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on the situation of fundamental rights in the European Union in 2012

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The situation of fundamental rights in the EU and the debate on the need for a new EU mechanism on fundamental rights, the rule of law, democracy and justice

The European Union is going through a period not only of economic crisis, but also of **democratic crisis**. The current confrontation between the EU and the Orban government in **Hungary**, as well as the criticism expressed by the Commission in relation to initiatives taken by new **Romanian** government in the summer of 2012, as well as systematic and persistent violations of certain fundamental rights across and in some **Member States**[1], have brought into light the **political difficulties and the lack of political will to activate the mechanisms available under the current treaties (for instance article 7 TEU)**, as well as the corresponding **need to create a new mechanism** to ensure and strengthen the respect, protection and promotion of the Union's values enshrined in article 2 TEU[2] and to address crisis situations in the EU and in its Member States. An important debate is developing on this issue, with the Commission, Council and Member States finally joining the Parliament and NGOs in it.

The **European Union** has progressively expanded its role in the field of fundamental rights, to ensure that these are respected while developing other policies, notably those related to the area of justice and home affairs, as well as by the new Member States that accede to the European Union through progressive enlargements. The development of the "Copenhagen criteria"[3], the inclusion of Articles 2 and 7 TEU in the Treaties, as well as the elaboration and entry into force of the Charter of Fundamental Rights, the obligation to accede to the European Convention of Human Rights and the recognition that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States constitute general principles of the Union's law"[4], are the pillars of the EU fundamental rights *acquis*. This *acquis* was based on the assumption that democracy, the rule of law and fundamental rights would be safeguarded in the Union without the need of a specific EU intervention. The Commission and the Council rested on, and "delegated" to, the Council of Europe and the ECtHR the task of sanctioning Member States violating fundamental rights.

The **European Parliament** has, on the contrary, always addressed issues related to the situation on fundamental rights and Article 2 TEU, both at the EU level *and* Member States level, and has called on EU institutions and Member States to address those issues and solve them. The EP has adopted a series of yearly reports on the situation of fundamental rights in the EU and it has also dealt with specific fundamental rights, such as media freedom[5]

[1] See, for instance, the document by the European Court of Human Rights: http://www.echr.coe.int/Documents/Overview_2011_ENG.pdf

[2] Article 2 TEU states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[3] The criteria for accession as defined at the European Council in Copenhagen in 1993 include "stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities", as well as "the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political… union".

[4] Article 6.3 TEU.

[5] EP resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU.

(including in Italy[6] and Hungary[7]), Roma rights (including addressing the situation in Italy[8] and France[9]), LGBT rights (including in Poland[10], Lithuania[11] and other Member States); it has examined in close detail the situation in Hungary; and it has held debates on the situation in relation to Article 2 issues in different Member States. The EP has notably raised the need to develop mechanisms to ensure Union values are respected, protected and promoted in the EU and in the Member States in its **last resolution on the situation of fundamental rights[12]**, where it specifically called for a more proactive Commission and Council policy on fundamental rights; the launch of a fundamental rights policy cycle; the development of a scoreboard on fundamental rights, democracy, the rule of law and justice; the creation of an early warning mechanism and of a freezing mechanism; the widening of the scope of the Commission report on the application of the Charter in order to provide a report on the situation of fundamental rights in the EU and its Member States; the creation of a mechanism to ensure that the ECtHR jurisprudence is applied by the Member States and the strengthening of the independence and of the powers of the Fundamental Rights Agency (FRA)[13].
The **Commission** progressively had to abandon its initial approach to fundamental rights, democracy and rule of law. Its initial annual reports on the application of the EU Charter of Fundamental Rights focused solely on the application of the Charter by EU institutions and by Member States when they apply EU law, on the basis of its interpretation of article 51 of the Charter[14] and consequently leaving aside the analysis and evaluation of the situation of fundamental rights in the Member States based on Article 2, 6 and 7 TEU[15]. It invited citizens raising issues related to violations of fundamental rights falling outside the Charter remit and "knocking at the wrong door" to address other institutions or bodies competent for the matter[16].

The Commission responded to EP criticism by highlighting the fact that the EU, and consequently also the Commission, is faced with the "**Copenhagen dilemma**", i.e. the fact that while candidate countries are required to adhere to democratic principles, rule of law and fundamental rights before joining the EU, after their entry there is no appropriate instrument

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[6] EP resolution of 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights).
[7] EP resolution of 10 March 2011 on media law in Hungary.
[8] EP resolution of 10 July 2008 on the census of the Roma on the basis of ethnicity in Italy.
[9] EP resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the European Union.
[10] EP resolution of 26 April 2007 on homophobia in Europe.
[11] EP resolutions of 19 January 2011 on the violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania and of 17 September 2009 on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information.
[12] EP resolution of 12 December 2012, on the situation of fundamental rights in the European Union (2010-2011).
[13] The EP is still waiting for the Commission written reply to the proposals contained in the EP resolution.
[14] Art 51 on the scope of the Charter states that "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".
[15] See the latest 2012 Commission report on the application of the EU Charter of Fundamental Rights, COM (2013) 271 final, http://ec.europa.eu/justice/fundamental-rights/files/2012_report_application_charter_en.pdf
[16] The EP invited the Commission to take into full consideration citizens' letters of concern on fundamental rights in relation to art. 2, 6 and 7 TEU, see report on fundamental rights approved in 2012, par. 50.

to address and redress violations, including in founding Member States or in Member States that joined the EU before the Copenhagen criteria were developed[17]. In relation to the EP proposal to enact a freezing mechanism to prevent Member States from adopting laws raising doubts about compatibility with EU law, the Commission replied that it would have needed a change in the Treaties, but in substance resorted to it when calling the Hungarian authorities not to adopt the 4th Amendment to the Constitution. The Commission finally had to address fundamental rights, democracy and rule of law violations by resorting to a series of instruments such as infringement proceedings[18], the temporary suspension of EU funds[19], the Cooperation and Verification Mechanism, political and technical dialogue and warnings[20], cooperation with the Council of Europe and other international institutions. It then launched a "justice scoreboard", unfortunately covering only civil justice; it stated, in relation to the new mechanism, that is to be seen more for the medium than the short term and referred to the need to change the Treaties[21]; it consequently announced that it might propose draft Treaty changes before the end of 2013 or beginning of 2014 to hold a debate during elections (including on Art. 7) and that consensus should be ensured before proposing them. The rapporteur believes that the Commission has a paramount role in proposing ways to strengthen the respect of fundamental rights in the EU both under the current Treaties and, if necessary, via Treaty changes: it shall seize such opportunity with courage.

Even the **Member States**, that had until now shielded themselves behind the subsidiarity principle to escape scrutiny and criticism on fundamental right coming from EU institutions, are now discussing in the **Council** the possibility to strengthen EU instruments to address violations of Union values. This debate was started on the basis of a **letter** written to the President of the Commission by the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands, raising the need to develop a new and more effective mechanism to safeguard fundamental values in the Member States[22], and by an initiative by the Irish Presidency in the informal JHA Council of January 2013 discussing the need to **counter intolerance, racism, anti-Semitism, xenophobia and homophobia**, as well as to set up a **mechanism** to better support the protection of fundamental rights and the application of the

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[17] See interventions of Commissioner Reding in the EP on 11 September 2012 http://www.parlament.gv.at/PAKT/EU/XXIV/EU/09/10/EU_91069/imfname_10374651.pdf and at the General Affairs Council of 22 April http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm . See speech of President Barroso on the State of the Union of 12 September 2012: "…A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy…these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments– not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty". http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm

[18] Infringement proceedings were launched against Hungary for instance.

[19] See Council Implementing Decision 2012/156/EU of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:078:0019:01:EN:HTML.

[20] Letters and press releases of the Commissioners responsible, of the President of the Commission, including a joint letter of President Barroso and the Secretary General of the Council of Europe Jagland on the 4th Amendment to the Constitution in Hungary.

[21] See speech 22 April 2013 at the General Affairs Council.

[22] see the letter of 6 March 2013 sent by 4 Foreign Affairs Ministers to the President of the Commission http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf

rule of law in the Member States. The Council recently underlined in its **conclusions** on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union that *"respecting the rule of law is a pre-requisite for the protection of fundamental rights"* and called the Commission *"to take forward in 2013 a process of inclusive dialogue, debate and engagement with all Member States, EU institutions as well as all relevant stakeholders" ("EU institutions and agencies; Member States and relevant institutions at national level, including judicial authorities, human rights institutions, equality bodies, ombudsmen and civil society; and relevant international institutions")* on the *"possible need for and possible shape of (collaborative and systematic) methods or initiatives to better safeguard fundamental values, in particular the rule of law and the fundamental rights of persons in the Union and to counter extreme forms of intolerance, such as racism, anti-Semitism, xenophobia and homophobia"*. Such dialogue would *"develop an agreed understanding of what any initiative in this area would entail, including of the problems to be addressed, as well as questions of methodology and indicators"*; *"make full use of existing mechanisms"; "focus on shared universal values"; "consider the full range of possible models, stressing the need for approaches that could be accepted by all Member States by consensus"; "any future initiative in this area that might be agreed would apply in a transparent manner, on the basis of evidence objectively compiled, compared and analysed and on the basis of equality of treatment as between all Member States"*[23].

The **FRA** has been working for a few years on the collection of objective, reliable and comparable data and on this basis provides assistance and expertise in the context of fundamental rights to the EU Institutions and Member States. Its experience in collecting data, analyzing comparative information and developing indicators could also be useful in the wider context of Article 2 TEU. Notably, the Agency organized an expert meeting on 7 June 2013 on the promotion of the rule of law in the EU focusing on appropriate operational indicators and on existing experiences in evaluation and 'measuring' the rule of law. Participants concluded that a regular and structured dialogue on the Article 2 TEU values would be a helpful tool to create a culture in which (non) compliance with the EU's founding values is discussed in a rational and objective manner[24].

Criticism has been raised by Member States when EU institutions have taken initiatives and decisions in relation to them to address violations of fundamental rights, democracy and the rule of law, such as the lack of EU competence, of objective and clear indicators and criteria for evaluation; double standards or political bias. Although this criticism is often politically motivated, it raises important issues – also raised by the EP in its reports - that should be addressed and solved. The aim should be that of ensuring that the EU policy on fundamental rights in the EU is **based on clear rules and mechanisms; objective indicators, data and evidence; transparent, fair and predictable; strong in protecting individual rights, democracy and the rule of law**.

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[23] see Council conclusions http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

[24] see http://fra.europa.eu/en/event/2013/fra-symposium-promoting-rule-law-eu. See also the Annual report for 2012 of the FRA and notably its focus section on "The European Union as a Community of values: safeguarding fundamental rights in times of crisis" at: http://fra.europa.eu/en/publication/2013/fundamental-rights-challenges-and-achievements-2012

The rapporteur believes that it is important for the EU to apply and implement all instruments currently provided by the Treaties and urgently adopt a "new mechanism" and a set of measures to ensure the respect, protection and promotion of the values enshrined in Art. 2 TEU and start a reflection on possible Treaty changes, if needed, where these have shown their limits[25].

[25] The LIBE committee, upon request of the ALDE group, has commissioned a study to be published after the summer on “the protection of fundamental rights, democracy and the rule of law in the EU: how to make full use and strengthen EU powers, with a view to a possible revision of the Treaties”, aimed at examining how the Treaty provisions have been used and implemented, which instruments could be developed (for instance on the model of the financial and budgetary supervision), address the Copenhagen dilemma, implement a scoreboard on fundamental rights, justice, democracy and the rile of law, also in the view of a possible revision of the Treaties.