the on-going challenges to democratic rights in Hungary, leading in 2013 to the Tavares report¹ presented to the European Parliament, outlining options for addressing EU member states that fail to respect the EU fundamental values listed in Article 2.

Hungary is far from being the only EU Member State where fundamental rights are in danger however, with other high profile examples in recent years including the UK's mass surveillance programmes², anti-protest laws enacted in Spain³, and the forced eviction of Roma in Bulgaria and France⁴.

The main response of European institutions to these threats has been via Article 7 TEU. Article 7 allows the EU to warn and ultimately suspend the membership rights of a Member State in cases where there is a clear risk of serious breaches of the values laid out in Article 2.⁵ This procedure can be initiated by one third of Member States, the Commission or the European Parliament and allows a four fifths majority of the Council, after receiving the Parliament's consent, to determine that there is a clear risk of a serious breach of Article 2 values and set out recommendations for reform. It also allows the Council acting unanimously, after either the Commission or 1/3rd of Member States have initiated the process and the Parliament has consented, to determine the existence of a serious and persistent breach of Article 2 values and suspend membership rights of that Member State.⁶

While theoretically having teeth and having once been used against Austria, Article 7 is considered by most commentators as holding currently little to no potential of being used against Member States. A number of reasons have been put forward for this, however the most often cited ones are that it requires a political decision by Member States to enact a process that they are potentially afraid could be applied against them and would affect the ability of the EU to in the future take decisions based on mutual compromise and trust.⁷

What has been proposed by the European Commission and European Council and actually established are two dialogue mechanisms, neither of which has direct enforcement powers.

The Annual Rule of Law Dialogue, established in 2014 by the European Council, is a once-per-year discussion on the status of the rule of law in Member States and is not linked to any sanctioning powers. The first session took place in November 2015⁸ and can be seen as limited at best, with the post-meeting minutes listing discussions on the Commission conference on anti-Semitism and anti-Islam hate in Europe, best practices and challenges from national contexts, and the rule of law in the digital

¹ Rui Tavares, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), Committee on Civil Liberties, Justice and Home Affairs, A7-0229/2013

² Amnesty International, Amnesty International Report 2014/15: The State of the World's Human Rights, 25 February 2015, p. 392

³ Eden Blake, Spain Gag Law: Protesters Rally Against New Public Demonstration Laws, International Business Times, 07 January 2015

⁴ Office of the High Commissioner for Human Rights, Zeid urges France, Bulgaria to halt forced evictions of Roma, 11 September 2015

⁵ European Commission, Promoting and safeguarding the EU's values, Last updated 10.03.2015, accessed 10 December 2015

⁶ Treaty on European Union, Article 7

⁷ Jan-Werner Müller, Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order, Transatlantic Academy, 2012-2013 paper series No. 3

⁸ http://eu-un.europa.eu/articles/fr/article_17135_fr.htm

era⁹ and reports indicating that a soft approach was taken, with Member States being encouraged to open up on issues rather than face criticism from other members.¹⁰

The Rule of Law Framework was the alternative or complementary option set up by the European Commission in 2014. Its focus is to address systematic threats to the rule of law in EU Member States and act as an early warning and resolution system before an Article 7 level 'clear risk of a serious breach' of fundamental values would be reached.¹¹ It relies on continuous dialogue between the Commission and the Member States on the issue involved and is made-up of three stages: an assessment by the Commission, dialogue with the Member State and a 'rule of law opinion', or warning; a public recommendation on issues to be resolved by the Member State, if they do not address the problems outlined in the warning; monitoring of follow-up and possible referral to the Article 7 procedures if the problems are not resolved.¹² This procedure has been praised by some commentators as a compromise process that neither alienates Member States nor requires a difficult-to-obtain treaty change. However its weaknesses are substantial, including being based on the presumption that Member States who have systematically breached the rule of law wish to enter into dialogue and resolve the issue, rather than having taken the decision to breach the rule of law,¹³ and it is still very heavily dependent on Article 7 as the ultimate sanction, which – as discussed – is very unlikely to be used. The most recent developments in Poland have led the European Commission to activate the Rule of Law Framework to monitor clear indications of systemic threat and, engage in dialogue with its government to remedy to the situation.¹⁴ Ultimately whether this would reach the level of sanctions under the Article 7 procedure is an open question.

As such, Article 7 remains the only way currently to address threats to Article 2 principles. In light of on-going threats to fundamental rights and democracy in the EU, the risk is high that relying on Article 7 means that the EU itself is not and will not be able to address threats to its own founding values by Member States.

⁹ http://www.consilium.europa.eu/en/meetings/gac/2015/11/st14185_en15_pdf/

¹⁰ Israel Butler, Wary EU governments hold first rights talk, E!Sharp, December 2015

¹¹ http://europa.eu/rapid/press-release_IP-14-237_en.htm

¹² http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

¹³ Dimitry Kochenov and Laurent Pech, Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction, EUI Working Papers, RSCAS 2015/24, http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3

¹⁴ http://ec.europa.eu/news/2016/01/20160113_en.htm