European University Institute

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

GLOBAL GOVERNANCE Programme

Issue 2015/01
May 2015

The EU needs a better and fairer scrutiny procedure over Rule of Law compliance

Carlos Closa [1]

POLICY BRIEF

Highlights

Recent events in some Member States show that the EU's values (article 2, TEU), in particular the Rule of Law, are not exempt from being challenged. Constitutional changes in Hungary, executive non-compliance with constitutional court rulings in Romania, and expulsion of Bulgarian and Hungarian Roma citizens in France are some of the episodes that illustrate these challenges.

Article 7 provides a mechanism for securing Member States´ compliance with the values contained in article 2. However, its potential devastating effects makes it unsuitable for an early reaction to potential threats. Hence, the EU needs to equip itself with a better procedure for scrutinising Member States' compliance with the Rule of Law for which the EU Commission and the European Council have proposed alternative instruments. Rather than adding a new proposal, a number of principles outlined in the recommendations should inspire this new mechanism.

ISSN 2314-9698
QM-AM-15-001-EN-N

1 Professor Carlos Closa <carlos.closa@eui.eu> is Co-Director of the Global Governance Programme research area "European, Transnational and Global Governance" at the of the European University Institute.

Background

Constitutional and legal changes in Hungary triggered concerns regarding the EU's ability to enforce Member States' compliance with the Rule of Law principles contained in article 2 of the Lisbon Treaty (TEU). Both the Venice Commission and the European Parliament (EP) extensively documented how these changes contradicted European common standards and some scholars have considered them "constitutional capture" or "backsliding" of constitutional essence. Events in Romania (involving the governmental defiance of a constitutional court ruling) and France (whose government expelled Bulgarian and Romanian Roma citizens) contributed to increased concerns about the availability and effectiveness of EU instruments in dealing with challenges to the Rule of Law. These concerns are by no means new. In the past, the accession to government of Haider's far-right party in Austria led to the adoption of bilateral sanctions, even though no specific act (beyond Haider's programme and declarations) could be identified as being against EU values.

The EU has applied different instruments in each of these situations. In the Romanian case, the *Cooperation and Verification Mechanism* agreed with both Bulgaria and Romania as part of their accession treaties provides a lawful way for the European Commission (EC) to monitor the situation and give it leverage for obtaining compliance. In the French case, bilateral dialogue between the EC and the French government halted the expulsion of the Roma population which had started. In the Hungarian case however, the combination of infringement cases brought to the European Court of Justice (ECJ), coupled with political pressure, has not succeeded in redressing the effects of the changes, and attempts at backsliding have not receded. In the summer of 2014, Orbán proclaimed his intention of turning the country into an "illiberal" democracy based on the models of Russia and China, arguing that he did not think that "*European Union membership precludes building an illiberal state based on national foundations*". In spring 2015, Orbán launched a very controversial national consultation on migration. He also supported a renewed discussion on the re-introduction of the death penalty. On 30 April 2015, European Parliament leaders decided to discuss this and requested the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to consider the issue.

The EU has not activated the instrument specifically designed to deal with breaches of this kind, that is, article 7 TEU, which introduces three stages of a procedure that ranges from noticing to sanctioning Member States for breaching the values sanctioned in article 2 TEU (respect for human dignity, freedom, equality, the Rule of Law and respect for human rights). The

common perception is that article 7 works as a nuclear bomb: its effects could be so devastating that no-one is really prepared to pull the trigger. This inability to use the "nuclear" option creates what Commissioner Reding, among others, described as the *Copenhagen dilemma* (in reality, a paradox): whilst the EU has the instruments to scrutinise applicants' compliance with the *acquis* on values listed in article 2, no procedure exists to monitor compliance by *actual members*.

Box 1: A new EU framework to strengthen the Rule of Law

The Framework contains three main elements:

- the definition of the ***situations*** which would activate the procedure
- the identification of the ***principles inspiring action*** and
- the ***stages of the procedure***.

Situations respond to the notion of "systemic threats" (for which the Commission referred to consolidated case-law definitions), excluding individual breaches of fundamental rights or miscarriages of justice. However, the notion of "systemic threats" remains undefined and this has activated calls for further clarification.

Principles. The Commission identified the following four principles: finding a solution through *dialogue with the concerned Member State*; ensuring an *objective and thorough assessment* of the situation; respecting the *principle of equal treatment* and indicating *swift and concrete actions*. Among these, equality is the key principle, given the persisting suspicions and allegations of a discriminatory attitude towards states becoming EU members after 2004.

Stages. The Commission designed a three-stage process: assessment, recommendation and follow-up.

In the *assessment* stage, the Commission would gather information and would initiate a political dialogue with the concerned state. Exchanges and dialogue would remain confidential (with the expectation that the duty of sincere cooperation will prevent any further and/or irreversible measure by the member state). On the downside, confidentiality reduces coercion since it impedes naming and shaming.

If the first stage does not produce the sought results, the Commission would activate the second: a "Rule of Law" *recommendation* which would identify the source of concerns and recommend the Member State to address them. The Commission may also recommend specific measures to be taken. Commissioner Reding explicitly argued that article 7 TEU could be interpreted using the model of the infringement procedure (article 258 TFEU).

Finally, the *follow-up* stage leads to the possibility of activating one of the mechanisms of article 7 TEU, although this did not result in any way automatically from previous stages.

The Commission Framework on the Rule of Law

Against this background, both the EP and national governments have claimed the need for alternative/additional solutions, and in February 2014 the EC established ***A new EU framework to strengthen the Rule of Law (see box 1)***. The Commission cautiously presented it as a residual instrument to be activated only in cases of "*systemic threats*" to the Rule of Law in Member States. The Framework will only operate when national mechanisms cease to operate effectively. It does not substitute any existing instruments; rather, it complements procedures envisaged in article 258 of the Treaty on the Functioning of the European Union (TFEU) (infringement) and article 7 TEU. Despite responding to EP and governmental demands, the Framework attracted criticism. Thus, the Council's Legal Service issued an Opinion arguing that the absence of solid and unambiguous competence by the Commission made its proposed procedure incompatible with the principle of conferral[2]. The Legal Service did not question the Commission´s competence *ratione materiae*, but denied that the legal basis for the procedures developed in the new Framework existed[3].

For the Council's Legal Service, *there is no legal basis (…) to create a new supervision mechanism of the respect of the Rule of Law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abased its powers by deciding without a legal basis*. But the Legal Service did not explicitly question the heart of the matter, i.e. the "assessment stage", which involved precisely such interaction, meaning the insertion of a political dialogue between the Commission and the state in question (beyond the fact that article 7 TEU does not explicitly entitle the Commission to make a recommendation). As for the argument that the Framework amends, supplements or modifies article 7 TEU, it seems clear that the proposal may be taken as a supplement but with little legal implications: it leads only to the first stage of article 7 (i.e. Commission initiative).

2 Council of the European Union Opinion of the Legal Service Commission's Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties Doc 10296/14 http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf

3 See an additional criticism of the Council Legal Service Opinion in Dimitry Kochenov et Laurent Pech Renforcer le respect de l'État de droit dans l'UE : Regards critiques sur les nouveaux mécanismes proposés par la Commission et le Conseil Question d'Europe n°356 11 mai 2015 http://www.robert-schuman.eu/fr/doc/questions-d-europe/qe-356-fr.pdf

4 UK Government Review of the balance of Competences between the UK and the EU-EU enlargement (December 2014). Para 2.116: The Government does not accept the need for a new EU rule of law framework applying to all Member States. There are already mechanisms in place to protect EU common values and a further EU mechanism would risk undermining the clear roles for the Council and the European Council in the area.

5 See UK House of Commons European Scrutiny Committee Documents considered by the Committee on 7 May 2014 - Commission Communication: A new EU Framework to strengthen the Rule of Law http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliii/8304.htm

Hence, it does not change the procedure. Moreover, as the Roma case in France proves, discrete dialogue between the Commission and individual Member States may well take place and provide for solutions, in the absence of a clear and explicit procedure.

The British government also criticised the Framework, lamenting the duplication of already existing institutions and procedures to deal with the issue, and the undermining of the role of Member States in the Council as a consequence of the enhanced role of the Commission[4]. The House of Commons endorsed and amplified this critique and added its own concerns regarding the uncertainty about what, precisely, would activate the Framework[5].

In reality, the Framework does not duplicate existing institutions or procedures. It adds a preparatory stage for the Commission in relation to its own position under article 7. Similarly, the "enhanced" role of the Commission would hardly affect Member States' position. In fact, political pressures from large Member States have deeply limited the role of the Commission in other infringement procedures (i.e. Excessive Deficit Procedure). The criticism concerning uncertainty, however, is fair: the values in article 2 are highly unspecified and they face systematic problems of definition. The same applies to the notion of "systemic breach", which the Commission struggled to define. Having said that, the criticism not only affects the Framework, but article 7 itself, which establishes such highly unspecified provisions (for example, the highly vague notion of clear risk of a serious breach in art. 7.1).

The Alternative European Council Mechanism

Against this background, the European Council approved a different mechanism in December 2014. The December summit *conclusions* outlined a mechanism, its principles, its limitations and some procedural aspects, all of them highly unspecific both in terms of their meaning and reach, as well as their legal implications. The new mechanism is simply a "dialogue among all Member States" and is aimed at promoting and protecting the Rule of Law. What such dialogue should be remains very vague and undefined:

The Council may propose debating "thematic subject matters".

The European Council set three limitations for this dialogue: the principle of conferred competences, respect for national identities of Member States and their essential state functions, and adherence to the principle of sincere cooperation. The excessive guarding principles behind this mechanism can be seen through the literal interpretation of the first limitation: Respecting the principle of conferred competences may lead to the somehow ridiculous conclusion that no dialogue may take place between Ministers of Member States regarding competences that are not conferred to the EU!

The European Council identified the principles upon which the debate should be based: objectivity, non-discrimination and equal treatment of all Member States. The Dialogue should proceed as a non-partisan and evidence-based approach. Whilst the latter principle refers to some kind of fact-finding, the EC has avoided mentioning the different alternatives discussed (such as the Copenhagen Commission, the Venice Commission, etc.). The EC has preferred to refer to the principle of complementarity as an indirect mechanism for gathering facts: *dialogue will be developed in a way which is complementary with other EU Institutions and International Organisations, avoiding duplication and taking into account existing instruments and expertise in this area.*

The European Council mechanism raises a significant number of criticisms. It is based on the lowest possible level of formalisation: disregarding even some of the soft-law instruments available, such as Decisions or Declarations, the new instrument merely emanates from one of the points in the "conclusions". It is also entirely undefined and avoids targeting breaches. Moreover, obligation to implement it is next to none: Member States "commit" themselves to merely establishing the mechanism. In addition, the new procedure marks a total shift towards an intergovernmental approach to resolving issues: the General Affairs Council of Ministers will meet once a year to discuss the themes, and its preparation is entrusted to the COREPER and the Presidency of the Council. No role is envisaged for the EP, nor the Commission, or for any other EU body. Hence, no external control on governments exists *a priori*. Finally, the potential consequences of the dialogue seem to be inexistent (although a pious interpretation may argue that the Council may go for bold decisions). The new dialogue is in fact deprived of any coercion power, even in its softer form: the procedure does not mention peer review (or, indeed, any kind of review!). Furthermore, there is no explicit obligation of making public the dialogue itself or its conclusions thus avoiding public scrutiny and even the soft coercion mechanisms associated with naming and shaming.

Policy Recommendations

The events of the past years show that the EU cannot disregard any future challenge to the Rule of Law in Member States. So far, available instruments have not proven their worth to deal with these issues. On the one hand, activation of article 7 presents severe difficulties due to its nuclear character. On the other hand, the European Council has settled for a harmless instrument whose inefficacy is predictable. Within this context, the Commission Framework, despite its limitations, remains a better instrument. The below recommendations should be taken into account either in the implementation of existing instruments or in the design of new ones.

1. Rather than defining the Rule of Law in formal substantive terms, its compliance should be assessed in relation to common or shared standards. One way could be referring to the set of indicators and criteria specified in already existing documents (such as those of the Venice Commission and EU Commission). The same applies to "systemic threats" which are nowhere defined, despite existing agreements on the kind of situations that will trigger action. The Assessment of compliance to the Rule of Law should be done by comparing best practices.

2. The existence of different procedures dealing with Rule of Law compliance may convey a perception of inequality as regards the treatment of different Member States. A single procedure translates better the principle of equal treatment.

3. A regular monitoring mechanism of the compliance of Member States with the Rule of Law should be put into practice. An 'incidental' review (i.e. one activated by specific events and/or demanded by some parties) leaves too large a margin of appreciation as to whether or not to activate the mechanism.

4. The EU should take advantage of the expertise of the Venice Commission to respond to the request for independent expertise, so as to avoid duplication and ensure a consolidated know-how.

5. A fair hearing principle should be established to guarantee fair treatment for offending states, meaning (as proposed by the Austrian government) that "any Member State [under scrutiny] must be given the possibility to explain its position to all the other Member States at all stages in the procedure."

6. The ECJ should be given the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach.

Global Governance Programme
Robert Schuman Centre
for Advanced Studies

European University Institute
Villa La Fonte
Via delle Fontanelle, 18
50014 San Domenico di Fiesole - Italy

Contact GGP Outreach Coordinator:
Eleonora.Carcascio@eui.eu

The Global Governance Programme

The Global Governance Programme (GGP) is research turned into action. It provides a European setting to conduct research at the highest level and promote synergies between the worlds of research and policy-making, to generate ideas and identify creative an innovative solutions to global challenges.

The Programme is part of the Robert Schuman Centre for Advanced Studies of the European University Institute, a world-reknowned academic institution. It receives financial support from the European Commission through the European Union budget.

Complete information on our activities can be found online at: *globalgovernanceprogramme.eui.eu*