

# Putting a price on human rights? A policy- based approach for the protection of human rights in Europe

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# **Putting a price on human rights? A policy-based approach for the protection of human rights in Europe**

**Stefanos Xenofontos\***

## **Abstract**

*Ongoing political uncertainty in Europe, as a result of, inter alia, Brexit, the rise of populism and nationalism, places the fundamental principles of democracy, rule of law and human rights under threat across the entire continent. The European Commission, in seeing certain EU Member States adopting national policies that severely compromise the state of the rule of law within the Union and in an effort to compel them to honour their international legal obligations, has recently proposed to make access to EU funds conditional on the respect for the rule of law. In critically analyzing this proposal, this paper presents a series of skepticisms on the wider human rights situation within Europe. Particularly, the paper questions whether the current juridical paradigm for human rights protection has been proven ineffective, whether alternative methods of protection are needed and whether funds could promote the rule of law and human rights in Europe. The paper concludes by suggesting that a paradigm shift, from a rights-based to a policy-based system, which includes diplomatic and economic incentives, could be an effective and appropriate response to the rule of law backsliding in the EU and a plausible alternative for the protection of human rights across Europe.*

## **I. Introduction**

International organisations such as the European Union (EU) and the Council of Europe (CoE) are values-based organisations. Both the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights refer to these values upon which the European Union is founded. These values are “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (Art. 2 TEU). Similarly, the Statute of the Council of Europe, the constituent instrument of the Organisation, as well as the European Convention on Human Rights (ECHR) identify respect for human rights and fundamental freedoms, democracy and the rule of law as the Organisation’s founding principles. As this tripartite (democracy, human rights, rule of law) is interdependent, none of these principles can be seen in disassociation with each other. States must therefore conduct their functions with conformity with these principles, both on the national and international level, as they should represent and honour the European values as a result, *inter alia*, of their membership in these international organisations.

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In recent years, however, both the EU and the CoE have struggled to respond effectively when their Member States have not shown the required respect for these fundamental values and principles. As shown, ongoing political uncertainty in Europe and the general political environment of the last years has affected the way certain States perceive and deal with these values. Populist movements, primarily on the extreme right, have flourished in many European countries. By instrumentalising the various political, economic and social crises that have hit Europe in the past decade, including the growing threat of terrorism and the ongoing migration/refugee crisis, many of these populist parties espouse ideologies which are at odds with the European fundamental values and principles.

Within the European Union, for example, Hungary's ruling party Fidesz, under the government of Viktor Orbán, has recently put forward a series of judicial reforms aiming, essentially, at removing checks and balances on its executive powers.<sup>1</sup> These reforms included the lowering of the retirement age of senior judges, and thus forcing them to leave their posts and replacing them with the government's own supporters, while adopting also certain measures against public media. Similar measures were also taken by Poland's coalition government led by the Law and Justice (PiS) party.<sup>2</sup> According to the European Commission, these so-called reform measures seek to diminish the independence and impartiality of the judiciary and the public media and undermine the rule of law domestically while also severely threatening to shock the very foundations of the EU.<sup>3</sup> The rule of law backsliding in Poland has led the EC to start infringement proceedings against the country under Article 7 TEU for the first time ever in the history of the Union.<sup>4</sup> Malta and certain Eastern European States, including Romania, have been also targeted by the EU Institutions over several democratic deficiencies as evidence for high levels of corruption and censorship of public media and the free press were identified on the domestic level.<sup>5</sup>

The Council of Europe has not remained unaffected by these rule of law crises. In 2017, the Committee of Ministers, the executive body of the Council of Europe, launched infringement proceedings against Azerbaijan due to the persistent refusal of the latter to enforce a 2014 ECtHR judgment requiring the immediate and unconditional release of an opposition politician.<sup>6</sup> Notably, this marks the first time ever in the history of the Organisation, and

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<sup>1</sup> Laurent Pech and Kim Lane Schepppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

<sup>2</sup> Ibid.

<sup>3</sup> See eg, European Commission, 'Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland' (Press Release, 21 December 2016), available at <[http://europa.eu/rapid/press-release\\_IP-16-4476\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4476_en.htm)>.

<sup>4</sup> European Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (Press Release, 20 December 2017), available at <[http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm)>.

<sup>5</sup> European Parliament, 'Rule of Law in Malta: MEPs demand police investigate all corruption allegations' (Press Release, 24 January 2018), available at <<http://www.europarl.europa.eu/news/en/press-room/20180123IPR92315/rule-of-law-in-malta-mepps-demand-police-investigate-all-corruption-allegations>>; Carmen Paun, 'Romanian President: EU can't link funding to rule of law' (*Politico*, 20 April 2018), available at <<https://www.politico.eu/article/romanian-president-eu-cant-link-funding-to-rule-of-law/>>.

<sup>6</sup> Council of Europe, 'Committee of Ministers launches infringement proceedings against Azerbaijan' (Press Release, 5 December 2017), available at <<https://www.coe.int/en/web/portal/news-2017/>>

since the introduction of the measure in 2010 as part of the reforms of Protocol No. 14 to the ECHR. that infringement proceedings based on Article 46 ECHR are used against an ECHR Contracting Party because of the non-execution of an ECtHR judgment.

Without prejudice to European Union law, and especially EU Constitutional law, this paper seeks to critically examine the recent legislative proposal (hereinafter ‘the proposal’) by the European Commission (EC) on making access to EU funds conditional on its Member States’ rule of law performance from a pure human rights law and theory perspective.<sup>7</sup> The paper essentially looks at whether EC’s proposal can be seen as an indirect assumption that the traditional juridical paradigm for the protection and enforcement of human rights has proven ineffective and whether alternative methods of protection are needed. Furthermore, it looks at whether a policy-based system, one that offers diplomatic and economic incentives, could be an effective and appropriate response to the rule of law backsliding within the EU and a plausible alternative for the protection of human rights and other fundamental values across Europe.

## **II. The EC Proposal: the key point and an initial aspect for problematisation**

According to the proposal, depending on the severity of the rule of law violation, the EC could suspend or restrict access to funds for the non-compliant Member State.<sup>8</sup> On the contrary, Member States that comply with their rule of law requirements can gain access to additional funds, while it was also suggested that member States which perform particularly well regarding their rule of law and other fundamental values obligations could be rewarded with extra funds.<sup>9</sup>

While the EC, in putting forward its proposal, has recognised that recent political developments in Europe have exposed generalised weaknesses in certain EU Member States’ national checks and balances, with all the potentially dangerous consequences this may entail regarding the status of the rule of law within the Union, the effectiveness of the existing EU mechanisms to address these situations remained unchallenged.<sup>10</sup> It is thus

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[/asset\\_publisher/StEVosr24HJ2/content/council-of-europe-s-committee-of-ministers-launches-infringement-proceedings-against-azerbaijan? >](#).

<sup>7</sup>European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM/2018/324 final - 2018/0136 (COD)), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A324%3AFIN>>. See also, Eszter Zalan, ‘Justice Commissioner links EU funds to ‘rule of law’’ (*EUobserver*, 31 October 2017), available at <<https://euobserver.com/political/139720>>.

<sup>8</sup> Art 4(1) of the proposal (n 7).

<sup>9</sup> See eg, Jasna Selih, Ian Bond and Carl Dolan, ‘Can EU funds Promote the Rule of Law in Europe?’ (Centre for European Reform, November 2017), available at <[http://www.cer.eu/sites/default/files/pbrief\\_structural\\_funds\\_nov17.pdf](http://www.cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf)> 2.

<sup>10</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM/2018/324 final - 2018/0136 (COD)), p 1, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A324%3AFIN>>.

deemed purposeful to examine whether the existing enforcement mechanisms, including the traditional juridical paradigm, for the protection of fundamental values and principles are still fit for purpose. In looking at the broader picture of human rights protection in Europe, the paper, therefore, asks if the EC's proposal should shift the focus on whether the existing enforcement mechanisms for the protection of fundamental values on the international, and more specifically European, level have proven ineffective and/or insufficient to respond to current multifaceted challenges which seriously undermine the respect for human rights and the rule of law in Europe.

### **III. Limitations in using effectively the existing enforcement mechanisms for the protection of human rights in Europe**

#### **Political limitations:**

International organisation, such as the European Union and the Council of Europe, operate within a complex and highly political structure. It is well established that international law is not self-enforcing and, therefore, its implementation at the national level depends almost entirely on the voluntary political will of the national authorities (despite some (political or economic) pressures from the international community). To be enforced at all, international law ultimately relies on the political will and co-operation of domestic authorities (i.e. executives, parliaments and courts). This reality makes the enforcement of international human rights law, and for present purposes, the protection and promotion of human rights in Europe even more difficult. As it has been acknowledged, "Respect for human rights is a legal obligation. Defending them is a political and diplomatic act".<sup>11</sup>

This phenomenon reflects also the reality within the EU and the CoE. Aware of these political limitations and the difference in dynamics within international organisations, member States are often unwilling to start infringement proceedings (under Art 7 TEU and Art 46 ECHR on the EU and the CoE level respectively) against their non-compliant counterparts, something which makes the organisations' existing enforcement mechanisms no longer a credible and effective deterrent.<sup>12</sup> Although the Committee of Ministers within the CoE context has managed to launch infringement proceedings in the case of Azerbaijan under Art 46(4) ECHR for the first time ever in the history of the Organisation (precise outcome under Art 46(5) ECHR is still unknown as the process is ongoing), it is very unlikely that the proceedings will lead to a desired outcome. Similarly, it is very unlikely, that any strict measures under Article 7 (3) TEU will be taken against Poland within the EU context because of the lack of necessary consensus (unanimity) on the European Council level (Art 7

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<sup>11</sup> Emmanuel Macron (French President), Speech at the European Court of Human Rights (31 October 2017), available at <[http://www.echr.coe.int/Documents/Speech\\_20171031\\_Macron\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20171031_Macron_ENG.pdf)>.

<sup>12</sup> See eg, Maria Fletcher, 'Article 7 sanctions: a legal expert explains the EU's 'nuclear option'', (*The Conversation*, 28 July 2017) available at <<http://theconversation.com/article-7-sanctions-a-legal-expert-explains-the-eus-nuclear-option-81724>>.

(2) TEU). As political development to date have shown, Article 7 TEU seems to be ineffective when it comes to triggering sanctions, exactly because of this high political threshold requiring unanimity by the European Council in determining whether a serious and persistent violation of EU values in the scrutinised State exists.<sup>13</sup>

Legal scholars have supported the view that addressing, for example, non-execution of ECtHR judgments through infringement proceedings is misguided and unlikely to be effective or useful because, essentially, the mechanism is not “fit for purpose”, and does not necessarily lead to the desired result.<sup>14</sup> Following a similar line of thought, and as the EC’s ongoing infringement proceedings against Poland demonstrate so far, the EU’s law enforcement mechanisms are not always effective and they sometimes fail to respond to the principled disagreement of certain member States to comply with certain laws and principles and/or their persistent refusal to enter into any kind of constructive dialogue (political or judicial) on the issue at stake.<sup>15</sup> Even if the high practical hurdle of the required unanimity of the European Council (Art 7 (2)) for the infringement proceedings to move forward is overcome, similar coercive measures have been proven counterproductive and may lead to a possible backlash against the EU amid an already intense political climate which can only add fuel to the fire of national populist discourse and Euroscepticism.

### **Financial limitations**

It should not be disregarded that the effective institutional functioning of these Organisations heavily depends on the financial contributions from their Member States. The considerable budget differences between the EU and the CoE should also be borne in mind when assessing the effectiveness of their own enforcement mechanisms for the protection of human rights or when making proposals for alternative mechanisms of protection and compliance. Although the newly proposed measure of the EC can be an appropriate alternative for the protection of human rights and the respect for the rule of law in the EU, this might not be the case for the CoE. This point will be further explored later in this paper.

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<sup>13</sup> See eg, Daniel McLaughlin, ‘Hungary vows to block any EU bid to punish Poland over reforms’ (*The Irish Times*, 22 December 2017) available at <<https://www.irishtimes.com/news/world/europe/hungary-vows-to-block-any-eu-bid-to-punish-poland-over-reforms-1.3336450>>.

<sup>14</sup> Fiona de Londras and Kanstantsin Dzehtsiarov, ‘Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in The European Court of Human Rights’ (2017) 66(2) International and Comparative Law Quarterly 467.

<sup>15</sup> See, decision of the European Commission to start infringement proceedings against Poland, n 4 above. See also, M. Apelbat, ‘European Commission enters dialogue with Poland on Rule of Law’ (*The Brussels Times*, 12 April 2018), available at <<http://www.brussels-times.com/eu-affairs/10977/european-commission-s-enters-dialogue-with-poland-on-rule-of-law>>.

## **Conceptual / Normative limitations**

The nature, definition and interpretation of these European values (democracy, human rights and rule of law) is not always straightforward. For example, the rule of law can be considerably undermined without a government having to violate the letter of the law (e.g. a specific provision under EU law). Similarly, a mere *post facto* compliance with a particular law or in a particular case cannot automatically ensure full compliance with the spirit of the rule of law as this may not resolve the systemic and structural deficiencies of the national legal system. This creates further difficulties as the practical application of these concepts becomes ever more complex, lengthy, and often controversial.

Given the wide range of these limitations, international institutions (the EU and CoE in particular) need to protect and enforce their founding values and principles more effectively and develop appropriate alternatives to ensure that their Member States abide by them. The respect for the rule of law within international organisations such as the CoE and the EU is of primary importance for two main reasons; a functional and a philosophical one. Functional, because effective protection of the rule of law through judicial cooperation as perceived under the concepts of collective enforcement and subsidiarity within the ECHR context and mutual trust within the EU context can ensure the proper functioning of the different institutions within these organisations, including the courts, which leads to a more effective and enhanced protection of other fundamental values and principles, such as human rights and democracy. Philosophical, because the establishment of these organisations are founded upon these European values and principles and as such they form the cornerstone for their further development and success.

## **IV. The need for alternative enforcement mechanisms for the protection of human rights and other fundamental values**

As it has been stated above, human rights are standards for domestic governments whose breach is a matter of international concern as it affects the functioning and threatens the foundations of the international organisations of which they are members. Taken in this context, the framers of international human rights law decided that human rights were to form part of the domestic law or policy of the State and be enforced in domestic courts. The international role was limited in monitoring compliance at the domestic level and acting where domestic enforcement was determined to have failed. Ideally, the framers would intend to create an international judicial body to monitor domestic compliance of human rights by juridical means of an international scale in the form of an international human rights court. This juridical paradigm of implementation, in reality, was only achieved on a regional level with the creation of regional human rights systems, most notably the European regional system and (not until the late 1990s) the European Court of Human Rights in its present form. The framers, therefore, believed that a juridical paradigm of implementation, primarily concentrated in domestic mechanism of States and overseen by

international or regional judicial mechanisms, was the most effective and most appropriate means to ensure respect and enforcement of the human rights obligations of States. However, in recent years we witness a significant growing body of human rights violations and a growing number of non-compliant States, something which raises concerns over the effectiveness and appropriateness of the wider implementation system and whether an alternative mechanism to make States abide by the human rights legal obligations should be found.

As the traditional mechanisms for dealing with breaches of human rights and other fundamental values has been proven flawed, a proposed alternative enforcement mechanism could be a policy-based, or incentive-oriented, system aimed at inducing respect for human rights obligations by threatening political or economic sanctions against States in cases of non-compliance. However, since the effectiveness of sanctions is highly contested, other means of enforcement could be considered outside coercive threats. A reverse approach to sanctions, one that offers incentives to States when they meet certain obligations, could be a possible alternative. Another alternative to encourage respect for human rights is by offering diplomatic or economic incentives to States, including preferential treatment in economic relations, offering access to economic, social and cultural resources and as a requirement to establish bilateral agreements or gain membership in international organisations.<sup>16</sup>

It is now established that human rights are an essential component of the rule of law in international affairs and global politics. A commitment to human rights doctrine and practice has now become an integral part and goal of the domestic and foreign policy of individual States as well as international organisations, such as the European Union.<sup>17</sup> On the EU level, for example, member States can benefit from the various EU funds, which are designed to enable further European integration and promote certain social, economic and cultural rights and policies. The Member States have access to funds, acting as financial incentives, to realise their legal obligations. Notably, the recent proposals by the EC on making access to EU funds conditional on States' performance regarding their human rights and rule of law obligations were made after certain EU Member States failed to comply with their legal obligations with respect to certain fundamental values and principles. It is believed that this kind of politico-economic policies, on the basis of incentives, will be more effective in the protection and implementation of human rights than the mechanisms traditionally used under the existing juridical paradigm.<sup>18</sup>

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<sup>16</sup> Charles R. Beitz, *The Idea of Human Rights* (OUP, 2011) 33-39.

<sup>17</sup> See eg, Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005); Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' (2000) 37 Common Market Law Review 1307.

<sup>18</sup> See eg, Jasna Selih, Ian Bond and Carl Dolan (n 9).

## **V. The case of an incentives-based approach for the protection of human rights: The EC proposal in context**

**Advantages:**

### **A flexible and practical approach**

A policy-based mechanism for the enforcement of human rights which is based on economic or political incentives is a flexible and practical approach which can be proved a good alternative to the existing insufficient implementation and enforcement mechanisms of fundamental values. An incentives-based system for the protection of fundamental values and principles can be an innovative and original approach which can provide answers to the various multifaceted and pressing challenges currently faced by the EU (e.g. migration).

Imposing sanctions or offering incentives in order to encourage compliance with certain obligations is often considered the two sides of the same coin as both means have the same objective. Instead of imposing sanctions with a much coercive and punitive character, which often bears a negative connotation (i.e. if a State does something wrong, it gets punished), however, EC's new proposal suggests that when States meet their legal obligations, they get rewarded by either retaining access to EU funds or gaining access to additional funds. The present proposal provides a more positive approach and presents compliance with fundamental principles and values as a rewarding incentive, rather than a strict obligation or even a burden for Member States.

Expert reports suggest that EU funds and other similar policy-based mechanisms have a more direct impact and are capable of contributing more effectively to the long-term political and economic development of the Member States. As a result, the rule of law and other fundamental values are better safeguarded.<sup>19</sup> Indeed, respect for the rule of law is directly linked with good public administration and management of public finances, minimised corruption levels, economic growth and an independent, effective and stable legal system which forms the basis for the better protection and enforcement of human rights.<sup>20</sup>

Political and economic incentives have proven in the past to be effective in achieving positive legal and policy reforms on the national level. Instead of obliging non-compliant States to pay large financial penalties, as the practice has been so far, the EC's proposal, adopting a reverse approach, and arguably a less coercive or punitive one, suggests that EU funds are to be suspended or restricted pending a successful removal of the infringement by the violating State. Additionally, it has been suggested that member States which perform particularly well regarding their rule of law and other fundamental values obligations could

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<sup>19</sup> See eg, Jasna Selih, Ian Bond and Carl Dolan (n 9).

<sup>20</sup> See, European Commission, *The 2018 EU Justice Scoreboard* (Fact sheet, May 2018), available at <[https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2018\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_factsheet_en.pdf)>.

be rewarded with extra funds. This could provide an added incentive for the Member States to comply with their fundamental values obligations, including following courts' judgments against them.<sup>21</sup>

### **A strategic and targeted approach**

The EC's proposal is not only flexible and practical, but also a strategic and targeted one. It is based on the fact that most serious violations<sup>22</sup> of the Union's founding values and principles occur by those member States which are also the biggest beneficiaries of the EU Funds.<sup>23</sup> Indeed, Poland is by far the biggest beneficiary of the EU regional and cohesion funding for the period 2014-2020, while Hungary is also among the biggest funding recipients for the same period.<sup>24</sup> It is no surprise, therefore, that the proposal is particularly supported by the biggest contributors to the EU budget, including Germany and France, who, at a time where European societies are confronted with numerous challenges, would like to ensure that EU money is spent to promote and strengthen justice, human rights and other EU values. Withholding EU funds from these States will be politically and economically detrimental for them, and it thus expected that the measure will exercise the necessary pressure on rogue States' governments to proceed with actual, rather than just symbolic, compliance with EU values.<sup>25</sup>

### **Points of skepticism:**

#### **Different dynamics within European organisations**

Although this policy may be proved an effective and appropriate alternative with positive results for a particular international organisation (e.g. EU), this might not necessarily be the case for another organisation (e.g. CoE) due to significant differences in their financial resources. While the EU can easily stream billions of Euros to its various Funds, the CoE, having significant budgetary limitations, simply cannot afford this kind of policy. It is reminded that Russia<sup>26</sup> (among the top-5 contributors to the CoE budget) has suspended its 12-million euro contribution, while Turkey<sup>27</sup> has recently threatened to significantly cut its funding towards the organisation. Not only do such financial limitations impose serious implications on the Organisation as a whole, as well as the functioning and viability of the

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<sup>21</sup> See eg, Jasna Selih, Ian Bond and Carl Dolan (n 9).

<sup>22</sup> European Commission, *Monitoring the Application of European Union Law – 2016 Annual Report* (Report, 6 July 2017), available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM%3A2017%3A370%3AFIN&from=EN>>.

<sup>23</sup> European Commission, *EU Budget 2016 – Financial Report* (2017), available at <[http://ec.europa.eu/budget/library/biblio/publications/2017/financial-report\\_en.pdf](http://ec.europa.eu/budget/library/biblio/publications/2017/financial-report_en.pdf)>.

<sup>24</sup> European Commission, *Analysis of the Budgetary Implementation of the European Structural and Investment Funds in 2017* (May 2018), pp 40-41, available at <[http://ec.europa.eu/budget/library/biblio/publications/2018/AnalysisBudgImplem\\_ESIF\\_2017\\_EN.pdf](http://ec.europa.eu/budget/library/biblio/publications/2018/AnalysisBudgImplem_ESIF_2017_EN.pdf)>.

<sup>25</sup> Laurent Pech and Kim Lane Schepppele (n 1) 42-44.

<sup>26</sup> See, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=4982&cat=8>.

<sup>27</sup> See, <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6808&lang=2>.

ECtHR, which is already underperforming as a result of its unmanageable case overload, but they also make any proposal based on financial incentives simply utopian.

### **Moral and normative concerns**

The next scepticism on the EC proposal has to do with the moral and normative aspect of the issue. International human rights theorists cannot simply disregard the moral or normative character of the obligation to respect human rights. From a moral point of view, how acceptable could it be to put a price on Member States' human rights compliance?, one may ask. Can we really trade human rights with money? Although a moral obligation is not a coercive factor which could create legally binding effects, member States of the EU and the CoE are, at least, under a higher moral expectation (assumingly compared with non-member states) to conduct their domestic and international affairs by honouring their international commitments towards fundamental values and principles, which, afterall, represent "the common heritage of their peoples" (Preamble, Statute of the CoE) and the "humanist inheritance of Europe" (Preamble, TEU), are part of their common political traditions and ideals (Art 2, TEU) and are well-embedded in their own national constitutions.

This scepticism could be extended over the normative dimension of the issue. Under a formalistic approach to the normativity of legal obligations, the above scepticism becomes even more compelling when considering that member States of a values-based international organisation are, as such, already bound by a strict *a priori* international legal obligation to respect and protect human rights. This legal obligation derives from the States' voluntary consent to a particular international law, and thus their outright commitment to obey this law, when signing an international legal instrument to join the organisation. So, how can the EC offer EU member States access to funds in order to comply with a pre-existing legal obligation that they are already bound by? Arguably, from a pure formalistic, normative approach to law, this proposal is again problematic.

## **VI. Concluding remarks**

The European Union is no longer a community of interests as it used to be in its early days. It has now become a community of values and principles. In sixty years of European integration, more and more emphasis is placed on the protection and promotion of fundamental values of human rights, democracy and the rule of law within the EU. As it was noted above, commitment to these fundamental values and principles has also become an essential part of the EU foreign policy, especially since the adoption of the EU Charter of fundamental rights. For instance, the EU is simply not inclined to sign any political or economic agreement with any partner or associate country unless an explicit reference to a commitment to certain EU values is made in the agreement. Similarly, candidate States willing to join the Union are subject to strict economic and political criteria, including an

obligation to show respect for EU fundamental values in their domestic and international undertakings (the so-called ‘Copenhagen criteria’, Art 49 TEU). The EC, in turn, thoroughly scrutinises their rule of law and human rights performance throughout the accession negotiations and pre-accession period. These criteria, however, should not be seen as a checklist of certain formalities that once met are to be forgotten post-accession. Instead, respect for and promotion of EU fundamental values and principles should be seen as a continuous pursuit which existing member States are under the legal obligation to always strive to achieve. It is thus essential for EU member States to realise that compliance with fundamental values does not cease to be important at the accession point, but, rather, it forms the cornerstone of the ongoing process of European integration. The growing emphasis on fundamental values compliance in EU’s foreign policy has arguably created the impression that the EU focuses more on the protection of these values by third countries, while compliance with this same obligation vis-à-vis the existing Member States has remained on the sidelines. What is fundamentally striking with the present EC proposal, therefore, is that for the first time ever in the history of the Union, EU values-linked economic incentives (to retain or gain access to EU funds) are offered to existing member States based on their rule of law and human rights performance, an already established responsibility for them both under the EU Treaties and Charter as well as their own national constitutional law.

What is even more striking, however, is the pronounced refusal of certain member States (no coincidence that they are the same member States which have been targeted recently by the EC for non-compliance with certain values) to accept such proposal. This move impliedly admits that these member States are completely aware of their wrongdoings and rule of law underperformance and oppose to any kind of scrutiny from the EU even when such fundamentally important issues for the Union are at stake. It is therefore clear that the EC intends to develop an alternative, well-suited mechanism capable of addressing systemic rule of law violations in a more effective way. The proposed measure aims to put member States’ compliance with fundamental values under strict scrutiny in order to minimise or eliminate, if possible, the illiberal tendencies among them and the current backsliding from EU values within the Union. The measure is also expected to respond effectively to the all similar ‘rule of law crises’ revealing problems of a systemic nature which were brought to the surface by the numerous internal and external challenges that the EU has been facing during the last years.

Although the present measure bears certain practical as well as conceptual limitations that prevent it from enjoying a wider acceptance, or even practical application, within the EU, it is believed that such a policy-based mechanism for the protection of human rights and other European values and principles should be seriously considered. This position is reinforced by the fact that existing enforcement mechanisms for the protection of human rights and the rule of law in Europe have already proven ineffective and/or insufficient. Not only does jeopardises the rule of law status at the national and European level, but it also negatively affects the functioning and success of these international organisations, as well as their

individual bodies, as it is the case with the European Court of Human Rights. Protecting fundamental values and principles should be placed right in the heart of all European policies. Policy-based measures, focusing on political or economic incentives might be capable of providing an appropriate and alternative response to the several and ongoing crises that the European societies have been facing during this decade. In any case, however, any policy-based approach for enhancing the protection of the European values should not merely be realistic and pragmatic and at the expense of the primary and principled obligation that member States have towards these values.