

Article 7 TEU is a Nuclear Bomb – with all its Consequences?

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Abstract: The present piece of writing analyses whether the “nuclear bomb” metaphor can be applied to Article 7 TEU. The theoretical framework applied belongs to the field of law and economics of criminal law. It will be presented a possible typology of international organisations which might explain the different measure of influence of different international bodies on the national legal orders. Besides the importance of reputation the study states that solely the mere sanctioning power of an international organ is insufficient in achieving significant results, however, if the sanctioning power goes together with a high probability of the application of the sanctions, the bigger consideration will be provided to the opinions or standards of the respective body. This hypothesis will be presented through the Fundamental Law of Hungary and its fifth amendment.

Keywords: Article 7 TEU, rule of law, deterrence theory, Fundamental Law of Hungary, constitutional amendment

1. INTRODUCTION

Changes in Hungarian public law¹ and the adoption of the Tavares Report² have stirred up the debate surrounding Article 7 of the Treaty on European Union (TEU).³ Lately, the same has happened following the declaration of the Prime Minister of Hungary regarding the possible re-introduction of the death penalty in Hungary.⁴ The present piece of writing analyses whether the “nuclear bomb” metaphor can be applied to Article 7, by resorting to economic analysis of criminal law and game theory (Section 2). In this section the purpose is to give arguments in the support of the metaphor and the following sections try to illustrate its usefulness through a specific example. Therefore Section 3 aims to represent these findings by focusing on a possible typology of international organisations and Section 4 applies all these to the Hungarian Fundamental Law and its fifth amendment. In Section 5 a few possible modifications will be discussed of the present EU legal framework and section 6 will conclude the paper.

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¹ The new constitution of Hungary has been adopted on 18 April 2011 and has been signed by the President of the Republic on 25 April 2011. It entered into force on 01 January 2012. Following this moment five amendments have been adopted by the constitution-maker within two years.

² 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)].

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

⁴ Nielsen (2015).

2. OLD PARADIGM IN A NEW CONTEXT

In Germany, the visitor can frequently observe that pedestrians stop at the red light even when there are no cars around. In Hungary our everyday experience differs, since we often find ourselves galloping across the street when the light is red. The situation is even more curious if we add that in Germany, the fine for irregular crossing is only 10 EUR while in Hungary this can amount up to 50,000 HUF (app. 165 EUR), which is almost twenty times higher. We can then ask ourselves, what is the reason for such a difference? Can cultural attitudes,⁵ the functioning of informal institutions⁶ or a stereotype of exactitude, which in this case results in a higher inclination to follow rules, supply sufficient explanation, or else should we attribute it to German parsimoniousness or the lavish lifestyle of Hungarian pedestrians?

The reasons behind this phenomenon might be less mysterious than one might think, and they may also answer the questions regarding the understanding of the “nuclear bomb” metaphor applied to designate Article 7 TEU.⁷

The dilemma of choosing the appropriate incentives to prevent criminals from committing crimes has been around for long. If we continue with the example above: why does one pedestrian cross the road while the light is still red and why does the other wait until the sign turns green? For a long time it was widely held that the prospective punishment deters potential criminals, who ponder upon the legal consequences of their actions.⁸ In light of this statement, the more severe the punishment in prospect, the less likely they will risk taking an action. However, this inverse proportion of variables has never been substantiated by studies (that is why the reintroduction of the death penalty would bear no significant power of deterrence over life imprisonment, regardless of the fact that it would also be unconstitutional),⁹ because they have showed that an important variable was missing from the equation: that is the probability of the execution of the punishment (and thus the probability of the deterrent and theatrical Foucauldian spectacle).¹⁰ In light of this reasoning, the so-called *deterrence theory* can be expressed with the help of the following formula:

A criminal will commit his crime as long as $Uc > p * Up$, where Uc is the expected utility [*(u)tility*] from the perpetration of the crime [*(c)rime*], p is the probability of successful investigation [*(p)robability*] and Up is the decrease in utility in accordance with the degree of the punishment [*(p)unishment*]. Consequently, if 10 out of 10 irregular crossings are duly punished by authorities, then even the most risk-loving pedestrian will reconsider his plans of crossing the street when the light is red, regardless of the degree of punishment. On the contrary, if the probability of the imposition of a fine is close to zero, then however high the amount of the fine may be, nobody will take it seriously, since as *lex imperfecta*, it will never bear an actual legal consequence.

⁵ Acemoglu (2009) 175–177.

⁶ North (1990) Chapter 5, 6.

⁷ Fekete (2015).

⁸ For an overview of the different criminal law theories see: Vókó (2012).

⁹ Death penalty is forbidden by many international treaties and also under EU law. Besides this, in Hungary the Constitutional Court held it unconstitutional. See Decision no. 23/1990. (X. 31.) CC.

¹⁰ Foucault (1995) 32–69.

While the above formula is evidently a simplified model¹¹ to depict the mechanisms of criminal actions (for instance it does not take into account psychological factors, attitudes of risk-taking, and operates under the presumption that the perpetrator always acts rationally, which is not the case for example with crimes committed as a result of provocation), it can shed a new light on the international commitments of states. Of course there is again the presumption of rationality behind the application of formula to states as well; however, if we use it with the rational bureaucracy¹² of state apparatuses in mind, this is a very plausible assumption.¹³

3. WE NEED A FORUM, BUT WHAT KIND OF FORUM?

It is often reiterated that international law is nothing more than *soft law*.¹⁴ The question is whether this is true with regard to all kinds of international commitments¹⁵ and how this can be interpreted in relation to EU law.

Andrew T. Guzman names reciprocity, retaliation and reputation as ‘the three Rs of compliance’,¹⁶ and underlines the repeated nature of international interactions between the states which makes them interested in a coordinated behaviour even without an enforcement mechanism carried out by a third party.

The situation is different when we take into account the international organs and dispute resolution mechanisms and it becomes more complicated when multilateralism comes into the focus.

In order to enlighten the deterrence formula presented above, in all cases of compliance with international and EU law there has to be a body which takes a position in cases of compliance with international commitments. Without such a body present, the right side of the deterrence formula would be undefinable and we would only be able to talk about unilateral commitments of states where the ‘three Rs’ give incentives for the states by self-interest.

The right side of the formula is composed of two elements: the probability of holding the state accountable for its failure to comply with the commitments, and the prospective legal consequences. Naturally, if the arbiter which takes a position in cases of compliance

¹¹ For more nuanced approaches in the field of economic analysis of criminal law see the seminal paper of Becker (1974). For an overview of Law and Economics of criminal law and deterrence theory see Cooter (2005) Chapter 12. and Shavell (2004) Chapter V.

¹² Weber (2011) 656–958., 973–980. However, for questioning the incentive structure of the bureaucracy see: Mueller (2003) 359–368.

¹³ Together with this assumption of the model the so-called individual methodology is released. For a such an approach see: Schäfer (2014) 82–94. However, there are strong arguments which support the rational behaviour of the states such as the benefits of coordination or the pure ‘interest in certainty and predictability over time’. See Guzman (2008) 26–27.

¹⁴ Kardos (2002) 76–82. ‘Whatever the strengths of international law, it remains almost entirely without coercive enforcement – the primary tool used to generate compliance in domestic systems.’ See Guzman (2008) Preface.

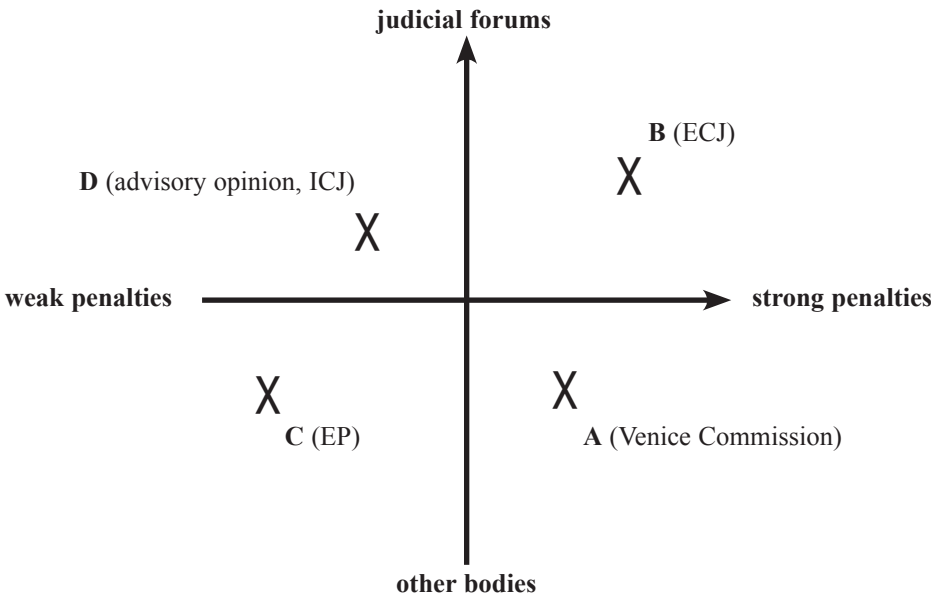
¹⁵ For example the decisions of the European Court of Human Rights unilaterally question this assertion in relation to compliance with standards of the European Convention of Human Rights.

¹⁶ Guzman (2008) 33–45. It should be noted that Guzman distinguishes between treaties and other soft law agreements but in his opinion the ‘Three Rs of Compliance make both treaties and soft law effective.’ 180.

or non-compliance is a judicial forum with concrete discretion, the probability of uncovering the infringements and imposing sanctions is higher than in a case when a political body is empowered only to adopt a political declaration or recommendation. There is a great institutional variety between these two extremes, for instance, the model can be further supplemented by the prestige of the international institution adopting a resolution only, which, similarly to an effect of a sanction, can potentially be detrimental to the reputation of the state in question, therefore it can have a stronger effect than the opinion of a not-so-reputed advisory body. Nevertheless, one thing is common in any of the assessing organs: they provide information and shape the perception of the international community about the examined state or its government.¹⁷

Consequently, international arbiters can be represented along two imaginary coordinates, one of which represents the nature of the institutions, while the other depicts the strength of the applicable sanctions:

Table 1



To give an example: the Venice Commission can “only” issue opinions, however, by virtue of its expertise and prestige this apparently weak discretionary power can involve relatively important consequences (such as loss of prestige or the accusation of turning away from the rule of law),¹⁸ that is the reason it appears in the lower right corner of the figure.

¹⁷ Therefore Guzman states that international tribunals can be effective without enforcement mechanism as well because ‘their primary role is informational’: if a state does not comply with international law, it will be considered as an unreliable partner. Guzman (2008) 34, 51–54.

¹⁸ The opinions of the Venice Commission by countries are accessible online.

The European Court of Justice (ECJ) has strong competence regarding infringements¹⁹ and other similar procedures, thus it is placed in the upper half of the figure, where, for that matter, we could also place the European Court of Human Rights (ECHR), as even though its decisions are of *inter partes* effect, they serve as minimal standards²⁰ for constitutional courts in member states, which is also stated in the EU Charter of Fundamental Rights.²¹ The relative position of the ECJ and the ECHR could be however subject to debate, despite the representational nature of the figure, so I do not wish to take a position on this question.²²

A decision about complying with an international commitment can be shaped by many other factors such as the balance between the reachable benefit and the expected sanction of non-compliance or the level of wealth of a country.²³ In this regard, on the one hand there might be a huge difference between the sanctioning powers of the European Court of Human Rights and the Court of the European Union, as the latter can impose huge a lump sum or a penalty payment on the Member State.²⁴ On the other hand, based on the different economic conditions of the countries, the Member States might respond in other manner to the same expected sanction. As a consequence and contrary with the general expectation regarding the damage based compensation, it seems to be logic that the measure of sanctions should depend also on subjective elements such as the economic conditions of the noncompliant country.²⁵

4. APPLICATION: FUNDAMENTAL LAW, ARTICLE 7

The functioning of the above depicted applied theory is perfectly manifest in the Hungarian Fundamental Law and its fifth modification.²⁶ I will not detail the process and the elements of the constitutional codification,²⁷ however, I would like to highlight the fact that after the fourth modification of the Fundamental Law, three international organizations reacted immediately: the Venice Commission, which issued an opinion²⁸ on the new constitutional framework, and two other institutions which are in a comparable situation from the perspective of our topic – the European Commission and the European Parliament. The story that followed is well-known: the European Parliament accepted the so-called Tavares Report,²⁹ and from the part of the European Commission, Commissioner Reding held a

¹⁹ Article 258–260 TFEU.

²⁰ In Hungary see Decision no. 1/2011. (VII. 13.) CC.

²¹ Article 53.

²² For the recent issue regarding the accession of the EU to the ECHR see link 3. Finck (2014).

²³ Shavell (2004) 479–482.

²⁴ Article 260 TFEU.

²⁵ Regarding the calculation of lump sum and penalty payments proposed by the Commission to the ECJ in infringement proceeding see link 9.

²⁶ The Fundamental Law of Hungary was amended for the fifth time on 16 September 2013.

²⁷ Regarding the debate among Hungarian scholars on the new constitutional framework see in English: Csink (2012), Tóth (2012), Bánkuti (2013), Szente (2015).

²⁸ Opinion On The Fourth Amendment To The Fundamental Law Of Hungary, CDL-AD(2013)012. See link 4.

²⁹ 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)), see link 5.

speech³⁰ in which she outlined three areas³¹ in the Fundamental Law that were considered problematic from the EU law perspective. This was followed by the fifth modification of the Fundamental Law.

Unsurprisingly, after the fifth modification the sovereign constituent corrected all three problems raised by the European Commission. However, the content of the Tavares Report and the opinion of the Venice Commission were taken into consideration to a lesser extent.³² How is that possible?³³

Applying the above described deterrence theory seems to provide a plausible explanation. Looking at the fifth modification of the Fundamental Law from this perspective, it seems obvious that the possible severe legal consequences had a deterrent (thus constitution modifying) effect. Moreover it also highlights that Article 7 is a political mechanism which is very unlikely to occur, thus it stays on a rhetorical level and has no consequences.

Although the Commission alone cannot impose sanctions on the Member States for their Treaty opposing behaviour, as “guardian of the Treaties” it is a Commission competence to investigate these issues and launch an infringement proceeding which might lead to severe one-sum sanctions proportionate to the GDP of the given country, or daily sanctions which incite modifications.³⁴

What can the European Parliament do in comparison? It can initiate the “nuclear bomb” procedure. The constituent might think that this is not a realistic option, because everyone knows from the cold war experience that nuclear bombs are not used by civilized and rational leaders. Article 7 has the same effect, so the *p* component of the above explained equation converges to zero.

Coming back to our metaphor, there is one small difference between Article 7 and a nuclear bomb: Article 7 is avoided not because of its unforgivable consequences (in comparison, the consequences of the excessive deficit procedure are more severe), but because the procedure developed around it makes it inapplicable due to its political character.³⁵ This feature is demonstrated by the fact that the European Court of Justice does not even have a right to give its opinion, while all Member States have to agree in sanctioning the Member State subject to the proceeding.

³⁰ Reding (2013).

³¹ One of the three areas which were affected by the competences of the EU is also interesting from a Law and Economics perspective. Article 17 of the Fourth Amendment to the Hungarian Fundamental Law made possible to entail payment obligations following the judgements of ECJ and other judicial forums. This could have led to the introduction of special EU, ECHR or CC taxes which on the end of the day could have deterred those forums to impose fines vis-à-vis the Government of Hungary, unless they risk their social reputation.

³² For an analysis see: Vörös (2014) 1–20.

³³ It is not an intention to provoke the domestic sovereignty-protecting discourse, but it seems to be provoking that the text of the Fundamental Law was modified exactly at those points which were formerly criticised by the European Commission. Lately, as a consequence of the whole constitution-making process can be interpreted the strengthening inquiry regarding the article 4 paragraph 2 TEU which declares that ‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’

³⁴ Article 260, paragraph 3 TFEU.

³⁵ Törő (2012).

The whole process can remind us of a prisoners' dilemma³⁶ with multiple actors. Member States should have to cooperate in order to regulate their rule-breaker partner; however, they can only do that with the danger of sacrificing their separately developed bilateral relations. So, only one Member State which chooses to help the partner under scrutiny (in order to put it under obligation), would be enough to jeopardize the procedure. Obviously all Member States know how they can take advantage of such a situation, so foreseeing the dominant strategies of others, it will not be a partner in imposing sanctions either.

In other terms, together with the collective action problem raised by the multilateral character of the European Union the so-called free-rider problem gives incentives to each Member State to exit the common retaliatory action. The only exception I can imagine in this scenario is a very severe violation of the law in one of the Member States.³⁷ What remains after all is the reputational sanction carried out by the report of the European Parliament and its weight or effect depends on the credibility and the authority of the issuer organ.³⁸

5. CHANCES OF DE-NUCLEARIZING OF ARTICLE 7

In past years the need for a more effective, value-protecting mechanism has arisen within the European Union. This contains the difficulty that even if the ECJ was involved in the procedure, creating an objective measurement for the violation of EU fundamental values would still be difficult. There are still some areas and ideas which might offer a certain kind of way forward.

One of them is the new mechanism based on the "Copenhagen dilemma"³⁹ raised by the Tavares Report, which would examine the endurance of the criteria required from the states at the time of their accession. From the perspective of the latecomers such a scrutiny could be welcome because as the Copenhagen criteria are relatively new, the old Member States would finally also have to go under scrutiny from this point of view. A dilemma might also arise regarding the fact that due to such a steering mechanism, the feeling of post-accession finality (rule of law fact-finding) would be taken over by a new, constant urge to comply (rule of law programme).⁴⁰

³⁶ Dixit (2008). Guzman mentions the Kyoto Protocol as another example which has a structure of a multilateral prisoner's dilemma. He states that reciprocity and retaliation will not work when an international issue involves public goods such as environmental problems or human rights questions. In other terms I would suggest that these mechanisms might work as well when the multilateral issue can 'individualized' as a debate among two partners of a multilateral agreement, so when the concrete issue becomes bilateral. Guzman (2008) 63–69.

³⁷ E.g. the re-introduction of death penalty could be such a severe violation of the law.

³⁸ As regards the third 'R' of Guzman, reciprocity cannot come into play in the European Union. For example it would make no sense for other Member States to decrease their own human rights' level of protection in response to an EU law violating action in another Member State.

³⁹ 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)), para 72. See link 5.

⁴⁰ This statement has been formulated by the Constitutional Court of Hungary short after the transition. See Decision no. 11/1992. (III. 5.) CC. Available at link 6.

Another potential basis could be the EU Justice Scoreboard launched in 2012.⁴¹ This initiative, which was launched strictly based on internal market motives, examines the effectiveness of the judicial organization of each Member State, as it can have a huge effect on the economy and the development of the whole EU internal market. The question might arise, whether this scoreboard will remain relevant only to the common market in the future.

One might see a long-term potential in EU enlargement and the Treaty modifications or a new charter coming along with it.⁴² This position so far has always been coherent with the deepening of EU integration. There are several variations in this regard, such as a deeper mechanism shaped especially to the Eurozone members together with the creation of a second budget, which would motivate the outsiders to join the deeper integration.⁴³

Last but not least, the further developing of the notion of EU citizenship can be considered to be great a possibility in the future as well, which has evolved from the right of workers to free movement to an EU-level fundamental political right.⁴⁴ In addition one can see potential in the annual reports on fundamental rights and the mechanisms which could be built around them in the future.⁴⁵ And finally it has to be mentioned the communication from the Commission which aims to strengthen the rule of law in the EU based on the duty of sincere cooperation set out in Article 4 paragraph 3 TEU.⁴⁶

6. CONCLUSIONS

To summarise, the purpose of this text was to use the tools of economic analysis of law in order to come closer to a better understanding of the ‘nuclear-bomb’ metaphor of Article 7 TEU. With the help of a simplified model of the so-called deterrence theory and of a potential classification of international organisations (which have contextualised and also shaped the constitution-making process in Hungary) the study has also tried to give a plausible explanation for the Fifth Amendment of the Fundamental Law of Hungary.

In addition, the “de-nuclearization” idea of Article 7 TEU has come into focus which might have some foundations. It seems that the key lies in the procedural principles which create the basis of the mechanism and in the exclusion of political deals from it. But of course, it is also possible that the potential of such a rule as the one outlined in Article 7 lies in its rhetorical and reputational power, which only fulfils its meaning in the professional diplomatic layers.

⁴¹ European Commission: *The EU Justice Scoreboard*. See link 7.

⁴² Regarding the potential impacts of further enlargements see Péter (2014).

⁴³ Another ‘push factor’ in this process might be the British referendum on the membership in the European Union. The idea of the so-called ‘multi-speed EU’, ‘à la carte integration’ which has also been called a ‘variable geometry’, ‘core and periphery’ or ‘concentric circles’ is present long ago in the public debates and also in the literature. See: Majone (2008) 457–481.

⁴⁴ A culmination of this process can be named the appearance of the EU citizenship in the text of the EU treaties in 1992 (Article 9 TEU) which has been supported by a set of judgements of the ECJ such as in the Gravier case, Cowan case, Allué and Coonan case, Vlassopoulou case, Bosman case, Gebhard case, D’Hoop, Martinez Sala case, Baumbast case, Trojani case and so on. See: Orbán (2014) 2–3.

⁴⁵ Annual report on the application of the Charter. See link 1.

⁴⁶ European Commission: *A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final. See link 2.

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