

Opinion of the European Economic and Social Committee on ‘The European control mechanism on the rule of law and fundamental rights’

(own-initiative opinion)

(2017/C 034/02)

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1. Observations and proposals of the EESC: an EU mechanism on the rule of law, democracy and fundamental rights

1.1. The European Union is not only a common market; it is a union of common values, as stated in Article 2 of the Treaty. Furthermore, it recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU. These values on which the European Union is founded form the basis of integration and are part of the European identity. As well as being criteria for accession, they must be respected in practice by the Member States, thereafter. It is therefore essential that the Treaty procedures be applied when these values come under attack. The EESC considers that the European institutions should take a proactive and preventive approach in their political activities, in order to anticipate and avoid problems.

1.2. Like many European civil society organisations, the EESC is alarmed by the deterioration in human rights, the populist and authoritarian drift that is spreading and by the risk this poses to the quality of democracy and the protection of fundamental rights, rights that are guaranteed by both the European Court of Human Rights and the Court of Justice of the European Union and constitute general principles of EU law⁽¹⁾.

1.3. The values referred to above are coming under attack all across Europe. Many civil society organisations are condemning the situation in several Member States and are hoping that the EESC will adopt new initiatives so that the EU institutions respond decisively. Not only is the European Union in danger but also citizens' confidence in national and European democratic institutions. The EESC considers the risk to be very serious and systemic in nature.

⁽¹⁾ Article 6 TEU.

1.4. The specific content of the principles and standards that derive from the rule of law may vary at national level, depending on each Member State's constitutional system. However, the case-law of the Court of Justice of the European Union and the European Court of Human Rights, as well as documents drawn up by the Council of Europe, in particular the Venice Commission, set out these principles and EU values. These principles include legality, which implies a transparent, responsible, democratic and pluralistic legislative process; the prohibition of arbitrariness on the part of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; equality before the law; and the protection of human rights, including those of persons belonging to minorities.

1.5. Both the Court of Justice of the European Union and the European Court of Human Rights have confirmed that these principles are not purely formal and procedural requirements, but instead constitute the means to ensure compliance with and respect for democracy and human rights. The rule of law is a constitutional principle with both procedural and substantive components.

1.6. Respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights: there can be no democracy and protection of fundamental rights without respect for the rule of law, and vice versa: fundamental rights are only effective if they are justiciable. Democracy is protected through the fundamental role of the judiciary, including the constitutional courts. It is worth adding that these are the **rights of people**, not of Member States or governments. Urgent priority should therefore be given to defending them.

1.7. In light of the work of the European Parliament's Committee on Constitutional Affairs and taking into account the Commission reports and the European Parliament's resolution of 27 February 2014 on the situation of fundamental rights in the European Union, the EESC believes that — in due course — Article 51 ⁽²⁾ of the EU's Charter of Fundamental Rights should be amended so as to extend its scope and make sure all provisions of the Charter are applicable in the Member States ⁽³⁾.

1.8. There is regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced if the EU signs up to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The EESC proposes that the Commission submit, in the first half of 2017, a proposal for the EU to sign up to this convention, which is specified in Article 6(2) of the Treaty.

1.9. The obligations incumbent on candidate countries under the Copenhagen criteria must continue to apply in the Member States after joining the EU by virtue of Article 2 of the Treaty and as such the EESC believes that all Member States should be assessed on a regular basis, in order to verify their continued compliance with the EU's fundamental values and to avoid the mutual trust breaking down.

1.10. The EESC believes that the EU institutions must strengthen the procedures and mechanisms to protect and defend democracy, the rule of law and fundamental rights in all Member States. In recent years and especially before 2014, we have noted with concern that the Commission, despite having launched infringement procedures in some cases, has failed to carry out its role as guardian of the Treaties effectively and has been unable to provide an adequate response to violations of the European principles and values that have occurred in several Member States.

1.11. The EESC encourages the Commission to take an active approach in protecting and defending the EU's values and principles, as set out in Article 2 TEU, in all Member States and use the existing 2014 framework to the fullest extent.

1.12. The EESC proposes the adoption of a shared approach by the three main EU institutions (Commission, Council and Parliament). Dialogue and cooperation between the institutions are essential for such an important issue. The EESC recommends that the Council supports the existing Commission framework by adopting a Council decision reinforcing the framework and supporting further strengthening of the rule of law.

⁽²⁾ Article 51 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

⁽³⁾ The Convention proposal and the EESC's opinions did not include the limitations decided by the European Council in Article 51.

1.13. Civil society organisations play a key role in the promotion of democratic values, in the proper functioning of the rule of law and the protection of fundamental rights. Given the shrinking democratic space and constraints NGOs face in the Member States, the positive grass-roots role played by NGOs is admirable. The Committee is working very actively with the social partners and NGOs on the protection of fundamental rights and the rights of minorities, refugees and immigrants.

1.14. The EESC, as a body representing European organised civil society, wishes to open a dialogue with the Council, the Commission and the Parliament, in order to improve governance and strengthen policy coordination between the EU institutions and the Member States, and to put in place an early warning system.

1.15. The EESC considers it vital to create a legally binding European mechanism, a framework actively involving the Commission, the Parliament and the Council and in which the EESC plays an important role representing civil society. This mechanism will complement the Commission's framework and the intergovernmental dialogue launched by the Council. This mechanism could be called the 'new Copenhagen mechanism' ⁽⁴⁾ and would be subject to democratic and judicial oversight ⁽⁵⁾.

That mechanism should, among other things, examine aspects such as legality, the hierarchy of norms, legal certainty, equality, non-discrimination, free access to justice and due process, prevention of abuse of the law and arbitrariness on the part of public authorities, separation of powers, respect and protection for political pluralism, minorities and social and sexual diversity, etc., respect for freedom of expression and of the press, with a view to identifying current shortcomings and calling for them to be remedied.

1.16. The Committee wishes the draft report being debated by the LIBE Committee of the European Parliament to be adopted and an interinstitutional agreement to be reached on the implementation of European Union Pact on democracy, the rule of law and fundamental rights. In general, the EESC supports the proposal as it contains the basis for the implementation of an interinstitutional agreement that is legally binding and that strengthens European governance and policy coordination between the EU institutions and the Member States. The EESC should be included in this pact, enabling a civil society debate at the EESC and the EESC should have a role in the proposed DRF semester.

1.17. The mechanism should be based on indicators that are themselves based on quantitative and qualitative data:

- indicators on the rule of law;
- indicators on the quality of democracy;
- indicators on the protection of fundamental rights.

1.18. The Committee stresses the importance of Titles I, II, III and IV of the Charter for drawing up indicators, taking into account that fundamental **economic, social and cultural rights** are 'indivisible' from civil and political rights.

1.19. It is important that both Member States and the institutions, bodies and agencies of the EU respect fundamental rights, including social rights, especially in times of crisis. This should also apply to relations and agreements with third countries, not only in terms of complying with these rights but also ensuring that they are enforced.

1.20. The mechanism requires the launch of a monitoring and evaluation system using transparent procedures. The FRA should explicitly be given the mandate to assist such a mechanism. The EESC supports the Parliament's proposal to create a group of independent experts ⁽⁶⁾ chaired by the Scientific Committee of the FRA.

⁽⁴⁾ As proposed by European Parliament in its Resolution of 27 January 2014 on the situation of fundamental rights in the EU (2012), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0173+0+DOC+XML+V0//EN>, Rapporteur: Louis Michel, 22 November, paragraph 9.

⁽⁵⁾ Carrera, S., E. Guild and N. Hernanz (2013), *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, Paperback, Brussels: Centre for European Policy Studies.

⁽⁶⁾ Appointed by the Member States, ALLEA, ENNHRI, Venice Commission, CEPEJ, UN, OECD.

1.21. The Committee proposes that it form part of this group. It also proposes that the experts appointed by the respective governments are the ombudsmen of each Member State.

1.22. On the basis of the indicators and using transparent procedures, the group of experts will review and assess the situation in each Member State. Here, the EESC can contribute by organising missions to the Member States to review the situation in cooperation with local civil society and draw up reports.

1.23. The EESC supports the implementation of the DRF semester. Based on the experts' reports, each year the Commission will draw up country-specific reports, including recommendations; the Parliament will hold an interparliamentary debate and will draw up a resolution; the Council will hold the annual dialogue and will adopt conclusions. The mechanism must function in the context of a new annual policy cycle with the aim of ensuring a common and coherent approach in the EU.

1.24. The Committee would like to participate in the preparation of the interinstitutional agreement, and might consider setting up a permanent group to organise hearings with civil society and draft opinions and reports in this regard.

1.25. As part of the DRF semester, in cooperation with civil society organisations it could organise an annual forum to review the situation of democracy, the rule of law and fundamental rights, and could draw up proposals and recommendations to be forwarded to the Commission, the Council and the Parliament. The Committee could also cooperate with the other institutions in the drafting of impact assessments.

2. The Treaty and related issues

2.1. The last few years have highlighted the lack of appropriate mechanisms to protect the values set out in Article 2 of the Treaty on European Union (TEU) which 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'.

2.2. The Union is founded on these values, which include respect for democracy, the rule of law and the protection of human rights. The EU has the opportunity to verify compliance with these values in the run-up to the State's accession to the EU under what are known as the 'Copenhagen criteria' or 'accession criteria'⁽⁷⁾. Membership requires that the applicant country ensures the stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities.

2.3. However, there is no similar mechanism applicable after Member States' accession. The lack of a mechanism for monitoring democracy, the rule of law and fundamental rights has been referred to as the 'Copenhagen dilemma'.

2.4. The proper functioning of the EU is based on 'mutual trust' between the European institutions and Member States, as well as between the Member States themselves; trust that the laws and policy decisions adopted respect the same principles in respect of the rule of law, democracy and fundamental rights. This creates a level playing-field between Member States in respect of the free movement of persons, goods, services and capital. It also allows governments to cooperate in matters of justice and home affairs, including criminal law, asylum and immigration.

2.5. The European Union was created to ensure peace and prosperity across its Member States and improve the wellbeing of its peoples; it depends not only on the existence of free trade but also on the protection of the EU's fundamental values. These fundamental values ensure that EU citizens can live free from oppression and intolerance with democratically elected and responsible governments that act in accordance with the rule of law.

2.6. In recent years, political and legislative decisions taken in various Member States have given rise to debates and disputes with the European institutions and with other Member States and the 'mutual trust' has been broken. In many cases, due regard has not been shown for the rules of democracy, the rule of law and fundamental rights, and the European Union has not been able to provide an adequate response.

(7) Conclusions of the Copenhagen European Council, 21-22 June 1993.

2.7. The EESC notes with great alarm that in various Member States legislation is being adopted and policies implemented that suggest a serious deterioration in the quality of democracy: violation of human rights, especially those of minorities; lack of independence of the judiciary and constitutional courts; restrictions on the separation of powers; limitations on the freedom of the press, freedom of opinion, freedom of assembly, limitations on freedom of association, freedom of information, collective consultation and bargaining, and limitations on other fundamental civil and social rights. On several occasions, the European Union has been confronted by crises in some Member States due to specific issues relating to the rule of law, and the Commission has dealt with these events by exerting political pressure and opening infringement procedures.

2.8. To date, no use has been made of the preventive and penalty-based mechanisms contained in Article 7 TEU, which is the only article in the Treaties for dealing with breaches of democracy, the rule of law and fundamental rights in areas outside EU legislative competence. There are two approaches, one preventive and one penalty-based. However, in practice these have never been used due to the political impact and the strict requirements governing their implementation: only in case of a 'clear risk' of a 'serious and persistent breach'.

2.9. The Commission and the Parliament can intervene in the preventive phase. In the second stage, the Council may sanction the Member State by suspending certain rights, including the voting rights of its representatives in the Council.

2.10. However, the Council enjoys a wide margin of discretion in applying this as it does not have specific and transparent criteria for activating the procedure, for the indicators it will use or what the evaluation procedures will be. The European Parliament, the European Commission and the European Court of Justice (ECJ) have a very limited mandate in these situations⁽⁸⁾; similarly there is no provision made for consulting the EESC.

3. The actions of the European institutions

3.1. The **European Commission** adopted a Communication on 'A new EU Framework to strengthen the Rule of Law' (COM(2014) 158) in March 2014. The framework will be activated in cases where Member States are taking measures or are tolerating situations which are systematic and are likely to adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law. This would include issues relating to their constitutional structures, the separation of powers, the independence or impartiality of the judiciary, or their system of judicial control, including constitutional justice.

3.2. The Commission's framework aims to address threats to the rule of law in Member States before the conditions for activating the mechanisms set out in Article 7 TEU would be met. It is the responsibility of the Commission and is designed to bridge a gap. It is not an alternative to but a mechanism that precedes and complements the Article 7 mechanisms. In cases where there is clear evidence of the existence of a systemic threat to the rule of law in a Member State, this framework would facilitate a structured dialogue between the European Commission and the Member State. The process of the exchange would entail three main stages: a Commission opinion, a Commission recommendation and a follow-up to the recommendation. The Commission may consult experts when carrying out its evaluation⁽⁹⁾.

3.3. The Committee welcomes the Framework to strengthen the rule of law adopted by the European Commission. However, this framework presents a set of limitations.

3.3.1. The evaluation does not provide for periodical comparative analyses of the problems and disputes produced by the Member States in relation to democracy, the rule of law and fundamental rights. By definition, the framework can only be activated when the problem has become 'systemic', which is a high threshold. A 'systemic' threat can occur when the judiciary is no longer able to make sure that the government acts within the limits of the law, which is already rather late in the game.

⁽⁸⁾ Whereas in EU law the protection of human rights has a mechanism enabling individuals to defend their rights, Article 7 is a general legal and political mechanism that is expressly excluded from the jurisdiction of the Court of Justice.

⁽⁹⁾ The FRA (Fundamental Rights Agency); the Network of the Presidents of the Supreme Courts of the European Union; the Council of Europe (Venice Commission); the Association of the Councils of State and Supreme Administrative Jurisdictions and the European Network of Councils for the Judiciary.

3.3.2. The way in which the Commission analyses the information must be transparent with specific indicators or objective procedures; it must also establish protocols for consulting civil society and the EESC.

3.3.3. The framework does not include any specific role for the European Parliament although the parliament is launching its own political initiatives in this regard.

3.3.4. Nor does it provide for any model for closer interinstitutional cooperation.

3.4. The EESC is concerned about the lack of follow-up in the **Council** to the framework to strengthen the rule of law.

3.4.1. At its meeting of 16 December 2014, the General Affairs Council adopted Conclusions on the role of the Council in ensuring respect for the rule of law. The Council undertook to establish an **annual dialogue** between Member States, to take place in the General Affairs Council, and to be prepared by Coreper. The Luxembourg Presidency launched this dialogue in November 2015, and it is intended to cover various specific topics which have not been made public: governments were asked to speak on any aspect of the rule of law that they wanted and to give one example of where they were doing well and one example of a challenge. The result was a series of monologues, rather than a dialogue. States did not engage with each other by providing support, help or criticism, no recommendations were issued or received and there was no commitment to take follow up steps to improve on the challenges identified. At the end of 2016, under the Slovak Presidency, the Council will carry out an evaluation of the experience.

3.4.2. The Council's Conclusions did not take into account or refer to the Commission's rule of law framework. The Conclusions do not provide a clear picture of the precise role that the Commission, the Parliament and the EESC will play in this dialogue.

3.5. The Juncker Commission has identified the rule of law as one of its priorities and has appointed Mr Timmermans vice-president responsible for the rule of law and fundamental rights. It is not known, however, whether the Commission will develop criteria and indicators for implementing the rule of law framework.

3.6. The Commission has, for the first time, activated this framework by opening a procedure in the case of Poland for infringing EU rules, taking into consideration a critical evaluation of the situation by the Venice Commission, a body of the Council of Europe⁽¹⁰⁾.

3.7. The LIBE Committee of the **European Parliament** is currently debating a draft own-initiative report⁽¹¹⁾ on 'Recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights' (2015/2254 (INL) — Rapporteur: Sophia in 't Veld), which among other issues 'requests the Commission to submit, by the end of 2016, on the basis of Article 295 TFEU, a proposal for the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an **interinstitutional agreement** laying down arrangements facilitating the cooperation of institutions of the Union and its Member States in the framework of Article 7 TEU, integrating, aligning and complementing existing mechanisms, following the detailed recommendations set out in the Annex thereto'.

3.7.1. The annex contains the **DRAFT INTERINSTITUTIONAL AGREEMENT: EUROPEAN UNION PACT ON DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS** which must be agreed between the Parliament, the Council and the Commission.

3.7.2. The pact includes a scoreboard, an annual interparliamentary debate, and arrangements for remedying possible risks and breaches and for the activation of the preventative or corrective arms of Article 7.

⁽¹⁰⁾ Opinion on amendments to the act of 25 June 2015 on the constitutional tribunal of Poland, Venice Commission, 11 March 2016.

⁽¹¹⁾ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-576.988+01+DOC+PDF+V0//EN>

3.7.3. The Parliament proposes launching an interinstitutional democracy, rule of law and fundamental rights (DRF) **semester**, to include the Commission framework, the Council's annual dialogue and the interparliamentary debate. The European semester shall be assisted by a secretariat and a group of experts, chaired by the chairperson of the Scientific Committee of the FRA, who will to draw up indicators and assess the situation in the Member States and the recommendations.

3.7.4. The DRF **policy cycle** will include the annual reports of the Commission, the Council and the Parliament, and an interinstitutional working group on impact assessments will be set up.

Brussels, 19 October 2016.

The President
of the European Economic and Social Committee
Georges DASSIS
