

What should the European Union do to safeguard its values?

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I will go straight to the heart of the matter. I need to stress from the outset that the views I will express are mine only, not those of the Council or of its Legal Service, yet considered views based on legal analysis and political assessment.

The substance of the real debate on the issue you want to discuss is not whether the Union should act to ensure the respect of the values on which it is founded, which by the way are the values common to its Member States in the terms of Article 2 of the Treaty on European Union, quoted at the top of the programme of this hearing - nothing therefore that has come to life for Member States by virtue of their accession to the Union, but necessarily a pre-existing legal reality. Of course the Union should act, since the existence of certain common standards in social life conditions the mutual trust on the basis of which the Member States operate with each other and the institutions in the Union framework. The European Court of Justice has brought to particular attention this principle of mutual trust in its opinion of December last on the problems posed by the EU's accession to the ECHR. The need for awareness of the Union is not an issue.

What is an issue is whether the Union has the authority to legislate on how the Member States organise themselves internally with regard to the common values, to determine what is the adequate form of government, of parliamentary democracy, of judicial review, and to sanction departures from an hypothetical unified model of political society.

There are two very different approaches. The first is to ensure that the policies of the Union are not jeopardised by the disregard of basic standards that certain Member States might demonstrate. No further empowerment is required to allow the Commission and the Court of Justice to operate in such circumstances. They already have full authority, under Articles 258 and 260 TFEU, to determine infringements and to impose penalties, even in the absence of a risk of a serious breach that would allow action by the Council under Article 7 TEU. But it would be quite another thing for the Union to seek to establish itself as the supreme constitutional authority of its founders by attempting to define *in abstracto* societal values in general, that is in the absence of any effect on the implementation of the policies of the Union.

To start with, such an attempt would run counter the principle of conferral on which the Union is based and which has the effect that the Union has authority regarding the values of article 2 and the fundamental rights of the Charter only in the scope of the provisions that grant it material competence. To allow an extension of this competence to subject matters that remain subject to national sovereignty on the grounds that the values of the Union are at stake would be tantamount to granting the Union universal competence, which goes against its constitutional order. To violate one's rules to prevent violations by others would quite simply not do.

More practically, if one looks at the reactions to the terrorist acts that have recently targeted the free press, it was possible to set aside cultural divisions among Union members by focusing on PNR, the monitoring of internet contents and the control of external borders. But, if one had attempted to define a common line on the philosophy of free expression, say on the right to blasphemy, that would have been the end of unity.

Any discussion by the Union's political institutions of what is, in concrete terms, the standard definition of freedom, democracy, equality and the rule of law could be an interesting time. Certainly it would have an integrative effect to agree on whether republic is better than monarchy, on how many chambers the parliaments should have, on how voting should be conducted and majorities shaped, on the authority of constitutional courts and on the existence of separate orders of jurisdiction. Anything is possible -even discussing whether democracy must be liberal- but, to be sure, this would be work for an intergovernmental conference, not something to be decided on the basis of the current treaties including their provisions on fundamental values.

Yet it was widely felt to be perfectly normal, two years ago, that Hungary be criticised as a Union member for reducing the powers of its constitutional court, amending rules regarding its electoral campaigns and advancing the retirement age for its judges. On what grounds such criticism? Certainly not on the inherent prerogatives of constitutional courts, which do not even exist in all Member States... Violating labour law by discriminating on the basis of age and going against a directive on television was, in simple terms, what the Commission came out with... Quite narrow to be frank.

Hence the "Rule of Law initiative" of March 2013, a letter of four Foreign Ministers, including that of Denmark, calling for a new mechanism, which some described as analogous to the excessive deficit procedure, and asking the Commission to come forward with proposals to this effect. It is not a secret that the initiative, which made no explicit mention of Hungary, was put together as a

political move to give to the Union, before important elections, a more democratic flavour and thus moderate its unpopular image of an organisation solely interested in budgetary cuts, the welfare of bankers and the reduction of public services and social benefits. To stress the rule of law value is an intended indication that, whatever the result of democratic elections, the political rights derived from the majority rule have their limits. Thus, invoking this value is anti-populist tool. Whether it helped in this context is not for me to say...

But the Commission did come out one year later, in March 2014, with a communication on a mechanism based on a "Rule of Law recommendation" that could be addressed by the Commission to a Member State following a dialogue with this Member State and prior to an activation of Article 7 TEU. The Council did not give any endorsement to the communication which, in actual fact, may be regarded as a stand alone Commission position.

Last December, the Council and the Member States adopted conclusions establishing that a dialogue between all Member States would take place once a year within the Council on the rule of law, with the possibility to hold thematic debates, and in full respect of the functions of Member States as recalled at Article 4 TEU and of the principle of conferred competences. The conclusions stressed the need to avoid duplicating instruments and expertise already existing in the Union and in International Organisations.

These conclusions put a final point to discussions on process within the Council, which demonstrated an interest to keep the subject alive, as well as doubts about the wisdom of formalising the issue too much by establishing additional bodies and mechanisms.

In the hypothesis of objectionable actions by a Member State, the authorities concerned are at present subject to exposure on five sides at least: from their own national courts, the ordinary judges of the Union; from the Commission, the only institution with the Court of Justice to be competent to address deficiencies of Member States in implementing Union law; from general commentary, be it political or academic, emanating in particular from civil society, the European Parliament, specialised agencies, the Council of Europe, etc...; from the angle of Article 7 TEU in case the violations are of such an extent that the continuation of regular relations with other EU partners must be reconsidered; finally -and, in my view, most importantly- through the peer pressure of other governments, the effectiveness of which depends in no way on the existence of a fully fledged devoted framework - rather to the contrary, as the general feeling goes...

This latest element accounts for the fact that the conclusions I am describing are not solely from the Council, but also from the representatives of Member States, not to prejudge Union competence.

This multiple exposure is widely recognised as being sufficient to meet the current risks. There is no reluctance to discussing the values of the Union at 28 at the political level. But to embark now into a negotiation on the material content of these values and on gradual sanctions to discourage their trespassing is an entirely unrealistic prospect that would raise hostility against the Union. The Commission itself has put power-grabbing projects like the justice scoreboard very much on the back burner. Integration does advance file by file, but not through declarations of principle that State power is wrong.

As long as Member States governments remain above certain intuitive thresholds, to frame their procedural autonomy in the abstract is a path that will not lead the Union very far. No doubt it would intellectually make sense to look at a definition for such thresholds, to make the rule more legally certain. But there are two reasons to stand back. First, it may well be that the results of a political negotiation on values would be less protective of fundamental rights than the current ambiguity, leaving scope to a generous judicial interpretation. Second, a focus on Union values was at a time considered opportune to combat anti-EU political tendencies. But it might very well backfire if it is perceived as politically oriented, and fuel extra resistance to the "plots of Brussels bureaucrats" attempting to discourage the voting of undesirable majorities. Not all Member States are alike in how their public opinion reacts and the preaching of virtue, particularly expressed in speech rather than in deeds, does not always get the electoral sympathy of the many sin-lovers that are around the place...

...which is after all a legitimate manifestation of their freedom of thought and of expression recognized by articles 10 and 11 of the EU Charter.

In a Union based on mutual trust which implies confidence (and, says the ECJ, a presumption) that Member States respect equivalent standards unless proof of the opposite is brought forward in a manifest and systemic manner, my final plea would be that one avoids going about the place suggesting that tyranny looms and that fundamental rights are everyday under threat in the Union or the Member States. This is not only detrimental to our collective image and our common project, this is also untrue and almost ridiculously excessive.

Does it make sense to devote one's efforts to control whether the prohibition of spanking is strong enough in the Member States when the barbarians are training their killers on our doorstep? I share the views of the many who entertain quite a strong doubt about it. What threatens most our values could be the fatigue brought about by overblown interpretations that make a farce of them. But this is another story...

I thank you for your attention.

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