

Policy Brief

Dr. Israel Butler

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How to monitor the rule of law, democracy and fundamental rights in the EU

Introduction

In March 2013, the foreign ministers of Germany, the Netherlands, Finland and Denmark called on the European Commission to establish a “new and more effective mechanism to safeguard” the EU’s “fundamental values”.¹ These include the rule of law, democracy and fundamental rights. This invitation was subsequently taken up by the General Affairs Council in April,² and the Justice and Home Affairs Council in June,³ which requested the European Commission to

engage in a consultation process during 2013 before returning to the Council with a set of recommendations in late 2013 or early 2014.

- ▶ There is a risk that no concrete steps will emerge from consultations and discussions in the European Commission and Council on how to protect the EU’s fundamental values within its member states;
- ▶ The European Commission could introduce measures to safeguard fundamental rights, democracy and the rule of law without creating new legislation or amending the EU Treaties;
- ▶ Country-monitoring could be reintroduced, drawing on the data, analysis and recommendations issued by the Council of Europe, United Nations and EU Agency for Fundamental Rights;
- ▶ The Commission could enforce its recommendations through a fundamental rights litigation strategy, which prioritises infringement proceedings for violations of fundamental rights-friendly EU legislation.

A process of consultation is important to ensure that national governments buy in to any potential mechanism, to ensure coordination between the EU’s institutions, and to avoid duplication or overlap of similar monitoring functions carried out by the Council of Europe and United Nations. However, concrete steps may fail to materialise from discussions, particularly if the mechanism ultimately proposed by the Commission can only be created through reform of the EU Treaties, as Commission Vice President Viviane Reding hinted in a speech in April.⁴ The last treaty reform process lasted approximately eight years.⁵ And the EU may well not even initiate treaty reform because governments are divided on whether it is feasible given public scepticism towards the EU and different member state attitudes towards the treaties.⁶

¹ Hayden, ‘EU Is Urged to Set Up Mechanism to Protect Basic Values’, Bloomberg News, 8 March 2013. Available on: <http://www.bloomberg.com/news/2013-03-08/eu-is-urged-to-set-up-mechanism-to-protect-basic-values.html>.

² Press release, 3235th Council meeting, General Affairs, Luxembourg, 22 April 2013, 8577/13. Available on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/136915.pdf.

³ Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council meeting, Luxembourg, 6 and 7 June 2013. Available on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.

⁴ ‘Safeguarding the rule of law and solving the “Copenhagen dilemma”: Towards a new EU-mechanism’, SPEECH/13/348, 22 April 2013. Available on: http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm.

⁵ Mahoney, ‘EU’s Lisbon Treaty comes into force’, EU Observer, 1 December 2009. Available on: <http://euobserver.com/news/29073>.

This policy brief suggests two measures that could be taken to improve compliance with the EU's fundamental values by its member states: country monitoring and a fundamental rights litigation strategy.⁷ These measures could be put into effect within a short timeframe on the basis of existing EU powers, and without an overly lengthy consultation process, new legislation or treaty reform.

Country monitoring

The Commission has already begun some monitoring of access to justice in EU member states through its Justice Scoreboard.⁸ According to the initial fanfare by Reding, the Scoreboard would monitor implementation of the rule of law.⁹ However, monitoring has thus far focused only on the role that courts play in economic development by providing efficient and timely justice in commercial and civil disputes. As such, it examines only the technical functioning of courts, such as the length of court proceedings, the availability of training for judges, the availability of alternative dispute resolution mechanisms, and the use of information and communications technologies in judicial proceedings. These criteria tell us very little about how effectively courts uphold the rule of law in terms of keeping governments' powers in check – a vital function for which the principal criteria would include judicial independence, how easily individuals can access the courts for judicial review, and the scope of the judiciary's authority to review and remedy violations by national authorities.

The shortcomings of the Scoreboard mean that a far more comprehensive form of country monitoring is needed. This is something that the Commission could do under its existing powers, and it has done so in the past. In 2003 the Commission published a Communication on Article 7 of the Treaty on European Union.¹⁰ Article 7 establishes a triple-layered mechanism for monitoring compliance with and enforcing the EU's fundamental values in the member states. However, none of the provisions of Article 7 has ever been triggered because the member states have never mustered sufficient political will. Nevertheless, in its 2003 Communication, the Commission stated that Article 7 implied the need for a “regular monitoring” mechanism. This would “make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of” the EU's fundamental values. To this end, a network of independent experts on fundamental rights was established by the Commission which reported on fundamental rights implementation by the member states across the EU until 2006.¹¹

However, when the EU established the European Union Agency for Fundamental Rights, the network of independent experts was discontinued.¹² This created a gap in monitoring, because the mandate of the agency does not allow it to carry out the same task as the network. The network had reported on how national governments were implementing all applicable international obligations in the area of fundamental rights. The Fundamental Rights Agency, in contrast, is limited to reporting on fundamental rights only in those areas that fall within the EU's

⁶ Grant, ‘Germany’s plans for treaty change – and what they mean for Britain’, Centre for European Reform, 28 March 2013. Available on: <http://centreforeuropeanreform.blogspot.be/2013/03/germanys-plans-for-treaty-change-and.html>.

⁷ Butler, ‘How the EU can safeguard its “fundamental values”: two ideas’, Open Society European Policy Institute, July, 2013. Available on: <http://www.opensocietyfoundations.org/briefing-papers/how-eu-can-safeguard-its-fundamental-values-two-ideas>.

⁸ Butler, ‘The Justice Scoreboard: an effective mechanism to enforce respect for the rule of law?’, Open Society European Policy Institute, 13 December 2013. Available on: <http://www.opensocietyfoundations.org/voices/justice-scoreboard-effective-mechanism-enforce-respect-rule-law>.

⁹ Council of the European Union Note, Council and Commission statements - Political situation in Romania, Strasbourg, 13 September 2012, 13780/12. Available on: <http://register.consilium.europa.eu/pdf/en/12/st13/st13780.en12.pdf>.

¹⁰ European Commission, Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, 15 October 2003, COM(2003) 606 final. Available on: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0606:FIN:EN:PDF>.

¹¹ See: http://cidho.uclouvain.be/en/eu_experts_network/.

¹² See: <http://fra.europa.eu/en>.

competence. For instance, unlike the former network of experts, the agency would not be able to investigate allegations of member state collaboration with the USA in CIA rendition operations.¹³ Furthermore, the network scrutinised each government individually. However, in practice the agency adopts a comparative approach. Although technically it could examine individual member states, it has done so on very few occasions. Rather, the agency tends to identify particular trends and practices across the EU as a whole, so single member states are rarely in the spotlight.

It is entirely feasible for the Commission to re-establish the former network, or some other similar monitoring mechanism, such as the ‘Copenhagen Commission’ suggested by the European Parliament.¹⁴ Of course, in the long-term it would be more coherent for this monitoring task to be given to the Fundamental Rights Agency (along with the additional resources needed). However, this would first require significant amendment of its founding regulation. Such reform may not be a realistic prospect because that requires unanimous consent from member states in the Council. This makes revival of the network or the creation of another similar body – which the Commission can decide on without permission from national governments – preferable as a pragmatic short-term solution.

Country reports produced by this EU country-monitoring body could form the basis of Commission (non-binding) recommendations, which could then be discussed in the Council’s Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons (FREMP). Unlike FREMP’s counterpart in the area of the EU’s external relations (the Human Rights Working Party, or COHOM), FREMP has not developed a practice of discussing specific countries, though it does discuss both the Commission’s and the Fundamental Rights Agency’s annual reports on fundamental rights. The European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) could also participate in these discussions. The member state under discussion could then be invited (on a voluntary basis) to respond and explain how it plans to address the problems highlighted. Such an arrangement could be put in place through informal agreements between the institutions or changes to internal rules of procedure, without the need for new legislation or amendment of the EU treaties.

Although similar monitoring processes exist in the Council of Europe (CoE) and the United Nations (UN), scrutiny by the EU does bring added value, and can be carried out without duplicating or substituting these mechanisms. In terms of the substantive information collected, an EU monitoring body could compile information from the reports of UN and CoE monitoring bodies and reports of the Fundamental Rights Agency. As well as using the data and analysis published by these bodies, the Commission could also draw on the recommendations they issue as the basis of the Commission’s own recommendations to member states. The EU would then serve primarily as a forum for political dialogue over implementation - which is where UN and CoE monitoring mechanisms are weaker.

This process would not have a means of enforcing compliance with the recommendations issued. However, it could be coupled with a fundamental rights litigation strategy which would give the Commission an indirect way of enforcing its recommendations.

¹³ EU Network of Independent Experts on Fundamental Rights, ‘The Human Rights responsibilities of the EU member states in the context of the CIA activities in Europe (“extraordinary renditions”)’ Opinion 3-2006, 25 May 2006. Available on: <http://crldho.uclouvain.be/documents/Avis.CFR-CDF/Avis2006/CFR-CDFopinion3-2006.pdf>.

¹⁴ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)). Available on: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315>.

A fundamental rights litigation strategy

Vice-President Reding and several national governments have stated on numerous occasions that the traditional method of sanctioning violations of EU Law committed by member states (through infringement proceedings) is inadequate to enforce compliance with the EU's fundamental values. This is because the European Commission can only bring infringement proceedings for violations of EU law, and few pieces of EU legislation regulate these topics directly. Because countries wishing to join the EU are required to guarantee democracy, the rule of law and human rights as a condition of joining the organisation, the EU assumes that existing member states are already in compliance.

Member states are presumed to adhere to these values not merely because they express an ideal of how Europeans want to live and be governed. Compliance with these values is also necessary to make sure that the EU's internal market can operate. For instance, the internal market cannot work properly unless businesses can enjoy a level playing-field across different countries. If certain national courts are susceptible to government interference, or if procedures for awarding government contracts are tainted by corruption, foreign businesses will face obstacles and unfair competition in those national markets. As Reding pointed out in her speech to the Council in April, the rule of law, democracy and fundamental rights support the operation of the internal market. But the Commission has yet to recognise that the internal market can also support the rule of law, democracy and fundamental rights. The Commission could develop a fundamental rights litigation strategy whereby it pursues infringement proceedings more aggressively on areas of EU law that could have a beneficial impact on the protection of its fundamental values. This would require it to develop a catalogue of existing legislation that indirectly protects the EU's fundamental values, and prioritise infringement proceedings where these rules are violated. Three examples would be competition rules that could protect freedom of expression, public procurement rules that could protect the democratic process, and rules relating to access to effective judicial procedures to enforce rights granted by EU law.

First, a properly functioning democracy relies on freedom of expression in public debate, which takes place in great part through the media. This requires media pluralism whereby a wide variety of owners of media outlets offer different points of view on questions of public interest. Some governments in the EU actively reduce media pluralism by systematically placing advertising with media companies that are friendly to the ruling party – the impact of which is deepened when government-friendly businesses follow suit.¹⁵ This distorts free competition in the media market, since those media outlets that are systematically left out have difficulty surviving. Arguably, discriminatory advertising amounts to a form of state aid – an illegal subsidy under EU competition rules.¹⁶

Second, democracy is based on the premise that politicians will reflect the views of the public over whom they govern. However, it is not uncommon for governments wishing to consolidate their hold on power to develop close ties with powerful businesses, which are able to influence voters, for example, through financial support to client parties during election campaigns. The bonds between business and government are often created when national authorities discriminate in favour of their business allies when awarding lucrative public contracts.¹⁷ This undermines

¹⁵ Open Society Media Programme, 'Mapping Digital Media in the European Union. A report for the European Parliament Committee on Civil Liberties, Justice and Home Affairs', November 2012. Available on: <http://www.scribd.com/doc/112939162/Open-Society-Foundation-Mapping-Digital-Media-Submission-to-the-European-Parliament-Committee-on-Civil-Liberties-Justice-and-Home-Affairs-2012>.

¹⁶ See: http://ec.europa.eu/competition/state_aid/overview/.

¹⁷ Nielsen, '€120 billion lost to corruption in EU each year', EU Observer, 06 March 2013. Available on: <http://euobserver.com/justice/119300>.

democracy and fundamental rights in at least three ways: contracts are awarded on the basis of political allegiance rather than value for money and public interest; the potential overspend means that less government money is available for public services such as education, health and law enforcement; and this relationship makes government susceptible to influence from business owners when taking decisions on issues such as employment rights, environmental regulation or mergers and takeovers. The behaviour described will often amount to a violation of EU rules on public procurement – which are soon to expand in scope.¹⁸ It will often also include a misuse of EU structural funds, which frequently finance large infrastructure projects. Where funds are misused, the Commission may block further payment and demand repayment.

Third, independent courts lie at the heart of the rule of law, which requires the judiciary to ensure that a government is acting inside its powers. EU law demands that member states give individuals access to a court or tribunal in order to enforce their rights under EU law. Such national procedures must be ‘effective’ in practice.¹⁹ Article 47 of the EU’s Charter of Fundamental Rights elaborates that the right “to an effective remedy” includes the right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal.” Where the Commission finds evidence that national courts are not independent, it would be entitled to assume that these courts are also incapable of delivering effective protection for rights granted by EU law.

The litigation strategy could be used to enforce the recommendations made to member states under the country monitoring process. Infringement proceedings are not a perfectly fitting tool for enforcement of recommendations on fundamental values because the Commission can only litigate where there is EU legislation at issue. Nevertheless, the Commission could match up certain of its recommendations against its catalogue of fundamental rights-friendly EU legislation. Infringement proceedings could then be used systematically to pressure the member state in question to implement at least some of the Commission’s recommendations.

Conclusion

Faced with the prospect of a consultation process that may lead to no concrete action, the EU should make the most of its existing powers. Country monitoring and a fundamental rights litigation strategy are well within the EU’s existing competences. These tools are not the whole answer to the question of how the EU can monitor and enforce compliance with its fundamental values, but they would go some way towards addressing the problem, and can be implemented in the short term while longer-term reforms are debated and negotiated. If the EU adopted these measures, they would deter governments from carrying out actions that contradict the EU’s fundamental values. They would also show the rest of the world that the EU is willing to practise at home what it preaches abroad.²⁰

¹⁸ European Commission, press release, ‘Modernising European public procurement to support growth and employment’, 20 December 2011, IP/11/1580. Available on: http://europa.eu/rapid/press-release_IP-11-1580_en.htm?locale=en.

¹⁹ European Court of Justice. Cases C-222/05 to C-225/05, *Van der Weerd and others*, 7 June 2007. Available via: <http://curia.europa.eu/>.

²⁰ See Human Rights and Democracy Network, ‘Strengthening the European Union’s response to human rights abuses inside its own borders’, August 2013. Available on: http://www.servicevolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN_Statement_EU_response_to_human_rights_abuses_inside_its_own_borders.pdf.

Open Society European Policy Institute contact on Fundamental Rights, Justice, and Home Affairs:

Israel Butler – Israel.butler@opensocietyfoundations.org

Tel: +32-(0)2-505-4646

For all media enquiries related to Open Society Foundations' work in Europe contact:

Eleanor Kelly - eleanor.kelly@opensocietyfoundations.org

Tel: +44 (0)20 7031 1719



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