



EDITORIAL

FUNDAMENTAL VALUES AND FUNDAMENTAL DISAGREEMENT IN EUROPE

On 12 September 2018, two events occurred, both with considerable legal and political implications, and seemingly inspired by different conceptions about the role of European fundamental values and principles.

The first event is a resolution adopted by the European Parliament – on the basis of a large majority – calling upon the Council to determine the existence of a clear risk of a serious breach by Hungary of the fundamental values of the Union – the so-called preventive procedure established by Art. 7, para. 1, TEU (P8_TA-PROV(2018)0340). The second event is the order in joint cases C-208/17 P to C-210/17 P, *NF and Others v. European Council*, by which the Court of Justice declared the appeals lodged against the three orders of the General Court of 28 February 2017 manifestly inadmissible, which, in turn, had declared as inadmissible three actions for annulment against the EU-Turkey Statement of 18 March 2016 (see case T-192/16, *NF v. European Council*; case T-193/16, *NG v. European Council*; case T-257/16, *NM v. European Council*: hereinafter, *NF*).

It would be highly improper, of course, to establish a link between these two events, pronounced by different institutions, on different subjects and having a totally different factual and legal background. Yet, the temporal coincidence prompts a parallel analysis of these two decisions, which seem to occupy the two opposite ends on the ideal scale measuring the substantial, not formal, adherence of the EU to its fundamental values.

The European Parliament is not the first institution to trigger the Art. 7, para.1, TEU procedure. As is well known, on 20 December 2017 the Commission adopted a reasoned proposal for a Council Decision on the determination of a clear risk of a serious breach of the rule of law by the Republic of Poland (COM(2017) 835 final). However, a parliamentary resolution appears to be the most appropriate means of initiating this procedure. The triune nature of the Parliament – an institution; a political institution; a political institution representing the European citizens – endows its resolutions with a special form of legitimacy, that neither the Commission nor one third of the Member States – the other two actors entitled to start this procedure – possess.

The Parliament was certainly aware of this special mission. The resolution was approved by an overwhelming majority going well beyond the double threshold established by Art. 354, subparagraph 4, TFEU. All the political groups, except the Europe of Nations and Freedom (ENF), formed part of the majority, thus highlighting the political

cohesion of the Parliament. To support the resolution, the European People's Party (EPP) had to sacrifice its internal cohesion and was dramatically ripped apart. The event was followed with growing trepidation by public opinion and received much coverage by the international press. The resolution constitutes, therefore, a momentous passage in the constitutional life of the Union; as such, it can be hardly treated condescendingly by the Council.

The resolution of 12 September 2018 has been criticised for being discretionary and inspired by questionable political wisdom. These critiques appear largely unfounded. The political nature of the resolution mirrors the political nature of the substantive goods that Art. 7 TEU is designed to protect, namely democracy and the rule of law, that, at least up to a certain threshold, seem to be immeasurable by predetermined, objective and impartial standards (see D. KOCHENOV, *The Missing EU Rule of Law?* and J.H.H. WEILER, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, both published in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, respectively at p. 290 *et seq.* and at p. 313 *et seq.*). Moreover, in the light of the still immature stage of the process of political integration, a determination by a technical organ of the respect of the EU fundamental values by Member States would be improper. It would exacerbate the perception of the EU as a technocracy aimed at subjugating the free expression of popular will and, therefore, do more harm than good.

The special legitimacy derived from the parliamentary vote may also have some implications on the effectiveness of the EU's reactions to the illiberal course taken by Hungary: the Achilles heel of Art. 7 TEU procedures.

The competence conferred on the Union under Art. 7 TEU has an exclusive nature only insofar as it concerns a systemic breach of the fundamental values of the Union; a breach that, otherwise, would fall outside the scope of EU law. It follows that individual breaches to fundamental values, that interfere with the application of EU law, come within the purview of the EU's competence and can be dealt with by other "ordinary" means of redress. As is well known, the Commission has proposed using the infringement procedure to determine the existence of breaches of fundamental values of EU law that have allegedly entailed a violation of specific rules and principles of Union law.

The main problem with these alternative means of redress, a notion not necessarily limited to infringement procedures, lies in the fact that they are entrusted to technical organs, not directly endowed with democratic legitimacy: a mortal sin in a struggle against democracies that, although "illiberal", are blessed with popular legitimacy. Beneath the mantle of the Art. 7 TEU procedure started by the Parliament, these "ordinary" means of redress, designed to put an end to "ordinary" breaches of EU law, will become part and parcel of the systemic reactions to the authoritarian drift of a Member State and, therefore, vested with the broader function of exerting political pressure on that State (see Court of Justice: judgment of 6 November 2012, case C-286/12, *Commis-*

sion v. Hungary and judgment of 8 April 2014, case C-288/12, *Commission v. Hungary* [GC], where this link was only surreptitious and emerged only from the opinions of AG Kokott delivered on 2 October 2012, case C-286/12, para. 56, and of AG Wathelet delivered on 10 December 2013, case C-288/12, para. 83).

All in all, the symbolic and political weight of the move of the Parliament might enhance – although to a limited extent – the effectiveness of the Art. 7 preventive procedure. It may trigger a chain of reactions that could halt, if not even reverse, the illiberal course of some of the Member States. It is to be regretted that, in crises intimately connected with the “core business” of the Parliament, namely democracy, the drafters of Art. 7 TEU did not rely to a much greater extent on that institution to provide a bulwark to challenge any wild call towards despotism.

Let us now pass to the story of *NF*, definitively closed by the Court of Justice’s order of 12 September 2018: a well-known story on which there is no need to dwell at length.

The story starts in 2016, when some asylum seekers brought in front of the General Court an annulment action against the EU-Turkey Statement, an act of uncertain legal nature, that had stopped a massive influx of migrants crossing the borders of the EU from Turkey.

The dubious consistency of the measures adopted in the Statement with mandatory principles and rules of EU law – and possibly also with principles of public morality – raised a lively debate among scholars and practitioners. To that debate *European Papers* has considerably contributed by hosting writings from opposite camps and inspired by antithetical ethical and legal perspectives, in the belief that this is the best way to accomplish its cultural mission (see, E. CANNIZZARO, *Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 251 *et seq.*; G. FERNÁNDEZ ARRIBAS, *The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 303 *et seq.*).

Under no circumstances was this debate settled by the three orders of the General Court of 28 February 2017. The inadmissibility of these annulment actions had been pronounced on the basis of the doctrine that an international arrangement, negotiated by the President of the European Council, visibly acting in this capacity, drafted within the headquarters of the European Council, and mentioning the European Council as one of its parties, was not attributable to the European Union but rather to the Member States, acting within the European Council.

This doctrine was neither upheld nor reversed by the Court of Justice’s order of 12 September 2018. The Court found that the appeals lacked the minimal requirements of coherence, clarity and intelligibility, without which a review of validity could not be car-

ried out (see, in particular, paras 16 and 17 of the order) and dismissed the appeals accordingly.

It is certainly not the intent of this *Editorial* to challenge the veracity of the reasons stated by the Court of Justice. The confidentiality of the written documents, in which the pleas of appeal are formulated, protects them from unwarranted criticism. But, even admitting that the appeals were badly drafted, to the point of making it difficult – perhaps very difficult – to draw clear and coherent arguments in favour of the annulment of the decision of the General Court, nonetheless, in the opinion of the current author, the Court of Justice should have attempted the impossible and tried to deduce these arguments from the available documents and to review the legality of the Statement. There were two reasons for doing so.

First, there was the need to restore the credibility of the EU judicial institutions, shaken by the controversial arguments made in the three orders of 28 February 2017, which give the impression that the real intent of the General Court was to shield the EU-Turkey Statement from judicial review.

To dispel that impression, the decision on appeal, regardless of its outcome, should have been supported by clear, transparent and verifiable arguments. By dismissing the case as being manifestly inadmissible, without considering the merits of the appeals, the order of 12 September 2018 tends to reinforce the idea that, in the EU legal order, there are *arcana imperii* still immune from judicial scrutiny.

There is a further criticism that can be directed towards the unfortunate end of the *NF* story, grounded in a technical assessment of the legal consequences of the declaration of manifest inadmissibility.

Under the principles of EU procedural law, as a consequence of a declaration of inadmissibility of an appeal, the decision taken in first instance becomes final and acquires the authority of *res judicata*. According to settled case law, the force of *res judicata* is not only attached to the operative part, but also to the *ratio decidendi* of that decision which is inseparable from it. It follows that the *ratio decidendi* of the three orders of 28 February 2017, namely that the Statement is to be attributed to the Member States and not to the European Union, is now final and endowed with the force of *res judicata*.

This outcome does not solely affect the interest of the Court of Justice in presenting itself as the impartial custodian of the European legality. It also affects the European public interest. In the three orders of the General Court of 28 February 2017, the European Council and its President are presented, on the basis of very controversial arguments, as agents of the Member States. This is the finding that, in the light of the order of 12 September 2018, has now acquired the authority of *res judicata*. Even if it were inspired by the noble purpose of protecting the European *contrat social* threatened by the migrant crisis, the price to be paid, in terms of the subversion of fundamental principles of the EU order, seems far too high.

There is no relation, of course, between these two events, that only by accident must have occurred on the same date. Their only connecting factor lies in the diverse, perhaps opposite, conception of the inspiring principles of the process of integration in Europe. On 12 September 2018, the European Parliament embraced the fundamental values of Europe as its own mission and brandished its democratic legitimacy as a sword against the popular legitimacy that, *hélas*, supports the path towards illiberal democracy. On the same date, the Court of Justice abstained from unveiling the mysteries that still surround one of the most controversial instruments of the Union's migrant policy; by so doing, it abdicated its role as ultimate custodian of the principles and values of the process of European integration.

These two events symbolise how fragile and inconsistent the conduct of the various actors of this process may be. At the same time, they remind us of the need to maintain firmly the fundamental values, common to the EU and to its Member States, as the only polar star to navigate the troubled waters of integration.

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