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HUMAN RIGHTS AND THE EUROPEAN UNION: TOWARDS A MORE COHERENT APPROACH

1. INTRODUCTION

One of the themes hotly discussed among international and European lawyers is the human rights accountability of international organizations.[1] This topic provokes analysis in several subfields as actions of an organization could be confronted with the ideal (lack) of human rights protection. Such a tension arises especially with international economic organizations, whose goal is, first of all, wealth maximization.

Human rights are a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human. Human rights norms create a relationship between individual (and very occasionally collective) right holders and other entities (usually States) that have obligations.[2]

The aim of this contribution is to analyze the importance of human rights in the European Union, both from internal and from external perspectives. When juxtaposed, those two may shed some additional light on the coherency of the Union's action in the respective field.

The reason for dealing with such a topic is two-fold. It has been repeatedly said that the European integration has promoted first of all economic goals, while leaving human rights and policies in a secondary position. The tension between the latter and market freedoms within the European Union can therefore be noticed. Another interesting issue is the distribution of regulatory competences between the supranational and the national levels. The process of European integration, lead-

[1] Reference, instead of many, may be made to O. De Schutter, *Human rights and the rise of international organizations: The logic of sliding scales in the law of international responsibility*, [in:] J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp 2010, pp. 51 ff.

[2] H.-P. Schmitz, K. Sikkink, *International human rights*, [in:] W. Carlsnaes, T. Risse, B. Simmons (eds.), *Handbook of International Relations*, London 2002, p. 517.

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ing to the establishment of the European Union is a result of restraining national sovereignty. In the similar vein the rationale of human rights, yet in their present form, also constitutes a serious constraint to sovereignty.[3]

Before turning to analysis, some terminological questions need clarification. The term 'human rights' appears parallel to the term 'fundamental rights,' although the latter dominates in the judgments of the European Union's courts and the majority of internal documents.[4] The reason is that they may be enjoyed by, and the respective protection is granted not only to human beings but also to legal persons. However, most authors use both terms interchangeably with the justification that fundamental rights respected by the European Union originate from the European Convention for the Protection of Human Rights and Fundamental Freedoms and common constitutional traditions of the Member States.[5] These traditions are strongly influenced by the international human rights treaties. Therefore, there are no reasons for the aforementioned distinction.[6] Of course, distinguishing between human and fundamental rights could serve a kind of an ordering function, but its necessity may be questioned. The advocates of fundamental rights as a separate category stress that fundamental rights do not include all human rights and, on the other hand, refer also to some other economic and social issues.[7] But numerous international human rights instruments refer to different, not always unanimous, scopes of protection. Given the aim of the paper, which is to contrast the internal and external "fundamental/human rights approaches" of the Union, and paying due regard to the above-mentioned reasons, the two terms are used interchangeably here.

2. FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

The idea of protection of fundamental rights in the European Union (EU) is not new. Despite the primarily economic character of the European integration, the issue was present already at its early stages. However, in the 1950s, when the original three European Community Treaties were signed, they contained no provisions concerning the protection of human rights in the conduct of Community affairs. Theoretically, all these rights should be protected by the European Conven-

[3] More on the relation between sovereingty and human rights: S.D. Krasner, *Sovereingty: Organised Hypocrisy*, Princeton 1999, Chapter 3.

[4] See, inter alia, D. Kornobis-Romanowska, *Europejska Konwencja Praw Człowieka w systemie prawa Wspólnot Europejskich*, Warszawa 2001, pp. 36 ff.

[5] See, e.g., S. Besson, *The European Union and human rights: Towards a post-national human rights institution?*, "Human Rights Law Review" 6 (2006), pp. 324 ff.

[6] C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, vol. 1, Warszawa 2000, pp. 439 ff.; P. Alston, M. Bustelo, J. Heenan (eds.), *The EU and Human Rights*, Oxford 1999.

[7] J. Sozański, *Prawa zasadnicze a prawa człowieka we wspólnotowym systemie prawnym*, Warszawa and Poznań 2003, pp. 30 ff.

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tion on Human Rights, since all Member States had already been the signatories of the Convention. Moreover, it was concluded that their constitutional courts would care for such rights.

Much has changed since those times. Fundamental rights have become even more important. Particular role in this field has since then been played by the EU Court of Justice. Attempts to enhance the protection of human rights have also been made by the political institutions of the Community.

In 1976, the Commission submitted a report to the European Parliament in which it expressed the belief that the best level of protection would be provided by the European Court through its doctrine of general principles of law, the flexibility of which would ensure that the law kept pace with the changing needs.[8]

The European Parliament, the Council and the European Commission in the Joint Declaration of 5 April 1977 stressed the prime importance they attached to the protection of fundamental rights and undertook to respect them in the exercise of their powers and in pursuance of the aims of the European Communities.[9]

The same three institutions adopted a Joint Declaration against Racism and Xenophobia in 1986.[10] Three years later, the European Parliament adopted its own Declaration of Fundamental Rights and Freedoms, which spelt out in detail the rights which the Parliament thought should be protected.[11] These were important steps possibly delivering inspiration but, nonetheless, deprived of a legally binding character.

The tenet of fundamental rights has been present in judgments of the European Court of Justice since 1969. That year, the judicial organ of the European Communities (EC) used the term 'fundamental rights' for the first time.[12] It has not, however, been defined what should be understood as such. The Single European Act (1986)[13] was the first legally binding document whose preamble used that phrase. The matter gained further legal importance with the adoption in Maastricht of the Treaty on European Union (1992)[14] and then its modifications made by means of the Treaty of Amsterdam (1997)[15] and the Treaty of Nice (2001).[16]

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[8] *The protection of fundamental rights in the European Community*, EC Bulletin, Supp. 5/76, quoted after T.C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 4th edition, Oxford 1998, p. 139.

[9] Joint Declaration of 5 April 1977 by the European Parliament, the Council and the European Commission on the protection of fundamental rights, OJ C 103 1977, p. 1.

[10] Joint Declaration of the European Parliament, the Council and the Commission against Racism and Xenophobia, 11 June 1986, OJ 1986, C 158/1.

[11] OJ 1989, C 120/51; EC Bull. 4/1989. More T.C. Hartley, op. cit., p. 140.

[12] Case 29/69, *Stauder v. City of Ulm*, ECR 1969, pp. 419 ff.

[13] OJ 1987, L 169.

[14] OJ 1992, C 191.

[15] OJ 1997, C 340.

[16] OJ 2001, C 80.

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Finally, the Charter of Fundamental Rights of the European Union (2000)[17] and eventually the Reforming Treaty which replaced the Constitution for Europe, prepared by the Convention shed special light on that issue.

The Amsterdam Treaty marked an important step on the way to the recognition of the fundamental rights. Article 6(1) of the then Treaty on European Union affirmed the European Union's commitment to human rights and fundamental freedoms.[18] Because of its crucial importance it is to be quoted here: "The Union is based on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

With the entry into force of the Lisbon Treaty, the aforementioned provision was redrafted and now much of its content is to be found in Art. 2 of the TEU, which concerns the axiological basis of the organization. Accordingly,

> 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.

As stipulated in Art. 3 TEU, it is the aim of the Union to promote those values. In addition, the Union shall "combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."[19]

A. THE EU AND THE EUROPEAN CONVENTION

The Lisbon Treaty introduces a remarkable revolution for the EU's relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the old Art. 6(2) TEU (no longer in force),

> The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

This provision used to provide a flexible guidance for accommodating fundamental rights within the EU legal order. Now, after the entry into force of the Reforming Treaty, the amended Art. 6 refers to fundamental rights in a comprehensive manner. The new Art. 6 para. 3 of the TEU rephrases:

> [f]undamental 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, shall constitute general principles of the Union's law.

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[17] OJ 2000, C 364.

[18] The consolidated versions of the Treaty establishing the European Communities and the Treaty on European Union: OJ 2002, C 325.

[19] TEU, Art. 3 (3), para. 2.

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In its Art. 6, the Reforming Treaty has also repeated the solution introduced by the Treaty establishing the Constitution of Europe on the accession of the EU to the European Convention.[20] Such a step has been discussed for decades.[21] In a report published in 1979, the Commission proposed that the Community should formally adhere to the European Convention on Human Rights and Fundamental Freedoms.[22] This proposal was renewed in 1990. Nevertheless, the ECJ, in the Opinion 2/94, stated that the Community had no competence to accede to the European Convention.[23] To achieve that goal an amendment in the constitutional treaties of the EC/EU would be needed. Moreover, several problems arise with the concurrent jurisdiction of the ECJ and the European Court of Human Rights. These two judicial bodies could, from a certain perspective, be seen as rivals.

The ECJ's argument did not seem obvious and the issue of accession by the Community/Union to the European Convention has since then constantly attracted the attention of the European institutions. Especially the European Parliament strongly supported the accession.[24] The external control mechanism would provide better protection of human rights. Through the accession to the ECHR the conflicts between the judgments of both courts could be avoided. The counterarguments, however, are also of great importance. If the European Court of Human Rights monitored the ECJ, the latter could not retain its position as the supreme judge, responsible for the interpretation and application of the Union law. It could be also harmful to the European integration if it was controlled by the ECHR judges originating from states other than the EU members that would not appreciate the peculiarity of such an organization.[25]

Article 6 para. 2 of the amended TEU stipulates: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." The drafters of the said provision were careful enough to again repeat, after the respective Constitutional Treaty provision, that such accession should not affect the Union's competences as defined in the Treaties.[26] The necessary content of the respective agreement was specified by Protocol No. 8.[27] A provision was accordingly requested for preserving the specific characteristics of the Union and

[20] See respectively Art. I-9 of the Constitutional Treaty.

[21] D. Kornobis-Romanowska, op. cit., pp. 77 ff.

[22] EC Bull., Supp. 2/79.

[23] Opinion 2/94, ECR 1996, p. I-01759.

[24] E.g. The European Parliament resolution on respect for human rights in the EU in 1994. Bulletin EU 9-1996, OJ C 319 of 1996.

[25] K. Wójtowicz, *Ochrona praw człowieka w Unii Europejskiej*, [in:] B. Banaszak et al., *Ochrona praw człowieka*, Kraków 2003, pp. 206–207.

[26] TEU, Art. 6 (2) *in fine*; cf. Constitution for Europe, Art. I-9 (2).

[27] Protocol (No. 8) relating to Article 6 (2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

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Union law.[28] The Member States also agreed that the agreement should not affect the exclusive jurisdiction of the Court of Justice of the EU.[29]

In the attached declaration, the Conference agreed that the EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law.[30] In this connection, the Conference underlined "the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights" and advised to reinforce such a dialogue when the Union accedes to that Convention.[31]

B. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

One month after the entry into force of the Treaty of Amsterdam, the Cologne European Council of 3–4 June 1999 decided that a Charter of Fundamental Rights of the European Union should be drawn up. The decision to create the Union Charter of Fundamental Rights of a genuine character was undertaken in order to provide evidence against the legitimacy and credibility crisis of the EU.[32]

The Charter was solemnly proclaimed before the Nice European Council by the European Parliament, the Commission and the Council in December 2000.[33] The question of its legal status and a possible integration into the Treaties was postponed to be decided ultimately by the Intergovernmental Conference in 2004. The latter was done by the Laeken European Council of December 2001, when the decision to establish Convention on the Future of Europe was announced.[34] But even in the interim period, its meaning for the protection of fundamental rights must not, despite some objections, be underestimated. Having no binding force, it dealt with the matter in a wider context.

The final chapter of the Charter contains several horizontal clauses, which play a significant role as regards the Charter's legal character. While the Charter applies mainly to the EU and its institutions, it is addressed also to the Member States "when implementing Union law," and it declares that no new power or task for the EU is created by its provisions. The respect for the principle of subsidiarity as well as distribution of competences should be provided. Articles 52 and 53 promote harmony between the provisions of already existing legal acts and the

[28] In that regard, Art. 1 of the said Protocol explicitly refers to two matters: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

[29] Protocol No. 8, Art. 3.

[30] 2. Declaration on Article 6 (2) of the Treaty on European Union.

[31] Ibid.

[32] Presidency Conclusions, Cologne European Council 3 and 4 June 1999, Annex IV.

[33] OJ 2000, C 364.

[34] Presidency Conclusions, European Council Meeting in Laeken. 14 and 15 December 2001.

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Charter. They include international law agreements to which the Union or all the Member States are party as well as their constitutional provisions. Special concern has been devoted to the European Convention without preventing the EU from developing more extensive protection than is provided for under the Convention.

In the Draft of the Constitution for Europe the Charter of Fundamental Rights was included as its integral Part II. Even at the times when the legal status of the Charter remained unresolved, it would be invoked in the institutional practice of the Commission, Parliament, Ombudsman, Court of First Instance, Advocates General and others.

With the entry into force of the Lisbon Treaty, the question was eventually resolved. Article 6(1) of the amended TEU expressly stipulates that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." Furthermore, the said provision gives some clarification as for its interpretation. Accordingly, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.[35] Moreover, the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.[36]

The practical importance of the protection that stems from the Charter has been restricted by the reluctance of States to apply it universally.[37] Suffice it here to mention the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.[38] Another example, yet of lesser legal importance, would be the Czech position.[39] Rather than to restrain in the strict sense the application of the Charter in the respective states, the adopted solutions point at the sensitivity and political importance that are connected with the application of fundamental rights.

[35] TEU, Art. 6, para 1 *in fine*. The attached declaration (No. 1) concerning the Charter of Fundamental Rights of the European Union confirmed that: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties."

[36] TEU, Art. 6, para 1 *in fine*.

[37] On the importance of the Charter see in particular F. Jasiński, *Charter of fundamental rights: Structure, scope of regulation and present practical meaning*, [in:] J. Barcz (ed.), *Fundamental Rights Protection in the European Union*, Warszawa 2009, pp. 50 ff.

[38] This issue attracted attention extensively, see the splendid summary by A. Wyrozumska, *Incorporation of the Charter of Fundamental Rights into the EU law: Status of the Charter, scope of its binding force and application, interpretation problems and the Polish position*, [in:] J. Barcz (ed.), op. cit., pp. 89 ff.

[39] The Czech delegation made the Declaration (No. 53) with the content similar to the Polish-British Protocol.

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C. INTERNAL SANCTIONS

One must quote here Article 7 of the EU Treaty, re-formulated by the Nice Treaty, which provides that in case of a serious and persistent breach of the principles mentioned in Article 3 the Council may suspend certain of a Member State's Treaty rights.

There has been so far only one attempt to make use of the provisions of Art. 7 TUE. It was not successful. In early October 1999 Jörg Haider's right-wing populist *Freiheitliche Partei Őesterreichs* (FPŐ) won a major electoral victory in Austria. The coalition formed by the FPŐ and the center-right *Őesterreichische Volkspartei* (ŐVP) in February 2000 led to protests all over Europe as a result of which the Presidency of the European Council of Ministers decided in favor of the so-called 'bilateral sanctions' of EU Member States against the Austrian government. Eventually, these sanctions were withdrawn in September 2000 when a commission of three: Martti Ahtisaari, Jochen Frowein and Marcelino Oreja judged the situation in Austria in line with the founding values expressed in the EU Treaties.[40]

3. HUMAN RIGHTS AND THE EXTERNAL RELATIONS OF THE EUROPEAN UNION

Human rights are referred to in various treaty provisions on external relations of the EU. One may begin with Art. 3 of the TEU, which requests the Union to "uphold and promote its values and interests and contribute to the protection of its citizens."[41] Furthermore, the EU shall contribute to "the protection of human rights, in particular the rights of the child."[42] Those general provisions are then detailed by the articles dealing particularly with EU external action and the Common Foreign and Security Policy.[43] The very first provision of Title V of the TEU explicitly identifies human rights among the founding principles:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[44]

According to Art. 21 para. 2 (b), the Union is to define and pursue common policies and actions, and to work for a high degree of cooperation in all fields of

[40] Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja adopted in Paris on 8 September 2000, www.virtual-institute.de/de/Bericht-EU/report.pdf (accessed on: 11 January 2012).

[41] TEU, Art. 3 para. 5.

[42] Ibid.

[43] TEU, Arts. 21 ff.

[44] TEU, Art . 21 para. 1 [emphasis mine — B.K.].

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international relations, in order to consolidate and support democracy, the rule of law, human rights and the principles of international law.

Moreover, the observance of human rights is an essential part of the European Security Strategy, which identifies the threats facing the Union and defines its strategic objectives.[45]

Assessing the human rights' role is complex. Several issues need further explanation. First of all, protection of human rights serves as a condition for EU enlargement. In addition, their importance is to be noticed as for the cooperation with other states or entities, especially through the conclusion of international agreements under Art. 218 TFEU (former Art. 300 TEC).

A. HUMAN RIGHTS AS AN ACCESSION CRITERION

Whereas the original Art. 237 of the Treaty establishing the European Economic Community accorded all European states the right to apply for membership,[46] subsequent EC declarations and legal acts as well as the EC practice have established several more precise prerequisites for a successful application. First, the EU requires its members to be democracies that respect the rule of law and human rights. Second, new members must conform to the Union principle of an open-market economy with free competition. However, this principle offers members a lot of leeway with regard to the degree of state involvement and intervention in the economy and does not specify any necessary levels of economic development or capacities. Finally, new members must accept the entire *acquis communautaire*, i.e. the entire body of EU law, as well as the *acquis politique* (mainly from the Common Foreign and Security Policy).[47]

Article 237 conditioned membership exclusively to the "European condition" of an applicant country. However, the concept of "European" was never understood merely in a geographical sense, but in a normative sense.[48]

The conditions for membership have clearly been evolving since the Community's beginnings with the basic condition as it was set out in the Rome Treaty. During the Cold War eligibility was not such a troublesome issue, as membership for states outside the Western half of the continent was unthinkable. Other West European countries were either not interested and/or were not democratic. The

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[45] The Strategy clearly notes: "Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order" (*A Secure Europe in a Better World*, European Security Strategy, Brussels, 12 December 2003, p. 10).

[46] "Any European state may apply to become a member of the Community."

[47] F. Schimmelfennig, *The community trap: Liberal norms, rhetorical action, and the eastern enlargement of the European Union*, "International Organization" 55, no. 1, pp. 59–60.

[48] A.J. Menéndez, *Exporting Rights: The Charter of Fundamental Rights, Membership and Foreign Policy of the European Union*, ARENA Working Paper 18/02, p. 8.

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first enlargement of the Community, to Great Britain, Ireland and Denmark, did not take place on the basis of explicit membership criteria.

It was not until the mid-1970s that membership conditions became a matter of concern, because of the unfolding events in Southern Europe. In April 1978, the European Council declared that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership in the European Communities." This was a clear signal to Greece, Portugal and Spain that they could become Community members if they proceeded with democratisation. Specific membership conditions for the three countries were not spelt out, but certainly included genuine free elections, the right balance of party strength (pro-democracy parties in the ascendance), and a reasonably stable government. The Commission's opinions on the three applications, however, only briefly mentioned the transition to democracy.[49] Much more attention was paid to consideration of the applicant's economic and administrative capacities, and implications of enlargement for the Community. Nonetheless, the importance of democracy as a basis for membership at this stage of the Community's history was an important signal that it was not just an economic integration project. Instead, deeper values linked the Member States. This interpretation may be reinforced if one bears in mind that Portugal and Spain asked to open membership negotiations in the early 1960s, and that their candidatures were not taken seriously because they did not have democratic governments.[50]

The general prerequisites were reaffirmed with regard to Eastern enlargement. The European Council in Copenhagen explicitly established the accession of Central and Eastern European states as an EU objective in June 1993, provided that they have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" and "the existence of a functioning market economy" as well as the ability to adopt the *acquis*.

Since Copenhagen, more general statements of the membership conditions have been made. The Amsterdam Treaty formalized the political conditions of membership. According to the Art. 49 TUE, any European state that respects the principles set out in Article 2 TEU may apply to become a member of the Union. Once again, it is worth repeating that respect for human rights belongs to these principles.

All membership applications must be judged by the Commission in terms of the extent to which an applicant State meets the Copenhagen conditions. The emphasis on respect for human rights and democratic principles has been important. A couple of examples of this can be cited here.

[49] Commission's opinions: *Opinion on Greek Application for Membership*, EC Bulletin 2/76; *Opinion on Portuguese Application for Membership*, EC Bulletin 5/78; *Opinion on Spain's Application for Membership*, EC Bulletin 9/78.

[50] H. Sjursen, K.E. Smith, *Justifying EU Foreign Policy. The Logics Underpinning EU Enlargement*, ARENA Working Paper 01-1.

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In 1994 and 1995, Romania appeared to have been heading towards more nationalistic and racist politics, as extremist parties gained power. The EU indicated that these developments would not help Romania's application for membership, and from mid-1995 the Romanian government — prompted by President Ion Ilescu — changed its course: over the following year, the ruling Social Democrats broke with extremist parties and an agreement with Hungary was negotiated. A new reformist government took office in November 1996, and relations with the EU improved significantly. This was not enough, however, for the Commission and the European Council to include Romania in the first round of membership negotiations, because Romania did not meet the conditions regarding economic readiness and acceptance of the *acquis*. Even more pressure was put on Slovakia during the period of the Meciar government — the EU delivered demarches and issued numerous warnings that Slovakia must meet democratic norms before it could join the EU. In 1997, the Commission and European Council agreed that Slovakia should not be included in the first round of membership negotiations, primarily on the basis of political criteria.[51] Another example could be the struggle to surrender General Gotovina to the International Criminal Tribunal for the former Yugoslavia as a prerequisite for EU talks to Croatia.

B. CONDITIONALITY IN AID PROGRAMMES AND TRADE AGREEMENTS

The European Union has developed a practice of including human rights aspects in its international agreements, unilateral trade preferences schemes (via 'special incentives schemes' or 'conditionality requirements') and technical or financial assistance programmes ('human rights clauses' and 'the European Initiative for democracy and protection of human rights'). A perfect illustration is the 1989 Phare Regulation, the main instrument for technical assistance to Central and Eastern European Countries.[52] The matter gained further development in Tacis Programme.[53] A similar approach was given as regards the MEDA Regulation on financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean Partnership.[54] In 2007, the latter was replaced by a European Neighborhood and Partnership Instrument.[55]

The possibility to suspend the partnership should be analyzed in close relation to the suspension of membership, laid down in Art. 7 TEU. Here, respectively,

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[51] Ibid.; see also K.E. Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe*, London 1998, pp. 141 ff.

[52] Council Regulation No. 3906/89 of 18 December 1989, OJ 1989, L 375 as amended by Regulation No. 753/96, OJ 1996, L 103, p. 5.

[53] Council Regulation No. 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the new independent States and Mongolia, OJ 1996, L 165, p. 1.

[54] OJ 1996, L 189, p. 1.

[55] Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ 2006, L 310. See in particular its Art. 28, para. 2.

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the possibility of making use of such measure is also low, restricted only to grave cases. However, such was the problem of Belarus under Lukashenko. In 1996, after the constitutional crisis, all bilateral Tacis assistance was suspended, but the Council left some freedom for the future Community assistance to Belarus if this was directly geared towards promoting human rights, freedom of the media and, more generally, the democratization process. Indeed, such was the purpose of further Council Decision on a Tacis Civil Society Development Programme for Belarus.[56]

The basis for the development cooperation is Part Five, Title III, Chapter 1 of the Treaty on the Functioning of the EU. Here also human rights play a vital role. According to Art. 208 TFEU, "Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action." In the similar vein, the former Art. 177 TEC demanded that Community policy in that area should contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms. One may be thus tempted to level some criticism on the lack of express reference to human rights. Be it as it may, a repetition of what has been included within general provisions does not seem to be necessary. In that sense, the amendment brought about by the Lisbon Treaty would not have a very detrimental effect.

The same objective should be fulfilled by the economic, financial and technical cooperation with third countries other than developing (formerly Art. 181a TEC, now Art. 212 TFEU). Here again the explicit reference to human rights was abandoned.

A human rights clause does not transform the basic nature of the agreements which are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation agreements, and expressly allows for and regulates suspension in case of non-compliance with these values. This approach seems to be confirmed by the ECJ in *Portugal v. Council*, where the Court observed that an important function of the human rights clause could be to secure the right to suspend or terminate an agreement if the third state had not respected human rights.[57]

Apart from international agreements, human rights may be linked to autonomous acts of secondary Community legislation as exemplified by the Community's unilateral scheme of generalized tariff preferences (the GSP) in respect of certain industrial and agricultural products originating in developing countries. It

[56] Council Decision 98/1, OJ 1998, L 1; see B. Brandtner, A. Rosas, *Human rights and the external relations of the European Community: An analysis of doctrine and practice*, "European Journal of International Law" 9 (1998), p. 482.

[57] Case C- 268/94, *Portugal v. Council*, ECR 1996, I-6177, para. 27.; B. Brandtner, A. Rosas, op. cit., p. 474.

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contains the most extensive set of actions related to third countries' respect for or neglect of fundamental labour standards.[58]

C. SANCTIONS

Beside shaming in the public policy, the EU has also used harder power in the form of sanctions. These were deployed on several occasions. After the imposition of martial law in Poland in December 1981 the statement of European Political Community (EPC) was adopted condemning the violations of the most elementary human rights and noting that the Member States would examine their commercial relations with the Soviet Union in the light of events in Poland.[59] The Council announced that all Member States, except Greece, were in favour of reduction in the Community's imports from the Soviet Union. The Council subsequently adopted Regulation 596/82[60] which reduced import quotas for 60 types of Soviet products.[61]

Another example could be the sanctions against South Africa in 1985–86. In 1989, an arms embargo and economic and diplomatic sanctions were declared against China. Diplomatic, but not economic sanctions were directed at Nigeria in 1993 and also in 1995 after the execution of Ken Saro-Wiwa.[62]

Generally, states are often reluctant to raise human rights issues for fear of disrupting good diplomatic relations. Collective actions through the CFSP, however, have a "shield" effect which can reduce the costs traditionally associated with human rights. As the European Union gains authority as a political actor on global stage, third states are increasingly keen to maintain a friendly dialogue with the Union and are anxious to avoid economic sanctions, which are a far more punitive weapon when imposed by the Community than by a single Member State. Moreover, any state contemplating retaliation in response to criticism of its human rights record is evidently far less likely to retaliate against the Union than against a single Member State.[63] There are, however, some exceptions, as e.g. the French refusal to support the condemnation of China is concerned.

4. CONCLUDING REMARKS

The relation between the European Union and the protection of fundamental rights is of a complicated nature. The rhetoric of human rights may not, neverthe-

[58] B. Brandtner, A. Rosas, op. cit., p. 477.

[59] Bulletin 12/1981, at para. 1.4.2.

[60] OJ 1982, L 72.

[61] T. King, *Human rights in European foreign policy: Success or failure for post-modern diplomacy?*, "European Journal of International Law" 10, no. 2, p. 322.

[62] J.H. Matlary, *Human Rights*, ARENA Working Paper 19/03, p. 5.

[63] T. King, op. cit., p. 336.

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less, be underestimated. The challenge for the Union is to build on its achievements and respond to the demands of its citizens, so that it can ensure a realistic protection of human rights within its legal order. Despite being uttered 23 years ago, the words of the former President of the Commission, Jacques Delors, are still valid:

> Although economic success is vital, it will not be enough to create a large frontier-free market nor an economic social area. It is for us […] to put some flash on the Community bones and, dare I suggest, give it a little more soul.[64]

The human rights policies of the European Union are beset by a paradox. As proven above, the EU is a strong defender of human rights in both its internal and external affairs. On the other hand, however, it lacks a comprehensive or a coherent policy at either level. The Lisbon Treaty brought about some important achievements.

There may still be some doubts whether the EU institutions guarantee the rights, and also whether they have legitimacy.

The EU has been paying great attention to human rights which form a large part of EU identity as a global actor. The adoption of the Union's instrument for the protection surely improved the Union's credibility on the international stage. Yet, reaching further economic goals needs to be accompanied by a more complex protection of the entities involved. The non-economic factors of EU activity as international organizations become more and more important and even inevitable. A further debate about the goals of European integration, notably the balance between efficiency and other values, is therefore required.

PRAWA CZŁOWIEKA A UNIA EUROPEJSKA: W STRONĘ BARDZIEJ SPÓJNEGO PODEJŚCIA

Streszczenie

Integracji europejskiej nie można już redukować do procesów gospodarczych. Wzrasta znaczenie aspektów pozaekonomicznych. Unia Europejska nie posiada całkowicie wspólnej polityki praw człowieka. Gdyby starać się przedstawić UE jako organizację praw człowieka, to należy stwierdzić, iż znajduje się ona we wstępnej dopiero fazie rozwoju. Prawa człowieka ugruntowały swoją pozycję jako podstawowe wartości integracji zarówno w prawie, jak i praktyce organów unijnych. Przedstawiona analiza wyraźnie wskazuje na rosnące znaczenie praw człowieka w stosunkach zewnętrznych Unii Europejskiej.

[64] Statement on "The Broad Lines of Commission Policy", 17 January 1989, to the European Parliament, Agence Europe No. 1542/1543, 26 January 1989, p. 1, quoted after: A. Clapham, *Human Rights and the European Community: A Critical Overview*, Baden Baden 1991, p. 104.

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Ochronę praw człowieka można traktować wręcz jako część międzynarodowej tożsamości Unii, co widać zwłaszcza przy analizie stosunków traktatowych. Klauzula praw człowieka jest potężnym narzędziem, ale jeszcze większą siłę oddziaływania ma oferowanie stowarzyszenia i członkostwa w Unii. Zastosowano tu mechanizm warunkujący przyznanie określonego statusu przestrzeganiem praw człowieka. Tę samą konstrukcję wykorzystuje się przy przyznawaniu pomocy rozwojowej. W połączeniu z mechanizmem sankcyjnym wyłania się z tego zróżnicowany obraz roli praw człowieka w polityce Unii Europejskiej.

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