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# WHAT ROLE FOR EU INSTITUTIONS IN CONFRONTING EUROPE'S DEMOCRACY AND RULE OF LAW CRISIS?

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Rethink.CEE Fellowship



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# Executive Summary

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The signs of the democracy and rule of law crisis in the European Union are undeniable. At the same time, autocratizing member states, like Hungary or Poland, block important EU policy initiatives, and their governing parties, which are key members of the European People's Party and the European Conservatives and Reformists, have significant impact on European party politics.

However, the democracy and rule of law crisis did not appear suddenly and unexpectedly; it developed gradually since 2010 and was exacerbated by the ineffective responses of the European institutions. This paper argues that not the deficiencies of its legal framework hampered the EU in addressing the developing crisis appropriately, but rather the political settings, the institutional traditions, and the role concepts of the main European institutions, especially the European Commission.

The Commission's lack of a constitutional mind-set, and its selective and superficial approach, resulted in only symbolic or procedural compliance with European values in Hungary's case. It overlooked the substantial violation of democracy and rule of law standards in the country. Furthermore, inter-institutional struggles, the ongoing conflict between the Commission and the Council over the monopoly of the legal interpretation of European values, and party-political bias aggravated the challenge and resulted in political deadlock.

Against this background, to overcome the current situation in which institutional traditions and political settings prevent exploiting the potential in the framework of EU law for the protection of democracy and rule of law, the main EU institutions—especially the Commission—have to reconsider significantly their approaches. The Commission and the Parliament need to engage in constructive cooperation, instead of leaving important initiatives of the latter unconsidered.

The Commission has to differentiate between Article 2 “constitutional” issues and matters of “ordinary” EU law, and develop an enhanced constitutional mind—set that insists on substantial output compliance with EU values by member states, and, if required, systematically enforces it. Furthermore, it should create via infringement procedures legal inputs for the Court of Justice of the European Union that allow the court to unfold a progressive interpretation of the treaties and the development of EU law.

A return to Article 2 compliance by rogue member states is very unlikely without putting pressure on autocratizing national elites and altering their political cost—benefit calculations. The proposal to impose rule—of—law conditionality on EU funds is the only current initiative that creates political issue linkage and offers solid political leverage over rogue member states. Most criticism toward its allegedly discriminatory character can easily be dispelled and the proposal is well-tailored to the political realities of the European rule of law crisis. This initiative must remain in the political forefront and put through the current negotiations over the multiannual financial framework without any weakening.

The complementary character of rule-of-law conditionality and proposals for an objective and comprehensive monitoring mechanism for Article 2 values should be better recognized. Creating such a mechanism could not only render obsolete the main objections against rule-of-law conditionality, i.e. the lack of benchmarks on which to base it, it could also ease the Commission's burden, as it is currently responsible for monitoring and the enforcement of value compliance. Last but not least, the parallel introduction of rule-of-law conditionality and a comprehensive Article 2 monitoring mechanism would represent a genuine compromise among the diverging interests of various EU institutions and member states.

# What Role for EU Institutions In Confronting Europe’s Democracy and Rule of Law Crisis?

DANIEL HEGEDÜS

Non-compliance with European Union law, norms, and values by member states has always been an inseparable companion of the European integration. However, the recent autocratization of Hungary and Poland, and the partial democratic backsliding in several other members pose a serious challenge with new qualities for the EU. Europe’s “other democratic deficit”<sup>1</sup>—the systemic violation of the principles of democracy, rule of law, and fundamental rights—has much more far-reaching negative consequences for European integration than the not-full-fledged democratic accountability of the EU institutions.

Article 2 of the Treaty on European Union (TEU)<sup>2</sup> states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” and that “these values are common to the member states.”<sup>3</sup> This not only embraces these liberal democratic values as normative guiding lights for the EU, but also identifies the fundamental political requirements of a functioning integration. Their violation in one or more member states undermines the functioning of the European legal order by hollowing out the principle of mutual trust. It also renders impossible the fulfillment of the union’s aims (Article 3) that among others imply the promotion of its values, and it jeopardizes the principle of sincere cooperation among EU institutions and member states (Article 4 (3)). While it is often argued that the protection of EU values is a secondary issue in comparison to the preservation of political unity, the

violation of the values laid down in Article 2 represents the most blatant breach of EU’s unity.

A vast amount of research has been devoted to the questions of democratic backsliding and rule of law crises in the last 20 years, mostly from a legal perspective. Some of it introduced legal innovations that changed the discourse on the compliance with European values,<sup>4</sup> but this mostly remained without any practical impact. This underlines the fact that the determination and sanctioning of breaches of values are at least as much political issues as legal ones.

This paper focuses on the political settings that hinder European institutions and bona fide member states in fulfilling their treaty obligations, the obeying and promotion of European values, and the ensuring of the application of the treaties. The central argument is that it is not the deficiencies of the EU legal framework that contributed to the growing democracy and rule of law crisis in the union, but rather the political settings, the institutional traditions, and the role concepts that hampered a more effective and strategic deployment of the legal instruments.

This paper is based on a combination of desk research and more than 30 interviews with EU stakeholders in Brussels, covering the whole institutional spectrum and all relevant political segments of European politics. The first section analyzes the political challenges that hinder the EU in addressing the democracy and rule of law

1 Kelemen, R. Daniel (2017), Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’, *Government and Opposition* 52(2): 211-238.

2 All references to treaty articles in this paper are to the TEU, except where otherwise specifically noted.

3 Here “European values” or “liberal democratic values” are exclusively used as references to democracy, rule of law, and the respect for human rights – the fundamental values incorporated in Article 2.

4 von Bogdandy, Arnim et al. (2012) ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU member states’, *Common Market Law Review* 49(2):489-520; Scheppelle, Kim Lane (2013) ‘What Can the European Commission Do When member states Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions’, *Verfassungsblog*, 22 November 2013, <http://verfassungsblog.de/wp-content/uploads/2013/11/scheppelle-systemic-infringement-action-brussels-version.pdf>; Müller, Jan-Werner (2013) What, if Anything, is Wrong with a Copenhagen Commission? The Idea of Democracy Protection in the EU revisited, *Transatlantic Academy – German Marshall Fund of the United States*, <http://www.gmfus.org/publications/what-if-anything-wrong-copenhagen-commission>

crisis and formulates recommendations to overcome them. It identifies four key challenges that are rooted in distinct institutional traditions and role conceptions of the European Commission and the Council, or are determined by the power relations among the key EU institutions. These are:

- Lack of a constitutional mind-set in the European Commission.
- Institutional power struggles among the Commission, the Council, and the European Parliament that hampers addressing issues related to breaches of fundamental values, resulting in diverging political approaches and the blocking of each institution's initiatives.
- Duopoly of the Commission and the Council's Legal Service in legal interpretation of the relevant treaty articles, which supports largely conservative and restrictive legal interpretations and blocks legal innovations.
- Party political bias that hinders the European institutions in addressing the issue of values compliance in a systemic, impartial, and effective way.

The second section looks at current institutional and legal proposals intended to enhance democracy and rule of law compliance in the EU, like the comprehensive monitoring of EU fundamental values in the member states or rule of law conditionality for EU funds. The paper then formulates certain policy recommendations bearing in mind the question of their political plausibility and the improbability of any treaty change in the near future.

## Political Obstacles to Democracy and Rule of Law Protection

### *The Commission's Lack of Constitutional Mind-set*

The values enshrined in Article 2 TEU enjoy constitutional status in EU law. This conclusion is not only supported by its stating that the "Union is founded" on these values and by analogies with national constitutional laws, but also by various institutional provisions of the European treaties. Article 13 (1) TEU further embraces European values as yardsticks for the functioning of EU institutions when it states that "the Union shall have an institutional framework which shall aim to promote its values". Article 14 (3) TEU refers to the minimum democratic requirements of the European Parliamentary elections in the member states. Furthermore, Article 19 (1) TEU stipulates the minimum standards of rule of law in member states required to the effective functioning of the EU legal order, as national courts are responsible for the implementation of a significant part of EU law.

The European Commission has several times expressed its position that its role as "guardian of the treaties" also embraces the protection of Article 2 values.<sup>5</sup> However, its political practice remains far behind this goal. Comparing the Commission's engagement in the Hungarian and Polish cases, its responses were clearly selective, biased, and disproportionate, and ultimately not determined by the situation regarding democracy and the rule of law there but by other factors.

The Commission has a diverging track record in dealing with these two members. Concerning Hungary, it followed a selective and legalist strategy, launching five infringement proceedings due to the violation of certain provisions of EU law with relevance to Article 2 values. However, it refrained from triggering the Rule of Law Mechanism or the Article 7 procedure to determine a

<sup>5</sup> See, for example, Viviane Reding, EU Justice Commissioner and Vice-President of the European Commission (2010-2014), [http://europa.eu/rapid/press-release\\_IP-14-237\\_en.htm](http://europa.eu/rapid/press-release_IP-14-237_en.htm) and "Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court", 24 September 2018, [http://europa.eu/rapid/press-release\\_MEMO-17-5368\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-5368_en.htm)

risk or the existence of a “serious breach” of Article 2 values by a member state.<sup>6</sup> It was only in September 2018 that Article 7 (1) was ultimately launched—by the European Parliament.

In the case of Poland, the Commission pursued a different strategy. Instead of isolated infringement procedures targeting individual aspects of the country’s autocratization, it followed an approach based on the systemic assessment of the rule of law situation, complemented by individual infringement procedures. Reacting to the undermining

“ *The constitutional engineering process in Hungary has had much more far-reaching consequences than the Polish rule of law crisis* ”

of the country’s Constitutional Tribunal, the Commission launched the Rule of Law Mechanism in 2016. Due to the lack of development in the rule of law dialogue between the Commission and the Polish government, even after the adoption of four rule of law recommendations by the Commission, the latter triggered Article 7 (1) against Poland in 2017. The systemic approach based on the Rule of Law Mechanism and Article 7 was supported by two strongly related infringement procedures with regard to the law on the organization of Poland’s ordinary courts in 2017 and the violation of the Supreme Court’s independence in 2018.

In contrast to the Commission’s official position that there is no risk of any serious, systemic breach of rule of law or other fundamental values in Hungary, there is a growing consensus that the quality of democracy and rule of law

6 For analyses of the proceeding based on Article 7 see, Bugarcic, Bojan (2014) Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. London School of Economics and Political Science. <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper79.pdf>; Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H. (2014) Reinforcing Rule of Law Oversight in the European Union, EUI Working Paper RSCAS 2014/25. <http://cadmus.eui.eu/handle/1814/30117>; Sadurski, Wojciech (2010) ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider’, Columbia Journal of European Law 16(3):385-426.

there is much worse than in Poland.<sup>7</sup> The problem is that the Commission assesses the quality of democracy and rule of law in member states only through a narrow prism of European law and the competences conferred by the member states to the EU, and leaves important systemic aspects unconsidered.

### *Symbolic Compliance and the “Peacock Dance”*

The European Commission’s different approach to Hungary and Poland can be best explained by two factors: the characteristics and/or the obviousness of the breach of European values, and the behavior of the affected member state toward the Commission.

The guardian of the treaties was rather effective and straightforward in addressing the challenge to the rule of law in Poland. The government’s breach of constitutional norms was procedural, and it often constituted a clear breach of national constitutional and legal norms. Therefore, the violation of the rule of law principle was obvious and did not require an additional substantial assessment. In Hungary, by contrast, mostly due to the two-thirds parliamentary majority enjoyed by the Fidesz party from 2010 until 2015, the hollowing out of the institutional checks and balances took place without any blatant procedural violation of the national legal order, at least until 2017. The constitutional engineering process in Hungary has had much more far-reaching consequences than the Polish rule of law crisis as it shaped the whole political system in favor of Fidesz. Nevertheless, the identification of the substantial violations of democracy and rule law required a nuanced, systemic, and substantial analysis of the situation in Hungary; a task that was fulfilled twice by the European Parliament—with the “Tavares Report” in 2013 and the “Sargentini Report” in 2018 (see further below)—but completely neglected by the Commission.

According to the principle of sincere cooperation enshrined in Article 4 (3) TEU, member states are

7 See V-Dem: <https://www.v-dem.net/en/> ; Freedom House – Nations in Transit, <https://freedomhouse.org/report/nations-transit/nations-transit-2018> ; Freedom House – Freedom in the World, <https://freedomhouse.org/report/freedom-world/freedom-world-2018>. See also Scheppele, Kim Lane and Pech, Laurent (2018) ‘Why Poland and not Hungary?’, Verfassungsblog, 8 March 2018, <https://verfassungsblog.de/why-poland-and-not-hungary/>

obligated to assist fully the EU institutions in carrying out their duties. Concerning the member states' behavior toward the Commission, the Hungarian government showed readiness to engage in constructive dialogue, where the Polish government took a mostly rigid position and often refused to address its concerns in a constructive way. However, even the Hungarian government's behavior failed to result in any substantial "outcome compliance" with European norms; it only undertook "process compliance" by a set of interactions that was only symbolic.<sup>8</sup> To defy the Commission, the Hungarian government successfully deployed what has been called a "peacock dance" or "two steps forward, once step back" strategy since 2011.

Faced with an escalating conflict with the European Commission and the threat posed by the looming Article 7 proceeding, Poland made a late strategic change in its interaction with EU institutions and started emulating Hungary's "peacock dance" in December 2017. The appointment of Mateusz Morawiecki as prime minister was followed by the communication of certain possible concessions on the judicial reforms. Ultimately the partial rollback of the reforms in November 2018 can also be considered an adoption of the "two step forward, one step back" strategy, as it only affected the discriminatory retirement regulation for judges, but not the issue of the judges' appointment by the minister of justice, which constituted one of the most blatant breach of judicial independence.

### *The Commission's Margin of Discretion*

The European Commission's inability to address substantial (and not only procedural) breaches of fundamental values and its tolerance of symbolic compliance constitute one of the main challenges for the safeguarding of democracy and rule of law in the EU. In spite of its declarations, it addresses violations of Article 2 values just as selectively as it does violations of "ordinary" EU legal norms lacking constitutional characteristics. The case law of the Court of Justice of the European Union (CJEU) confirms the Commission's wide margin of discretion in fulfilling its role as "guardian of the treaties". The latter therefore has the right to choose its battles. However, its decisions

<sup>8</sup> Batory, Agnes (2016), 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration*, 94(3): 685-699.

about whether and how to address violations of Article 2 should be based on the consideration of the substantial merits of each case. The Commission should not only scratch the surface by reacting to procedural violations of liberal democratic norms, but also address substantial breaches of values that require comprehensive and systemic evaluation.

As a result of its experience with Hungary and Poland, the European Commission has undergone since 2010 a significant learning process in how to address violations of EU fundamental values by member states. However, it has made efforts not to repeat with Poland the mistakes it made regarding Hungary, but its track record with the latter remains poor and showing bias.

There is a striking similarity between the forced early retirement of judges in Hungary's 2012 constitutional reform and in Poland's more recent judicial reform. The fact that the Hungarian case was addressed by the Commission as an issue of age discrimination and the Polish case as discrimination and the violation of the judicial independence can be explained by the fact of its learning process. However, the lack of any reaction by the Commission to the Hungarian administrative-court reform in 2018, which introduced executive control over the judiciary similar to that attempted in Poland, highlights the lack of any legal rationality behind its selective approach.

Obviously, the Commission cannot re-open closed cases, like that of the early retirement of Hungarian judges, in light of its lessons learned subsequently. However, not addressing new issues that pose a serious threat to the remnants of judicial independence for whatever reason appears to be an abuse of its discretionary power. Currently, the Commission could be accused of failure to act, e.g. not fulfilling its obligation as guardian of the treaties, under Article 265 of the Treaty on the Functioning of the European Union (TFEU) when it comes to the lack of reaction to Hungary's administrative-court reform.<sup>9</sup>

<sup>9</sup> "Blurring the Boundaries - New Laws on Administrative Courts Undermine Judicial Independence", Hungarian Helsinki Committee, 2018, <https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf>

The lack of a constitutional mind-set by the European Commission is a key obstacle to the EU safeguarding liberal democratic values. No legislation is required to overcome this, but the necessary change of institutional traditions, role perceptions, and ways of thinking may cost even more time and political resources than legislation. The Commission should embrace the idea that Article 2 and Article 7 issues must be considered constitutional affairs. Substantial breaches of fundamental norms may not be as obvious as procedural breaches or violations of “ordinary” European law, and therefore their investigation may require a more nuanced approach. Since these breaches may pose a considerably higher threat for the functioning of the EU than simple legal non-compliance, it should be the undisputable obligation of the Commission to address them systematically and in an unbiased way. Its margin of discretion in whether and how to address these challenges should be significantly reduced, and be subject only to substantial consideration of the threat posed and the member state’s outcome compliance.

## Institutional Power Struggles

Tensions and power struggles between the Council, the Commission, and the European Parliament have been a serious obstacle to addressing effectively Article 2 compliance issues. Institutional conflicts made not only the forging of political synergies impossible, but often impeded or even paralyzed initiatives of the Commission or the European Parliament that aimed at enhancing the protection of democracy and rule of law in member states.

Based on the restrictive interpretation of its Legal Service claiming that Article 2 issues can be handled exclusively in the frame of the Article 7 procedure,<sup>10</sup> the Council has sharply opposed and partially delegitimized the Commission’s two key initiatives.<sup>11</sup>

10 Scheppelle, Kim Lane, Pech, Laurent and Kelemen, Daniel R. (2018) ‘Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism’ *Verfassungsblog*, 12 November 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>

11 Council lawyers raise concerns over plan to link EU funds to rule of law, *Politico*, 29 October 2018, <https://www.politico.eu/pro/council-lawyers-raise-concerns-over-plan-to-link-eu-funds-to-rule-of-law-hungary-poland/>

Following the introduction of the Commission’s Rule of Law Framework in 2014, the Council heavily criticized this and claimed that it violated the principle of conferral, according to which competences not explicitly conferred upon the EU in the treaties remain with the member states.<sup>12</sup> Later that year the Council announced the adoption of its own “Rule of Law Dialogue” procedure. This brought to life the most toothless EU measure for the protection of rule of law, the functioning of which remains without any notable result. The true reason for its existence is to imitate some engagement by the Council in field of the rule of law, create a parallel structure to the Commission’s Rule of Law Mechanism, and thus serve as excuse for the Council’s lacking cooperation with the Commission. Against this background, the Council refused to reflect on the Commission’s Rule of Law Procedure against Poland until Article 7 (1) was finally activated in December 2017 and the procedure reached a legal level that was already recognized as legitimate by the Council.

In October 2018 the Council’s Legal Service announced its opposition to the planned introduction of rule of law conditionality in the management of the European Structural and Investment Funds,<sup>13</sup> arguing the Commission’s proposal created a sanction mechanism outside of the scope of Article 7 and not in conformity with the treaties. The Council’s Legal Service not only put itself in fundamental opposition to the first Commission proposal that tried to add a bite to the EU’s bark<sup>14</sup> toward member states, but also to the position of important ones like France and Germany. Apparently, the Council’s Legal Service is so attached to a restrictive interpretation of the principle of conferral and the exclusive role of Article 7 in addressing issues related to fundamental values that it is ready to argue against significant member states’ positions.

12 Kochenov, Dimitry and Pech, Laurent (2015) ‘From bad to worse? On the Commission and the Council’s rule of law initiatives’, *Verfassungsblog*, 20 January 2015, <https://verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/>

13 Scheppelle, Pech and Kelemen (2018), Never Missing an Opportunity to Miss an Opportunity

14 Sadurski, Wojciech (2010) ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider’, *Columbia Journal of European Law*, 16(3):385-426.

Following the fourth amendment of Hungary's Fundamental Law in 2013, which raised serious concerns in the European Commission, the European Parliament adopted that same year the "Tavares Report" on the situation of fundamental rights in Hungary.<sup>15</sup> In it the European Parliament called on the Commission to "respond appropriately to a systemic change in the constitutional and legal system and practice of a member state" and "to adopt a more comprehensive approach to addressing any potential risks of serious breaching of fundamental values". Furthermore, it invited the Commission and the Council to participate actively in monitoring the situation regarding democracy and rule of law in Hungary in the frame of an "Article 2 Trialogue." Although the introduction of the Commission's Rule of Law Initiative in 2014 can be perceived as a positive reaction to the Parliament's demand for a tool to address the systemic deficiencies of rule of law in member states, this has never been deployed against Hungary. Furthermore, the European Parliament's call for a common comprehensive monitoring mechanism of the fundamental values remained unanswered by the Commission. The Commission largely neglected the political support and window of opportunity that was provided by the Parliament with the report. This appears to fit the pattern to this day.

In 2016 the European Parliament adopted the "in't Veld Report" on the introduction of a comprehensive "Union Pact for democracy, the rule of law and fundamental rights" (DRF Pact).<sup>16</sup> While proposing the creation of a DRF Expert Panel, the resolution gave the Commission practically a free hand to develop a proposal for a comprehensive monitoring mechanism of democracy, rule of law, and fundamental rights in the EU. However, the Parliament's recommendations fell on deaf ears in the Commission. Speaking in 2015, Commission Vice-President Frans Timmermans opposed any initiatives intended to embrace a comprehensive understanding of democracy, rule of law, and fundamental rights, to undertake the introduction of objective measurement and monitoring of Article 2

15 Named after the rapporteur Rui Tavares. "Report on the situation of fundamental rights: standards and practices in Hungary", <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN>

16 Named after the rapporteur Sophie in 't Veld. "European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights", <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+0+DOC+XML+V0//EN>

values, or to reduce the Commission's political and legal margin of discretion.<sup>17</sup> Considering that position of the Commission, it is not surprising that the Parliament's DRF Pact initiative remained unheard and unanswered, leaving the impression that the Commission—once again—attaches greater importance to the preservation of its institutional prerogatives and margin of discretion than to the safeguarding of the EU's fundamental values or to pursuing sincere cooperation with other EU institutions.

In September 2018 the European Parliament adopted the

“ *The Commission largely neglected the political support and window of opportunity that was provided by the Parliament* ”

Sargentini report on Hungary,<sup>18</sup> and triggered Article 7 (1) to determine the existence of "clear risk of a serious breach" of EU fundamental values by the country's government. However, subsequent events underlined that the procedure is handled differently by the Council dependent on which EU institution launched it, putting the Parliament's in a disadvantaged position relative to the Commission.

Following an opinion of its Legal Service, it looked like Council was not going to accept the report as a "reasoned proposal", the official document the Council hearing is based on, and that members of the European Parliament would not be allowed to represent its position during the Article 7 hearings on Hungary.<sup>19</sup> Ultimately, a

17 "The European Union and the Rule of Law – Keynote speech at Conference on the Rule of Law, Tilburg University," 31 August 2015, [https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en)

18 Named after the rapporteur Judith Sargentini. "Report on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded," <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN&language=en>

19 EU action on Hungary and Poland drowns in procedure, EU Observer, 13 November 2018, <https://euobserver.com/political/143359>

non-official meeting of the General Affairs Council was called and Sargentini and the Chair of the Parliament's Civil Liberties Committee presented the report's main findings in this non-official format.<sup>20</sup>

Maintaining the appropriate institutional balance between the two EU co-legislators, the Parliament and the Council is an important and delicate task. However, in contrast to the ordinary procedure in which the Commission has the exclusive right to make legislative proposals, Article 7 empowers the Commission, the Parliament, or one-third of member states to trigger the procedure, and it does not mention any differences in the proceeding with regard to the initiator. Therefore, an equal chance should be given for all initiators to represent their reasoned opinion in front of the other decision-making bodies involved in the procedure. According to its rules of procedure, the Council can be represented before the European Parliament. Ensuring reciprocity for the Parliament with regard to the Article 7 procedure would be of crucial importance for the safeguarding of democracy and the rule of law in the EU.

As demonstrated, the Commission and the Council have systematically neglected and rejected the European Parliament's efforts to address democracy and rule of law problems. This fact is even more interesting from the perspective of claims that lack of political support by the Parliament and the Council played a crucial role in the Commission's reluctant approach toward Hungary. This explanation might be valid in the case of the Council, but appears to be a rather counter-factual, subjective perception with regard to the European Parliament.

Institutional power struggles have in the past few years paralyzed or weakened valuable proposals that aimed at enhancing member states' compliance with fundamental values and rights. Ending business-as-usual and focusing on the development of institutional synergies is a sine qua non of progress in safeguarding Article 2 values, especially if enhanced protection is to be achieved without treaty change. The introduction of an honest and functioning "Article 2 Trialogue", as recommended by the Tavares Report, could be a huge leap forward. However, due to

20 Rule of law in Hungary: MEPs demand swift action from EU ministers, European Interest, 12 November 2018, <https://www.europeaninterest.eu/article/rule-law-hungary-meps-demand-swift-action-eu-ministers/>

the sovereigntist tradition among the member states, the Council can hardly play the role of an institutional pacesetter on protecting the democracy and rule of law in the EU. This is true despite of the contribution by the informal "friends of rule of law" group of member states, who coordinate their position on Article 2 questions and support initiatives for the protection of fundamental values. Therefore, the development of constructive institutional cooperation between the Commission and the Parliament is crucial. The Commission should strive for a more cooperative partnership with the Parliament, utilizing the windows of opportunities that are opened by the latter's political support and proposals. Being the "guardian of the treaties" should mean first increased substantial engagement for the safeguarding of Article 2 values in sincere cooperation with other EU institutions, and not the maximizing of the Commission's margin of discretion.

## The Legal Interpretation Duopoly of the Council and Commission

The Court of Justice of the European Union (CJEU) has the ultimate prerogative of interpretation of EU law according to the treaties. However, its interpretation has brought only limited clarity in several questions related to the protection of Article 2 values. One of the key reasons has been the attempt of the Commission and the Council's Legal Services to maintain full control over Article 2 issues and to preserve their duopoly in interpreting them.

The September 2018 decision of the Commission to refer Poland to the CJEU for undermining the principle of judicial independence constitutes a notable exception in this regard and is a positive development. However, the Commission was only ready to make this move after the groundbreaking decision of the CJEU in two recent cases that demonstrated the court's readiness to ensure the protection of judicial independence on the basis of Article 19 (1).<sup>21</sup>

21 The Associação Sindical dos Juizes Portugueses case and following the preliminary ruling in the Celmer case.

Bearing in mind the implausibility of treaty change and the political deadlock in the Council, CJEU rulings constitute the most realistic option for any significant improvement of the EU legal framework for democracy and rule of law protection. If the court provided clarity on whether the violation of Article 2 values can only be addressed by the Article 7 procedure, as the Council's Legal Service claims, or whether other mechanisms can also be in conformity with European law, it could provide the way out from the present legal and political deadlock. Likewise, if the court answered the question of whether the bundling of the Article 7 procedures triggered against Poland and Hungary would be in breach of the treaties or whether it constitutes a viable legal option, it could solve the fact that the presence

“ *The left, green and liberal political groups demonstrated higher commitment for the protection of European values than their right-conservative peers* ”

of two rogue member states in the EU practically renders Article 7 (2) inapplicable as they protect each other from any sanctions with their mutual veto.<sup>22</sup>

Unfortunately, the CJEU cannot be simply asked about these questions, as it is not empowered to issue opinions that are not legally binding with regard to the abstract interpretation<sup>23</sup> of EU law on the request of the institutions, unlike the International Court of Justice (ICJ) offering advisory opinions at the request of UN institutions. The difference is explained by the fact that UN institutions are not allowed to be represented as parties before the ICJ and therefore are entitled to request non-binding advisory

22 Scheppelle, Kim Lane (2016), 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too', *Verfassungsblog*, 24 October 2016, <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/>

23 Abstract and concrete judicial reviews are two opposing categories of judicial review. Abstract reviews are typically theoretical and take place in the absence of an actual case or controversy, while concrete reviews are mostly initiated on the basis of a judicial case.

opinion, whereas EU institutions enjoy full legal capacity in CJEU proceedings. However, the political costs to the Commission or the Parliament of asking the court's opinion outside of trial would be much lower than the costs of litigation with another EU institution or member state in an annulment or infringement procedure. Therefore, it would be advantageous if EU institutions and member states were entitled to ask the CJEU for abstract interpretation of EU law. But this is not a politically viable route since the introduction of any new competence for the Court requires an amendment of the treaties.

Bearing the legal and institutional context in mind, the main problem is that EU institutions, and especially the Commission, favor the minimizing of legal risks over the establishing and exercising of legal claims, which could be used by the CJEU for a progressive interpretation of EU law. This strategy might be understandable when it comes to "ordinary" EU law; however, it is counter-productive at the constitutional level of Article 2 values and contributes to the current legal and political deadlock.

The European Commission has an impressive track record of won cases before the CJEU. Member states can be pretty sure that in infringement litigations the court will rule in favor of the Commission, which gives enormous strength to the latter's infringement procedure even in the pre-litigation phase. However, the intention to maintain this undisputed legal reputation, i.e. the perception that its legal arguments are most often right, which is an important political resource for the Commission, leads to the situation that it chooses its battles rather carefully.

Unfortunately, for safeguarding Article 2 values, where from a legal perspective the Commission enters uncharted waters, this strategy results in it accepting creative compliance or, in the worst cases, it only looking for creative compliance.<sup>24</sup>

The best examples are again the cases of early retirement of judges and the independence of the data protection

24 Batory (2016), *Defying the Commission*.

authority in Hungary.<sup>25</sup> The first case was framed by the Commission as an issue of age discrimination and the referral to the CJEU refrained from any reference to judicial independence or rule of law. With this move the Commission sought a sound legal basis, but failed to address the real danger of violation of judicial independence posed by the Hungarian legislation. In the second one, after the CJEU ruled in its favor, the Commission failed to determine a proper remedy for the breach. It declared Hungary being in compliance with the judgment after the government and the former data protection ombudsperson agreed on financial reparation. Ultimately, the Commission won the early retirement case without any significant impact on the quality of rule of law and judicial independence in Hungary, and it left the data protection case totally unexploited just to avoid a possible further procedure due to the government's non-compliance with the CJEU ruling. Winning and closing the cases were of greater importance than remedying the substantial violation of EU law and values.

The Commission should clearly differentiate between infringements of “ordinary” EU law and issues with relevance to the fundamental values of the union. This could enable it to pursue different strategies in the two legal domains. With “ordinary” EU law, it could resume its largely selective infringement strategy aimed at the preservation of its unquestioned legal reputation. In parallel, the Commission could freely formulate its legal positions in Article 2 cases in a way that allows the CJEU to unfold a progressive interpretation of the treaties and advance EU law by its rulings, if the court wishes to do so.

Given the political environment in the EU that renders the protection of fundamental values via legislation nearly impossible, ensuring respect for EU law via CJEU case law is the last arrow in the institutions' quiver.

The European Commission must put its unchallenged legal reputation at stake, base its legal arguments on an extended and progressive interpretation of EU law, and hope that the CJEU will accommodate the its legal positions. If the situation in the Council does not change in favor of an

25 On these cases, see Halmi, Gábor (2017) 'The Early Retirement Age of the Hungarian Judges', In Fernanda Nicola and Bill Davies (eds.) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, 471–488.

open confrontation with Hungary and Poland, only a common legal position shared by the Commission and the CJEU can promise any success. Furthermore, such an approach could—at least partially—restore the position of the CJEU as the supreme interpreter of EU law even with regard to the protection of fundamental values, of which it has been largely deprived by the Commission's restrictive legal approach.

Above all, the Commission should choose its weapons wisely, not its battles. It should create via infringement procedures legal inputs for the CJEU that can destruct the extremely restrictive and sovereigntist interpretation of the Council's Legal Service on Articles 2 and 7 issues. This would make it more complicated for the Council to obstruct future legislative proposals that aim at guaranteeing democracy and rule of law with measures others than the Article 7 process.

## Political Bias Hampering Systemic and Impartial EU Actions

There is evidence that political groups represented in the European Parliament follow a politically biased approach toward the safeguarding and enforcing compliance of Article 2 values. According to one study, the ideological distance of the Parliament's political groups from a non-complying government was neither a sufficient, nor a necessary condition of the support for sanctions on Hungary after 2010 and Romania in 2012.<sup>26</sup> The party groups' ideological commitment toward the values of liberal democracy showed the highest correlation with the political readiness to sanction national governments violating Article 2 values. In short, the left, green and liberal political groups demonstrated higher commitment for the protection of European values than their right-conservative peers, and were more ready to sanction rogue governments even from their own political family. Therefore, left-leaning governments are more likely to be sanctioned for violating EU fundamental values than right-leaning ones. The suspension of the Slovak

26 Sedelmeier, Ulrich (2016), 'Protecting Democracy Inside the European Union? The Party Politics of Sanctioning Democratic Backsliding in the European Parliament', MAXCAP Working Paper Series No. 27. [www.maxcap-project.eu/system/files/maxcap\\_wp\\_27.pdf](http://www.maxcap-project.eu/system/files/maxcap_wp_27.pdf)

left-populist party Smer from the Party of European Socialists in 2006, the progressive parties' support for a straightforward European approach toward Romania's socialist government during the constitutional crisis in 2012, and the conservative European People's Party's reluctance to exert significant pressure on the Fidesz government in Hungary<sup>27</sup> or to suspend it support this claim.

However, in spite of the right-wing political groups' often reluctant approach toward European values, the European Parliament has been at the forefront of the protection of democracy and rule of law in the EU compared to the

“ *Partisan bias in the Commission was able to block it taking actions in certain cases* ”

Commission and the Council. Therefore, the question is whether and how the other two institutions are also influenced by party political considerations. Recent research and the Commission's traditional role concept rule out that partisan politics could have played any role in the Commission's approach toward the enforcement of rule of law in Poland and Hungary.<sup>28</sup> Scholars and Commission representatives argue instead that the Commission's decisions are mostly based on the national government's procedural compliance and its readiness to engage the Commission in a constructive dialogue.

However, interviews conducted for this paper point in another direction. Indeed, Commission officials working in primarily non-political positions (i.e. who were not or had not been members of the college of Commissioners or the cabinet of Commissioners) denied that partisanship could have played any role in the decisions of the institution on values compliance. However, all active and

<sup>27</sup> See Kelemen (2017), Europe's Other Democratic Deficit.

<sup>28</sup> Closa, Carlos (2018), 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance', *Journal of European Public Policy*, DOI: 10.1080/13501763.2018.1477822

former members and employees of the Commission in political positions confirmed the existence of party-political considerations, even if they all underlined that partisanship is neither the only, nor the most influential variable that explains the Commission's behavior.

Bearing this in mind, how should the Commission's diverging approach to Poland and Hungary be interpreted in light of alleged political bias? Partisanship may be an insufficient explanation on its own for the Commission's policy, but this does not mean that it is unimportant. As R. Daniel Kelemen has argued, there is “just enough partisan politics at the EU level to coddle local autocrats, but not enough to topple them.”<sup>29</sup>

The party-political considerations of Commissioners and Commission officials affiliated with the European People's Party (EPP) ultimately reinforced the Commission's selective approach and its readiness to tolerate the symbolic compliance of the Hungarian government instead of enforcing outcome compliance. Furthermore, the EPP's influence contributed to the Commission turning a deaf ear to the calls of the socialists, greens and liberals in the European Parliament for a more systemic and substantial protection for democracy and rule of law.

In this manner partisan bias in the Commission was able to block it taking actions in certain cases, but it was not powerful enough to mobilize the Commission for positive action. It contributed to the failure to act in the Hungarian case in a substantial manner and therefore also to its failure to address the issue of Article 2 properly.

Subjective political considerations other than partisanship have also had a significant impact on the Commission's activities, often in support of values compliance. The approach of the second Barroso Commission toward Hungary was much more determined and sometime even more confrontational than that of the Juncker Commission, even though in the first case the vice-president responsible for rule of law and fundamental values was Viviane Redding of the EPP, while in the second one it was Frans Timmermans

<sup>29</sup> Kelemen (2017), Europe's Other Democratic Deficit.

of the Progressive Alliance of Socialists and Democrats. Of course, the second Barroso Commission only had to struggle with Hungary, while the Juncker Commission has had to divide its political attention between Hungary and Poland. Nevertheless, the difference in the Commission's track record with regard to Hungary is still striking in these two periods. The puzzle might be explained by the personal ambitions and strategies of the two Commission vice-presidents.

Reding and Timmermans have had ambitions to become Commission president and they choose different strategies to pursue this goal. Reding used the issue of rule of law and fundamental values to build up her political image as an impartial Commission member highly engaged for European values and not intimidated by conflicts with member states. Therefore, she launched an unprecedented political offensive in the protection of the rights of Roma persons in France and Italy, tried to address the Hungarian and Romanian cases in a straightforward (if often ineffective) way, and contributed to the toolkit of rule-of-law enforcement with the Commission's Rule of Law Mechanism. In contrast, Timmerman's strategy appears to be mostly based on the enforcing of symbolic compliance and maintaining dialogue with the governments of Hungary and Poland. He only opts for coercive measures, like in the case of Poland, when these superficial goals cannot be fulfilled anymore.

Politicians' personal ambitions and strategies may be a limited explanation for how the EU institutions act, but they help understand how accidental the Commission's position can be and how it can be influenced by political variables, in strong contrast to the Commission's own legitimizing discourse that heavily emphasizes its politically neutral character.

## Proposals for Improvement

The European Commission's selective approach, preference for symbolic compliance, and high margin of discretion have had a largely negative impact on the enforcement of Article 2 values in the EU. This section scrutinizes the following three proposals that have been made to remedy the European democracy and rule of law crisis.

- The establishment of a comprehensive monitoring mechanism for the supervision of democracy, rule of law and fundamental rights in member states, through a "Copenhagen Commission"<sup>30</sup> or a "Union Pact for democracy, the rule of law and fundamental rights".
- The creation of a rule of law peer review mechanism in the Council, and
- The Commission's proposal on the introduction of rule-of-law conditionality for EU funds.<sup>31</sup>

The analysis below looks at how each could enhance the protection of Article 2 values, reduce selectivity and symbolic compliance, and alter a rogue government's political cost-benefit calculations.

## A Comprehensive Monitoring Mechanism

Considering the scarcity of implementable European legal norms at the field, the fact that the European Commission is currently the single organ responsible for the evaluation and enforcement of the compliance with Article 2 values constitutes a significant political burden for it, and doubles the negative impact of its selective and superficial approach. The creation of a comprehensive mechanism for monitoring democracy, rule of law, and fundamental rights in member states could ease the burden for the Commission. This could allow it to focus on its enforcement role. Complemented by early-warning and "red card" functions, such a mechanism could significantly enhance the protection of fundamental values. It could provide a systematic and objective analysis of the facts on ground, and free the evaluation phase from the shortcomings associated with the Commission's discretionary approach.

30 Müller (2013), What, if Anything, is Wrong with a Copenhagen Commission?

31 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the member states, [https://ec.europa.eu/commission/sites/beta-political/files/protection-union-budget-rule-law-may2018\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/protection-union-budget-rule-law-may2018_en.pdf)

The Commission should keep its right to disagree with the conclusions of the monitoring mechanism or to refuse the launch of enforcement. In such cases it should provide a detailed explanation of its decision. The political costs of such a decision would be definitively higher for the Commission than today when evaluation and enforcement of values compliance is firmly in its hands.

The monitoring mechanism should be equipped with a preventive and an emergency function based on early-warning and “red card” principles. It should determine and provide an early warning for the European institutions that a rapid or substantial decrease in the quality of democracy, rule of law and fundamental rights may pose a significant threat for the systemic compliance of a member state. Based on thorough and careful evaluation of the situation, the mechanism should also determine whether the autocratization process of a member state hollows out Article 2 values to such an extent that it constitutes a systemic breach of democracy, the rule of law or fundamental rights. Such a “red card” should be automatically considered as a call for triggering the Article 7 procedure, even if no legal coupling can exist between the two procedures. Triggering Article 7 would remain the responsibility of the institutions and member states under the treaties. However, the exercise of their discretionary power would be embedded in a rather different political environment with the determination of non-compliance with Article 2 values carried out by an independent institution. Only enforcement would remain in the main EU institution’s hands. Such an institutional setting could put the Council and the Commission under increased political pressure to decrease the arbitrary exertion of their discretionary power in the field of fundamental values, and to provide a detailed and credible explanation if their position diverges from the findings and recommendations of the monitoring mechanism.

The key question is how a comprehensive monitoring mechanism should be organized to guarantee the highest possible independence, efficiency, objectivity and impartiality. The various existing proposals represent three options. Monitoring can be either outsourced to a non-EU organ with significant expertise, like the Venice Commission, a new EU institution can be established, or

the mandate of the EU’s Fundamental Rights Agency (FRA) can be amended appropriately to that end.<sup>32</sup>

The first option can be ruled out as outsourcing the monitoring of member states to a non-EU organ raises significant political and legal concerns; first of all since non-EU institutions could create political (and perhaps also legal) effects for EU citizens. Using the CJEU’s

“ *The key question is how a comprehensive monitoring mechanism should be organized to guarantee the highest possible independence, efficiency, objectivity and impartiality* ”

opinion on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms as an analogy, its refusal to such a solution is likely. With regard to the second and the third options, creating a panel of experts as an independent EU institution or amending the FRA’s mandate would require unanimity in the Council, as both pieces of legislation would be based on Article 352 TFEU, which enables actions outside of the scope of the treaties if such actions are required to attain the objectives of the union within the scope of policies defined by the treaties.

According to the DRF proposal, the panel of experts would be established by the European Parliament; hence, it would be practically a body subordinated to it. This would hardly generate any added value in comparison to the current situation, as the panel would suffer from the same lack of perceived political weight as the Parliament does in the field of protecting European values. If the Commission and the Council are not responsive to the proposals and initiatives of the Parliament, it is not clear

<sup>32</sup> Schulte, Juliane (ed.) (2018), *The Other Democratic Deficit – A Toolbox for the EU to Safeguard Democracy in Member States*. Friedrich-Ebert-Stiftung: Berlin. <http://library.fes.de/pdf-files/id-moe/14371.pdf>

why they would recognize the legitimacy and conclusions of a panel of experts it appoints.

Therefore, it would be better to amend the FRA's mandate and to introduce a comprehensive annual DRF monitoring exercise for all member states under the aegis of the agency. This exercise would not be as resource-intensive as some suggests.<sup>33</sup> Member states should not have any comprehensive reporting obligation within its scope, they only should provide specific information if requested. Existing democracy-monitoring projects demonstrate that gathering the required information is possible without any collaboration by the state in question, which contributes to the independence and objectivity of the exercise. Furthermore, although rule of law and fundamental rights constitute key dimensions of liberal democracy, democracy as such is a much more complex phenomenon that it could be evaluated only from the perspective of the law. Bearing in mind that no international organization has experience with comprehensive democracy monitoring, using the methodology of widely recognized and ongoing research projects at least partially as blueprint would be desirable for the prospective EU monitoring organ.

Convincing all members of the Council to amend the mandate of the FRA must be part of a broader political deal. The lack of objective benchmarks and procedural frames for the evaluation of the quality of rule of law is one of the Council's Legal Service's key objections against the Commission's rule-of-law conditionality proposal. If the FRA could be tasked to perform the DRF monitoring exercise independently, impartially, and based on a solid methodology, this could provide the objective evaluation for rule-of-law conditionality. Significant political leverage would be required to convince the governments of Poland, Hungary and several other member states that are uncomfortable about enhanced democracy and rule-of-law monitoring.

Bearing in mind that the only current political setting that enables the exertion of such amount of political leverage are the ongoing negotiations over the EU's multiannual financial framework (MFF), the issues of a monitoring mechanism and rule-of-law conditionality should be placed together on the table. This could enable a genuine

<sup>33</sup> Ibid.

compromise among the institutions and member states. The Commission and the "friends of rule of law" group could get the conditionality they desire and the Parliament an amended but potent DRF Pact, while the sovereignist member states could be reassured by the separation of rule-of-law evaluation and enforcement as well as an objective monitoring mechanism that applies to all and does not impose a special treatment on anyone.

The Council, the Commission, and the Parliament are apparently at a crossroads. Either they find common ground on the future institutional frames for the protection of Article 2 values, or they keep following their individual approaches, which significantly increases institutional complexity while rendering protecting the values almost impossible due to lack of cooperation. In such a case the Parliament can establish its own panel of experts, the Council can introduce its own rule-of-law peer-review procedure, and the Commission can stick to its own unlimited margin of discretion in addressing Article 2 issues. From the current perspective the latter scenario appears to be more plausible, but it is perhaps not too late to start working on the cooperative one.

### *Rule of Law Peer Review in the Council*

The rule-of-law peer-review mechanism proposed by Prime Minister Charles Michel of Belgium<sup>34</sup> and supported by the "friends of rule of law" group can be considered a direct development of the current rule-of-law dialogue in the Council. Without questioning the good faith of its supporters, the proposal is a low-ambition effort that might be able to win majority in the Council and demonstrate some symbolic commitment by the member states to safeguarding the rule of law. But it also has counterproductive effects. Instead of arguing for inter-institutional solutions, the proposal reaffirms the restrictive approach of the Council's Legal Service that Article 2 issues can only be addressed via the Article 7 procedure or in the Council.

<sup>34</sup> Belgian PM: EU needs 'peer review' system on rule of law, Politico, 3 May 2018, <https://www.politico.eu/article/europe-rule-of-law-charles-michel-belgian-pm-needs-peer-review-system/>

Bearing in mind the sovereignist tradition of the Council, the respectful and careful approach of the member states to each other, and the complete lack of any results of the rule-of-law dialogue since 2015, the Council's peer review will hardly have any positive impact on the quality of rule of law if the member states supporting the initiative are not ready to threaten offenders with "biting intergovernmentalism"<sup>35</sup> and refer them to the CJEU on the basis of Article 259 TFEU, due to failure to fulfil their obligations under the treaties.

With the help of Article 259 TFEU, member states could re-establish the interpretation supremacy of the court in Article 2 cases and bring before it all the questions that the Commission refused to bring. However, this largely ignores the reality of relations among member states. "Biting intergovernmentalism" may be a tempting idea, but whether even the most committed friends of rule of law (for example, Luxembourg, the Netherlands, Sweden or Belgium) would be ready to refer another member state to the court is extremely doubtful.

### *Rule-of-Law Conditionality for EU Funds*

The European Commission's 2018 proposal about the possible suspension of European Structural and Investment Funds payments to member states due to systemic breaches of rule of law has attracted considerable attention. Among the member states it is also supported by France, Germany and the "friends of rule of law group." Regardless of the Council's Legal Service unconvincing objections, it has a sound legal basis in Article 322 TFEU, which states that EU institutions are authorized to determine the rules of establishing, implementing and auditing the EU budget, and thus allows the introduction of conditionality through ordinary legislative procedure. However, the initiative is rather plagued by political concerns.

There are deeply rooted fears that the mechanism would widen the cleavage between Western and Central Eastern European member states, as it implies that deficiencies in

<sup>35</sup> Kochenov, Dimitry (2015) 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool', Jean Monnet Working Paper Series 11/15, <https://jeanmonnetprogram.org/paper/biting-intergovernmentalism-the-case-for-the-reinvention-of-article-259-tfeu-to-make-it-a-viable-rule-of-law-enforcement-tool/>

democracy and rule of law are primarily problems of the poorer "new" members that are net beneficiaries of the funds.<sup>36</sup> Furthermore, based on the experience of the dealing with Austria in 2000, when the other members suspended bilateral relations with its government following the coalition agreement that included the radical-right Austrian Freedom Party, conditionality could backfire and diminish pro-EU attitudes, which are still high in the Central and Eastern European societies, especially in Poland and Hungary.

While they are important, these objections overlook crucial arguments. First, they reject a measure that could create effective political leverage over member states that are mostly affected by Article 2 compliance problems with the argument that it is not able to create equal political leverage over every member state. Yet no measure can create equal leverage over all members; for example, even if conditionality would be extended to all EU funds, including the European Agricultural Guarantee Fund that most members benefit from. Member states are embedded in the internal market and EU redistributive policies in very different ways, which renders the idea of an ideal measure that does not discriminate among them and exerts the same level of political leverage over them simply unrealistic.

The example of the 2012 constitutional crisis in Romania demonstrated that the establishing of issue linkages and the exertion of hard political leverage are the most effective tools to enforce compliance with liberal democratic values. The bundling of Romania's Schengen accession to the rule-of-law situation in the country is a textbook example of that approach. The move, which was spearheaded by Germany and the Netherlands, was not in conformity with European law, as the Commission repeatedly emphasized, but it did not constitute a violation of EU law either. Above all, it was triggered by sufficient political will, which is the most important condition for political issue linkages. To date, the Romanian crisis has been the only occasion when

<sup>36</sup> Steinbeis, Maximilian (2017) 'The Hand on the Faucet', *Verfassungsblog*, 3 June 2017, <https://verfassungsblog.de/the-hand-on-the-faucet/> and Michelot, Martin 'How Can Europe Repair Breaches of Rule of Law', *Notre Europe Policy Paper No.221*, Jacques Delors Institute, 4 April 2018, <http://institutdelors.eu/wp-content/uploads/2018/04/BreachesoftheRuleofLaw-Michelot-March18.pdf>

member states effectively exerted significant political pressure on a norm-breaking peer.

From this perspective, the creation now of appropriate political leverage by rule-of-law conditionality over net recipients of EU funds is a unique opportunity that could have a significant impact on the autocratization process of Poland and Hungary, and that could prevent others like Romania and Slovakia from following the same path. Non-compliance with Article 2 values is an EU-wide phenomenon, but the threat is not identical in all member states. Bulgaria, Croatia, Italy, Malta, Romania, and Slovakia have significant problems with the rule of law, political corruption, and the independence of media. But only in Hungary and Poland has a conscious autocratization process driven by the governing elites' ideological motivations and power calculations systemically altered the quality of the political system and led to a defective democracy and a competitive authoritarian regime. The violation of liberal democratic values in the EU is predominantly a Central and Eastern European, and above all a Polish and Hungarian, problem. Therefore, in the absence of ideal solutions, the EU tools to address breaches of Article 2 values may be adjusted to the political reality of the challenge.

“ *A permanent mechanism should be created for monitoring democracy, rule of law and fundamental rights in the member states* ”

Concerning the potential impact on pro-EU attitudes in these countries, the picture is more complex. In the Austrian case in 2000, member states sanctioned the political composition of the country's governing coalition while EU fundamental values were not under serious threat. From this perspective, the negative impact of this overreaction on the attitudes of Austrian society toward the EU was understandable, and the repeated later references to the Austrian crisis are flawed. The situation in Central and Eastern European countries

is fundamentally different. Large parts of Polish and Hungarian society are aware of the autocratization in their countries and expect a greater engagement from the EU. Furthermore, the political legitimacy of the PiS and Fidesz governments is largely based on their welfare policies and economic performance, which depend on EU financial transfers. While the Commission's proposal safeguards the ultimate beneficiaries of these funds (citizens, municipalities and companies) by making it the governments' obligation to implement EU cohesion programs and make appropriate payments even without the EU financial flows, the economic and financial pressure may alter the political cost-benefit calculations of rogue governments and allow a return to some compliance with liberal democratic values.

The proposal of rule-of-law conditionality for EU funds represents the first serious attempt by influential member states to deploy political leverage in defense of Article 2 values since the Romanian constitutional crises in 2012. Given the advanced autocratization of Poland and Hungary, as well as the general democratic backsliding in the EU, the union as community based on liberal democratic values cannot allow itself to miss this chance.

## Conclusion

To overcome the current situation in which institutional traditions and political settings prevent the EU from exploit the potential in the framework of EU law for the protection of democracy and rule of law, EU institutions—especially the European Commission—have to reconsider significantly their approaches.

In contrast to its current strategy, which is characterized by the arbitrary use of discretionary power and the acceptance of symbolic compliance, the Commission has to differentiate between Article 2 constitutional issues and matters of “ordinary” EU law, and has to develop an enhanced constitutional mind-set that insists on member states' substantial output compliance with EU values and, if required, systematically enforces it.

Instead of the inter-institutional power struggles that often block valuable initiatives, the main EU institutions,

especially the Commission and the Parliament, have to engage in constructive cooperation to overcome the legal and policy deadlock.

The CJEU's position as supreme interpreter of EU law should be restored, including with regard to Article 2 and 7 issues. Instead of maintaining the legal interpretation duopoly of the Commission and the Council's Legal Service that is largely responsible for the lack of legal innovation in this field, the Commission should create via infringement procedures legal inputs for the CJEU that allows the court to unfold a progressive interpretation of the treaties and the development of EU law.

A permanent mechanism should be created for monitoring democracy, rule of law and fundamental rights in the member states, based on the Parliament's proposal for a DRF Pact and by the amendment of the Fundamental Rights Agency's mandate. The independent, objective, and universal monitoring that the mechanism could provide could address all the important concerns of member states

over the Commission's MFF rule-of-law conditionality proposal.

A return to Article 2 compliance is highly unlikely without putting pressure on autocratizing national elites and altering their political cost-benefit calculations. The MFF rule-of-law conditionality proposal is the only current initiative that creates political issue linkage and offers solid political leverage over rogue member states. As most criticism toward its allegedly discriminatory character can easily be dispelled and the proposal is well-tailored to the political realities of the European rule of law crisis, the initiative must remain in the political forefront and put through the MFF negotiations without any weakening. For this purpose, the complementary character of the comprehensive monitoring mechanism and rule-of-law conditionality proposals should be better recognized and it should be considered that their parallel introduction could represent a genuine compromise among the diverging interests of various EU institutions and member states.

# Acknowledgments

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Beside qualitative documentary research, the study is largely based on more than 30 structured stakeholder interviews conducted in Brussels in September and October 2018. The interviewees covered the whole EU institutional spectrum and all relevant political segments of European politics, including active and former members of the European Commission, staff members of commissioners, representatives of the Commission's Legal Service, the Directorate-General for Justice and Consumers and other Directorate-Generals, several members of the European Parliament from the European People's Party, the Progressive Alliance of Socialists and Democrats, the Alliance of Liberals and Democrats for Europe, and the Greens, experts of parliamentary groups and committees, members of the Council's administration, diplomats of member states' permanent representations to the EU, think tankers and journalists. I would like to express my sincere gratitude to all interviewees who supported the research with their insights.

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