

FROM COMMITMENT TO ACTION: *FUNDAMENTAL VALUES IN THE EU MEMBER STATES*

REPORT ON AN EXPERT ROUNDTABLE ON LEGAL MECHANISMS AND REFORMS OF EU LAW, BERLIN, 30 JANUARY 2014



THE PROBLEM

There is a consensus, confirmed by participants, that something needs to be done to strengthen the EU's response to democracy crises in EU member states. The problem is manifest. As one participant noted: "*We are in a situation where citizens from a member state are granted political asylum in Canada.*" The EU's fundamental values, expressed in Article 2 EU Treaty, are not respected everywhere.

Participants noted a number of reasons why a democracy problem in one member state represents a problem for all:

- Each member state is a pan-European co-legislator through the Council and the European Parliament; when you are in a Union you become inherently complicit in what is going on in each member states. This is a matter of responsibility, not charity.
- "Mutual trust" is an essential element of EU relations, it underpins the principle of mutual recognition (see for example European arrest warrant).
- The free movement principles have created a "European Space".
- The EU's external credibility as a community of democracies is at risk.

CHALLENGES

There are however many challenges in solving this problem:

- Almost all participants agreed that treaty change is not an option for the foreseeable future. Any response must take place within the existing framework.
- The commitment to respect national traditions and democratic decisions ("margin of appreciation") must be weighed against responsibility for each other. This is a matter of line drawing.
- Procedures cannot be based on 'decisions of the powerful'; they must be based on impartial assessments and evenhanded application towards all.
- A participant noted that the EU's own democratic credibility needs to be strengthened. Otherwise there is a risk of a European **authoritarian constitutionalism**.

- It was mentioned that the EU model differs from the US's aspiration of *e pluribus unum*, which is directional: It is rather based on *in varietate concordia* (Article 2 vs Article 4 III TEU).
- A participant highlighted the reactions on the Austrian case in 2000 as a bad precedent of a process that infringed the rule of law.
- Member states are unlikely to raise concerns about one another: It was mentioned that article 259 TFEU, allowing member states to bring infringement procedures against another member states has only been used three times. Another example is the ECHR: Russia does not have the structural elements of democracy enshrined in the ECHR but no state party has used the opportunity to bring the matter before Court nor has the Committee of Minister suspended Russia from its rights of representation.

DEFINING SHARED VALUES - THE MEANING OF ARTICLE 2

There appears to be an agreement that the triangle of democracy, human rights and the rule of law cannot be broken up. It is not possible to limit concerns to only one of these aspects. There is some disagreement on which of the three is more fundamental. Somebody noted that it may be a matter of 'you stand where you sit'. For the Fundamental Rights Agency (FRA), human rights are the overarching concept, for DG Justice it may be the rule of law, while others may feel that democracy is the glue that binds the three elements together.

Sometimes it is argued that Article 2 TEU is only aspirational, not carrying concrete legal meaning. One participant pointed out that the *travaux préparatoires* of the Lisbon Treaty make clear that Member States consciously accepted that Article 2 TEU carries concrete, legal content in conjunction with Article 7 TEU. The trigger mechanisms and sanctions of Article 7 TEU pre-suppose that Article 2 TEU has a concrete meaning. Participants generally agreed with this point of view. A few said that Article 7 TEU was narrow however, conceived to deal with manifest crisis, such as a military coup d'état. Others suggested a wider notion: The EU should not deal with every imperfection but must speak up against systemic challenges to the democratic order.

Most participants also felt that Article 7, by limiting itself to 'serious breach', leaves a wide gap in protecting values in member states. In particular, a narrow reading does not allow any preventive intervention to avoid that 'serious breach' occurs, or to halt an incipient erosion of a democratic order.

One participant expressed the view that constitutions are often generalistic on major concepts such as democracy or the rule of law; it is then up to legislators or courts, constitutional courts in particular, to fill out the blanks. In that sense there is no gap. In his view the interesting aspect is that no EU body has the 'courage' for a dynamic interpretation of the treaty. In this vein another participant suggested that Article 7 TEU is limited to institutional responses, while there is another dimension of individual litigation or 'class actions' against violations of Article 2 TEU values.



Some questioned the idea of Article 7 TEU being a 'nuclear bomb', given that it provides a careful escalation of steps. They felt that the Article is more usable than many people suggest. Many felt also that Article 7 TEU (and infringement procedures under 258 TFEU) are insufficient by only providing legal remedies, where problems should be addressed politically as well.

Some participants felt that the Copenhagen criteria for accession provide the best concrete and detailed expression of an obligation entered into. However, many participants considered that the Copenhagen criteria are not relevant anymore for member states and that they have been superseded by Article 2 TEU. They see a crisis in a member state as something unrelated to past accession negotiations. Any link to past accession negotiations could be seen as an implicit threat to undo accession. In their view membership and candidate status are fundamentally different and should not be conflated: "It is not accession reloaded".

Some participants indicated that existing international obligations should be used to understand the scope of Article 2 TEU, such as the International Covenant for Civil and Political Rights and the European Convention on Human Rights. Others indicated that the European understanding is that Europe's human rights obligation are more stringent than those at the international level.

FACT-FINDING AND ANALYSIS

Participants agreed that within the EU there is an abundance of open, available information. Fact-finding thus poses no difficulty. The question of analysing and evaluating information is more complex. Currently the Venice Commission and the FRA appear to be the best placed expert bodies to deal with this. While the FRA as an EU institution is better placed, the Venice Commission has a stronger mandate in addressing structural elements of democracy. There was no clear preference for either of the two bodies but agreement that they will have a role to play.

TYPES OF RESPONSES: POLITICAL, SOFT LAW OR HARD LAW

The possible responses to an Article 2 TEU problem were discussed. Some participants expressed their opinion that a political mechanism was lacking, pointing out that currently it is difficult to put Article 2 TEU challenges on the agenda of the Council. There is no established procedure or trigger mechanism to do so. They feel that this should change and that the Council should become a primary body for addressing Article 2 TEU issues on the basis of a dialogue between equals. Other participants felt that the EP should continue to work as a political forum with more visibility and connection to citizens than the Council has. They thought that Orban's debate with the EP was a positive moment of public accountability at the European level.

'Soft law tools' such as FRA or Venice Commission reporting was also discussed. These are generally considered to be useful providing facts-based analysis. However, the FRA's mandate is relatively limited and amending its mandate may be difficult, while the Venice Commission is part of the Council of Europe and thus part of a wider framework than the EU. It is also open to debate how these soft law tools interact with EU procedures. For example, what is the consequence of a negative report by the Venice Commission? A participant suggested that another soft law tool from EU practice should be considered, namely the open method of co-ordination, which works through benchmarking and peer pressure rather than hard law and sanctions.



In terms of hard law, Article 7 TEU and infringement proceedings under Articles 258-260 TFEU were discussed. According to one participant the practice of Article 259 TFEU is telling about the reluctance of member states to point out problems in another member state. Article 259 TFEU, allowing a member state to bring alleged infringements of treaty obligations to the ECJ, has only been used three times. A number of participants feel that the Commission has no legal basis to directly address challenges to democracy or the rule of law.

As far as sanctions are concerned opinions were mixed: It was pointed out that the sanctions mechanisms under infringement procedures usually work well, but sceptics feel that article 2 TEU crises are different because in those cases governments often do not act in good faith and may actually consider a confrontation with the EU as part of a strategy of rallying domestic, nationalistic support. In those cases the impact of the sanction threat is more difficult to ascertain.

WHICH INSTITUTION?

The question of which is the appropriate institution was considered to be the most difficult one, raising the question of who judges whom. Most participants agreed that the more political institutions, the EP and the Council, can play complementary roles: the EP provides visibility and public accountability, while in the Council peer pressure can be made to bear on member states concerned. However, these institutions were seen as too political to have a role in hard law mechanisms. These would be left to the Commission as the guardian of the treaty and the CJEU. Participants did not feel the need for a new body, such as a Copenhagen commission given that there are already many soft law institutions involved.

CONCLUSION



The participants concluded that significant steps need to be taken to ensure that human rights and democracy are effectively respected. The EU response to democracy crises in member states has not been adequate so far. It was generally agreed that there is significant scope for doing more within the current EU law and with the existing institutions. Treaty change or establishing a new institution was not considered desirable, realistic or necessary for the time being.

It was furthermore agreed that there is no silverbullet, not one mechanism, tool or institution that could provide all the answers to the challenges. Instead there should be a package of measures to improve the EU's handling of democracy crises in EU member states. These would include political dialogue and a better use of existing soft and hard law tools.

PARTICIPANTS



Dr. Hannes Krämer, Legal Service, European Commission

Dr. Christoph Sobotta, Legal secretary in the Cabinet of Advocate General Kokott, Court of Justice of the European Union

Dr. Gabriel Toggenburg, Programme Manager, Legal Research, Equality and Citizens' Rights Department, Fundamental Rights Agency

Dr. Thomas Markert, Secretary of the Venice Commission

Dr. Stefan Grabherr, Head of Division, Justice, Home affairs and EU law, German Ministry of Foreign Affairs

Dr. Jens Jokisch, Deputy Head of Division for EU institutional issues, German Ministry of Foreign Affairs

Ms. Kaisa Tiusanen, Ministerial Adviser, Unit for Democracy, Language Affairs and Fundamental Rights Ministry of Justice, Finland

Ms. Iwona Jakuszko Dudka, First Secretary, Embassy of the Republic of Poland in Berlin

Ms. Pauline Diepenbroek, Head of the Political Division, Embassy of the Netherlands in Berlin

Mr. Elie Cavigneaux, Delegate for EU Affairs, Embassy of France in Berlin

Ms. Marianne Hoffmann, British Embassy in Berlin (Observer)

Mr. Andre Wilkens, Director Mercator Centre Berlin and Director Strategy, Mercator Foundation

Prof. Dr. Dimitry Kochenov, Universiteit Groningen

Prof. Dr. Aida Torres, Universitat Pompeu Fabra Barcelona

Prof. Dr. Dr. h.c. Christian Tomuschat, Humboldt Universität

Prof. Dr. Mattias Kumm, WZB Berlin Social Science Centre, Humboldt Universität

Prof. Dr. Mark Dawson, Hertie School of Governance

Prof. Dr. Christian Joerges, Hertie School of Governance

Ms. Franziska Pfeiffer, LL.M., Hertie School of Governance (Observer)

Prof. Dr. Dr. h.c. Ingolf Pernice, Director of the Walter Hallstein Institute, Humboldt Universität

Dr. Mattias Wendel, Academic Assistant, Walter Hallstein Institute, Humboldt Universität

Mr. Michael Meyer-Resende, LL.M., Executive Director, Democracy Reporting International

Ms. Evelyn Maïb-Chatré, LL.M., Programme Officer, Democracy Reporting International

Ms. Amandine Rat, LL.M., Democracy Reporting International

Mr. Duncan Pickard, Democracy Reporting International

Mr. Raymond Serrato, Democracy Reporting International

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions worldwide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<http://www.democracy-reporting.org>

Or contact:

info@democracy-reporting.org

ABOUT THE WALTER HALSTEIN INSTITUTE AT THE HUMBOLDT UNIVERSITY

The Walter Hallstein Institute for European Constitutional Law at the Humboldt University in Berlin was created in 1997. It is a scientific branch of the law faculty of the Humboldt University. Its main focus is the research and discussion of the foundations and structures of the substance of a European constitutional order on the basis of a comparative constitutional law. Directed by Professor Pernice, it is part of an international network of Institutes with similar aims for a cooperative research.

<http://www.whi-berlin.eu/>