
**Remarks on the Press Release on the Rule of Law
circulated by the European Commission**



4 JUNE 2019

CENTER FOR FUNDAMENTAL RIGHTS



Introduction

In April 2019 the European Commission (hereinafter: the Commission) published a press release which took stock of available tools to monitor, assess and protect the basic values and the rule of law in the European Union (hereinafter: EU). The Commission expressed concern that the principle of the rule of law came under increasing pressure over the recent years. With regard to the press release, Mr. Frans Timmermans, vice-president of the Commission, has expressed¹ his opinion that the concept of the rule of law forms a fundamental part of European identity, as the functioning of the EU rests on the cooperation of Member States that base their governance on the rule of law. It is, therefore, necessary to stress the importance of the rule of law and enhance adherence to this principle within the Member States. The creation and adoption of new procedures might help the EU address any violations of the rule of law more efficiently.

The Center for Fundamental Rights has in the past reflected on the rule of law procedure², since it was Hungary against whom the procedure under Article 7 of the Treaty on European Union (hereinafter: TEU) was launched for the first time in the history of the EU. The Article 7 procedure calls for a so-called prevention mechanism and eventually sanctions in cases where the values enumerated in Article 2 TEU, including the rule of law, are breached in a Member State. Concerning procedures and mechanisms pertaining to the rule of law we propose to consider the points enumerated below.

Legal framework

One of the generally applied, most important principles of the EU is the principle of conferral of competences set down in Article 5 TEU. According to this Article, the EU can act only within the limits of the competences conferred upon it by the Member States to attain the objectives set out by the Treaty itself. Further, competences exercised on the EU level are governed by the principles of subsidiarity and proportionality.

Article E, Paragraph 2 of the Fundamental Law of Hungary (the Constitution of Hungary) deals with the conferral of competences and the limits thereof. According to Article E, Hungary may exercise some of the competences arising from the Fundamental Law jointly with other Member States, through the institutions of the EU. However, some inalienable rights and freedoms may not be limited in the course of exercising those competencies including the right of Hungary to determine its form of government and state structure.

¹ http://europa.eu/rapid/press-release_IP-19-1912_en.pdf

² <http://alapjogokert.hu/en/2018/12/04/the-rule-of-law-debate-vs-confrontation-of-worldviews-hungary-and-article-7>



Paragraph 2 of Article 4 TEU also applies: *“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”* This principle runs parallel to Article R Paragraph 4 of the Hungarian Fundamental Law. *“The protection of constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.”*

The principle of the rule of law is an organizing principle of state and constitutional order. Accordingly, during the constitutional process in 2011 in Hungary, sufficient safeguards for the principle of the rule of law were created by the Hungarian National Assembly. Forming the constitutional system is an organic element of national sovereignty – a competence that was never conferred upon the EU by the Member States. This would also be unconstitutional in the case of Hungary. It is the position of the Center for Fundamental Rights that, violating the principles of conferral of competences, subsidiarity and proportionality; disregarding the national sovereignty and constitutional identities of Member States, the Commission is trying to create an EU level control over the application of the principle of the rule of law within the Member States.

The scope of the debate - Law versus Politics

Article 2³ enshrines the rule of law – that is the core of the debate – as a European value. In his comments to the April press release by the Commission Mr. Timmermans identifies the values enumerated in Article 2, in this particular case the rule of law, as a cornerstone of European identity. As a result, he declares that these values must be enforced uniformly in all Member States. It follows that the “European identity” envisioned by Mr. Timmermans presupposes a set of basic values uniformly and generally applicable to all Member States, which in turn means that European identity supersedes the respective national and constitutional identities of the Member States. This approach is highly debatable. However, it becomes quite clear that the debate isn’t legal in nature but political and ideological – a clash of worldviews.

The political nature of this debate is also underscored by the date of the press release: April 2019 was in the middle of the intensively fought campaign for the European Parliament elections, and as the Spitzenkandidat of the European Socialists, Mr. Timmermans took active part. His press release, communicated as Vice-President of the European Commission, could be seen as campaigning and as such a political message was formulated. The controversy is

³ Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.



exacerbated by the fact that Commissioners are required to delineate their public messaging as officers of the EU from their campaign messaging as political actors⁴; a principle Mr. Timmermans failed to adhere to in this particular case.

A further evidence for the political nature of the debate is that the values enumerated in Article 2: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are not properly defined or endowed with legal, normative substance; no other source of law pertaining to these terms can be identified. An earlier Communication from the Commission⁵ - referred to by the present one - makes an attempt at defining the precise nature of the rule of law, referencing the case law of the Court of Justices of the EU and the European Court of Human Rights as well as documentation provided by the Council of Europe. Thus, the Communication enumerates the following principles as forming the basis of the rule of law: legality, legal certainty, prohibition of arbitrariness of the executive power, independent and impartial courts, effective judicial review and equality before the law. These principles, however, are no less abstract. Therefore, the values enumerated in Article 2 are political and philosophical categories in need of proper legal definition. It also follows that these values might be co-opted by ideologies and burdened with political content resulting in the prospect of becoming compulsory benchmarks for the Member States, shaped by the prevailing ideological winds.

Clearly, the rule of law debate is a political debate masquerading as a legal one; its primary aim is interference with the sovereignty of the Member States. What is more, recent experience shows that the tools currently available in the EU have been used for political motives, without paying heed to real dialogue, professional or legal arguments.

The Recent Experience with Regard to the Rule of Law Mechanism

The activation of the Article 7 rule of law procedure directed at Hungary was preceded by the Sargentini Report, which itself came after a period of sustained political criticism of the Hungarian legislation coming from the liberal and leftist parties culminating in a report compiled by Mr. Rui Tavares from the Greens regarding the rule of law in Hungary. In the end, it was Ms. Judith Sargentini, a Dutch Green party member who compiled the report precipitating the initiation of the Article 7 procedure against Hungary. While compiling her report she offered no opportunity for Hungary to express its position, ignored the comments

⁴ Campaigning by Mr. Timmermans prompted the Commission to communicate that President Juncker amended the Guidelines on Ethical Standards and issued new directives regarding campaigning by members of the Commission (https://ec.europa.eu/info/sites/info/files/guidelines_election_campaign_en.pdf)

⁵ <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1.Pdf> - A new EU Framework to strengthen the Rule of Law; Communication of the Commission to the European Parliament and the Council 11.03.2014



of the Government lodged with the European Parliament in the course of the procedure and she never made an attempt to describe the situation on a factual basis.

The Sargentini Report touched on several issues that are reserved for Member State competence and as a result should have fallen outside the remit of the Report. Two instances of such overstepping the bounds were the jurisdiction of the Hungarian Constitutional Court and the delimitation of the electoral boundaries for the Parliamentary elections. Ms. Sargentini explained this violation of national sovereignty in her report by referencing a 2003 Communication from the Commission⁶ which stated that during the application of the Article 7 procedure potential breaches of European values might be investigated in areas outside shared EU competence. A communication from the Commission, however, does not constitute a source of EU law, cannot be viewed as part of the EU legal system and therefore, by referencing her attempt to prevent breaches to the values listed in Article 2, Ms. Sargentini herself violated the principles of conferral, subsidiarity and proportionality enshrined in Article 4.

Beyond this, the Report contained claims which are better characterized as politically motivated accusations, not professional legal work. To mention a few, the Report accused Hungary of anti-Semitism, racism and claimed that Hungary didn't regulate the prohibition of discrimination based on gender and sexual orientation. None of these claims were grounded in reality.

The Article 7 procedure concerning Poland also investigated areas primarily reserved for Member State competence. The Commission criticized, among others, the Polish law on the constitutional court, laws adopted in the course of the justice reform which were crucial in shaping the justice system of Poland. The Commission expressed concern with a lack of independent and legitimate constitutional review and claimed that the new legislation relating to the Polish judiciary raised *"grave concerns as regards judicial independence and increased significantly the systemic threats to the rule of law in Poland"*⁷

The Idea of Europe – the Real Subject of the Debate

Tools aimed at investigating breaches of the foundational values of the EU, as we have shown above, raise the prospect of violations of the sovereignty of the Member States. This cannot be remedied with a soft law toolset. A comprehensive solution to the problem requires amending the EU Treaties which presupposes a consensus among the Member States. It remains clear, however, that the diversity of the EU, the different geographies, geopolitical

⁶ <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>

⁷ [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0835/COM_COM\(2017\)0835_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0835/COM_COM(2017)0835_EN.pdf)



positions and different historical experiences of Member States prevents the application of a uniform standard when it comes to the values set in Article 2. Even the earlier referenced 2014 Communication from the Commission, which contained a definition of the rule of law, agrees that *“The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system.”* Consider, for instance, how many different forms of government and state structure the Member States have adopted.

The original purpose of the creation of the EU was a unified internal market⁸, economic cooperation was the sole motivation employed by the founders. Throughout the history of the EU (and its predecessors) there were numerous and often successful attempts at deepening integration. This process culminated in the Constitutional Treaty which, however, never came into force due to non-ratification by some Member States. Despite this, ambitions towards deepening integration persist, not least in the form of broadening EU competences at the expense of Member State competences. A fresh sign of this is the press release of the Commission dated April 2019 opening the debate on the rule of law mechanisms. While Mr. Frans Timmermans, in his comments attached to the press release, took it for granted that the rule of law is a cornerstone of European identity; the Center for Fundamental Rights is of the view, that this communication should have been preceded by another debate on this issue. The reality is that the debate regarding the meaning and definition of European identity is yet to be settled – regardless of the debate surrounding the rule of law.

We must address the question whether there is such a thing as a European identity, or are there merely common European values which stem from the national or constitutional identities of the Member States of the EU? If there is a European identity, who is its subject? Can we state that the EU has a European identity? The practices of recent years show that these questions remain unanswered and the founding, or western Member States define the foundational values of European identity arbitrarily and according to their own tastes. For this purpose, they attribute such meaning to the abstract ideas expressed in the Treaties as serves the current prevailing political interpretation. This interpretation is enforced through communications from the Commission and press releases like the one addressed here.

Further, principles like the equality of the Member States and respect for the national identities of the Member States are ignored. There is no common ground on where the boundaries of national and European identities lie – if the latter even exists. It is the opinion of the Center for Fundamental Rights that instead of applying the Article 7 procedure and similar enforcement mechanisms, the debate on worldview must be conducted to the full.

⁸ Article 3 TEU to this day lists several aims promoting economic development and progress.



Conclusion

In his often cited press release, Mr. Frans Timmermans said that the question of the rule of law in the EU is more pressing today than ever before. We have, indeed, arrived at an inflection point in the history of integration; however, the Center for Fundamental Rights does not think that discourse regarding the application of the rule of law mechanisms as political tools to discipline Member States should play a key role in shaping Europe's future. There are matters more immediate and unprecedented in the history of the EU on the agenda. Among these, there are Brexit and the challenges pertaining to immigration – relevant not merely for Member States on the borders of the Schengen Area. Today, Europe is going through an identity crisis, which presents in the form of growing internal fault lines. The Commission has tried to address these issues by virtue signalling, projecting values it espouses and creating artificial tools and mechanisms; without turning to real dialogue.

The debate around the rule of law, therefore, does nothing to strengthen European identity. Ideological and political differences lie in its basis. Hence, we cannot support any proposals towards expanding the potential for attacks based on breaches of abstract legal categories. We have no intention of providing the currently dominant leftist and liberal opinion leaders with just another tool that they can use to shape the constitutional systems of Member States in order to force them to conform to their tastes or to let them increase political pressure on the Member States in the guise of protecting EU values.

Finally, we wish to stress how distasteful it is when such political methods are deployed using double standards – as this undermines the equality of the Member States. Have the tools deployed to push back against the yellow vest movement in France, or the police abuse evident in the reaction to the Catalan independence referendum raised concern regarding the rule of law? No.

The Center for Fundamental Rights is convinced that conducting this and similar debates, as well as any new mechanisms designed to address potential breaches to the founding values of the European Union go far beyond the original concept of integration and serve merely as tools for political clashes.