Is there a New Impetus or a Political Paralysis regarding the protection of the EU's Fundamental Values?

A comparative analysis of policy proposals and adopted procedures from the Copenhagen Commission proposal to the Rule of Law Initiative of the European Commission

Abstract

The paper puts the most important proposals and adopted procedures under the microscope, which were placed on the agenda since 2010 to enhance the level of protection of the European Union's fundamental values and to complement the existing Article 7 procedure. While it strives to identify key dilemmas and variables based on which these policy tools can be evaluated as well as conducts a comparative European legal and political analysis, the paper finally argues that the quality and performance of the procedural tools has only secondary importance vis-á-vis the existence or non-existence of political will to scrutinize and sanction the violation of the fundamental values. Therefore one can observe rather a political paralysis than a new impetus in this field. Nevertheless the new Hungary Resolution of the European Parliament from June 10, 2015 can help to break the Council's political and institutional deadlock around the Commission's Rule of Law Initiative. However, not a Philosophers' Stone like new procedure, but an activist approach both from the Commission and the European Court of Justice (ECJ) as well as a political backing by the European Parliament are the crucial factors to the success; to enhance the Member States' compliance with the EU's fundamental Values.

The European Union, as it is used to think about it, *"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."*[1] However, if one takes a closer look both on the history of the integration as well as on the current state of affairs, one must admit that Dimitry Kochenov is much closer to the truth when he states: *"the assumption that the EU is and will always be composed by democratic Members States respecting the rule of law and other Article 2 TEU values is unfounded."*[2] It is a fact hardly questionable that since its coming into force with the Treaty of Amsterdam all together four Member States were endangered by the deployment of the so called Article 7 procedure[3], the only mechanism provided by the EU law until 2014 to sanction Member States violating fundamental EU values seriously or in a systemic manner. Affected was Austria in 2000 during the so called "Haider-crisis"[4], Slovakia in the period of the first Fico-government[5] between 2006 and 2010, Romania during the 2012 constitutional crisis[6] and Hungary many times since 2010 as consequence of the different constitutional engineering and populist political measures of Viktor Orbán's government undermining liberal constitutionalism in the country.[7] It is important and

[1] Article 2 TEU

[2] KOCHENOV 2014

[3] This paper does not provide a deep analysis of the Article 7 procedure, just makes comparative references to it. For further reading in this topic see: CLOSA-KOCHENOV-WEILER 2014 and SADURSKI 2010.

[4] SADURSKI 2010

[5] MESE□NIKOV-GYÁRFÁŠOVÁ 2008

[6] STRATULAT-IVAN 2012

[7] SCHEPPELE 2012, CLOSA-KOCHENOV-WEILER 2014

worth noting that non-compliance with EU values is not a phenomenon limited to new Member States or "New Democracies" at all. Perhaps the most flagrant case of serious breach of fundamental values conducted by an old Member States was how France treated the Romas migrated to the country with Romanian and Bulgarian citizenship and deprived the essence of the right to free movement, perhaps the most basic right of an EU citizen, from them. Commissioner Reding slightly compared these actions of the French authorities and the decision of Mr. Sarkozy to ethnic cleansings experienced last time during the Second World War in Europe.[8] The Commission deployed a straightforward "naming and shaming" communication campaign, threatened France with infringement procedures, but finally no further legal or political steps were undertaken.

This paper does not have the intention to blur these cases and open a broad but fruitless discussion about the different structural resources and capabilities of old and new democracies or how differently they are able to face the breaches of fundamental values within their own constitutional systems and political cultures. However one thing is a fact. There exists a kind of "double standard" between old and new democracies as well as between small and big Member States in respect of what kind of sanctions they have to face if violating EU fundamental values at once. Although one can be quite sure that similar discrepancies will always exist, parallel to this one has to admit as well that such discrepancies can undermine the credibility and therefore the legitimacy of the EU actions aiming the compliance with fundamental values.

Nevertheless, the main question which has to be addressed in Europe is whether the above mentioned cases of flagrant non-compliance have an individual character or whether a kind of general trend can be identified. Self-evidently it depends from this answer, whether the phenomenon Europe is actually facing shall be interpreted as a systemic threat to the current form of the European integration or just as individual challenges.

Theoretical explanation

While analysing the above mentioned non-compliance cases and generalizing some conclusions of them the following fact must be underlined. The non-compliance with the EU fundamental values is a conscious behaviour of the Member States as well as their respective national elites and is a phenomenon in advance. However, to be able to identify this phenomenon as a systemic one, a theoretical explanation with systemic qualities shall be found which explains this behaviour of the Member States and their national elites with a possibly high plausibility.

Without comparing the different possible theoretical explanations, this paper is based on the "illiberal populism" theory of Daniel Smilov and Ivan Krastev[9], which delivers such an explanation. The authors argue in their paper published in 2008, well before that Viktor Orbán made the term of "illiberal state" and "illiberal democracy" part of the mainstream European political discourse, that illiberal populism is in the advance in Europe and gains more and more power and influence on the continent. One has to admit, and this is neither questioned by Smilov

[8] Viviane Reding, Statement on the latest developments on the Roma Situation, Speech 10/428 (14.09.2010), http://europa.eu/rapid/press-release_SPEECH-10-428_hu.htm and "Europe Compares France Roma Expulsion to Nazi Deportations", The Telegraph, 15.09.2010, http://www.telegraph.co.uk/news/worldnews/europe/france/8002518/Europe-compares-France-Roma-expulsion-to-Nazi-deportations.html

[9] SMILOV - KRASTEV 2008

and Krastev, nor by the author of this paper that populism has clear majoritarian features and is therefore per se a democratic phenomenon. However, Smilov and Krastev define illiberal populism through a negative approach. In their understanding illiberal populism covers the phenomenon which consciously questions and undermines the most liberal constrains of majoritarian decision-making. And it does this under the cover of populism as a thin ideology[10] and mostly with the argumentation that external constrains of majoritarian decision-making limiting the variety of political alternatives are illegitimate and anti-democratic.

According to Smilov and Krastev illiberal populism is per se a phenomenon of new democracies as it is targeting those "liberal consent" which determined the political processes and development of these countries from the political transition to the EU accession. They define the complex system of liberal consent as constituted by liberal constitutionalism (including checks and balances and rule of law as well), the individual human rights and freedoms, the external constrains of European conditionality, the neoliberal economic order and a politically correct public discourse vis-á-vis minorities.

At this point I argue that the theory of Smilov and Krastev can and should be extended. "Liberal consent" was the ruling macro-level political frame not only for the former candidate countries, now new member states, but for the old ones as well. Therefore the validity of the illiberal populism theory can be extended both geographically and politically as well. Self-evidently, the political process of monitoring the Copenhagen Criteria is largely different from the fundamental legal constraints of the acquis communautarie. However, despite all qualitative differences, elements of the "liberal consent" are assaulted by Eurosceptical, populist forces in very similar ways both in "new" and "old" European democracies as external constraints limiting the political options of democratic national politics. It has to be underlined therefore that the European integration has always constituted external constraint vis-á-vis domestic politics and has always been part of the liberal consensus both for old and new Member States. Furthermore, the validity of this statement is limited neither by the differences between the political and legal nature of the constrains nor by the fact that in the first decades of the integration the constrains only affected regulatory fields covered by the common market and not necessarily the question of political values.

Nevertheless European integration has not been the only constrain of majoritarian decision making since the end of the Second World War. As Jan-Werner Müller argues[11], liberal democracies were since 1945 in various constitutional forms and in different extent but always constrained democracies. If one combines Müller's theory with the one from Smilov and Krastev, first one comes to the point that the different elements of the "liberal consent" have always constituted the most important constraints vis-á-vis political options not complying with the idea of liberal democracy since the end of the Second World War in Europe. Secondly, if one complements this statement with the negative definition of illiberal populism, the phenomenon consciously targeting different elements of the "liberal consent" in different Member States, then finally one can see the real deep of the systemic threat constituted by illiberal populism to the post Second World War political order of the liberal democracy.

Key Dilemmas

[10] STANLEY 2008

[11] MÜLLER 2011

This chapter tries to point out the most important factors and dilemmas which have to be taken into consideration while evaluating different proposals aiming at the securing of Article 2 TEU compliance.

Touching upon the first issue of *institutional factors*, as the non-compliance with European values anchored in Article 2 TEU is a conscious behaviour of Member States and their respective national elites, the Member States itself and the EU institution representing their interests, the Council, should be treated as part of the problem rather than part of the desired solution. Therefore this paper prefers institutional settings and mechanisms aiming to ensure Article 2 TEU compliance which envision a rather low role for the Council.

A second key dilemma is related to the question of *political discretion*. In the first reading it is strongly linked to the previous issue. The high level of political discretion arranged for the Council in the Article 7 procedure is the most important, although not the only reason why Article 7 procedure does not work. The required 2/3 and 4/5 majorities in the mechanism cannot be reached if they are combined with the free political deliberation of Member States whether they would like to sanction a "serious and continuous breach" of fundamental values or not. The problem is definitely not only with the threshold. The problem is partially rooted in the case of expecting something from the Member States what they regularly do not do. Member States typically do not vote in the Council but seek for political consent. Member States usually refrain from "naming and shaming" each other or interfere in others' domestic issues. This respective argument of non-interference will always keep away national governments to judge and stamp another Member States. The more Eurosceptic a government is, the greater will be its principle-based refraining from the interference of European institutions in the domestic affairs of any Member State. Therefore the higher the possibility of political discretion is, the lower is the chance of effective "naming and shaming" or political sanctioning of any Member State violating the fundamental European values. Perhaps this assertion does not apply in general and for all eternity, but sure applies under the current political settings.

However this statement not only applies to the Council. The problem of political discretion paralyzes partially the European Parliament and the European Commission as well. The phenomenon, how the big European party families safeguard its members against criticism and sanctions, is not new at all and is not only present in scientific analyses, but in the broader political discussion as well. The European Peoples Party has played a crucial role since 2010 that Hungary – which is lead by the EPP member party Fidesz – mustn't face any real political and legal consequences of the politically motivated, illiberal constitutional reshaping and capturing of the country. On the other hand the same story could be told about the European Socialists role in the Romanian constitutional crisis during 2012 or – with some reservations[12] – in the case of the Slovak "Smer" between 2006 and 2010.

Last but not least the European Commission itself is not an exception if one puts the phenomenon of political discretion under the microscope. The Commission is sentenced to an active and strong cooperation both with the Member States and the Council and therefore "chooses its battles very carefully", as Kim Lane Scheppele formulated it very suggestively.[13] The Commission is in a constant bargaining process about a number of issues with Member States,

[12] The Party of European Socialists (PES) temporarily suspended Smer's membership in 2006.

[13] SCHEPPELE 2013

the European Parliament or the Council and thus the question of Article 2 TEU compliance can be easily a victim of various political considerations or package deals.

In nutshells, the challenge of political discretion cannot be eliminated in any institutional setting as long as the procedure dealing with the Article 2 TEU compliance is a political one. Self-evidently the question arises at this point, *whether a legal or a political procedure should deal with the enforcement of Article 2 TEU values*. Which of them could perform more effectively? Especially under the current circumstances, when political procedures are doomed by the bias of political discretion on the one hand, but on the other hand Article 2 TEU contains political values and not rights, ordinary EU law in many cases simply does not provide a sound legal basis to challenge the national legislations undermining fundamental European values in the Member States. Sure can these values be interpreted by judicial bodies in a legalistic approach, but the legitimacy of such kind of legalist interpretation can and will be always questioned by politicians who are affected negatively by such an interpretation.

A further procedural dilemma can be identified in the *format and timing of the intervention*. In a more legalistic wording, whether an *ex ante or an ex post procedure* could safeguard Article 2 TEU values more effectively? The introduction of ex ante components in the form of monitoring procedures can be useful to complement the existing ex post mechanism, the Article 7 procedure, as it already happened through the introduction of the Commission's Rule of Law Initiative.[14] Ex ante mechanisms can play an important role as watchdogs in a more complex procedural setting: they can bark if things are going in the wrong direction and can contribute to the revealing of complex matter of facts in the constitutional and political procedures of the Member States. However the point is still blurred when biting is required instead of barking and the sanctioning mechanisms have to be deployed instead of the monitoring ones. Summarizing this point, ex ante procedures are important and necessary, however they can only complement the ex post instruments with sanctioning powers, but not substitute them. Ex ante instruments alone simply lack a credible deterrence potential. On the other hand the question arises again, how effective sanctions are and whether it is possible in any case to reintroduce or reinstall the original state of affairs prior to the government's action which violated one or more of the Article 2 TEU values.

The practical experiences with the reinstallation of the former state of affairs are rather negative. As I argued earlier based on the example of the Hungarian constitutional engineering,[15] national governments can play off the European institutions effectively. While they constantly send signals of cooperation in reality they refrain from genuine measures to reinstall the former constitutional or legal environment they violated or annihilated. However not only this "two step forward, one step back" or "peacock dance" communication strategy makes it in many cases impossible to reinstate the former state of affairs, but the time factor as well. This was exactly the outcome in the case Commission vs. Hungary C-286/12 on the forced early retirement of judges. Although the Commission won the case against the Hungarian government, because of the time passed by the former positions of the removed judges were already filled and most of the removed judges accepted a financial compensation from the state. Therefore their individual harm was compensated, but the systemic damage caused by the government for the judicial independence was not cured. This outcome is partially independent from the fact whether the Commission based his infringement procedure in this case on the alleged violation of anti-discrimination rules. The legal base has only secondary importance behind the time factor why

[14] COM(2014) 158 final

[15] HEGED□S 2014, 9-10.p.

the reinstallation of the former state of affairs is difficult or hardly impossible. This problematic shall be bear in mind under any circumstances, if one drafts or evaluates time-consuming, long legal procedures to ensure the compliance with the fundamental European values.

Combining this issue with the question of sanctions, it has to be seen that even hard-hitting financial or political sanctions do not necessarily contribute to the restoring of Article 2 TEU compliance, if the violation of the fundamental values – as I argued before – is an intentional political step or part of a conscious political strategy. The argument of Kochenov that "cosmetic changes are for sale, but regime changes are not"[16] shows that in the case of Article 2 TEU compliance one has to face the same questions and challenges concerning the efficiency of sanctions as has to face in the international relations generally. However at this point I would argue that the reason of sanctions lays prima facie not in imposing ex post changes in the behaviour of the affected government. The reason of a consequently imposed sanction regime is to rise the costs of breaking the norms and therefore to deter from it. And exactly this is the point where the high level of political discretion involved in the current European politics around Article 2 TEU compliance undermines the credibility of any sanctions and pushes illiberal populist governments to consider violation of norms in exchange of a low political price, instead of facing them with a higher price level of guaranteed sanctions. The key factor of this ex ante impact of sanctions – changing the behaviour of actors through increasing the price of breaking the norms – is credibility and consequent application. Questioning the rationality of imposed sanctions and therefore their legitimacy as well can be a right and logical position in a particular case. However questioning the whole rationality of sanction regimes because of the lack of ex post impact on the targeted government's behaviour leaves this above mentioned ex ante impact on further similar cases out of the consideration and is therefore very detrimental from a broader, future oriented perspective.

Continuing the long list of key dilemmas, one of the most important challenges is rooted in the *question of the legal basis* and is hampered by an immense contradiction. On the one hand the political chance of a treaty amendment which could create a genuine legal base in the primary acquis for a new instrument intended to deal with the question value compliance is rather low under the current European political circumstances. I would argue it is rather impossible. These political circumstances can self-evidently alter over time, but they have currently a largely paralysing effect. Therefore any proposal aiming the goal to be deployable in the foreseeable future shall be based on the current text of the treaties and shall not require any treaty change, which is overall impossible. But on the other hand, the establishing of any new mechanism would require a fairly expanded and activist interpretation of the treaties, which could be easily questioned by parties with conflicting interests.[17] Even if the debates around the soundness of the legal basis do not fully undermine the deployability of the new procedure – which unfortunately happened in the case of the Commission's Rule of Law Initiative – they can seriously hamper its legitimacy. The most vicious circle of Article 2 TEU compliance is actually that only proposals not requiring the amendment of the treaties have a practical political chance to be introduced, meanwhile the legitimacy of any new instrument build on the expanded and activist interpretation of the current text of the treaties will be constantly challenged. Self-evidently this paper is neither aimed, nor able to solve this contradiction. However as the analysis is rooted in the actual

[16] KOCHENOV 2014

[17] For a practical example see the conflict between the Commission and the Council on the legal base of the Commission's Rule of Law Initiative.

political environment and cannot exceed it, this paper prefers the proposals rooted in the actual European legal environment and not requiring the amendment of the treaties. Not necessarily because they represent the better option from any angle, but because they represent the only option, which is currently real.

Slowly approaching to the end of the list, a broader complex of key dilemmas is constituted by a couple of *questions of operationalization* affiliated with the fundamental values of the European Union and with the compliance with them. At this point I would not like to open the box of Pandora, how these fundamental values, like democracy or rule of law should be interpreted in a political or legal process by different institutions of the European Union and how the concept of compliance with them should be filled with real political and legal content. As appropriate mechanism will be available, this task will become just as business as usual as the fundamental rights jurisdiction became for the European Court of Justice. However the question can arise, whether it is still possible to cover all Article 2 TEU values with one mechanism? Perhaps it is not impossible in a form of an ex post political sanction mechanism, like the Article 7 procedure. However ex ante monitoring procedures clearly need more focus in their scope, especially if they are more or less legal procedures and require a legalist interpretation of the protected subject. And if one prefers a selective approach towards the fundamental values laid down in Article 2 TEU, is a priority ranking of the fundamental values possible as well? Or the EU has to establish separate mechanisms to enshrine the compliance with the different fundamental values?

With a practical look on the proposals of the last five years one can get the impression that both scholars from the academic world and policy stakeholders of the Members States[18] are committed to the issue of rule of law above all and the European Commission prefers the protection of the rule of law as well. The theoretical intervention, whether the issues of democracy and rule of law compliance can be separated from each other, is worthy of consideration. Especially because of the argument, whether one does not overtake the democracy concept of illiberal populist with this step, stating that democracy is hardly more than just pure majoritarianism. Is it not per se a kind of capitulation by the defenders of liberal democracy, if they acknowledge that liberal democracy is only one of the many contested interpretation of democracy marked by different adjectives, and not the dominant and mainstream interpretation anchored in the – written or unwritten – constitutional systems of all EU Member States? While I share these above mentioned considerations, in this paper I argue that it is more simple to operationalize the question of Article 2 TEU compliance, if one interprets it in the frame of the above mentioned illiberal populism theory of Daniel Smilov and Ivan Krastev.[19] If one accepts the assumption that actors following the patterns of illiberal populism attacks crucial elements of the "liberal consent", than it is clear that democracy understood as majoritarian decision-making is not endangered, just the contrary. Liberal capitalism and free market economy are not enlisted among the fundamental values of the European Union in Article 2 TEU, therefore – albeit being in the crosshairs of illiberal populist actually – they are not qualifying to be an issue of value compliance. The only three common elements of fundamental values protected by Article 2 TEU and contested by illiberal populist are liberal constitutionalism, which can be easily equalized with the term of rule of law, individual human rights and minority rights. However, the European

[18] The letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the European Commission http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf

[19] SMILOV - KRASTEV 2008

Court of Human Rights in Strasbourg can be seen as an important guarantee of individual human rights and freedoms in Europe, therefore there is no harsh need that the EU focuses on the issue of the protection of individual human rights in a similar form. Concerning the minority rights, as consequence of an unfortunate situation the European Union is effectively paralyzed on the field of minority protection, or – in a more permissive approach – the legal content and target groups of minority rights are so intensively discussed within the EU institutions and Member States that it hard to find any commonly shared approach. Therefore the only issue remaining on the table is the protection of liberal constitutionalism through the enforcing of the rule of law. The prioritizing of the rule of law vis-á-vis other Article 2 TEU values and its decoupling from the principle of the democracy is perhaps not the best way from a theoretical perspective and definitely not without any political danger. However, from a practical perspective the best choice which can be made if one tries to focus the very limited political resources available for ensuring Article 2 TEU compliance and to reach the comparatively highest possible effect against the challenge of illiberal populism. Self-evidently this interpretation is only temporarily valid and only under the circumstances, if one shares the assumption that the actors currently challenging the fundamental European values act in concordance with the above described pattern of illiberal populism.

A second challenge of operationalization is bound to the question, how should be *a systemic breach of fundamental values* defined. Shall it refer to a perhaps temporary quality on the level of the whole political system in a particular Member State as well or shall the phenomenon be bound to the concept of state capture or constitutional capture, when the constitutional structure of the State is such deeply perverted that no formal constitutional way out exist to return to a normal liberal and democratic constitutional functioning? Is the concept in the first case not too vague and the response of the European institutions in the second case simply too late?

Last but not least a final key dilemma can be identified, a phenomenon which I am going to call the *"problem of one size does not fit all"*. Taking all of the above mentioned dilemmas into consideration it has to become clear that there is no chance to find one ideal mechanism which has all the features to safeguard fundamental European values in an optimal way. Therefore I argue on the following twofold path. First, that instead of looking for an optimal procedure and contesting each candidate with its weaknesses, the EU has to seek for an optimal system of several procedures. Only this kind of web of parallel existing, but not necessarily interconnected procedures can reduce the paralysing effect of political discretion in the EU institutional system and can afford the choice to deploy that mechanism which is best shaped to face the actual challenge. Moreover the currently existing mechanisms and proposals allow us to create a more or less promising Article 2 TEU compliance system through combining them. The conclusion of this paper contains a proposal for such a system based on a combination of different particular mechanisms.

On the other hand, the impossibility of finding an ideal compliance procedure clearly shows that the way Europe partially followed during the past five years was blurred by smoke and mirrors. Self-evidently the importance of the competences and procedures shaping how European institutions can act cannot be underestimated. But there is a thing, which matters more, and this is political will. No institutional environment ever is ideal. However, the illiberal challenge contesting European values can be addressed in the current legal and institutional environment and could be faced in the past as well. The Article 7 procedure is not a nuclear option which can be never deployed. It was the worst case which could only happen when it was baptised to

"nuclear option" and therefore became excluded from the list of valid political actions by this discursive framing. Article 7 TEU was tailor-made to allow an absolute free consideration for the European Council of any kind of sanction which could be the most suitable in a particular case.[20] However the (European) Council uses the political discretion granted by Article 7 TEU not to tailor the deployment of the procedure to the actual case, but not to deploy the procedure at all. Therefore I argue that bearing the development of the newly born mechanisms in mind, first and foremost the the Rule of Law Initiative of the European Commission, if this mechanism will not be deployed in the foreseeable future as well, it will not be a sign of lacking appropriate mechanisms. It will be the symbol for clearly and fundamentally lacking political will to safeguard or at least to try to safeguard EU fundamental values. And the implications of such a message could be crucial in the current political environment of many Member States.

Copenhagen Commission

This chapter covers several very similar proposals aiming to ensure Article 2 TEU compliance through the establishment of an independent body dealing with the "Copenhagen Acquis". The name was proposed originally by Jan-Werner Müller,[21] however the task's outsourcing to similar institutional setting emerge in many different variations. The main idea behind a "Copenhagen Commission" is to establish an independent watchdog institution to monitor the compliance with Article 2 TEU fundamental values in the Member States. According to the concept of Jan-Werner Müller[22] the Copenhagen Commission shall posses the capability to act fast, to consider whether there is a systemic threat for fundamental values in a Member State and to do this in an impartial, but political manner and not following the legalist approach of international judiciary bodies. Finally this new institution shall be able both to bark and bite, to fulfil the function of early warning, to name and shame governments if they do not comply with the fundamental values and to trigger sanction mechanisms. Regarding this last point, both Jan-Werner Müller and the four that time foreign ministers[23] shared the opinion, that blocking the financial transfer from the cohesion policy funds could be an appropriate response as sanction.

As an alternative option, Müller also envisages the empowerment of the EU Fundamental Rights Agency (FRA) in Vienna with the same duties and competencies, if the establishing of the new institution would not be a viable political option. One another alternative proposal was advocated by Venice Commission President Gianni Buquicchio[24] to outsource all this tasks and responsibilities to the Venice Commission.

However, an important point of Müller and the crucial question behind all of these proposals is, why is the European Commission probably not able to fulfil its task as "guardian of the treaties"

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[20] Article 7 paragraph (3) TEU „Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, *may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question*, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons."

[21] MÜLLER 2013

[22] MÜLLER 2013

[23] The letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the European Commission http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf

[24] KOCHENOV 2014

in connection to the fundamental values anchored in Article 2 TEU and why one needs an independent body as "Article 2 watchdog". Prior to answering this key question, let consider the primary advantages and disadvantages of the Copenhagen Commission proposals as well.

Its greatest disadvantage is first and foremost that all above mentioned variants of the proposal require an amendment of the treaties and are therefore not deployable in the foreseeable future. As I argued above, the current political circumstances will not determine the development of the EU institutions eternally and therefore the Copenhagen Commission can be considered as a serious proposal for the distant future. However, waiting on a political constellation which enables its establishment through a treaty amendment would be a very long and politically very costly game from the perspective of the EU fundamental values. On the other hand the proposal has some positive features as well. As a monitoring and early warning watchdog it could effectively cover both the ex ante and ex post procedural phases and could complement the existing sanctioning mechanisms, like the Article 7 procedure very effectively. Its mixed political as well as legal character could allow fact-based monitoring, independent but partially political evaluation and last but not least a flexible, tailor-made response as well. Nevertheless, in some points it is simply impossible to evaluate the Copenhagen Commission proposal. Its legal layout is hardly more than just a first draft. One cannot know, how would be its Members elected (a crucial point if one would like to put the issue of independence under the microscope), how would its rules of procedure look like, what kind of sanctions could it deploy or what would be the political weight of the body within the EU institutional system.

There are only three points which are already visible from a present day perspective. First, that as a newly established body it has to muddle through an early process of institutionalisation with all its challenges and difficulties. In this early process the interpretation of many procedures and competences can be elastic and the views and perceptions of the key persons in charge will shape the self-understanding of the body. The task and challenge of institutionalization shall not be underestimated. It is worth just to take a closer look on the first years of activity of the Fundamental Rights Agency.

Secondly, just agreeing with Jan-Werner Müller, more "creative sanctions" would be required. However, the proposals in this field are rather few. The cutting of the cohesion transfers has no legal base in the current text of the treaties therefore its introduction requires an amendment of the treaties as well, similarly to the Copenhagen Commission itself. Furthermore, there are some arguments which could oppose such a sanction, the most important would be that no citizens of any EU Member State would warmly welcome this kind of sanctions and therefore they would start to oppose the European intervention in the country even if they originally supported it. However, the argument has no sound base that this kind of sanction would affect the lower segments of the respective society very negatively. There is a huge lack of knowledge within the EU how cohesion transfers contribute to the macroeconomic activities of a particular society. But what is possible to know is that national elite groups can monopolize the redistribution and utilization of these financial transfers through corrupted structures on the national level in a great extent.[25] Therefore the European Union finances those corrupt elites which are challenging the EU in the same time through illiberal populism. Under these circumstances the suspension of the cohesion transfers is not more ridiculous at all, than to contribute to a state capture within the EU with the own financial resources of the EU-budget.

[25] For an example just see the case of Hungary.

There is often complained that the suspension of cohesion transfers is a tailor-made sanction against new Member States in East-Central Europe. The presumption is probably right, however it is worth to mention that the suspension of agricultural and cohesion transfers can be a useful sanction against all kind of Member States, even if it will not have the same effect and pressuring power in every particular case. The fact is that all Member States receive agricultural and cohesion transfers from the European Union. These transfers can be suspended, even if the financial balance of the Member State is negative, understand it pays more in the EU-budget than it receives back from it. Self-evidently the Member State has not the worst bargaining position in this case as it can threaten with the suspension of the inpayment in the EU-budget as well. However, this would be a clear violation of obligations arising from EU law and of the principle of sincere cooperation and therefore would escalate the conflict in a way which is not necessarily in the interest of the affected government. Summarizing this point in nutshells, the suspension of the cohesion (and agricultural) transfers can be in some cases an effective sanction, but requires an amendment of the treaties and is characterized by massive question marks. Therefore the "creative sanctions" missed by Jan-Werner Müller are still urgently needed…

Last but not least, the outsourcing of the interpretation of the fundamental values anchored in Article 2 TEU to a non-EU body like the Venice Commission would be a fundamentally negative sign which should be avoided at any cost. On the one hand this would send the signal that the EU is politically not able to find or establish a body which could fulfil this task in a competent way. This would be a bad message for sure. On the other hand it would open the way to place the interpretation and determination of the content of the EU fundamental values outside of the EU institutional structure. This consideration also applies partially, if ones places these tasks and competencies outside of the currently existing mainstream EU institutional framework. With the proper words of Jan Komárek *"[the] proposal to establish 'Copenhagen Commission' [and any other proposal based on the principle of outsourcing the issue of Art. 2 TEU compliance][26] only confirms that the current EU is not capable of defending democracy and the rule of law."*[27]

Coming back to the crucial point and debate with Jan-Werner Müller, why the EU needs a Copenhagen Commission, Müller argues that due to the nomination of candidates for the post of the Commission's President at the elections of European Parliament and other issues the European Commission will become increasingly politicized during the forthcoming years and will not be able anymore to fulfil its task as "guardian of the treaties" in impartial manner.[28] First and foremost I share the possibly right argument of Jan Komárek that a politicization of the Commission shall not necessarily lead to a lack of interest concerning the protection of the fundamental values of the Union, perhaps just the contrary.[29] Secondly I would argue in the following twofold way. On the one hand one cannot know anything about the conditions of membership and about the election procedure itself in the case of the Copenhagen Commission. However, this information would be crucial if one would like to evaluate the expected independence of the body. One can also expect that under some circumstances politically biased functioning can be a real threat for the Copenhagen Commission as well. On the other hand, the Copenhagen Commission is partially only needed, because the European Commission is currently not ready (or not able) to overtake these duties effectively due to the lack of (mainly its

[26] The text in the brackets is inserted by the author of this paper.

[27] KOMÁREK 2013a

[28] MÜLLER 2013

[29] KOMÁREK 2013a

own) political will. However, what does the establishment of the Copenhagen Commission require? The amendment of the treaties, which means the political will of the Member States. If this intention existed, the EU would only have a newcomer body with questionable political weight, struggling with all burdens of institutionalization and looking for its own place within the institutional structure of the EU. If political will existed, the European Commission could grow up to the tasks faster and through its central position within the EU institutional structure and through its political weight it could ensure the compliance with the fundamental values more effectively, once committed to this mission. The Copenhagen Commission would also require the cooperation with the European Commission when the issue of sanctions would come to the table. And last but not least a very subjective point. The European Commission can develop a commitment to the issue with a much higher probability than the Member States can, although their support is inevitable to the establishment of a Copenhagen Commission.

The idea to found an independent "Venice Commission like" watchdog institution can be a good plan for the distant future. However I would argue that as long as the commitment and the political will related to the issue is rather weak, the European stakeholders shall try to focus on institutions and procedures which can enter this political battlefield in the foreseeable future and can contribute to the protection of the EU fundamental values sooner than later.

Reverse Solange

The doctrine of a "reverse Solange" proposed by Armin von Bogdandy and his co-authors[30] became one of the most disputed proposals aiming to ensure the rule of law in the Member States during the past years. The baptism of the proposal goes back to the famous Solange I. ruling of the German Federal Constitutional Court (BVerfG, 1974). Its core idea in nutshell is that as long as the protection of fundamental rights is not provided by the national institutions (for example by the national constitutional court), in the case of serious systemic violation of the rule of law (e.g. if the judgements of the European Court on Human Rights [ECHR] are not implemented), national courts shall deploy the respective cases before the European Court of Justice (ECJ) according to Article 267 TFEU.

This paper would not like to join to the nuanced analyzes of the proposal's legal advantages and disadvantages.[31] Instead of this it focuses mostly on some political and legal policy aspects which are crucial from the point, how "reverse Solange" shall be interpreted thus it could contribute to the fundamental value compliance in an important way. To approach this goal, first it is important to mention that I agree with the evaluation of Kochenov stating that from a substantial point of view there is hardly anything new or innovative in the "reverse Solange" doctrine. The fundamental rights jurisdiction of the ECJ is based on a doctrinal foundation of the European citizenship and in some aspects it is already more developed. Especially concerning the point that it is not limited exceptionally to the "systemic violations" of fundamental values, but activates regularly if a suspected danger of the "deprivation of the essence of rights" can be identified.[32]

However, not every critical point vis-á-vis "reverse Solange" is really justifiable. According to an often used argument, in a particular Member State violating the value of rule of law in a systemic manner, where the national constitutional court is not able to ensure the protection of

[30] VON BOGDANDY et al. 2012

[31] To a detailed European legal analysis of the proposal see KOCHENOV 2014

[32] KOCHENOV 2014

fundamental rights, the whole national judiciary system can be under such a control of the illiberal government that simply no such independent national courts will anymore exist, which could be able and have the intention to trigger a preliminary ruling procedure to transfer the contested cases to the ECJ. Although this consideration can be valid under the circumstances of a genuine doomsday scenario, it simply does not fit to the current European experiences. Even in the actual worst case scenario presented by Hungary where the government managed to take over control of the national constitutional court through new constitutional provisions, through a new law on the constitutional court itself and through a very conscious human resource policy, or where the functioning of the attorney general has a grave political bias and where the government undertook several attempts to be able to interfere in judicial procedures, at the end of the day ordinary courts of the justice system are still independent and fulfil their tasks according to the law. Therefore motivating the national courts to transfer sensitive cases to the ECJ is not an attempt in vain. Just the opposite, this could be an important way how European legal intervention in particular cases and European commitment to the issue of value compliance could be triggered effectively. Moreover, doing these all by circumventing the obstacle of political discretion in the main political EU institutions.

Self-evidently, as I emphasized it above, one cannot expect the solution of a mainly political challenge by the judiciary or through legal procedures alone. However this does not mean at all, that a judicial approach cannot even contribute to the desired solution. An activist approach of the ECJ is indispensable in a twofold way to ensure the rule of law compliance in Europe effectively. The first path is covered partially by both the "reverse Solange" doctrine and the current judicial praxis of the ECJ itself and implies an activist as well as extended interpretation in the fundamental rights jurisdiction of the ECJ. This kind of activism is per se essential today as the legal content of the Union citizenship shall be interpreted and determined, while neither Article 2 TEU, nor the European Charter of Fundamental Rights (CFR) serves as a sound and unquestionable legal basis for the interpretation.

Nevertheless the second path has a fundamentally different direction. As I argued before, any kind of new procedure introduced to ensure Article 2 TEU compliance without the amendment of the treaties, any activist interpretation of either the content of Article 2 TEU or its own related powers by the European Commission are hampered by the lack of legitimacy and will be attacked by the parties with conflicting interests, for example by the Council or by some particular Member States. However at the end of the day the position of the ECJ will be the most crucial and final factor in these disputes about the competencies and powers of the European Commission. If the ECJ will not share the activism of the Commission, the "Guardian of the Treaties" is going to lose all of the complaining cases running on the basis of Article 263 TFEU because of the lack of competency. Self-evidently the activist approach of the European Commission and the European Court of Justice cannot be coordinated or harmonized. On the one hand such an attempt would be a practically impossible hubris, while on the other hand it would seriously violate the independence of the ECJ. Nevertheless it is the sine qua non of all initiative regarding Article 2 TEU compliance that these two institutions have a shared activist approach in the issue. Not only concerning the substantial interpretation of some fundamental rights, but first and foremost concerning the extended interpretation of the Commission's powers and competencies related to the ensuring of Article 2 TEU values vis-á-vis the Member States. In this respect could be a revised "reverse Solange" doctrine a useful narrative frame to create a new and more polish doctrinal face both for the ECJ's fundamental rights jurisdiction and judiciary activism.

Independently from the "reverse Solange" proposal it is worth to spend some words on the idea that a more activist and more extended fundamental rights jurisdiction would be possible, if ECJ used the European Charter of Fundamental Rights (CFR) more extensively as a legal basis. It is a fact that the ECJ rarely refers to the CFR in its jurisdiction and it has two main reasons. The first and very often mentioned one is the limited scope of the Charter according to Article 51 CFR, which makes the Charter legally binding for Member States only when they implement EU law.[33] Therefore the CFR can be seen rather as constrain for European fundamental rights jurisdiction than as a strong pillar. Secondly it is very often forgotten that three Member States, the United Kingdom, Poland and the Czech Republic enjoy a practically full opt-out from the Charter. Self-evidently cannot be a document the cornerstone of the ECJ's fundamental rights jurisdiction in the scope of which European citizens are not equal. Different proposals aim to overcome the obstacle raised by Article 51 CFR therefore, either by the amendment[34] of the Charter or by a kind of "creative reading"[35] of Article 51 CFR.

However these suggestions are, according to my view, rather fruitless. Taking the three existing opt-outs into consideration, an amendment of the primary law aiming to expand CFR's legal scope is nothing else but hopeless from a political perspective. Even if a compromise could be forged among the Member States which would allow the above mentioned expansion of the Charter's scope in exchange of the maintaining of the current – and perhaps of the introduction of some other – opt-outs, it would not solve the problem at all. Particularly because as long as any opt-outs exist which negate the legally binding effect of the CFR vis-á-vis some Member States, the CFR does not empower all European citizens with the same level of fundamental rights' protection. Therefore it cannot constitute a sound legal base for the ECJ to an activist fundamental rights jurisdiction. Putting the second proposal, the "creative reading" of Article 51 CFR under the microscope, one has to seriously doubt its feasibility. The author of this paper is a supporter of activist and extended legal interpretations of courts contributing in an important way to the development of international, European as well as national constitutional law. However this proposal is rather theoretical than serious as it argues for an interpretation of a legal text (Article 51 CFR, especially the part "when they are implementing Union law") which would be exactly the opposite of the first, grammatical meaning of the phrase and calls for an ultra vires decision of the ECJ in this sense. It is not unimaginable that the ECJ expands the scope of the formula "implementing Union law" through a series of particular cases, however one theoretical ultra vires decision completely overwriting the interpretation of Article 51 CFR is neither realistic, nor would be in favour of the rule of law. At the end of the day it would be only just a hubris in vain as it could not address the problem of the CFR opt-outs at all.

To sum up in nutshells, an expanded fundamental right jurisdiction of the ECJ could not solve the political challenge of the European value crisis alone. It would be partially limited by and dependent from the national courts empowered to initiate the preliminary ruling procedures as well. However it could contribute to the Article 2 TEU compliance in some way and the "reverse

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[33] Article 51 CFR "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

[34] CLOSA-KOCHENOV-WEILER 2014

[35] CLOSA-KOCHENOV-WEILER 2014

Solange" proposal could serve as an important discursive frame for the ECJ's activist and expanded jurisdiction, even if not in its original, but in a slightly modified form. However these "reverse Solange v2.0" should not only focus on the protection of fundamental rights, but shall embrace an expanded interpretation of the European Commission's powers and competencies in the field of ensuring Article 2 TEU values and a cover for the Commission's actions by the ECJ as well. Nonetheless this last point is the sine qua non of any attempts in this field.

Systemic Infringement Procedure

The other best-known and most widely disputed proposal is the "systemic infringement procedure" elaborated and published by Kim Lane Scheppele.[36] Summarizing the core of the proposal, "the Commission could signal *systemic complaints* against a Member State *by boundling a group of individual infringement actions together under the banner of Article 2* of the Treaty of the European Union (TEU)".[37] Since November 2013 several papers put Scheppele's draft under the microscope and published various opinions concerning the legal base and practicability of the proposal.[38] To contribute to the discussion but not to explode the limits of this paper I only would like to express my arguments and concerns without reflecting on all of these different views.

Article 258 and 260 TFEU present a sound legal base in my eyes to initiate such a procedure. Therefore, as making a reference to one of the most important dilemmas above, it does not require any amendment of the treaties and its deployment depends only from the European Commission's considerations. The bundling of several individual infringement procedures sharing significant commonalities is nothing new in the praxis of the Commission, as Kochenov[39] explains it on the basis of "Irish Waste Case"[40]. From a legal perspective the problems arise behind this point. One can be identified as the question of "cross-sectoral bundling" and the another one as the challenge of the completely missing secondary acquis in some fields, which could not allow therefore the launching of "normal" infringement procedures required to bundling.

Scheppele herself reflects on the point that combining ordinary infringement procedures with Article 2 TEU to catch the systemic character of the Member State's misbehaviour can be tricky from a legal perspective.[41] However it is important to underline that it would not pose an ultra vires act or an act against the text of the treaties, albeit it is undoubtedly not contained by the treaties or supported by a conservative reading of the treaty texts as well. To give a more stable legal background, Scheppele argues for an alternative or supplementary approach substituting or complementing Article 2 TEU with Article 4 (3) TEU. This latter contains the so-called "principle of sincere cooperation"[42] and entails a stronger legal obligation for Member States to

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[36] SCHEPPELE 2013

[37] SCHEPPELE 2013

[38] See BLOKKER 2013, CLOSA-KOCHENOV-WEILER 2014, KOCHENOV 2014, KOMÁREK 2013b

[39] KOCHENOV 2014

[40] Case 494/01 Commission v. Ireland

[41] SCHEPPELE 2013

[42] Article 4 paragraph (3) TEU „3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

fulfil their duties arising from the treaties and to refrain from all measures which could undermine the Union's efforts. It is worth to note that the last phrase of Article 4 (3) TEU uses the wording of "Union's objectives" and in a conservative reading it must be interpreted therefore that it establishes a protective legal barrier not only for the legal provisions but for political objectives – like Article 2 TEU – as well against the jeopardizing misbehaviour of Member States.

Contributing to the debate on the proper legal basis of the Commission's potential actions, I would argue that the last phrase of Article 4 (3) TEU[43] and the first phrase of Article 258 TFEU[44], if read together, establishes the task of "Guardian of the Treaties" for the Commission not only in respect of legal provisions, but in a negative approach in respect of the Union's objectives as well. Although Article 258 TFEU is traditionally seen and interpreted as the legal fundament of the classic infringement procedure, nothing excludes the possibility that it could serve as a treaty base for further mechanisms as well. Especially if the Commission would like to realise its "Guardian of the Treaties" role in respect of the "Union's objectives" as well and it pursues the goal of putting those behaviour of the Member States under the microscope, which jeopardize EU efforts, for example the objective of being a community of values laid down in Article 2 TEU.

The detailed analysis of the Commission's Rule of Law Initiative will follow in the next chapter. However it is important to note here that Scheppele's proposal and the procedure still accepted by the Commission share the very same legal fundament, even if just tacitly. The core of this interpretation is that the Commission's competencies as "Guardian of the Treaties" are not limited only to the safeguarding of the strictly legal provisions of the treaties, but covers the supervision of state acts jeopardizing the "Union's objectives" as well. And if so, then the Commission's competencies comprise the protection of the values laid down in Article 2 TEU as well. However in the establishment of the proper legal base Article 2 TEU plays only a secondary role. A "reading together" of Article 4 (3) TEU and Article 258 TFEU is what principally matters.

The conceptual difference between the logic of Scheppele and the European Commission is that on the very same legal base Scheppele argues for the deployment of the infringement procedure by bundling the actions against violation of the law and the EU objectives together. On the other hand the Commission uses Article 258 TFEU tacitly and it separated the actions against the violation of law and actions against the undermining of EU objectives and established a new procedure to fight the second one. Both procedures need a bit extended interpretation of the treaties, but this interpretation is legally very well anchored. The only thing they needed would be an approval by the European Court of Justice. If – as I argued above – the ECJ shared the same extended interpretation of the treaties' text.

The main consequence of the diverging approaches is the difference of the sanctioning regimes. In the case of the systemic infringement procedure Scheppele takes the ordinary fine or

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The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[43] See above in footnote 42.

[44] Article 258 TFEU „If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

sanctioning system related to the "normal infringement" and anchored in Article 260 TFEU as granted. Although different considerations exist about the legality of such a sanctioning measure, it cannot be forgotten that a systemic infringement bundles ordinary infringement procedures together. If sanctions based on Article 260 TFEU are legal in the individual cases, they must remain legal even if the individual infringements are bundled together. However the following two questions remain open. First, how far can be the sanctions extended by the ECJ if it determines the existence of a systemic breach? And secondly, whether the reinstallation of the former "constitutional" state of affairs is possible through any sanction in the affected Member State? However, this second one is a broader theoretical dilemma which does not put the values of Scheppele's proposal into question.

Although they seem to be competing instruments at the first glance, I would argue that the "systemic infringement" and the Commission's "Rule of Law Initiative" complement each other rather than they are in conflict. Both mechanisms possess strengths were the other is afflicted by weaknesses. Scheppele's proposal is procedurally better embedded as both the Commission and the ECJ are fully experienced in dealing with infringement procedures. Even though systemic infringement involves many extensions, this existing basis of sound procedural knowledge may not be underestimated. A further consequence of this coupling to the "infringement knowledge-base" could be the lover intensity of political discretion compared to the "Rule of Law Initiative", a more political and less legal procedure with no traditions and in a greater need to set fundamentally new rules and standards. The existing sanctioning mechanism based on Article 260 TFEU is a further advantage of the "systemic infringement". To sum up in nutshells, I would argue that Scheppele's proposal was the most innovative and most useful initiative to enhance Article 2 TEU compliance compared to any other one published during the past years. It is a partially legal, ex post procedure which does not require any amendment of the Treaties, has a comparatively sound legal base and could be deployed promptly, if the appropriate political will – in the form of an extended interpretation of the Treaties – would exist.

Nonetheless the systemic infringement proposal has one major drawback. As Jan Komárek points it out[45], different cases can very often emerge in constitutional matters – as consequence of the principle of conferral and the limitations of the EU legislation – where no legal base will exist in the EU law even to start an ordinary infringement procedure. Without proper infringement procedures there is nothing to bundle, neither with each other, nor with Article 2 TEU. In the case Commission vs. Hungary C-286/12 on the forced early retirement of judges the European Commission was widely criticized why it has chosen Article 2 and 6 (1) of the Council Directive 2000/78/EC and the discrimination based on age as the legal ground for the infringement. Against all critical remarks I share the point that it would have been hard to find any other solid legal base for the procedure. It was first and foremost not the Commission's mild stance but the lack of opportunities allowed by the European legal order which lead to this suboptimal solution. However even a similar legal crutch can be lacking in future cases. I would argue therefore that both procedures, systemic infringement as well as the Rule of Law Initiative shall be part of the European Commission's toolkit and they shall be seen as complementing measures. If a solid legal base for infringement procedures is provided which can be bundled together as well as with Article 2 or Article 4 (3) TEU then the Commission shall initiate a systemic infringement. In this case the more legalist approach can be compensated by a higher procedural legitimacy through the involvement of the ECJ and by the possibility of firm

[45] KOMÁREK 2013b

sanctions. If such a sound legal base is lacking, the Commission is still able to address the challenge in a more political manner by the Rule of Law Initiative, with all drawbacks and advantages provided by the flexibility of politics.

Existing Instruments – The European Commission's Rule of Law Initiative and the Council's Rule of Law Dialogue

Although speaking about two different instruments, taking their strong political connection as well as the lacking relevance of the Council's mechanism into consideration, this paper will analyse them in a common chapter.

The roots of the Commission's Rule of Law Initiative launched on March 11, 2014[46] can be traced back to September 2012 when Manuel Barroso, President of the European Commission that time, called in his State of the Union speech to elaborate a *"better developed set of instruments– not just [having] the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty".*[47] He repeated this claim one year later *"to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights."*[48] Therefore the new "pre-Article 7" instrument of the Commission, the Rule of Law Initiative shall be seen as a stopgap measure with all hindrances and advantages of it. According to the Commission's position[49] the instrument's goal is to deal with the systemic threats of the rule of law, but not with individual cases.

Some important details of the instrument still remained unclear; however the three stages of the procedure can be summed up in the following way.

In the first stage, if according to the Commission's assessment a clear preliminary indication of systemic threat to the rule of law exists in a particular EU Member State, the Commission elaborates and delivers a "rule of law opinion" on the situation for the respective MS. The facts that the procedure started and the opinion is delivered are public and constitute therefore a (not too strong) basis for "naming and shaming" of the Member State. However the negotiations with the Member State are confidential and whether the content of the opinion is public or not, is currently unknown.

If the government of the respective Member State does not undertake appropriate actions to deal with the threat, the Commission can – in the second stage of the procedure – address a detailed "rule of law recommendation" to the national authorities. This recommendation contains the ways and measures required by the Commission to solve the situation as well as the final deadline. In contrary to the first step, the main content of the recommendation is ab ovo public and the respective government faces therefore an increasing pressure through naming and shaming in the procedure's consecutive stages.

Finally, in the third stage, the Commission monitors the implementation of its recommendation. If the respective government does not deliver or it steps are not satisfactory, the Commission can consider the triggering of the Article 7 procedure, as a sanction.

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[46] COM(2014) 158 final

[47] http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm

[48] http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

[49] http://europa.eu/rapid/press-release_SPEECH-14-202_en.htm

Meanwhile the author of this paper shares the opinion of Dimitry Kochenov and Laurent Pech[50] that it is hard to find any revolutionary in the mechanism and the Rule of Law Initiative alone is not an appropriate tool to address the rule of law crisis of the European Union in a serious and promising way, in my view it is not useless as well.

Nonetheless the instrument has two drawbacks. First that it lacks any new sanction mechanism and is only coupled to those Article 7 TEU procedure in connection which the European institutions behaved so reluctant and sceptical during the last years. The situation could be better, if in the third stage the triggering of Article 7 TEU could happen automatically or semi-automatically[51] if the Member State does not cope with the recommendations. Unfortunately it is currently not the case. The launching of Article 7 TEU as a sanction is fully dependent from the political discretion of the Commission, just in the same form as it is today. From this perspective the Rule of Law Initiative hardly delivers more than just increases the legitimacy and political embeddedness of an Article 7 procedure and contributes therefore to its potential success. Furthermore the instrument only affords the tool of "naming and shaming", however in a well-founded and well-embedded way again. Taking these two facts into consideration, it is not a blasphemy to argue that the Commission's answer to the rule of law crisis does not cope with the Commission's earlier expectations. Barroso asked to have *"an alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty"*.[52] Although there is one brand new instrument in the Commission's toolkit, Juncker and Timmermans do not have the above mentioned alternative Barroso called for.

The real value of the Rule of Law Initiative could be – as I argued above – in the combination with the systemic infringement procedure. Particularly that it could complement the systemic infringement in those cases, in which the Commission lacks the legal ground to launch any infringement due to the non-existing European legal regulations.

A further weakness of the instrument is constituted by the lacking deployment and the intense political debates about it. The Council's Legal Service criticised the Commission[53] for overstepping its powers and violating the principle of conferral laid down in Article 4 and 5 TEU. To oppose and undermine the Commission's undertaking, the Council established a parallel and therefore duplicated procedure. During its meeting on December 16, 2014 the Council[54] created an annual dialogue on rule of law, which shall take place once in a year in the Council's General Affairs configuration. Albeit the Council's decision emphasis the principles of objectivity, non-discrimination and equal treatment of all Member States and that the dialogue shall be conducted in a non-partisan and evidence based approach, not too much specific detail came until now to the daylight. The proclaimed motivation behind the decision was to complement the existing (Art. 7 TEU and infringement) procedures, but doing this with the intention to avoid any procedural duplication. Nevertheless, with a short reflection on the Commission's Rule of Law Initiative, the goal of avoiding procedural duplications was definitely missed. Bearing both these details and the Council's former political track record in the field of article 2 TEU compliance in mind, one has to agree with Dimitry Kochenov and Laurent Pech that the Council's only

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[50] KOCHENOV – PECH 2015a

[51] This could happen for example through a negative decision, if a motion and the decision would not be required to the triggering, but to the not deployment of Article 7 TEU.

[52] http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm

[53] KOCHENOV – PECH 2015a

[54] 16936/14 – Press Release, 3362nd Council meeting, 16 December 2014

intention was to create a "façade of action."[55] Especially as the single outcome of this political manoeuvre became the blocking and political undermining of the EC Rule of Law Initiative. A fact that clearly emphasizes the Council's destructive role in this particular field.

The Council's objection that the Commission oversteps its power with the Rule of Law Initiative is from a legal perspective definitely unfounded. Although the Commission's communication avoids any clear statement on the legal fundaments of its instrument, I share the opinion of Kochenov and Pech that Article 7 (1) TEU constitutes a stable base for the procedure.[56] If the Commission is literally empowered by Article 7 (1) TEU[57] to trigger the Article 7 procedure by a "reasoned proposal", it may be also empowered to gather information about the alleged risk of a "serious breach" of one of the EU fundamental values, to analyse this information and to communicate and officially exchange positions with the affected Member State. The Commission's Rule of Law Initiative does not contain anything more just these steps to the preparation of a "reasoned proposal" to the Article 7 TEU procedure. If the instrument comes to this last stage at all.

It is hard to reveal whether there is anything else hidden in the background, like a political deal between the institutions, or really just the Council's legal reservations hinder the Commission to deploy its new instrument. However there are two points which should be considered honestly by the Commission. First that the serious delay since March 2014 undermines the credibility of both the Commission and the Rule of Law Initiative fundamentally in a political environment which urgently requires measures to protect the compliance with Article 2 TEU values generally and the rule of law particularly. As explained in the introduction, the Resolution of the European Parliament from June 10, 2015 on Hungary opened a new window of opportunity for the Commission to launch the new instrument and secured political support vis-á-vis the Council's objection. However, this window of opportunity expires in October 2015 at latest. If the Commission remains paralysed and does not undertake any step, the crisis of credibility will grow even further. The Commission shall rather strive to clear the legal dispute with the Council on its own competencies and on the legal fundaments of the Rule of Law Initiative as soon as possible. Therefore the Commission shall launch the instrument and if the Council or some Member States charge it because of acting without powers, simply put the case before the ECJ and wait for the sentence. If the Commission do not decide to give up the battlefield entirely this scenario is unavoidable sooner or later. I would argue the sooner Europe has a binding ECJ judgment in the issue the better. As I wrote it above, when it comes to the extended interpretation of the Commission's powers related to Article 2 TEU values, the ECJ's support is the final and the most decisive factor. Either these institutions will mutually support each other to enhance the competencies of the European Union against its Member States undermining the European community of values or the current paralysis will hard to be exceeded.

Conclusion

[55] KOCHENOV – PECH 2015b

[56] KOCHENOV – PECH 2015a

[57] Article 7 (1) TEU "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."

Although numerous proposals were drafted since 2010, the protection of the EU fundamental values is actually rather determined by the lack of political will and a kind of political paralysation than by any new impetus. Due to the high level of political discretion moored into the different procedures neither the newly invented (Rule of Law Initiative), nor the already existing instruments (Article 7 TEU) became deployed at a single occasion. Even though the currently existing legal and procedural frames (including the Article 7 procedure inter alia) could afford an important contribution to the solution of the rule of law crisis, the respective institutions and actors simply lack the political will to deploy them. On the other hand there is an enthusiastic academic debate aiming the creation of the single "philosopher's stone like" perfect mechanism to ensure Article 2 TEU compliance. Nonetheless this enthusiasm delivered valuable proposals and theoretical insights, the pursuing of the perfect legal tool is in vain. There is no "one size fits all" instrument which could be best shaped to all emerging challenges. Therefore a complex system of different legal and political as well as ex ante and ex post procedures would be required. A system constituted possibly by such instruments which does not require the amendment of the treaties. The best institutional stakeholders of such a complex regime could be the European Commission and the European Court of Justice. The tandem of these two institutions cannot be outflanked at all, if one pursues an effective solution to the current value crises both politically feasible and legally sound at the same time. The Commission should accept and introduce a toolbox constituted by both the systemic infringement procedure and the existing Rule of Law Initiative, two instruments which complement each other very well and are well suited to address challenges emerging in different contexts. Parallel to this the ECJ should both extend their fundamental rights jurisdiction and support the Commission's extended interpretation concerning its Article 2 TEU and Article 258-260 TFEU related powers. Under the current circumstances this support is the sine qua non of any serious action taken on the field of the protection of the EU fundamental values.

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