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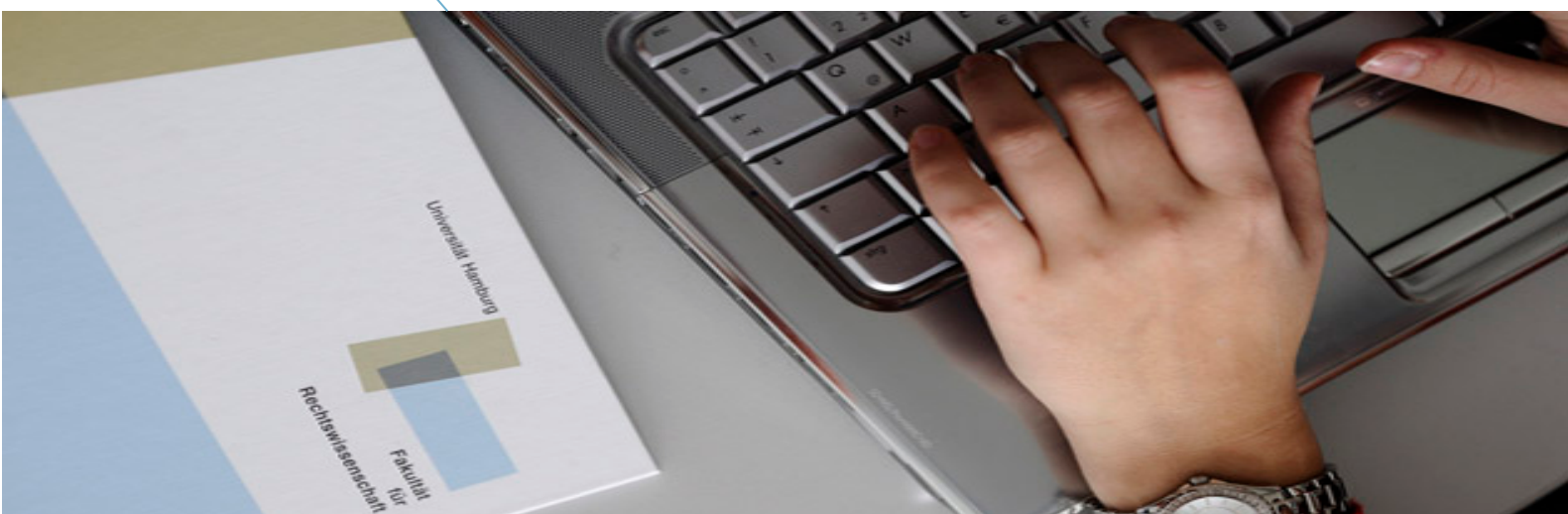
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Taking the Rule of Law Seriously – How the EU Could Foster Its Own Values

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Abstract:

The rule of law, a fundamental value of the European Union (EU), has come under stress in a number of its member states. The EU's response to these stresses has been criticized as politicized, slow, and unassertive. This research note develops a proposal to improve the current procedure.

Keywords: rule of law, Article 7 TEU procedures, infringement proceedings, expert committee.

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1. Introduction

Article 2 of the Treaty of the European Union (TEU) declares the Union to be “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.” Article 3 of the Treaty goes on to describe the aim of the Union as promoting its values.

Over the last decade, many of the values stated in Article 2 TEU have come under attack in various member states. The reaction of the Union has been criticized as slow and hesitant. It has also been argued that the toolkit at the disposal of the European actors was insufficient to deal with governments in overt opposition to these values.

In this research note, I am proposing a way for the EU to strengthen the pursuit of its fundamental values. Special emphasis will be put on the rule of law, because a high level of the rule of law is a crucial precondition for realizing the other values stated in Article 2 of the TEU.² For the proposal to be implemented, a reform of the Treaty would be necessary. Although this appears unlikely at the moment, it seems nevertheless prudent to think about possibilities to improve the Treaty sometime in the future when a window of opportunity opens.

A number of years ago, Hungarian Prime Minister Viktor Orbán declared that he wanted to turn his country into an illiberal democracy. But this is an oxymoron. Democracy presupposes the possibility that somebody else wins and receives the right to govern for a limited period of time. It presupposes the possibility that parties with very different positions try to convince citizens to vote in their favor. Democracy, thus, presupposes a certain amount of liberalism. Governments like the one run by Orbán change many institutions with the explicit aim of making an electoral defeat at the voting booth unlikely. Elections are *de rigueur*, but these governments tilt the playing field in their favor by reducing media freedom,

² The position that the rule of law is the foundation of all values on which the Union is based is shared by the Commission and explicitly stated in its rule of law framework (IP/14/237).

making activities by civil society more difficult, and so on. They can be described as would-be autocrats who keep on running elections to give their government the appearance of legitimacy.

Before developing a proposal as to how the Union could be given more teeth to promote the rule of law, I ask if intervention by the EU in member states' policies can be justified in the first place. In the third section, I summarize the shortcomings of the toolkit currently available at the Union level. Section four contains the proposal, and section five puts the proposal in a broader context.

2. How to Justify the Intervention of the EU?

The governments of a number of member states whose policies are in overt opposition to the rule of law have harshly criticized the behavior of members of the Commission. Hungarian minister of justice, László Trócsányi, for example, recently described the behavior of the Commission vis-à-vis Hungary as “like a Politburo” (FAZ March 11, 2019; p. 2). Populist governments, in particular, frequently use the Brussels elite as a welcome scapegoat claiming that it interferes in issues that are part of the respective member states' national sovereignty. These types of accusations require a brief presentation of arguments that serve to justify intervention by the EU when the basic principles of the rule of law have been infringed.

First of all, the Union is based on a number of fundamental values, including the rule of law. All member states have explicitly agreed to them by ratifying the treaties. If one (or more) member state openly departs from these values, intervention by the remaining member states seems legitimate.

Second, the EU is a single judicial area with regard to a number of policy areas. Courts on the nation state level thus implement EU law. One measure frequently taken by governments tinkering with the rule of law is to reduce the independence of the judiciary. But if the courts are not independent from their nation state governments, this is likely to prevent a single judicial area from emerging.

For many of the member states from Central Europe that have relatively recently joined the Union, an important benefit of being a member of the EU is that membership enables their governments to make more credible commitments. Newly created states that do not have a long history of having abided by their promises appear less credible to, for example, potential foreign investors. Given

this reality, membership in the Union, which signals compliance with basic rule of law criteria as well as a functioning market economy, could be very valuable. If, however, a single member state is permitted to enact policies that are not in line with the basic rules of the EU, general membership in the Union becomes less valuable. In other words, non-complying member states create negative externalities on complying member states. Hence, simply being a member state of the EU is no longer a credible signal, and insistence on basic levels of compliance by all member states is well justified.

Finally, many decisions of EU organs are directly relevant for all EU member states' citizens. If the voting rights of would-be autocrats are not suspended, then these would-be autocrats are allowed to make decisions that are directly relevant for all EU citizens. This has aptly been called Europe's "other democratic deficit" (Kelemen 2017). In other words, another justification for intervention by the EU is negative externalities created by would-be autocratic governments that extend not only beyond their nation state borders, but impact every citizen of EU member states.

3. Deficits of the Current Toolkit

The Treaties ratified by member states provide two procedures to sanction a non-compliant member state government. If a member state fails to implement EU law, Article 258 provides an infringement procedure that may be invoked by the Commission, or by any member state. If consultations fail, it may be referred to the Court of Justice. Financial penalties may be invoked.

The second procedure is known as the Article 7 procedure, but commonly referred to as "the nuclear option". Article 7 (TEU) actually contains two procedures, a prevention mechanism described in Article 7(1), and a sanctioning mechanism outlined in Article 7(2).

	Prevention mechanism	Sanctioning mechanism
Legal basis	Art. 7 (1)	Art. 7(2)
Subject	Clear risk of serious breach of the values referred to in Art. 2	Existence of a serious and persistent breach of the values referred to in Art. 2
Procedure initiated by ...	1/3 of the member states, the European Parliament or the Commission	1/3 of its member states, or the Commission AND the consent of the European Parliament
Decision by ...	Council (4/5 of its members)	European Council (unanimously)
Formal sanctions	None	Non-mandatory but possible (e.g. suspension of voting rights)

Whereas a “clear risk of a serious breach by a Member State of the values referred to in Article 2” can be determined by a four fifths majority of the Council members, the European Council (i.e., the heads of states) must achieve unanimity to determine that a “serious and persistent breach by a Member State of the values referred to in Article 2” exists. While the Treaty does not specify a sanction if the prevention mechanism has been invoked, Article 7(3) allows that the Council “may” decide to suspend certain rights if the sanctioning mechanism has been invoked.

There are a number of problems with these two procedures. Infringement procedures are not always complied with. Since there are many of them (against all member states), non-compliance often goes largely unnoticed by the general public. But even when decisions handed down by the Court of Justice are complied with, would-be autocrats are often able to sidestep true compliance. Here is one example: the Commission invoked the infringement procedure to sue Hungary after it passed a law forcing all judges who had reached the age of 62 to step down. When the case came before the Court of Justice, it decided in favor of the Commission (C 286/12). The appearance of compliance was maintained when

the Hungarian parliament revoked the law. The fact remains, however, that most of the judges who had been forced to retire could not return to their previous positions because those positions had already been filled by the Orbán government. Interestingly, the Commission sued Hungary on the basis of not complying with its anti-discrimination legislation, rather than on the more serious grounds of reducing the independence of the judiciary.

To an outside observer, it is abundantly clear that the Hungarian government has systematically acted against the rule of law ever since Fidesz won the elections in 2010. Yet, the European Parliament only initiated a formal procedure according to Article 7(1) – i.e., dealing with the issue whether a clear risk of a serious breach exists – in September 2018. One reason for this long delay seems to be that the initiation of such procedures is based on political considerations: the Hungarian Members of the European Parliament (MEPs) sent by Fidesz belong to the Group of the European People's Party. Fidesz-sent MEPs are unlikely to remain loyal Group members if the group supports the initiation of an Article 7 procedure. Losing some MEPs would weaken the group and is therefore considered as politically inopportune (Sedelmeier 2017).

To sum up: the initiation of Article 7 procedures is highly politicized and cumbersome. In addition, it has been extremely slow. Infringement procedures also suffer from lengthy delays that frequently enable those being sued to have their way before a final decision is reached, even if they formally comply with EU legislation subsequent to a Court decision.

4. How to Improve the EU Toolkit – A Proposal

4.1 Conceptual Considerations

Taking the weaknesses of the current procedures just described explicitly into account already provides us with a number of criteria for developing better and more effective procedures.

First, if the rule of law really is a fundamental value of the EU and its implementation is a precondition for the realization of other values, then its protection should not depend on political power games. It should, therefore, be depoliticized.

Second, the more time allotted to would-be autocrats to establish their own rules and political institutions, the more difficult it is to turn back the clock and (re-) establish the rule of law. First warnings, therefore, should be carried out swiftly and as early as possible.

Third, populist governments frequently stir up public opinion against the “Brussels elite” which would behave like an autocrat and lack democratic credentials. To take the wind out of their sails the procedure should, therefore, be as transparent and rule-based as possible.

4.2 The Proposal Proper

The behavior of politicians who attempt to reduce the rule of law is alike across the world. This is good news for those interested in protecting the rule of law, as early signals can be detected easily. As soon as one (or more) of the predictable policy measures is observed, a first warning could be sent.

Here is a list of policy measures typically chosen by would-be autocrats:

- Certain constitutional changes, in particular those allocating additional power to the executive (such as prolonging the office term, but also expanding the possibility to use decrees).
- Changes in the electoral system that improve re-election prospects, in particular redistricting (“gerrymandering”).
- Reducing the independence of the judiciary.
- Creation of new agencies whose heads are then filled with cronies.
- Reduction of media freedom (including the freedom to use social media).
- Reduce the leeway of civil society organizations.³

Although these measures are frequently used by would-be autocrats, they can also serve legitimate purposes. For example, districts might be realigned because of changing population densities. Therefore, I propose the creation of an expert committee that is given the responsibility of monitoring the governments of member states to determine whether the policies mentioned above were used in a

³ In a previous study (Gutmann and Voigt 2019), we found that reductions in media freedom, as well as in the leeway that civil society organizations enjoy, are a good predictor for the degree to which the executive respects the constitution, which can be interpreted as a proxy for the degree to which the rule of law is upheld in a country.

legitimate way, or in a way that the rule of law is likely to suffer.⁴ Of course, any list cannot be considered comprehensive. Would-be autocrats are likely to become innovative if the listed measures are not open to expansion.

An expert committee that determines that the rule of law is likely to suffer as a consequence of any measure taken by a particular government could issue an “early warning”. This should be made public, but no formal sanctions should be attached to it. However, if the respective government does not react to this early warning within a reasonable period – say one year - an Article 7(1) procedure could be triggered automatically.⁵

As pointed out above, timely action is likely to reduce the damage a would-be autocrat might cause. This is the reason behind creating “early warnings”. The warnings should be made public in order to give opposing political parties an opportunity to challenge the respective measure. If governments know that inaction will automatically trigger an Article 7 procedure, this should increase their incentives to modify the respective policy measure.

The main idea behind the creation of an expert committee is to depoliticize the process and to establish an expert body that will continuously monitor the governments of member states. If the committee acts upon a recognized set of criteria and makes its deliberations public, the allegation of populist governments that the “Brussels elite” act in their own self-interest are likely to be ineffective.

Many ways to compose an expert committee can be envisioned. It seems, again, crucial that membership is based on clearly established criteria. One possibility is to compose the expert committee with one expert from all member states whose ranking in one of the rule-of-law indicators with a high reputation is above the ranking of the median EU member state. But many other options are available.

But this need not be the only way in which an Article 7(1) procedure can be kicked off. Imagine a country having been found in non-compliance with EU legislation according to Article 258 TFEU and the member state not having taken

⁴ Whether the respective government intended to reduce the level of the rule of law in its country or whether this was an unintended effect is irrelevant as long as one is interested in the protection of the rule of law.

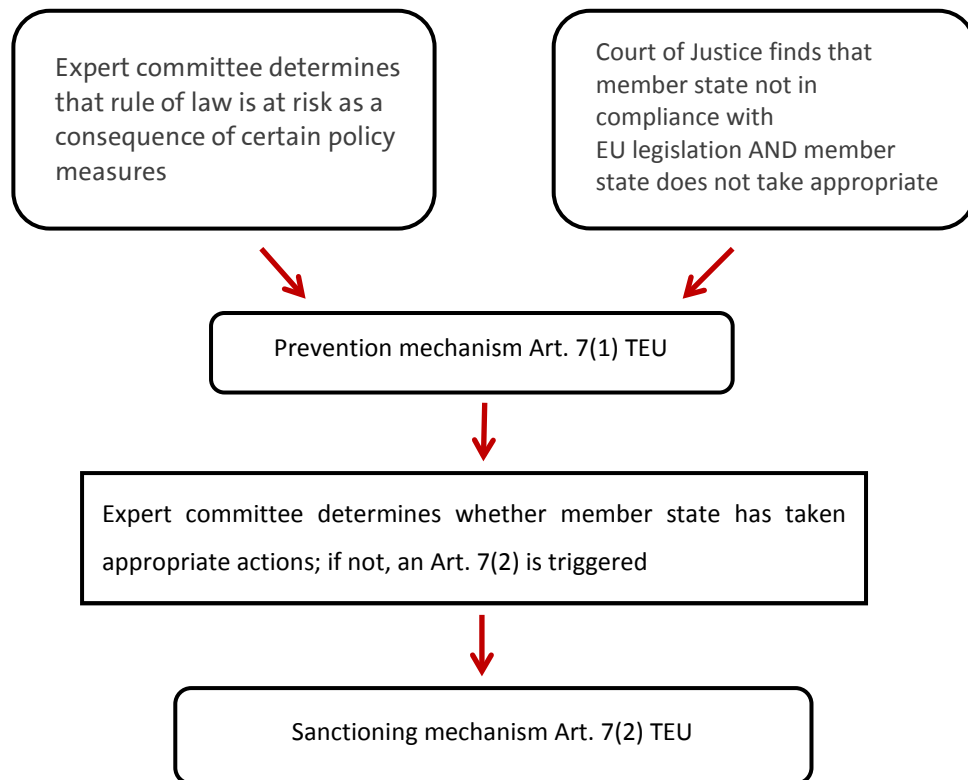
⁵ Remember that Article 7(1) procedures only determine whether a “clear risk of a serious breach” of the rule of law exists.

any measures to correct that. If important rule of law aspects are underlying the infringement proceedings, then this could also trigger an Article 7(1) procedure.

The proposal is, hence, to create two ways of triggering Article 7(1) procedures, one after an expert committee has determined that a government has chosen a number of policy measures that might threaten the rule of law and the other after the Court of Justice has decided an infringement procedure that touches upon important rule of law issues and the member state has not taken appropriate measures to correct that. But what should be done if a member state that has been found to be under a “clear risk of a serious breach” according to that article refuses to take action to avert that risk within a reasonable period of say two years? To me, the obvious answer is initiating an Article 7(2) procedure. Now, it may not be self-evident whether a member state has taken appropriate action or not. This implies that a judgment call is needed and I propose to have the expert committee make that judgment. The decision as to whether a member state has seriously breached the rule of law should be made by the Court – and not the Council as is currently the case.

Figure 2 summarizes the proposal. What is still missing are formal sanctions. Currently, Article 7(3) gives the Council the power to suspend “certain of the rights deriving from the application of the Treaties ... including the voting rights ... in the Council.” This is vague and the last word is with the Council. I propose to give the last word to the European Court of Justice. To be practicable, the Court needs clear guidelines regarding possible sanctions. These should, therefore, be spelled out in more detail in Article 7(3).

Figure 2: Summary of the Proposal



Financial sanctions constitute an obvious possibility. Some of the governments currently suspected of breaching the rule of law are among those who receive the most funds from the EU. EU expenditures in Hungary, for example, have been in excess of 5% of the Hungarian GDP.⁶

A skeptical reader might wonder if such a proposal has any chance of ever being implemented. After all, the proposal implies that politicians voluntarily rescind their current competences of both the initiation and the final decision of Article 7 procedures. Yet, support by many politicians does not seem unlikely. Imagine a politician who is genuinely interested in promoting the rule of law, but who belongs to a parliamentary group that also hosts the MEPs of a government reducing the rule of law in its home country. Under the current setting, this MEP

⁶ As an *ultima ratio*, the possibility to exclude members from the EU should be discussed. Currently, the treaties only know the possibility of leaving the Union but not the one of being expelled. Imagine a successful military coup having taken place in a member state with the military firmly installed. In such a situation, the possibility to exclude a member state might be necessary.

faces a difficult dilemma: to foster the rule of law implies weakening one's group. A depoliticized mechanism designed to maintain the rule of law would liberate the MEP from this dilemma, and this is exactly the reason why support by politicians does not seem unlikely.⁷

5. Conclusions and Outlook

The rule of law is one of the most fundamental values of the European Union, yet it is currently under heavy stress in a number of its member states. As of today, the EU's reaction to this threat has not been convincing. This research note proposes to depoliticize the process by creating an expert committee. The main task of that committee would be a constant monitoring of the degree to which member states comply with the rule of law. Such a committee could issue early warnings and, thus, considerably speed up the process compared to the current situation. The expert committee would act upon a clear mandate, namely to protect the fundamental values of the Union as spelled out in Article 2 TEU. It would alleviate politicians from having to make difficult tradeoffs. By depoliticizing the process, it would be more difficult for populist governments to call the entire process a scam.

There are other lessons to be learned from the current experiences with governments distancing themselves from some of the core values of the European Union. One is that the European actors should be more careful when giving policy advice. Just one example: All of the new member states were pressed to introduce judicial councils that allow the judiciary to administer itself. At base, separating the administration of the judicial branch from the executive sounds like an excellent idea, yet in most countries that have judicial councils this has led to a politicization of the judiciary and has made it less, rather than more effective. Another lesson is that Brussels should stop overestimating its own strength. The EU is not sufficiently strong (or attractive) to be instrumental in helping the governments of member states to realize a high level of the rule of law in their own countries. In other words, new members should only be let in after having satisfied the Copenhagen criteria, and not on the hope that becoming a member will speed up that process.

⁷ In the literature analyzing the reasons why politicians delegate competence to non-elected agencies, this is known as "responsibility shifting" (Voigt and Salzberger 2002 survey that literature).

The concept of militant democracy was developed in the 1930s in an attempt to prevent fascist movements from taking over governments. The proposal presented here can be interpreted as one aspect of a concept that could be coined militant constitutionalism. It is an attempt to prevent would-be autocrats from revoking the rule of law and abandoning democracy.

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