

TO BARK OR TO BITE?

THE EUROPEAN UNION, ITS MEMBER-STATES AND THE RULE OF LAW

Friday
2 March 2018
13.00-14.00

Room 7.23
7/F, Cheng Yu Tung Tower
Centennial Campus, HKU

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The European Union was founded by the Treaty of Maastricht (1992) succeeding the hitherto-existing European Community. Although the main focus of EU activities has always been oriented on economic integration, the expansion of the EU powers required that more attention be given to the protection of human rights and, more generally, to the respect of the rule of law. Accordingly, Article 2 of the Treaty on European Union (TEU) provides that:

- ▶ 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.

The Maastricht Treaty did not establish any particular procedures allowing the Union to react to threats against the rule of law that might arise in the Member-States. However, the prospect of the EU's enlargement towards the East (as well as the so-called Haider controversy in Austria) prompted modifications of EU law. At present, next to the regular "infringement procedure", there are three procedures (mechanisms) in which the Union may enforce respect of the values consecrated in Article 2 TEU:

- ▶ The Early Warning Mechanism, which may be launched by the EU Commission in situations where "a systemic threat to the rule of law" is about to emerge in a Member-State.;
- ▶ The Preventive Mechanism, in which the EU Council (with the consent of the European Parliament) may consider "a clear risk of a serious breach by a member-State of the values referred to in Article 2". Should the existence of such risk be confirmed, the EU Council may, by a majority of four fifths of its members, address "recommendations" to the Member State in question;
- ▶ The Sanctioning Mechanism, responding to "a serious and persistent breach" of the values referred to in Article 2. In such a case the European Council, by unanimous decision, may suspend certain of the Member State's rights deriving from the application of the Treaties.

All three mechanisms involve only the EU political institutions and do not provide for any direct jurisdiction of the Court of Justice. It is assumed that the political authority of the Union would be sufficient to find a solution. Only the latter mechanism provides for sanctions, without, however, clear specification of their nature and consequences. None of the three mechanisms have ever been applied until 2016 (although, already in 2011-2012, Hungary fell short from being the first "victim"). There was also some skepticism in legal writings as to the effectivity and feasibility of these mechanisms.

It was only in 2016 when, at first "the early warning mechanism" was applied to Poland. It did not bring any results and, due to further deterioration of the situation, in December 2017, the Commission requested the EU Council to launch "the preventive mechanism" to defend the rule of law in Poland.

The situation remains dynamic and it is still too early to foresee whether and to what extent the EU may be able and willing to move from barking to biting in enforcing its demands.

Judge Lech Garlicki is a visiting professor at HKU and renowned constitutional law specialist. Since 1988 he has been a professor at the University of Warsaw. He was member of the Warsaw Bar from 1980 to 1993, judge of the Constitutional Court of the Republic of Poland from 1993 to 2001, and in the years 2001 to 2002 president of the Polish Society of Constitutional Law. From 2002 to 2012 he was a judge of the European Court of Human Rights.

He is one of the Founding members of the European Law Institute, author of over 300 publications in various languages and has lectured at numerous universities in Asia, Europe, the USA and Israel.

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ALL ARE WELCOME!

