

HOW TO ENFORCE THE FUNDAMENTAL VALUES OF THE EUROPEAN UNION? / Jaap W. de Zwaan

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1. INTRODUCTION

This article contains the written, and slightly elaborated, version of a presentation the author made to the Bratislava Legal Forum Conference of 22 April 2021.

The topic of the Bratislava Legal Forum Conference: Law in Crisis and Crisis in Law, inspired the author to make a presentation about the state of play, in the European Union (hereafter also: EU or Union), with regard to its fundamental values.

The respect of the EU's fundamental values concerns a crucial problematic. Full respect is a precondition to allow an organisation to function properly.

2. THE EU AS A 'COMMUNITY OF LAW'

The Union is a rule-based organisation and European integration as a process is practised through law. The doctrine of the Court of Justice regarding the European Union

as a community of law has been confirmed in the *Les Verts vs Parliament* judgment of 1986 (Case-294/83).¹ Notably its consideration 23 is of importance.²

Actually, important components of the concept - the reference is in particular to principles such as supremacy, direct effect, indirect effect and interpretation in conformity - have been developed over the time in the jurisprudence of the Court of Justice. Some crucial, and at the time ground-breaking, Court decisions date back to the beginning of the integration process: the judgments *Costa/ENEL* and *Van Gend & Loos*.³

3. THE FUNDAMENTAL STANDARDS AND PRINCIPLES OF THE EU

All Member States of the Union are member of the Council of Europe and party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴ The commitment of the EU to accede to the European Convention (hereafter also: ECHR) is laid down in Article 6(2) of the Treaty on European Union (TEU).⁵ Besides, according to Article 6(3) TEU the fundamental rights as guaranteed by the ECHR constitute general principles of EU law.⁶

On 7 December 2000 the Union adopted its own catalogue of fundamental rights and freedoms, the Charter of Fundamental Rights of the European Union. At that time the text had a purely political character. The Charter was adapted on 12 December 2007 and became legally binding by virtue of a reference, agreed upon in the framework of the negotiations for the Lisbon Treaty, in the Treaty on European Union.⁷

The fundamental values of the Union are listed in one of the first provisions of the Treaty on European Union, Article 2 TEU. In that provision it is said: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the

¹ CJEU, judgment of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, C-294/83, ECLI:EU:C:1986:166. See about this subject matter also Mañko (2017).

² Consideration 23 reads: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures, which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.'

³ CJEU, judgement of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26-62, ECLI:EU:C:1963:1; and CJEU, judgement of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms is available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 04.06.2021).

⁵ That provision reads: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

⁶ Article 6(3) TEU reads: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

⁷ See for the most recent version of the Charter: OJ C 326, 26.10.2012, p. 391–407. Article 6(1) TEU reads as follows: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

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.'

At the same time the values of Article 2 TEU reflect the minimum conditions of EU membership: see the reference in Article 49 TEU.⁸ That means that, when not respecting (anymore) these fundamental values and principles, the basis of a Member State's EU membership gets lost.

In connection with Article 2 TEU the provision of Article 4(3) TEU, reflecting the obligation of Member States to cooperate with the Union,⁹ as well as the doctrine developed by the Court on the basis of that treaty provision, is equally important.

4. THE RISKS OF NON-RESPECT OF THE FUNDAMENTAL VALUES

Full respect of the EU's fundamental values all over the European Union - in the individual Member States as well as in the framework of the Union itself - assures the proper functioning of the organisational structures at the national as well as the EU level. That process has to be monitored closely and carefully.

In that sense the non-respect of the EU's fundamental values and principles may easily undermine, not only the working of democracy and good governance in the Member State concerned, but also the functioning of the EU institutions as well as the effectiveness and credibility of the Union as an organisation. In such a case the basic structures of the EU will be negatively affected, with all its consequences for acts of maladministration and the possible illegality of acts adopted by the institutions.

Such consequences should be prevented to occur at all price.

5. MONITORING AT EU LEVEL

5.1. *The Rule of Law Framework*

In recent years the Union has been confronted with events in some EU countries, which revealed threats to the rule of law. The Commission reacted in 2014 to these events by adopting a 'rule of law' framework to address such threats.¹⁰ The objective of framework is to prevent emerging threats to the rule of law to escalate to a point where

⁸ The whole Article 49 TEU reads: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.'

⁹ The wording of that provision is as follows: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

¹⁰ Communication of 11 March 2014 from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158> (accessed on 04.06.2021).

the Commission will be forced to trigger the mechanisms of Article 7 TEU. This is done in the first instance through dialogue with the EU country concerned.

The 2014 framework establishes a three-stage process:

- Commission assessment;
- Commission recommendation;
- Monitoring of the Member State's follow-up to the Commission's recommendation.

5.1 EU Justice Scoreboard

The EU Justice Scoreboard is an established tool of the Commission to analyse the trends in the justice systems in the Union. It is a comparative overview of the efficiency, quality and independence of justice systems in all EU Member States.

The 2020 Scoreboard was presented on 10 July 2020.¹¹ The Commission observed a continued improvement in the efficiency of justice systems in a large number of Member States. On the other hand, according to the results of an Eurobarometer search the perception of judicial independence amongst citizens in a number of Member States has continued to decrease.

5.2 Annual Rule of Law Reports

As from the autumn of 2020 annually Rule of Law reports will be drawn up by the Commission, reporting about the situation in the Union as well as in all 27 Member States. The first general report dates from 30 September 2020.¹² On that same day assessments of the situation in each Member State were published.¹³

The Rule of Law report covers four pillars: the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances. For each pillar, the methodology practised by the Commission recalls the EU law provisions relevant for the assessment. It furthermore refers to opinions and recommendations from the Council of Europe. The country chapters rely on a qualitative assessment carried out by the Commission. They focus on a synthesis of significant developments in the Member State concerned since January 2019 and are introduced by a brief factual description of the legal and institutional framework relevant for each pillar.

The reports are the result of close collaboration with the Member States and rely on a variety of sources. For example, the Commission received written input from all Member States and from over 200 stakeholders. The Commission furthermore conducted more than 300 virtual meetings with the Member States, stakeholders and

¹¹ Communication of 10 July 2020 from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 2020 EU Justice Scoreboard, COM(2020)306 final. Available at: https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2020_en.pdf (accessed on 04.06.2021).

¹² Communication of 30 September 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, COM/2020/580 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0580> (accessed on 04.06.2021).

¹³ European Commission (2020a). 2020 Rule of law report - Communication and country chapters. Available at: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en (accessed on 04.06.2021).

civil society. The methodology followed will continue to guide the preparation of the next editions of the annual Rule of Law report.¹⁴

The rule of law country reports are discussed in Council.¹⁵

6. INSTRUMENTS TO ENFORCE THE EU'S FUNDAMENTAL VALUES

6.1 *Political Dialogue*

In case tensions with the respect of the fundamental values of the Union do occur, political discussions can -or, rather, should- be started at political level, so the level of the European Council, the Council and/or the European Parliament.

Such dialogues do not require a specific legal basis in the treaties. They are inherent to policy-making, governed by principles such as good governance and/or good administration. And, of course, such discussions can also be held on the basis of the annual Rule of Law reports of the Commission, referred to a moment ago.

Now, obviously political discussions can only be useful when they are substantive and in depth in nature, and when specific conclusions are drawn. In practise, however, one gets the impression that the discussions in the Council organised on the basis of the 2020 Rule of Law report of the Commission are rather 'pro forma' and superficial. If that impression is correct, the whole instrument can hardly be considered credible. Anyway, here seems to be room for improvement.

Anyhow, political dialogue as a first means of action is the right approach. The way a country is managed is after all essentially a responsibility of politicians. That being so, such dialogues can only be useful if there is sufficient political will on the part of those politicians.

6.2 *The Article 7 TEU Procedure*

A special mechanism to combat breaches of the values of Article 2 TEU is included in Article 7 TEU, in practise referred to as the 'nuclear' option (see for the full text of Article 7 the separate frame).

The procedure reflects a careful and multilayer approach. Two stages can be distinguished: the determination of a 'clear risk' of a serious breach of the values of Article 2 (paragraph 1), and the determination of a 'serious and persistent breach' of those values (paragraph 2). On the other hand, the institutional modalities are restrictive in nature, which makes the overall credibility of the procedure doubtful.

Article 7 TEU

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the

¹⁴ See for a further explanation: European Commission (2020b). 2020 Rule of law report. The 2020 Rule of law report monitors significant developments relating to the rule of law in all member states. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en (accessed on 04.06.2021).

¹⁵ The (informal) Conference of European Affairs Ministers of 20 April for example discussed the findings with regard to Germany, Ireland, Greece, Spain and France.

Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Once Article 7 is applied, the procedural stages are well defined:

- Dialogue with the Member State concerned: first paragraph;
- Recommendations of the Council: first paragraph;
- Determination by the Council of a clear risk of a serious breach: first paragraph;
- Determination by the European Council of the existence of a serious and persistent breach: second paragraph;
- The possibility to suspend certain membership rights, including the right to vote in the Council: third paragraph.

Special institutional arrangements are foreseen with regard to all stages of the decision-making under the Article 7 framework. For example, a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission is required to launch the procedure of Article 7. The decision making regarding 'a clear risk' of a serious breach of the values of Article 2 requires a majority of four fifths of the members of the Council (in practise that comes down to the support of 22 Member States) plus the consent of the European Parliament. Then, in order to be able to determine 'the existence of a serious and persistent breach' of the Article 2 values, a proposal by one third of the Member States or by the Commission is needed. The

decision-making in that regard requires a unanimous position in the European Council plus, also in this case, the consent of the European Parliament.¹⁶

In the context of the application of Article 7 TEU the Court of Justice has only limited jurisdiction. The Court can assess whether the procedural stipulations of the provision have been applied correctly.¹⁷

All in all Article 7 reflects essentially a political procedure. Moreover, as was hinted at earlier, in view of the extraordinary decision making modalities the provision is in practise difficult, not so say impossible, to apply.

In the meantime though, the Article 7 TEU procedure has been triggered twice: the first was started by the Commission in December 2017 against Poland, the second was initiated by the European Parliament in September 2018 against Hungary.¹⁸

6.3 Infringement Procedure

Of course, the traditional instrument to combat violations by Member States of their treaty obligations - violations of the EU's fundamental values can be qualified as such - is the so-called infringement procedure. The arrangements are included in the Articles 258, 259 and 260 of the Treaty on the Functioning of the European Union (TFEU). Actually, there do exist two variants of infringement procedures. The most practised is the one of Article 258 TFEU, in the context of which the Commission starts legal proceedings against a Member State. The arrangements of the other one are to be found in Article 259 TFEU, in the context of which another Member State acts as the initiator.

The infringement procedure has several stages, informal and formal ones:

- the Commission addresses the Member State in a written form;
- the submission of observations by the Member State concerned;
- the Commission delivers a so-called reasoned opinion;
- the Commission brings the matter before the Court.¹⁹

Once a judgment has been given, Article 260, first paragraph, TFEU becomes relevant. That provision states: 'If the Court of Justice (...) finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court'. In case of non-compliance with a judgement, the Commission can start a second procedure. In the framework of that second procedure the Court can, upon the initiative of the Commission, impose a lump sum or penalty payment on the Member State concerned.²⁰

¹⁶ For sure, in those contexts the position or vote of the Member State in question shall not be taken into account: Article 354, first paragraph, TFEU. The European Parliament acts by a two-third majority of the votes cast and representing the majority of its members: Article 453, fourth paragraph, TFEU.

¹⁷ Article 269 TFEU, that reads: 'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.'

¹⁸ See European Commission (2020c). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The Rule of Law Situation in the European Union, 30 September 2020, COM(2020)580 final, p. 25. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN> (accessed on 04.06.2021).

¹⁹ In case a Member State initiates the procedure, it shall first bring the matter before the Commission: see Article 259, second, third and fourth paragraph, TFEU.

²⁰ Article 260(2) TFEU.

Therefore, the Court has the final say at all stages.

Already several examples of infringement procedures, launched by the Commission, can be given where violations of human rights, fundamental freedoms and/or the rule of law values were at stake.²¹

6.4 Preliminary Ruling Procedure

The preliminary ruling procedure of Article 267 TFEU is the unique framework for cooperation between national courts and tribunals on the one hand, and the Court of Justice in Luxembourg on the other. In such a case the initiative is taken by a national court or tribunal, once doubts do exist with regard to the interpretation of provisions of EU law that have been invoked in the proceedings before that court or tribunal. The preliminary ruling procedure consists of a written and oral stage. Member States and the EU institutions can present their opinion about the question(s) that have been submitted to the Court. In view of its role to ensure the correct application of EU law,²² the Commission always presents observations.

Before giving judgment, one of the Advocates-General who assist the Court, presents his/her opinion on the case concerned to the Court.²³

Notably in the context of the obligation of Member States to provide for an effective legal protection system as referred to in the first paragraph of Article 19 TEU,²⁴ and of which the full independence of the national judiciary is an inherent element, already extensive experiences have been gained with the application of the preliminary ruling procedure.²⁵

After the Court has given judgment, the national judge who referred the case to Luxembourg, decides the matter in light of the elements contained in the decision of the Court. In such a way the Luxembourg Court has the final say with regard to the correct interpretation and application of EU law provisions.

6.5 Regulation 2020/2092

A new instrument of secondary law, the Regulation 2020/2092 dated 16 December 2020, is of application since January 2021. The objective of the regulation is to protect the financial interests of the Union against violations, by Member States, of the rule of law. The regulation is formally called the 'Regulation on a general regime of conditionality for the protection of the Union budget'.²⁶ In concrete terms the regulation

²¹ Recent examples are respectively CJEU, judgement of 24 June 2019, *Commission v Poland*, C-619/18, ECLI:EU:C:2019:531; CJEU, judgement of 5 November 2019, *Commission v Poland*, C-192/18, ECLI:EU:C:2019:924; CJEU, judgement of 18 June 2020, *Commission v Hungary*, C-78/18, ECLI:EU:C:2020:476; CJEU, judgement of 6 October 2020, *Commission v Hungary*, C-66/18, ECLI:EU:C:2020:792; and CJEU, judgment not yet delivered, *Commission v Poland*, C-791/19, opinion of the Advocate-General of 6 May 2021, ECLI:EU:C:2021:366.

²² Article 17(1) TEU.

²³ Article 252 TFEU.

²⁴ The second sub-paragraph reads: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

²⁵ See for recent examples: CJEU, judgment of 17 December 2020, *'Openbaar Ministerie' v L and P*, joined cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033; and CJEU, judgment of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, C-824/18, ECLI:EU:C:2021:153.

²⁶ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ EU L 433 I/1 of 22 December 2020. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN> (accessed on 04.06.2021).

aims to protect the EU's financial interests against any kind of fraud, corruption and conflict of interest from the side of Member States.

According to the mechanism, appropriate measures shall be taken when breaches of the principle of the rule of law in a Member State affect, or seriously risk affecting, the sound financial management of the EU budget or the protection of the EU's financial interests 'in a sufficiently direct way'.²⁷ In such a situation, the Commission 'shall' submit a proposal for an implementing decision to the Council, for adoption by qualified majority.²⁸

Although there is not yet a practice that can be referred to, certainly the Member State that will be the addressee of such a 'sanction' decision, can lodge an appeal against that measure with the Court of Justice in Luxembourg.²⁹ So, also here the Court of Justice will have the final say.

Having said that, for Hungary and Poland this file is a controversial one. Both Member States deny that the EU possesses the competence to develop a system enabling the Commission to establish violations of the rule of law. For that reason they launched on 11 March 2021 an appeal with the Court of Justice against the adoption of the entire regulation.³⁰

As mentioned, the focus of the new rule of law mechanism concerns in the first instance the protection of the EU's financial interests. The regulation thus is a special instrument. It cannot be considered a tool to combat breaches of the rule of law generally speaking.

7. THE MECHANISMS OF THE COUNCIL OF EUROPE

Since all Member States are members of the Council of Europe and party to the European Convention on Human Rights (ECHR), invoking the mechanisms of that Council can equally be an option to combat violations of human rights and fundamental freedoms.

In that regard, also in the Council of Europe context political discussions in the Committee of Ministers and/or the Parliamentary Assembly are the first remedies to think of.

The launching of an interstate application with the European Court of Human Rights in Strasbourg is another. According to Article 33 ECHR namely 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.'

It seems that so far no Member State of the EU has invoked one of these mechanisms against another Member State. In a way that is surprising, since the values covered by Article 2 TEU can basically be protected by applying the mechanisms of the Council of Europe as well.

²⁷ Article 4(1). Although it is not immediately clear what is to be understood by 'sufficiently direct', the breach apparently has to be a serious one.

²⁸ Article 6 (9-11).

²⁹ By virtue of Article 263 TFEU.

³⁰ CJEU, Hungary v European Parliament and Council of the European Union, case C-156/21, available at: <https://curia.europa.eu/juris/document/document.jsf?docid=240021&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=13846077> (accessed on 04.06.2021); and CJEU, Poland v European Parliament and Council of the European Union, case C-157/21, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=240048&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8482096> (accessed on 04.06.2021).

Moreover, the Union is supposed – actually, that is a treaty obligation - to accede to the ECHR.³¹ That accession has not been achieved yet.

8. THE SITUATION IN THE EU AT PRESENT

8.1. *The Scope of the Problematic*

Problems with regard to the respect of the EU's fundamental values and violations thereof have occurred, and still occur, in quite a number of Member States.

Dialogues at the political level to have these events discussed are ongoing. And, as has been mentioned,³² the annual Rule of Law reports of the Commission, inter alia reporting about the rule of law situation in the Member States, will be discussed in Council. Organising political discussions is the right approach, as long as these discussions are thorough and in depth. Conclusions have to be drawn, and plans for improvement developed.³³

On the other hand several legal proceedings have been brought before the Court of Justice in Luxembourg, either at the initiative of the Commission (Article 258 TFEU, the infringement procedure) or of a national court requesting the Court for guidance regarding the interpretation of the EU's fundamental values (Article 267 TFEU, the preliminary ruling procedure). More particularly Poland and Hungary have been, and still are, involved in serious discussions, more particularly regarding the respect of the independence of the national judiciary, the respect of the independence of the media, the freedom of education and the functioning of non-governmental organisations.³⁴

Moreover, as stated earlier,³⁵ two complaints based on Article 7 TEU - the one against Poland, the other against Hungary – have been initiated. Meanwhile the Court dismissed on 3 June 2021 Hungary's action against the European Parliament's resolution triggering the Article 7 procedure.³⁶

8.1 *Historical Considerations*

When assessing the merits of the rule of law situation in individual Member States, one must take into account that each Member State has a different history and traditions. Likewise all Member States have experienced different economic developments over the time.

In that context all Member States have developed their own system of government and democracy. Notably most of the new Member States have suffered under the severe consequences of the Cold War and communism. Only relatively recently

³¹ Article 6(2) TEU. See also supra, chapter no. 3 of this paper.

³² Supra, subchapter no. 5.3 of this paper.

³³ See also supra, subchapter no. 6.1 of this paper.

³⁴ A first prominent judgment regarding the principle of judicial independence is: CJEU, judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117. Other judgments regarding that same subject matter are: CJEU, judgment of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586; CJEU, judgment of 7 February 2019, *Carlos Escribano Vindel v Ministerio de Justicia*, C-49/18, ECLI:EU:C:2019:106; CJEU, judgment of 19 November 2019, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982; CJEU, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuratorę Krajową, formerly Prokuratora Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, Joined Cases C-558/18 and C-563/18, ECLI:EU:C:2020:234.

See for some recent cases and decisions, supra footnote 21 (infringement procedures) and footnote 25 (preliminary rulings procedure).

³⁵ Supra, subchapter no. 6.2 of this paper.

³⁶ CJEU, judgment of 3 June 2021, *Hungary v European Parliament*, C-650/18, ECLI:EU:C:2021:426.

an authoritarian style of regime and dictatorship was replaced by democracy and the market economy model in these countries.

8.2 The Economic Inequalities in the EU

The continuous economic inequalities existing between West and East in the Union are another important factor in this discussion. The reference here is more particularly to differences as regards standards and costs of living. In that sense, these inequalities can have an impact on the timing and the way Member States organise their societies as well as their systems of governance.

Again, we touch upon a phenomenon that concerns more particularly the new Member States rather than the older ones. Certainly, there are ways and means to overcome these differences. Think for example at the establishment of a programme similar to the EU New Generation Programme, adopted to assist the Member States to recover from the economic damage caused by the Covid-19 pandemic.³⁷ A similar programme could be developed in order to create more equality between the Member States in the Eastern and Western part of the Union. The financing of national projects and massive investments, by public and private entities, could be useful instruments to assist the Member States concerned. Anyway, as long as these inequalities between East and West do continue to exist, we must exercise some patience when looking after the full respect, by the Member States, of the EU's fundamental values.

8.3 The 'Red Lines'

On the other hand, what to do if a Member State clearly does not comply (anymore) with the minimum requirements of membership of the Union? Then the basis for its membership gets lost.

So, at least we have to draw some 'red lines' that we cannot allow a Member State to cross. The guarantee of full independence of the judiciary and of the media is of crucial interest in this regard. Both entities – the judiciary and the media – do not belong to the policy-making infrastructure of a country. They rather control the functioning of the partners – the legislator and the executive – involved in policy-making. The judiciary and the media must be enabled to perform these controlling tasks in complete independence.

9. WHO ARE THE ACTORS?

From the discussion it follows that in the EU context all relevant initiatives to survey the respect of human rights and the rule of law by the Member States have so far been launched by institutions, either the Commission or the European Parliament.

However, looking after the respect of fundamental values is not simply an issue to be compared with monitoring the implementation of EU law obligations by Member States, such as the correct and timely application and enforcement of EU regulations and directives. Supervising the respect of human rights and the rule of law, and actively countering violations thereof, is therefore not just a responsibility of the Commission or

³⁷ Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ EU L 433 I of 22 December 2020, pp. 23-27. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0023.01.ENG&toc=OJ%3AL%3A2020%3A433I%3ATOC> (accessed on 04.06.2021).

the European Parliament. Here rather a primary responsibility of the Member States themselves is at stake.

What is more, the Member States have founded the Council of Europe and the European Union. It were also the Member States who have developed Europe's catalogues of fundamental rights and values, either in the framework of the Council of Europe (the European Convention of Human Rights) or the European Union (the Charter of Fundamental Rights).

Therefore, the EU's fundamental values reflect as it were the constitutional traditions common to the Member States, and vice versa. For this reason Member States should become much more active in surveying the respect of those values than happens today.

10. SANCTIONS

10.1 Suspension of Membership Rights

Once serious violations of the Union's fundamental values do occur, the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' – that is the wording of the third paragraph of Article 7 TEU - comes to mind.

So, essentially the focus is on membership rights. In that regard, the treaty thus specifies that the suspension of voting rights of the government concerned in the Council is the first option to think of. That certainly is an effective sanction. It would mean that, whereas the Member State concerned can, at least in principle, still participate in the discussions about policy-making, it is not able to influence the decision-making about the substance matter concerned.

The suspension of payments from one of the EU funds is another possibility. Here a comparison can be drawn with the effects of the application of the new instrument to protect the financial interests of the Union against violations of the rule of law.³⁸

10.2 Does an Ultimate Sanction – Expulsion – Exist?

That said, does an ultimate sanction exist, so suspension of membership or, even, expulsion of the Member State concerned?

Contrary to the situation of a Member State aiming to withdraw from the Union,³⁹ there is no explicit legal basis for the expulsion of a Member State.

On the other hand, suspension of membership rights is a broader concept than referring, as is done in Article 7(3) TEU, to the suspension of voting rights in the Council. Therefore, at least in theory it seems that the wording 'suspension of certain of the rights deriving from the application of the Treaties to the Member State in question' includes suspension of the right of representation, thus the right of the Member State concerned to be represented in the institutions.

Such a consequence would imply in practise that, unlike in the case when voting rights are suspended, the Member State in question is not even able anymore to

³⁸ Supra, subchapter no. 6.5 of this paper.

³⁹ Article 50 TEU.

participate in the discussions about policy making of the Union. Basically, the result would come down to an expulsion of that Member State.

Remains the question of decision-making. That issue is slightly more complicated to handle. That is to say, of course the requirement of 'consent' of the European Parliament⁴⁰ is not problematic. It is only positive that the Parliament is fully involved in the decision making regarding such politically sensitive issues.

Rather the decision-making modalities in the (European) Council require a closer look. Because, whereas on the one hand there is a reference - in Article 7(3) TEU, with regard to the suspension of membership rights - to qualified majority voting, the determination of a serious and persistent breach of the Article 2 values - the issue mentioned in Article 7(2) TEU - requires unanimity (again, the vote of the Member State in question not being taken into account).⁴¹

Now, in a way it is logical that the decision-making modalities regarding the issuing of sanctions are simpler compared to the ones related to the preliminary determination of a serious violation of the Article 2 values. On the other hand, the requirements to determine such a violation are excessive. Indeed, in light of the nature of the decision concerned, it is not acceptable that all other Member States possess as it were a right to veto such a decision.

To that extent the arrangements of Article 7(1) TEU, according to which a majority of four fifths of the members of the Council (so, 22) will suffice to determine a clear risk of a serious breach by a Member State of the Article 2 values, are more appropriate. One also could think at alternative majority models: two thirds (18) or, possibly, three quarters (21) of the number of Member States.

In this context, by the way, inspiration can be drawn from the corresponding arrangements of the Council of Europe. In that regard, it is stated in Article 8 of the Statute⁴² of the Council of Europe: 'Any member of the Council of Europe which has seriously violated Article 3,⁴³ may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.'

Now, first of all the Council of Europe practises an explicit formula regarding the cessation of membership of the organisation, whereas they are lacking in the EU context. Apart from that, the decision-making arrangements of the Council of Europe are more flexible compared to the ones in EU law. As a matter of fact, according to Article 20 (d) of the Statute of the Council of Europe, a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee is required for such a decision.⁴⁴

So, on this point, there clearly is a need to improve the arrangements of EU law, more particularly the arrangements of Article 7(2) TEU.

Having said that, such an improvement would require treaty amendment.⁴⁵

⁴⁰ The consent of the European Parliament has to be obtained by a two-third majority of the votes cast, representing the majority of its members: Article 352, fourth paragraph, TFEU.

⁴¹ Article 354, first paragraph, TFEU.

⁴² Statute of the Council of Europe is available at: <https://rm.coe.int/1680306052> (accessed on 04.06.2021).

⁴³ Article 3 reads: 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.'

⁴⁴ See about this subject matter also Dzehtsiarou and Coffey (2019).

⁴⁵ See for the procedural arrangements of treaty amendment: Article 48 TEU.

What, apart from these decision making modalities, is just as important, is that there should be a mechanism of judicial control to assess the legality of (binding) acts adopted in order to enforce the EU's fundamental values. More particularly such a control should be made possible with regard to the decision – mentioned in Article 7(2) TEU - determining the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 - as well as to the decision – referred to in Article 7(3) TEU - regarding the suspension of membership rights. Now, as already discussed,⁴⁶ the control of the Court regarding these issues is by virtue of Article 269 TFEU for the moment limited to an assessment of the procedural requirements of Article 7. Essentially, therefore the provision of Article 269 TFEU should be deleted so that, as a consequence, Article 263 TFEU - containing the general regime for direct appeals against acts of the institutions - becomes of full application.

Be that as it may, if one indeed would aim to extend the scope of the Court's jurisdiction, again treaty change is required.

Finally but not least, when reflecting about imposing sanctions on a given Member State, politicians should mind whether the issuing of such far-reaching decisions may damage (disproportionally) the interests of ordinary citizens of the Member State concerned. That of course is a policy matter.

11. FINAL REMARKS

Democracy, good governance and effective judicial protection, at national and EU level, are principles whose proper functioning is completely dependent of the respect, by the Member States, of the fundamental values of the European Union. It is a crucial subject matter.

Violations of those values have to be combatted in an appropriate manner.

Certainly, in doing so we have to act with patience and comprehension. But also with determination.

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