BRIEFING PAPER 49
JUNE 2014

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DEMOCRACY REPORTING INTERNATIONAL

TOWARDS A NEW DEAL FOR DEMOCRACY IN EUROPE

MAKING THE EU'S ROLE IN PROTECTING FUNDAMENTAL VALUES EFFECTIVE

EXECUTIVE SUMMARY

In recent years, there has been a wide-spread debate on how to protect the values on which the European Union is founded. These are democracy, human rights and the rule of law, enshrined in Article 2 EU Treaty. The developments in Hungary have raised particular concerns. The Council of Europe's Venice Commission considered them a serious 'threat to democracy'.

In response to the debate, the European Commission published a Communication in March 2014, laying out a new 'rule of law framework', designed to address potential systemic threats to the rule of law in EU member states. The Communication is a good step to end impunity in what constitutes a major threat to European values: a new authoritarianism that maintains the facades of a democratic state - elections are held, courts continue their work, soldiers stay in the barracks – but it undermines the essential democratic architecture behind these facades: Electoral majorities cement their ideologies, they re-compose key institutions such as constitutional courts, they ignore essential guarantees for opposition parties, manipulate electoral arrangements and stifle or manipulate the media sector.

While sanctions against such violations have already been available under Article 7 EU Treaty, imposing these would require a willingness by the European Council, the representation of member states, to act. So far the member states have not shown an inclination to do so.

The new rule of law framework now gives a more significant role to the Commission. It will, in a first step, address such concerns through a structured political interaction with the concerned member state, based on a Commission assessment and recommendation. When these do not result in change, Article 7 could be triggered and may lead to sanctions, including the suspension of voting rights. The new framework thus provides for a 'pre-Article 7 procedure' that is lighter and more flexible than the process foreseen in Article 7.

The framework creates accountability and responsibility of EU bodies by putting the Commission squarely in the centre of the process. To adapt Henry Kissinger's reported phrase: In case of a rule of law crisis in a member state, it is clear then which number to dial – the Commission's number.[1] The framework also respects the principal of subsidiarity by foreseeing a Commission role only in cases of a 'systemic threat' – when a member states' rule of law guarantees stop working effectively - against values of Article 2. In other words, the framework is not a catch-all weapon against any kind of rule of law deficiency.

While the new framework is a good step, a lot must happen still for it to become effective. The terms of engagement appear too focused on the rule of law, while new authoritarianism often constitutes a threat to democracy through legal machinations. As the Hungary example shows, rule of law may actually be used as an argument to defend new authoritarianism: Hungary's government has significantly changed the country's constitution and replaced constitutional court judges with party sympathisers. Rather than openly fighting for its ideology on the market place of ideas and elections, it has cemented

[1] Henry Kissinger is reported to have asked: "Who do I call if I want to speak to Europe?". However, it has been reported that Kissinger never said this. See http://blogs.ft.com/the-world/2009/07/kissinger-never-wanted-to-dial-europe/

and shielded it in wide-ranging legal protections. Any future challenge to these arrangements will be decried as a challenge to the rule of law, even if it enjoyed significant democratic backing.

If the EU Commission wants to ensure that the new rule of law framework becomes an effective measure against such situations, it should at least use a wide definition of the rule of law, including a democratic law-making process and guarantees for democratic pluralism, to be able to address all aspects of new authoritarianism.

A general challenge of these democracy and rule of law crises is a vague regulatory framework at the level of the EU. The Communication on the framework only begins to address this. A number of democratic guarantees are considered self-evident in the EU and member states, rather than laid out in positive law. The Commission has stronger legal grounds to force a member state to respect noise emissions of lawn-mowers that are sold in the EU, than to do anything about a member state's government that sends all its constitutional court judges into retirement and appoints ideologically sympathetic judges instead.

Significantly more needs to be done here. On the one hand, the international and European regulatory framework should be established in detail and communicated clearly. All EU member states have numerous freely accepted obligations under international law to respect the rule of law, democracy and human rights, for example under the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The jurisprudence of the European Court of Human Rights and the authoritative interpretations of the ICCPR by the UN's Human Rights Committee have revealed many features of these obligations that are relevant for addressing the challenges of new authoritarianism, such as guarantees for media pluralism or an independent judiciary. Furthermore, the constitutional traditions of member states, forming part of the EU's legal order, provide an untapped resource for identifying legal obligations for democratic governance.

Beyond establishing more clearly safeguards already in place, the EU should develop a more in-depth regulatory framework to protect democratic institutions and the rule of law in member states. As a first step, the European Parliament should adopt a resolution on "Democracy in Europe," providing the details that are missing elsewhere. A resolution being a soft law instrument, adoption would be easier and the drafting of a resolution would provide an opportunity for the European constitutional law community to deepen the European understanding of the foundations of a rule of law bound democratic order.

The framework makes clear that the Commission will draw on any reliable source in making its assessment. The many European bodies which deal with aspects of democratic governance should support the Commission and explicitly indicate when they spot a systemic threat to Article 2 values. This could be done for example by the European Court of Justice, by the Fundamental Rights Agency, by the Council of Europe's Venice Commission and by the Organization for Security and Co-operation in Europe.

RECOMMENDATIONS:

- Having established a framework that is lighter than the Article 7 procedure, the Commission should not hesitate applying the framework immediately.
- The relevant Directorate General Justice should be allocated the necessary resources to fulfil the task.
- The Council and the European Parliament should endorse the framework in order to strengthen the EU's responses to systemic threats; in the interest of clear accountability they should accept the Commission's leading role under this framework.
- The European Parliament should adopt a resolution on "Democracy in Europe," providing more detailed rules on democratic governance than are currently available.
- The expert community in academia, civil society and governments should clearly establish and effectively communicate already existing obligations for democratic governance under international and European law.
- The European Court of Justice and the European Court for Human Rights should be sensitive in their case law to 'systemic threats' of Article 2 values and express such concerns in their decisions.
- The Fundamental Rights Agency should develop its work in relation to Article 2 values, in particular democracy and the rule of law. It should adopt a position on the new rule of law framework and it could be tasked by the European Parliament to make proposals for a stronger Article 2 framework.
- The Council of Europe's Venice Commission has been at the forefront of analysing and making recommendations in countries with re-emerging authoritarianism in EU member states and beyond. Its case law provides rich grounds for understanding the foundations of constitutional democracy. The Venice Commission should be strengthened and it should provide clear signals to the EU when it has serious concerns, for example by explicitly indicating 'systemic risks to the rule of law.'
- The Organization for Security and Co-operation in Europe, and in particular its Office for Democratic Institutions and Human Rights tasked with election observation, should use the language of 'systemic threats' explicitly when it finds serious shortcomings in elections.

1. INTRODUCTION

In the last years there has been a wide-spread debate on how to protect the fundamental values on which the EU is founded according to Article 2 EU Treaty, namely democracy, human rights and the rule of law. The developments in Hungary, called by the Council of Europe's Venice Commission a 'threat to democracy', raise particular concerns.

There has been a sense that the EU system has a gap. While Article 2 makes clear that these values form the basis of the EU, the main procedure available to sanction backsliding – Article 7 - is not being used.

Many proposals have been made to address the problem, as documented in DRI's last Briefing Paper on the issue[2]. In the meantime the European Commission issued a new Communication laying out how it intends to respond in the future to such crises: "A new EU Framework to strengthen the Rule of Law".

The Commission's framework is immediately effective.[3] This Briefing Paper assesses to which degree it responds to the problem, how it could be effectively implemented and how the other EU institutions could relate to the proposal.

2. THE KEY ELEMENTS OF THE NEW FRAMEWORK

The new Rule of Law Framework the Commission adopted on 11 March 2014 complements the procedure of Article 7 TEU. Article 7 can be triggered in cases of a "clear risk of a serious breach of the values referred to in Article 2," and in case of a "serious and persistent breach" the Council may suspend rights of that member state under the treaty, including its voting rights in the Council.

The new rule of law framework can be seen as a preparatory process for starting an Article 7 action. It allows the Commission to enter into an exchange with a member state when it has concerns, without having to immediately launch the Article 7 procedure.

Rule of law as a legally binding constitutional principle is, according to the Commission, "one of the main values", "the backbone of democracy", which justifies its enhanced protection. The Commission's communication and its annex lay out the defining principles of the rule of law. They include legality, legal certainty, prohibition of arbitrariness of the executive power, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.
The Commission has no intention to use the framework whenever a principle may be in question but only when there is a 'systemic threat' to the rule of law: "where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure rule of law".[4]

While notifying the Commission of the possible existence of a systemic threat can be done by anyone–the member states, the European Parliament, stakeholders, and national court networks are cited as an example–the Commission is the central institution in the whole procedure set in this new framework.

The new rule of law framework foresees the following steps by the Commission:

1. The commission **assesses** whether there are indications for a systemic threat to the rule of law. If so , it

2. Sends a '**rule of law**' opinion to the member state concerned as a basis of a dialogue to resolve the issue. This part of the procedure is to a certain extent, confidential.

3. In case the member state in question is not taking appropriate action to address the issue, the Commission issues as '**rule of law recommendation**'. The main content of the recommendations will be published.

4. The Commission then **monitors follow-up** of the recommendation and if it is not satisfied, it will consider triggering the Article 7 procedure.

During the process, the European Parliament and the Council will be kept "regularly and closely informed".

3. THE POSITIVE ASPECTS

The Communication acknowledges the acute problem of insufficient response mechanisms to Article 2 crises: "... current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law".

With many commentators considering that Article 7 is the only rule in the Treaty dealing with Article 2 violations, the design of a 'pre-Article 7' process makes sense, even if more creative interpretations of the treaty would have been possible (see below).

The process outlined by the Commission creates a clear sense of **accountability**, in itself an important feature of a democracy. It puts the Commission, as the guardian of the Treaty, in the centre of the process. While it opens the door for the use of external expertise, such as the Council of Europe or the Fundamental Rights Agency, the responsibility for the assessment, dialogue and recommendation rests with the Commission. This clear allocation of authority and responsibility for the process is welcome.

To paraphrase the old Kissinger saying: there is one number to call when Article 2 values come under attack; it is the Commission's number. Furthermore, political crises that will trigger the mechanism are usually characterised by a degree of fluidity and dynamism, which call for one institution to be in charge and to respond quickly and directly. It is also positive in terms

[2] Briefing Paper 43, November 2013, *Proposals for New Tools to protect EU Values: an overview*, available at: http://www.democracy-reporting.org/where-we-work/europe.html
[3] "(...) the new rule of law framework is now in place and operational.", Viviane Reading, Vice-President of the European Commission, speech at the Centre for European Policy Studies, 20 June 2014.
[4] Communication, page 6.

of accountability that the proposed mechanism is clear and easy to understand.

The proposed solution is furthermore in line with the principle of **subsidiarity**. The Communication stresses that threats that trigger the mechanism must be of 'systemic nature', characterised among others by a 'lack of domestic redress'. It is appropriate that the EU would only act where national mechanisms stop functioning.

Crises occur in any democracy and can be solved by democracies. The EU's role should enter the stage only when domestic mechanisms stop working. As we argue in this paper, the core threat to Article 2 values is indeed the targeted dismantling of domestic checks and balances – here the EU's involvement is called for.

4. CRITIQUE

4.1. A Cautious Approach

The Commission's interpretation of Article 7 being the only effective preventive mechanism for Article 2 values is also a cautious interpretation of the Treaty, even if shared by many commentators who assume that Article 7 is *lex specialis* for Article 2 violations, not allowing other routes, such as infringement procedures. The bolder alternative to this soft law pre-Article 7 process would have been to develop infringement procedures more systematically, for example by bundling various cases, which amount to a violation of Article 2, as proposed by Kim Lane Scheppele from Princeton.[5]

There have been a range of other proposals for more forceful legal options. Armin von Bogdandy from the Max Planck Institute proposed to set aside the presumption that EU member states respect fundamental rights, in case there are *systemic* violations. In such a situation, the Court of Justice of the European Union (CJEU) would be competent to decide all matters of fundamental rights in a member state, regardless of the normal scope of fundamental rights in the EU; i.e. the limitations of Article 51 of the Charter would not apply anymore.[6] Other authors went even further, proposing to extend the scope of the Charter in all cases[7] or to interpret Articles 258-260 TFEU broadly in order to include cases of threat to the Article 2 values.[8]

The CJEU has demonstrated in the past that it is willing to make leaps in the interpretation of EU law.[9] Indeed where fundamental concerns of democracy are in play, High Courts often fill general provisions, such as Article 2, with specific content. One needs to look no further than the German Federal Constitutional Court in Karlsruhe, which built wide-ranging case law on the slim constitutional wording of the need to protect the "free-democratic order" ("freiheitlich-demokratische Grundordnung"). By applying a more forceful interpretation of the EU Treaty, for example through infringement procedures, the Commission could explore the CJEU's willingness to protect fundamental values. The approach of the communication does not open opportunities for the CJEU to develop its case law on Article 2.

The Commission's caution can be explained by various factors, among them the novelty of the challenge for an institution more attuned to economic issues, serious internal tensions due to the Euro crisis and upcoming EP elections with virulent campaigns by Eurosceptic parties.

4.2. What Problem to Solve?

The Communication is not very specific on what problem it seeks to solve. It indicates that "recent events in some member states have demonstrated that a lack of respect for the rule of law can become a serious concern". This vague reference and problematic description results in a solution, which may be too narrow.

The biggest challenge to Article 2 values appears to be the targeted dismantling of checks and balances that characterise a democratic state based on the rule of law. It typically involves the destruction of effective checks by the constitutional or other courts, the weakening of independent state bodies, the reduction of the role of parliament, the narrowing of media pluralism and, more often than not, the tampering with electoral arrangements. The end result tends to be a plebiscitary, winner-takes-all arrangement entrenching dominant rule by one party or a leading political figure. This new authoritarianism[10] does not abolish democratic institutions; instead, it rather weakens them, if not turning them into mere facades. Such challenges to Article 2 values are more difficult to deal with than the in-your-face 20th century-type *coup d'États* or official one-party rule, which expressly did away with democracy. Berlusconi's Italy showed some symptoms and the EU's squabbles with Slovakia under Meciar in the late 1990s had to deal with these phenomena. The combined features of new

[5] Kim Lane Scheppele, *What can the European Commission do when Member States violate basic Principles of the European Union? – The case of Systemic infringement Action*, Princeton University, November 2013

[6] Armin Von Bogdandy, *Reverse Solange – Protecting the essence of fundamental rights against EU Member States*, CML Rev 49 : 489-520, 2012, ed. Kluwer Law International, United Kingdom

[7] András Jakab, *Supremacy of the EU Charter in National Courts in Purely Domestic Cases,* 27 March 2013, available at: http://www.vergassungsblog.de/en/hungary-taking-action-andras-jakab/#.unuafbcb6ij; Eleanor Spaventa, *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects*, CMLRev 45: 13–45, 2008, Kluwer Law International, Netherlands; Opinion of Advocate General Sharpston delivered on 30 September 2010 (C-34/09) *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*

[8] Israel Butler, *Policy brief: how to monitor the Rule of Law, Democracy and Fundamental Rights in the EU*, Open Society European Policy Institute - Open Society Foundations, August 2013, available at http://www.opensocietyfoundations.org/sites/default/files/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf

[9] For instance when it introduced Fundamental Rights in the EU legal order with *Stauder v. Stadt Ulm* 1969 (C-29/69), see also: *Internationale Handelsgesellschaft mbH v. Einfuhr- und Voratsstelle für Getreide und Futtermittel* 1970 (C-11/70); More recently in the context of EU citizenship: *Ruiz Zambrano* 2011 (C-34/09), and for the interpretation of the Charter: *Melloni* 2013 (C-399/11)

[10] About new authoritarianism, see for instance: Jan Werner-Müller, *Europe's other crisis: Authoritarianism,* Open Democracy, 10 December 2011, available at: http://www.opendemocracy.net/jan-werner-mueller/europe%E2%80%99s-other-crisis-authoritarianism;

authoritarianism should be the target of EU action under Article 2.

4.3. A Rule of Law Problem?

The question then is if new authoritarianism is a rule of law problem. The definition provided by the communication provides useful elements.

- **Principle of legality,** which includes a *"transparent, accountable, democratic and pluralistic process of enacting the laws"*
- **Legal certainty,** which requires that *"rules are clear and predictable and cannot be retrospectively changed"*
- **Prohibition of arbitrariness of the executive powers**
- **Independent and effective judicial review including the respect for fundamental rights**
- **Right to a fair trial** implying also an operational separation of powers in order to ensure an independent and effective judicial review
- **Equality before the law**.

Positively the communication does not take a merely formal approach to defining these concepts. For example it highlights that legality is premised on a democratic process of law-making. Often reforms aimed at a more authoritarian political system are formally legal under their constitutions. The way that 'systemic deficiency' is described (see below) further strengthens the notion that the framework addresses new authoritarianism, a systematic attempt to undermine democratic institutions.

However, by focussing only on the rule of law the Commission is in risk of giving too little attention to other aspects of new authoritarianism which are more difficult to conceptualise as a rule of law issue, for example the weakening of media pluralism, wide-spread political corruption or tampering with electoral arrangements. There may even be situations where an already more entrenched authoritarian system tries to weaken democratic decision-making by stressing rule of law arguments. Many analysts see the Hungarian reforms as an attempt to put massive limitations on the margin of manoeuvre of future parliaments by cementing the government's political ideology in the constitution and cardinal laws. Thus in the future there may be a tension between the concept of the rule of law and democratic decision-making, with entrenched authoritarianism defending itself on the basis of the former.

In the Commission's view, the rule of law is at the centre of these concerns because any type of democracy or human rights problem should in principle be solved domestically through appropriate remedies. Only where domestic rule of law mechanisms fail, the EU is called for. This reasoning makes sense, but it mixes two issues namely: *when* should the EU act and *why*? The rule of law nexus answers the *when* (systemic violation when no domestic redress works) but does not say enough about the *why*. The why should include attacks on the rule of law as much as attacks on democratic institutions.

4.4. 'Systemic Threats'

The communication notes:

> "The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.
>
> The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.
>
> The main purpose of the framework is to address threats to the rule of law, which are of systemic nature."

The communication is sufficiently clear in requiring a situation characterised by action or omission of authorities related to the systematic dismantling of rule of law institutions. Even a badly designed constitutional court reform may not necessarily be a trigger for action as long as it is not part of a broader tendency to weaken checks and balances.

While the notion of a systematic threat makes sense to ensure that the new framework does not become a wide catch-all tool for any kind of limited problem, it could be argued that in case of systemic deficiency Article 7 should apply straight away. 'Systemic threat' seems to be similar to the Article 7 threshold of "a clear risk of a serious breach by a Member State of values referred to in Article 2".

Given the wide-spread reluctance of applying Article 7 – underpinned by exaggerated rhetoric of it being a 'nuclear option' – the framework could thus be seen as an attempt to create a process which is initially softer, easier to manage, more face-saving and easier to trigger than Article 7. If so, the Commission should not show the reluctance that the institutions have generally shown to apply Article 7 in critical situations.

At the practical level, the Directorate-General Justice of the Commission should be strengthened to have resources for effective responses to Article 2 crises.

5. Democracy's Black Hole

A regular feature of neo-authoritarian governments is a claim that all they do is lawful and nowhere prohibited. It is indeed a paradox of international and European law alike that technical issues are regulated in greatest detail, while essential ques-

tions of democratic governance tend to remain under-regulated. It is forbidden in EU law to market lawnmowers that are noisy beyond a defined limit[11], but it is nowhere explicitly stated that one cannot send all your constitutional and supreme court judges into retirement at a stroke by reducing the judges' retirement age[12], or to re-write a constitution in 24 hours. The absence of such rules often give a sense that judgements on democracy are a matter of "I know it when I see it" rather than legal analysis.

The field is however not entirely void of regulation. A wide range of details have been determined in hard law, such as various international and regional human rights instruments and soft law, such as reporting by international bodies and political commitments. Democracy Reporting International, together with The Carter Center, published an overview of such sources of law.[13] In the electoral field in particular there have been wide-ranging attempts to solidify an international understanding of the necessary features of democratic elections.

Within the EU systematic efforts should be made to establish a body of essential rules of constitutional democracy. These could be based on several sources:

- Compiling relevant existing hard and soft law from international, regional (Council of Europe, OSCE, OECD, etc.) and EU sources;
- Compiling relevant cases and legislation from EU member state practice representing "constitutional traditions common to the member states" (Article 6 III EU Treaty). Indeed, comparison can be a powerful tool for identifying questionable arrangements;
- Develop the EU's legal framework further.

As far as the last point is concerned, it seems difficult to straightaway develop a hard law instrument on democratic practice. However, the European Parliament could take a lead role by adopting a resolution on "Democracy in Europe" aimed at addressing key issues, which are under-regulated. A resolution would only have soft law value, but would provide useful orientation to the other EU institutions and member states governments and could become hard law over time. The exact content of such a resolution would need to be carefully researched and established.

One example may illustrate what issues a resolution could cover. One concern in Hungary was the speed in which some constitutional reforms were adopted as well as the process: Instead of bills tabled by the coalition parties, they were submitted as private member bills which could be adopted in a shortened procedure without consultations. In January 2012, a new and equally problematic procedure was adopted: if two thirds of the parliament approves–the governing party already had 2/3 of the majority–a bill can go from first proposal to final vote, with much shorter debate.[14]

These practices represent "I know undemocratic conduct when I see it" situations, as does the case of the retirement of constitutional court judges (see footnote no. 16). There was no objective justification to use such shortcuts that left the opposition out of the process. An EP resolution could state something along the lines of: "Significant constitutional amendments or the writing of a new constitution should be undertaken through a careful and inclusive process providing sufficient time, a due role to the opposition, as well as time and space for a public debate. The only exception may be objective urgencies, where essential public interests may suffer significant harm."

6. THE ROLE OF OTHER BODIES

The Commission communication does not propose any specific role for other EU bodies. It mentions merely that the EP and the Council shall be kept "regularly and closely informed of progress made in each of the stages" (page 8).

It is now up to the Council and the EP to define their positions towards the communication. Given the manifest need for stronger EU action in this field, the two institutions should endorse the communication, and define their roles in a way that strengthens the impact of the framework.

As far as the **Council** is concerned, the problem has been an absence of any procedure for tabling Article 2 problems in Council meetings. Any attempt to do so would have required some member states to demand the review of practices in another member state; a sort of 'blaming' that member state

[11] Philipp Stephens, *Why Europe needs cross-border lawnmower regulations,* Financial times, 15 October 2013, available at: http://www.ft.com/intl/cms/s/0/ac04efc8-34c8-11e3-a13a-00144feab7de.html#axzz311r0NfQQ

[12] As happened in Hungary. The EU's only legal tool was an infringement procedure on age discrimination which the ECJ confirmed. However, it did not change the facts on the ground; none of the judges returned to the job, see: Case C-286/12, Commission v. Hungary, 2012; See also Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age,* Parts I & II, available at: http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-i/#.U1-C5FfUOih and http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-ii/#.U1-DLFfUOig; See also the Venice Commission's opinion on this and wider judiciary issues, 16-17 March 2012, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282012%29001-e

[13] Strengthening International Law to Support Democratic Governance and Genuine Elections, Democracy Reporting International and The Carter Center, April 2012

[14] See Kim Lane Scheppele & Gábor Halmai ed, *Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the transitional provisions of the Fundamental Law and the Key Cardinal Laws,* 2012, available at: http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf
and Venice Commission, Opinion on the fourth amendment to the fundamental law of Hungary, 17 June 2013, paras129-134, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29012-e

governments are generally unwilling to do. The Council should see the new framework as an opportunity to solve this problem and resolve to automatically put respect of Article 2 values in a given member state on the agenda, once the Commission has announced that it has sent a 'rule of law opinion' to that member state. A finding by the Commission as the guardian of the treaty that a member state faces a systemic threat to the rule of law should be reason enough for all member states to discuss the case. At the same time the Council should refrain from adopting their own conclusions on such cases, because they could differ from the Commission's findings, thereby weakening the entire framework. Accountability would be seriously blurred if both institutions would start pronouncing on the issue.

As far as the **European Parliament** is concerned, it has direct democratic legitimacy and therefore a particular role to play. In the case of Hungary, the EP adopted the most detailed analyses. On the other hand the past has shown the risk that party politics pose in influencing the EP's positioning and its voting behaviour on these issues. It is therefore suggested that the EP gives the Commission the benefit of the doubt to implement the framework and to be the lead agency in identifying and addressing rule of law concerns. If the Commission sends a recommendation to a member state, this document should be the key reference for EU action on the matter.

At the same time the EP should discuss such concerns whenever the EU issues a 'rule of law opinion', if not before. The EP's role has been positive in the past by providing a pan-European forum for public debate, as was the case when Prime Minister Viktor Orbán came to the EP to debate his policies. The EP should continue playing this role. Finally, as mentioned above, the EP should play a role in creating a strong soft law framework on democratic governance issues.

The **European Court of Justice (CJEU)** has no role under the new rule of law framework, which has a political rather than legal character. The Court has a role in the classic infringement procedures under Articles 258-260 and it has laid the ground for a more extensive role in its *Zambrano* ruling.[15] Scholars suggest that it could now link the application of fundamental rights to the fundamental status of EU citizens or the principle of non-discrimination[16], or condemn a national law limiting the freedom of media through the freedom of establishment. Beyond developing its own jurisprudence, the Court should indicate if it sees a systemic threat to Article 2 in the facts of its cases, thus providing an authoritative trigger for the rule of law mechanism.

The Commission communication notes that the **Fundamental Rights Agency** (FRA) can provide the indications needed for the Commission to make an assessment. The FRA should thus develop its profile in relation to Article 2 values. Its current multi-annual programme, running until 2017, does not include many themes that are closely related to the problem of new authoritarianism, but under the issue of 'access to justice' the FRA should already be able to look at matters of constitutional justice and its relations to Article 2 values. As the FRA has the right to formulate opinions, it could formulate an opinion on the Commission's Rule of Law Framework in light of 'access to justice issues'.

Furthermore, the Council or the EP can request FRA to undertake work on themes outside the multi-annual framework. The EP should task FRA to make proposals for a stronger framework for the protection of Article 2 values.[17]

When defining the areas of focus of the FRA in its next Multi-annual framework in 2018, the Council should add a focus on Article 2 issues.

The Council of Europe's **Venice Commission** is for a long time at the forefront of analysing and creating pressure for change in countries where democratic governance and the rule of law are under threat. No European institution can match the Venice Commissions experience and depth in dealing with such challenges. The Commission has developed extensive 'case law' in its numerous opinions on constitutional or other legal reforms by many of the Council of Europe member states. While the Venice Commission is not an EU-body – indeed the Council of Europe has many undemocratic member states – its substantial work is of critical importance for the application of the Commission's rule of law mechanism. The Venice Commission should use the language of systemic threat to signal to the Commission situations that should trigger the rule of law mechanisms. The Venice Commission called Hungary's reforms a threat to democracy[18] – such a statement should suffice for the Commission to initiate the framework. It is welcome that the Commission communication indicates that the Commission will seek the advice of the Venice Commission.

The Communication also notes that the Commission may seek advice and assistance from members of the **judicial networks** in the EU, such as the Presidents of
Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, or the Judicial Councils. These networks will provide credibility and a link to national judiciaries for Commission action.

The Communication does not mention the role that **civil society** can play, although it is clear that the Commission will use any reliable source. Given that some of the most insightful and influential analysis of recent problems have been given by

[15] Decision of 8 March 2011 (C-34/09)
[16] Eleanor Spaventa, *Supra* No. 23

[17] It is noteworthy that when the FRA was founded, the Council made clear that the FRA could play a role in assessing the situation in a member state with a clear risk of a serious breach of Article 2 (minutes of the 2781th Council meeting, 15 February 2007. Thus the FRA was seen from the beginning as a potential actor in these circumstances.
[18] See "Opinion on Fourth Amendment to the Fundamental Law of Hungary, Venice Commission (14-15 June 2013). Retrieved at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e

scholars, such as Kim Lane Scheppele and Jan-Werner Müller, it is clear that non-state actors have an important role to play.

7. CONCLUSION

The new rule of law framework represents a cautious step for addressing serious concerns about the respect of Article 2 values by some EU member states. It creates an easy-to-trigger structured political dialogue between the Commission and a member state in case of serious concerns. The success of the framework will hinge on the Commission's willingness to apply it without the hesitation that has characterised the institutions' approach to using the Article 7 procedures, barring member states from voting in the Council.

The Commission will need the support of member states, the European Parliament and other EU and non-EU bodies, which need to provide expertise and credibility to the actions of the Commission. All players should recognise the Commission's authority and the associated responsibility during the period in which the framework is applied, while playing their complementary roles. They need to be willing to start Article 7 proceedings once the Commission finds that a member state is not co-operating.

The framework offers a chance to address Article 2 shortcomings in a direct manner by an institution, the Commission, which has the mandate to guard the treaties and ample experience in addressing compliance questions with member states.

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