POLICY PAPER

» STRENGTHENING COMMON CORE VALUES MEANS STRENGTHENING EUROPE!

BÜNDNIS 90 DIE GRÜNEN BUNDESTAGSFRAKTION

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I. STATUS QUO: THE EU SAFEGUARDS FUNDAMENTAL RIGHTS AND VALUES – BUT SO FAR NOT WELL ENOUGH!

The European Union's blueprint for success relies not only on securing economic prosperity but also on consensus on core values common to all the EU Member States. This consensus is acknowledged by all Member States in Article 2 of the EU Treaty: *"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 shared values have been the backbone of the EU ever since it was established. The EU, its institutions and Member States have a duty to promote and uphold them.

To date the EU has done much to deepen and reinforce this consensus. Important achievements in recent years include agreement on a common Charter of Fundamental Rights of the European Union (CFREU), the increasing importance of rulings by the European Court of Justice (ECJ) in strengthening fundamental rights, for example the Court's judgment against the Data Retention Directive, strengthening of the European Parliament as a democratic body with powers of co-decision in Europe, and the establishment of a support body in the form of the Fundamental Rights Agency (FRA). From the very start the EU, with its policy of enlargement, has supported and promoted the process of democratic change and the rule of law. It has strengthened citizens' rights and encouraged an energetic civil society in Europe. This policy remains attractive to the present day, as events on the *Euromaidan* in Ukraine made clear very recently.

And yet: developments in Hungary, for example, or those we saw unfolding for years in Romania or earlier in Italy can jeopardise our common core values and the EU's ability to function if we do not take swift and decisive action to counter them. The Orban Government, four years after the controversial Media Act which triggered worldwide protests and an infringement procedure in Brussels, once again has Hungary's media in its sights. It passed the controversial Advertising Tax Law with great haste. This law makes private media groups in Hungary, especially those which are comparatively critical, like RTL, liable to a particularly harsh special tax on advertising revenue which slashes the amount of money available to fund comprehensive and free journalistic activity. The tax also threatens the survival of smaller independent TV and radio broadcasters. In Romania the Ponta Government has sought to undermine existing checks and balances, for example through laws curtailing the powers of the constitutional court. Italy's former Prime Minister Berlusconi had media laws and cartel arrangements altered and extended, helping his media empire to a position of dominance in influencing and forming public opinion. And in many EU Member States, Romania or Bulgaria for example, the situation of the Sinti and Roma is not consistent with agreed minority rights. The treatment meted out by the EU Member States to refugees at the Union's external borders falls short of the most basic human rights standards and, once inside the EU, asylum seekers often experience violence and discrimination. People with a different sexual orientation often suffer exclusion and discrimination too.

We must not allow national aspirations towards democracy and the rule of law to end once a country has joined the EU. But on the other hand, proper protection of basic values within the EU is also an essential precondition of EU enlargement.

The question is always how credible are our international human rights policy and our efforts to encourage good governance? If the EU is to be credible in its external policy, it and its Member States must uphold the same values in its internal policy that it requires of its partners worldwide.

We know too that the rule of law and respect for human rights are often a basic precondition of sustainable economic growth and of action against corruption and the political appropriation of state structures in the pursuit of power. And states need to be especially firmly anchored in the rule of law if they are to carry out reforms. The "Glienicke Group"[1] addressed this issue at the end of 2013, pointing to the problems which face Member States going through a severe economic crisis. "Experience shows", says the Group, "that such crises radicalise societies and threaten democratic institutions. In a currency union crises can occur in such a variety of configurations that the need for democratic and constitutional robustness is all the greater. It is unacceptable that the EU can call countries to account more effectively for state aid breaches than breaches of democratic or constitutional rules."

As we move towards ever-deeper union in Europe our future is increasingly shaped by legislation framed jointly by the Council and the European Parliament. This process must ensure that Europe's governments safeguard fundamental rights, democracy and the rule of law within the EU.

II. A LACK OF INSTRUMENTS

The ECJ is an increasingly useful weapon which the EU can wield against breaches of individual fundamental rights. This is clear from the steady improvement in protection against discrimination in the EU, for example in matters of religion and beliefs, age or sexual orientation. The Lisbon Treaty provides the Commission with a new weapon, because after 1 December 2014 it can also institute proceedings against EU Member States for Treaty infringements in the areas of police and justice cooperation on criminal matters too.

In some areas the EU still lacks the instruments for effective action in cases where the national constitution or basic principles of democracy and the rule of law of a country are abused, regardless of how this is done and by whom. There is a loophole here in the multi-tiered system of safeguards, which means that total protection of core values is not guaranteed within the EU. The Commission can, admittedly, bring proceedings against Member States which fail to meet their obligations under the EU Treaties, particularly the obligation to transpose EU legislation, but it cannot act against Member States for breaching fundamental rights and the rule of law in areas where the EU places no binding obligations on them. Thus the provisions of the Charter of Fundamental Rights of the EU apply at present to Member States "only when they are implementing Union law" (CFREU, Article 51). So national rules cannot currently be measured against the Charter[2] if they do not fall within the scope of Union law. It is true that in the interests of safeguarding fundamental rights the ECJ tends to adopt a broad interpretation of the concept of the scope of Union law, but this is not enough. This is deplored by experts, including those at the Max Planck Institute for comparative Public Law and International Law in Heidelberg. They want to see a "rescue package for fundamental rights" because, they say, the EU has done very little so far. This would allow at least the essence of the Charter's fundamental rights to be

[1] The "Glienicke Group" is a group of eleven leading German economists, jurists and political scientists who share the view that the current European strategy of crisis management cannot solve the structural problems.

[2] See speech 13/677 by Viviane Reding, Vice-President of the European Commission, in which she favours a Treaty amendment, "abolishing Art. 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States."

enforced in response to purely national measures, and would enable action to be taken against any "serious and persistent breach" of fundamental rights (Art. 7 TEU).[3]

When it comes to core values the EU is more concerned with candidate countries than with existing Member States. C*andidate countries*, that is to say states that have not yet joined, must satisfy the "Copenhagen criteria". These allow the EU to be demanding and tough in its dealings with them, imposing strict conditions. But post-accession it can no longer do this.[4]

If the government of an EU Member State infringes fundamental rights on a huge scale, either indirectly by undermining the checks and balances and principles of the rule of law, or directly by promulgating laws which disproportionately curtail fundamental rights, the only countermeasure open to the EU is the highly confrontational "Article 7 procedure". Under Article 7 TEU the severest penalty that can be imposed on a Member State guilty of a "serious and persistent breach" of the values enshrined in the Treaty (see Article 2 TEU) is the suspension of that State's voting rights.

This is thus an instrument that can effectively isolate the Member State concerned. But Member States have so far shied away from using it – even against Austria in 2000, when the Austrian People's Party (ÖVP) went into coalition with Jörg Haider's right-wing populist Freedom Party of Austria (FPÖ), though the Government did make the political concession of adopting the EU's anti-racism directive (2000/43/EC).

It also seems from experience to date that the large majorities required in Council and Parliament to trigger the Article 7 procedure are in practice an almost insurmountable hurdle.

The EU does not have other monitoring institutions of the kind that exist within the Council of Europe (Venice Commission), the OSCE and United Nations. The remit of the Fundamental Rights Agency, for example, does not currently empower it to conduct independent investigations of infringements. All these international organisations are assuredly more than capable of helping to tackle the problems within an increasingly integrated EU effectively. But their membership and interests extend far beyond the EU. As agreed in the 2007 Memorandum of Understanding between the EU and Council of Europe, however, we must develop cooperation between the EU, the Council of Europe and the Venice Commission.

III. THE EU COMMISSION RESOLVES TO ACT …

Following an initiative by Denmark, Finland, Germany and the Netherlands aimed at securing a new mechanism to safeguard core values, the European Commission addressed the issue in its communication of 11 March 2014 entitled **"A new EU Framework to strengthen the Rule of Law"**. The Commission's analysis of the situation is accurate: "In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU…" Equally correct is the finding that "Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State." The Framework "seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met." It is not an alternative to Article 7 TEU mechanisms but complements

[3] Cf. Armin von Bogdandy *et al.*.: *Ein Rettungsschirm für europäische Grundrechte* [A Rescue Package for EU Fundamental Rights], in: ZaöRV/Heidelberg Journal of International Law 72 (2012), pp. 45-78).

[4] Romania and Bulgaria are exceptional cases. For these countries the EU established a Cooperation and Verification Mechanism to ensure its continued influence on their reform processes even after accession.

them. The Commission proposes a three-stage process and will keep the European Parliament and Council "regularly and closely informed".[5]

The detail:

1. **Assessment**: The Commission will collect and analyse all the relevant information and assess whether "there are clear indications of a systemic threat to the rule of law". If, as a result, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending its "rule of law opinion", which will be a warning to the Member State – and substantiating its concerns. It will give the Member State concerned the possibility to respond.

2. **Recommendation**: In a second stage, unless the matter has already been satisfactorily resolved, the Commission will issue a "rule of law recommendation" addressed to the Member State. It will recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. The Commission will make public its recommendation.

3. **Follow-up:** In a third stage the Commission will monitor the follow-up given by the Member State to the recommendation. If there is no satisfactory follow-up within the time limit set, the Commission can resort to one of the mechanisms set out in Article 7 TEU.

… BUT DOESN'T RESOLVE THE PROBLEM! IT CONTINUES TO MANAGE THE STATUS QUO

With this Framework the Commission is simply setting out to formalise a previously informal procedure which already proved flawed in the past, when applied to Hungary and Romania in 2011 and 2012 for example. The Commission wants to continue making the judgments itself and appointing ad hoc experts. The Council and European Parliament are not to be involved – a change from the Article 7 procedure. Only at a late stage in the process will the Commission "go public". It is not interested either in political forms of a transparent and permanent process for monitoring all Member States, or in possible sanctions. And yet the Member States have long been talking in the Council about a more transparent mechanism of political dialogue which could include hearings and recommendations. The Federal Government is pressing for a regular political dialogue in the Council under the existing Treaties, which could also draw on reports or opinions by outside experts, from the Venice Commission for example. Other Member States think the right course of action would be to include the Fundamental Rights Agency. The European Parliament has repeatedly called for the EU to be given the necessary instruments to enforce democracy, the rule of law and core values, at the same time warning of the need to avoid double standards. The EP's Michel report, following on from the earlier Tavares report, advocated a permanent monitoring mechanism to include a group of experts (new "Copenhagen commission"), modelled on the old network of independent fundamental rights experts which existed prior to the Fundamental Rights Agency. Objective indicators, penalties and even Treaty amendments were also discussed.

[5] Sources: Press release: http://europa.eu/rapid/press-release_IP-14-237_en.htm,
Document: http://eudoxap01.bundestag.btg:8080/eudox/dokumentInhalt?id=74901,
Annex: http://eudoxap01.bundestag.btg:8080/eudox/dokumentInhalt?id=74902

The EU reports on its work and the situation in other countries, producing its "Annual Report on Human Rights and Democracy in the World" on the basis of a detailed Action Plan, but there is no equivalent mechanism for reviewing the position of human rights, the rule of law and democracy within the EU itself.

That fact ultimately weakens the position of the Commission, national procedures and civil society. And it gives more power to national governments, which dismiss unwelcome findings as biased.

We know from experience: the EU and its Member States have not exerted enough influence on certain Member States to support or stimulate political debate there, and they have not given enough backing to civil society in the countries concerned. Those in power, not needing to fear any reaction worth the name, misrepresent the few warning voices that do emerge from Brussels and the Member States, branding them as external meddling. As a result people in the countries concerned tend to close ranks rather than distance themselves critically from their governments.

That needs to change, and fast: the European institutions must be more influential and above all they must support politicians and those in civil society who work to promote democracy and the rule of law.

IV. THE GREEN RESPONSE: WE WANT LIVELY DIALOGUE ON FUNDAMENTAL RIGHTS AND A UNION WHERE THE RULE OF LAW PREVAILS

Until such time as the area of freedom, security and justice is complete and fully enforceable by law and until the core values laid down in Article 2 TEU are defined, by the addition of supplementary provisions, in such a way that they restrict room for political interpretation to a degree where those values can be upheld in practice with a maximum of independence, further action is needed. More precise formulation of the rules would make for greater clarity here. It is possible these days to take legal action against individual breaches of fundamental rights, but it is not possible to do so against breaches of democratic principles and the rule of law, that is to say restrictions like curtailment of the independence of the judiciary, which often impact on people only after some time has elapsed, but no less forcefully for that. The objective should be Treaty change, creating explicit powers for the EU in this area and making it clear that the Commission can pursue measures against Treaty infringements, to secure compliance with Article 2 TEU and the Charter of Fundamental Rights, as an activity separate from the enforcement of EU law. The exact form these powers should take would need to be explored in a further discussion of possible Treaty revision.

In this context we should launch a debate about how we can expand both the European Parliament's rights of legal redress in particular, but also legal remedies whereby the Member States concerned can defend themselves before the ECJ, so that European core values can be safeguarded more comprehensively. To minimise conflicts of interest and ensure greater acceptance, future dialogue should be overseen by the Fundamental Rights Agency as an independent body of experts. To that end we shall press over the longer term for Treaty change and amendment of Regulation (EC) No 168/2007, which is the legal basis for the Agency.

Until these changes are made, we need an alternative **under the existing Treaties.** We are opposed to additional international agreements of the kind called for by the Council's Legal Service in its opinion of 27 May 2014 (10296/14) on the Commission's proposed Framework, because these undermine the Community method and do not strengthen integration but rather weaken it. We want **if possible to have all Member States on board** as part of a process of political dialogue **and to bring civil society in from the periphery to the centre of this**. We must identify systematic breaches of Article 2 TEU as early

as possible, so that we can prevent them from happening rather than constantly having to deal with them as and when they arise.

This calls for a) a permanent **early warning and monitoring mechanism** for all Member States, new and old.

But we also need b) a mechanism for the sensible **handling of acute crisis situations**, when the situation in Member States escalates to a point where clear action is needed.

a) Regular monitoring by European peer review

A first step might be the introduction of a voluntary screening mechanism, to which Member States would submit themselves at regular intervals on the basis of a **policy agreement in the Council.** This would place all non-participating States under peer pressure. We realise that the operation of a peer review mechanism of this kind would be problematic. But we think it will improve compliance with core values. This has been the experience with existing monitoring procedures such as Universal Periodic Review process of the United Nations Human Rights Council or the OECD's Development Assistance Committee (DAC). There is increased pressure to be accountable. The procedure mobilises civil society and encourages countries to be self-critical, even the Member States, since all of them are liable to be the subject of a procedure on exactly the same footing.

1. The EU Commission, under the aegis of Frans Timmermans, first Vice-President of the Commission with responsibility for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, should set up a **Panel of Eminent Persons** modelled on the Council of Europe's Venice Commission, by agreement with the Member States. To create an independent and credible review process – to be a watchdog for democracy – this Panel should be permanent and as immune as possible to influence and political pressure by Commission and Council. So we do not favour a mechanism limited to the Council alone, which some Member States would like.
   The Panel should comprise one independent expert on the rule of law and fundamental rights from each Member State parliament, plus 10 more from the European Parliament who were former eminent "EU brains", or representatives of NGOs.
   In this way the EU Commission would not have to rely on a changing group of experts of the kind we know from other arbitration procedures; there would be a permanent body representing all the Member States.
2. To start with, the panel should set the **criteria** to be used as the basis for repeated review cycles. These criteria should make Article 2 TEU more specific. In addition to the principles which the Commission lists in its Rule of Law Framework (legality, legal certainty, prohibition of arbitrariness of executive powers, independent and effective judicial review, equality before the law, etc) a new procedure should also focus attention on aspects such as press freedom or media diversity. The enlargement criteria (Copenhagen criteria) and the existing Justice Scoreboard used for the European Semester might be a starting point here. The procedure should be devised by the Panel, to guarantee independence and a high degree of commitment. These review criteria should then be approved by the Council and European Parliament as the basis for monitoring.
3. If asked to do so by the EU Commission, the **Fundamental Rights Agency** should advise the **Panel** and through its **network** help **individual country mission teams** with data collection in the countries targeted. From their findings the Panel would compile an interim report, to be laid before the **government and civil society representatives** in the country concerned for their **opinion**. The country would then receive a **final report with recommendations**, to be debated and **approved** by Member States in the Council and by the **EP**. A subsequent cycle would review the **progress** achieved. Final and progress reports should be published annually in a **White Paper on Core Values**

and the Rule of Law in the EU by a **new EU Core Values and Rule of Law Officer** (see below). This would intensify the pressure on the "black sheep".

4. Member States should set up **"focal points"** to ensure a continuous exchange and flow of information in the process between government bodies, experts, civil society, parliaments, the Panel and the EU Member States in the Council. These would act as a contact point for country mission teams. They could be attached to the EU Commission's representation offices, serving as a point of contact and interface for experts and civil society groups and receiving advice and support from the Fundamental Rights Agency.

b) Acute crisis mechanism

1. The Panel should also be able to prepare **ad hoc reports on acute situations** in individual countries, performing this task on its own initiative or at the request of the Commission, EP or Council.
2. When serious and persistent braches of democracy and the rule of law are identified in a report by the Panel of Eminent Persons, a political vote should be taken to **open an acute dialogue procedure** in the EP and in the **Council** by a **simple-majority vote**. Experience has shown that the majorities required hitherto have been too high, thwarting the chances of early critical dialogue.
3. In principle the **Commission, as guardian of the Treaties,** should **oversee** the dialogue procedure. For reasons of legitimacy and independence it should ideally draw on the **same group of experts** used for the peer review procedure (the Panel of Eminent Persons). The **Fundamental Rights Agency** could also provide advice and support in the form of expert opinions. We would also advocate making the procedures public and **involving non-governmental organisations and civil society** at an earlier stage than envisaged by the Commission. As a general rule dialogue sessions held locally in the field should employ specially trained **dialogue and mediation experts and advisers on core values and the rule of law**. The EU Commission should deploy staff with more specific training here, as a matter of urgency.
4. Each procedure should be the subject of a **debate and political decision** in the European Parliament and the Council.
5. Unlike the Commission we also favour the imposition of **penalties**, endorsed by the EP and Council, on states which infringe Article 2 TEU. We appreciate that this demand is a sensitive one, but we believe it to be appropriate provided that financial sanctions are used in a way that will impact most on the offending government and least on the people. In this context we should talk about freezing money from the structural funds – a measure already under discussion in connection with allegations of corruption and which should be extended to core value infringements. But here too we should consider Treaty change in the longer term.

c) A new EU Core Values and Rule of Law Officer

An **Officer for Core Values and the Rule of Law** would generally be a good thing for the EU in view of the importance of the subject for cohesion within the Union. This person should have maximum independence, credibility and democratic legitimacy. To provide a regular overview of the situation of core values within the EU, the Officer should, as part of the European peer review mechanism described above, publish an annual **White Paper on Core Values and the Rule of Law in the EU**. The Officer could also act as a **contact point for complaints**, prepare reports on these and bring them to public notice.

d) More information means more transparency

The EU and its Member States must also inform people better, **not only as a general rule** but especially in countries with a poor record, to promote understanding, counter the growth of myths and ensure that the governments of these countries do not provide the only side of any story.

We need a comprehensive policy of information on the ground. As part of the process, all information on a country must be available in that country's language, so that media, civil society and public can use it. The same goes for press and other information material. Experience has shown that it is not enough to show information on websites – like a shop window display. The greater need is for publicity campaigns on radio and television and in the street. The EU Commission's local representation offices and the network of EU information centres must be expanded, and these must be proactive in their dealings with the public.

e) A rule of law fund

If those working for human rights and democracy both in **non-EU countries –** for example through EIDHR, the European Instrument for Democracy and Human Rights – and **in the EU itself** are to receive targeted support, with greater help for impartial, independent players, the EU budget needs a **rule of law fund**. This fund should be able to provide fast and flexible assistance, to small projects especially, as well as project financing both directly and indirectly, for example through existing EU agencies.