Systemic infringement action: mind the particulars - and go for the big picture

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28.11.2013 doi: 10.17176/20170930-152454

Infringement action against Member States that violate the fundamental values of the EU (Article 2 TEU): that was the course of action I suggested in response to Jan Werner Müller's recent proposal to establish the "Copenhagen Commission", which would investigate such violations. Kim Lane Scheppelle takes the idea of employing infringement action much further, suggesting that the Commission should group together related complaints against one Member State thematically under Article 2 TEU. This, according to Scheppelle, "would add the argument that the whole is more than the sum of the parts", rising "to the level of a systemic breach of basic values".

While I agree with Scheppelle's proposal, I am not so sure that it can be accomplished under the existing legal authority (notwithstanding the proposal's part concerning the temporal withholding of funds, where Scheppelle admits that it would require additional secondary legislation). Or better put, the prevailing understanding of what EU Treaties allow the Commission to do requires a much deeper transformation of the Commission's role than Scheppelle suggests.

At present, infringement actions by the Commission concern violations of rules contained in concrete policy areas, defined in the Treaty on the Functioning of the EU. One can see this clearly in the Commission's regular annual reports on national implementation of EU law. There is no EU policy on democracy or freedom, the primary concerns in Hungary or Romania. "Justice, fundamental rights and citizenship" is perhaps closest to such concerns; yet, as Scheppelle observes regarding the case concerning the compulsory retirement age of Hungarian judges, the Commission chose to challenge it as a violation of EU anti-discrimination law rather than an issue of the rule of law or the independence of judges, despite clear indications from the Venice Commission that there might be a serious problem (see its opinions concerning Hungary here).

The Commission cannot interpret the reach of EU norms in this context too widely for at least two reasons. First, it would invite ever more adventurous challenges to different national rules, where the link to EU law would be rather weak. The ECJ once rejected to deal substantively with a challenge from Hungary concerning the prohibition of the public display of red stars in Hungary. Innovative EU lawyers could argue that bottles of Heineken beer have red stars on their etiquettes and that the Hungarian prohibition potentially violates the free movement of goods, but such question was never put to the ECJ (one such innovative lawyer became an ECJ judge, however...). Sure, the Court would have easier time to deal with it than it once had with the Irish abortion case, where the link to market freedoms was 'too remote', but why create such troubles and invite controversial cases in the first place?

Second, the Commission (and possibly the ECJ) could be accused of competence creep. The reaction of the German Constitutional Court to the ECJ's interpretation of the scope of EU Charter is telling in this respect.

This deals with the most serious problem with Scheppelle's proposal, I think. The 'systemic infringement action' still needs particular infringements to form the bundle. While it could be difficult in case of judges and their independence, in case of the freedom of press – another pressing concern in Hungary – it is close to impossible to find EU norms that deal with that matter, let alone free elections and the principles of pluralist constitution (see Marco Dani's superb analysis here). It is true that the Commission announces in

its recent report (here, p. 58) that "enforcing citizens' political rights stemming from the Treaty and secondary law" is going to be its priority, but one must wonder what political rights do indeed stem from EU law. To use the words from the title of this post: the Commission must mind the particulars…

In my view, the Commission should go for the 'big picture' instead. If the EU fundamental values are ever to be enforced, it has to be done openly. As I stated earlier: the notion of 'an obligation under the Treaties' contained in Article 258 TFEU (which regulates infringement actions) should be understood as encompassing the respect for the EU foundational values. Instead of developing systemic infringements the Commission should focus on how to enforce Article 2 TEU head on.

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SUGGESTED CITATION

Komárek, Jan: Systemic infringement action: mind the particulars – and go for the big picture, Verfassungsblog, 28.11.2013, doi: 10.17176/20170930-152454.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170930-152454.