CIVIL LIBERTIES UNION FOR EUROPE

# *Brief overview and analysis of tools available to the EU to protect pluralist democracy, the rule of law and fundamental rights*

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*February 2019*

*Prepared for the roundtable discussion on the rule of law in Poland and Hungary in the Standing Committee on European Affairs of the Netherlands House of Representatives, 14 February 2019*

## *Key points:*

- Infringement procedures are a helpful tool to rectify specific violations of EU law but cannot be used to counter systematic attempts to dismantle institutional guarantees to protect pluralist democracy, the rule of law and fundamental rights.

- The rule of law framework allows the Commission to engage a government in dialogue and issue non-binding recommendations, where a government seriously interferes with the independence of the judiciary. The procedure is ineffective at securing compliance from governments that are unwilling to cooperate. But the framework does help to induce political will in the Council to discuss the government under examination, which can then lead to the Article 7 procedure.

- The Article 7 procedure allows the Council to sanction a government that seriously and persistently violates democratic pluralism, the rule of law and fundamental rights. However, the procedure first has to pass through multiple stages and secure large majorities or unanimity. There does not appear to be sufficient political will in the Council to complete these stages, which in turn lessens the deterrent effect of Article 7.

- The rule of law dialogue in the Council, in practice, has been used to discuss topics that are tangential to the rule of law without meaningful examination of problematic developments. Some governments want to upgrade this process to a more effective peer review system.

- Regular monitoring does not exist yet at EU level. Creating a periodic monitoring exercise examining the situation in all EU countries could help with early identification of problems and also ensure political considerations do not shield countries of concern from scrutiny.

- Linking access to EU funds to respect for rule of law is currently under negotiation and if approved would be an effective tool to deter and correct governments undermining democratic pluralism, the rule of law and fundamental rights.

- EU financial support for rights and democracy groups inside the Union is under negotiation but is meeting resistance from the Commission and Council. This would be an important complement to top-down tools that apply political pressure. This is because it would create public support for, and increase the resilience of, democratic pluralism, the rule of law and fundamental rights in the face of attacks from populist authoritarians.

# I. Introduction

This paper offers a brief overview of the tools available to the EU to protect pluralist democracy, the rule of law and fundamental rights inside its member countries. These three pillars of the modern European state are guaranteed by Article 2 of the Treaty on European Union. According to Article 2, they are the values commonly shared by European countries, and the values on which the EU is founded. Any country wishing to join the EU is required to demonstrate that it has sufficient institutional and legal guarantees in place to implement these values. The architects of the EU assumed that once a country had joined the Union, it would continue to adhere to Article 2 values. As such, the EU's powers to deal with member countries that violate Article 2 values are minimal and poorly designed. There are currently certain legislative proposals and diplomatic initiatives that could provide the EU with more appropriate tools, but it is far from certain that these will come to fruition.

# II. Infringement procedures

Infringement procedures are the Commission's go-to tool for trying to bring a government that is breaking EU law back into line with the rules. It is not a very effective tool for protecting Article 2 values for three reasons.

First, relatively few rights are protected by specific pieces of EU legislation. Notable exceptions are the prohibition on discrimination and hate crime, the protection of personal data, some guarantees for victims of trafficking and victims of crime and criminal suspects, and certain standards of treatment for asylum seekers. But for the most part, when the Commission wants to protect Article 2 values, it has to be more creative. For example, early in Hungarian Prime Minister Orbán's tenure, the Commission won a case against Hungary over the forced early retirement of judges, which was designed to purge senior members of the judiciary. But the Commission argued this case on the basis of age discrimination, not on the basis of protecting judicial independence.

Although the Charter of Fundamental Rights is legally binding, it is primarily designed to make sure that the EU itself respects fundamental rights. National authorities are only obliged to respect the Charter when they are implementing a piece of EU law. The Charter does not have a life of its own - it piggy-backs on other pieces of EU legislation. Because of this, if the Commission wants to proceed against a government before the European Court of Justice to protect fundamental rights, it will usually need to find a relevant piece of EU legislation unconnected to Article 2 values, and then argue that the way that the government is implementing this rule is a violation of the Charter of Fundamental Rights. For example, recently, the Commission has taken Hungary's government to court over national laws designed to starve NGOs of funding. In short, the Commission's argument is that the government is implementing EU rules on free movement of capital in a way that violates the freedom of association protected by the Charter.

The second problem with infringement procedures is that they are designed for executing surgical strikes on problematic pieces of legislation. But they are not very effective against broad concerted reforms designed to destroy the division of powers. For example, the case that the Commission won against Hungary over the early retirement of judges did not prevent the government from purging the judiciary. Only around one fifth of the judges were returned to post, and not necessarily to their original positions. But technically, the government complied with the judgment. Similarly, the Commission won another case against the Hungarian government over the premature termination of the mandate of the data protection ombudsman. Nevertheless, the ruling did nothing to prevent the government creating a new data protection authority headed by a political appointee.

The third problem is that the Commission has complete discretion over whether to bring infringement proceedings. Which means that the protection of Article 2 is subject to the Commission's political will. For example, it took the Commission over a decade to begin proceedings against certain Member States under the Racial Equality Directive despite well-documented discrimination against Roma. The current Commission has shown greater willingness to protect Article 2 values. This is evident from its case to protect NGO funding in Hungary as well as its case against Poland to protect judicial independence. But there is no guarantee this approach will continue once the next Commission is appointed and this does not remedy the other shortcomings of infringement procedures as a way of protecting Article 2 values. For example, although a recent interim judgment of the European Court of Justice has obliged the Polish government to remove a recent provision forcibly retiring judges over 65, this represents one positive development among countless other steps against the Polish judiciary.

## *III. Rule of law framework*

In response to a call from the Council to create some kind of new mechanism that was more powerful than infringement proceedings and more easily activated than Article 7, the Commission created its 'framework on the rule of law' in 2014. The framework sets out a process of dialogue to be followed in cases where a government has created a systematic threat to the rule of law. The process concludes with the Commission issuing non-binding recommendations to be implemented by the government in question. This author and many in academia criticised the rule of law framework as half-hearted and self-defeating. Mostly because it relies on the goodwill of the targeted government to voluntarily repair the situation – goodwill that is unlikely to exist if the government is deliberately and seriously sabotaging the rule of law. We have seen a clear demonstration of this weakness in the Commission's dialogue with Poland, whose government ignored, mocked and rebuked the Commission and its recommendations. A second shortcoming of the framework is that it relies on political will for activation. This explains why the framework has not been used in relation to Hungary, despite the

fact that Hungary's problems run deeper and have a longer history. A third problem with the framework is that the Commission will only trigger it in cases of systemic problems with the judiciary. This means that other serious government interferences with standards covered by Article 2 like media independence, the right to peaceful protest or free and fair elections, are not protected.

For all its shortcomings, the rule of law framework can serve a useful purpose, which has been seen in the case of Poland. If the Commission pursues dialogue with a government exhaustively and a government refuses to cooperate, it will become politically more difficult for the Council not to discuss the situation in that country. As such, the rule of law framework can help to ratchet up political will among governments that are normally reluctant to discuss each other's internal rights situations.

## III. A. Why Poland and not Hungary?

The Commission has been criticised for not activating its rule of law framework in relation to Hungary. Objectively speaking, Hungary's situation is still worse than Poland's. Legally, it is difficult to make the case that the difference in treatment in justified. The Commission's line on Poland has been that the government is acting in contradiction to its own constitution in the way that it has interfered with its judiciary. This suggests that the Commission regards Hungary as a different case because everything that Orbán has managed to do (including clipping the wings of the highest courts and packing them with friendly judges) has been in line with national law. But this is because his super-majority has allowed him to change the constitution whenever he needed to.

The real reason Hungary's government has escaped the pressure facing Poland is that the ruling party, Fidesz, belongs to the largest political grouping in the European Parliament, the European People's Party (EPP). This group has shielded the Hungarian government from criticism. After years of unity, splits have emerged in the EPP and much of the group's MEPs voted in favour of activating the Article 7 procedure against Hungary in September 2018. Nevertheless, since that vote, the EPP appears to have once again closed ranks around Fidesz in the run-up to European elections.

This situation has hitherto meant that the Commission knew it probably would not have support among the member states in the Council if it triggered Article 7. In Poland's case, however, the ruling Law and Justice party belongs to a relatively small group in the European Parliament, the European Conservatives and Reformists (ECR), which has been unable to protect it. This has allowed stronger criticism of the Polish government to emerge from the Commission and the European Parliament.

# IV. Article 7

Article 7 of the Treaty on European Union sets out a three-stage procedure that can be triggered in the event of serious violations of Article 2 values, and that can eventually lead to sanctions being taken against the government in question. Article 7 proceedings are currently open in relation to Poland (triggered by the Commission in December 2017) and Hungary (triggered by the European Parliament in September 2018). Although it can be triggered by the Commission or Parliament, the Article 7 procedure takes place in the Council among national governments. The procedure had never been used before December 2017. There has traditionally been an absolute taboo in the Council on governments discussing each other's rights records at all. The first time this happened was in May 2017 when the Commission placed Poland on the Council's agenda to inform governments about the lack of progress under the rule of law framework.

Article 7(1) sets out the first stage of proceedings. Under Article 7(1), the Council may make a statement to the effect that there is a 'clear risk of a serious' violation of the basic rights and freedoms listed in Article 2 of the Treaty on European Union. This has to be supported by 22 of the EU's 28 governments. Governments in the Council are also allowed to issue a government with recommendations before taking this vote. There's no time limit for how long the Council can take with this stage. Governments can decide just to keep the issue on their agenda and drag talks out for months. We've seen this happen with the Polish government. Talks with Poland and Hungary are likely to remain in this limbo stage of Article 7(1) without a vote. This is because governments that want to protect Article 2 are not sure that there are 22 governments willing to use Article 7. At the same time, keeping talks open under Article 7(1) allows those governments willing to protect Article 2 values to exert some political pressure on Hungary and Poland.

If a vote under Article 7(1) were to pass, the Council could move to the second stage under Article 7(2). This allows the Council to vote again, but this time make a statement to the effect that there is 'a serious and persistent' violation of basic rights and freedoms. This vote has to pass unanimously (minus the country that's being examined). The obvious obstacle to this happening in practice is that the Polish and Hungarian governments have promised to protect each other and block this vote if the day ever comes. Some academics have said that the Council could get around this by taking a vote in this second stage of Article 7 on both countries at the same time. That would exclude both of them from the vote at the same time so they couldn't protect each other. It's not clear if this would be legally acceptable.

If there were a successful vote under stage two against Hungary or Poland and there was no improvement at national level, then the Council could move to stage three. It is under this stage that the Council could, finally, decide to take some kind of sanctioning measure. This decision has to pass by a 'qualified majority' vote – basically, this means 16 governments out of 28.

A sanction under Article 7 can be any measure that takes away a right that a country gets when it joins the EU. The example cited most often is that a government could lose its voting rights, which would stop it having a say on which laws the EU passes. But governments get many privileges when they join the EU, including free trade across European borders, the ability to move money and buy and sell services anywhere in the EU, not to mention being able to take part in the hundreds of meetings where laws and policies are decided. Sanctions could also be something more symbolic, like not translating EU documents into the language of the targeted government, or not promoting citizens of the targeted country to top civil servant positions.

It is difficult to see signs that the Article 7(1) procedure is currently effective at making the Polish and Hungarian governments reverse course and restore respect for Article 2 values. Ultimately, the coercive power of Article 7 lies in the activation of sanctions. For as long as the Polish and Hungarian governments believe that the procedure will never reach this stage, they may be unlikely to change course.

## V. Rule of law dialogue

In 2014 the Council started holding an annual 'rule of law dialogue' with the stated aim of protecting the rule of law in the EU. To date, there have been four such 'dialogues'. The current practice is for the government in charge of the EU presidency to pick a topic, hold a preparatory expert meeting, prepare a background paper and then have a discussion of half a day or shorter in the General Affairs Council. The topics chosen so far have been digitisation (Luxembourg presidency, 2015) the integration of migrants (Netherlands presidency, 2016), disinformation (Estonian presidency, 2017) and trust in public institutions (Austrian presidency, 2018). The dialogues are occasions where ministers can share experiences of challenges and successes on the topic in question. They are not designed to allow for any review of how governments are performing on the rule of law, there is no opportunity for governments to engage each other about their track records, they do not tend to address thorny topics such as judicial or media independence, and there is no opportunity to address individualised recommendations to specific governments.

It is difficult to say that the exercise has any meaningful impact on the protection of Article 2 values. An opportunity to improve the rule of law dialogue came about under the Slovakian presidency of the EU in 2016, which conducted an evaluation. However, there was insufficient will among governments to turn the dialogue into a meaningful process where governments review each other's performances, identify challenges, and address each other with recommendations. Another evaluation is due to take place before the end of 2019, which might allow for the dialogue to be developed into a useful process. For a number of years, the Belgian government has been trying to convince other governments to convert the rule of law dialogue into a meaningful peer review mechanism, based on the example of the United Nations Universal Periodic Review. A

paper by Liberties with suggestions on how to improve the rule of law dialogue along these lines was published in 2015.

## VI. Future measures to protect Article 2 values

The traditional powers available to the EU to protect Article 2 values are poorly adapted to dealing with governments that have a deliberate agenda to systematically dismantle democracy, the rule of law and fundamental rights. Infringement procedures are too focused on legal specificities to deal with policies that attack institutions and the balance of powers. The rule of law framework is toothless and has been applied selectively. The rule of law dialogue is not even designed to deal with problematic governments. The threat of Article 7's sanctions appear to be too politically unrealistic to coax governments back into compliance. And the political selectiveness of all these procedures prevents Article 2 values being watched over with an even hand. If the EU is to protect Article 2 values from being eroded, it will need to develop new tools.

## VI. A. Regular monitoring process

All EU countries are subject to procedures under the United Nations and the Council of Europe that periodically review their compliance with a range of treaties covering Article 2 values, to which all EU member states are parties. It should be noted that while the Fundamental Rights Agency (FRA) of the EU carries out research on the state of fundamental rights across the EU, its reporting is not currently designed as a review of member states: the FRA does not issue individualised assessments or recommendations. Additionally, the FRA can only examine fundamental rights to the extent that they are covered by EU law. Nevertheless, there is plenty of information readily available about how governments are performing, as well as clear and authoritative recommendations from UN and Council of Europe bodies. However, the UN and Council of Europe have minimal means to encourage compliance with their recommendations. Calls for the EU to create a regular process to monitor the implementation of Article 2 values have been made for a number of years. The most effective way of doing this, would be to collect existing monitoring reports produced by international bodies and use these as the basis of discussions between EU bodies and national governments.

The most high-profile suggestion for a regular monitoring procedure at EU level has come from the European Parliament, which adopted a resolution requesting the Commission to propose the creation of a 'Democracy, Rule of Law, Fundamental Rights' (DRF) pact. This resolution outlined a mechanism that would periodically review all EU countries to check their compliance with Article 2 values. The suggestion would have brought together the rule of law framework and rule of law dialogue, strengthened them, and added new elements

to create an overarching system of oversight and dialogue. The Commission, which has the right to introduce new legislative proposals, did not act on the European Parliament's request to draw up a proposal for the DRF pact. This is probably because the Commission was well aware of the lack of appetite among governments to strengthen even the modest rule of law dialogue in the Council. As such, it was clear that any Commission proposal would not have received enough support from national governments. There is currently no legislative proposal for a DRF pact. In anticipation of this reaction from the Commission, Liberties published a paper with suggestions as to how the European Parliament could establish its own periodic review procedure, independently of the Commission and Council, in 2016.

A regular monitoring system that examined all countries automatically would be beneficial for at least two reasons. First, it would ensure that all situations are examined and remove the possibility that governments are shielded from scrutiny by their political families. Second, it would allow erosions in Article 2 values to be scrutinised, and perhaps prevented, at an early stage, rather than when the problems have already become too serious to rectify easily.

## *VI. B. Linking access to EU funding to respect for Article 2 values*

In March 2018 Liberties published a paper outlining two suggestions for how the EU could use its new Multiannual Financial Framework (the EU's new seven-year spending plan) to protect and promote Article 2 values. The first suggestion outlined how the EU could tweak and clarify existing EU rules concerning the proper oversight of how EU funds are spent at national level. By making minor amendments to its financial rules, the EU could cut the flow of EU funding to governments that interfered with the independence and effectiveness of their judiciaries. This is because the national judiciary is the ultimate check on whether national authorities checking on the proper spending of EU funds are working correctly. This suggestion was taken on and developed by the Commission's later proposal, which is currently under negotiation in the Council. The European Parliament has adopted its negotiating position on the Commission's proposal which is supportive, as well as suggesting some improvements. The Council's own legal service has cast doubt on the legality of the Commission's proposal, though experts have convincingly argued that the legal service's advice, which is not legally binding, is of poor quality.

The Commission's proposal would offer the EU a tangible and effective deterrent against governments that interfere with their judiciaries and prosecutors. First, the proposal would allow the Commission to activate the mechanism on its own initiative - it would take a majority of governments in the Council to actively block the procedure once the Commission had activated it. This would help to overcome reticence among governments to openly sanction their peers. Second, the proposal would allow for the flow of EU funding to be paused or

cut, which could have a significant economic impact. The main flaw of the proposal is that the Commission has not included a means for ensuring that EU funding continues to flow to the innocent end beneficiaries of EU funding, whom the measure is ultimately designed to protect. This could be achieved if the Commission were prepared to take over management of funds and disburse them directly to end beneficiaries in the event that funding to national authorities is cut off.

## *VI. C. Bottom-up measures to support Article 2 values*

Most of the focus in policy debates at EU level has been on top-down measures. That is, laws and procedures that would allow the EU to apply political pressure to governments that are taking retrogressive measures in violation of Article 2 values. Such measures are necessary, but they are not sufficient. The governments in question were elected by voters. The deeper problem is that significant amounts of the electorate seem not to understand the importance of Article 2 values. Politicians with authoritarian agendas have become increasingly successful at convincing the electorate to reject independent courts, civil liberties and free and fair elections. It is not possible to preserve Article 2 values at national level unless they have broad grassroots support.

The EU and its governments understand this, and accordingly they provide significant financial support to rights and democracy groups in countries outside the EU to support their transition to democracy. The EU allocated at least 2bn EUR to civil society groups outside the EU for this purpose from 2014-2021. But the EU does not provide similar support to civil society groups inside the EU. Inside its member countries, EU funding is available to civil society organisations to carry out activities such as training officials, carrying out research, informing the public about EU-level decision-making or town-twinning. The funding is confined to working on fundamental rights issues only to the extent that there are particular pieces of EU legislation in place. Groups working at local level tend not to be eligible for funding, and funding is usually available only for short-term projects, which hinders the financial sustainability of civil society organisations. Inside its member countries, the EU essentially treats NGOs as subcontractors helping to implement EU law and policy, rather than as an essential pillar of support for Article 2 values. A further compounding problem is that Article 2 values tend to be under greater threat across the EU, and that governments are increasingly trying to inhibit the work of rights and democracy groups, including by cutting funding. Non-governmental organisations (NGOs) working on Article 2 values tend to have to rely on private philanthropies and financial support from the Norwegian government. The latter is the largest single source of funding for NGOs promoting Article 2 values in the EU.

Liberties has suggested the creation of a 'European Values Instrument' to provide rights and democracy groups inside the EU with

funding that is accessible to national and local NGOs working to promote and protect pluralist democracy, the rule of law and fundamental rights. Funding should cover activities like public education, public mobilisation, litigation and advocacy, and it should allow NGOs to become financially sustainable and plan ahead. The size of the fund should match the amount the EU dedicates to support civil society outside the Union. This suggestion has been endorsed by the European Parliament. As part of its package of proposals under the Multiannual Financial Framework, the Commission has published a proposal for a 'Rights and Values' funding programme. However, this programme effectively ensures the continuation of existing funding programmes, which do not provide the help needed. This funding programme is still under negotiation. The European Parliament's negotiating position is that the Commission's proposal should be amended to, in effect, incorporate a 'European Values Instrument', with a commensurate increase in budget for the programme. The negotiating position of the Council amounts to an endorsement of the Commission's proposal.

## VII. Concluding remarks

Populist authoritarian parties appear to be increasing their political power across the EU. Their agendas include attacks on the independence of the judiciary, media independence and civic participation, as well as on fundamental rights standards. The EU is ill equipped to deal with governments actively dismantling Article 2 values. It requires new powers that are easier to activate, not hampered by political considerations and better designed to deal with systemic problems. But the EU cannot protect Article 2 values through top-down measures alone. Unless the EU invests in civil society groups that can protect and promote Article 2 values, grassroots support among the general population may not be strong enough to prevent rights-respecting pluralist democracies under the rule of law from eroding.

## Relevant Liberties publications:

Butler, I., 'Analysis of the Commission's proposal for a Rights and Values programme', June 2018

Butler, I., 'Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs', March 2018

Butler, I., 'Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU', August 2017

Butler, I., 'How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue', January 2016

Butler, I., 'The rule of law dialogue: Five ideas for future EU presidencies', December 2015

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