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European Union and Council of Europe human rights agendas: synergies not duplication!

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Parliamentary Assembly, which is following the expansion of the European Union's activities in the human rights field, notes that a number of initiatives have recently been taken to set up a monitoring mechanism for European Union member States' compliance with common values, such as fundamental rights, democracy and rule of law standards.

The Assembly reiterates its position, according to which one should avoid the duplication of the Council of Europe's work and unnecessary waste of resources. The Council of Europe's binding legal instruments, and in particular the European Convention on Human Rights, constitute an effective system of human rights protection and promotion of democracy and the rule of law in all its member States, including those which are also members of the European Union.

Although higher levels of human rights protection are always welcome, the setting up of parallel mechanisms can lead to double standards, "forum shopping" and lowering of Council of Europe standards. Therefore, any initiative in this respect should take into account the Council of Europe's role of "benchmark for human rights, rule of law and democracy in Europe". Synergies with existing Council of Europe monitoring mechanisms should also be explored. In any event, full coherence of standards can only be ensured by the accession, foreseen in the Treaty on European Union, of the European Union to the European Convention on Human Rights.

1. Reference to committee: Urgent debate, Reference 3982 of 30 September 2013.



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A. Draft resolution²

1. The Parliamentary Assembly recalls its previous resolutions and recommendations concerning co-operation between the European Union and the Council of Europe, in particular [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#) on the need to avoid duplication of the work of the Council of Europe by the European Union Fundamental Rights Agency and [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#) on the impact of the Lisbon Treaty on the Council of Europe.
2. It stresses that the Council of Europe's binding legal instruments, first and foremost the European Convention on Human Rights (ETS No. 5), constitute an effective system of human rights protection and promotion of the rule of law in all its member States, including those which are also members of the European Union.
3. The Europe-wide common standards and the level of protection set by the Council of Europe's legal instruments must not be undercut by member States of the Council of Europe or by the European Union. At the same time, higher standards and stronger protection are always welcome.
4. The Assembly reiterates its view that reinventing existing norms and setting up parallel structures creates double standards and opportunities for "forum shopping", which leads to new dividing lines in Europe. Duplication of work also wastes limited budgetary resources needed for improving the protection of human rights and upholding the rule of law.
5. The Assembly is therefore worried that the accelerating expansion of the European Union's activities in the human rights field may result in unnecessary duplication of the Council of Europe's work. In the wake of the Charter of Fundamental Rights, the European Union established a Fundamental Rights Agency and created the position of a Special Representative for Fundamental Rights, and is now considering setting up a monitoring mechanism for its member States' compliance with common fundamental rights and rule of law standards.
6. The Assembly recalls that many issues stemming from the coexistence of the legal orders of the Council of Europe and of the European Union will be resolved by the accession, foreseen in the Treaty on European Union, of the European Union to the European Convention on Human Rights.
7. The Assembly recognises the need for the European Union to ensure the implementation of its own legal standards by all its member States. It recalls that the expertise of relevant Council of Europe bodies, forged and funded to a large extent by the European Union's member States acting within the framework of the Council of Europe, is at the disposal of the European Union.
8. In particular, the Council of Europe's European Commission for Democracy through Law ("Venice Commission") has recently proved capable of providing a well-founded, objective assessment of the constitutional and human rights implications with respect to the situation in Hungary. The Assembly has followed up these findings in [Resolution 1941 \(2013\)](#), based on a report by its Monitoring Committee, and has invited its Committees on Culture, Science, Education and Media, on Legal Affairs and Human Rights and on Political Affairs and Democracy to continue following relevant aspects of the situation in Hungary.
9. In view of the above, the Assembly invites
 - 9.1. the European Union to:
 - 9.1.1. explore possible synergies with existing Council of Europe mechanisms in the fields of human rights, democracy and the rule of law before setting up new structures or further expanding the activities of recently created bodies;
 - 9.1.2. in particular, to continue to make use of the expertise of relevant Council of Europe bodies such as the Venice Commission, the Parliamentary Assembly and relevant specialised monitoring mechanisms, including those set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), the revised European Social Charter (ETS No. 163), the Convention on Action against Trafficking in Human Beings (CETS No. 197), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No. 141), as well as with the Group of States against Corruption and the European Commission against Racism and Intolerance;

2. Draft resolution adopted unanimously by the committee on 1 October 2013.

- 9.1.3. explore modalities of co-operation with the Council of Europe in promoting and implementing the above-mentioned Council of Europe conventions and becoming a Party to them to the extent possible;
- 9.1.4. accelerate the accession of the European Union to the European Convention on Human Rights;
- 9.2. the member States of the Council of Europe to facilitate co-operation between the Council of Europe and the European Union at all levels, including by ensuring that relevant conventions are drafted or adapted in such a way as to facilitate accession by the European Union.
- 9.3. those member States of the Council of Europe which are also members of the European Union to exercise their influence in the Union in such a way as to minimise duplication and maximise synergies between the European Union and the Council of Europe in the field of human rights, democracy and the rule of law.

B. Explanatory memorandum by Mr McNamara, rapporteur

1. Introduction

1. On 30 September 2013, the Parliamentary Assembly agreed to the proposal submitted by the European Democrat Group to hold a debate under urgent procedure on “European Union and Council of Europe human rights agendas: synergies not duplication!”. On the same day, the Committee on Legal Affairs and Human Rights appointed me as rapporteur.

2. Recent development within the European Union: the proposal to set up a mechanism for monitoring respect for rule of law, democracy and fundamental rights

2. Following the entry into force of the Lisbon Treaty on 1 December 2009, the Council of Europe’s core values such as the respect for human rights, democracy and the rule of law, have been placed at the forefront of the European Union (see Article 2 of the Treaty on European Union, hereinafter “TEU”). It granted the Charter for Fundamental Rights the same legal value as the European Union Treaties and required the European Union’s accession to the European Convention on Human Rights (ETS No. 5, “the Convention”) (under Article 6.2 of the TEU). European Union competence in the field of human rights has further expanded to traditional areas of activity of the Council of Europe such as justice, freedom and security, which was subsequently reflected in the European Council’s “Stockholm Programme – An open and secure Europe serving and protecting citizens”. In July 2012, the Council of the European Union appointed the European Union Special Representative for Human Rights, mandated, *inter alia*, to contribute to the implementation of the Union’s human rights policy, in particular the EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy.

3. Despite these developments, the steps taken by the EU institutions to “discipline” its own member States as to the respect for the rule of law, democracy and fundamental rights appeared to be quite insufficient. For instance, in the “Austrian crisis” in 2000, the European Union was unable to make use of the mechanism of Article 7 of the TEU allowing in exceptional circumstances the suspension of certain rights (including the right to vote). The “Roma crisis” in France in the summer of 2010, the “Hungarian crisis” following changes to the constitutional order started in this country at the end of 2011, and the Romanian constitutional crisis in the summer of 2012 showed some deficiencies concerning the limited scope of instruments to be applied in “a rule of law crisis”, despite the fact that European Commission managed to trigger with success targeted infringement proceedings on the basis of Article 258 of the Treaty on the Functioning of the European Union (TFEU). It looks like the European Union, and in particular the European Commission – “the guardian of the Treaties” – face the “Copenhagen dilemma”, which focuses on the need to comply with fundamental rights in countries before their accession to the European Union, leaving aside the situation in member States.

4. Recent developments concerning the political situation in Hungary have catalysed a debate within the European Union about whether it currently has the tools necessary to respond to persistent breaches of EU human rights standards and how to make a bridge between political persuasion and targeted infringement procedures on the one hand, and the “nuclear option” of Article 7 of the TEU, namely suspension of a member States’ rights, on the other hand.

5. In a letter sent in March 2013 to the President of the European Commission, the Foreign Ministers of Germany, the Netherlands, Denmark and Finland stressed that the European Union’s fundamental values must be “vigorously protected” and that the European Union “must be able to react swiftly and effectively to ensure compliance with its most basic principles”. The June 2013 EU Council Conclusions for the first time recognised that more was needed to ensure that human rights violations in EU member States were adequately addressed, and called on the European Commission to “take forward the debate ... on the possible need for and shape of a collaborative and systematic method to tackle these issues”.

6. Subsequent to the Assembly’s decision of 25 June 2013 not to open a formal monitoring procedure in respect of Hungary, in its Resolution of 3 July 2013 “on the situation of fundamental rights: standards and practices in Hungary”, the European Parliament urged the Hungarian authorities to fully comply with EU law and implement international instances’ recommendations and proposed that the EU institutions establish a new mechanism to enforce Article 2 of the TEU effectively and ensure the continuity of the “Copenhagen criteria”. Member States should be regularly “assessed on their continued compliance with the fundamental values of the Union and the requirements of democracy and the rule of law” (paragraph 74) and there should be better co-operation between the EU institutions and other international bodies (including the Council of Europe and its Venice Commission). The resolution does not predetermine the form of the future of the

mechanism (it could be, for instance, a “Copenhagen Commission” or high-level group), which should be built upon the mandate of the European Union Fundamental Rights Agency (FRA); the latter’s mandate should consequently, it is proposed, be strengthened. The new mechanism should be independent from political influence, and operate in full co-operation with other international bodies. It should provide for regular monitoring following the same procedures for all member States, as well as provide warnings, at the early stage, about any risk of deterioration of the values at stake, and finally issue recommendations to member States and EU institutions on how to respond and remedy any shortcomings. EU institutions should start a joint debate on how to fulfil Treaty obligations and, by the end of 2013, the European Parliament will convene a conference with the participation of the member States, European institutions, the Council of Europe, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights.

7. The European Commission’s President, Mr José Manuel Barroso, addressing the European Parliament on 11 September 2013 on the “State of the Union address 2013” also stressed the importance of developing a comprehensive mechanism under the dominant role of the Commission, based on equality of all member States, applicable only to cases of serious risk to the breach of law and activated by predetermined criteria. He announced that the Commission would come forward with a communication on this issue. Similarly, in her speech of 4 September 2013 before the Centre for European Policy Studies (Brussels) on “The EU and the Rule of Law – What next?”, Ms Viviane Reding, Vice-president of the European Commission and EU Justice Commissioner, presented the guidelines for a future rule of law mechanism, and the policy options for the Commission. The proposed rule of law mechanism should be based on four main principles:

- legitimacy: the European Commission’s legitimacy must be enhanced if the latter has to play “an enhanced or new monitoring, supervision and enforcement role”; the new rule of law mechanism should be at least endorsed by European Council conclusions and European Parliament resolutions;
- necessary expertise: such as comparative knowledge of the member States’ justice systems (including that of DG Justice, which has prepared the EU Justice Scoreboard, in co-operation with the Council of Europe);
- equality of all member States: the new instrument must be applied in the same way to all member States, without double standards or “anti-Eastern” bias;
- special role and complementary work done by the Council of Europe: co-operation with the Council of Europe, and especially its Venice Commission, should be continued.

8. Commissioner Reding proposed a two-step approach as a guideline for the Commission’s policy options. The first step would be to exploit the potential of the existing Treaties under procedures enshrined in Article 7 of the TEU, which includes the Commission’s possibility to issue a “reasoned proposal” by giving “formal notice” if a rule of law crisis is about to emerge. The second step would be to amend the Treaty to give more monitoring and sanctioning powers to the Commission.

9. In the meantime, a motion for a resolution in the framework of the European Parliament’s annual report on the situation of fundamental rights in the European Union (2012) has been prepared by the Mr Louis Michel, member of the European Parliament, and will be discussed in the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) on 3 October. In this motion, the rapporteur stresses the failure of the European Union to activate the mechanisms enshrined under Article 7 of the TEU to enforce Article 2 of the TEU. The EU policy on fundamental rights in the European Union should be “based on clear rules and mechanisms; objective indicators, data and evidence; [be] transparent, fair and predictable; strong in protecting individual rights, democracy and the rule of law”. The new mechanism for the respect of the fundamental rights and the values and the rights enshrined in Article 2 of the TEU and in the Charter for Fundamental Rights should be triggered by a decision of the European Commission, which will decide about the definition of indicators, monitoring of the situation in member States, making thematic evaluations on the basis of the human rights instruments (particularly but not exclusively of the European Convention on Human Rights and other Council of Europe conventions), a European policy cycle and annual inter-institutional forum, developing a set of recommendations and sanctions to deal with the breaches of Article 2 of the TEU and an early warning system, followed by a political dialogue and possible sanctions. The instrument to emerge must also be based on the Fundamental Rights Agency’s experience. The rapporteur emphasises the urgency of the situation and the resulting need to address it under the current Treaties, which should nevertheless be revised in the future by amending Article 7 of the TEU, extending the powers of the Commission and the Court of Justice of the European Union, deleting Article 51 of the Charter for Fundamental Rights (which would make the Charter provisions legally binding on the member States, and not only to the EU institutions as is the case now) and extending the competence of FRA, which would play a major role in the proposed mechanism.

During the European Parliament's September 2013 session, the Council of Europe's Secretary General, Mr Thorbjørn Jagland, received Mr Michel in Strasbourg and discussed the possible added value and disadvantages of introducing the proposed mechanism.

10. It should be noted that the European Union's weak response to human rights violations was especially criticised by representatives of civil society, which stressed the importance of the Council of Europe's monitoring mechanisms. As stressed by the Human Rights and Democracy Network, in a statement of August 2013, the European Commission has sought infringement proceedings in some cases but it has been reluctant to use human rights as a basis for infringement or to "name and shame" member States in its annual report on the application of the European Union Charter for Fundamental Rights. Although FRA has identified specific problems in EU member States, there is a political vacuum between these developments and EU action to address the problem. As regards the European Parliament, it has played an important role in challenging EU policy on human rights (for example in its recent strong resolutions on Hungary and on European complicity in the CIA rendition and secret detention programme), however it is not always effective; for example, its annual report on fundamental rights failed to identify a single country where human rights concerns have been raised. The Council of the European Union was criticised for the absence of political will to act when EU values were at risk, and for the narrow material scope of the mandate of its Working Party on Fundamental Rights and Free Movement of Persons (FREMP) and its insufficient engagement with civil society.

3. The Assembly's position

11. Co-operation between the Council of Europe and the European Union is currently governed by a Memorandum of Understanding between the Council of Europe and the European Union concluded on 23 May 2007, which contains a general framework for co-operation in the area of human rights and fundamental freedoms and highlights the role of the Council of Europe as "the benchmark for human rights, the rule of law and democracy in Europe".

12. Due to the creation of the European Union Agency for Fundamental Rights (FRA) in 2007, there has been concern within the Council of Europe about unnecessary duplication by the agency of the Council of Europe's work (see, in particular, Assembly [Resolution 1427 \(2005\)](#) and [Recommendation 1744 \(2006\)](#)). In 2008, an agreement was concluded between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe.

13. In 2010, the Assembly adopted [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#) on the need to avoid duplication of work of the Council of Europe by the European Union Agency for Fundamental Rights, based on the report of my committee colleague, Mr Boriss Cilevičs (Latvia, Socialist Group). The Assembly noted that since 2007 circumstances had changed, and the European Union's Fundamental Rights Agency and the Council of Europe had established appropriate forms of co-operation and consulted each other in their daily work. Although both institutions sometimes worked on the same or similar issues, they used different tools in carrying out their respective activities. FRA's data collection and evidence-based analyses might complement the work undertaken by the Council of Europe's monitoring bodies.

14. Despite these positive developments, the Assembly underlined the need for FRA to retain – in its work – the Council of Europe's *acquis* in the human rights field as its main point of reference. It called on the EU member States and institutions to reflect "once again on the allocation of financial and other resources to the different European human rights protection mechanisms in order to distribute them in a way which ensures their most effective use" and regretted that the funding of the Council of Europe's core human rights activities was far lower than that of FRA.

15. In October 2011, the Assembly adopted [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#) on the impact of the Lisbon Treaty on the Council of Europe, based on a report by Ms Kerstin Lundgren (Sweden, ALDE) from the Committee on Political Affairs, which took stock of the changes in the EU legal framework following the entry into force of the Lisbon Treaty and the latter's impact on the Council of Europe's work, including in the areas covered by the Stockholm Programme. In this resolution, the Assembly noted that the post-Lisbon partnership between both organisations should "ultimately lead to a common space for human rights protection" across the European continent, in particular through the European Union's accession to the European Convention on Human Rights and other key Council of Europe conventions and monitoring mechanisms. Duplication and monitoring fatigue would thus be avoided, especially at a time of economic crisis, and the Council of Europe's role as "the benchmark for human rights, rule of law and democracy in Europe" should further be enhanced.

16. Furthermore, in its [Resolution 1901 \(2012\)](#) on human rights and foreign policy, based on a report by the Chairperson of the Political Affairs Committee, Mr Pietro Marcenaro (Italy, Socialist Group), the Assembly welcomed the adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy and saw it as an opportunity to improve synergies between the Council of Europe and the European Union and to enhance the effectiveness of international efforts to promote and protect human rights worldwide.

17. Despite these positive developments, concerns about duplication of work and resources still remain. Following the decision of the European Union to appoint a Special Representative for Human Rights and fears of overlap with, and duplication of, the Council of Europe's activities, during the third part-session of 2012 (June 2012), the Assembly held a current affairs debate on "European institutions and human rights in Europe". Subsequently, the topic of the debate was referred for report to the Committee on Legal Affairs and Human Rights and, having been mandated by this committee, I am now preparing a report on this subject.

18. Further work is being done by other colleagues from the Assembly. Ms Kerstin Lundgren (Sweden, ALDE) of the Committee on Political Affairs and Democracy is mandated to prepare a report on "The Memorandum of Understanding between the Council of Europe and the European Union – evaluation 5 years after". A report on the "Accession of the European Union to the European Convention on Human Rights: Election of judges" is also currently being prepared by my committee colleague, Mr Jordi Xuclà (Spain, ALDE).

4. The need for complementarity and avoiding duplication

19. Since the adoption of the Memorandum of Understanding between the Council of Europe and the European Union in 2007, there has been positive developments in co-operation between the Council of Europe and the European Union. The European Union has shown a growing interest and support to the ratification of key Council of Europe conventions (such as the Convention on Cybercrime (CETS No. 195), the Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the Convention on the Protection of Children against Sexual Exploitation of Children and Sexual Abuse (CETS No. 201) and the Convention against Trafficking in Human Beings (CETS No. 197). It has also enhanced its co-operation with the Venice Commission, the European Commission for the Efficiency of Justice (CEPEJ) and the Group of States against Corruption (GRECO), to which it is expected to adhere. It is also taking part in the negotiations concerning the modernisation of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS No. 108).

20. Despite these developments, there have been some regressive trends, too, like in the case of the revision of the Council of Europe Transfrontier Television Convention of 1998, which was blocked by the European Union after the entry into force of the Lisbon Treaty, due to the lack of competence on the side of member States in the area of negotiating international treaties on audiovisual services, which apparently now falls within the remit of the European Union. This issue, which is followed by my committee colleague, Mr James Clappison (United Kingdom, EDG), shows that the European Union's approach focused on the "internal market" might considerably differ from that of the human rights approach of the Council of Europe.

21. Before starting any further debate on a possible duplication of the Council of Europe's work by the European Union, it should be recalled once again that the Council of Europe is the reference point in matters of human rights, democracy and the rule of law in Europe; this has recently been reaffirmed by the Committee of Ministers' decision of 16 May 2013 adopted at its 123rd session, as well as in the Council of Europe Secretary General's report of 7 May 2013 on "Democracy, human rights and the rule of law in Europe: Strengthening the impact of the Council of Europe's activities". The latter underlines the importance of the Council of Europe as a mechanism for the protection, promotion and enforcement of human rights in Europe. It recalls that the key part of the system is the European Court of Human Rights, the unique international court allowing individual petitions against States and issuing legally binding judgments. But the overall Council of Europe legal space is a mutually-reinforcing system, composed of all Council of Europe conventions, bodies and programmes, including their monitoring mechanisms. As pointed out by the Secretary General, before the European Union accedes to the European Convention on Human Rights, the Council of Europe must serve as a guardian for the whole Europe. This excellent partnership with the European Union can be further expanded by respecting the "integrity of the two organisations and without introducing new parallel mechanisms".

5. Conclusion

22. The initiative of the European Union to set up a mechanism for monitoring the respect for the rule of law stems from its failure, to date, to adequately respond to pressing human rights problems within the European Union itself, despite the reinforced human rights legal framework under the Lisbon Treaty. The situation in

Hungary should not become a precedent for duplicating the work of the Council of Europe. The sole fact that the Assembly did not decide to open a formal monitoring procedure in respect of this country, at its previous part-session, does not mean that the Council of Europe lacks political will to tackle the issue of compliance with the rule of law of the constitutional changes in this or any other EU member State. The Council of Europe, and its Assembly, will continue to monitor the situation in Hungary, and the expert opinions given by the Venice Commission confirm the Organisation's primordial role in this field.

23. There is nothing wrong with the idea of strengthening the European Union's capacity to contribute to the protection of human rights, democracy and the rule of law, among its members and promoting higher regional standards in this respect. However, it is important to avoid the risk of duplication and developing comprehensive parallel protection mechanisms at the cost of European taxpayers. Reinventing existing norms and setting up parallel structures creates double standards and opportunities for "forum shopping", which leads to new dividing lines in Europe. Duplication of work also wastes limited budgetary resources needed for improving the protection of human rights and upholding the rule of law. The Assembly has already expressed its concerns in this respect in its previous texts concerning the role of the Fundamental Rights Agency and its findings on this subject remain valid, in the context of various proposals to strengthen the mandate of this Agency. The system of developing indicators, monitoring and developing recommendations already exists in the Council of Europe. Its monitoring bodies operate, principally, on the basis of international instruments which are legally and equally binding on all its member States, including those which are also EU member States. This monitoring forms the basis for non-politicised monitoring, assessment, advice and, when necessary, practical co-operation in remedying the problems. Furthermore, a comprehensive country-by-country mechanism to monitor respect for democracy, rule of law and human rights in all member States of the Council of Europe already exists within the Assembly: its Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) closely follows developments in those three fundamental areas in 14 member States and provides annual assessments on the remaining 33.

24. Therefore, any future EU mechanism should take into account the existing monitoring bodies in the Council of Europe, of which all EU-countries are members. Synergies between these bodies and the European Union should be better exploited and reinforced, before putting in place any new monitoring mechanism for EU member States. Moreover, any new monitoring mechanism on the rule of law, within the European Union, must not be given higher political priority than the expected accession of the European Union to the European Convention on Human Rights, which is necessary to ensure coherence of human rights protection standards in Europe. Since, the CJEU is now to give its opinion on the draft agreement on EU accession to the Convention, I can only appeal to all stakeholders to ensure that the accession process be finalised as soon as possible, for the benefit of all European citizens.