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The case of Hungary

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HUMAN RIGHTS ENFORCEABILITY UNDER THE EUROPEAN UNION'S REFORM TREATY AS AN INCENTIVE FOR MEMBER STATES: THE CASE OF HUNGARY

Introduction

After the Second World War the general consensus was that an effective system of human rights was needed. Many global developments designed to preserve human rights followed, such as the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966),the International Covenant on Economic, Social and Cultural Rights (1966), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984), and the Convention on the Rights of the Child (1990). In Africa the African Charter on Human and People's Rights and in Europe the 1948 European Convention on Human Rights have been established. However, most of these conventions do not have the same contextual background ideas, nor do they look after the same interests.

In Europe, during the famous Congress of Europe in The Hague in 1948, a Resolution was adopted urging the establishment of a Charter of Human Rights. The proposals were far reaching: not only a legal framework, but also the institutions of a Commission and a Court of Justice for human rights with adequate authority and competencies should be set up. It is to this Convention of Human Rights that the current Article 6 of the European Union Treaty refers when human rights issues are at stake. All European Member States are bound to this Convention by their European Union membership. However, western and eastern European countries have different backgrounds in relation to applying human rights. This is part of their history after World War II. The East European Countries that became part of the European Union in 2004 had accepted the so-called Copenhagen accession criteria that, apart from economic criteria, consist of requirements concerning the rule of law and human rights. Claimants of human rights under EU law can request a ruling under the Court of Human Rights in Strasbourg, but also - if the principal economic case deals with human rights as well - under the Court of Justice of the EU in Luxembourg.

In December 2007 a Reform Treaty was agreed upon by the Member States, documented that the European Union will become part of the European Convention of Human Rights. As such the European Union will be placed in the same position as members of the Convention. This article in the Reform Treaty describes the background of the human rights system in Western and Eastern European countries. It seeks to finds answers to the question whether the European human right system offers enough protection by looking at examples of violations of human rights in Hungary. It tries to find solutions that guarantee human rights protection for the individuals of the European Union Member States.

Human Rights under the Convention of Human Rights in Europe

Background of the Convention of Human Rights.

Until the end of World War II, human rights were not acknowledged as basic rights for individuals. The United Nations (UN) has taken responsibility for setting standards and creating international instruments to monitor regimes on their human rights duties. The UN Charter provided

the basis for the acceptance and applicability of human rights in the world. This Charter makes a distinction between fundamental freedoms without distinction as to sex, religion, language or religion, and economical and social rights. These rights strive to a higher standard of living and conditions of economic and social progress and development. The Charter explicitly places in its Article 56 the responsibility of the Member States in cases of violations of these provisions.[1] Under the Resolution of 15 March 2006, the Human Rights Council of the UN was established as a replacement of the former Commission of Human Rights of the UN. One of the explicitly new purposes of this Council is a periodic review of the human rights performance of all Member States, based on 'reliable and objective information in a manner that ensures universality of coverage and equal treatment with respect to all States'.[2] This purpose is a necessary new development because the UN treaty structure was, as Nowak states, considered as a 'product of Cold War, which only allowed for the lowest common denominator between the East, West and South.' The two UN treaties, the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), made a clear division between Western and Eastern European countries concerning priority of human rights: the Western European countries stressed the importance of civil and political rights as a precondition for economic, social and cultural rights; the Eastern European countries main concern was the latter category. Moreover, socialist countries considered a monitoring system as undue interference with their domestic situation. These facts underlie the weakness of the UN's system for monitoring the two international human rights treaties of 1966. Additional factors were the optional reporting system from Member States to the UN Commission and the lack of the Commission's competence to give binding judgements.[3] Based on the performance of the weak UN human rights system it will be evident that we cannot expect Eastern European countries to have a well-developed civil and political rights system unless, at a regional level, a monitoring system with greater influence is in place.

At regional level, the European Convention of Human Rights was adopted on 4 November 1950 by the Council of Europe as a response to the atrocious events of World War II.[4] By 1955 all original members of the European Community except France had ratified the European Convention on Human Rights.[5] After the French Ratification the Court of Justice of the EC started to refer to the European Convention on Human Rights 'as an example of the member state's commitment to fundamental rights'.[6] The Convention consisted of a list of substantive rights and the establishment of two institutions, a Commission and a European Court of Human Rights. In 1994 the Human Rights institutions were changed by Protocol 11, which was responsible for the creation of better supervisory mechanisms. This was considered

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[1] R. Gropas, 'Is Human Rights Foreign Policy Possible? The case of the European Union'. http://www.ant-sakkoulas.gr/en/book.php?id=8664.

[2] GA Res. 60/251, A/RES/60/251, para 5 (e).

[3] M. Nowak, 'The Need for a World Court of Human Rights', *Human Rights Law Review* 2007 7 (1), p. 252.

[4] European Convention of Human Rights, 4 November 1950, entered into force September 3, 1953.

[5] The French ratified the treaty in 1974.

[6] Nigel Foster, *Foster on EU law* (Oxford UP, 2006, p. 98) states that encouragement also came from the Joint Declaration by Community Institutions on Fundamental Rights of April 5, 1977.

necessary because of the entry into the EC of Member States from the East European countries, and because of the pressing need to streamline the procedures dealing with the huge number of complaints received by the Commission.

The new European Court of Human Rights (ECHR) handles both the admissibility and the applicable rights. Protocol 11 also introduced two important legal rights: the obligatory right for the individuals to submit applications to the Court and the mandatory jurisdiction of the Court.[7] The Court of Justice was charged with seeking to secure friendly settlements of the cases and was authorized with binding final judgements.

On legal questions relating to interpretations of the ECHR, Member States are allowed to ask questions of the Court (Art. 47 ECHR). The Court answers these in a reasoned opinion.[8]

Since there is no legal obligation to insert the text of the Convention into domestic laws, the implementation of the Convention has become a matter of legal technique. However, States are obliged 'to ensure that their domestic legislation is compatible with the Convention and, if need to be, to make any necessary adjustments to this end'.[9] According to Article 1, States are liable for violations of the Convention. For instance, this is the case when laws are incompatible with the Convention or if public authorities act against the ECHR. It is not clear whether States can be responsible for violations of the Convention committed by individuals.[10] The terms of the individual articles of the Convention in relation to the rights guaranteed can say something about the precise extent to which a State may be liable for the conduct of an individual person.[11]

Rights under the Convention of Human Rights.

The rights that the Convention confers upon the citizens of the contracting States deal with obligations of the State. The duties of the State are of a different character. The duties that correlate to human rights can be divided in different categories: the first category refers to certain limits of state power and are known as 'freedoms from' the State which the State has to guarantee. Non-intervention of the State is the main characteristic of these rights. These rights are called political and civil rights. The second group of human rights deals with economic, social and cultural rights. They are referred to as 'freedoms' but in fact they require State involvement and active State action. Contrary to the first group of rights this group cannot exist without the intervention of the State. The State fulfills certain obligations regarding these rights which include the right to education, social welfare, economic equality, and cultural heritage.

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[7] Article 34 of the Protocol entitles any person, NGO or group of individuals claiming to be the victim of a violation to bring the case directly before the Court without restrictions.

[8] See Clare Ovey & Robin White, *Jacobs & White: The European Convention on Human Rights* (Oxford UP, 2002): 9-10. There is a strict framing of the conditions of advisory opinion. That is why this procedure has not been used yet. On the contrary the advisory opinion procedure under the Inter-American Convention on Human Rights has proved to be fruitful.

[9] See case 214/56, De Becker versus Belgium, 9 June 1958.

[10] This concerns the difficult item of 'third party applicability'. See E.A.Alkema, 'The third party applicability or 'Drittwirkung' of the European Convention on Human Rights' in E. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda* (Köln, 1988), p. 33-45.

[11] There is case law on this item. See Ovey & White, p. 19 where different cases are being mentioned.

A third group of rights involves 'new' rights such as a right to development, the right to a fair and just international order and to a healthy environment.[12]

The traditional civic and political rights have been supported by jurisprudence from the European Court of Human Rights in the Western European countries. The most important rights of the first type can be found in section I of the Convention which contains a list of articles relating to rights and freedoms. Articles 2, 3, 4 and 6 are compulsory. Article 2 provides the right to life. The greatest number of the Court's judgements is given based on this article.[13] Article 3 prohibits torture or inhumane or degrading treatment or punishment. This prohibition has an absolute character[14] and makes the State responsible for any failure.[15] Another basic article is Article 4 which prohibits slavery and forced labour. The object of Article 6 is to guarantee liberty of the person, and in particular to provide guarantees against arbitrary arrest or detention. Articles 8 - 11 consist of two parts. The first paragraph of each article sets out a right. The right is then qualified in the second paragraph of the article by listing limitations. Firstly, we consider the limitations on the rights[16] of Articles 8 - 11. Implicit in the limitations is the intervention of the authorities to protect rights under certain prescribed conditions. Where a State seeks to rely on a limitation to protect one of these rights, there may be a breach to a personal individual right. The Court follows a three-part examination to find out whether this breach exists. Firstly it determines whether the interference is in accordance with, or prescribed by law; secondly it looks to see whether the aim of the limitation is legitimate in the specific circumstances; and finally it asks whether the restriction is necessary in a democratic society. Central to this determination is 'the proportionality of the interference in securing the legitimate aim'(Jacobs & White, o.c., 201). Any interference of the authorities with the rights of Articles 8-11 has to be in accordance 'with the law' or 'prescribed by law' (art. 9.2, 10.2 and 11.2). This reference means that the interference with the Convention rights has to have a basis in national law. The formulation in the national law should be foreseeable. This means that a citizen can foresee what consequences the law will have in certain circumstances. The law does not have to be statutory. For instance, the law that interferes with a political or civic right can consist of the rules of a Veterinary Surgeons'Council[17] that should be formulated precisely enough to make clear the rights of the citizen.

Democratic rights are described in Articles 10 and 11 of the Convention. Article 10 guarantees freedom of speech. Article 11 covers the right to freedom of peaceful assembly and

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[12] A. Cassesse, *International law in a divided world*, (1986) Oxford : Clarendon, p. 310- 311.

[13] The application of Article 2 to cases of aborting and euthanasia is uncertain as is the situation with assisted suicide. See Jacobs & White o.c., p. 53 - 57.

[14] A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment of Punishment' in: R. Macdonald, E. Matscher and H. Petzold, *The European System for the Protection of Human Rights* (Dordrecht, 1993), p. 225.

[15] One could think of disappearances, destruction of homes and possessions, acts in the course of arrest and police detention, condition of detention, detention and mental disorder, admission and immigration, deportation and extradition.

[16] Jacobs & White, o.c., p. 198 indicate some differences in detail in the nature of the limitations but 'there are sufficient commonality of approach to justify a collective consideration of these limitations before examining the substantive rights'.

[17] Barthold versus Germany, Judgement of 23 March 1985; Series A, No 90; (1985) 7 EHRR 383.

to freedom of association with others. It is also stated that 'this article shall not prevent the imposition of lawful restriction on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

Concerning limitations one could think of a variety of needs of national security, such as the prevention of disorder or crime, the protection of health or morals, the protection of the reputation of others, the prevention of the disclosure of information received in confidence to maintain the authority and impartiality of the judiciary. These limitations can be found in part 2 of Articles 10 and 11 which state that 'no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.' In that respect the second paragraph of the articles deals with the question of whether the intervention of the authorities is necessary in a democratic society. An example is the case of Zana versus Turkey,[18] where the national government's measures for dealing with the security situation in South-East Turkey were accepted as necessary for the protection of national security. The argument of interests of territorial integrity was rejected in this case.

In combination with these rights, Articles 17 and 18 of the Convention are of importance. They urge the State to uphold these freedoms and to forbid 'any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' This means that under all circumstances a democratic society implies free participation in elections, and a citizen's rights to make their own opinion known and to join public debate. The rights mentioned under Articles 17 and 18 entail a citizen's rights to form, support and join political parties and pressure movements to make their political thoughts known and manifest. The freedom of peaceful assembly includes meetings,[19] public demonstrations and processions.[20] The violations of these rights by Member States have to do with the restrictions imposed upon these freedoms. However, as has been said before there are limited grounds for restrictions.

The second group of rights are advanced especially by the Soviet Union and the Eastern European countries; they expect the state in performing its activities, to stimulate equality and to prohibit discrimination (Gropas, 4). The third group of rights is not explicitly mentioned in the UN treaties, nor in the European human rights treaty since these rights derive from current thinking about conditions that can now be seen as human rights.

Enforceability of Human Rights under the Convention of Human Rights.

The permanent European Court of Human Rights in Strasbourg established a European regional system for the protection of human rights. Any person, NGO, or group of individuals that considers themselves to be a victim of human rights abuse is entitled to initiate proceedings before the Court directly. The approach of the Convention of Human Rights is based on the

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[18] Zana versus Turkey, Judgement of 25 November 1997; (1999) 27 EHRR 667.

[19] Rassemblément Jurassien and Unité Jurasienne versus Switzerland, App. 8191/78, 17 DR (1979), p. 119. By meetings are meant private, social meetings and public political meetings.

[20] Christians against Racism and Fascism versus England, App/ 8440/78, 16 July 1980.

principles of solidarity and subsidiarity. Solidarity refers to the articles that contain declarations of the contracting parties; subsidiarity refers to the role of the Court of Human Rights being subsidiary to the role of the national Member States.[21] This implies that the Court is not able to receive a complaint until all efforts to settle the complaint have been undertaken within the national legal order. It is worth observing that individuals are obliged to initiate proceedings within the national legal order and take them to the highest national level before being able to formulate and submit a complaint to the Court of Human Rights. This can cause a variety of difficulties for the individual, for example, financial and psychological challenges..

However, this important right of access to the Court has been made complete by the enforceability of human rights. Utilizing case law, the Court is in a position to find a contracting State in violation of the Convention. Parties to the European Convention on Human Rights are bound by the principle 'pacta sunt servanda'. According to Article 53 of the Convention, parties have officially committed to abide by the decisions of the Court in any case to which they are part.[22] Member States which do not observe the protected rights are, as parties to the Convention, in breach of contract of their treaty obligations. Judgements which go against Member States focus on the validity of the democratic form of the Member State in question. Then it becomes clear how far the domestic legislation is in accordance with the requirements of the European Convention on Human Rights or how far national authorities are inclined to protect the validity of democratic rights. The binding force of the final judgement guarantees the Human Rights Court's powers and has political effects. However, an unwilling Member State that does not want to cooperate cannot effectively be forced to accept the decision of the Court in cases it is a party to. This means that the binding force of the judgement cannot always be materially enforced on that Member State. Only pressures such as psychological force can be brought to bear upon a Member State for being an undemocratic state, and this may be effective in the end.

The actual control mechanism of the ECHR set up in1994 has as an aim 'to gain a greater unity between the Member States for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'. As such the system has gained considerable respect in the contracting Member States.[23]

Human Rights under European Union Law

European Union and human rights.

After the European Economic Treaty of 1956 and the European Single Act of 1987, came the Treaty of Maastricht, the European Union Treaty of 1992, a new treaty that was comprised of the existing European Economic Treaty, the European Treaty of Coal and Steel and the Euratom

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[21] H. Petzold, 'The Convention and the Principle of Subsidiarity', in Macdonald, Matscher and Petzold, o.c., p. 41.

[22] Article 27 of the Vienna Convention on the Law of Treaties of 1969 states that 'a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[23] Andrew Drzemczewski and Jens Meyer-Ladewich, 'Principal Characteristics of the New ECHR Control Mechanism as established by Protocol No. 11, signed on 11 May 1994', *Human Rights Law Journal* 15.3 (1994): pp. 81 -136.

Treaty. The main changes were the timetable and convergence criteria to move to a single economy and monetary union, culminating in a single currency. Its framework consisted of a three-pillar construction, established to govern the existing Communities which were placed in the first pillar. This pillar is the so-called supra-national pillar. It was also meant to give guidance for more political cooperation in the areas of foreign policy, security, home affairs, and justice. Those subjects were part of the second and third pillars, the intergovernmental pillars. This 3-pillar treaty was known as the Treaty of the European Union (TEU). The original European Economic Treaty contained some isolated social articles referring to people's rights, such as social protection (Article 2), standard of living (Article 2), social security (Article 43), equal payment (Article 43) and prohibition of discrimination (Articles 12, 34 and 39 (2)). More daring was the treaty of the European Union of 1992 that included a reference to the European Convention of Human Rights to the effect that, 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom and since they result from the constitutional tradition common to the Member States, as general principles of Community law'. Different from the original treaty is the reference to the European Treaty of Human Rights explicitly made in Article 6 of the TEU which obligates the European Union as a whole to a broad commitment to respect the articles of the European Court of Human Rights as general principles of Community Law. This article states that the Union was founded on respect for 'liberty, democracy and respect for human rights'.

Before 1992, the Court of Justice had reaffirmed that fundamental rights form part of the general principles based on constitutional traditions of member states.[24] In the meanwhile judgements have been given in recent cases concerning the free movement of persons, such as Baumbast and Akrich , which both cited Article 8 of the European Convention on Human Rights, the right to family life.[25] It is clear that the tendency of the Court of Justice to use human rights as a source of law has developed since the reference of the TEU to the Treaty of human rights of the Council of Europe.

Case law made it clear that the Court of Justice would have to deal with areas other than purely economic matters. In the debate on the position on fundamental rights in the European legal order, controversies evolved between advocates and opponents of a broad interpretation of the task of the Court of Justice. In the end, by adopting the EU Charter on Fundamental Rights, the Member States declared themselves in favour of human rights as part of the European integration ideal. The adoption of the Charter was in line with the wish of advocates of human rights protection to bind the EU to the European Convention on Human Rights. The negotiations on the European Constitution showed a willingness to insert a human rights clause and the accession of the EU to the ECHR. The European Union discussed the matter fully, and concluded that human rights should be incorporated in the treaty. This is the background of the new Reform Treaty of December 13, 2007. Meanwhile, in the European Union the Charter of Human Rights, adopted in 2000 as a political document, contains a mixture of human rights and can be seen as a combination of classic, social and modern human rights.[26] Although the Court

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[24] Internationale Handelsgesellschaft MgbH versus Einfuhr- und Vorratstelle für Getreide und Futtermittel (1970) ECR 1125.

[25] Case C-43/99 Baumbast and case C-109/01 Akrich.

[26] R. Lawson, 'In Search of Polaris: which Rights for the European Union? In: *Rethinking Europe's Constitution*, Andreas Kinneging (ed.). 2007, p. 235 speaks of 'the 'state of the art' in human rights'.

of Justice does not refer explicitly to this document, it has acknowledged its existence and its importance.[27] The expectations for the future of this Charter are high since Article 51 of the Charter refers to the Fundamental Rights Agency, established in 2007 to monitor the national fundamental rights institutions. The Charter is not the only source of fundamental rights and does not cover all types of rights. Minority rights are not included in the Charter, whereas in other international instruments these rights are protected. Accordingly, the Court of Justice in the EU has to use common principles of the Member States and the provisions of the European Treaty of Human Rights, such as Article III - 193 of the draft EU Constitution: the Union's action shall be 'guided by, and designed to advance in the wider world, the principles which have inspired its own creation, development and enlargement: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms.' In the recently concluded Reform Treaty the same position is given to human rights and fundamental rights.

Differences between Western and Eastern European Countries.

As it was thought that the development of human rights could give rise to political stability (Gropas, p. 8), after the dismantling of communism, human rights won importance in Eastern Europe. Favouring democratic values had implications for the building of a democratic state and such values became a new experience for the governmental elites. At least, we can assume that after the fall of communism knowledge and understanding of the defence of human rights against the state authorities were underdeveloped compared to Western European countries.

The European Union (EU) and its Member States have promoted the defence and promotion of human rights in the EU's external relations within the content of the principles of the UN Charter Declaration of Human Rights. There were two instruments that became part of EU Member State human rights policies in the European Member States. Additional international covenants of the UN are the Convenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). From the use of these instruments it becomes clear that European countries did not always share the same interests in the treaties. Generally speaking, the western European countries showed much more interest in the United Nations' International Covenant on Civil and Political Rights and the European Convention of Human Rights, whereas the Eastern European countries were more inclined to stress the importance of the International Covenant on Economic, Social and Cultural Rights. This can be deduced from the political and economic situations of both parts of Europe. Western Europe's inclination towards Civil and Political Rights provided inspiration leading to the establishment of the European Convention on Human Rights of the Council of Europe in 1948. This treaty, as has been shown earlier, had a binding force between the Members of the European Convention. Moreover, the judgements of Strasbourg's Court of Human Rights have set an example in Western European countries. National proceedings have to be completed before a citizen may start proceedings before this Court of Human Rights. National judges are bound to use these judgements as precedents. By the time Eastern European countries became members of the Council of Europe, they were inclined to put more stress on the economic, social and cultural rights of the UN Covenant of 1966 than on the civic and political rights of the 1966 UN Covenant of Civil and Political Rights. We may suppose that the European Convention has less

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[27] Case C-540/03, Parliament versus Council, 26 June 2006, para 38.

traditional value for Eastern European Member States than for those in Western Europe. The accession conditions, such as the criteria of human rights, were accepted for another reason. Bieler suggests that the decision to apply for EU membership was taken by what he called 'cadre elites within state institutions'. These elites had taken advantage of the collapse of the previous regimes to acquire power by introducing 'programs of neo-liberal restriction'. These reforms turned out to be a failure. To save their legitimacy the elites sought the help of EU membership as a solution for their own weak position. To the citizens, 'the application to the EU was sold as a 'return to Europe''.[28] We can assume that the driving forces behind the accession of Eastern European countries were less idealistic than one might suppose, and may not have been driven by the serious issue of human rights. While the Western governments concentrated on civil and political rights - and they believed human rights could be connected to trade and security issues - in Eastern Europe the implementation of human rights was seen as an interference in the national sovereign jurisdiction.[29] From this perspective one can understand why in Eastern European countries the national authorities will not adopt the principles of human rights as extensively as seen in Western European countries. For this reason, since 1990, the European Commission concentrated on the strengthening of human rights. The EU declared itself a fighter for human rights through its external policies, through its development cooperation policy, in international agreements, and at international conferences.

At the same time the European Commission stressed some priorities connected to human rights, such as the rule of law, independent media, the independence of the judiciary, and promotion of a pluralistic civil society.[30] Available instruments to sanction action against human rights violations had a political base in Article 228 of the EEC Treaty. Human rights. references have been inserted in all EC contracts with third countries. Also, in the association agreements with the former Eastern European countries, human rights references have been added as a central mechanism for promoting human rights values (Gropas, p. 15). The European Parliament has provided a forum for public hearings, and it processes general reports on human rights situations throughout the world. This broad attention to human rights has become a system that provides information on violations, raising public awareness and encouraging the European Union to act.[31]

Enforcement of Internal Market Rules.

The Court of Justice, together with the afore-mentioned principle of the Supremacy of European Community Law - the Principle of Direct Effects introduced in 1963, secures the rights of the individual. This principle plays a crucial part in securing the application of European Union law. It defines the extent to which individuals can rely on European law in the national courts. It has

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[28] Bieler, 2002, 'The struggle over EU Enlargement: A Historical Materialist Analysis of European Integration', in: *Journal of European Public Policy*, p. 589.

[29] M. Nowak, 'The Need for a World Court of Human Rights', *Human Rights Law Review*, 2007 7 (1), p. 252.

[30] COM (95) 567 final, 22.11.1995, p. 10 - 11.

[31] European Parliament, PE218.638/fin, 28.11.1996, p. 52.

been pronounced in the Van Gend & Loos Case:[32] if a provision of EC law has direct effect, domestic courts must apply it. The Court law saw the Principle of Direct Effects as a means to confer rights to its citizens, and to also ensure that EC law was applied and enforced uniformly in all Member States. The criteria meant for direct effect are that the provision must be sufficiently clear and precise, it must be unconditional, and must leave no room for the exercise of discretion in implementation by Member States or Community institutions. In the case of Francovich the Court held that where a State had failed to implement an EC directive it would be obliged to compensate individuals for damage. To verify this damage certain conditions should be satisfied, such as: (a) the directive must involve rights conferred on individuals; (b) it should be possible to identify the content of those rights on the basis of the provisions of the directive; and (c) there should be a causal link between the State's failure and the damage suffered by the person claiming damage.[33] When these conditions are fulfilled individuals may proceed directly against the national State. In the case of Brasserie du Pecheur in 1993 the responsibility of the State became applicable to all domestic acts and omissions.[34] But the Court held again that States will be liable only where the rule of law infringed is intended to confer rights on individuals and the breach must be sufficiently serious. There must be a direct link between the breach of the obligation resting on the State and the damage sustained by the injured parties. By repeating the conditions of Francovich the Court illustrated more explicitly that the breach should be 'sufficiently serious'. In the meantime this term has given rise to much jurisprudence. As Steiner states, 'given the lack of clarity of much EC law, and that Member States have no 'choice' to act in breach of Community law, the crucial element will often be the clarity and precision of the rule breached.'[35]

European institutions, individuals as well as States, are able to enforce Community rules. States can act against their own nationals. Individuals can act against their State to enforce community rules. They rely on their effective rights.[36] Also the Commission can start proceedings under Article 226 against Member States. However, there is no effective enforcement mechanism at the EU level. This means that enforcement is dependent on enforcement at national level. If the Court of Justice has ruled that an infringement of Community law has occurred, it is the national judge who assesses the amount of damage the individual has suffered and what should be done to make it up. This enforcement situation deals with internal market law regulated in the first pillar of the Maastricht Treaty. The case of the Internationale Handelsgesellschaft[37] illustrates that the Court, by giving judgements on internal market questions, has been involved in human rights issues as well. In this case the German constitutional law made clear that German human rights law would take precedence over

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[32] Van Gend & Loos v. Nederlandse Administratie der Belastingen, Case 26/62, 1963, ECR 1 (1963) CMLR 29.

[33] Francovich v. Italy (cases C- 6 & 9/90, (1991) ECR 1- 5357, (1993) 2CMLR 66.

[34] Brasserie du Pêcheur SA versus Germany and R. v. Secretary of State for Transport, ex parte Factortame (cases C- 46 & 48/93).

[35] Josephine Steiner & Lorna Woords, (2003) Textbook on EC Law, Oxford: University Press, p. 115.

[36] Case C-213/89 Factortame (nr. 1) (1990) ECR I - 2433.

[37] Cf. note 24 above. In an earlier case, Stauder versus City of Ulm, Case 29/69 the Court of Justice gave a proper interpretation of the term 'equality.'

European law. In 1969, the simple response of the Court of Justice was to explicitly declare human rights part of European Community law (*ibid.*). This jurisprudence has been accepted and recognised at the national level of the Member States. The enforcement of these rights as part of European Community rights has not been dealt with until now.

Enforcement of Human Rights Law under Community Law.

Officially the Charter of Human Rights of 2000 has not yet become a legally binding document. The Court of Justice, giving judgements, takes this Charter into account and gives guidance according to the ascribed principles.[38]

As mentioned before, the introduction of Article 6 of the Treaty of the European Union of 1992 gave the European Union some competencies regarding human rights. The Treaty of Amsterdam of 1997 gave the Court of Justice express competence with regard to action of the institutions 'insofar as the European Court of Justice has jurisdiction either under the treaties establishing the Communities or under the TEU' by inserting a new Article 7 into the Treaty of the Union. In this article the Council has been given expressly the right to punish Member States which offend the rights of citizens. The judgement can include the suspension of certain of the rights of the Member States, including their voting rights. Although the use of these competencies by the Court of Justice could have considerable consequences for the Member States, according to Steiner, the difficulty will come from the complexity of the procedure (Steiner p. 160). Since this procedure has so far never been applied we do not know whether this is true or not.

At the moment the EU is in the process of accepting and acknowledging human rights,[39] but the competentece and the limits to the areas the Court of Justice has to deal with are not clear. Talking about human rights, the Court shows a preference for using the word 'principle' instead of the word 'rights' (Lawson p. 237). This may be proof of the difficulties the Court has in accepting the task of pronouncing decisions on certain rights in certain circumstances. Where human rights are involved in case law, the Court of Justice relies on general principles of Community law. From the jurisprudence it becomes clear that the Court strives to interpret Community law in such a way that there will no conflict between community law and national law. The Court is 'bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.'[40] This sentence refers to international treaties of Member States and has been meant to avoid conflict between European Community law and international treaties, for instance between the Council of Europe and the European Convention on Human Rights (ECHR). The ideal relationship between the ECHR would exist when questions of human rights could be solved by the ECHR as a body experienced in handling human rights issues. This will not be the case until the accession of the EU to the ECHR has been completed in accordance with the Lissabon Reform Treaty of December 2007.

According to this treaty the Charter of Human Rights becomes an official binding document. However, then new problems will arise; for instance, concerning the accessibility of

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[38] Advocaten voor de Wereld, Case C- 303/05, 12 September 2006, par. 38

[39] B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.) *The EU and Human Rights*, Oxford 1999, pp. 859-899.

[40] J.Nold KG versus Commission, 4/73 (1974), ECR 491.

the Court of Justice in third pillar cases.[41] The question arises: what is the exact position given to the Court of Justice concerning the application of human rights? Does the treaty make a difference in the interpretation of human rights and do human rights fall under the authority of the Court of Justice?

Human Rights as part of Eastern European Accession Negotiations.

The collapse of communism in 1989 provoked new challenges for the European Community. Former communist countries wanted to escape from influences Russia had exercised and wished to become members of the EU. There was much pressure on the Western European countries to offer membership to central and east European countries. Two political issues became dominant and intertwined: the fact that the NATO did not include too quickly former communist countries for fear of Russia, and the former Baltic states – Estonia, Latvia, and Lithuania – needed a guarantee of independence from Russia. According to Germany there were political and economic reasons for admitting Poland, Hungary and the Czech Republic.[42] Guidelines for enlargement were laid down in the so-called Copenhagen criteria. They consist of political criteria, economic criteria and criteria relating to the so-called *acquis communautaire*.[43] Respect for human rights and freedoms is a precondition of EU membership and the post-accession condition of membership requires continued respect as well. This is guaranteed by the ECHR, set out in Article 6 (1) of the Treaty of the European Union (TEU), and enforced by Article 7 of the TEU Charter of Fundamental Rights of the European Union (EU Charter), as well as its explanatory report[44] which makes reference to the ECHR. Together with the rule of law, this cluster of human rights as political criteria, was part of the negotiations with Eastern European countries as basic conditions for Europe's people.

Differences between the Western European societies and the former communist societies are reflected in the differences between state and civil society. Western European countries are familiar with different levels of governance as the system of representation and decision-making is complex at the level of the state. Democracy is not a simple element in societies where participation in public life is a basic right. Melucci says that 'democracy in societies requires conditions which enable individuals and social groups to affirm themselves and to be recognized for what they are or wish to be.' This means that one can belong to a non-authoritarian democracy and can be heard by means of representation or by belonging to political parties or social organisations. A condition for these freedoms is freedom of information and the possibility of active participation in the democratic process.[45] The candidate countries have struggled to adopt basic legislation and strengthen the judicial system. Ensuring the independence of the judiciary was

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[41] Opinion of AG Mengozzi in Case C- 354/04/ P, Segi a.o. of 26 October 2006; cf. Lawson, p. 236.

[42] I. Bache & Stephan George, *Politics in the European Union*, Oxford University Press, 2006, p.551.

[43] That an applicant must be able to take on obligations of membership, including adherence to the aims of political, economic, and monetary union. The *acquis communautaire* consists of all laws and legal measurements taken in the European Union.

[44] EU Charter 2000/C 364/01, Official Journal of the European Communities, 18.12.2000. 'Text of the explanations relating to the complete text of the Charter', COVENANT 49, Charter 4473/00, 11.10.2000.

[45] Alberto Melucci, Social Movements and the Democratisation of Everyday Life, in: *Civil Society and the State. New European Perspectives*, ed. John Keane, London 1988, p. 258

a point of special attention.[46] The importance of the latter point is reflected not only in the respect for the rule of law, but also in the effective enforcement of the *acquis communautaire*. Participation in civil society presupposes active respect for human rights, such as the right of association, the right of expression, and a free press system. Eastern European systems used to be totalitarian in that they were political state systems that assumed responsibility for everything that happened in society, directing and controlling the societal system. At the same time it is questionable which values are at the basis of the Eastern Europan civil society.

Difficulties between East-Central European state systems and the emancipation of civil society arise because autonomous organizations may not be established. It has been said that the habit of smoothing out the conflict between state and civil society is part of the East-Central European tradition. For example, in Hungary, before the accession to the European Union, the state claimed a monopoly on the traditional framework of total power, but 'in order to avoid damaging confrontation' it reduced its claim to total control and allowed some freedoms. Mihály Vajda makes clear that in East-Central Europe civil society never won more than 'a limited amount of social autonomy and was not strong enough to challenge the group that had a grip on political power.'[47] It seems to him that without western individualism the Eastern European citizen failed to grow into a *citoyen,* a citizen with political rights participating at public life. By saying this she may have meant the lack of awareness of the citizens as *citoyens* in everyday life. Nowadays, Hungary is a member of the European Union and is supposed to be fully democratic according to the standards of the European Union. This means that it has adopted the principles, priorities, intermediate objectives and conditions contained in the individual Accession Partnerships and the *acquis* of the European Union. Part of this *acquis* are the human rights clauses that guarantee common values through legal practices. They are seen as part of a common European identity.[48]

A remarkable fact is that these requirements for accession have not been imposed upon the Western European Member States. However, they are assumed to be applicable in the same way as they are in the Eastern European countries as all members of the European Convention on Human Rights have to prove their adherence to the requirements of the Convention. The difference is that the Western European countries do not have to prove their trustworthiness with regard to human rights conditions.

Accession Partnership with Hungary.

The conditions for accession that applied when ten new Member States joined in 2004 were set out by the Copenhagen European Council in 1993and are further detailed by subsequent European Councils.[49] The focus has been placed on the candidates' capacity to implement and enforce the *acquis*, consisting of 29 chapters, and on its transposition into law. This made it

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[46] Key documents on Enlargement 2001, Strategy paper 2001, p. 3. cf. http://ec.europa.eu/enlargement/archives/key_documents/reports_2001_en.htm

[47] Mihály Vajda, 'East-European Perspective' in *Civil Society and the State* (ed. Keane), p. 340

[48] Franz C. Mayer, European Identities and the EU - The Ties that Bind the Peoples of Europe. KCMS 4.3 (2004): 586 -589.

[49] http://europa.eu.int/comm/enlargement/intro/criteria.htm#Accession%20criteria

necessary to hold a special examination of the administrative and judicial capacity of the candidate countries. The Commission examined whether reforms that were announced have been carried out, basing the assessment on information provided by the candidate countries themselves. In its Key Document on Enlargement (2001) the Commission states that it 'has also drawn upon information provided in the context of the accession negotiations as well as in meetings held under the Association Agreements. It has compared information from these sources with that contained in the new National Programmes for the Adoption of the Acquis. The Commission has drawn on the reports of the European Parliament, evaluations from the Member States, the work of international organisations, in particular the Council of Europe and OSCE, and international financial institutions, European business associations as well as non-governmental organisations.' The Commission concluded that the Copenhagen political criteria continued to be met by all negotiating candidate countries. This meant that these countries had achieved stability as institutions guaranteeing democracy, the rule of law, human rights, and the respect of and protection of minorities. Although the Commission seemed to be very optimistic about the political situation, unmistakably the Commission criticized the lack of enforcement of the acquis, and saw the need to fight against corruption and the problems related to pre-trial detention in certain countries. Some subjects were addressed, such as the trafficking of women and children from, through or into several candidate countries, gender inequality and discrimination, and the situation of the Roma people.[50] Under the heading 'Making a Success of Enlargement' the Commission acknowledges a lack of relevant expertise to judge the readiness of the candidate countries' administrations since implementation is largely up to Member States. That is why the Commission has established 'peer reviews' that allow the candidate countries to involve experts from Member States and the Commission in the evaluation of administrative capacity.[51] In annex 4 of the' Key Documents on Enlargement 2001'can be found the Human Rights Conventions ratified by the Candidate Countries on 30 September 2001.

In the 2001 Regular Report on 'Hungary's Progress towards Accession' much criticism can be found of the human rights situation in Hungary. The report states that 'public opinion of police behaviour is not very high. Police officers are often suspected of corruption and accused of frequent use of excessive force. In particular, international human rights organisations reported cases of unjustified and harsh police action against Roma people as well as the mistreatment of foreigners. The overall number of complaints regarding unjustified police measures lodged at the Offices of the Ombudsman for National and Ethnic Minorities and for Civil Rights had increased in 2000. Of the complaints introduced, only around 30% resulted in court cases, and in 70% of complaints, no investigation occurred. Many cases did not reach the court system and are still pending [...]'[52] In the same report we find that, 'The supervision of the public service media by the Presidium of the Boards of Trustees is still not properly ensured. The three Presidiums continue to be composed solely of pro-government members. Despite initiatives taken by the Government, Parliament was not able to settle the issue, as it did not reach the

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[50] http://ec.europa.eu/enlargement/archives/key_documents/reports_2001_en.htm: Key documents on Enlargement 2001, II. Progress by the candidate countries in meeting the membership criteria, 6.

[51] Peer reviews are being considered in the field of financial services, justice and home affairs, budget, agriculture, nuclear safety and environment.

[52] Commission of the European Communities, 2001, Regular Report on Hungary's Progress towards Accession. SEC (2001) 1748, p.19 - 20.

two-thirds majority required for the adoption of a new law. The situation, which has remained unsolved for two years, might lead to 'growing political pressure on the public service media [...].' Under the heading of General Evaluation we find, 'However, there is a need to address police behaviour, notably with regard to reported cases of ill-treatment' (*ibid.*, 20, 24).

The conclusions of the accession negotiations are embodied in a treaty of accession. The Accession Partnership with Hungary was concluded on 28 January 2002 after a former Accession Partnership for Hungary was decided upon in March 1998 and updated for the first time in 1999. The Partnership Council Decision of 2002[53] provided a basis for a number of policy instruments meant to be used to help Hungary in its preparations for EU membership. It consisted of 3 articles. Article 1 states that the principles, priorities, intermediate objectives and conditions in the Accession Partnership for Hungary are included in this decision. Article 2 states that the implementation of the Accession Partnership shall be examined in the European Agreement bodies and by the appropriate Council bodies to which the Commission shall report regularly. And Article 3 makes a statement about implementing the Council Decision.

This Council Decision deals with principles such as the obligation of meeting the Copenhagen criteria as a priority. The main emphasis was laid upon the vital importance of the applicant countries' capacity to implement and to enforce the *acquis*. This would mean determined efforts by the applicant, Hungary, to strengthen and reform their administrative and judicial structures. Important also were stability and achievements of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union, and the ability to take on obligations of membership, including adherence to the aims of the political, economic and monetary union.

Under point 4 of the Council Decision the priorities and intermediate objectives of the European Community are dealt with, such as economic criteria, free movement of goods, free movement of persons, free movement of capital and company law, agriculture, transport policy, taxation, energy, justice and home affairs, customs union and financial control.[54] Human rights and the protection of minorities are also mentioned under this heading. Among the objectives indicated here is the improvement of the integration of the Roma minority in Hungarian society through more efficient implementation and impact assessment of the medium-term Roma action programme, with particular emphasis on promoting access to mainstream education, fighting discrimination in society (including within the police services), fostering employment, and improving the housing situation. Another objective is the guarantee of an effective system for addressing complaints of police misconduct.

The last point of the Council, number 7, deals with monitoring the implementation of the Accession Partnership in the framework of the Europe Agreement. Under this heading it becomes clear that the implementation of the *acquis communautaire* belongs to the institutions

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[53] 2002/87/EC: Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Hungary.

[54] The strengthening of the administrative framework for internal audits and ensuring of functional independence; the specification of the role and the functions of the designated contact point and to start cooperating with OLAF through this contact point; strengthening the fight against fraud, notably in the area of VAT; continuing efforts to ensure the correct use, control, monitoring and evaluation of Community pre-accession funding as a key indicator of Hungary's ability to implement the financial control *acquis.*

of the Europe Agreement. Nothing is written about the enforceability of the human rights paragraph and the protection of minorities. This is an important issue underlying enlargement and constitutional reform. Concerning violations of human rights, new legal developments are required as will be demonstrated below.

Violations of Human Rights in Budapest

The government-inspired Gönczöl Report

In September and October 2006, two and half years after the accession, much unrest occurred in Budapest. The demonstration on Kossuth Square commenced on the evening of the disclosure of parts of Prime Minister Balatonőszöd's speech. There were demonstrations, street riots and the police took measures in order to maintain public order. Those measures were against democratic principles. As a reaction to these events, the Hungarian government set up an expert Commission for the analysis of the causes of the public unrest.[55] The findings of the report of this Commission became known in February 2007 as the so-called Gönczöl Report. According to this expert Commission which was established to review and provide recommendations on these public problems, the unrest was part of a 'series of social-historical events'. One of the causes indicated was the long chain of grave violations of law, the impact of which was felt by individuals and their families. Other problems were the new reform measures announced by the government, communication difficulties between the government and its people, and 'finally, the intention of the opposition to overthrow the Government'. The report indicates the social unrest and that expectations of individuals and certain groups, such as the European Union, have not been fulfilled. The fact that formal institutional frameworks of cohesion and socialization have collapsed influences the societal atmosphere in a negative way. The Research Commission was of the opinion that the leaders of the political parties were 'mostly inexperienced regarding how to formulate and determine the modern version of the portion of the political spectrum to which they belonged.' The leaders of political parties also avoided the necessary reforms, fearing their very own governmental position. This combination of a disappointed population and inadequate leadership has provoked disintegration factors and political division. Eventually the political situation was no longer tolerated by society.[56] The Budapest Police Headquarters failed because it did not take the necessary measures immediately when it realised that it was not able to defend the Headquarters. According to the Commission, the determination whether the measures inflicted on individuals were unlawful or disproportionate, requires a detailed assessment of the situation. Peaceful demonstrators were not aware of the threat of a cavalry charge and rubber bullet fire because of the quality of the technical devices used by the Headquarters. Next to this observation the Commission blames the demonstrators for their own

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[55] By way of Resolution 1105/2006 (XI.6) the Government had set up a team of specialists to analyse the events relating to the 2006 autumn demonstrations and Street riots. This Special Committee had been established pursuant to article 26 of Act LV 11 of 2006 on central administrative organs and on the legal status of Government members and state secretaries.

[56] Report of the Special Commission of Experts on the Demonstrations, Street Riots and Police Measures in September-October 2006, the so-called Gönczöl Report. Summary of Conclusions and Recommendations. February 2, 2007, p. 5-8

acts. In other words, they wouldnot have suffered injuries, if they had avoided proximity to the police action.[57] According to the Commission, the Police Headquarters applied substantial restrictions to the law of assembly because of misinterpretation of the law. Another conclusion of the commission is in regard to the shortcomings of the current organizational police law enforcement system. This system does not comply with the requirements of a democratic constitutional state. The police law enforcement and security service system should have been regulated by an act of Parliament. In this respect the Commission recommends that 'the Police include in the curriculum of their own training the requirements and norms of integration into the international legal system; moreover, the recommendations on ethical norms of the UN General Assembly pertaining to policing.' Other deficiencies have been analyzed, such as the methods of using force, especially regarding riots, the means of force applicable in the course of such deployments, the rules regulating firearms regarding the use of rubber bullets, the rules regarding the use of force, the methods of warning the crowd to disperse and the legal consequences, and the adequacy of equipment indicating the officer in action. This bringst the Commission to recommend the drafting of a bill that ensures the possibility of legal remedy in case of unlawful riot control actions or 'in case police officers, acting individually or in groups, infringe the requirements of proportionality. Independent from the law enforcement agencies, the Commission recommends the appointment of a commissioner who is allowed to report in court. The creation of legal safeguard ensuring civilians can assert their right of complaint in case of police action and police force. At the same time the Act on Contraventions should be amended because the current one was considered not to be detailed enough' (*ibid.*, 10-11).

Comments concerning the Findings of Gönczöl Report.

The Gönczöl Report has been examined and critically analysed by three former judges of the Hungarian Constitutional Court in July 2007. They carefully analyse every step the poice and the autorities took in the course of events in Budapes in September and October 2006. The criteria used by these three judges are the rules of law and democracy. In their detailed findings they blame the autorities for constitutional offences and the present government of Ferenc Gyuarcsány is accused of posing a serious threat to the laws and institutions of Hungarian democracy. Explicitly they state that 'the Prime Minister, by admitting to continuously misleading the citizens during his his previous tenure in 2004-2005, triggered off a political crisis, whose constitutional and political consequences he was not willing to face; the Government failed to accept its responsibility for police action throughout the examined period; police commanders overruled the Constitution and the European Court's rulings in their orders and instructions to their corps.' Police actions are seen as unlawful, unprofession and disproportionate because the 'police did not defend innocent civilians but attacked them; members of the riot police did not wear personal identification badges, thereby eschewing individual responsibility and subsequent court action for their brutality.'[58] In this regard the judges stress the

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[57] *ibid.* p. 13. According to figures the Commission has knowledge of, the number of wounded during the event was nearly 800, including civilians and police officers. The National Ambulance registered 326 injured persons, while the State Public Health and Medical Office Service registered 195 injured civilians.

[58] Comments Concerning the Findings of the So-Called Gönczöl Report, Magyar Szemle Foundation, 2007, p.6-8.

primary doctrine and value of the Constitution lying in its emphasis on human personality, human dignity and personal freedom. All restrictions on personal freedom are derogatory and restrictions can only be made in a necessary and proportionate manner. These conditions make the police incompetent to act as it did: It had no right 'of reprisal nor does it have a right to cause bodily harm, abuse integrity, or behave in a manner that violates human dignity' (*ibid.*, 64). Moreover, the judges suggest that it seems as though the Gönzöl Report consider's people's rights of assembly as ' necessary evil, the police actions as justifiable sins and those civilians exercising their basice rights and the opposing as potential enemies, which should be dealt with accordingly'(*ibid.*, 73). There are comments on the legal proceedings: 'The tribunal of first instance, in great haste, committed serious procedural mistakes and handed out unjustified sentences against civilan defendants'. The sharp conclusion of the judges is that the police, in 'its internal culture, its style of command and its attitude to the citizen, it has preserved an alarming amount of the residues of the communist heritage' (*ibid.*, 9).

Monitoring Human Rights and Principles.

The above-mentioned human rights situation and comments on the police behaviour brings us to questions of monitoring human rights and human principles in the European Member States. At the moment, Member States of the European Union are members of the European Convention of Human Rights which means that victims of human rights abuse are allowed to seek a binding judgement at the Court of Human Rights in Strasbourg and the Court of Justice in Luxembourg. However, the European Court of Human Rights, specialised in human rights conflicts, lacks the ability to provide proper reparation. Article 41 of the ECHR provides for monetary compensation and compensation for legal expenses. It does not cover restitution of property, release of detainees, and rehabilitation.[59] The Court of Justice in the European Union, as stated before, has not showed willingness until now to make use of the provisions of the Charter of Human Rights. It seems that the European Union wants to establish appropriate human rights standards and consolidate existing general human rights features into something that could be trusted and built upon. This will change in the future, since the European Commission has put more emphasis on the value of this document by introducing the Fundamental Rights Agency (cf. the next section, below) in anticipation of the Reform Treaty. The Charter and its scope of human rights is judged by the Commission as 'an essential reference document in the discussion on the definition of the Agency's areas of intervention.'[60] What became clear from the Budapest situation is that the existing human rights situation has not reached the unspoken standards of the European Union or the European Convention of Human Rights. New Member States have been admitted, optimistically assuming that they have a democratic, functioning police system guaranteeing legal rights and certainties to civilians. The human rights situation was supposed to be at the level of obligations of the Copenhagen criteria. However, those criteria are open and do not define specific human rights conditions for the national governments. On this subject the European Union does not even anticipate a system for monitoring the functioning of national

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[59] M. Nowak, o.c., p 255 mentions legal, psychological, medical and social measures, also satisfaction of truth commission, criminal prosecution of perpetrators and as guarantees of non-repetition amendments of laws, abolition of certain institutions.

[60] COM (2004) 693 final of 25 October 2004, p. 7.

governance. There does, however, exist a EU Network of Independent Experts in Fundamental rights, which has made a valuable contribution through its annual reports on the situation of fundamental rights in the EU and its thematic opinions. But this Network will not address the problems in the case of Hungary. Moreover, it will not meet the needs and policy objectives of the Council. A new Agency was understood to have a role 'in relation to the present and potential candidate countries during the accession period'[61] – possibly the Human Rights Institute of the European Union, recently established in March 2007. This brings us to questions concerning the meaning of this Institute in the near future for Western and Eastern European countries considering their different human rights backgrounds.

Establishment of a Human Rights Institute

Background

In June 1999 the Cologne European Council suggested examining the need for an Agency for human rights. This was not a new idea because the European Parliament had made similar suggestions many times in several Resolutions. In December 1999 the European Council became interested in the idea of an independent Institute for European Human Rights, and to that end, representatives of the Member States decided to extend the responsibility of the European Monitoring Centre on Racism and Xenophobia.[62] The institutional identity of the agency is in many respects similar to national human rights institutions. The term 'Agency' was not considered neutral for the purposes of this institute. It implies a body which does something on behalf of someone else. This institution supports the Community in drawing up and implementing policies intended to protect fundamental rights in the specific field of discrimination on the basis of race. This institute will collect and analyse data and information, write thematic and annual reports, and issue opinions and recommendations. 'The main beneficiaries of the agency will be EU institutions and Member States. But the agency will also have a direct influence on citizens and promote awareness of fundamental rights.'[63] The main task of this institute consists of collecting and analysing data , and studying the causes of racism and xenophobia, prompted by the commitment of the European Union to respect fundamental rights, embodied in the proclamation of the Charter of Fundamental Rights of the European Union and its incorporation into the Treaty establishing a Constitution for Europe of 2004.[64] The Council Ministers' proposal has been to continue the policies of the institute and at the same time to

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[61] As such are mentioned the collection of information on respect and promotion of fundamental rights, the carrying out of assessments and issue policies based on data collection. See: Preparatory study for impact assessment and ex-ante evaluation of fundamental rights agency. Final Report. European Policy Evaluation Consortium (EPEC), February 2005, p. 6.

[62] Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151, 10.6.1997.

[63] Preparatory study for impact assessment and ex-ante evaluation of fundamental rights agency. Final report. February 2005, p. 10.

[64] Charter of Human Rights, OJ C 364, 18 December 2000.; Treaty establishing a Constitution for Europe, signed on 29 October 2004, OJ C 310, !6.12.2004.

extend its responsibility in order to convert it into a Fundamental Rights Agency. An assessment has been made of the external evaluation of the EUMC carried out in 2002 and the considerations of the Commission towards the existing legal order in the European Union.[65] The Steering Group included representatives from DG Justice, Freedom and Security, DG Employment, Social Affairs and Equal Opportunities, DG External Relations, DG Budget, Legal Service and the Secretariat- General. The assessment included a combined evaluation in the context of financial regulation.[66]

Analysing the Human Rights system in the European Union, the Commission considers many challenges and needs related to different kinds of issues such as availability, comparability and quality of data and information on fundamental rights across the Union. The observed shortcomings are multiple: 'There is a lack in systematic observation of the situation of fundamental rights in practice in the Union and the Member States when implementing Union law and policies. There are shortcomings in the EU screening mechanisms for the purposes of Article 7 of TEU, which enables the EU to act against a Member State when there is a clear threat or actual breach of common values.' Along with shortcomings in communication between the EU and national and European non-governmental organisations, and a lack of awareness among the European people of their fundamental rights, there was a need for more coherence in respecting these rights.[67] In short, the deficiencies indicated in the existing situations are manifold. The Institute must operate within an EU legal framework, based on the Community competencies in the area of human rights. There are different articles in the Treaty of the European Community (TEC) indicating respect for human rights, such as Articles 13, 18, 19, and 280 of the TEC,[68] while Article 29 of the Treaty of the European Union provides the legal basis to take action to prevent and combat racism and xenophobia. Since human rights should be respected in all the policies of the Union, Article 308 of the EC treaty has been chosen as the Institute's legal basis.

Requirements for the Human Rights Institute

Considering all the deficiencies in the European Union human rights system, the tasks of the Institute will be varied. One of the main underlying principles and aims of the Institute should be building consensus between the different stakeholders in the field, between the Council of Europe and other international organisations, such as the UN and OSCE, EU institutions,

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[65] Commission Communication on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97. COM (2003) 483 final, 5.8.2003.

[66] The Preparatory study is available in the Freedom, Justice and Security website http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm. also: Financial Regulation, COM (2005) annexed to the proposals to recast Council Regulation (EC) 1035/97.

[67] Commission Staff Working Paper, Annex to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on a European Union. COM (2005) 280 fin., p. 5.

[68] Respectively: To combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; to facilitate the exercise of the right to move and reside freely within the territory of the Member States; to facilitate the exercise of the right of Union citizenship; right to access to documents.

Member States, civil society, such as NGOs, social partners, local and regional government and citizens.

Its primary target audiences, however, should be the EU institutions, which results in a minimum representation of the Member States and the EU Institutions in the Management Board that consists of, at maximum, 10 persons. That number of people ensures working efficiency, 'allowing meetings to be convened with relative ease and decisions to be made quickly and effectively'.[69] That is why the Board membership involves a mix of staff from different backgrounds, such as managers, experts from the human rights field, NGOs, legal experts and experts with legislative experience.

On the whole, the communication unit, analysis unit, assessment and good practice unit with the task of identifying and validating good practice, are of main importance. Next to these in importance are the networking tasks of the network unit. The network implies cooperation with national focal points in 25 Member States, including thematic networks, the network of national institutions of human rights, the network of independent legal experts (ex-EU Network of Independent Experts on Fundamental Rights, Annual Roundtable, and advisory groups with representation from different NGOs, unions, churches, national parliaments, international organisations, EU institutions and Member States (*ibid.*, 85). The Institute cooperates with national human rights institutional arrangements as far as they have been established. Currently there are only 11 Member States that have institutional arrangements with human rights institutions. The Netherlands is not included in this number.[70] The differences between these countries in terms of scope of competence, degree of independence, and level of income are obvious.

An interesting question is whether the Council will be able to identify situations which violate human right and then initiate Union action. Another question will be whether the Council will take measures against a Member State in cases of violation of the common values. The legal basis to act upon will be Article 6 of the Treaty of the European Union (TEU) which stipulates that all Member States respect the common values identified in this article. Article 6 is intended to give the European Union the capacity to react, if necessary, as a risk is identified, to discipline and to resolve breaches of human rights norms. The primary target audience of the Institute will be the European institutions, and the Institute will be of importance in providing the European Union with independent and reliable information on the breaches of common values.

Not all Western and Eastern European countries conform uniformly to human right standards. An examination of cases heard by the European Court of Human Rights will make that clear. The Institute should be aware of the differences in the level of adherence in different countries, and should accordingly strive for harmonisation in the level of application of human rights. The difficulty will be that the Convention on human rights is based on the principle of solidarity and subsidiary. The last mentioned principle refers to the role of the court of Human Rights, subsidiair to the national legal instances. It is for this reason that a victim of human rights always has to ask for judgements within the national legal order. Only after a judgement by the

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[69] Preparatory study for impact assessment and ex-ante evaluation of fundamental rights agency, p. 84

[70] Eleven European countries have a national body explicitly charged with monitoring compliance with human rights standards within the meaning of the Resolution 48/134 of 20 December 1993 of the General Assembly of United Nationals and Recommendation No R (97) 14 of 30 September 1997 and Recommendation No R (97) 14 of 30 September 1997 of the Committee of Ministers of the Council of Europe. Those countries are: Czech Republic, Denmark, Germany, Estonia, Greece, France, Ireland, Cyprus, Latvia, Luxembourg and Slovak Republic.

highest national legal instance has been given on the alleged fundamental rights violations a complaint can be made to the Court of Human Rights. The subsidiary principle provokes long procedures which can be very demanding for the claimant: it consumes time and energy, and , when the claimant has to pay the costs of procedures, it is expensive. It is from this reason that we may assume that much case-law will not be dealt with by the Court of Human Rights and subsequently will not come to the knowelegde of the Human Rights Institute. This situation forces the national Human Rights Institutes and networks in the Member States to provide information to the Euorpean Human Rights Institute in order to ensure adequate knowledge on which to operate. For the moment this seems to be the only way to safeguard EU protection as described in the articles that outline the rights of European citizens, and the reference in Article 6 to the human rights clauses of the European Treaty of Human Rights. The legal provision given in Article 7 of the EU treaty to enforce the application of human rights turns the European Union into a governing and protecting regional human rights organisation. However, the European Union is not a member of the European Convention of Human Rights, and therefore it will not be able to exercise a strong political influence in the European human rights system. A change can be expected from the accession of the European Union to the European Convention on Human Rights under the Lisbon Reform Treaty of December 2007.

The accession of the European Union to the European Convention on Human Rights

Reform Treaty (Treaty of Lisbon)

The Treaty of Lisbon, the Reform Treaty, was concluded at the 13th of December, 2007.[71] For the subject of human rights this treaty is of significance because it officially allows the EU to become part of the European Convention on Human Rights. This accession is not completely unexpected. The draft Constitutional Treaty for the European Union in 2003 foresaw the accession of the EU to the European Convention in article 7(2).[72] The need for EU accession to the European Convention on Human Rights has been repeatedly advanced by the European Institutions and the 46 Heads of State and Government of the Council of Europe.[73] Recent reports on the 'State of Human Rights and Democracy in Europe' demonstrate that 'EU accession to the European Convention on Human Rights should be regarded as an urgent priority'.[74]

One of the considerations discussed prior to the decision to allow the EU access to the European Convention on Human Rights was the discrepancy in human rights standards which

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[71] The future of this treaty has become uncertain as Ireland recently has refused to ratify it. It will depend on European politics whether this treaty or a revised version of it will be accepted.

[72] Draft Treaty establishing a Constitution for Europe, Conv 820/1/03 Rev 1, Conv 847/03, Con 848/03, 18.7.3003. Article 7 (2) reads, in part: 'the Union shall accede'.

[73] Committee on Legal Affairs and Human Rights, http://assembly.coe.int Introductory memorandum p. 2; Third Summit of Heads of State and Government of the Council of Europe, Warsaw, 16 - 17 May 2005, Warsaw Declaration, par. 10.

[74] PACE, State of human rights and democracy in Europe by the Committee on Legal Affairs and Human Rights, (M. Pourgourides) doc. 11202, and State of Democracy in Europe (Mr. Gross), doc. 11203, 26. 03. 2007.

currently exist both at the European level and between individual Member States. Ensuring consistency proved to be an important incentive for accession.[75] Moreover, the EU is establishing its own standards that can deviate from the standards of the European Convention on Human Rights. Deviation standards can provoke confusion between the Member States of the European Union that are also member of the European Convention of Human Rights.[76] Also, the lack of a monitoring system for EU activities forces the EU to become part of the European Convention on Human Rights. In the context of the establishment of the Fundamental Rights Institute, the Parliamentary Assembly applied pressure to support the accession of the EU to the European Convention on Human Rights to ensure that the EU will act in respect of human rights.[77] But the key argument for accession was the need to give a strong message about commitment to the protection of human rights and the importance of cooperation between the EU and the Council of Europe in order 'to achieve a pan -European identity of shared values without dividing lines'. The Human Rights Agency will contribute to developing shared common European values and will ensure that the EU acts with respect for human rights.[78] Politically, accession would be a sign of European solidarity in the area of fundamental rights. The advantage to be gained for a potential victim of human rights abuse will be that s/he can sue the EU for acts committed by its institutions. In this sense there will be legal certainty and protection for individuals.

Although the European Court of Justice acknowledges the jurisprudence of human rights and follows the jurisprudence of the European Court of Human Rights in its decisions,[79] until now, the institutions of the European Union were kept outside the jurisdiction of the European Court. The accession is also intended to involve EU institutions in the same system of independent external monitoring of compliance with fundamental rights. Accession will enable European citizens to make complaints before the European Court of Human Rights against EU institutions directly regarding infringements by the EU of rights under the European Convention on Human Rights . In this way the EU becomes a party in the proceedings directly or indirectly concerning EU law in the European Court of Human Rights. This means that after accession the European Court of Human Rights will have direct jurisdiction over the EC, and EU institutions will be enable to take the EU law into account, improving the overview and reach of EC/EU law. From this Court a greater normative approach can be expected than from the Court of Justice.[80] There is no doubt that the uniforming task of the ECHR will bring a coherent system of fundamental rights' protection across Europe. The EU will not be above the law as far as human rights are concerned, and there will be external scrutiny. The European Court of Justice's position will be analogous to that of national courts and will be regarded as a 'domestic' court.

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[75] Final report of Working Group II, CONV 352/02, WG II 16 Brussels, 22.10.2002.

[76] An example is the Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.13759/06 DROIPEN 62, 10.10.2006, par. 14.

[77] PACE REC. 1744, (2006), follow-up to the 3th Summit: the CoE and the proposed fundamental rights Agency of the EU.

[78] Draft Consitution for Europe, CONV 850/03.

[79] P. Drzemczwski, 'The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights', HRLJ 22.1-4 (2001).

[80] H.C. Krüger & J. Polakiewicz, 'Proposals for a Coherent Human Rights Protection System in Europe', HRLJ 22 (2001): 1-13.

The EU has its own Charter of Human Rights and the EU follows the logic of its Member States with their constitutional bill of rights.

As individuals may still need to turn to the European Court of Justice before they start proceedings under the European Court of Human Rights, the European Court of Human Rights can be regarded as a specialised human rights court that will provide an external guarantee to Europe's citizens.

Legal and Technical Demands

Protocol nr 14 of the European Convention on Human Rights explicitly provides for the possibility of EU accession to the Human Rights Convention through an amendment of its article 59,[81] recognizing that it will be necessary to develop legal and technical amendments of the European Convention on Human Rights. Amendment protocols to the Convention or the conclusions of an accession treaty between the EU and the Council of Europe Member States can be seen as principle modalities.

From the legal point of view, the accession of the European Union must be based on an agreement negotiated by the European Commission on the basis of a mandate of the Council. The Draft Reform Treaty anticipates that the EU will be granted accession to the European Convention on Human Rights with a phrase identical to the one mentioned in Article I-9(2) of the Treaty establishing a Constitution for Europe. This phrase can be found in 188n of the amended EC Treaty (renamed Treaty on the Function of the European Union) and states that 'the Council shall [...] act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements.' This means that each Member State ratifies the agreement prior to it coming into force. It will not come into effect if the Council of Ministers does not act unanimously. The Reform Treaty requires ratification by all EU Member States and all States which are a party to the European Convention on Human Rights as well as the EU. Therefore formal consent of the national parliaments and of the European Parliament is required. To this end it is important that the Draft Reform Treaty makes a provision to insert Article 32 into the EU Treaty in order to provide the Union with a legal personality.[82]

Politically there will be a link between accession and incorporation of the EU Charter. This should be maintained in order to ensure an equal human rights system in the EU. The expectation is that accession will take place after the Reform Treaty comes into force.[83]

As regards the interpretation of EU law according to Article 220 EU, the Court of Justice will retain exclusive authority to review final decisions. Each court will make the final pronouncement in the case law of its court. The European Court of Justice should be regarded

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[81] Protocol nr. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13.05.2004. See also the Explanatory Report, CETS nr. 194 to Protocol nr. 14, par. 101.

[82] Some argue that the Treaty of Nice has implicitly recognized the legal personality of the EU.

[83] Parliamentary Assembly, AS/Jue (2007) 53, Accession by the European Union to the European Convention on Human Rights. Answers to frequently asked question. 16 October 2007, p. 8.

as a 'domestic' court where individuals may lodge complaints prior to starting proceedings before the European Court of Human Rights. The judgements of the Court of Human Rights are essentially declaratory judgements. This means the Court can state an opinion about a legal situation but is not able to annul or amend national measures or court decisions. The EU will be part of these judgements on the topic of human rights.

Possibilities of protection

Context of European Values.

The preamble of the draft Constitution for Europe (CONV 850/03) speaks of a 'reunited Europe' and of a commonness of the people of Europe reflected in the words 'forge a common destiny'. Supposedly, there is meant to be a common destiny for the European people that deals with common European values. The question will be whether there exists a context for these values. From the different forms of citizenship one can extract some notions, such as the notions of equality, local associations, public participation and state involvement.

The source of those notions can be found in Article 6 paragraph 1 EU that expresses that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, but is also based on the rule of law and principles which are common to the Member States'. The second paragraph of Article 6 refers to the EU's respect for fundamental rights as guaranteed by the European Treaty of Rome, aiming to protect fundamental human rights and freedoms, and considers these rights and the rights that come from the constitutional traditions of the Member States as common values of Community law. The third paragraph of Article 6 states expressly: 'The Union respects the national identity of its Member States.' Taken together we can assume that Article 6 EU has been formulated as an identity cornerstone for European integration. However, the EC/EU is not a State neither a federation of States. It is an international organisation with specific goals and powers attributed to it to achieve its goals. As the European Union's Charter of Fundamental Rights of December 2000, notwithstanding its lack of enforceability, would have become Part II of the draft Constitution,[84] this Charter could have been seen as an attempt to create common European human rights values. However, the constitution failed and in its place, a Reform Treaty has been formulated. According to this Treaty, the EU becomes part of the European Convention on Human Rights. The Charter of Fundamental Rights of the European Union will become part of the Reforms Treaty and will be a constitutional human rights act for the EU.

The accession of the EC/EU to the European Convention on Human Rights requires that the EU/EC system will be brought within its system. Does this mean that all citizens of the EU will have the same human rights protection?

Protection of European citizens.

In the first place it is of importance to find out what the effect of the implementation of the European Union Charter in the Reform Treaty will be on the EU. The Charter itself stipulates

[84] Draft Consitution for Europe, CONV 850/03.

that it does not 'establish any new power or task for the Union, or modify powers and tasks defined in other parts of the Constitution'.[85] As the Court of Justice has developed its fundamental rights case law according to the European Community's capacity to affect fundamental rights, which has been increasing since the 1960s, we can expect that the implementation of the Human Rights Charter in the Reform Treaty will influence the European Union.[86] The rights articulated in the Charter are derived from sources which the Court of Justice uses; several rights articulated in the Charter of Fundamental Rights are based on the European Convention of Human Rights,[87] some originate from common constitutional traditions, some are inspired by national constitutional law such as the European Social Charter of 1961 and the Revised Social Charter of 1996, and some are articles from the EC or Treaty of European Union (Knook, p. 395). Many sources of law have made the Charter into the existing Charter of Rights. The implementation of these rights in the Reform Treaty may mean that the Charter will be changed into a constitutional law of the European Union. The Court of Justice has the authority to deliver preliminary judgements in questions dealing with those rights as far as they are in the ambit of the Court's competences.

New competences may be established in the light of the Reform Treaty and its' annexes for the traditional third pillar of the EU. This means that the Council may be able to deal with issues it has not been dealing with until now. The non-discriminatory Article 12 in connection with the contents of the Charter of Human Rights (which has given the Court of Justice enormous power) could be used by the Council in order to develop fundamental rights within the ambit of the EU. In relation to this we can think of the Race Directive and policy programme promoting transnational cooperation to combat discrimination. The elaboration of those fundamental rights in EU law as directly applicable rights will guarantee the protection of EU citizens. If those rights do not form a part of the European Convention, then protection can be expected only in the ambit of the EU. However, even when those rights are acknowledged in the European Convention of Human Rights, the EU system will afford better protection as the claimants only have to go to a national court and to ask for a preliminary decision from the Court of Justice. There is no dispute that to start proceedings in the European Court of Human Rights costs the claimant much more, as he has to go through all legal national institutons before addressing this Court.

All European citizens will have the same protection from the EU and the European Convention on Human Rights. However, a difference in human rights traditions can provoke a difference in treatment before the Court of Justice. We may expect that the more experienced courts of human rights will be able to analyse and understand national human rights peculiarities. In this respect the payment of sanctions by the national authorities violating human rights can be seen as a means to equalising the differences between human rights standards in Western and Eastern European countries. But in practice the courts give their judgements on a case-by-case basis.

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[85] Laeken Declaration on the Future of Europe, December 2001; CONV 375/1/02 REV 1, p. 1-3.

[86] A. Knook, (2005) 'The court, the Charter, and the Vertical Division of Powers in the European Union', *Common Market Law Review* 42, p. 385.

[87] Explanatory Memorandum on art. II-112 CT The Explanatory Memorandum was added to the Constitution as 'Declaration concerning the explanations relating to the Charter of Fundamental Rights'. O.J. 2004, C 3 310/324.

For a more structured approach to the national human rights situation, expectations may be based on the conclusions of the Human Rights Institute in Vienna which will be able to analyse political human rights situations in national Member States. Although this agency does not have enough power to detect and to judge human right violations in the Member States, if it works as an inspiring and stimulating institute its functioning can lead to adequate human rights policies in the Member States. A better understanding of the differences in background between Eastern and Western Europe will contribute to overcoming national human rights violations. Alongside the Court of Justice and the Council of Europe, the Human Rights Institute has a key role in developing human rights protection for the people of Hungary.

Equivalent protection

After accession of the EU to the European Convention on Human Rights, the European Court of Human Rights has the function of judging European Union cases of violations of fundamental rights. This means t hat the acts of the European institutions will be included in the competence of the European Court of Human Rights. As domestic law must give full effect to the right guaranteed by the European Convention. this court will also be able to discuss national violations of human rights.

The question will be to what extent the European Court of Human Rights will be inclined to interpret the human rights clauses of the EC/EU in the light of the goal of European integration. Will it take into account the specific features of the EU/EC as an economic/social organisation? This might prove difficult for the European Court of Human Rights, as has been shown in Bosphorus Case law where the Irish Government has contended that the interference complained of was justified for the reasons mentioned by the Court of Justice, which made the European Court of Human Rights incompetent to review the case. The European Court of Human Rights confirmed this reasoning stating that 'if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.'[88] The difficulty will be the interpretation of the term 'equivalent protection' by the Court of Justice. The Reform Treaty focuses on the functioning of the admissibility criterion and has not made a jurisdiction condition. The European Court of Human Rights can do so, interpreting the Human Rights Treaty in the light of the goal of European integration.

Conclusion

The remarkable characteristic of the European Convention on Human Rights is that it penetrates the national legal order by requiring national contracting States to behave in a certain way towards their own citizens and the citizens of other countries who are within its jurisdiction. This paper deals with the question whether the human rights system in the EU offers enough protection nowadays to the individual European citizen. The example of violations of human rights in Hungary demonstrates the need to stress the importance of human rights principles as

[88] ECHR 30 June 2005, Bosphorus Have Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, par. 156.

cornerstones of common European policy. It justifies a central human rights institute that safeguards human rights as part of European integration.

The national safeguarding system of the Member States is best scrutinised by an independent, specialised European Human Rights Institute which pursues the aim of analysing national human rights administrative systems and authorities. The case of Hungary could be reported easily and by communicating with a national human rights institute, the results of changes in the national public law system can be followed. The establishment of national human rights institutes serves as a minimum requirement to audit the acts of the national authorities. The Human Rights Institute in Vienna, serves only as a network to give information to the national human rights institutes. At the same time it can function as a watchdog of human rights practices in the Member States and in the EU. The Institute's board members should be aware of this important task of identifying and tackling human rights violations. To that purpose the simple exchange of information between the national human rights institutes and the European Institute will be useful. In addition, the underlying principles of building consensus between the stakeholders in the field and of informing the persons involved about violations, will be of importance.

The Institute can be a means of applying pressure on national governments and regional institutions to improve human rights standards. At the very least, human rights institutions should be convinced of the need for equivalent protection of human rights in the Member States. The question of what can be expected from the European Court of Justice will be raised in court law. The Reform Treaty focuses on the functioning of the admissibility criteria of the EU to the European Convention on Human Rights. For the future this means the Court of Justice will not be officially the guardian of human rights provisions in treaties and secondary legislation. However, the implementation of the Charter of Human Rights in the Reform Treaty guarantees it to be applied in all Member States of the EU. The implementation of the Charter in the Reform Treaty does not prohibit the Court of Justice from playing a proactive role concerning human rights matters as it has done until now. Driven by a concern for legitimacy, the Court of Justice did develop its own case law on fundamental human rights. What can be expected from the Court of Justice in the near future, when the EU will be part of the European Convention of human rights, is not clear. At least we know that the admission of the EU to the European Convention on Human Rights will put the European Court of Human Rights in a position to analyse the shortcomings in the EU decision-making system. The European Convention on Human Rights will become an instrument for those who are seeking protection against the actions of EU authorities. What is more, it will serve as a necessary instrument for harmonisation at the level of human rights in the Member States of the Convention.

The lack of enforceability of sentences against violating authorities will be compensated for by the fact that Member States - and in the future the EU itself - can be condemned by the European Court of Human Rights in Strasbourg for not guaranteeing the protection of human rights. The pressure of the Vienna Human Rights Institute on the Member States can be used to make the Member States fulfill their obligations.

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