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What does and should the EU do to further the rule of law in Europe? – a critical perspective

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I was invited to this conference to provide "a critical perspective" – presumably because two years ago, when then Commission Vice-President Viviane Reding delivered a speech in which she singled out three Member States for alleged failures to comply with the "rule of law" principle and then went on to suggest quite far reaching Treaty reforms to enable the enforcement of broadly circumscribed "EU values" against Member States, I criticized that speech in a contribution to the blog of the European Journal of International Law (EJIL).¹

What displeased me at the time was, more than anything else, the way in which Commissioner Reding built her argument: it looked like a case of argumentative ad hocery, as if she were looking for a problem that could be solved through the solutions she wanted to propose. But the cases she referred to were, in my view, not sufficient to evidence such a thing as a "rule-of-law crisis" that could only be resolved by the means she was proposing.

This does not, however mean, that there can be no problems relating to the rule-of-law principle in the Member States of the EU, or even within the EU as such, and that no remedies against such problems should be sought, including at EU level. So the only critical remark I will make, if it really can be called such, is that I will briefly summarize the essential meaning of the rule-of-law principle, and then use this as a basis for a further discussion of how that principle could be defended.

Rather than a fundamental right for individuals, the rule of law is a constitutional principle. If it is quoted in Article 2 TEU as one of the EU's core values, this means that not only should the EU itself abide by that principle, but that a state becomes eligible for EU Membership only if this principle is duly enshrined in its constitutional law.

Searching for the origin of the term, we unavoidably come to Chapter 18 "on Tyranny" of John Locke's Second Treatise on Civil Government, where tyranny is described as "*the exercise of power beyond right*", in which "*the governor, however intitled, makes not the law, but his will, the rule*". Writing in 17th century England, Locke lived at a time when ambitions of King Charles I. to establish royal absolutism had triggered a civil war in which ultimately the Parliament prevailed over the King, resulting in the beheading of the latter in 1649. Disenchanted from ten years of republican rule under Oliver Cromwell, the Parliament invited the House of Stuart back to England in 1659, but when King James II. attempted to rule against the will of the Parliament the "Glorious Revolution" of 1688 settled the matter once and for all times. Contemporary constitutionalists say that Parliament could set an end to the British monarchy by a simple majority vote – and this seems quite plausible if we look at the fact that such a simple majority vote was sufficient to call the referendum that, if successful, would have resulted in Scottish independence. Even a simple majority of the British Parliament is, constitutionally speaking, immensely powerful – but this has also resulted in a political and legal culture in which a very cautious attitude towards the law prevails. From a European perspective it is quite remarkable that, on the one hand, the UK is usually very hesitant in supporting new legislative initiatives – but on the other hand it traditionally is one of the Member States with the lowest number of infringement procedures: the law is the law, and once it has come into force, it is respected.

What is the essential meaning of the rule of law? Often, when it is difficult to define a term, it is expedient to imagine its opposite. The opposite of the rule of law is the rule of *a person*, or a group of persons. At the same time when Locke wrote his treatise, France had a King who summarized his legal philosophy by saying "*l'état c'est moi*". Prior to the French Revolution in 1789, the Etats généraux (at the time the French equivalent to a parliament) had not been convoked for more than 180 years. Indeed, the 17th and 18th centuries were, more than any other period before or after, a period of royal absolutism, in which the King or Prince was a "*princeps legibus solutus*", not bound by any law.

¹ The European Union: Rule of Law or Rule of Judges?, published on 11 November 2013 at EJILtalk!, <http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/>

The rule of law is not equivalent to democracy and parliamentary rule, but it says that whoever rules is bound by the law. This has several implications. First, if he wants to change the law, he must do so through a legal procedure. Second, all acts of government must be based on a law, and each law must be sufficiently determinate to make its meaning and application previsible and non-arbitrary. "The King may decide as he pleases" is not sufficient to comply with the rule-of-law principle, even if it is printed black on white in the statute book. Third, it must be possible to enforce the law. Indeed, it must be possible for subjects of the King to enforce the law against the King in the King's own law court – which in turn presupposes a separation of powers, i.e., the existence of independent judiciary powers.

Is the rule-of-law principle in danger today?

I think we must answer this question by saying that it is in danger always and everywhere, wherever men exercise power over other men. We should not go out and point at always the same "usual suspects", preferably at some politicians with a different political creed than our own, or at some Member States at the ill-reputed South-Eastern fringe of this continent, but use this occasion for an examination of conscience.

As an Austrian national, let me make one observation from a particularly Austrian perspective, concerning the origins of Article 7 TEU, which is at the focus of today's discussion – even if with this I risk to move this discussion back to its point of departure. There is one aspect that seems completely absent from the current debate, although it should be there.

It is already 15 years ago, so I am not sure everyone will remember – but the early warning mechanism in this Article actually exists in its current form thanks to an initiative of the Austrian government, then consisting of the (conservative) Austrian People's Party led by then-Chancellor Wolfgang Schüssel and the (populist right) Freedomite Party (notorious through its President, Jörg Haider). The background of this initiative were the events of 4 February 2000, when the announcement that this government had been formed prompted the other 14 governments of (then 15) EU Member States to impose "diplomatic sanctions" against Austria – not because of anything that Austria, or any person acting on her behalf, had done, but simply because of the bad reputation of one politician, Jörg Haider, who was not even a member of that government. These "sanctions", which even included rather lawless attempts to deprive Austria of its rights as an EU Member State, applied from day one, i.e. at a time when – already for lack of occasion – the new government could not possibly have committed any act that might have warranted such reactions. For a couple of days or weeks Europe was in a fit of collective hysteria as if the SS were marching on the streets of Vienna – and the only institution that acted with relative calm and self-restraint was the European Commission under Romano Prodi, reminding Member States that the EU was a legal system in which Member States enjoy rights, irrespective of whether their current governments are liked or disliked by other governments.

Despite the constructive role of the European Commission, the diplomatic crisis of 2000 has led to an immediate and radical drop of popularity of the EU within the Austrian population, which unfortunately has never quite been recovered. Since then, Austria remains one of the most Euro-sceptic countries.

The EU has certainly learnt its lesson. Since 2000, there have been, and continue to be, numerous cases in which controversial political parties have had an influence on the governments of certain Member States. These cases include not only the current Greek government, which consists of an extreme left-wing and an extreme right-wing party, but also countries like Denmark (where the government depends on the support of the anti-immigration Danish People's Party) or the Netherlands (where the minority cabinet of Mark Rutte was dependent on the support of Geert Wilders's PVV). Not to mention the Participation of Gianfranco Fini's Alleanza Nazionale in the cabinet of Italian Prime Minister Silvio Berlusconi... In none of these cases, however, have there been any attempts to impose any sanctions against the Member States concerned. Instead, the approach quite reasonably was to wait and see what those governments would actually do.

Back then, in the year 2000, the 14 governments deliberately did not invoke Article 7 TEU, given that they would hardly have been able to evidence any violation of the "values" enshrined in Article 6 (1). Their "sanctions" had no basis in the TEU; they were imposed without the Member State concerned (Austria) having been given any hearing or right to appeal, and without any formal procedure.

The crisis around Austria occurred just at the time when the Nice Treaty was under negotiation. And as a reaction to the experiences it had made, the Austrian government proposed² that in order to rule out such lawless actions as it had faced at the moment of its nomination, The Article 7 mechanism should be clarified, and itself subject to judicial review, so as to comply *itself* with the rule-of-law principle it serves to protect. This mechanism should not be a political witch-hunt, but include a possibility for the Member State concerned to defend itself. As a result, the early warning procedure in Article 7 (1) TEU was newly introduced, dealing with situations in which not the *existence* of serious and persistent breaches of EU values are alleged, but only (as in the case of Austria), the *risk* of such breaches. The finding of such a mere *risk* will, however, not lead to any sanctions.

This is the background of Article 7 as we know it today, and it is therefore for good reasons, and certainly not un-intentional, that this mechanism is not designed to be used light-handedly. Arguments that Article 7 is inefficient because it has never been used miss the point: it is not there to be used, except under the most extreme circumstances – and there is no good reason to believe that in such situations it would not be efficient. This is not an instrument to impose on Member States the "pensée unique européenne", or peculiar interpretations of "European values" that are not widely shared. This is the "nuclear option", because it has been designed as such. Yes, this Article was designed to protect the rule of law – but also in the sense that it protects *Member States* against un-lawful pressures.

Any proposal for reform should take this into account, and those pushing for a new mechanism should carefully think about how their claim that "it should be easy to use" might sound in the ears of some who might perceive this as a threat rather than as a promise. And frankly it is difficult to understand why we would need an "easy-to-use" mechanism to get rid, or suspend the membership rights, of Member States, when at the same time the efforts (in particular by the European Commission) to keep Greece within the Eurozone evidence that the EU's intrinsic vocation is to do all to keep countries in, not to kick them out.

It seems in any case unlikely that any Treaty reform that would make the suspension of membership rights any easier than it currently is would find the unanimous support of all 28 Member States. It is therefore a sign of healthy realism that the European Commission's Communication of March 2014³ focuses on new mechanisms that could be implemented already now, i.e. without requiring a Treaty change. In short, this Communication proposes a "pre-Article-7"-procedure, i.e. a structured dialogue with the Member State concerned, before a decision is taken to formally launch the Article 7 procedure.

Such a mechanism has a precedent in the European Commission. Years ago, prior to launching formal infringement proceedings regarding alleged violations of EC law, the Commission had a practice of sending so-called pre-Article-169-letters to the Member States concerned – Article 169 being the article that (then) described the different steps of the formal infringement procedure. The sequencing was thus: (1) pre-169-letter, (2) *mise en demeure* (formal notice), (3) Reasoned Opinion, and then (4) – if the issue had still not been resolved – the filing of a court action. Thus in addition to the formal notice, which is implicitly foreseen, and the reasoned opinion, which is explicitly mentioned in the

² Katrin Träbert, Sanktionen der EU gegen ihre Mitgliedstaaten, p. 288. The Austrian proposal is found in the document CONFER 4748/00 of 7 June 2000
<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=2hQrJy9PJfC2Y2G2TqJcxltmQ1gXpPQ34Vth1TJnVQXQyCVtKDFJ!469751194?docId=8191&cardId=8191>

³ COM(2014) 158 final/2 of 19 March 2014

Treaty, there was an additional step. (Today the relevant Article in the TFEU is Article 258, before it was 226, and before that 169)

That additional step was not useless. However, I believe that the Commission has in the meantime dropped that practice, simply because there are so many infringement procedures to be administered that the procedure needed to be streamlined. In any case, both the formal notice and the reasoned opinion, and the Member State's reaction to both (and, at the time, the pre-169-letter and the answer to it), have an important filtering function: if the Commission has such a remarkably high success quota in the infringement cases it brings to court, this is because it brings only cases to court if it is satisfied that the probability of winning is very high.

In the same way, such an intercalated "structured dialogue" with a Member State may allow to take the steam out of a heated political debate and return to the calm exchange of rational arguments. This was also the Commission's role in the case of Austria back in 2000. And it seems likely that many perceived problems can be resolved in this way or, at a second glance, will turn out to be no problems.

However, this leaves one difficulty unresolved. The Article 7 procedure will remain as difficult to use as before. And if the Member State concerned maintains its stance, the Commission will at one point face the decision whether it wants to launch this formal procedure (with the implicated risk of remaining unsuccessful), or whether it gives in. And there is every reason to expect that the Commission will not launch the procedure except in extreme circumstances, in which it can be sure that it has the support of four fifths of Member States (or, in the case of Article 7 § 3, of all Member States except the one concerned), so that the procedure can be successfully terminated.

Thus, the new mechanism described in the Commission's 2014 Communication is in fact a mechanism the Commission imposes on itself. This is of course something the Commission is always free to do, and there is even no means to force a Member State to co-operate in such a procedure. It may sound paradoxical, but the main effect will be for the Commission to protect itself – against making rash and impulsive assessments that it may have to regret later on.

The fact that the Council Legal service has opined⁴ that the proposed new framework is incompatible with the principle of conferral is regrettable – but at the same time it seems to evidence how wary Member States are of any attempt to go beyond what is currently provided for in Article 7 TEU.

Let me thus come to the end of my "critical remarks", and summarize them. In fact, they are not critical at all. The Commission's Communication of 2014 is a far cry from the somewhat over-zealous proposals made by then-Commissioner Reding in her 2013 speech. It contains realistic and reasonable proposals that can, if need be, immediately be implemented.

But let us all hope that such a need will never arise.

⁴ cf. Council of the EU, *Ensuring respect for the rule of law in the European Union*, Note (15206/1414) of the Presidency dd. 14 November 2014