

University of Groningen

Reinforcing the Rule of Law Oversight in the European Union

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Reinforcing Rule of Law Oversight in the European Union

Carlos Closa, Dimitry Kochenov and J.H.H. Weiler

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

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Abstract

This paper provides a critical overview of options available to the EU to deal with the Rule of Law crisis in some of the Member States. The options it engages with were offered and discussed by a handful of the leading experts in the field and drawing on the critical EUI discussion, the first part of the paper tackles the following questions:

1. Why should the EU reinforce the oversight of Member States' Rule of Law performance?
2. Are there sufficient legal bases for such oversight – should a reform of the Treaties be required?
3. What kind of procedure could be designed to meet the need of such oversight?
4. Which body should be entrusted with the oversight function?

The second part provides a word of caution warning of the possible problems related to the EU's involvement with the constitutional core of the Member States

Keywords

Rule of Law, EU values, democracy, Article 2 TEU

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Preface

This working paper summarises the findings and debates of a seminar held at the Global Governance Programme of the RSCAS in the European University Institute on 16 January 2014, organised in cooperation with the Department of European and Economic Law, University of Groningen.* Besides intellectual curiosity, the seminar responded to the significant concern that recent events in a number of the Member States have provoked among political leaders and scholars. Rather than hosting a usual academic event, the convenors – Carlos Closa and Dimitry Kochenov aimed at holding a straight-forward discussion on the eventual reinforcement of the Rule of Law oversight in the EU, focusing on EU's possible involvement in guaranteeing that the Rule of Law at the national level does not weaken, let alone deteriorate. To this end, instead of presenting traditional papers, the participants were asked to reflect on four questions framing the key outstanding issues. The four seminar sessions followed the four questions asked:

1. Why should the EU reinforce the oversight of Member States' Rule of Law performance?
2. Are there sufficient legal bases for such oversight – should a reform of the Treaties be required?
3. What kind of procedure could be designed to meet the need of such oversight?
4. Which body should be entrusted with the oversight function?

Although no unanimous opinion has emerged as a result of the very intense discussions, a number of the essential points, which should necessarily be taken into consideration when answering the four questions outlined can now be identified with clarity. Participants outlined an array of different options, pertaining to the political as well as to the legal sphere. Many of these are of direct relevance within the currently existing framework of the Treaties and legislation, while Treaty revision options were also considered.

The First Part of this paper reflects the different options open to the EU in dealing with the Rule of Law problems at the Member State level as discussed by the participants. Besides the eventual contradictions between the possible views, it identifies the consensus emerging on specific points, touching upon the advantages and drawbacks of specific understandings and courses of action advocated.

The Second Part of the paper contains the contribution of the President of the EUI, Prof. J.H.H. Weiler. It is critical of the key assumption behind the workshop, namely, questioning whether the EU is in the position to – and, more importantly, whether it should – do something at all in terms of the Rule of Law oversight. The word of caution offered in the Second Part is an important critical perspective to consider, when dealing with the options seemingly open to the EU as outlined in the First Part.

Annexed to this working paper there is a list of literature of key relevance for dealing with the issues of Rule of Law oversight in the EU, approaching the problem from a number of different angles and prepared by the Florence workshop convenors in consultation with the participants of the event.

Besides the participants of the Florence workshop, whose contributions were invaluable, the authors are grateful to Martijn van den Brink, Justin Lindenboom, Suryapratim Roy and Wim Mertens – graduate students at the EUI and Groningen – who were indispensable in helping with this project, which will continue in the form of an edited volume to be prepared by the convenors later this year to include all the individual contributions from the participants plus some additional ones.

Carlos Closa, Dimitry Kochenov and J.H.H. Weiler
Florence and Groningen, March 2014

* We would like to thank Silvia Dell'Acqua for her support in the organisation of the event.

Introduction and the structure of the paper

In the past few years, several EU Member States have faced political changes which resulted in threats to the Rule of Law and liberal democracy, core values based on which the EU was established, as outlined in Article 2 of the EU Treaty (TEU). Austria, Greece, Hungary, Romania and other Member States could provide the cases in point to a varying degree. This poses a particular problem, since scholars and politicians in Europe share the general perception that the EU is currently *not* properly equipped to deal with such threats. This paper discusses the ways to approach this problem. This is done without prejudice to the substantive definitions of the Rule of Law and the contents of values in question – the issue falling outside the scope of this paper.¹

The EU was explicitly established not just to be a community based on common interests of its Member States, but also a community of values, reflected in the way how integration progresses, as well as in the *ethos* of rights and freedoms, which the EU officially embraces and guarantees,² while demonstrating direct concern for the peoples of Europe.³ In this context it is not surprising that the EU's credibility and even its very *raison d'être* – traditionally related, besides economic integration, also to values and rights⁴ – require that it develops the means to face these challenges. A virtually universal consensus has emerged on the fact that the EU shows a less than brilliant record on the internal enforcement of its own constitutive values. This is definitely the case when dealing with the alleged breaches of the Rule of Law at the Member State level. This is both due to the EU's very design – since the powers not explicitly delegated to the EU remain with the Member States,⁵ the priority in values-promotion has traditionally been confined to the pre-accession/external relations context, leaving the internal Rule of Law issues to Member States⁶ themselves – as well as to its day-to-day functioning, where the priority, quite expectedly perhaps, is awarded to the enforcement of the *acquis*.⁷

The discussion of these issues, which are of overwhelming importance for the successful future of both the EU and its Member States, requires establishing, **first of all**, the normative foundation for enhanced EU monitoring and enforcement of the foundational values of Article 2 TEU – with a

¹ For a comprehensive approach to the Rule of Law in the EU see e.g. Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No. 04/09 (NYU Law School), 2009. For a troublesome vision of other values see e.g. J.H.H. Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"', in Marta Cartabia and Andrea Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo*, Bologna: Il Mulino, 2009, 51; Andrew Williams, *The Ethos of Europe*, Cambridge: Cambridge University Press 2010; Dmitry Kochenov, Gráinne de Búrca and Andrew Williams (eds.) *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2014. For the analysis of the meaning of the values in the context of Article 2 TEU enforcement, see, Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 *Common Market Law Review*, 2014, 59.

² See, e.g., Carlos Closa, 'Deliberative Constitutional Politics and the Turn towards a Norms-Based Legitimacy of the EU Constitution', 11 *European Law Journal*, 2005, 411.

³ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 (special English edition); J.H.H. Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism', in Julie Dickson and Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012.

⁴ Gráinne de Búrca, 'Europe's *raison d'être*', in Dmitry Kochenov and Fabian Amtenbrink (eds.), *European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, 21.

⁵ Art. 4(1) TEU.

⁶ Christophe Hillion, 'Enlarging the European Union and Deepening Its Fundamental Rights Protection' *SIEPS European Policy Analysis*, 2013:11, 2013.

⁷ For a disastrous example (when approached from the Rule of Law angle) see Case C-286/12 *Commission v. Hungary* [2012] ECR I-0000, as analyzed by Kim Lane Scheppele, 'How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part II', *Verfassungsblog*, 9 August, 2012. Available online at <http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-ii/#.Uw4Zlvuzm5I>.

particular emphasis on the Rule of Law – in the Member States. Then, **secondly**, the legal basis making the growing EU’s role possible must be identified and scrutinised. Once this is done, **thirdly**, the procedural issues of the day-to-day operation of EU’s involvement with the values are to be addressed. In this context, a clearly-designed procedure should identify the actors involved, their functions and roles, as well as the different stages in the process. **Finally**, the potential bodies best suitable for the specific oversight function will need a closer scrutiny, thus shifting the focus to the issue of who will actually be doing the ‘values job’. Each of the stages along the logical route thus outlined boasts a huge array of possible options, offering a large number of potentially deployable and at times contradictory approaches.

While this is not the task of this working paper to make hard choices, it will outline concrete options available to the EU with regard to each of the four issues we are concerned with, also explaining, based largely on the discussion held in Florence, what the pros and the cons of each of the choices thus offered are. Besides, it will offer a legal-theoretical warning to make us think twice whether the EU is the right source of Rule of Law solutions, however badly-needed. Part I written by Carlos Closa and Dimitry Kochenov and based on the EUI debate focuses on the four meta-issues outlined above, while Part II, written by J.H.H. Weiler puts these issues in a broader perspective, of democracy, legitimacy and accountability, sounding the warning.

Part I. The case for EU reinforced oversight in four questions

Carlos Closa and Dimitry Kochenov

This part proceeds along the four questions at the core of the Florence exchange:

1. Why should the EU reinforce the oversight of Member States’ Rule of Law performance?
2. Are there sufficient legal bases for such oversight – should a reform of the Treaties be required?
3. What kind of procedure could be designed to meet the need of such oversight?
4. Which body should be entrusted with the oversight function?

Key points worthy of consideration emerging from the EUI discussion are summarised in the conclusion.

Question 1. Why should the EU reinforce the oversight of Member States’ Rule of Law performance?

The general normative argument in favour of the EU’s democratic oversight of its Member States is related, quite simply, to the safeguarding of the core values on which the Union has been established, as set out in Article 2 TEU, which are shared between the EU and the Member States. A more specific answer to the question concerning the reasons behind the EU’s particular role is an analytical process of two stages. The first refers to the nature of the problems existing in some Member States which could (and, presumably, should) be addressed with the help of the actors external to the Member States concerned. The second concerns, specifically, the justification of the EU’s role in dealing – or at least participating in dealing – with those problems.⁸ In other words we are dealing with the *what?* and the *why?* questions.

⁸ It is crucial to realize that given the EU’s design any EU involvement – as well as its very existence – is always in need of justification: Glyn Morgan, ‘European Political Integration and the Need for Justification’, 14 *Constellations*, 2007, 332.

1.1. The ‘what?’ question: on the nature of the Rule of Law problems at issue

The calls for oversight have emerged in recent years in the context of a number of different events: the participation of an extreme right-wing party in the government in Austria, concentration of the media and political power in Italy, the treatment of EU citizens of Romani ethnicity by France, and the behaviour of political parties enjoying strong majorities in the countries like Hungary or Romania etc., sometimes with a particular reference to the change of the Constitution and the rewriting of hundreds of laws virtually in a fortnight.⁹ Although possible threats to the Rule of Law arise in all these Member States, specific situations, especially the most problematic ones, are never perfectly equal. Romania and Hungary in particular are the cases in point. A careful empirical assessment of the exact situation in each country concerned is necessary in order to determine an appropriate response. Looking at the assessment of the outstanding Rule of Law problems in the media and at times by the international institutions, it is clear that such careful empirical assessment, regrettably, does not always underpin the response actions undertaken, as it should.

Crucially, important problems emerged *both* in the ‘old’ and in the ‘new’ Member States. Moreover, the problems we are dealing with do not seem to be confined to a particular region. It is abundantly clear, that no country can be *per se* immune from the concerns we are dealing with.

The key point is to be able to distinguish with abundant clarity between two radically different sets of issues. On the one hand, there are problems amounting to nothing else but careless use of the law or abuses of political power – something that can and will be corrected with time through the functioning of the relevant Member States’ own democracies. On the other hand, there are problems of such a profound and fundamental nature, that the Member States’ own legal and political systems are overwhelmingly unlikely to be in the position to right the wrongs concerned in the near- to long-term future.

A broad consensus among all the participants of the EUI round-table arose on the issue of limiting EU’s possible involvement to the second set of problems outlined above. Indeed, mingling with the first will be nothing but an outright *ultra vires* act by the Union. The fact that Article 2 TEU as well as other values-relevant instruments to be discussed *infra* are not about micro-management and are only to aimed at addressing the gravest concerns is evident. Yet, how do we draw the line between the first and the second type of problems outlined?

While a general sense of unease about certain constitutional developments in a Member State is an insufficient factor to propose a classification of a particular problematic issue – or, indeed, even to establish its very existence, there are ways to go beyond the general vagueness on this issue.

Three profoundly interrelated criteria could be employed as key signs of which kind of problems we are witnessing. The first is Jan-Werner Müller’s ‘**constitutional capture**’¹⁰ – a problem, which was spreading through the region and beyond the EU as well, also characterised as unconstitutional constitutionalism or a constitutional *coup d’État*: an profound reshuffling and abuse of power through perfectly legal means.¹¹ The second criterion is the general dismantlement or profound **undermining of the liberal democratic state** and the third is a reference to **systemic corruption**, which can be an overwhelming problem undermining Article 2 TEU compliance.¹² In any case, there is a general

⁹ The well-known Hungarian case provides an illustration of such a possibility: Kim Lane Scheppelle, ‘The Unconstitutional Constitution’, *New York Times*, 2 January 2012. For a discussion see Verfassungsblog’s special feature *Hungary: Taking Action*, 2013. Available online at <http://www.verfassungsblog.de/en/category/focus/hungary-taking-action/#.Uw4a-Puzm5I>

¹⁰ Jan-Werner Müller, *Constitutional Patriotism*, Princeton: Princeton University Press, 2007.

¹¹ E.g. Scheppelle, ‘The Unconstitutional Constitution’, *supra*; Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppelle, ‘Hungary’s Illiberal Turn: Disabling the Constitution’, 23 *The Journal of Democracy*, 2012, 138.

¹² Milada Ana Vachudova, ‘Corruption and Compliance in the EU’s Post-Communist Members and Candidates’, 47 *Journal of Common Market Studies*, 2009, 43.

feeling that the problems should absolutely go beyond individual human or fundamental rights violations and petty corruption, and that they may represent a new phenomenon in that they profoundly undermine the very essence of the modern democratic state.

In general, participants agreed that those problems go beyond violation of specific fundamental rights or, indeed, governance standards. In other words, crucially, the Rule of Law problems we should be concerned with are not necessarily human rights problems. Constitutional capture, dismantlement of the liberal democratic state and endemic corruption taking different forms which penetrates the whole body of the state and society are the three inter-related factors to be concerned with when answering the ‘What?’ question.

The last but not least fundamental issue which is abundantly relevant for the enforcement of the Rule of Law is of course whether the EU itself is up to the standard. This question discussed in Part II *infra*.

1.2. The ‘why?’ question: what does the EU have to do with all this?

Any EU action in relation to scrutinising and correcting Member States’ deviation from the Rule of Law requires a previous normative foundation. All the participants of the meeting agreed, in general on the pertinence of the eventual Union’s role: none of them really questioned whether the EU should do something about the situations where EU values are gravely violated. Yet, the dangers of expecting too much from the Union in this respect should also constantly be kept in mind, as Part II of this paper emphasises in detail.

This being said, three key normative arguments emerge for, specifically, the Union’s involvement clearly emerged from the Florence discussion. These concern, firstly, the effects of Article 2 violations by a single Member States on the whole of the Union both at the citizens’ and at the level of the Member State level; secondly, these concern the supranational understanding of the Union as a federal legal-political organism, requiring it to intervene in defence of the rights and freedoms, which it directly endows its citizens with; and, thirdly, the argument building on the EU’s congruence with its own proclaimed values and policies.

In other words the three types of arguments are derived from:

- a. The all-affected principle
- b. The supranational federal vision
- c. The principle of congruence

a. The all affected principle

The normative argument on the universal effects of the individual Member States’ departures from the values of the Union on whole of the EU starts with the all-affected principle, related to the deep inter-penetration and the mutual interdependency between the Member States of the Union at the current stage of European integration. This works at two levels.

Firstly, every European citizen has an interest in not being faced with an illiberal Member State in the EU, since that state will take decisions in the European Council and the Council of Ministers and at least indirectly participate in governing the lives of *all* the citizens of Europe. If one or more Member States change their standards regarding the Rule of Law or democracy, this necessarily and automatically affects the decisions in and by other Member States as well.

Secondly, every EU Member State is equally interested in ensuring that none of the others free-ride, undermining the genuine nature of the Union and the internal market. Legally speaking, the interdependency between the Member States now works in such a way that the EU obliges the Member States to presume that each of them is at least as good as any other in terms of the

governance, democracy and the Rule of Law standards. Mutual trust, which is essential to the working of the EU and the market itself, depends precisely holding true this presumption. Departures from accepting other Member States' court decisions, European arrest warrants, newly-issued nationalities or the quality of phytosanitary measures – you name it – are generally *prohibited* by EU law.

Thus, disrespect for the Rule of Law and democracy in one particular Member State may have negative externalities upon third (EU) parties. This principle assumes that the EU is already a coherent legal-political entity based on mutual trust and respect and works both at the level of citizens and at the level of the Member States.

b. The supranational federation approach

The federal analogy builds on the inter-dependency argument but moves it one step further: the EU is recognised – in tune with the functioning of its law in some domains – as a supranational federation.¹³ Such recognition provides an additional normative argument for its involvement in the cases when the Member States disregard the Rule of Law, as the Union *per se* is also conceived of as a bearer of an important stake in the functioning of the system and the effectiveness of the rights it grants. As an important bearer of duties *vis-à-vis* the citizens and, also, the Member States, the EU as such is viewed as a responsible actor.

This vision cannot emerge out of a story of interdependence between the EU citizens or between the EU Member States. Once the EU's supranational nature is fully taken into account, it acquires a role in protecting its citizens, which is *independent* of the Member States. Playing such a role pertains to the key recent jurisprudence of the Court of Justice of the European Union (ECJ).¹⁴ Some participants, expressed doubts as to how far the federal analogy can travel: even though in analytical terms the EU can be perceived this way, it is questionable that normative arguments can be automatically derived from this view.¹⁵

c. The principle of congruence

The third normative argument refers to the *principle of congruence* and it has an internal and an external dimension. Externally, the argument based on this principle points to the kind of requirements that the Union usually puts for engaging in co-operation with third parties. The protection of fundamental rights, the Rule of Law and democracy all together or one by one are good cases in point. Indeed, the EU even attempts to shape international law to its liking, using its own fundamental values and principles as a basis for this.¹⁶ Should the EU establish oversight mechanisms, then it would clearly also reinforce its credibility in the wider world. This is crucial, in particular, given that the EU sets high standards for the candidate countries in the course of the pre-accession,¹⁷ which contrasts sharply with what is required of those Member States, which are already 'in'.

¹³ The “f”-word is then used in Robert Schütze's vein: Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009.

¹⁴ E.g. Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-1449; Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [2011] ECR I-1177. For an analysis, see, Dmitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe', 18 *Columbia Journal of European Law*, 2011, 55.

¹⁵ See, on the essence of such disagreements, Gareth Davies, 'Constitutional Disagreement in Europe and the Search for Legal Pluralism', *Eric Stein Working Papers* No. 1/2010 (Prague), 2010.

¹⁶ Federico Fabbrini, 'The Enhanced Cooperation Procedure: A Study in Multispeed Integration', *Centro Studi sul Federalismo Research Paper*, October 2012.

¹⁷ Marc Maresceau, 'The EU Pre-Accession Strategies: A Political and Legal Analysis', in Marc Maresceau and Erwan Lanon (eds.), *The EU's Enlargement and Mediterranean Strategies: A Comparative Analysis*, Basingstoke: Palgrave, 2001, 18.

Internally, the congruence principle means that respect for democracy and the Rule of Law should not only be viewed as a prerequisite for accession but also for continued membership. In short, the congruence argument, when taken seriously, enhances EU's credibility in safeguarding and defending its fundamental values.

The three arguments combined provide a sound normative foundation for the intensification of the EU's involvement with the outstanding issues of the disregard of the fundamental values by the Member States.

Question 2. Are there sufficient legal bases for such oversight – should a reform of the Treaties be required?

In order to be able to intervene, a sound legal basis is required, to empower the EU to act. This section first argues that Article 7 TEU, which is the main legal basis in the Treaties currently in force *ab initio* designed to tackle value problems, provides an insufficient legal basis for a successful intervention. It then moves to assess the potential need for a Treaty reform, also considering other options, *i.e.* agreements on values' enforcement placed outside the framework of the EU *acquis*. Lastly, this section turns to the concrete legal bases in primary EU law discussed by the participants of the Florence seminar as possible legal grounds for EU's involvement in solving the Rule of Law problems at the national level.

2.1. Article 7 TEU

The main provision in the current framework, which formally establishes the possibility to take measures in case of violations of the Rule of Law is Article 7 TEU, which contains a mechanism to protect the EU against serious breaches of the values as reflected in Article 2 TEU by any of the Member States. Importantly, the scope of Article 7 TEU is not confined to the areas covered by EU law but also allows the Union to act in the event of a breach in which Member States act autonomously, in their own exclusive area of competence.¹⁸

In practice, a strong political unwillingness to use the mechanism provided for by Article 7 TEU, which places the determination of the existence of a breach fully with the Council, has emerged. Calls for the establishment of monitoring or early warning mechanisms have gone unheeded for a decade.¹⁹ Besides, the procedure contained in this provision is a political, not a judicial one, allowing for a lot of behind-the-scene leverage and not implying any active participation of the ECJ. This makes it reasonable to believe, and the majority of scholars seems to agree, that Article 7 TEU can only be used in the most outrageous and acute factual constellations – far superseding any of the problems faced by some EU Member States at the current stage. There is thus a pressing need to look for alternatives, both within the existing Treaty framework and possibly beyond.

2.2. Key options framing the way forward: what about the Treaty change?

All participants in the EUI workshop converged that it is necessary to aim at proposals which could be implemented without a Treaty amendment, even if many believed such an amendment would be desirable. Treaty revisions are slow and painful processes²⁰ and, hence, as some scholars argued, it should not be the focus at the present moment, when we are dealing with an imminent crisis of the

¹⁸ Communication from the Commission to the Council and the European Parliament on Art. 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based: COM (2003) 606.

¹⁹ Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', 16 *Columbia Journal of European Law*, 2010, 385.

²⁰ See Carlos Closa, *The Politics of Ratification of EU Treaties*, London: Routledge, 2013.

Rule of Law, or even a ‘constitutional crisis’²¹ in some Member States. Moreover, non-complying Member States will obviously block any Treaty change aiming at tackling their non-compliant behaviour.

Yet, much is to be said for considering Treaty amendments in all seriousness. The key reason for this is that a Treaty revision, even if not happening overnight, which brings about a substantial reinforcement of the oversight mechanisms would significantly increase the legitimacy of the EU’s interventions.

Only a Treaty change will provide a satisfactory response to the potential limitations arising from Article 4(2) TEU, which can be misused to over-emphasise the protection of the constitutional specificity of the Member States failing to comply with the values as set out in Article 2 TEU. Article 4(2) TEU requires ‘respect for national identities of Member States which are *inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security*’ (emphasis added). While it is clear that it is legally untenable to stretch this provision to such an extent that it would amount to *de facto* denying the *effect utile* of Article 2 TEU as a minimal values’ denominator common to all the Member States and the Union alike, a forceful restatement of this fact in the text of the Treaties would be a good thing.

We should not forget, however, that the dilemma whether to amend or not to amend the Treaties does not reflect all the possible causes of action. So a wide agreement emerged in Florence that new mechanisms could potentially be created both within and, importantly, *outside* the Treaty framework.

Indeed, examples of two types of actions outside the Treaty framework are known. The first is about *ad hoc* interventions, to which the case of Austria following the elevation of FPÖ to power testifies, when the Member States rallied for change entirely outside of the scope of the *acquis*.²² The second is about formal legal structures outside the scope of the Treaties. An example of the latter is the whole architecture to deal cope with the financial crisis. As always, a middle way is possible also here – it concerns the enhanced co-operation procedures in the Treaties. These are notoriously difficult to use, however.²³

Having outlined all these ‘extra-*acquis*’ options, it seems that compelling arguments would still require remaining within the Treaty framework. The alternative options arguably diminish the effectiveness of the much-needed oversight mechanism, since it presupposes the agreement and participation of all Member States (unless outright bullying of a potentially illegal nature is advocated, which was the Austrian case). Crucially undermining the potential success of any of the approaches placed outside of the context of the Treaties and the *acquis*, it would be very likely that the Member States plagued by deficiencies in the area of Rule of Law and other values will opt out of a mechanism established outside the Treaties.

All in all, thus, although the preference in the current situation, which is the one of urgency, should definitely lie with the attempted deployment of the existing Treaty machinery, in the medium- to long-term future a Treaty amendment would definitely be beneficial for the success of the Rule of Law oversight mechanisms, also increasing the legitimacy of EU interventions. This said, the focus of the section which follows is on the deployment of the *existing* legal bases.

²¹ The Fundamental Rights Agency concluded that this is the case in Hungary: FRA, *Fundamental Rights: Challenges and Achievements in 2012*, Vienna: FRA, 2013, 22–25.

²² Gabriel von Toggenburg, ‘La crisi austriaca: delicate equilibrismi sospesi tra molte dimensioni’, *Diritto pubblico comparato ed europeo*, 2001, 735.

²³ Fabbrini, ‘The Enhanced Cooperation Procedure’ *supra*.

2.3. Legal bases currently available

The issue of the legal bases is at times intimately related to the questions of the procedure deployed and the bodies responsible for action, particularly so, when an innovative – or even an outright inventive deployment of the Treaty instruments is advocated. This section should thus be necessarily considered in an intimate connection with the discussion of Questions 3 and 4 *infra*. The key legal bases for addressing the departures from the values of Article 2 TEU by certain Member States, as outlined during the Florence meeting include a wide array of options, including the following:

- a. Reading Article 2 TEU in conjunction with 4(3), 3(1), and 13(1) TEU
- b. Deploying Article 2 TEU in combination with 19 TEU
- c. Deploying Article 2 TEU in combination with 258 TFEU
- d. Adding fines along the lines of Article 260 TFEU
- e. Creative reading of Article 51 of the Charter of Fundamental Rights of the Union (CFR)
- f. Extending the pre-accession monitoring practice to cover the Member States

Importantly, all these options allow for inter-penetration, thus largely increasing the potential of their combined application.²⁴ It goes without saying that any mechanism deployed should bear in mind the eventual limitation imposed by Article 4(2).

Before introducing them one-by-one their interrelation with Article 7 TEU has to be clarified, however: does the mere presence of Article 7 TEU, as a special procedure to deal with the infringements of Article 2 TEU in the Treaties pre-empt the utilisation of other Treaty instruments to guarantee Member States' compliance with Article 2 TEU? Should this question be answered in the affirmative, this would imply that no effective remedy against the Member States undermining the Rule of Law is available in the system – this is taking into account all what is said *supra* about the serious drawbacks of Article 7 TEU as a possible tool to bring about compliance. An overwhelming consensus has emerged in Florence that Article 7 TEU does *not* pre-empt other ways of values' enforcement. Indeed, Article 7 TEU does not prevent the adoption of another mechanism enforcing Article 2 TEU: this would seriously undermine the possibilities of reading other provisions in the Treaties in the light of Article 2 TEU, thus effectively diminishing the reach of EU values. As a consequence, in one example, Article 258 TFEU and Article 7 TEU are not incompatible. The Commission should definitely be able to use Article 258 TFEU if the Member States refuse to activate Article 7 TEU. By extension, the same applies to Article 260 TFEU.

a. Articles 2 TEU and 4(2), 3(1) and 13(1) TEU read together

The article dealing with the values in the Treaties is well known. The general agreement in the literature as well as the reading given to this provision by the Commission tended to assume that the strictly legal effects of this article are limited due to its over-encompassing nature and perceived vagueness of the values and principles it deals with. Yet, in order to build a sound alternative to Article 7 TEU and achieve a high level of compliance with the values among the Member States, some measure of direct effect for Article 2 TEU is indispensable. This is the case since if we believe that Article 2 TEU does not impose an obligation on Member States, its deployment as a legal measure *sensu stricto* becomes overwhelmingly difficult. This implies that a Treaty change is still required to make this possible.

However, when considered in a systemic fashion in the context of the requirements laid down in other provisions of the Treaty, a radically different reading of Article 2 TEU can be proposed. As stressed by Christophe Hillion, Articles 3(1) and 13(1) TEU are of particular importance in this regard. Both provisions oblige the EU and its Institutions (respectively) to 'promote' its values, which may

²⁴ For a number of options discussed see *Verfassungsblog Hungary: Taking Action, supra*.

provide for a sufficiently solid legal-constitutional basis for EU action in relation to Article 2 TEU depending on how the term ‘promote’ is interpreted. It is apparent that when Article 2 TEU is read in the context of other Treaty provisions – rather than alone – strong arguments can be made for reconsidering our general view of this provision as a mere declaration. Moreover, taking also Article 7 TEU into account in this regard provides an additional argument for Treating Article 2 TEU in all seriousness. Indeed, Article 7 TEU may be read in a way that indicates that Article 2 TEU imposes an *obligation* on the Member States. Indeed, a different reading seems to be impossible if the Treaty attaches a sanction to the observance of what Article 2 TEU requires. As with the sanction itself, however, to speak of an ‘obligation’ in the context of 2 TEU there has to be a very serious systemic infringement of the values and minor infringements would fall outside the scope of EU law.

Add to this the duty of loyalty as outlined in Article 4(3) TEU and the reality of a reinforced perception of Article 2 TEU is complete. The duty of loyalty, which ‘prohibits sins of commission and omission’²⁵ would clearly demand the Member States and the EU alike to Treat the systemic reading of Article 2 TEU seriously. In other words, any claim either by a Member State or by the Union itself, that Article 2 TEU is of somehow diminished legal value, would most likely be unsound in such context.

In other words, the most popular limited reading notwithstanding, Article 2 TEU, when read together with Articles 3(1), 4(3) and 13(1) TEU appears to produce an obligation on the Member States which can objectively be seen as sufficiently strong to justify forcible EU measures to adhere to the values protected by Article 2 TEU. The very existence of Article 7 TEU supports this argument. The fact that the legal effects which Article 2 TEU can produced are not confined to a mere declaration open up the door to a whole array of options concerning this article’s enforcement.

b. Articles 2 TEU and 19 TEU read together

One of such options, which the Commission actually considered deploying against Hungary to which the reasoned Opinion it brought in *Commission v. Hungary*²⁶ seems to testify is the combined reading of Articles 2 and 19 TEU.²⁷ Article 19 TEU provides that the courts of the Member States have an active role in ensuring the effective application of EU law. It directly follows from this provision that undermining the role of the national courts could be construed as an infringement of the Treaty. The Commission did not follow this course of action in the end, which could be connected to an argument that many outright undesirable changes to national judicial systems do not bar national courts from effectively applying EU law. However thin is the line between the application of national and the application of EU law, pursuing the enforcement of values in courts through the combined reading of Articles 2 and 19 TEU could thus be problematic.

c. Articles 2 TEU and 258 TEU deployed together

A potentially more viable way to endow Article 2 TEU with come teeth relates to connecting it directly with the standard enforcement procedure of Article 258 TFEU. This connection, which is not pre-empted by the existence of Article 7 TEU as we have seen above, rests on the premise that Article 2 TEU is not a mere declaration. The main difficulty which necessarily arises from bringing Article 258 TFEU into the picture relates to the (over-)general nature of the functioning of Article 2 TEU combined with the premise that the infringements to fall under Article 258 TFEU should be concrete and clearly demonstrable. Kim Lane Scheppele proposed the key way of dealing with it. She advocates the reorientation of the combination of the two provisions in question to produce a

²⁵ P.J.G. Kapteyn and P. VerLoren van Themaat (Laurence Gormley (ed.)), *Introduction to the Law of the European Communities*, 3rd ed., The Hague: Kluwer Law International, 1998, 148.

²⁶ Case C-286/12 *Commission v. Hungary* [2012] ECR I-0000.

²⁷ Kim Lane Scheppele, ‘How to Evade the Constitution’, *supra*.

‘systemic infringement action’²⁸ which would allow bundling together numerous examples that Article 2 TEU is being seriously violated in a Member State and then proceed by way of Article 258 TFEU, submitting the whole bundle of evidence to the ECJ. As a result, the ECJ would have a very concrete ground akin to a conventional infringement action brought by the Commission under Article 258 TFEU. By grouping together related complaints thematically under Articles 2 or 4(3) TEU, however, the Commission would add the argument that the whole is more than the sum of the parts and that the set of alleged infringements rises to the level of a systemic breach of basic values. This proposal is of fundamental importance both in terms of giving Article 2 TEU a renewed importance and in terms of drawing on the consistent ECJ practice of bundling infringements in other fields of law.²⁹

d. Adding Article 260 TFEU

Systemic infringement actions acquire additional importance in terms of enforcing the values of the Union in the Member States also due to the route towards the deployment of Article 260 TFEU, which a statement of breach by the ECJ in the context of an Article 258 TFEU procedure offers. Indeed, should the ECJ find a Member State in violation, it would be possible for the Commission to bring another action before the Court, this time on the basis of Article 260 TFEU in order to ask the Court to order levying a fine or a lump-sum from the Member State in question. Financial sanctions are then regarded as an additional incentive to make the Member State in breach of Article 2 TEU to change its practices.

What if the Member State does not pay? A logical continuation of imposing a fine or a lump sum would be to withhold the amount due directly from the moneys assigned to the Member State in question from the EU budget as has been proposed in a recent letter from the Foreign Ministers of Germany, the Netherlands, Finland and Denmark to the Commission³⁰ in which they suggested that the suspension of EU funding should be possible as a last-resort measure. Some of the Member States with Rule of Law problems rely quite heavily on EU funds, as the Hungarian example demonstrates, which theoretically makes it quite probable that the Member State will choose a way of compliance, once EU money has been cut. Better still, releasing the funds after the Member State complied provides an additionally incentivising ‘friendly’ option.

The suggestion to invoke Article 260 TFEU after Article 258 TFEU is not without its drawbacks, however. Most importantly, the power of the EU to adopt financial sanctions is limited and requires a specific legal basis. Consequently, it is not entirely clear whether, in particular, withholding funds is an option: changes in the legal framework serving Article 260 TFEU might be necessary. Moreover, sanctions research in law and political science demonstrates quite clearly that sanctions are almost never an effective way to bring about compliance in the situations when compliance would potentially go to the core of the regime in question. The practice of application of the very Article 260 TFEU shows that the least cooperative Member States – and the ones breaching Article 2 TEU values will

²⁸ Her proposal has been analyzed in the *Verfassungsblog* in great detail. For the details of the proposal, see, Scheppele, Kim Lane, ‘What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions’ (2013), available at http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; for the proposal in brief, see, Kim Lane Scheppele, ‘EU Commission v. Hungary: The Case for the “Systemic Infringement Action”’, *Verfassungsblog*, 22 November 2013, available online at <http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uw4mfPuzm5J>. For the discussion, see, *Verfassungsblog*, ‘Hungary – Taking Action, Episode 2: The Systemic Infringement Action’, available online at <http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J>.

²⁹ E.g. Case C-494/01 *Commission v. Ireland (Irish Waste)* [2005] ECR I-3331.

³⁰ See ‘The Letter from Germany, Finland, Denmark and the Netherlands Request a New Mechanism to Safeguard the Fundamental Values of the EU’ addressed by the four respective Foreign Ministers to President Barroso. Available online at <http://www.rtt.ro/en/scrisoarea-prin-care-germania-finlanda-danemarca-si-olanda-solicita/>.

most likely belong precisely to this category – prefer to *pay* rather than *comply*.³¹ Thus even if we answer the question whether the adoption of sanctions relating to Rule of Law or democracy violations is necessary in the affirmative, there are very strong reasons to doubt whether such sanctions will bring about the desired effects in terms of living up to what Article 2 TEU requires.

e. Creative reading of Article 51 CFR

Moving beyond the Treaties *sensu stricto* but nevertheless remaining within the realm of primary law of the Union allows considering the Charter of Fundamental Rights of the Union as a possible source of inspiration with regard to Article 2 TEU enforcement. Circumventing the current reading of Article 51 CFR which has been rather restrictive so far³² would make it possible to render judicially enforceable the values on which the EU has been founded. This approach is based on the premise that fundamental rights can be interpreted in a way which takes systemic violations into account.

Catching Article 2 TEU with the Charter would seemingly require that the Charter apply outside of the scope of EU law. The legal viability of such a reading could be justified via the notion of EU citizenship, potentially implying that EU law (through the Charter) must ensure the last guarantee of fundamental rights for cases of systemic failure in a Member State.³³ If interpreted even more widely, however, Union citizenship does not only entail a guarantee for the total failure of national mechanisms, but it also ensures the general applicability of the Charter in all domestic cases. András Jakab argues that the last option would provide for a ‘fully-fledged value community’. To claim belonging to such community no systemic failure on behalf of the local human rights protection regime in the Member State concerned is required.

In support of this wide interpretation of the scope of the Charter, it can be argued that notions such as ‘the scope of EU law’ or ‘implementing EU law’ are not fixed and subject to flexible interpretation and further development. However, there are overwhelming reasons to be sceptical about stretching Article 51 CFR to the extent implied in the proposal, and the ECJ may well be acting *ultra vires*, should it ever decide to do so. It seems legitimate to assume that avoiding such *ultra vires* action should be the key approach when considering the options offered by the Charter. In other words, to make this approach work, most likely, a Charter change (read: Treaty change) is most probably required, making its deployment difficult.

Moreover, crucially, it should not be forgotten that the drawback of any approach based on the Charter of Fundamental Rights, consists in the very starting assumption behind looking in the direction of the Charter in the first place, namely that the values of Article 2 TEU are about – or can always be approached through – human rights or fundamental freedoms. That this is *not* the case can be illustrated by the situation in the non-complying countries themselves. A strong agreement emerged in Florence that fundamental rights are only part of the problem and the focus should be on the wider Rule of Law and democracy concerns. Both on substance and also institutionally – *i.e.* through the Fundamental Rights Agency of the European Union – there are limits to what can be achieved by only focusing on fundamental rights.

³¹ Brian Jack, ‘Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?’ 19 *European Law Journal*, 2013, 420.

³² The Charter applies when EU law is applicable: C-617/10, *Åkerberg Fransson* [2013] ECR I-0000.

³³ Armin von Bogdandy et al, ‘Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States’, 49 *CMLRev* (2012) 489. As to why the approach is of little use see *e.g.*: Dmitry Kochenov, ‘Von Bogdandy’s “Reverse *Solange*”: Some Criticism of an Important Proposal’, 2013, *Verfassungsblog* contribution available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034444.

f. Application of the pre-accession oversight templates

An additional, albeit somewhat ambiguous way to approach the legal basis for intervention in the cases of Article 2 TEU violations as proposed in Florence, consists in the utilisation of the templates that the Commission employs to scrutinise the candidate countries desiring to accede to the Union in the course of the pre-accession process, including the Copenhagen criteria³⁴ and their progeny. Since the Member States approved of such templates – or so the argument goes – they can now be used to operationalise Article 2 TFEU. Numerous problems arise both with the presumption of effectiveness of this method – indeed, those countries scrutinized in the course of the pre-accession exercise leading to their joining the Union are now in breach of the values of Article 2 TEU – and also in terms of the actual legal basis used. When Hungary joined, the vague legal basis for values-scrutiny was the reference from Article 49 TFEU to the values of Article 2 TEU. In practice, however, the pre-accession context endowed the Commission with a *carte blanche* to guarantee that the candidate countries are ‘good enough’.³⁵ The internal context is quite different. While all the pre-accession templates dealing with values are based on Article 2 TEU – and its predecessors – which was made possible by the reference to this provision in the clear *procedure* regulating EU enlargements, once the procedure is removed from the picture – the countries we have in mind are already ‘in’ – pretending that this does not detract from the nature of Article 2 TEU as a legal basis when approached through the pre-accession lens is not convincing at all. The effectiveness of the Copenhagen criteria seems more a myth than reality.³⁶

To sum up, a number of instruments in the current version of the Treaties is capable of being deployed in order to guarantee that the values on which the Union is based are observed. Notwithstanding the fact that some of the readings of the instruments in question as proposed above might strike some as innovative, sound interpretation of the law is unquestionably on the side of those who see clear potential in Article 2 TEU in combination with other provisions. An overwhelming consensus on this issue emerged at the Florence meeting.

Question 3. What kind of procedure could be designed to meet the need of such oversight?

As has been demonstrated above, there are convincing reasons to mandate EU’s intervention in the area of values’ and, in particular, of Rule of Law protection. This is not to dismiss caution, as reasons to the contrary are equally clear, as outlined in Part II. Whichever position one adopts on the scale and necessity of intervention, the Treaties unquestionably contain an ample variety of instruments already, which can be deployed to bring about the enforcement of the basic Rule of Law and other values’ standards in the Member States. The question that arises is which procedure to use, building on all these possibilities. This section introduces a brief classification of the key procedures arising from the Florence discussion and also covers the sanctions and penalties, to bring about enforcement.

3.1. Key components and classifications of procedures

Several proposals outlined different kinds of procedures. The previous section has briefly touched upon some aspects of these proposals– some will necessarily be covered in greater detail in the section that follows, focusing on the actors responsible for bringing about compliance with the EU’s values.

³⁴ For a meticulous analysis, see Christophe Hillion, ‘The Copenhagen Criteria and Their Progeny’, in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 2004, 1.

³⁵ Dimitry Kochenov, ‘The ENP Conditionality: Pre-Accession Mistakes Repeated’, in Laure Delcour and Elsa Tulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Baden-Baden: Nomos, 2008.

³⁶ For a meticulous analysis, see, Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague: Kluwer Law International, 2008.

Ideally, a comprehensive procedure should outline three key issues with clarity: the legal basis, the object on which oversight is exercised; the stages in the procedure, and the institutions or organs involved in their implementation. Within the procedure, the different phases (initiative, trigger instrument, assessment, implementation and follow-up action) should also be clearly identified. Instead of going into very specific details, to keep this paper focused, this section offers a general glimpse of the key procedures outlined in the course of the EUI meeting.

a. Brand-new procedures vs (updated) existing ones

Some of the proposals discussed in Florence involve brand-new procedures, albeit based on the pre-existing legal bases (like Kim Scheppele's systemic infringement procedure for instance), others are entirely new for the context of the Treaties, as illustrated, *inter alia*, by Jan-Werner Müller's suggestion to endow the day-to-day management of the enforcement of values to a new EU institution – the Copenhagen Commission.³⁷ Besides the procedures managing compliance, special emphasis is put on the possible ways to enforce the findings of the monitoring organs, institutions and/or relevant court decisions. Here too, the same distinction is observed between the new (like amending the Treaties to make exclusion of the Member States from the EU possible, voiced by Carlos Closa) and well-known procedures used to the full or slightly reinterpreted (like giving a boost to Article 260 TFEU in the context of the systemic infringement procedure).

Drawing on the existing procedures has two advantages. Firstly, it is easier to deploy such procedures since no new methodology needs to be developed and no Treaty amendment is necessary. The second advantage – which is probably more important than the first – is that the use of the pre-existing procedures avoids the appearance of a power grab. This may be why the Commission has played an active role in relation to Hungary: the Commission works in a political environment which favours using existing *acquis*. The same applies to other actors and institutions. Established procedures thus have an air of reliability and, at the same time, institutional modesty to them, making their deployment easier, which is a particular asset in such sensitive political contexts as Article 2 TEU compliance.

b. Judicial vs political procedures

In essence, all the procedures outlined split into two key categories: judicial and political procedures. While the first rely on the perception of the values of Article 2 TEU as binding law, drawing on the court systems at all the available levels to enforce compliance, the latter make a particular emphasis on the continuous monitoring of compliance by a wide variety of means. Here a huge array of options is available, as besides the existing EU institutions, like the Fundamental Rights Agency (FRA), for instance, also new ones can be created (*e.g.* the Copenhagen Commission). Besides, the outsourcing of monitoring to the existing institutions outside of the EU's legal framework also remains an open possibility. In this regard, both the Council of Europe bodies (such as the Venice Commission³⁸) and, theoretically, *ad hoc* bodies, could be engaged.

Proponents of the judicial procedures favour, in particular, the involvement of the courts in the oversight mechanisms. Proponents of the political procedures, on the other hand, aim at allowing the Member States and individual non-adjudicatory institutions to play a crucial role. Arguments for the latter directly relate to trying not to alienate the non-compliant Member States completely and emphasising the openness to dialogue. Arguments for the former split into two depending on which

³⁷ Jan-Werner Müller, *Safeguarding Democracy inside the EU. Brussels and the Future of the Liberal Order*, Washington DC: Transatlantic Academy Paper Series, 2013.

³⁸ Venice Commission has been active in trying to solve the Hungarian Rule of Law crisis: European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary' (17 June 2013) Opinion 720/2013, CDL-AD(2013)012.

level of the judiciary – national or European – is to be endowed with enforcing the values of Article 2 TEU. Those relying on the national courts are, expectedly, less convincing.³⁹ This is primarily because national-level judiciaries in the jurisdictions facing severe problems with the Rule of Law are not necessarily independent and should not necessarily be trusted.

c. Ex-ante vs ex-post procedures

The majority of the procedures discussed at the seminar concerned *ex-post* involvement, which is fully justified in the context where the violations are already *on-going* in some Member States. This leaning towards dealing with the existing problems is due solely to the urgency of the matter, however, and should not be read as a sign that *ex-ante* procedures are of lesser importance. Quite on the contrary: in the medium- to long-term future, the Union's success as a community of values will most likely depend on its ability to create and effectively implement a reliable way to deal *ex-ante* with potential breaches of Article 2 TEU. For this a Treaty change will presumably be required. This will not only contribute to the stability of the Union's and the Member States' adherence to the values set out in that provision, but will also ensure *full Member State equality* – in the context of continuous monitoring no arguments will be possible that some Member State is somehow single out among the rest. Thus various participants have noted the importance of establishing an early warning mechanism, calls for which have been made for a long time by both the Commission and scholars.

d. Avoiding fake semblance of change

Last but not least, to be successful, any new EU mechanism that seeks to promote the quality of democracy and the Rule of Law must not just pressure governments of the Member States where Article 2 TEU is not observed. It must go further than that, presumably attempting to influence the tenor of domestic political competition, thus having profound effects on the day-to-day functioning of politics in those Member States. Although this might seem self-evident, the EU's pre-accession engagement with the candidate countries did not take this simple truth sufficiently into account, which could be regarded as one of the reasons behind the Rule of Law problems experienced by some Member States.

This section will first look at the legal procedures, then at the political ones and, finally, assess the main proposals related to sanctions and fines.

3.2. Legal procedures

The legal procedures discussed include:

- a. Systemic infringement procedure
- b. ECJ involvement via the Charter of Fundamental Rights
- c. ECJ involvement via EU citizenship rights

a. Systemic infringement procedure

The essence of this proposal, briefly touched upon above is in enhancing the role of the ECJ to ensure that it could be a part of a tri-institutional arrangement for determining and reviewing systemic infringement, and extend its scope to country-specific review in addition to issue-based review, given it now has the resources. The Commission would bundle a group of individual infringement actions against a Member State found to be in violation of Articles 2 in combination with Article 4(3) TEU. In

³⁹ See, e.g., the Verfassungsblog debate for the criticism of von Bogdandy's proposal: Verfassungsblog, 'Recue Package for Fundamental Rights', available online at <http://www.verfassungsblog.de/rettungsschirm-fr-grundrechte-ein-onlinesymposium-auf-dem-verfassungsblog-2/#.Uw4rVPuzm5I>.

this way, it groups conventional individual infringement actions that it has the power to bring under Article 258 TFEU anyway. If the ECJ confirms the existence of such ‘systemic infringements’, Member States responsible for the systemic breach would be required to ensure systemic compliance, going beyond ‘superficial patches’. Secondary legislation may be required to provide the Commission effective sanctioning powers to withhold funds by keeping them in escrow (while the power to fine is found in Article 260 TFEU) until the implicated Member State complies. The attractiveness of Kim Scheppele’s proposal is both its reliance on the existing legal basis *and* making the procedure independent of the court system of the Member State suspected of infringing Article 2 TEU, thus guaranteeing legal effectiveness and political acceptability.⁴⁰

At the same time, it has to be said that besides the preoccupations which some scholars have with the reinterpretation of Article 258 TFEU in order to turn this provision into a vehicle of systemic infringement, infringement proceedings that have been used so far, have only had a very limited effect – just as the sanctioning of the chronically non-compliant states in general, as discussed above in the section pertaining to the analysis of the second question. There was a sense in Florence that the infringement mechanism could make sense if used *in combination with other mechanisms* in order to tackle the most severe cases. Also the substantively different nature of ‘democracy’ and ‘rule of law’ compared with ‘normal’ *acquis*-enforcement usually dealt with this the help of Article 258 TFEU could call for a different procedure with a different blend of institutional involvement and differentiated effects. Naturally, some insight can be drawn from existing infringement as well as from the Excessive Deficit Procedure (EDP) and the Excessive Imbalance Procedure (EIP).

b. ECJ involvement via the Charter of Fundamental Rights

Drawing on the Reverse *Solange* article by von Bogdandy et al.,⁴¹ András Jakab suggested that the reach of the scope of the Charter of Fundamental Rights be rethought, moving in the direction of a general human rights jurisdiction for the ECJ, to be activated through the preliminary ruling procedure. The key difference with what von Bogdandy proposed in his work concerns the exceptionality of the ECJ’s involvement. The result of Jakab’s take on the limits of the CFR would be a re-invention of Article 51 CFR to enable the ECJ to monitor Member State compliance with EU values and fundamental rights in day-to-day matters; as opposed to highly exceptional cases. The Charter would then obtain general applicability in all domestic cases in the Member States. This approach entails an interpretation of Article 2 TEU which presumes that Member States have to comply with their fundamental rights obligations and Union citizens can rely on Part II TFEU to seek redress before their national courts and, eventually, the ECJ.

As part of this procedure, domestic judges in Member States will be able to make use of the preliminary reference procedure to bring question before the ECJ under Article 267 TFEU. When faced with a case like this, the ECJ would need ‘to have the courage’ to apply the Charter directly,⁴² and potentially in a way which may contradict a national higher or constitutional court as well as its own jurisprudence. The ECJ would then be able to rely on the moral authority of the European Court of Human Rights by referring to its case-law as well.

Advocates of this procedure argue that through such judicial reinterpretation, and without any need for a Treaty change the ECJ can assume a larger role even without political support. However, even if this is possible, this course of action may not be very wise. A majority of the participants of the seminar agreed that a proposal like this is not only unrealistic to be workable in the current circumstances, but would also be unwise to follow. If the ECJ assumes roles which seriously reinforce

⁴⁰ Scheppele, ‘EU Commission v. Hungary: The Case for the “Systemic Infringement Action”’, *supra*.

⁴¹ von Bogdandy et al. ‘Reverse *Solange*’, *supra*.

⁴² For an earlier argument to this end see, *inter alia*, Allard Knook, ‘The Court, the Charter, and the Vertical Division of Powers in the European Union’, 42 *Common Market Law Review*, 2005, 367.

its role as a *quasi* Constitutional court, a specific political decision seems indispensable; it cannot be the by-product of reinforcement of mechanisms to monitor Member State compliance with the rule of law. Moreover, since the procedure is entirely dependent of the will of the national courts to activate Article 267 TFEU procedure, its feasibility is further undermined.

c. ECJ involvement via EU citizenship rights

When discussing the drawbacks of the above procedure it has been noted in Florence that, theoretically, the Charter is not even necessary to try to ensure that the ECJ gains an increased participation, should EU citizenship be taken into account seriously. This is due to the fact that EU law can, albeit in exceptional cases, be activated via the logic of unwritten citizenship rights, as the ECJ has done, for instance in *Ruiz Zambrano* and later case-law.⁴³ This clearly demonstrated that while the ECJ is ready to adopt a hands-on approach to protect EU citizenship rights, it was not ready at all to play with the scope of Article 51 CFR.⁴⁴ While the problem of *contra legem* interpretation of the Charter is probably solved in the context of taking EU citizenship rights directly – rather than EU citizenship rights via the Charter – as a starting point of defending EU values, the procedure suffers from the same severe drawbacks as the one described above. It is fully dependent on the good will of the national courts and implies a severe extension of the ECJ's jurisdiction without any necessary Treaty authorization.

3.3. Political procedures

All in all, given that scholars present in Florence agreed on the fact that dealing with rights violations *does not* necessarily resolve values problems under Article 2 TEU and can even be unrelated to the level of protection of the Rule of Law in the Member States, the effectiveness of the procedures based on the starting assumption that the Rule of Law can be tackled via tackling individual violations can be questioned even more seriously. Moreover, also historical evidence points against the effectiveness of checking individual violations. This inspires the need for improving monitoring and sanctioning mechanisms. Consequently, this is what the political procedures discussed in Florence mostly relate too: monitoring and oversight, including *ex post* and, potentially, *ex ante*. Based on the EUI discussions it is possible to outline five main political approaches discussed. These include:

- a. Learning from the Council of Europe
- b. Using existing EU bodies
- c. Creating a special EU institution: the Copenhagen Commission
- d. Peer-pressure among the Member States
- e. Horizontal *Solange*

a. Learning from the Council of Europe

Such a monitoring process could be based, for instance, on the commitments undertaken on accession. The EU would then need to establish a monitoring of commitments akin to the 'Monitoring Committee of the Parliamentary Assembly' of the Council of Europe, with the consultative role of the Venice Commission as a 'constitutional fire-brigade'. An attractive point of this approach is that there is no need for the formalisation of the democratic oversight by the Venice Commission, and it is

⁴³ Koen Lenaerts, "'Civis Europaeus Sum': From the Cross-Border Link to the Status of Citizen of the Union", 3 *Journal of Free Movement of Workers in the European Union*, 2011, 6; Dmitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', 37 *European Law Review*, 2012, 369.

⁴⁴ Martijn van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously', 39 *Legal Issues of Economic Integration*, 2012, 273.

possible to rely on the ‘institutional memory’ of the Venice Commission and the sanctioning power of the EU. Another positive feature is that should the Venice Commission be deployed, there would be no need to create new EU institutions, like the Copenhagen Commission for instance.

However, the procedures enabling the Council of Europe (including the ECtHR and the Venice Commission) to have a stronger role in the monitoring and enforcement of compliance with the values of Article 2 TEU can also be criticised on a number of important grounds. In Jan-Werner Müller’s outline, such ‘outsourcing’ would not be a good idea, as it will most likely be insufficient in dealing with specific highly technical areas of EU law such as data protection. Besides, Council of Europe institutions themselves could be criticised as incapable of meeting the basic standards of Article 2 TEU – a similar argument, but applied to the EU is in Part II *infra*. Moreover, although the Venice Commission seems to be immune from such criticism, other Council of Europe organs and the European Court of Human Rights (ECtHR) in particular deal precisely with the individual rights violations, which, as Florence participants agreed, are not necessarily a way to address Rule of Law drawbacks.

b. Using existing EU bodies

Thinking in the same vein, using the EU’s existing institutional resources would be the most desirable option. Yet, the participants of the EUI meeting largely dismissed the idea of building the monitoring of Article 2 compliance around the Commission or the FRA. This does not only have to do with the mandates of the two, but also with their prior performance. The fact of the matter is that FRA, although able to collect information, is lacking a bite – it is clearly not an enforcement agency. And the Commission’s credentials – legally and politically – can be viewed as potentially problematic in this context, given the problem of the perceived desirability of ‘power-grabs’, but also given the context of its pre-accession performance. All in all, proposals were made to *insulate* the monitoring procedure-to-be from the European Commission.

c. Creating a special new EU organ: the Copenhagen Commission

Suggested by Jan-Werner Müller, the Copenhagen Commission is proposed precisely to avoid the drawbacks of the procedures outlined above. Most importantly, when looking at different types of outsourcing of Article 2 TEU compliance, whatever body is used for the actual monitoring (FRA, the Venice Commission etc.), the actual *sanctioning* would still have to be done by the EU. Thus, the solution is to have a new EU organ, which will combine the monitoring and the sanctioning functions – the Copenhagen Commission. This proposal resonated amongst the participants. Milada Ana Vachudova argued that the new Article 2 TEU compliance procedure should have three characteristics: it should be insulated from the Member States that have a bad reputation in areas related to the quality of democracy and the fight against corruption; it should be part of the EU because there are no alternative, credible institutions; and it should have instruments not just be about monitoring, but also for imposing sanctions. In fact, several participants argued against ‘contracting out’ the powers of the EU to the Council of Europe. The solution is to enhance monitoring and sanctioning powers, primarily through a Cooperation and Verification Mechanism (CVM), which is coupled with sanctioning powers linked to EU funding.⁴⁵ Yet, idealising the CVM could be dangerous, knowing that the current problems the Union is facing are partly due to the Commission’s performance in the course of the pre-accession exercise, which led Hungary and Romania into the Union.

⁴⁵ For an analysis see, e.g., Milada Ana Vachudova and Aneta Spendzharova, ‘The EU’s Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession’, *SIEPS European Policy Analysis*, 2012, 1.

d. *Peer-pressure among the Member States*

Although one could safely assume that among the consequences of a finding (by the ECJ or a specially-designated responsible body) that a Member State is in breach of the values on which the Union is built may already result in some peer pressure from the part of other Union members to improve compliance, the participants of the Florence roundtable agreed that such pressure will most likely be limited. This is the reason why some form of formal sanctions to instil compliance is most desirable.

e. *“Horizontal” Solange*

Mentioned once and unanimously dismissed, this procedure presupposes allowing the Member States themselves to sanction their peers who are not in compliance with the values by not honouring EU law obligations *vis-à-vis* such states as long as they fail to comply.⁴⁶ Since walking down this line will put the functioning of the internal market⁴⁷ – if not the very existence of the Union in jeopardy, this is not the way to be taken. Sanctions and penalties, if (and when) applied, should be centralized, rather than left to the whim of the individual Member States.

3.4. *Penalties and sanctions*

A clear distinction between financial and non-financial pressure and sanctions should be outlined at the outset. Peer-pressure and reverse *Solange* approaches would pertain to the realm of the non-financial sanctions, but there even more far-reaching proposals were put on the table in Florence. The main non-financial option to be discussed beyond what has been covered *supra* is a potential possibility to *eject* a Member State, advanced by Carlos Closa.

a. *Financial sanctions*

Besides the discussion of the legal possibilities of attaching Article 260 TFEU to the systemic infringement procedure under Question 2 above, several observations on the nature and possible usefulness of the financial sanctions are in order.

It has been claimed that the EU funds are often crucial to Member States. In cases where the state plays an important role in distribution of resources, cutting funds will mostly affect the right people.

A majority of the participants to the workshop did not share this analysis, however. This is for a number of reasons. Indeed, it could be normatively problematic to take away the money from a state in dire need of it. It goes without saying that innocent people may be affected. Another problematic feature, in his opinion, is the idea of taking away funds for political reasons. Moreover, as has been also mentioned above, the practice of application of financial penalties suggests that fines may not have much effect, as is illustrated by the case of Greece: a regular extraordinary contributor to the EU budget. In addition, if a sanction is imposed by the ECJ, the ability of a Member State to pay is taken into account in the decision as to the amount to be lived.⁴⁸

A possible counter-argument could run along the line that, funds can be used both as a carrot and as a stick. Withholding funds could be used as a temporary measure until a Member State changes its policies, rather than cutting them forever. Yet, Article 260 TFEU – at least as it currently stands – does

⁴⁶ Iris Canor, ‘My Brother’s Keeper? Horizontal *Solange*: “An Ever Closer *Distrust* among the Peoples of Europe”’, 50 *Common Market Law Review*, 2013, 383.

⁴⁷ On inadmissibility of ‘self-help’ in the context of EU law, see, Joined cases 90 and 91/63 *Commission v. Belgium and Luxembourg* [1964] ECR 626.

⁴⁸ Jack, ‘Article 260’, *op cit.*, providing a great analysis of the relevant case-law and Commission’s practice.

not allow for paying the fines collected by the EU back to the Member States. To employ the fining schemes in a positive way, thus, it will be indispensable to change the law on financial sanctions.

b. Ejecting a non-compliant Member State from the Union

A normative argument in favour of the introduction of an ejection procedure remains that non-compliance by a Member State with the same conditions which need to be met when it accedes to the EU can logically become a reason to eject such a Member State from the EU. While it would be premature to advocate acting, immediately, on this threat, a provision introducing it should have a kind of ‘deterrence effect’. In fact, the Council of Europe system knows precisely such a procedure.⁴⁹ The huge effects of such a procedure’s eventual deployment probably make the threat itself unusable, while making less harmful penalties more credible at the same time. The ejection procedure could thus potentially reinforce the effectiveness of other sanctions.

The main argument against ejecting Member States does not pertain to the gravity of the general threat, however. Rather, it is related to the potential threat to Article 2 TEU which such procedure itself brings about. In fact, admitting a possibility that a Member State can be ejected implies that the EU does *not* enjoy a direct bond of responsibility connecting it to the citizens of the Member State concerned in their capacity of EU citizens, as reflected under Article 9 TEU. To introduce such a procedure thus would potentially mean to imply that the EU, rather than defending its citizens in trouble, will spit them out together with the dysfunctional Member State. The ethical problems with this approach are thus far reaching – just as the legal ones. Besides, it is also unlikely that Member States would actually ever come to an agreement on ejecting a state out of the EU.

Question 4. Which body should be entrusted with the oversight function?

At the Florence meeting, suggestions were made for role for existing EU bodies as well as to establish new institutions. A preliminary issue is that of the legal basis for entrusting bodies with functions. This requires a clear distinction between bodies with a *monitoring role* and bodies with *decision-making capability*. It is easier to establish the former: monitoring bodies have been established in the past without a formal legal basis, such as the network of experts on fundamental rights.⁵⁰ Then there are more permanent and independent monitoring bodies, such as the Fundamental Rights Agency. For those bodies, the proper legal basis is found in Article 352 TFEU.⁵¹ The proposed ‘Copenhagen Commission’ could, similarly to the Fundamental Rights Agency, be established based on the basis of the same provision. Unfortunately, however, the requirement of unanimity makes this unlikely to happen in the current political climate. An alternative legal basis can be provided by linking this mechanism to the Commission. Besides poses additional risks to the mechanism’s legitimacy, this will also most likely undermine the added value of having the new institution in place, as discussed above. It is abundantly clear that for all decision-making bodies – particularly when their powers include eventual sanctioning of the non-compliant Member States – an explicit legal basis is indispensable, unless the primary law of the Union is changed. For the latter to happen, however, the agreement of all the Member States is equally required.

⁴⁹ Article 8 of the Statute of the Council of Europe (1949, ETS 001) reads as follows:

‘Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine’.

⁵⁰ EU Network of Independent Experts on Fundamental Rights: http://ec.europa.eu/justice/fundamental-rights/document/index_en.htm.

⁵¹ FRA Regulation (No. 168/2007, OJ L53/1, 2007).

The key bodies to be entrusted with sorting out the Member State-level problems related to the Rule of Law and other values established by Article 2 TEU, as discussed in Florence, include the following ones:

- a. The Courts
- b. The European Commission
- c. The European Parliament
- d. Introduction of new EU bodies
- e. Outsourcing the task to non-EU bodies

Some comments regarding the involvement of each of the bodies in achieving Member States compliance with Article 2 TEU are presented below. These are additional to other considerations presented in the sections dedicated to Questions three and four.

a. The Courts

It has been argued that the key role in performing the oversight function should be played by the European Court of Justice. In combination with national courts, the ECJ can provide for a solution to existing problems, although it is not in a position to solve them entirely. Most importantly, should the national courts be unable to use the Article 267 TFEU procedure for any reason whatsoever – from imperfections of training to outright corruption, such a system is *de facto* unusable. The ECJ should, in the proposal to extend the scope of application of the Charter of Fundamental Rights, not be afraid of national Constitutional courts and also should not expect competition from the ECtHR. In the proposal for a systemic infringement procedure, the role of the ECJ is crucial, but secondary to that of the Commission, which would be taking the initiative to the infringement action. It is clear, however, that using the Commission as a proxy to reach the ECJ would be preferable, compared with the national courts of the very states, which suffer from Article 2 TEU violations.

The main reason to be sceptical about a prominent role for the ECJ (or the national courts for that matter) is that the problematic situations under discussion actually go beyond fundamental rights violations. It seems that the courts are not equipped to deal with these kinds of more holistic challenges. In addition, assigning a constitutional role to the ECJ should not be done without political support. Acting outright *contra legem* (bearing the validity of the limitations on the Charter's scope contained in Article 51 CFR) can threaten its legitimacy. It is thus most likely that the judges in the ECJ would take unilateral decisions stretching existing provisions as much as in the proposals. All in all, however, courts involvement in stating the breaches of Article 2 TEU should not be frowned upon: as long as it happens in the context of strict compliance with the primary law of the Union, it is likely to take centre stage in any legal procedure.

b. The European Commission

Opinions were equally divided on a more prominent role for the Commission. Some believe this is necessary, like for example in the systemic infringement action proposal. The Commission already enjoys a lot of legitimacy in other fields and may enjoy this in rule of law and democracy assessments as well. Even if the Commission has not always acted in a very inspired way, it has been fairly apolitical and received some leeway from Member States. Giving this task to the Commission would thus also keep EU's own values enforcement within the EU rather than 'outsourcing' it. This is perceived as a good thing.

At the same time, however, given that the Commission seems to have failed in the pre-accession process in light of the problems which have arisen in some states after they joined the EU, it may not be the right actor to entrust with the internal monitoring of Member States. In addition, the Commission has a tendency to view every problem as a fundamental rights problem. Even though it is not supposed to be political, it has not always been non-partisan or apolitical. The Commission also

faces political constraints which may prevent it from acting boldly when necessary. Also the problems related to the eventual perceived ‘power-grabs’ by the Commission are to be kept in mind when deciding who will do the values’-enforcement job. Should we consider the eventual planned politicisation of the Commission, which is likely at least in the mid-term future – and it becomes even less suitable an actor to entrust values’-enforcement to: a more partisan actor rather than not.

c. The European Parliament

The European Parliament has been surprisingly active regarding the situation in Hungary,⁵² which suggests that it might be able to take on a more prominent role also in the future. However, the Parliament may be suffering from partisanship or the perception of partisanship, making it an outright-biased actor. Besides, enforcement powers of the Parliament are none: its reports and resolutions come and go, while the problems at times stay for decades.

d. Introducing new EU bodies

In the atmosphere where the ECJ, the Commission or the European Parliament, should they be asked to do so, would face serious challenges preventing them from becoming truly effective enforcers of EU values, creating new institutions potentially becomes a clear option. The most popular among such institutions has been proposed under the name of the ‘Copenhagen Commission’. This would be an independent institution, non-partisan, and designed to be involved in ‘democracy protection’, thus going *beyond* simple monitoring. It should consist of a body of lawyers and/or elder statesmen/stateswomen with a proven track-record of outstanding political judgment, aided by experts and institutions such as the Fundamental Rights Agency (FRA). The Commission could serve as an early warning mechanism.

Some support has in fact been building for a new ‘mechanism’ that would send an early warning signal, including the Tavares report by the European Parliament Committee on Civil Liberties, Justice and Home Affairs,⁵³ as well as a letter to President Barroso signed by four EU foreign ministers⁵⁴ which stressed the need for mechanisms short of Article 7 TEU. Neither the invocation of Article 7 nor the FRA is particularly good for, so to speak, giving an early warning signal. Building support for Article 7 is likely to take too long, and the FRA, at this point, simply does not have the appropriate mandate. A properly designed Copenhagen Commission would have the right mandate and, above all, it would concentrate minds in a highly fragmented political space and in a weak, public sphere.

The Copenhagen Commission could also be more specific than any other institutional options currently on the table and go deeper in areas where EU law is more developed than the standards of the Council of Europe. Unlike the Venice Commission, it could be proactive and unlike the ECtHR, it could take a more holistic view than that provided by individual rights violations. Despite the support which the idea received in Florence, the Copenhagen Commission as described by Jan-Werner Müller may currently be difficult to introduce – which has to do with the above-mentioned problems with the legal basis, required unanimity of the Member States and other issues discussed above. All in all, doubt has been expressed about the feasibility of bringing about yet another EU body. Indeed, the creation of such an organ could threaten to undermine EU values, rather than reinforce it, should the critical considerations expressed in Part 2 of this paper be fully taken into account.

⁵² European Parliament Committee on Civil Liberties, Justice and Home Affairs, ‘Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)’ A7-0229/2013. See also Kim Lane Scheppele, ‘In Praise of the Tavares Report’, *Hungarian Spectrum*, 3 July 2013, available online at <http://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report/>.

⁵³ Tavares Report, *supra*.

⁵⁴ Letter of the Four Foreign Ministers, *supra*.

e. Outsourcing the task to non-EU bodies

Rather than acting itself – either via the existing, or via newly-created institutions – the EU could also ‘outsource’ the oversight over rule of law and democracy to other institutions, as discussed above. The most obvious candidates for such outsourcing would be the bodies of the Council of Europe. The main candidate is the Venice Commission (the European Commission for Democracy through Law). The Venice Commission is both independent and has a specific expertise in these matters. However, there are also drawbacks. The Venice Commission may be more valuable as a source of knowledge than as the source of action. It may also be insufficiently insulated from politics and diplomacy and some countries have learned ways to circumvent it, which is an eventual negative effect definitely to be taken into account.

In addition, outsourcing in itself has disadvantages: it would look strange for the EU to outsource its own key constitutional issues – is there any other mature legal system seriously doing this?. Outsourcing to the Council of Europe also has the disadvantage that EU democracy standards would be substituted (or double standards would be applied) with that of an institution which includes countries like Azerbaijan in its membership, as well as other states which do not meet the Copenhagen criteria. The Venice Commission and the ECtHR may not be equipped to deal with the depth and density of integration in the EU. Besides, both institutions are seemingly too focused on fundamental rights violations and less on democracy and the rule of law. The arguments against outsourcing are very strong, allowing the majority of scholars present at the round-table to argue, in general, against this option.

Conclusions to Part I: lessons learnt from the Florence meeting

The current Treaty framework provides ample space for new mechanisms strengthening the oversight and scrutiny over Member States’ potential breaches of the Rule of Law. This paper has identified three compelling normative reasons for EU’s intervention where the performance of the Member States in complying with Article 2 TEU values is (extremely) poor. These are based on the all-affected principle, the supranational federal vision, and/or the principle of congruence. In any situation of a very serious disturbance of the Rule of Law at the national level these seem to justify intervention. Identifying the situations where the disturbances should be sufficiently severe with required exactitude is not easy: all possible precautions have to be taken to avoid turning the idea of safeguarding the essence of the Union through enforcing Article 2 TEU into an outright power-grab by the Union institutions. Interference is thus only to be mandated in the cases of constitutional capture of a Member State, systemic corruption, or any other type of profound undermining of the liberal democratic state which is stated on the basis of sufficient evidence, leaving no room to doubt.

In thinking about how to tackle such important yet tricky issues any method is to be considered, including the deployment of the existing legal bases and procedures, their rethinking or update by the means of secondary legislation or via court practice. Treaty change is not an option to be excluded however. The same applies to the creation of eventual structures outside the framework of the *acquis*. While the latter options would not be deployable efficiently in the current context of urgency, when a constitutional crisis is clearly observable in some quarters, the same cannot be said about mid- to long-term perspective: clearly, the EU’s success will to a large extent depend on its ability to address Article 2 TEU problems in the future in the most efficient and effective way. For this a Treaty change will most likely be required.

Turning to the Primary Law currently in force, it is clear that sufficient legal bases exist, which, when interpreted and applied in a sufficiently inventive way, will be in the position to bring about a high degree of Member States’ compliance with what Article 2 TEU requires. Of particular importance are the options offered by a combined reading of Article 2 TEU with other TEU

provisions, seemingly mandating the EU to treat its values in all seriousness, thus moving them beyond the realm of mere declarations.

Moreover, when coupled with the existing infringement machinery of Articles 258 and 260 TFEU, the combined legal bases might actually prove effective in bringing about compliance, particularly if a systemic consideration is given to the assessment of compliance and sanctioning across the board. An attractive option is to deploy the existing instruments in combination with other tools, including peer-pressure among the Member States, inventive interpretation of the Charter of Fundamental Rights and the inventive reading of the financial sanctions in the meaning of Article 260 TFEU. When turned into the positive incentives of compliance, financial sanctions could do a much better job than in a situation when they are taken as purely punitive measures, as the general effectiveness of the punitive approach is highly doubtful. A systemic approach to dealing with values and Rule of Law compliance in the EU could be key to the Union's success in the area of values' enforcement. Such systemic approach could include sanctioning, monitoring and also first-order prevention of value infringements.

At the level of procedures, too, any tools even potentially of any use, should be tested out. This includes political procedures, judicial procedures, *ex-ante* as well as *ex-post* approaches, new and also pre-existing procedures. Besides having an inward focus, the EU could also turn to other actors available in Europe to help with expertise and an unbiased ability to tackle the sensitive issues arising under Article 2 TEU. Equality among the Member States and general moderation in the context of intervention should definitely be combined with the credibility of threats, up to discussing a possibility to enable the Union to get rid of the worst non-compliant Member States in the future.

Whichever option is eventually chosen among a huge array of the templates presented, it is abundantly clear that the time to act is *now*. Having said this, the natural limitations on what the Union can possibly do should also be considered in all seriousness. This is the reason why Part II of this paper is dedicated to the warning, which should be taken in all seriousness.

Part II. Living in a Glass House: Europe, Democracy and the Rule of Law

J.H.H. Weiler

In the face of the ugliness of the Hungarian situation, perhaps also French action regarding the expulsion of ‘clandestine’ Roma in France which was the subject of a terse even inflammatory exchange between an EU Commissioner and the French Presidency, and more generally a xenophobic mood sweeping the continent, the view has developed, notably within the Commission, that the Union cannot remain indifferent to egregious Member State violations of the Rule of Law and that as both a moral and legal imperative a more robust apparatus and policy should be put in place not simply to ensure compliance with European legal requirements but to guard the deeper fundament of European values.

Legally speaking this is a fraught issue where the wish to ‘do good’ on the substance might run against the value of containing the jurisdictional and competences appetite of the Union generally and the Commission in particular.⁵⁵ Issues of constitutional legality apart, the overall approach and intentions of the Commission are mostly⁵⁶ noble: The Union cannot and should not remain indifferent to State based violation of its core values.

The framing of the issue as one concerning The Rule of Law, and not for example as one of Democracy, is of salient importance for at least two reasons: First, the aggression against the core values is often done in the name of democracy and popular will. The Rule of Law – understood in its thick substantive and not thin procedural sense – is raised as a check on majoritarian tyranny. A democracy of evil people will produce evil results and such evil is not cleansed simply because a lot of people, even a democratic majority, wills it. Second, because whereas the democratic credentials of the Union are at least suspect, its Rule of Law credentials are thought to be, and in many senses are, above any suspicion. By framing the issue as Rule of Law and not Democracy the Union and Commission seem to be occupying an unassailable high moral ground.

What I want to do in this Part is not to undermine the Commission and Union initiative but, try and explain why this separation between Rule of Law and Democracy is untenable and to suggest that the high moral ground from which it emanates is far more precarious and has some pretty slippery slopes.

One can start such a critical examination by going to the foundation of the Union’s Rule of Law edifice in *Van Gend en Loos* itself.

Direct effect of Union law which is an essential part of the Rule of Law is not only a legal proposition. It is also a proxy for Governance. The fact that the writ of Union law runs through the land, indeed is the law of the land, is a hallmark of governance, whereby the Union legislative and administrative branches do not need the intermediary of the Member States, as is the default position in general public international law, to reach individuals both as objects and subjects of the law. And herein lies the challenge.

Van Gend en Loos itself is the fountainhead. In arguing for the concept of a new legal order the Court reasoned in the following two famous passages as follows:

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become

⁵⁵ See the excellent and challenging comment of Jakob Conrady (2013) *The European Union: Rule of Law or Rule of Judges?* *EJIL Analysis* Available at: <http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/>

⁵⁶ Commissioners are politicians and considerations of popularity are part and parcel of the job description. It comes with the territory and is not as such objectionable. Likewise, the Commission is a political body and considerations of its legitimacy are similarly part of the territory and not as such objectionable.

part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.* (Emphasis added)

The problem is that this “cooperation” was extremely weak. It was, in truth, a serious “dumbing down” of democracy and its meaning by the European Court. At the time, the European Parliament had the right to give its Opinion – when asked, and it often was not asked. Even in areas where it was meant to be asked, it was well known that Commission and Council would tie up their bargains ahead of such advice which thus became pro-forma. But can that level of democratic representation and accountability, seen through the lenses of normative political theory, truly justify the immense power of direct governance which the combined doctrines of direct effect and (and then supremacy) placed in the hands of the Community institutions? Surely posing the question is to give the answer.

You might think that since those early days the European Parliament has become very different body, hugely increased in powers and a veritable Co-Legislator with the Council. You would be right. But the widely shared assumption that the democracy problems of the Union would simply be solved by increasing the powers of the European Parliament is simply misconceived. There remains a persistent, chronic, troubling Democracy Deficit, which cannot be talked away.

In essence it is the inability of the Union to develop structures and processes which adequately replicate or, ‘translate,’⁵⁷ at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practiced with different modalities in the various Member States. Make no mistake: It is perfectly understood that the Union is not a State. But it is in the business of governance and has taken over extensive areas previously in the hands of the Member States. In some critical areas, such as the interface of the Union with the international trading system, the competences of the Union are exclusive. In others they are dominant. Democracy is not about States. Democracy is about the exercise of public power – and the Union exercises a huge amount of public power. We live by the credo that any exercise of public power has to be legitimated democratically and it is exactly here that the problems loom.

In essence, the two primordial features of any functioning democracy are missing – the grand principles of accountability and representation.⁵⁸

As regards accountability,⁵⁹ even the basic condition of representative democracy that at election time the citizens “...can throw the scoundrels out”⁶⁰ – that is replace the Government – does not

⁵⁷ Neil Walker, “Postnational Constitutionalism and the Problem of Translation,” in *European Constitutionalism beyond the State*, eds., J.H.H. Weiler and Marlene Wind (Cambridge: Cambridge University Press, 2003): 27-29.

⁵⁸ Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds. *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999); Philippe C. Schmitter and Karl Terry Lynn, “What Democracy Is... and Is Not,” *Journal of Democracy* 2(3) 1991: 76.

⁵⁹ On the concept of accountability, see Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009), chapter 9. See also Carol Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002); Anthony Arnall and Daniel Wincott, eds., *Accountability and legitimacy in the European Union* (Oxford: Oxford University Press, 2002).

⁶⁰ Ian Shapiro, *Democracy’s Place* (Ithaca: Cornell University Press, 1996): 96; J.H.H. Weiler, “To be a European Citizen: Eros and Civilization,” in *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 324 at 329.

operate in Europe.⁶¹ The form of European governance,⁶² governance without Government, is, and will remain for considerable time, perhaps forever such that there is no “Government” to throw out. Dismissing the Commission by Parliament (or approving the appointment of the Commission President)⁶³ is not quite the same, not even remotely so.

Startlingly, but not surprisingly, political accountability of Europe is also remarkably weak. There have been some spectacular political failures of European governance. The embarrassing Copenhagen climate fiasco;⁶⁴ the weak (at best) realization of the much touted Lisbon Agenda (aka Lisbon Strategy or Lisbon Process),⁶⁵ the very story of the defunct “Constitution”⁶⁶ to mention but three. It is hard to point in these instances to any measure of political accountability, of someone paying a political price as would be the case in national politics. In fact it is difficult to point to a single instance of accountability for political failure as distinct from personal accountability for misconduct in the annals of European integration. This is not, decidedly not, a story of corruption or malfeasance.⁶⁷ My argument is that this failure is rooted in the very structure of European governance. It is not designed for political accountability. In similar vein, it is impossible to link in any meaningful way the results of elections to the European Parliament to the performance of the Political Groups within the preceding parliamentary session, in the way that is part of the mainstay of political accountability within the Member States.⁶⁸ Structurally, dissatisfaction with “Europe” when it exists has no channel to affect, at the European level, the agents of European governance.

Likewise, at the most primitive level of democracy, there is simply no moment in the civic calendar of Europe where the citizen can influence directly the outcome of any policy choice facing the Community and Union in the way that citizens can when choosing between parties which offer sharply distinct programs at the national level. The political colour of the European Parliament, as an expression of voter preference, only very weakly gets translated into the legislative and administrative output of the Union.⁶⁹

The Political Deficit, to use the felicitous phrase of Renaud Dehousse⁷⁰ is at the core of the Democracy Deficit. The Commission, by its self-understanding linked to its very ontology, cannot be

⁶¹ Renaud Dehousse, “Constitutional Reform in the European Community. Are there Alternatives to the Majority Avenue?” in *The Crisis of Representation in Europe*, ed., Jack Hayward (London: Frank Cass, 1995) 118 at 123.

⁶² Philip Allott, “European Governance and the Re-branding of Democracy,” *European Law Review* 27 (2002): 60.

⁶³ Article 17.7 and 17.8 TEU.

⁶⁴ See European Parliament resolution of 10 February 2010 on the outcome of the Copenhagen Conference on Climate Change (COP 15) [2010] O.J. Electronic 341-06/25 especially at 26, points 5, 6.

⁶⁵ Iain Begg, “Is there a Convincing Rationale for the Lisbon Strategy,” *Journal of Common Market Studies* 46 (2008); European Commission, “Facing The Challenge: The Lisbon Strategy for Growth and Employment,” Report from the High Level Group chaired by Wim Kok (Luxembourg: Office for Official Publications of the European Communities, 2004).

⁶⁶ Treaty establishing a Constitution for Europe [2004] OJ C 310/1 [European Constitution]. See Ian Ward, “Bill and the Fall of the Constitutional Treaty” (2007) 13 *European Public Law* 461; “What Should Replace The Constitutional Treaty?” Editorial Comments, *Common Market Law Review* 44 (2007) 561.

⁶⁷ On this aspect, see Veith Mehde, “Responsibility and Accountability in the European Commission,” *Common Market Law Review* 40 (2003), 423.

⁶⁸ Julian Priestley, “European Political Parties: The Missing Link” in *Democracy in the EU after the Lisbon Treaty*, ed., Raffaello Matarazzo (Rome: Edizioni Nuova Cultura, 2011) 15; Francisco Roa Bastos, “Des ‘partis politiques au niveau européen’? Etat des lieux à la veille des élections européennes de juin 2009” (2009) *Notre Europe, Etudes & Recherches* No. 71.

⁶⁹ Vernon Bogdanor, “Legitimacy, Accountability and Democracy in the European Union,” A Federal Trust Report (2007), at 7, 8; Andreas Follesdal and Simon Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik,” *Journal of Common Market Studies* 44(3) (2006), 533.

⁷⁰ Dehousse, *supra* note 20, at 124. See also, Jean-Marc Ferry and Paul Thibaud, *Discussion sur l’Europe* (Paris: Calmann-Lévy, 1992).

‘partisan’ in a right-left sense, neither can the Council, by virtue of the haphazard political nature of its composition. Democracy normally must have some meaningful mechanism for expression of voter preference predicated on choice among options, typically informed by stronger or weaker ideological orientation.⁷¹ That is an indispensable component of politics. Democracy without Politics is an oxymoron.⁷² And yet that is not only Europe, but it is a feature of Europe – the “non-partisan” nature of the Commission – which is celebrated. The stock phrase found in endless student text books and the like, that the Supranational Commission vindicates the European Interest, whereas the intergovernmental Council is a clearing house for Member State interests, is, at best, naïve. Does the “European Interest” not necessarily involve political and ideological choices? At times explicit, but always implicit?

Thus the two most primordial norms of democracy, the principle of accountability and the principle of representation are compromised in the very structure and process of the Union.

The inextricability of the Rule of Law from the democratic travails of the Union is easily stated even if usually uncomfortably discussed. The late Federico Mancini in his *Europe: The Case for Statehood* forcefully articulated the democratic malaise of Europe.⁷³ There were many, myself included, who shied away from Mancini’s remedy, a European State and shied away from his contention that this remedy was the only one which was available.⁷⁴ But few quibbled with his trenchant and often caustic denunciation of the democratic deficiencies of European governance. Imagine yourself, say, as a Judge of the European Court of Justice charged with enforcing the Union writ within the Member States.

What would I do if you felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would you want to give effect to the Community’s undemocratic laws—adopted in his words by ‘numberless, faceless and unaccountable committees of senior national experts’⁷⁵ and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? Whatever the hermeneutic legitimacy of reaching supremacy and direct effect, the interaction of these principles with the non-democratic decision making process was at the time Mancini wrote and is today, not without some delicate normative issues. Seen from the perspective of the individual citizen, in effect, if not in design, giving direct effect in the context of European governance, objectifies the individual or re-objectifies him or her. In the Member States with imperfect but functional democracies the individual is ‘the’ political subject. In the European Union with its defective democratic machinery where the individual has far less control over norm creation, the Rule-of-Law has the paradoxical effect of objectifying him or her – an object of laws over which one has no effective democratic control.

To put it somewhat bluntly, from the perspective I just outlined it might be thought that the Rule of Law underpins, supports and legitimates a highly problematic decisional process. Substantively, then, the much vaunted Community rights which serve, almost invariably the economic interests of individuals were “bought” at least in some measure at the expense of democratic legitimation.

Procedurally we find a similar story. One secret of the Rule of Law in the legal order of the European Union rests in the genius of the Preliminary Reference procedure. The Compliance Pull of law in liberal Western Democracies does not rest on the gun and coercion. It rests on a political culture

⁷¹ Follesdal and Hix, *supra* note 69, 545.

⁷² On EU’s “policy without politics,” see Vivien Ann Schmidt, *Democracy in Europe: the EU and National Politics* (Oxford: Oxford University Press, 2006): 157-162 .

⁷³ G. Federico Mancini, “Europe: The Case for Statehood,” *European Law Journal* 4(1) (1998).

⁷⁴ J.H.H. Weiler, “Europe: The Case Against the Case for Statehood,” *European Law Journal* 4(1) (1998).

⁷⁵ Mancini, *supra* note 73, at 40.

which internalizes, especially in public authorities, obedience to the law rather than to expediency. Not a perfect, but one good measure of the rule of law is the extent to which public authorities in a country obey the decisions, even uncomfortable, of their own courts.

It is by this very measure that international regimes are so often found wanting. Why we cannot quite in the same way speak about the Rule of International Law. All too frequently, when a State is faced with a discomfiting international norm or decision of an international tribunal, it finds ways to evade them. Statistically, as we know, the Preliminary Reference in more than 80% of the cases, is a device for judicial review of Member State compliance with their obligations under the Treaties.⁷⁶ However, it is precisely in this context that we can see the dark side of this moon. The situation implicated in the Preliminary Reference always posits an individual vindicating a personal, private interest against the national public good. That is why it works, that is part of its genius, but that is also why this wonderful value also constitutes another building block in that construct which places the individual in the center but turns him into a self-centered individual.

The moral is not for the Union to shy away from taking robust action, within its competences and jurisdictional limits, to quell gross violations of the Rule of Law in and by some of its Member States. But it should simultaneously hurry up and put its own democratic house in order lest it be reminded that those living in glass houses should be careful when throwing stones.

⁷⁶ Robert Lecourt, “Quel eut été le droit communautaire sans les arrêts de 1963 et 1964” in *L’Europe et le droit: Mélanges en hommage à Jean Boulois* (Paris: Dalloz, 1991) at 349; Henry G. Schemers et al., eds., *Article 177 EEC: Experiences and Problems* (Amsterdam: North-Holland, 1987); Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010); Thomas de La Mare and Catherine Donnelly, “Preliminary Rulings and EU Legal Integration,” in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011).

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