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**The Proposal to Create the European Union Mechanism
to Monitor Democracy, the Rule of Law and Fundamental
Rights, and the Council of Europe Reaction**

Keywords: rule of law, democracy, fundamental rights, EU, Member States, Council of Europe

Słowa kluczowe: rządy prawa, demokracja, prawa podstawowe, UE, Państwa Członkowskie, Rada Europy

Abstract

The rule of law is one of the founding values of the EU, as indicated in Art. 2 TEU. This provision recognizes that the rule of law is a core value, inherent to liberal democracy, and one which characterized the Union and its Member States. Taking into account this context, as well as the deficiencies of the EU mechanism to enforce the rule of law within the Member States, European Parliament called on the Commission to establish a new tool to address rule of law backsliding in Member States. In October 2016, Parliament addressed recommendations to the Commission on the establishment of EU mechanism on democracy, the rule of law, and fundamental rights (EU pact for DRF) in the form of an international agreement. The new mechanism should integrate and complement the existing mechanism, should be evidence-based, objective, addressing the Member States and EU. The author analyzes this initiative and tries to answer why it was not fully realized. Additionally, he pres-

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ents a reaction to that initiative of the Council of Europe. There is no doubt, that realization of the EU Pact for DRF would influence the Council of Europe and weaken its role as a main European mechanism in the area of protection of democracy, rule of law, and human rights.

Streszczenie

Propozycja utworzenia mechanizmu Unii Europejskiej monitorującego demokrację, praworządność i prawa człowieka oraz reakcja Rady Europy

Rządy prawa są jedną z założycielskich wartości UE, jak to zostało określone w art. 2 Traktatu o Unii Europejskiej. Przepis ten uznaje, że rządy prawa są rdzeniem demokracji, który powinien charakteryzować Unię i jej Państwa Członkowskie. Biorąc to pod uwagę jak też definicje mechanizmu UE w zakresie wdrażania rządów prawa w państwach członkowskich, Parlament Europejski wezwał Komisję do utworzenia nowego instrumentu realizacji rządów prawa w państwach członkowskich. W październiku 2016 Parlament zalecił Komisji utworzenie mechanizmu UE dotyczącego demokracji, rządów prawa i praw podstawowych (EU pact DRF) w formie międzynarodowego porozumienia. Nowy mechanizm powinien integrować i uzupełniać istniejące mechanizmy, powinien bazować na dowodach oraz obiektywnie odnosić się do Państw Członkowskich i UE. Autor analizuje tę inicjatywę i próbuje odpowiedzieć na pytanie, dlaczego nie została w pełni zrealizowana. Dodatkowo prezentuje reakcje na nią Rady Europy. Nie ulega bowiem wątpliwości, że realizacja tego Paktu UE mogłaby mieć wpływ na Radę Europy i osłabiłaby jej rolę jako głównego europejskiego mechanizmu w obszarze ochrony demokracji, rządów prawa i praw człowieka.

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I. Introduction

The European Union has been traditionally perceived as a values-based power that has exerted a certain appeal to the world and a transformative influence on its neighbors. The power of its attraction derives from the fact that it is a unique model in history, constructed on common values, mutual interests, solidarity, and joint policies for economic develop-

ment and convergence, to preserve peace, stability, and welfare for all European peoples².

The rule of law is one of the founding values of the EU, as indicated in Art. 2 TEU. This provision recognizes that the rule of law is a core value, inherent to liberal democracy, and one which characterized the Union and its member states long before the formal establishment of the EU by the Maastricht Treaty. However, several member states, most notably Poland and Hungary, seem to have placed this value in jeopardy, leading EU institutions to disagree on how to combat this problem and its political consequences³. There were several signals of the crisis of rule of law in the EU Member States⁴. That creates an impulse for reinforcing rule of law oversight in the European Union⁵.

Taking into account this context, as well as the deficiencies of the EU mechanism to enforce the rule of law within the Member States, European Parliament called on the Commission to establish a new tool to address rule of law backsliding in Member States. In October 2016, Parliament addressed recommendations to the Commission on the establishment of EU mechanism on democracy, the rule of law, and fundamental rights (EU pact for DRF) in the form of an international agreement⁶.

This paper aims to analyze this initiative and find the answers to the question of why it was not yet fully realized. Additionally, I will present a reaction to these proposals by the Council of Europe. I would like to verify the hypothesis that the realization of this initiative might weaken the position of the Council of Europe as a main guardian of democracy, rule of law, and protection of human rights.

² M. Skordeli, *The European Union as a global power of values*, “European View” 2012, No. 2, p. 149.

³ K. Margaritis, *Strengthening the founding values of the EU: The potential role of the Fundamental Rights Agency*, “European View” 2019, No. 1, p. 97.

⁴ S. Braum, *The crisis of the European rule of law*, “New Journal of European Criminal Law” 2018, No. 4, p. 42.

⁵ O. Garner, *Reinforcing Rule of Law Oversight in the European Union*, “International Journal of Constitutional Law” 2017, No. 3, p. 866.

⁶ *Legislative Train Schedule. Area of Justice and Fundamental Rights*, <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights> (13.8.2019).

II. Genesis of a Proposal to Create a European Union Mechanism to Monitor Democracy, the Rule of Law and Fundamental Rights and its Evaluation

The European Parliament has initiated a Legislative Own-Initiative Report (L-INI) on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights. This L-INI was triggered by the European Parliament's Resolution of 10 June 2015 on the situation in Hungary⁷. In this Resolution, the European Parliament urged the European Commission to “carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis, involving an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level; instruct its Committee on Civil Liberties, Justice and Home Affairs to contribute to the development and elaboration of this proposal in the form of a legislative own-initiative report to be adopted by the end of 2015⁸. In December 2015, the European Parliament reiterated this call in another Resolution regarding the situation in Hungary. As stated in Art. 1 Treaty of the European Union (TEU), the Member States confer on the Union competences to attain the objectives they have in common. The adoption of legally binding norms based on the European treaties has given rise to mutually interdependent legal relations linking the EU and its Member States with each other⁹.

In October 2016, European Parliament addressed recommendations to the European Commission on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights (EU pact for DRF) in the form of an international agreement. The new mechanism should integrate and complement the existing mechanism, should be evidence-based, objec-

⁷ European Parliament, Resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8_TA-PROV(2015)0227, para. 12.

⁸ Ibidem. Cf. A. Di Gregorio, *Constitutional Courts and the Rule of Law in the New EU Member States*, “Review of East and Central European Law” 2019, No. 2, p. 223.

⁹ *An EU mechanism on democracy, the rule of law and fundamental rights*. Annex I – *An EU mechanism on democracy, the rule of law and fundamental rights*, European Parliament Research Service, Brussels 2016, p. 12; J. Marszałek-Kawa, D. Plecka (eds.), *Dictionary of Political Knowledge*, Toruń 2019.

tive, addressing the Member States and EU. A panel of independent experts would annually assess the state of DFF in the Member States, as well as develop country-specific draft recommendations. In consultation with the panel, the Commission will draw an annual Report on the state of democracy, rule of law, and fundamental rights in the Member States that would be published and discussed in an annual inter-parliamentary debate.

The European Commission formally replied to Parliament's proposal on 17 February 2017. It supported the EP's objective, welcoming the proposal for an inter-parliamentary dialogue on DRF between the EP and national parliaments. Yet, it was reserved toward suggestions for Treaty changes and questioned the need and the feasibility of an annual Report and a DRF policy cycle prepared by a committee of "experts", along with the need and added value of an inter-institutional agreement in this area¹⁰.

On the 14 November 2018, European Parliament adopted a resolution calling again on the Commission to propose the adoption of an inter-institutional agreement on the EU Pact for DRF and to consider linking its proposal for a regulation on the protection of the Union's budget in case of generalized deficiencies as regards rule of law in the Member States with that mechanism. After Parliament's calls, the Commission opened up a wide debate on the possible ways to reinforce the EU toolbox to enforce the rule of law within the Member States and on 17 July 2019 proposed to strengthen it through different mechanisms. It proposed to promote a rule of law culture within the EU through different measures and prevent rule of law backsliding in the Member States by deepening its monitoring compliance with the rule of law by the Member States through a Law Review Cycle¹¹.

Currently, the EU possesses one sole supervisory mechanism to uphold its values, in the form of Art. 7 TEU¹². Both scholars and European institutions have called for reforms; the latter's group of proposals most impor-

¹⁰ *Legislative Train Schedule. Area of Justice and Fundamental Rights*, <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights> (13.8.2019).

¹¹ *Ibidem*.

¹² L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo, H. Spanikova, *An EU mechanism on democracy, the rule of law and fundamental rights An EU mechanism on democracy, the rule of law and fundamental rights*, Brussels 2016, p. 8.

tantly include the Commission's New EU Framework to Strengthen the Rule of Law, commonly referred to as pre-Art. 7 procedure, currently being tested concerning Poland. The formulation of a pre-Art. 7 procedure is a milestone in a worrying trend of non-enforcement of European values to be witnessed for almost two decades. The Amsterdam Treaty introduced the Art. 7 sanction mechanism in 1999¹³, and soon the Nice Treaty added a preventive arm to it. Whereas there were good reasons for instigating the mechanism in the recent history of integration, instead of making use of the already diluted procedure of Art. 7(1), the Commission decided to water down the process even further by inserting a preventive-preventive process. Moreover, it is used selectively, thereby questioning the objectivity of the process and the equal treatment of Member States. Despite its weaknesses, the creation of the Commission's new EU Rule of Law Framework can be seen as an acknowledgment of the rule of law problem, and as a step in the right direction to overcome it. On a positive note, the ongoing rule of law debate shifted its focus from an Art. 7 TEU emergency-led context toward a discussion on shared European values and legal principles. Beyond supervision, EU values shall be promoted actively. Still, previous mechanisms and the EU Rule of Law Framework are crisis-driven and do not constitute a permanent and periodic monitoring and evaluation process of EU Member States' compliance with Art. 2 TEU legal principles. Neither do they go far enough in ensuring objective, independent, and regular scrutiny of EU Member States' rule of law obligations¹⁴.

EU Member State governments' adherence to foundational EU values cannot be taken for granted. Violations may happen in individual cases, or in a systemic way, which may go as far as overthrowing the rule of law. The impacts of the limitations of the existing EU mechanisms to promote and protect Art. 2 TEU values can be assessed in political, social, and economic terms. First, this can harm mutual trust among the Member States. If a Member State is taking actions threatening Art. 2 TEU values, which may affect their citi-

¹³ A. Verhoeven, *How Democratic Need European Union Members Be? Some Thoughts After Amsterdam*, "European Law Review" 1998, No. 3, p. 217.

¹⁴ P. Bárd, S. Carrera, E. Guild, E. Konachev, *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, "CEPS Paper in Liberty and Security in Europe" 2016, No. 91, p. 7.

zens living in this Member State and cross-border knock-on effects, and the EU mechanisms are unable to address this situation, other Member States, businesses and EU citizens may question the trustworthiness of that Member State and the EU system as a whole. This could undermine the legitimacy of the EU mechanisms to uphold Art. 2 TEU values. There is also a correlation between Art. 2 TEU values and the financial market, which is most visible during financial crises. Finally, the limited ability of EU mechanisms to sustain Art. 2 TEU values has an impact on fundamental rights. According to data from the European Court of Human Rights, the three fundamental rights more commonly violated in EU countries are the right to a fair trial, the right to timely proceedings, and the right to legal remedies. These are also fundamental rights intrinsically related to democracy and the rule of law since one of their underlying core principles is the right of access to justice, which entails the right to fair and timely proceedings¹⁵.

European Parliament legislative initiative reports drawn up based on the Art. 225 of the Treaty on the Functioning of the European Union are automatically accompanied by a European Added Value Assessment (EAVA). Such assessments are aimed at evaluating the potential impacts and identifying the advantages, of proposals made in legislative initiative reports. The root causes of this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law, and fundamental rights. These weaknesses could be overcome by the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an interinstitutional agreement (IIA). This IIA should lay down arrangements for (i) the development of an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States with country-specific recommendations assessing compliance with DRF, and (ii) a policy cycle for DRF, involving EU institutions and national parliaments, with country-specific recommendations aimed at monitoring and enforcing Member State compliance, including a DRF policy cycle within the institutions of the Union. This could be done at a relatively low cost, particularly if the right synergies are found with international organ-

¹⁵ *An EU mechanism on democracy, the rule of law and fundamental rights. Annex I – An EU mechanism on democracy, the rule of law and fundamental rights*, Brussels 2016, p. 5.

izations, whilst at the same time having significant benefits, notably fostering mutual trust and recognition, attracting more investment, and providing higher welfare standards¹⁶.

In 2014–2019, the EU has faced serious challenges related to the protection of fundamental rights within its territory, notably in connection to the Rule of Law and democracy in some EU Member States. Important legislative dossiers on procedural rights were approved (presumption of innocence, safeguards for children in criminal proceedings, legal aid). While the EP continued to report annually on the situation of fundamental rights in the EU and on traditional issues of interest (among which minorities, Roma, anti-Semitism, right-wing extremism, prisons, media freedom, as well as follow up activities on mass surveillance and CIA), it has also addressed new issues, such as protection of whistle-blowers (a Commission proposal was issued following the insistence of the EP), islamophobia, Afrophobia and fundamental rights of intersex persons¹⁷.

III. The Council of Europe Attitudes to Proposal to Establish a European Union Mechanism to Monitor Democracy, the Rule of Law and Fundamental Rights

The Parliamentary Assembly of the Council of Europe held resolution 2273 (2019) entitled Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights¹⁸. It held also recommendation Recommendation 2151 (2019) on this subject.

¹⁶ *An EU mechanism on democracy, the rule of law and fundamental rights*, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA\(2016\)579328](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)579328) (12.8.2019).

¹⁷ O. Marcozzi, *The protection of fundamental rights in the EU: European Parliament achievements during the 2014–2019 legislative term and challenges for the future*, Brussels 2019, p. 12.

¹⁸ Assembly debate on 9 April 2019 (13th Sitting) (see Doc. 14850, report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Ms Petra De Sutter; Doc. 14862, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Lord Richard Balfe; Doc. 14860, opinion of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteur: Mr Andrej Šircelj). *Text adopted by the Assembly on 9 April 2019 (13th Sitting)*.

The Parliamentary Assembly has recognized that such an initiative is legitimate and consistent from the European Union perspective, the European Parliament itself noting that the existing instruments implemented by both the European Commission and the European Council have limited scope. The Assembly has considered that the initiative of the European Parliament, which is still under discussion, requires serious reflection as the proposed mechanism makes specific reference to the Council of Europe framework¹⁹ and aims to create synergies between the two organizations. The proposed mechanism would, on account of its substance and scope, have a clear impact on the Council of Europe, its standard-setting *acquis*, and the implementing mechanisms of its conventions²⁰. The mechanism refers to the Council of Europe *acquis* and includes in its “legal basis” several Council of Europe conventions – in particular the European Convention on Human Rights²¹ and the European Social Charter (revised)²² – to which the European Union is not a party. Several Council of Europe bodies should be called upon to collaborate with the European Union under this mechanism: the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (GRECO), the Commissioner for Human Rights of the Council of Europe, the Congress of Local and Regional Authorities of the Council of Europe and the European Commission for the Efficiency of Justice (CEPEJ)²³.

The Assembly has recalled that the Council of Europe and the European Union rely on strong standards in the field of human rights, the rule of law, and democracy to achieve their respective institutional goals²⁴. Since the 2007 Memorandum of Understanding, the Council of Europe and the European Union have developed a strategic partnership based on these common values, which make synergy and convergence of action indispensable²⁵. The Assembly has noted that the Council of Europe acts as a partner of the Eu-

¹⁹ B. Wassenberg, *History of the Council of Europe*, Strasbourg 2013, p. 89.

²⁰ L. Pratchett, V. Lowndes, *Developing Democracy in Europe: An Analytical Summary of the Council of Europe*, Strasbourg 2004, p. 23.

²¹ ETS No. 5.

²² ETS No. 163.

²³ PACE Res. 2273(2019), § 2–3.

²⁴ J. Petaux, *L'Europe de la démocratie et des droits de l'homme: l'action du Conseil de l'Europe*, Strasbourg 2009.

²⁵ PACE Res. 2273(2019), § 4–5.

ropean Union, providing the basis for the European Union decision-making process in respect of countries which are also the Member States of the Council of Europe. The Council of Europe's input to current European Union rule of law initiatives, especially with the Venice Commission opinions, has already proven substantial²⁶.

The Assembly has recalled that since 1993 it has had a procedure for monitoring the obligations and commitments undertaken by the Member States upon their accession to the Council of Europe, the implementation of which is the responsibility of the Committee on the Honouring of Obligations and Commitments by the Member States of the Council of Europe (Monitoring Committee). This procedure allows for the examination of questions relating to the functioning of democratic institutions in the Member States. Lastly, it ensures compliance with the obligations assumed by member States which are not the subject of specific monitoring procedures through periodic review reports carried out on a country-by-country basis²⁷.

Besides, the European Parliament resolution on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law, and fundamental rights gives national parliaments an important role in the envisaged mechanism and calls for a reinforced interparliamentary dialogue between the European Parliament and national parliaments. Like the European Parliament, the Assembly is convinced that national parliaments are, upstream, well-positioned to identify shortcomings and frame indicators to measure compliance with the shared values. However, it also has considered that, downstream, the lack of information in national parliaments on recommendations made by the various European institutions in the context of rule of law compliance mechanisms is detrimental to the consolidation of the system of protection of human rights and the rule of law in Europe. The Assembly has considered that, as a pan-European forum for interparliamentary dialogue which adopted texts guide national governments and parliaments on the standards to be promoted in Europe, it could be the privileged place for regular interaction between the European Union institutions and the national parliamentary delegations

²⁶ Ibidem, § 6–7.

²⁷ Ibidem, § 8.

which sit in the Assembly. Thus, it stands ready to hold an annual parliamentary debate on the rule of law, which would provide a timely opportunity to bring European decision-makers and monitoring bodies closer to national parliaments²⁸.

Therefore, the Assembly has decided to invite the European Union to co-operate on establishing an annual parliamentary debate on the rule of law, using the Parliamentary Assembly platform to:

1. better inform national parliaments about the conclusions and recommendations of the various reports on Member States' compliance with the standards of human rights, the rule of law and democracy produced by the Council of Europe and the European Union, and by doing so to contribute to converting recommendations, advice, and conclusions into national compliance policies;
2. enable national parliaments to inform the European institutions of their priority issues;
3. help to create a common feeling that a country's situation is not unique and that the same problems are shared by others²⁹.

Finally, the Assembly has started the development of European Union rule of law mechanisms, ongoing initiatives and their implications for the Council of Europe deserve further analysis and reflection at the level of the Assembly itself concerning the potential impact on its own mode of operation in terms of compatibility with its procedure for monitoring the obligations and commitments entered into by the Member States³⁰.

IV. Final Comments

The initiative of the European Parliament to create a European Union mechanism to monitor democracy, the rule of law, and fundamental rights has an important meaning. Currently, the EU possesses one sole supervisory mechanism to uphold its values, in the form of Art. 7 TEU. It is a broad opinion that this mechanism is not enough to achieve the goal which was

²⁸ *Ibidem*, § 20–21.

²⁹ *Ibidem*, § 22.

³⁰ *Ibidem*.

formulated at the time of its introduction. The additional motivation to offer such a proposal coincided with the problem of execution of the rule of law principle in some EU members, e.g. in Hungary and Poland. Surely it influenced the expectations that some permanent procedure should be in place to deal with the realization of democracy, rule of law, and protection of fundamental rights in the Member States. Although the general reaction of the European Commission to Parliament's proposal was positive, the Commission has expressed a reservation dealing with a proposal of the Treaty changes and questioned the need and feasibility of an annual Report and DRF policy cycle prepared by the committee of experts, along with the need and added value of an inter-institutional agreement in this area. The dialogue between the Parliament and Commission is continued, including the considering linking of Parliament's proposal on the protection of the Union's budget in case of general deficiencies as regards the rule of law in the Member States. There is no doubt that the EU needs more effective instruments of execution of the democratic values included in Art. 2 TUE in the Member States.

The Council of Europe's reaction to the European Parliament's initiative was also positive however cautious. CoE's Parliamentary Assembly stressed several initiatives which this organization offers in this area, some of them with the cooperation with the European Union. PACE has suggested that achievements in this area, e.g. in the framework of CoE's monitoring procedure, should be useful in the process of implementation of the democracy, rule of law, and protection of human rights in the EU's Member States. The cautiousness of the CoE to the formula of EP's initiatives might be explained by the doubts in some CoE's circles whether the expansion of the EU in the area of fundamental rights would not diminish the leading role of the CoE in the area of democracy, rule of law and protection of human rights. Originally it was an exclusive area of CoE's competence. The picture has been changed after entering into force of the Charter of fundamental rights of the EU and establishment of the EU's Agency for Fundamental Rights. It might be argued that while the EU pact for DRF would be implemented, the Council of Europe's role in the area of democracy, rule of law, and protection of human rights might be weakening.

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