Valuing the values and diluting the dilemma: a call for an EU framework for fundamental rights

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The EU as a community of values

There are many reasons why the European Union and its Member States can be proud of what they have achieved in terms of fundamental rights protection. It is almost 70 years since Europe left behind one of its darkest chapters and started to build an ever closer community based on shared values, including the rule of law. Over the years, this has developed into an impressive fundamental rights landscape in the EU. However, the socio-economic crisis has put these fundamental rights to the test, and recent years have shown that EU Member States are not immune to regression in terms of rule of law standards. Moreover, the new annual report by the Fundamental Rights Agency demonstrates clearly that all Member States and indeed the EU itself are facing major challenges, from migrants drowning off the EU's coast, through unprecedented levels of mass surveillance, to murders motivated by racism or extremism, as well as childhood poverty, Roma deprivation and many other problems that risk undermining the EU's commitments to shared values.

In this sense, respect for the shared values listed in Article 2 of the Treaty on the European Union cannot be taken for granted. This gives rise to a dilemma, since the European Union is founded both politically and legally on the assumption that all EU Member States will continue to comply with the core values they share with each other as well as with the European Union. The years 2012 and 2013 witnessed a lively debate on how to guarantee that all EU Member States remain within the boundaries of the so-called 'Verfassungsbogen' or 'arco costituzionale', which draws the line between what is still acceptable from a constitutional perspective in a shared community of values – and what is not.

The question is not limited to the European Union. On the contrary, the question of how to guarantee the intactness of the constitutional order is intrinsic to every constitutional system. The well-known but rather pessimistic answer given by Ernst-Wolfgang Böckenförde was that the "libertarian secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it risked for freedom's sake."

How does this *Böckenförde dilemma* relate to the European Union? There is one positive and one more negative reply to this. To start with the negative: considering the fact that the Member States build a core layer of legitimacy where the democratic will of the participating states resides and where the EU norms are implemented by national institutions and procedures, it has to be assumed that the EU is even less able to guarantee the value foundation than individual Member States are. The more positive reading is that the European Union forms an additional layer of governance that makes it possible to exercise value control in a complementary and innovative manner. A manner that is not unidirectional, sanction-oriented and hierarchical, but rather aimed at increasing mutual trust, based on dialogue, peer-evaluation and a culture of transnational constitutional exchange. Admittedly, there are limits to this approach, but there is no realistic alternative to the attempt to protect shared values together (the concept of 'protecting' shared values against one other would not appear sustainable in the long run).

Recent events and potential for development

In March 2014, the European Commission presented a new EU framework to strengthen the rule of law. The framework is "not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice". Instead, it will be activated in "situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law." The Commission envisages a three-stage process for the mechanism whereby it could issue a public "rule of law opinion", a "rule of law recommendation" and, thirdly, activate one of the procedures laid down in Article 7 of the TEU if this was deemed necessary.

Critics of the framework have said that it "is difficult to see what the Communication adds," complaining that "no new sanctions are envisaged, and the hurdles for Article 7 ultimately remain as high as before". This, however, misses the point that the sanctioning procedure laid down in Article 7 TEU cannot be changed without Treaty amendments. There is an obvious value in the European Commission consolidating the experiences it made in the 'Hungarian case' and clarifying how it will, in the future, proceed in situations where an EU Member State runs the risk of violating Article 2 values. The Commission's communication also complements other new initiatives such as its first corruption report, presented in early 2014, and its efforts to assist the EU and Member States to "achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States" through its annual "Justice Scoreboard".

While appreciating the benefits of this newly proposed rule of law framework, one should not stop at the Commission's communication, but rather recognise that there is indeed scope to move forward without having to touch the Treaties. We would like to mention three points that we believe are vital for this debate.

Firstly, the Article 2 values should be looked at in their entirety; focusing only on the rule of law might be a too limitative view on the community of values that is formed by the EU and its Member States. Secondly, it is misleading to only address individual Member States and ignore the EU's own performance in terms of value conformity. Thirdly, any 'EU framework' should be as inclusive as possible and recognise the multilevel and multi-stakeholder character of the European Union. It is of the utmost importance to include the European Parliament, the Council of the European Union and other relevant EU bodies, as well as relevant actors at national level, such as national parliaments, bodies with a human rights remit and civil society. It is difficult to think of any efficient framework without buy in by all relevant actors, far beyond the usual 'Brussels machinery'.

The way forward: a strategic framework for the protection and promotion of fundamental rights within the EU

Fifteen years ago, a group of distinguished academics called for a human rights policy for the European Union. At the time, this was motivated by the lack of coherence between internal and external policies, of systematic and reliable information bases, of coordinated knowledge, resources and of many of the EU's (then: Community) activities, of a 'human rights culture' in the EU 'apparatus', of the mainstreaming of fundamental rights, of consultation of relevant civil society actors, etc. Although a great deal has been achieved in these areas since then, a strategic framework would still have a number of advantages.

We believe that it would be unfortunate to think of an EU strategic framework as an exclusively EU owned supranational intervention. Such a framework should rather be approached as a multilevel and multi-actor setting that could help coordinate EU and Member State efforts to protect and promote fundamental rights. It is in this spirit that FRA has made the proposals contained in "An EU internal strategic framework for fundamental rights: joining forces to achieve better results", which also presents 20 different tools that could form part of such a framework.

At the level of the EU, a strategic framework could for instance provide for an audit that would examine how the EU legislator could better conform to the different mainstreaming obligations laid down in the EU Treaties. Equally, such an audit could analyse whether the current mechanisms designed to make sure that EU policies do not infringe the rights enshrined in the Charter meet expectations. Moreover, such a general assessment could be used to consider how existing EU competencies could be better utilised to promote fundamental rights and implement standards agreed upon in the context of the Council of Europe.

At national level, Member States could consider the adoption of national action plans (NAPs), which have proved to be "useful tools for clarifying the authorities' responsibilities and for identifying and addressing gaps in human rights protection". FRA research such as the EU-MIDIS survey suggests that EU Member States should also target their awareness-raising efforts better, as even where EU legislation explicitly stipulates that countries should inform citizens of their rights, as is the case in the equality directives, levels of rights awareness remain strikingly low. Building on the example of FRA's positive experience with its fundamental rights platform (FRP), individual countries could consider establishing national fundamental rights platforms that bring together government institutions and civil society to take part in a structured dialogue.

At transnational level, a strategic framework could provide for enhanced cooperation, exchange of promising practices, and peer evaluation mechanisms. In addition, a strategic framework should also put sufficient emphasis on the local level. The Charter for multilevel governance in Europe, which was recently adopted by the Committee of the Regions, rightly affirms the importance of local partnerships and the exchange of promising practices (see in this regard FRA's joined-up e-toolkit for local, regional and national public officials). Increased levels of cooperation and coordination are particularly important in countries with a federal structure, in which the implementation of fundamental rights falls under the competence of a number of authorities at various levels.

Examples like these show that a strategic framework would have to be filled with life over time, to ensure that it incorporates all relevant actors and does not end up in becoming a Brussels-driven box-ticking exercise. However, the EU institutions can nonetheless provide highly relevant advice. For instance, the institutions can supply guidelines on fundamental rights implementation related to relevant EU legislation. The Commission did this in the areas of victims' rights and family reunification, as did FRA in the context of apprehending irregular migrants or the processing of Passenger Names Records. The EU institutions could also assist in the exchange of promising practices and the provision of expert know-how wherever applicable.

At a more political level, the strategic framework would envisage a fundamental rights policy cycle, enabling relevant actors to come together in a structured dialogue over course of the year. Such a cycle would help both to guarantee that national experiences feed into EU-level policy developments, and that EU-level developments are implemented on the ground. It would further allow better coordination of fundamental rights-relevant policies approved by the European Parliament, the Council of the European Union and the European Commission, rendering their respective roles and activities more efficient. A variety of formats for such a policy cycle could be considered, such as an annual fundamental rights forum that brings together relevant EU actors with civil society; an inter-institutional exchange on fundamental rights between European Parliament, Council and European Commission, or an action plan for the protection and promotion of fundamental rights within the EU.

Conclusion

Just like its Member States, the EU itself suffers from a Böckenförde-dilemma. Moreover, from a more legal perspective, the EU's means to intervene in areas outside its legislative competence remain limited. However, the EU does offer a vital additional layer of governance that allows all Member States to exchange experiences and increase their willingness to accept constructive criticism as an expression of a shared fundamental rights culture. Fundamental rights are central to the value debate, as the Charter of Fundamental Rights can be read as an operational version of the Article 2 values. Taking fundamental rights seriously is thus an excellent way of guaranteeing coherence within the EU's community of values. Protecting and promoting fundamental rights is a means of working proactively to prevent rule of law crises. Moreover, a decline in regard for fundamental rights can indicate systemic deficiencies in the rule of law.

The Council of the European Union recently tabled the idea of a 'Union internal strategy on fundamental rights' . This is a promising and exciting step. Now it is crucial to gain support at all layers of governance. Due to the limited legislative competencies of the Union and its specific nature as a *mixtum compositum*, it would be greatly beneficial if the EU Member States could complement the fundamental rights strategy with something akin to a peer-review process on the Article 2 values. Let's start thinking creatively about how we can not only uphold the shared values in the EU, but also develop them. Not in order to reject diversity, but in order to create trust in our unifying community of values.

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