

Albania and Northern-Macedonia. Victims of autocratizing EU-oligarchy

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by Leo Klinkers |

What happened?

In October 2019, the European Council decided, on the advice of the EU ministers concerned, to stop accession negotiations with Albania and Northern-Macedonia. France, the Netherlands, Spain and Denmark no longer had any confidence in it. Measures to combat corruption and crime, and improvements in public administration, were not yet sufficiently implemented.

I am attacking this decision with five lines of thought. Note the way in which France (Macron) and the Netherlands (Rutte) are dealt with in this article.

The European Council has no democratic mandate

One of the foundations of democracy is that administrators are accountable to a constitutionally elected parliament.

Well, the European Union is not based on a constitution but on a treaty – in this context, the Treaty of Lisbon. It is, therefore, merely a form of cooperation between governments. This form of cooperation is called intergovernmental government within which government leaders and heads of state make up the decision-making body. Not the people's representatives. Either because a parliament does not exist or because it does not have the authority to call the administrators to account.

The European Parliament only has a few powers to authorize or disapprove of something. The European Council of twenty-seven government leaders and heads of state takes the most important decisions, but it is not elected by the people. The Council therefore has no constitutionally established democratic mandate. And because the members of the European Council cannot be called to account, they are untouchable.

The members of the European Council can ignore criticism from the European Parliament, the European Commission and the media. The Treaty gives the Council the power to take any decision that it considers serving the EU's objectives. Basta.

The European Council is a form of autocratizing oligarchy

Jean-Jacques Rousseau taught us that any representation of the people is an elective aristocracy. And that it will always evolve in the direction of an oligarchy. Then, an oligarchy always tends to slip into a form of autocracy. History has many examples of real and would be autocrats. Today's world too: Trump, Johnson, Erdogan, Putin, Bolsonaro, Orban, Assad, Xi Jinping, Maduro, Netanyahu, to name but a few.

Defensive mechanisms are needed to slow down such an evolution, which is harmful to the people. They must be built into the constitutional and institutional system of a democratic state. Where they are lacking or weak, autocrats seize the opportunity.

In section 6.3.5 of my book *'Sovereignty, Security and Solidarity'* I discuss how Valérie Giscard d'Estaing's attempt to design a true European Constitution (2003) has been torpedoed by the rejection of the referendum in France and the Netherlands (2005). Then the EU leaders took over the work and, with the construction of the Lisbon Treaty, they put themselves at the head of the ultimate decision-making process as a European Council. As a result – i.e. due to the absence of a real parliament with the power to hold government officials to account – the first defence mechanism against persons who aspire to (more and more) administrative power without having to account for the use of that power is lacking. This can only be solved by exchanging the treaty for a constitution. And thus, sending the heads of government back to their own country because double mandates (incompatibilité des fonctions) are constitutionally reprehensible.

The European Parliament can be seen as a form of elective aristocracy. The trick with which the European Council has placed itself at the head of this is an example of creeping oligarchy, derived from the European Parliament as the elective aristocracy. And within that oligarchy of twenty-seven people, it is always two members who push through the real decisions: France and Germany. Recently, there seems to be a tendency for it to become a tandem of France and the Netherlands. More on that later.

The Treaty of Lisbon does not contain any defence mechanisms against autocratizing oligarchy. It is a chaotic treaty with conflicting articles and many exceptions to rules. This makes it the worst legal document ever produced in the history of Europe. I refer to the European Federalist Papers and to the book mentioned above for the arguments that go with this position. For an excellent article on the need to build in mechanisms to defend democracy, I refer to *'The institutional defences of democracy'* by Matteo Laruffa.

The European Council hides behind the principle of unanimity

One of the tricks with which the European Council – like the Security Council in the UN – has organised its inviolability is to take decisions by unanimous vote. This has the advantage that the Council can say on controversial issues: 'We all agree'. This silences criticism and prevents that its members can be played off against each other after the decision has been taken.

Not every issue is subject to the unanimity rule. For some issues, the European Council decides by a majority. However, when it comes to the accession of new member states – as is the case with Albania and Northern-Macedonia – the principle of unanimity applies. It has been widely reported in the media that France and the Netherlands in particular – supported by Denmark and Spain – wished to stop the accession negotiations. That is a veto. After which the entire European Council had to support a unanimous decision to reject the proposal.

In the next line of thought, I will elaborate on this further.

Macron and Rutte commit 'abuses of power'.

Macron and Rutte are playing a curious game when it comes to unanimity in the European Council. In my article *'Macron and Rutte: intergovernmentalism 2.0'* I explain how Macron, in his Sorbonne speech of September 2017, attacked the principle of unanimity in the European Council. He advocated majority voting in order to prevent vetoes by one or more heads of government from blocking decision-making on important issues.

In his Churchill Lecture in Zurich in February 2019, Rutte took an even stronger stand against the principle of unanimity. At least for a few subjects, such as the imposition of sanctions on countries outside the EU. It does not take much knowledge and experience of public administration to predict that soon after the abolition of the unanimity principle for such a subject, the European Council will, by means of majority decisions, also impose sanctions on EU-countries that do not comply with the treaty obligations and with further agreements, such as the reception of immigrants.

It should be noted that I am opposed to the principle of unanimity because, with its disguised right of veto, it only serves to protect national and nationalistic interests. It is therefore not in the interests of the EU, let alone in the interests of Europe.

But what do we see in the Albania/North-Macedonia dossier? This principle of unanimity is being manipulated. In public, Macron and Rutte insist on the need to abolish the principle of unanimity. However, in order to block Albania's and Northern-Macedonia's access to the EU, they are making good use of it.

I must now introduce a few legal concepts, knowing that this article does not offer sufficient scope for explaining them in detail.

In the past century French law gave the legal systems of other European countries some important principles of good administration. For example, judges prohibit decisions based on *détournement de pouvoir*. This is the use of a power for a purpose other than that for which it was granted. Closely related to this is the principle of *abus de droit*. This is the abuse of rights. One can argue about the question whether one of these two is at issue in this case. But it is difficult to deny that a combination of both principles is certainly applicable: *abus de pouvoir*, misuse of power. In the field of European law, this is now regarded as a general principle that should not be violated by EU-bodies. I would advise Albania and Northern-Macedonia to seek legal advice as to whether, on this basis, a lawsuit can be brought against the European Council.

I see Macron's and Rutte's fiddling with the principle of unanimity as policy-waste from autocratizing oligarchy. Policy-waste in the sense of corruption. But beware. I am not talking about the common perception of corruption in the sense of accepting money for lending services. The term 'corruption' comes from the Latin word 'corrumpere'. And that means 'spoiling'. Autocratizing oligarchy will always produce spoiling. Or, as Voltaire once said, 'Une droit porté trop loin devient une injustice' (A right that is implemented too far becomes an injustice).

A federal Europe would not have this problem

I cannot set out the democratic values of a federal Europe in this article. For the sake of brevity, I refer again to the literature mentioned above. I will suffice to say that everything that goes wrong in this dossier stems directly from the fact that the Treaty of Lisbon is a legal monstrosity that must be replaced as soon as possible by a federal constitution of the United States of Europe.

If Europe would have a federal state structure, the arguments put forward by France, the Netherlands, Spain and Denmark in October 2019 against opening further accession negotiations would not apply. In a federal Europe, although the member states remain sovereign, they entrust a federal body with the task of dealing with a limited range of issues that they cannot deal with themselves. One of these issues concerns justice. Matters relating to the fight against corruption and crime would then fall within the remit of federal judicial bodies such as the federal police and federal judges.

I rest my case.

Leo Klinkers – Editor

The question is where to find the legal right to repair this situation. Is it to the national parliaments to call back the Treaty of Lisbon and replace with a proper Constitution? As far as the leaders of political parties are chosen by the people's election, what is principally wrong with giving this leaders the power to form an European Council and Parliament? Isn't it all about the division of tasks, decision making, staying in line with that? Isn't it just the corrective institution we are missing? When leaders overrule their fields of power (building blocks), to call them back immediately and even proactive? Concerning the building blocks within European governance: The change of social economic awareness and capacities of people and organisations, is asking for the revision of the building blocks. More issues need now become solved within the sovereignty of focus local bodies, where other need to be added to central more bodies. Does has the EU an institute or more group to monitor and advice in this? It can possibly prevent the EU from Brexit and Catalan alike mistreatments.

The problem that the 'autocratised oligarchy' creates is that now as a direct result of selfish state interest the stability on the Balkans is risked. No longer are the Balkans a tinderbox but neither is the region a rock of democracy. The risk now is the growth of accession fatigue in the candidate countries themselves where population and government lose sight of EU membership putting at risk the vital reforms needed in these states. Having a council that puts regional reform and stability at risk is irresponsible for the EU and thus I echo your calls for the issues brought forward by France to be the competences of a higher authority EU enlargement is a continental, mainly legal, issue not a French one.

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