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Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Lord Richard BALFE, United Kingdom, European Conservatives Group

A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights thanks the rapporteur of the Committee on Rules of Procedure, Immunities and Institutional Affairs, Ms Petra De Sutter (Belgium, SOC), on her report, and supports by and large the proposed draft resolution and draft recommendation.

2. The Committee on Legal Affairs and Human Rights has already dealt with the issue of relations between the European Union and the Council of Europe. In the past ten years, it has adopted reports which led to the Parliamentary Assembly Resolution 2041 (2015) and Recommendation 2065 (2015) on European institutions and human rights in Europe,[2] Recommendation 2027 (2013) "European Union and Council of Europe human rights agendas: synergies not duplication",[3] and 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 Agency for Fundamental Rights,[4] as well as an Opinion on the report behind Resolution 1836 (2011) on the impact of the Lisbon Treaty on the Council of Europe.[5] The committee has welcomed the synergies developed between the European Union and Council of Europe bodies and the good co-operation with the European Union Fundamental Rights Agency (FRA). At the same time, it stressed that the expansion of the European Union's activities into areas covered by the statutory mandate of the Council of Europe and touching upon democracy, human rights and the rule of law created risks of overlap and unnecessary duplication of work.

3. The committee recalls that the 2007 Memorandum of Understanding between the Council of Europe and the European Union recognises the Council of Europe as the "benchmark for human rights, the rule of law and democracy" in Europe and its provisions should be taken into account by EU institutions when launching and implementing any initiative in this field. It notes that since March 2015, when Assembly Resolution 2041 (2015) was adopted, the European Union has taken several steps in order to reinforce its capacity to monitor respect for the rule of law by its member States. Therefore, the need to avoid duplication and ensure coherence and complementarity between the European Union and the Council of Europe in the fields of human rights, the rule of law and democracy in Europe has become even more of an issue.

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1. Reference to committee: Doc. 14317, Reference 4308 of 30 June 2017. Reporting committee: Committee on Rules of Procedure, Immunities and Institutional Affairs. See Doc. 14850. Opinion approved by the committee on 8 April 2019.
2. See Doc. 13714, report by the Committee on Legal Affairs and Human Rights (rapporteur: Mr Michael McNamara, Ireland, SOC).
3. See Doc. 13321, report by the Committee on Legal Affairs and Human Rights (rapporteur: Mr Michael McNamara, Ireland, SOC).
4. See Doc. 12272, report by the Committee on Legal Affairs and Human Rights (rapporteur: Mr Boris Cilevićs, Latvia, SOC).
5. See Doc. 12741, opinion of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD).

4. In the opinion of the committee, it is particularly important that Ms De Sutter's report has taken a critical perspective of the initiative taken by the European Parliament in its resolution of 25 of October 2016 "with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights". The report examines at length the possible impact of the proposed mechanism ("EU Pact on DRF") on the functioning of the Council of Europe and includes pertinent recommendations. Although the mechanism has not been put in place yet, due to lack of interinstitutional agreement, the Council of Europe as a whole and the Assembly in particular should follow closely any further developments concerning its possible establishment or the development of similar proposals. The committee therefore wishes to propose some amendments to further strengthen the draft resolution and draft recommendation. In particular, it wishes to refine certain terminology and to underline further the unique and long-standing role of the Council of Europe as a pan-European organisation tasked with the protection and promotion of human rights, the rule of law and democracy.

B. Proposed amendments

Amendment A (to the draft resolution)

At the end of paragraph 1, add the following sentence:

> *"Following a lack of action by the competent European Union institutions, the European Parliament, in a resolution of 14 November 2018 reiterated its call for establishing such a mechanism without delay".*

Amendment B (to the draft resolution)

In paragraph 4, third sentence, replace

> *"that this set of shared core values and principles is not interpreted independently either by the European Union or the Council of Europe"*

by

> *"ensuring that this set of shared core values and principles is interpreted in a coherent way".*

Amendment C (to the draft resolution)

In paragraph 6, first sentence, after "under the 2007 Memorandum of Understanding", add the following:

> *"the co-operation between both organisations will be based on "the principles of indivisibility and universality of human rights, respect for the standards set out in this field by the fundamental texts of the United Nations and the Council of Europe, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, and the preservation of the cohesion of the human rights protection system in Europe". Moreover,"*

Amendment D (to the draft resolution)

In paragraph 9, replace "various European Union rule of law monitoring and enforcement mechanisms have been established" by "some European Union rule of law monitoring mechanisms have been triggered and other initiatives aimed at monitoring respect for the rule of law have been taken".

Amendment E (to the draft resolution)

At the end of paragraph 12, add the following sentence:

> *"It recalls, in line with its previous recommendations, that unnecessary duplication of work in the field of human rights, the rule of law and democracy shall be avoided."*

Amendment F (to the draft resolution)

At the end of paragraph 13.1, replace "opinions and/or conclusions of the relevant Council of Europe advisory or monitoring bodies" by "recommendations, opinions and/or conclusions of other relevant Council of Europe bodies".

Amendment G (to the draft recommendation)

In paragraph 5, after "Council of Europe expert bodies" delete "on the basis of standards common to both organisations".

C. Explanatory memorandum by Lord Richard Balfe, rapporteur for opinion

1. I can only thank Ms De Sutter on her report, which deals with recent European Union initiatives aimed at establishing a mechanism to monitor respect for democracy, the rule of law and fundamental rights in its member States. The report examines in detail the initiative taken by the European Parliament in its resolution of 25 of October 2016 "with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights" and its possible impact on the functioning of the Council of Europe.

2. I should like, however, to propose a few amendments to the draft resolution and the draft recommendation, with a view to strengthening them. In particular, I would like to stress the Council of Europe's unique role as a pan-European organisation tasked with the protection and promotion of human rights, the rule of law and democracy and the need to avoid unnecessary duplication of tasks in this area.

3. The 2007 Memorandum of Understanding between the Council of Europe and the European Union recognises the Council of Europe as the "benchmark for human rights, the rule of law and democracy" in Europe. According to this agreement, the European Union should not be prevented from either providing more extensive protection in the field of human rights and fundamental freedoms or adopting more far-reaching rules concerning legal co-operation with a view to ensuring coherence with the relevant Council of Europe conventions.[6] The Memorandum of Understanding also contains detailed provisions concerning arrangements for co-operation between both organisations. All its provisions should be taken into account by European institutions when launching and implementing any initiative in this field.

4. The Assembly and its Committee on Legal Affairs and Human Rights have examined the issue of relations between the European Union and the Council of Europe many times. In particular, in its Resolution 2041 (2015) on European institutions and human rights in Europe, the Assembly reaffirmed that duplication of work should be avoided and that the European Convention on Human Rights (ETS No. 5) is the "cornerstone of the human rights protection system in Europe".[7] It also called on member States of the Council of Europe which are also member States of the European Union to exercise their influence in such a way as "to avoid any unnecessary duplication of work in the field of democracy, human rights and rule of law" and to re-open as rapidly as possible the negotiations on the accession of the European Union to the European Convention on Human Rights, to give high political priority to this issue.[8] The Assembly also welcomed the European Commission's proposal of 2014 on "A new European Union Framework to strengthen Rule of Law" and invited the European Union to make use of the Council of Europe's relevant expertise and to inform it of any subsequent developments. The report by Mr McNamara, on which Resolution 2041 (2015) was based, also took stock of the already existing "fragmented" tools such as the European Union Anti-Corruption Report, the EU Justice Scoreboard, the Co-operation and Verification Mechanism (for Bulgaria and Romania) and certain annual reports prepared by European institutions and agencies.[9]

5. However, since March 2015, many new initiatives have been taken at the European Union level to monitor respect for democracy, the rule of law and human rights by its member States, besides the above-mentioned resolution of October 2016 of the European Parliament. In December 2014, the EU Council conclusions had established an annual Rule of Law Dialogue with regular thematic discussions at the highest political level on the key values on which the European Union is based. Procedures on the basis of Article 7.1 of the Treaty on the European Union have been launched against Poland (by the European Commission) and Hungary (by the European Parliament). Infringement proceedings have also been launched against these countries before the Court of Justice of the European Union.[10] On 13 November 2018, the European Parliament adopted a Resolution on the rule of law in Romania expressing concern about the recently adopted Romanian criminal legislation which could potentially undermine judicial independence and the rule

6. Paragraphs 19 and 24 of the Memorandum of Understanding.
7. Resolution 2041 (2015), paragraph 2.
8. Ibid., paragraph 8.
9. See paragraphs 19-22 of the report, Doc. 13714.
10. Case C-619/18R, Commission v. Poland, concerning the new Polish Law on the Supreme Court and, concerning Hungary, infringement procedures on NGO Law and Higher Education Law, press releases of the European Commission of 4 October 2017 and 7 December 2017.

of law. On 15 November 2017, it also adopted a Resolution on rule of law in Malta and on 28 March 2019 – a Resolution on "Situation of rule of law and fight against corruption in the EU, specifically in Malta and Slovakia". In May 2018, the European Commission published a proposal to make European Union funds conditional on the sound functioning of the rule of law as a part of its Multiannual Financial Framework package 2021-2027.[11] Very recently, on 19 March 2019, Germany and Belgium presented to the General Affairs Council an initiative to set up a regular (annual) peer review mechanism on the rule of law.[12] Therefore, European institutions continue to launch various initiatives based on different paradigms in order to "discipline" European Union member States.

6. The Council of Europe has not been blind to threats to the rule of law in some member States of the European Union. In its Resolution 2188 (2017) "New threats to the rule of law in Council of Europe member States: selected examples", the Assembly expressed concern about developments in Bulgaria, Poland and Romania.[13] The Assembly's Committee on Legal Affairs and Human Rights is currently preparing reports on rule of law-related issues in Poland[14] and in Malta.[15] Moreover, in its Resolution 2187 (2017) on the Venice Commission's Rule of Law Checklist, the Assembly endorsed the latter document and invited the Council of Europe and the European Union to refer regularly to it.[16] Several times, the European Commission for Democracy through Law (Venice Commission) has delivered – often at the request of the Assembly – critical opinions on the developments concerning judicial and other issues related to the rule of law in Poland, Hungary, Romania, Malta and Bulgaria. These opinions have been used by the European Union in assessing compliance with rule of law standards by these countries.

7. Although the Council of Europe has nothing against higher standards and stronger protection in the area of human rights, the rule of law and democracy, any new initiative of the European Union in this field must be coherent with our Organisation's standards, as stated in the Memorandum of Understanding. Therefore, the Council of Europe, including the Assembly, should closely study such initiatives in order to ensure coherence with its standards.

1. Explanatory notes

1.1. Amendment A (to the draft resolution)

The implementation of the European Parliament's resolution of 25 October 2016 requires an interinstitutional agreement between the European Parliament, the European Commission and the Council of the European Union. As neither the European Commission nor the Council has responded to this proposal, in another resolution of 14 November 2018 on the "Need for a comprehensive Democracy, Rule of Law and Fundamental Rights mechanism", the European Parliament regretted that such an agreement had not been concluded and called again for "a comprehensive, permanent and objective EU mechanism for the protection of democracy, the rule of law and fundamental rights". It also stressed that such a mechanism "is more urgently needed now than ever before" (see also paragraph 87 of Ms De Sutter's report).

1.2. Amendment B (to the draft resolution)

According to the Memorandum of Understanding, the Council of Europe "will remain the benchmark for human rights, the rule of law and democracy in Europe" (paragraph 10). The current wording of the sentence in question in paragraph 4 of the draft resolution gives the impression that the Council of Europe, which has been set up to protect and promote these values, should not (sic!) interpret them independently, which if nothing else would preclude the European Court of Human Rights from exercising its role under the European Convention on Human Rights. Moreover, the Memorandum of Understanding often uses the term "coherent" (see in particular its paragraph 16 referring to "cohesion of the human rights protection system in Europe" and paragraph 24 referring to "ensuring coherence between Community and European Union law and the

11. COM(2018)321 final.
12. https://euobserver.com/political/144443.
13. See report by the Committee on Legal Affairs and Human Rights (rapporteur: Mr Bernd Fabritius, Germany, EPP/CD), Doc. 14405.
14. Motion for a resolution, "Judges in Poland and the Republic of Moldova must remain independent" (rapporteur: Mr Andrea Orlando, Italy, SOC), Doc. 14650.
15. Motion for a resolution, "Daphne Caruana Galizia's assassination and the rule of law in Malta and beyond: ensuring the whole truth emerges" (rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD), Doc. 14479.
16. Paragraph 6.4 of Resolution 2187 (2017).

standards of Council of Europe conventions" in the context of the rule of law and legal co-operation). Therefore, it would be better to speak about ensuring a "coherent" interpretation of the shared values and principles.

1.3. Amendment C (to the draft resolution)

It is important to add a reference to the wording of paragraph 16 of the Memorandum of Understanding between the Council of Europe and the European Union, as this provision puts emphasis on the indivisibility and universality of human rights, the need to respect the European Convention on Human Rights and preserve the cohesion of the human rights protection system in Europe.

1.4. Amendment D (to the draft resolution)

As indicated in paragraph 9 of the draft resolution, the measures taken by the European Union to ensure compliance with the rule of law by its member States were based on "different paradigms", differed in their nature and their coercive effects and were taken by different EU institutions. Those measures include, on one hand, more structured mechanisms (such as the Rule of Law Framework of the European Commission or the Co-operation and Verification Mechanism Reports on Romania and Bulgaria), and political actions such as resolutions of the European Parliament or discussions in the General Affairs Council.

1.5. Amendment E (to the draft resolution)

This amendment is aimed at underling the need to avoid unnecessary duplication of work between the European Union and the Council of Europe, as stressed, in particular, in the Assembly's Resolution 2041 (2015), Resolution 1756 (2010) and Recommendation 2027 (2013).

1.6. Amendment F (to the draft resolution)

When speaking about the implementation of the Council of Europe's standards, it is necessary to mention not only its opinions and conclusions, but also its recommendations. Moreover, the term "the relevant Council of Europe advisory or monitoring bodies" could be replaced by a broader term "other relevant Council of Europe bodies" to include explicitly bodies like the Commissioner for Human Rights or the Congress of Local and Regional Authorities of the Council of Europe.

1.7. Amendment G (to the draft recommendation)

The sentence in question refers to the assessments provided by various Council of Europe expert bodies and those bodies refer mainly to Council of Europe's standards (although they also refer to pertinent international standards), which are sometimes very detailed. Although the European Union shares the same values as the Council of Europe (see Article 2 of the Treaty on the European Union), it does not have the same tasks and expertise as the Council of Europe and therefore has relied on the latter's conclusions in assessing the rule of law situation in some of its member States (for example, Hungary and Poland).