The Commission gets the point – but not necessarily the instruments

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Jan-Werner Müller Sa 15 Mrz 2014

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This week the European Commission issued a Communication about a new framework for protecting the rule of law within EU Member States.[1] Is this the long hoped for mechanism that allows the EU to deal with internal threats to liberal democracy (the democratic deficits *within* Member States, so to speak) effectively? The clear-cut answer is: yes and no.

The Commission has evidently understood that attempts systematically to undermine rule of law principles require a different response than individual infringement proceedings. Depending on the circumstances, a structured process of naming and shaming which is now available to the Commission might work. But if it doesn't, then the Commission will remain just as helpless as before: no new sanction mechanisms are envisaged (and, to be fair, none might be feasible without treaty change). In that sense, the new framework formalizes — or, in the words of Commission President Barroso, "consolidates" – the Commission's de facto approach in recent years.

This is not a trivial achievement; and it's probably the most the Commission could do on the basis of existing law and with available institutions such as the Fundamental Rights Agency. It may well deter some governments. But for illiberal national politicians determined to go head to head with the Commission, there is in the end still only Article 7 TEU – and that remains as difficult to put into effect as before.

The Commission's initiative comes against the background of threats to liberal democracy in Hungary and Romania since about 2010 – and an acute sense among many observers (and also among political actors) that the Union has been ill-equipped to deal with a challenge one might call "constitutional capture." Constitutional capture is different from pervasive corruption (a major problem still in Bulgaria and Romania, for instance); but it is also different from individual rights violations, grave as the latter might be. Constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult. Hungarian Prime Minister Victor Orbán actually passed a new constitution for his country (a case of formal constitutional capture); his Romanian counterpart Victor Ponta, in the summer of 2012, blatantly tried to disable checks and balances (the constitutional court in particular) to get rid of his political arch-enemy, the President of Romania (this being a matter of attempting an *informal* constitutional capture).

In both cases, the Commission got into a direct confrontation with the respective national governments. While the EU arguably helped to avoid the worst, the experience seemed to point to a significant weakness of the Commission as a guardian of the treaties: it could take governments to court for individual infringements of EU law, but it proved incapable of addressing systematic attempts to undermine the rule of law. In some cases, it could not "read" certain laws for what they were, but had to reinterpret them in an EU framework such that their real political meaning was officially missed. When Orbán's government effectively decapitated the Hungarian judiciary by drastically lowering the retirement age of judges, the EU sued Hungary for age discrimination. Brussels won its case, but the judges were never re-instated; the political situation remained more or less as Orbán's government wanted it.

The Commission now explicitly makes the point that there can be systematic threats to the rule of law within Member States and that Article 2 TEU gives the Commission, as the guardian of the treaties, the mandate to intervene. The Commission also in plain words reiterates the basic legal and normative argument that is crucial to counter the claim that such an intervention somehow constitutes an illegitimate meddling in internal affairs: the EU relies on the mutual trust of the Member States in each others' legal systems; if a kind of "horizontal Solange" were to replace this trust, the EU as we know it would be at an end. Hence the Commission is spot-on in stressing that "the confidence of all EU citizens and national authorities in the legal systems of all other Member

States is vital for the functioning of the whole EU."

So far, so good. But what is the concrete content of the new framework? The Commission envisages a "structured exchange" with a Member State that appears to be undermining the rule of law. This would start with an assessment of the situation in a particular country, which could result in a "rule of law opinion" expressing the concerns of the Commission vis-à-vis the national government in question. If the government fails to respond appropriately, Brussels will issue a "rule of law recommendation;" if the state still fails to comply, "the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU" (which allows, at the limit, the suspension of a country's voting rights in the European Council, imposing a kind of normative quarantine on a Member State).

Three aspects are notable here: first, the Commission gives itself leeway to draw on whatever sources it chooses for its assessment: the Venice Commission, the Fundamental Rights Agency, but also other, as yet unnamed sources. This gives it a fair amount of power to come up with a comprehensive judgment – as opposed to mechanically working through checklists, as has too often been the case in accession processes, or entirely relying on one institution which the national government under suspicion might try to capture.

Second, the Commission emphasizes the "duty of sincere cooperation" as set out in Article 4(3) TEU. This clearly reflects lessons learnt from the Orbán government's rush to go ahead with the fourth amendment to the new Hungarian "Fundamental Law," when the Commission had asked it to take a pause and talk. A government acting in bad faith or defiance is presumably now more likely to be faced with a "recommendation" and, ultimately, an attempt to get the European Council to vote for Article 7.

Third, the Commission seems to hope for the effects of a kind of naming and shaming. The fact of an assessment and a rule of law opinion will be publicly known, but the content won't be; in the next step of escalation, the recommendation as such would be made public. Clearly, the Commission itself has drawn the conclusion that its very public conflicts with the Hungarian and Romanian governments helped to prevent the worst.

Will the next Orbán think twice, then? That's not obvious. A government intent on constitutional capture knows that it is on a confrontation course with the EU – and, if anything, will try to mobilize public opinion against Brussels even preemptively (and not care much about the views of other governments in the EU). Shaming might sometimes work – but it is less likely to do so in the absence of credible penalties. And in this respect not much has changed: no new sanctions are envisaged, and the hurdles for Article 7 ultimately remain as high as before. To be sure, the Commission might be making a bet that creating a public record of rule of law abuses – certified by everyone from the Venice Commission to prestigious judicial networks in the EU – and thus pushing the European Council on the basis of a "reasoned proposal' (as the Treaty puts it), would actually shame the European Council into getting serious about Article 7.[2] Still, because everything will come down to Article 7 in the end, it would be a mistake to sit back and relax, in the knowledge that, across the Union, the rule of law will now be safeguarded by the Commission. Further thinking and further action are needed.

So let me suggest two further thoughts right away. First, if the Commission really were to become more consciously politicized – appearing as a quasi-government with a recognizably partisan agenda – for the sake of increasing the Union's "democratic legitimacy", then the whole confident self-presentation of the Commission as "objective" (something stressed a great deal in the Communication) would become much less credible. A Schulz Commission might go head to head with an Orbán government, but Orbán's habitual argument that all criticism of his government is just a matter of the European Left going after a successful conservative revolutionary might look a touch more credible in the eyes of observers.

Second, it might be unclear who makes the assessments, crafts the opinions, and issues the recommendations. Rival proposals – such as my colleague Kim Lane Scheppele's idea of systematic infringement proceedings or the creation of a Copenhagen Commission – suggest highly visible (and, ideally, prestigious) actors with a proven capacity for comprehensive legal and political judgment as ultimately making the calls. To be sure, the ECJ and a Copenhagen Commission would also be open to charges of partisanship or excessive political subjectivity, but much less so. Furthermore, such rival proposals suggest not just intermediate mechanisms

(intermediate, that is, between soft power, i.e. persuasion, and Article 7), but intermediate *penalties*. Any of this, it seems though, will have to be for the next Commission, and, ultimately, the next treaty.

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