Article

Wilfried Martens Centre for European Studies

European View
2019, Vol. 18(1) 97–104

DOI: 10.1177/1781685819840276
journals.sagepub.com/home/euv
SAGE

Strengthening the founding values of the EU: The potential role of the Fundamental Rights Agency

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Abstract

The rule of law is one of the founding values of the EU, as indicated in Article 2 TEU. This provision recognises that the rule of law is a core value, inherent to liberal democracy, and one which characterised the Union and its member states long before the formal establishment of the EU by the Maastricht Treaty. However, several member states, most notably Poland and Hungary, seem to have placed this value in jeopardy, leading EU institutions to disagree on how to combat this problem and its political consequences. The aim of this article is to propose a solution that involves a rather neglected, yet certainly competent actor, the Fundamental Rights Agency. The outcome would be twofold: on the one hand, the rule of law would be vitally strengthened; on the other, the role of the Agency would be fortified in line with its scope.

Keywords

EU values, Rule of law, Article 7 TEU, Sanctioning mechanism, Fundamental Rights Agency

Introduction

The concept of the rule of law has been rigorously discussed throughout the centuries by prominent political philosophers, such as Aristotle, Locke, Montesquieu and Dicey. Aristotle provided the basic definition, which indicates that the law should govern rather than any individual citizen. Enlightenment thinkers underlined several parameters of the concept: the importance of the law being promulgated and known to people, and the connection between the rule of law and an independent judiciary. Along the same lines, Dicey argued that everyone should be equal before the law, that no one should be

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punished by the state except where there has been a clear breach of the law and that the judiciary should be able to uphold the rights of individuals against the power of the state (Waldron 2016). From that perspective, the rule of law is an essential element for the proper functioning of a liberal democracy. Hence, the EU, as an autonomous legal order, acknowledges the rule of law as one of its founding values.

One of the main problems to which the EU has to find answers concerns instances of backsliding on the rule of law. Indeed, the tension created by the jeopardy in which the rule of law has been placed in Hungary and Poland has revealed institutional disparities within the Union. As Kochenov and Bard aptly observe: 'All that is being done by the institutions appears to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse' (2018, 4).

An outcome of this rule of law crisis is the new rule of law framework, which allows the European Commission to address systemic threats in EU member states following a three-stage process. In brief, first, through an examination of the relevant information, the Commission assesses whether there are clear indications of a systemic threat to the rule of law and sends a 'rule of law opinion', initiating a dialogue with the member state concerned. On the basis of the results of that dialogue, if the Commission finds that there is objective evidence of a systemic threat, it addresses a 'rule of law recommendation' to the member state, clearly indicating the reasons for its concerns and recommending the resolution of the problem by the member state's authorities within a fixed time limit. In the final stage, the Commission monitors the action taken by the member state with regard to the recommendation, assessing the possibility of activating one of the Article 7 TEU mechanisms should the results not be satisfactory (European Commission 2014, 7–9). This quasi-legal, new, soft law tool has limited binding effect and complements the traditional sanctioning mechanism included in Article 7 TEU, which is perceived as a solution of last resort.

However, this lack of immediate action traumatises the EU both internally and externally. Internally, another fundamental principle, mutual trust between the member states, is undermined. As the European Court of Justice (2018) has emphatically stated,

> EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected.

From the perspective of those outside the Union, the EU loses its credibility as a promoter of democracy, the rule of law and human rights, the principles also required for accession in accordance with the Copenhagen criteria.

The aim of this article is to propose a solution that involves a quite neglected, yet certainly competent actor, the Fundamental Rights Agency (FRA). The FRA was established in 2007 under Council Regulation 168/2007; as an EU agency it is legally independent of

EU institutions and was set up to perform certain tasks under EU law. Its activities are organised into three main areas: data collection, research and analysis; providing advice to policymakers, and cooperating and networking with stakeholders; and communicating the results of its work and raising awareness of fundamental rights (FRA 2018a, 3). Nevertheless, the Agency's verdicts have not been taken seriously in the formulation of EU human rights policy, as explained below. Understanding the Union's founding values as a cohesive whole, the outcome of this proposal will be twofold: on the one hand the Union's founding values will be vitally strengthened; on the other hand, the role of the Agency will be fortified in line with its scope.

A bloc of values

A provision on founding values was first included in Article F of the Maastricht Treaty. This was enriched and clarified with the Amsterdam amendment, with the addition of more values and a direct reference to the Union as the subject. Finally, the amended TEU under the Lisbon Treaty enacted a separate provision on the founding values of the Union, one that had first been introduced in the unsuccessful Treaty Establishing a Constitution for Europe (Dorssemont 2012, 46–7). Article 2 TEU reads: 'The Union is 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'.

Apart from its highly symbolic value, which reflects the common identity of the member states both independently and as components of the Union, Article 2 TEU imposes legal obligations that both the member states and the EU are bound by, in the sense that any respective violation will have legal consequences, for example, under Article 7 TEU. This being the case, it has been argued that Article 2 TEU is comprised of principles and legal norms, rather than values, which mostly have an ethical dimension (von Bogdandy 2009, 22; Kochenov 2014, 148).

Since this terminological question, although very important, is not the main concern of this article, both terms will be used with reference to Article 2 TEU. What must be underlined is the unity of the values reflected in Article 2 TEU, in the sense of their inherent interrelation in a modern, democratic regime. This approach is manifestly illustrated by the British jurist, Lord Bingham, in his work on the rule of law. The author favours a 'thick' definition of the rule of law, embracing the protection of human rights within its scope, over a 'thin' approach which favours a distinction between human rights protection and the rule of law (Bingham 2011). Hence, when part of the population within a legal order is systematically oppressed, in the sense of being deprived of human rights, that legal order cannot be observing the rule of law; the 'fundamental compact' that underpins the very concept of the rule of law between the governed and the governors, whereby both 'sacrifice a measure of freedom and power' for the benefit of all, is infringed otherwise (Parpworth 2018, 35).

Unlike other philosophical approaches to the rule of law which could be applicable in totalitarian regimes (Raz 2009, 211), the formulation of Article 2 TEU in the EU legal order affirms Lord Bingham's perspective. From a textual analysis of the provision, it can be easily observed that the Union understands respect for human rights, democracy and the rule of law in combination as founding values. Furthermore, seen in the general context of the Union's nature, those values are highly interrelated. Indeed, no one could possibly argue that the rule of law is being conformed with in cases of massive human rights violations, nor could anyone suggest that the rule of law is functioning in a non-democratic legal order. In that sense, rule of law crises often reflect human rights infringements, whereas a systemic instance of backsliding on human rights is simultaneously considered a problem in terms of the functioning of the rule of law. This perception is further confirmed in the treaty provisions governing the Union's actions on the international scene, which seek to promote democracy, the rule of law and human rights (art. 21 TEU).

Sanctioning mechanism

Included at an early stage in the Treaty of Amsterdam, as part of the negative integration policy (Alston and Weiler 1998, 665), Article 7 TEU contains a preventative mechanism and a sanctioning mechanism in paragraphs 1 and 2 respectively. The sanctioning mechanism is a two-step procedure: first, a proposal is submitted to the European Council by either one-third of the member states or by the Commission; the European Council must then unanimously agree that there has been a serious and persistent breach by a member state of the values referred to in Article 2 TEU. The consent of the European Parliament is needed. The penalty on the basis of the above-mentioned determination is imposed in the second stage, by the Council acting by a qualified majority, with the ability to suspend certain rights derived from the application of the treaties, including voting rights in the Council.

A major issue is the definition of the terms 'serious' and 'persistent' in order to understand when the sanctioning mechanism can potentially apply. According to the Commission, for a breach to be considered serious for the purpose of Article 7 TEU, a variety of criteria have to be taken into account, including the purpose and the result of the breach (2003, 8). The purpose criterion implies policies introduced at a member state level that negatively affect specific, vulnerable social classes, for example immigrants or minority groups. The result of such an effect is the breach of one of the values given in Article 2 TEU.

Regarding persistence, the breach should go far beyond the limits of a typical human rights violation or an ordinary EU law violation and acquire a systemic character. The formality used for the breach is irrelevant: it could either be forced via a piece of legislation or merely be an administrative or political practice of the authorities of the member state. If a member state has repeatedly been condemned for the same type of breach over a period of time and has not demonstrated any intention to take practical remedial action this should be taken into account (European Commission 2003, 8).

Although the sanction mechanism is a potentially efficient procedure in promoting the Union's founding principles, its application in practice has been conducted reluctantly (Hillion 2016, 4–5; Kochenov 2017, 2), mainly for two reasons. First, since there is no common understanding of the principles in Article 2 TEU (Council 2013, 5), an effective response through a formal procedure could end up being rather nebulous, and hence risky, in terms of legal certainty. However, the most important reason is related to the consequences for the 'guilty' member state. The penalties imposed are of a political nature, with the most severe being the deprivation of voting rights in the Council. This would cause the political isolation of the member state within the institutions of the Union, which may create tensions and, ultimately, be counterproductive.

The Fundamental Rights Agency

The Fundamental Rights Agency was established in 2007 as the successor to the European Monitoring Centre on Racism and Xenophobia, under Council Regulation 168/2007. The agency is composed of experts in the field of fundamental rights representing the member states, the EU and the Council of Europe. Its main objective, as outlined in Article 2 of the Regulation, is to provide the relevant institutions, bodies, offices and agencies of the Community (now Union), as well as its member states, with assistance and expertise relating to fundamental rights when implementing Community law. It is there to support these actors to fully respect fundamental rights when they take measures or formulate courses of action within their respective spheres of competence, and does so through the publication of relevant reports in accordance with Article 4 of the Regulation. As emphatically presented on the Agency's website, it seeks to instil a fundamental rights culture across the EU. It does this by

- collecting pertinent and timely data and information,
- sharing evidence-based insights and advice with policy- and decision-makers,
- raising rights awareness and promoting fundamental rights through cutting-edge communications, and
- engaging with a wide array of diverse stakeholders from the local to the international level with the targeted assistance and in-depth knowledge that is the hallmark of Europe's centre of fundamental rights expertise.

The typology of agencies varies depending on the criteria used (Chiti 2013, 94–100; van Ooik 2005, 139–45; Geradin 2004, 19–27). Based on its above-mentioned objectives and tasks, the FRA should be considered an information agency, responsible for the production and dissemination of high-quality information in the field of human rights.

The Agency's fields of work are further specified in a five-year multi-annual framework determined at Council level. The Agency's thematic focus for 2018–22 is set forth in Council Decision 2017/2269:

The thematic areas shall be the following:

a) victims of crime and access to justice;
b) equality and discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on the grounds of nationality;24
c) information society and, in particular, respect for private life and protection of personal data;
d) judicial cooperation, except in criminal matters;
e) migration, borders, asylum and integration of refugees and migrants;
f) racism, xenophobia and related intolerance;
g) rights of the child;
h) integration and social inclusion of Roma. (Council of the European Union 2017, 3)

The findings of the Agency, especially in the last thematic area, demonstrate significant human rights deficiencies regarding fields of public policy in certain member states. As indicated, the socio-economic situation of the Roma in the four key areas of employment, education, housing and health is not satisfactory and is worse, on average, than the situation of non-Roma living in close proximity; in addition, Roma continue to experience discrimination (FRA 2012). Unfortunately, these findings are further confirmed in the Agency's more specialised reports (FRA 2016a, FRA 2016b) and the latest annual fundamental rights report (FRA 2018b, 99–122).

The possibility of a serious and persistent breach of the Union's values could at least be considered on the basis of the Agency's above-mentioned reports. Public policies in certain member states negatively affect a vulnerable social class, the Roma, whose quality of life is much lower compared to that of their non-Roma neighbours, thus creating a systemic problem, far beyond typical human rights violations.

The author supports a more active role for the FRA within the Article 7 TEU scheme. In the above-mentioned example, no further action has been taken on the basis of the Agency's continued findings. The predominance of intergovernmentalism in the Article 7 TEU procedure, which demands a political consensus, has led to a static situation. In that sense, the Agency's efforts to pursue a more dynamic and cohesive protection of fundamental rights within the Union has so far been in vain.

So what role for the FRA? Repeated reports by the Agency could alert the only politically supranational institution involved in the Article 7 TEU process, the Commission, to propose the initiation of the sanctioning mechanism. The Commission would not be bound by the Agency's findings, but would inform the Agency of its reasons if no proposal was brought. This form of collaboration among institutions is not new to the EU legal order. According to Articles 225 and 241 of the Treaty on the Functioning of the European Union the Commission is not bound to act on proposals within its competences, however, in case of refusal, the Commission must inform the relevant actor accordingly.

Putting this spirit of collaboration into context, the role of the FRA should be modified with regard to the interrelation of its reports with Article 7 TEU. From a technical perspective, this would demand amendment of, most notably, Articles 2, 4 and 7 of Council Regulation 168/2007, regarding the objectives, tasks and relations with relevant Union institutions respectively. This implies the alteration of the nature of the Agency from a purely informational one to a quasi-instrumental one that has a more active involvement in the procedures leading to the adoption of binding rules (Chiti 2013, 96).

Conclusion

The ongoing rule of law crisis has put the values of the Union into context. The EU must clarify that Article 2 TEU does not simply contain a political manifesto and that it may require difficult decisions to be taken at EU level. In this framework, the FRA can play a significant role: as an independent agency composed of experts in the area of fundamental rights, it enjoys the credibility needed for such a task. As proposed, the reports of the Agency would not be binding on the Commission, but would provide advisory assistance for further proceedings. Hence, the nature of the FRA would be altered. What is now a purely informational agency would become a quasi-instrumental agency in the sense that it would promote integration through a clear and harmonised level of protection of fundamental rights in the EU and its member states.

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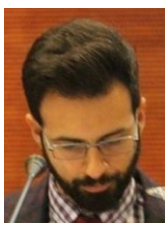

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