The European Union: Rule of Law or Rule of Judges?

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In this year's "State of the Union Address", delivered on 11 September 2013 at the European Parliament in Strasbourg, Commission President Barroso announced that the Commission would come forward with a communication that would contain proposals for a "general framework" to address "challenges to the rule of law in our own member states". Just one week earlier, on 4 September, Commission Vice President Viviane Reding had given a talk at the premises of the Center for European Policy Studies (CEPS), in which she outlined what such a "rule-of-law-mechanism" might look like. While it must be supposed that, rather than an official Commission position, this talk represented nothing but Commissioner Reding's personal views, it nevertheless could be seen as a sort of kite-flying exercise with the purpose of testing the reactions of the public to ideas for which the Commissioner wants to garner support. The Commissioner's intention to frame the debate is further underlined by the fact that she will host a conference in Brussels on 21/22 November in Brussels, where one panel has been set up to deal with her proposal, which has been summarized in a discussion paper.

Commissioner Reding. Photo from the CEPS website

In this post I will set out the "challenges" that Commissioner Reding thinks should be addressed and then describe the remedies that she proposes before offering my own views on whether there is indeed a problem and my analysis of the proposed solutions. In my view, the Commissioner's analysis of supposed problems is rather unconvincing, and her proposals appear more likely to create new problems than to solve existing ones. In particular, her proposals would accord excessive power of the judicial institutions of the European Union and in effect end the sovereignty of Member States.

The so called "Rule of Law" Crisis

In her CEPS speech, Mrs. Reding specifically mentioned three cases in which a "rule-of-law-crisis" in a Member State made an intervention by the Commission necessary: (1) the political mayhem surrounding the French government's decision to repatriate several thousand Roma originating from Romania and Bulgaria, who had neither residence nor

work permits, back to their countries of origin; (2) the lively debates, in particular in the European Parliament, concerning the new constitution of Hungary in 2011; and (3) the constitutional crisis in Romania in 2012, where the newly elected Government, attempting to divest State President Traian Basescu of powers, refused to abide by a decision of the country's Constitutional Court finding that a referendum to impeach the President had failed to attain the necessary quorum. According to Commissioner Reding, these three cases illustrate that a new "rule-of-law-mechanism" is necessary for the EU in order to prevent national governments from violating the EU's common values. This mechanism should "bridge the gap" between the normal infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU) – which apparently is too "soft" -, and the procedure set out in Art 7 of the Treaty on the European Union (TEU) – which, in the Commissioner's words, is "very heavy to handle". In other words, what is needed is a new procedure for the Commission to discipline Member States, which should be at the same time dissuasive and easy to use.

The Proposed Solutions

What could such a mechanism look like? In her CEPS speech, Mrs. Reding made three concrete proposals:

- To extend the jurisdiction of the Court of Justice of the European Union (CJEU) to Article 2 TEU which sets out the objectives of the European Union, allowing the Court to hear cases on alleged breaches of the rule-of-law-principle (or even, more generally, of any of the "common values" enshrined in that Article);
- To extend the mandate of the EU Fundamental Rights agency (FRA), which is currently barred from analysing or criticizing what Member States do within their own competences;
- To abrogate Art. 51 of the EU Fundamental Rights Charter (FRC), which limits the scope of application of the Charter *"to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law"*.

Analysis of the "Problems" and the Solutions

In the first place, it seems to me that the three examples used by Mrs. Reding in making her argument do not support the claim that the law enforcement powers of the EU institutions need to be geared up.

With regard to the French "Roma crisis", the Commission appears to have not even attempted to initiate infringement procedures under Article 258 TFEU. Why not? Because, even if some may have regretted it, there was no doubt that the French Government's action was perfectly in line with its obligations under the EU Treaty. The free movement of persons under the EU Treaty comes with conditions (which are set out in Directive 2004/38/EC , and in particular Art. 7 thereof). Where these conditions are not met, the rule of law does not prohibit, but in fact *requires*, the measures that the French government decided to take.

In the case of Hungary, as many will remember, there was a lot of excitement over the fact that the newly elected Government led by Viktor Orban, whose FIDESZ Party controls more

than two-thirds of seats in Parliament following an overwhelming election victory in 2010, used this majority to adopt a new constitution that enshrined values such as the protection of life from the moment of conception, the definition of marriage as a union between a man and a woman, and (*horribile dictu*!) even an invocation of God. Representatives of the liberal, socialist, green, and left groups in the European Parliament lambasted this as "retrograde" or as "a breach of European values" – but was this really more than politically motivated rhetoric? Instead of more than "100 breaches of EU Law" (which was the claim loudly proffered by certain critics), the Commission identified only three such instances, in regard of which it initiated infringement procedures under Article 258 TFEU. In two of these cases, Hungary followed the Commission's advice and changed its laws, and only the third one resulted in a judgment of the CJEU, which condemned Hungary for … a case of age discrimination(!). However, by the time that judgment was issued, the controversial law was not in force anymore, because it had already been invalidated by Hungary's own Constitutional Court.

Thus, there was one instance in which Hungary, rather than submitting to the Commission's assessment, chose to defend its position in court. The court made a decision, and Hungary abided by it. Is this really a "rule-of-law-crisis", or is it not rather part of everyday normality? How does this case prove that the procedures provided for in Article 258 TFEU are not efficient?

The only "rule-of-law-crisis" that can correctly be called that name is the constitutional crisis that occurred in Romania in 2012. But even this crisis, which involved alleged breaches of Romania's own constitutional order rather than any infringement of EU laws, was resolved without any recourse to Article 7 TEU. Once more, how does this evidence the inefficiency of Article 7 TEU, or the need for additional instruments? Does it not, on the contrary, show that Article 7 TEU was, even without being used, efficient as a fall-back scenario?

If the analysis of the problem appears grossly mistaken, what shall we say of the proposed solutions?

Rather than widening the FRA's mandate, one might, with good reasons, ask whether this agency is, or ever was, really needed. There is no place, in Europe, for yet another human rights tribunal besides the European Court of Human Rights (or, as far as the interpretation of the FRC is concerned, the CJEU). If, by contrast, one considers that the Agency's role should remain that of a provider of technical assistance and academic expertise (cf. Article 2 of Regulation 168/2007), one cannot help mentioning that the "expertise" so far provided by the Agency has been of extremely poor quality, if not worse (see, for example, here and here). Moreover, such assistance and expertise is available on the free market: there are hundreds of research institutes, academics and NGOs dealing with human rights issues. Why, then, does the EU need a specialized quango that, at the cost of €20m per annum, monopolizes the role of providing "expertise"? Would not an open academic debate, in which everybody can participate on an equal footing, be far better?

The idea of extending the FRA's mandate seems, however, rather harmless, if compared to the other two proposals made by Mrs. Reding, which, if followed, would have the potential of completely overturning the balance of power within the EU.

What Commissioner Reding apparently wants to achieve by the removal of Article 51 of the Fundamental Rights Charter is that the Charter would become applicable to whatever Member States do *within the scope of their own exclusive competences*. Extending the CJEU's jurisdiction to Article 2 TEU would mean that the Court could henceforward hold Member States accountable not only for the breach of concrete provisions of EU law, but also of vaguely defined "values", which include not only the rule of law, but also "non-discrimination", "pluralism", "solidarity", or "tolerance".

It is not that I believe these values shouldn't be defended. But maybe not in this way. Taken together, Mrs. Reding's proposals would transform the CJEU into a judicial super-institution with nearly unlimited powers to use those vague concepts as a pretext for interfering everywhere and at all levels. This would be the end of Member States' sovereignty.

This would not only severely affect the power balance between the EU and its Member States, but also between the different EU institutions. It is hard to imagine that the CJEU, once provided with unlimited jurisdiction (which, different to the ECtHR, comes along with the power to impose extremely severe sanctions on Member States), would not succumb to the temptations of judicial activism. And the Commission would assume a new role: instead of a guardian of the Treaty, it would become the "guardian of the values". An "activist" CJEU, in conjunction with a Commission that, rather than pursuing its policy goals by proposing new legislation, uses "strategic litigation" as a means achieving those goals, could become a nearly omnipotent power machine, whereas the roles of Parliament and Council would be marginalized.

Would such a mechanism really lead to a better protection of the rule of law? Or would it not rather achieve the opposite?