



FEPS JURISTS NETWORK MEETING

HOW TO OFFER A MORE EFFECTIVE PROTECTION SYSTEM FOR FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION?

Summary of the meeting which took place on 27 May 2011 in Dresden, Germany

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The event was organised with the support of the Fondation Jean-Jaurès.

During the presentation of the articles written by the members of the FEPS Jurists Network concerning the effectiveness of the protection of fundamental rights in the EU, the following points came up and were discussed.

1. THE NECESSITY OF EU ACTION CONCERNING FUNDAMENTAL RIGHTS

The foundations of the current protection system were not questioned. The protection of fundamental rights is seen as the primary task of national institutions. These institutions are complementary to the regional level, where the European Court of Human Rights (EctHR) takes the role of main protector of fundamental rights. The question arose, what role could the EU take in this system? It was examined if in cases when government action is questionable from a fundamental rights point of view a mere political objection from the EU should be enough. However, taking into account some recent cases, like the expulsion of Roma people from France or the introduction of media laws containing serious infringements of press freedom in several EU Member States, it is clear that simple political action is not enough. New legal initiatives are needed at EU level to examine contested national measures in a quick and effective way. Candidate countries are thoroughly monitored in their compliance with fundamental rights. It is a question of credibility for the EU to maintain this strict approach once a country becomes a Member State.

2. RELATIONS BETWEEN THE EU AND THE COUNCIL OF EUROPE

It has been evoked several times that the CoE and EU protection system should be better linked. It seems that these institutions often both work on the same issues, but not at the same time and mainly without effective coordination. Doubling creates the risk of breaking the unity of fundamental rights protection system, and rendering it less efficient. The CoE has a vast expertise including comprehensive recommendations on which the EU could lean. By better incorporating them in its legislative and administrative practice, it could strengthen and further promote these instruments. Also, the EU should not overlook the already existing CoE fundamental rights monitoring systems and should build more on these observations.

The importance of the European Social Charter was emphasised separately. With the accession of the EU to the ECHR, there will be no institutional link between the CoE and the EU concerning the Social Charter. This would create a huge deficit in fundamental rights protection, but also an obligation for progressive lawyers to raise awareness about this deficit and act in order to overcome this shortfall.

3. FUNDAMENTAL RIGHTS – FUNDAMENTAL FREEDOMS

The importance of the fact, that according to the jurisprudence of the ECJ, fundamental rights prevail over fundamental freedoms, was largely emphasised. Fundamental rights were seen as an integral part of the general principles of the EU law. With the entry into force of the Lisbon Treaty, fundamental rights were codified under Article 6(1), which, after being considered as general principles, gave them a strengthened position. It is still to be seen how this will affect ECJ case-law.

The example of two pre-Lisbon cases was brought up.

The Schmidberger case, indeed, had a great importance, as this was the first occasion when the ECJ had to deal with the contradiction between the free movement of goods and the right to assembly. In this case, and under these particular circumstances, the Court decided that the right to assembly formed a legitimate aim to restrict free movement of goods. Although the decision is mostly considered to have a positive effect, some critical comments were also made. In some paragraphs, the language of the judgement suggests that even when opposed to fundamental rights, restrictions on fundamental freedoms are merely tolerated.

This approach characterised the case-law of the ECJ until the Laval case, which was received with vast disappointment. This complex case raised several issues, one of them being a conflict between the right to collective action and the freedom to provide services. The Court recognised that the right to collective action is a fundamental right, the exercise of which may be subject to some restrictions. However, in the particular circumstances of this case, it found that the obstacle created by the exercise of the right to collective action is not justified with view to the objective. The judgement, which could lead to serious social dumping, was heavily criticised by trade unions, NGOs and progressive parties and more precisely, progressive lawyers. Several alternative legal solutions were drafted that could have led to a different outcome.

A debate emerged based on the latter point whether the judgement also took political considerations into account. This has led to a short side-discussion on the satisfactory judicial independence both in the ECJ and the ECtHR.

It was agreed that the ECJ has a huge role in the elaboration of the protection of fundamental rights at EU level. However, it would be the most welcome if in its reasoning, it would be clear that in cases when fundamental rights and fundamental freedoms clash, the logical starting point should be the protection of these fundamental rights. This could eventually be limited, with the objective of fundamental freedoms – but definitely not the other way round.

4. THE EFFECTIVENESS OF LEGAL AND NON-LEGAL MEASURES

At EU level, two procedures could be evoked for alleged fundamental rights violations by Member States.

Article 258 TFEU gives the possibility for the Commission to examine the case before taking it to the Court. However, the Commission interprets its role concerning fundamental rights in a very narrow manner. Although national fundamental rights activists would expect and need some kind of formal support from the Commission, usually cases do not arrive to the point where the procedure described in Article 258 TFEU is launched, as the Commission considers that fundamental rights violation should be addressed by national authorities. This could create a vicious circle, without any effective solution to the breach itself.

There are also examples when the Commission informally asked at first for explanations, but the reasoning for this was based on technicalities rather than using a fundamental rights reasoning.

A second option can be the recourse to Article 7 TEU. This article contains both the possibility for a preventive and remedial action. Nevertheless, because of the serious consequences its exercise entails, this solution rather looks like a double-edged sword. Its use seems to be strictly a political issue. Instead of encouraging the Member State to put an end to the breach, it risks strengthening anti-European feelings. Furthermore, it only offers an answer, when there is clear risk of serious breach or the existence of a serious and persistent breach. It does not offer a solution to the different shades and the grey zone, in which the Commission claims that it does not have the legal power to act.

It was underlined that for effective fundamental rights protection legal measures should go hand in hand with non-legal ones. Blaming and shaming by EU institutions and European and international media generally can also be efficient. But besides the criticism on the legal track, non-legal measures have also lost their power recently, as international media is not focused on Europe, as far as human rights are concerned.

Generally, after the entry into force of the Lisbon Treaty, which includes the Charter of Fundamental Rights of the EU, the Commission should more strongly assume its role in protecting fundamental rights. It should make more use both of the existing legal and non-legal measures, which could be already an effective solution to the cases currently in the grey zone. This could also lead to the elaboration of further legal measures, offering more consistency, judicial security and transparency in this field.

5. THE ROLE OF THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA)

It was noted with regret that the FRA does not have a better visibility and a more prominent role in the protection of fundamental rights. However, as an advisory body, the FRA could only gain more recognition, if the Commission would give an outstanding attention to its reports, and if it would ensure an effective follow up of the problems listed in it.

6. SPECIFIC ISSUES

In relation to the general debate on the protection of fundamental right, some specific rights were highlighted and discussed.

- **Freedom of expression and freedom of press**

This issue has been brought up in relation to the restrictive media laws in existence in some Member States. For a more detailed analysis on this, please, read the FEPS document “Freedom of expression in the European Union”.

- **Labour rights**

The debate on the European Social Charter and the Laval case brought up more specifically the issue of social dumping and the detriment of workers' rights. Here, the margin for interpretation and the possibility for balancing between fundamental rights and fundamental freedoms are relatively wide. According to the jurisprudence of the ECJ, labour rights are recognised

- **Human dignity and migration**

It was underlined that one of the conditions for handling the immigration crisis in a humane way is compulsory burden sharing at European level.

A detailed analysis is needed on two issues. First, the legal reasoning of the limitation of free movement of persons in the EU should be examined, based on the expulsion of Romanian Roma from France. Secondly, the legal grounds for temporarily closing the Schengen borders should be studied, with reference to France's reply to Italy's decision on providing permits for Tunisian migrants.

ARTICLES

- HUMAN RIGHTS, By Sonja BIGEC, University of Maribor, Slovenia
- A SOCIALIST STRATEGY FOR HUMAN RIGHTS IN EUROPE, By Prof.Dr. Manuel MEDINA ORTEGA, EUSONET, Spain
- HOW TO OFFER A MORE EFFECTIVE PROTECTION SYSTEM FOR FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION? By Tiina RUNTHAL, Ministry of Justice, Estonia
- PROTECTION FOR FUNDAMENTAL RIGHTS AND DEMOCRATIC FREEDOMS IN AND BY THE EUROPEAN UNION: AUSTRIA, HUNGARY, ARTICLE 7 AND AN UNCERTAIN FUTURE, By Brian-Christopher SCHMIDT, SPÖ Parliamentary Group, Austria
- HUMAN RIGHTS AND THE THREATS TO NATIONAL SECURITY, By Cosmin Doru URSU, Lawyer, Romania

HUMAN RIGHTS

By Sonja BIGEC, University of Maribor, Slovenia

Human rights refer to the concept of human beings as having universal rights, or status, regardless of legal jurisdiction, and likewise localizing factors, such as ethnicity and nationality¹. The existence and validity of human rights continue to be the subject to debate in field of sociology and political science. However, human rights are defined in international law and covenants, and further, in the domestic laws of many states. Within particular states, human rights refer to safeguards for the individual against arbitrary use of power by the government regarding the well being of individuals, the freedom and autonomy of individuals and the representation of the human interest in government.

Europe is a small region but has many people, cultures and nations. Throughout history, this region has seen many wars and conflicts, as well as progress and developments. The 20th century, described as many as the "Century of War", saw two world wars (centered around Europe), amongst other terrible conflicts. Millions of people were killed. There were human rights violations throughout. However, towards the 21st century, human rights, while considerably improved, is still an issue.

The new European Union Reform Treaty, adopted in October 2007 in Lisbon, establishes in Article 6, the legal basis for the EU's accession to the European Convention on Human Rights (ECHR)². The ECHR was signed in Rome in November 1950. It offered protection of fundamental civil and political rights and established an enforcement machinery through the European Court of Human Rights, based in Strasbourg. Individuals who deem their rights have been violated in one country can bring their case to the Strasbourg court after exhaustion of national remedies³.

The human rights in Europe on the whole is good, although there are several human rights problems ranging from the treatment of asylum seekers and the Roma to reports of police brutality. Even though Europe is freer than most regions around the world, there is a marked increase in racism and

¹ Hojnik J., English legal terminology, Materials, Maribor 2006, Str. 14.

² 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at..., on... 2007], which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

³ Summarized from: W. Janis M., S. Kay Richards, W. Bradley A., European human rights law, text and materials, Oxford 2008.

anti-immigrant policies, as well as a rise in poverty. During violent conflict, safe havens to protect refugees and war victims from any surrounding violence in their communities can sometimes help to safeguard human lives.

The EU is based on single market in which goods, services, people and capital could move around freely. One of the basic freedoms of the single market of the European Union is free movement of goods, but the law gives priority to human rights when they come into conflict with this fundamental freedom. The fact that human rights are an exception to the free movement of goods can be seen from judgment of the Court of 12 June 2003 (Schmidberger v. Austria, C-112/00)⁴. This case shows that the European Court treads very carefully in enforcing Community rights when there is a possibility of a clash with human rights as laid down in national constitutions or in the European Convention on Human Rights. The first conclusion is that this is the first case in which respect for and protection of fundamental rights has been used by a Member State as a justification for a restriction on a fundamental freedom. Secondly, the Schmidberger case clearly demonstrates that the Community courts do not always protect fundamental freedoms to the detriment of fundamental rights. It is probably the first time that the ECJ accepted the supremacy of another source of law over the EC law. It is important if a Member State has a choice between several measures for achieving the same aim, it should choose the means which least restricts the fundamental freedoms. Give priority to human rights is one way to improve their protection.

To protect human rights is to ensure that people receive some degree of decent, humane treatment. International human rights law, humanitarian intervention law and refugee law all protect the right to life and physical integrity and attempt to limit the unrestrained power of the state. These laws aim to preserve humanity and protect against anything that challenges people's health, economic well-being, social stability and political peace. Underlying such laws is the principle of nondiscrimination, the notion that rights apply universally⁵. Responsibility to protect human rights resides first and foremost with the states themselves. However, in many cases public authorities and government officials institute policies that violate basic human rights. Such abuses of power by political leaders and state authorities have devastating effects, including genocide, war crimes and crimes against humanity. I think the EU should have greater control in the protection of human rights. One way to increase the protection of human rights is that the Parliament adopted several resolutions which condemn the Government for violations of human rights.

External specialists can offer legislative assistance and provide guidance in drafting press freedom laws, minority legislation and laws securing gender equality. They can also assist in drafting a constitution, which guarantees fundamental political and economic rights. For example, the newly implemented Hungarian media law limits freedom of expression in several ways. The journalists are pushed to self-censorship as they are being threatened by extremely high fines for coverage issues⁶,

⁴ Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0112:EN:HTML>

⁵ Human Rights Protection: http://www.beyondintractability.org/essay/human_rights_protect/

⁶ High fines for media reporting will not be "politically balanced" or human dignity will be flooded.

which are determined by unclear criteria. Also source protection is not guaranteed. The law was strongly criticized by several European leaders, as well as numerous international organizations and the Hungarian and foreign media. There is need for a European directive setting press freedom standards. As media freedom is under threat in several countries, the solution must be found at the EU level.

Despite the adoption of many documents, I believe that one of the main ways of increasing the protection of human rights is education about human rights. It must become part of general public education. Technical and financial assistance should be provided to increase knowledge about human rights. Members of the police and security forces have to be trained to ensure the observation of human rights standards for law enforcement. Research institutes and universities should be strengthened to train lawyers and judges. To uphold human rights standards in the long-term, their values must permeate all levels of society.

A SOCIALIST STRATEGY FOR HUMAN RIGHTS IN EUROPE

By Prof.Dr. Manuel MEDINA ORTEGA, EUSONET, Spain

Socialist parties place human rights at the forefront of their political aims. Human rights cannot be used and disposed of as an instrument or as a convenience. They are not a tool for other goals, social or economic. Socialists are uncompromising in this respect. Short-term electoral gains are secondary in relation to the goal of protecting human rights.

The attitude taken by the right-wing parties in Europe appears to be just the opposite. The right is gaining ground in Europe on the basis of the denial of human rights to many of the people who are now living and working with us in this part of the world: the immigrants. Xenophobic attitudes fostered some time ago from the extreme right by people like Jean-Marie Le Pen and his "Front National" in France or by Umberto Bossi and the Northern League in Italy have become the standard-banner for the formerly moderate center-right political forces in those countries. Most elections in Europe are being won by this new right based on anti-immigration policies. Socialist parties keep losing ground because they are being considered too soft in the curtailment of immigration. The equation "Socialists=pro-immigration, Right=anti-immigration" is working against the Socialists and for the right. Workers, the unemployed and other weaker social sectors in need of public assistance make up the backbone of the Socialist electorate. In many European countries these weaker sectors are now voting for the right or even for the extreme right. They have been led to believe that the Socialist humanitarian policies in favour of the immigrants pose a threat to their jobs and to their social benefits.

The polarization of political discussion centered in immigration grows exponentially whenever an immigration crisis appears. This happened during the Balkan crisis of the 1990s, when thousands of Yugoslavs and Albanians were forced to leave their countries looking for security in the European Union, as they had to escape ethnic and political conflicts in their home countries. The same happened when the countries of central and Eastern Europe were demanding integration in the Union, prompting the xenophobic right to picture the ugly image of the "Polish plumber". This is happening again with the arrival of many African immigrants to the shores of southern Europe as a consequence of the political instability and the flaring up of civil war in northern Africa and the Middle East.

The moderate right is now competing with the extreme right in their anti-immigration zeal. When public opinion polls in France showed that the daughter of Jean-Marie Le Pen, Marine Le Pen, now the hereditary leader of the Front National, was doing better than Sarkozy and could kick him out of the electoral race in the first round of the presidential elections, Sarkozy used a typical right-wing gimmick to gain back the support of his right-wing electorate. He decreed the closure of the illegal Romanian gypsy camps outside the main cities and the expulsion of their population. When Berlusconi realized that his broad-based right-wing coalition "Popolo della libertà" was disintegrating as a consequence of his very personal and self-supporting approach to political power he appealed to the Italian xenophobic sentiment by taking a tough attitude against the newly arrived illegal immigrants and forcing them to move towards France. This prompted his neighbour and coreligionist

Sarkozy to cut momentarily the rail links with Italy. On a vaudeville-like sequence, the two right-wing leaders passed then from a nationalist confrontation between them to a common understanding against the Schengen agreement. More recently, the conservative coalition in Denmark has found a way to appease their extreme right with the establishment of controls on goods coming from their closest neighbours, Germany and Sweden, notwithstanding the damages these restrictions will cause to the Danish economy. It remains to be seen whether the Danish business sectors will be willing to support this self-denying behaviour of their conservative government or, on the contrary, will be forced by the economic realities to work against it.

In order to develop a coherent socialist strategy in the area of human rights a comprehensive analysis of the immigration issues must go beyond the simple question of principles. The main beneficiaries of immigration are the business sectors that support the political right. The social sectors that feel threatened by the arrival of new immigrants are those that have supported the Socialist movement from its inception: the labourers, the unemployed, the poorest and the weakest. Socialist policies have provided a network of support for these sectors, and these policies are the core of the European social model. The European social model is now under strain due to many causes, including the demographic changes that have reduced the availability of young workers in the labour market. European societies are aging rapidly. Immigration is needed to provide for a young labour force that is now lacking in our own countries. At the same time, the economic crisis has put under pressure the social security systems of Europe which have become weaker financially, and the right is using the vulnerability of the social security systems as a pretext for further cuts in social services and as a way to get electoral support by blaming the immigrants for the weakening of the social model. Immigrants are blamed for the limitations in social coverage and for the financial difficulties of our social security systems. It is easy to blame the others, the immigrants, who came "unsolicited" from third countries as the cause for problems that we have created by ourselves. It would be irresponsible for the Socialists to follow the example of the right and to take unfair and disproportionate measures against the immigrants in order to justify the deficiencies of our social security systems.

It is not fair that the right-wing governments that are in fact furthering immigration in order to supply with cheap labour their internal markets, thus lowering social conditions, blame the immigrants for the consequences of right-wing policies directed towards a reduction of the costs of the social systems. This deceptive message has proved to be effective, however. The right-wing parties keep winning elections and the Socialists are net losers everywhere for policies for which they are held to be responsible without being actually so. The humanitarian policies supported by the left in favour of one of the weakest sectors of our societies, the immigrants, are being used by the right to point out their accusing finger against the socialists for the social conditions that the right-parties have created. Efforts by the Socialist parties to explain their real position in the way of decoupling the social measures in favour of immigrants from the policies carried out by the right in order to create cheap working conditions don't appear to have been well grasped by the broad public opinion in Europe. For the European electorate, Socialist policies favour immigration while right-wing parties are given credit in attempting to curtail immigration through the measures announced by their leaders against the rights of the immigrants. This perception has an electoral cost for the left and gives political advantage to the right in all electoral processes.

In the democratic system of government it is not enough to produce sound policies. They also have to be explained to the people so that the voters understand the reasons lying behind them. While the right has skilfully mastered its anti-immigration discourse, the Socialist parties have not been successful in the explanation of their policies. The internal contradiction of the right-wing policies of supporting immigration while disclaiming any responsibility for the negative impact of those policies on some aspects of the European social model. Socialist parties couldn't and shouldn't imitate the right in their cynical double game of both supporting immigration and using immigration as an electoral issue against the left. On the other hand, the Socialists should explain to the electorate that their humanitarian policies are not the cause of the upsurge of immigration but the necessary consequence of poorly designed policies produced by the right in this area.

The development of comprehensive policies covering the whole gamut of immigration should be a priority for the European socialists. Immigration policies must be developed from the bottom up. With fecundity rates far below the level of population-maintenance, and falling, we need immigrants. Immigrants, however, are not merchandises. They are human beings and they should be treated as such. We shouldn't open our frontiers to new immigrants people if we cannot guarantee them an appropriate, European-level salary, decent living accommodations, and the required conditions for education, healthcare and unemployment benefits. Thus, while the immigrants are making a substantial, net contribution to our economy, nobody has worried about who should pay for the social costs that they generate for the public administrations. This means that the average taxpayer must contribute to these added social costs him being aware that he is a direct beneficiary of the contribution of the immigrants to the national economy. An important element for the evaluation of the economic activity in the modern capitalist system is the apportionment of public costs in accordance with the benefits accruing to the respective economic sectors. This consideration is not being taken into consideration in the area of immigration. For the average tax-payer, the admission of new immigrants is tantamount to new tax raises. The business sectors that take advantage of immigration consider it an externality for which they don't have to bear any additional costs. Thus, there is an unfair distribution of burden-sharing between the general tax-payer who benefits only indirectly from immigration and the business sectors that benefit directly from the reduction of labour costs that the arrival of cheap immigrant workers is generating.

A second, but equally serious problem created by immigration must be taken into consideration. European societies have old historic roots that give them a high degree of internal consistency even in time of crisis. Unlike the North-American society, which is the result of the melting-pot of people coming from different geographical, ethnic and cultural origins, European societies enjoyed until recently a solid ethnic homogeneity. The arrival of large numbers of immigrants appears to be threatening now the internal cohesion of our traditionally well integrated societies. The European response to the massive inflow of immigrants has been to place them in ghettos where they are separated from the main stream society by their geographical, ethnic and cultural origins. It is as if were returning to the Middle Ages, when cities were divided by ethniae. Thus, in the medieval Spanish cities, their inhabitants were quartered in accordance with their respective religious creeds. There were quarters, respectively, for the Christians, the Jews and the Moors. At night, the residents of the minority quarters were prevented by to leave their quarters by locked gates, so that they would not disturb the peace and safety of the residents of the majority quarters. We are now doing something similar in Europe, when we place the immigrants in ghettos and let them sort out by

themselves their everyday problems. The police tends to shy away from these dangerous hearths of conflict and insecurity. Weekends in many of the French immigrant ghetto cities are marked by car-burning, looting and other violent incidents, while the rest of the “ordinary” citizens can rest in their usually well protected neighbourhoods without fear of having their peace disturbed by the presence of suspicious immigrants. It is difficult to foresee, however, for how long we may expect to maintain this precarious status quo of “separate but equal” coexistence of city quarters before it generates conflict situations affecting the whole social structure.

Changes in the rules concerning the admission of immigrants and their status within our societies have been introduced in many European countries on the basis of immediate practical needs. We have also developed an extensive European Union legislation to deal with these issues. The basic rule of the European law on immigration, both at the national and supranational level is the principle of the equality before the law. This legal equality of principle may in fact be following the old slogan of the southern States of the U.S. where blacks were granted a “separate but equal” treatment in relation with the whites. In fact, this situation is creating segregation between the “European” majority and the minorities resulting from immigration, or, to put it more strongly, is creating a certain form of apartheid. We might be slipping into an Indian-like system of castes where the place of people in society is determined by their ethnic origins. A system where the social integration of immigrants is not guaranteed is not democratic and is conducive to social conflict. Cultural and social integration are essential elements of a stable and democratic society.

Some German right-wing politicians are now demanding some form of compulsory assimilation of immigrants to the “master culture”. Forced assimilation through legally binding rules is not the best guarantee for social integration. Legal measures have to be supplemented with positive measures in support of the immigrants. Love and affection are an important element of social integration. The average European citizen has, unfortunately, very little time to dispense love and affection to his close relatives and friends. It is unrealistic to demand from him the additional voluntary effort that is required to facilitate the smooth integration of the foreign immigrants. Here, as elsewhere within the European social model system, public resources will have to be provided from all levels, from the local level to the European Union level. We need to develop a comprehensive policy for the integration of immigrants, which should include economic, social and legal measures. Resources for these policies should be found, without further fuelling the average taxpayer complaints for the extra costs to his pocket of admitting immigrants in Europe.

The European Union Law on matters of immigration is now developing along the lines sketched in this paper. The European Court of Justice has played a leading and consistent role in the protection of the human rights of the immigrants. Socialists should be made aware of the development of this proactive approach of our common institutions to the immigration policies.

Difficulties remain, however, in the area of communication of the Socialist policies on immigration over Europe. The Socialists have not been able so far to convey to the European public opinion the idea that a humanitarian immigration policy is not equal to encouraging immigration. The right is in fact encouraging immigration through their policy of weakening the European social system, but they mask this real pro-immigration policy with anti-immigration, anti-human rights rhetoric and the defence of positions that threaten to increase the social cleavages within Europe. The Socialists

should rely on recent legal developments within the European Union concerning immigration as a starting point to show to the European electorate that the control of immigration is compatible with a humane treatment of immigrants. The integration of immigrants in our societies is a socialist goal that can be clearly understood by European public opinion. The recognition of human rights to immigrants is clearly compatible with a well ordered and controlled immigration system.



HOW TO OFFER A MORE EFFECTIVE PROTECTION SYSTEM FOR FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION?

By Tiina RUNTHAL, Ministry of Justice, Estonia

European Court of Justice has found in its practice that fundamental rights belong among the general principles of the European Union law. The Charter of Fundamental Rights of the European Union controls the fundamental rights in the European Union and the European Convention on Human Rights controls them outside the European Union (thus like a mutual complementary control, while it is even possible to look into the matter deeper on the EU level).

Time will show how the co-operation between the European Court of Justice and the European Court of Human Rights will start to look like. However, the problem here is the fact that the scope of application of the Charter of Fundamental Rights is limited only to situations where the institutions or member states of the European Union apply the European Union law. While the member states act purely within the scope of application of their national law, the nationally enforced fundamental rights and obligations concerning international human rights are binding for the member states.

There is no straight answer to the question how and if the so-called gray area can be regulated by amending the Treaty on European Union.

One thing is certain that one cannot recommend starting at once with the amendment of the Treaty. First, the practice has to be analysed and conclusions have to be made based on this – whether the Treaty or the practice should be changed.

Discussions related to human rights are complicated by their nature because the proportionality (conformity/conflict) thereof with the Treaty on European Union has to be ascertained. Although the ascertainment is complicated and time-consuming, it is definitely not impossible. Before thinking about the amendment of the Treaty, one has to think how to implement the Treaty in a better way in order to ascertain the violation of human rights.

It is complicated task to qualify an act regarded as violation of human rights because it is difficult to draw a line, no matter how; the practice continues to change also. Judicial practice in the field of human rights is definitely one source of ascertainment in addition to the Charter of Human Rights⁷ and the Explanations relating to the Charter⁸, however it may happen that relevant practice or other scientific sources are not always available.

In addition to the Explanations relating to the Charter, we would actually need guidelines that would help the Council bodies to implement the control and find out cases where the human rights have been violated and the Council has to act pursuant to Article 7.

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

The guidelines should provide general information grounds – how and who will transmit information concerning a possible violation from a member state to the Council, and in which form and to which extent the relevant information has to be submitted.

The guidelines should be similar with the assessment of impact of legislation or the guidelines on inclusion.

It would also simplify the work done by the member states because this way it will be possible to ascertain what are the grounds based on which the cases of violation will be processed, or which will be qualified as violation in the first place.

All in all, I think that it is definitely not required to start to amend the Treaty on European Union in the first place, instead its application in the practice should be analysed in a longer perspective and the guidelines should be established for the bodies of the European Council as well as the member states which could inform of any possible violation through the non-profit associations or other representatives of groups (e.g. Parliament factions).

PROTECTION FOR FUNDAMENTAL RIGHTS AND DEMOCRATIC FREEDOMS IN AND BY THE EUROPEAN UNION:

AUSTRIA, HUNGARY, ARTICLE 7 AND AN UNCERTAIN FUTURE

By Brian-Christopher SCHMIDT, SPÖ Parliamentary Group, Austria

A) BACKGROUND

1. Jörg Haider's Austrian Freedom Party in a government coalition

In 2000, the conservative Austrian People's Party, led by Wolfgang Schüssel, made good on a promise that if they come in third in the national elections, they would go into opposition – by going into a government coalition with the Jörg Haider's right wing Freedom Party. Haider having gained notoriety for xenophobe, anti-semitic populism and a revisionist attitude towards World War II, there were expectations, both among critical and progressive voices in Austria and elsewhere in Europe, for a reaction by the European Union.

Yet, at this point, there was no real instrument for the Institutions of the European Union to react to the participation of the right-wing party in the Austrian government. What followed was a concerted reaction by the governments of the (then) fourteen other Member States to reduce the bilateral interactions with Austria to a minimum. Although there was unanimity among the other members, the actions taken were strictly bilateral and did not involve institutions of the European Union. The sanctions were lifted after the "wise men" panel (Finland's Ahtisaari, Germany's Frowein and Spain's Oreja) delivered a report on the situation.

2. The outcome of the "sanctions of the EU 14"

The panel came to the conclusion that the sanctions were counter-productive. In fact, on a national political level, they seemed to play right into the hand of the populist approach of Jörg Haider. Demonising the Union had always been a major part of his rhetoric arsenal, and the sanctions gave him further potential to do so (enhanced by the Austrian tendency to a defiant, sullen attitude towards foreign criticism, showcased impressively in the election of former SS member Kurt Waldheim to the Austrian President). Furthermore, the Austrian Social Democrats, who had publicly welcomed the sanctions as a warning sign against Haider's extremism, came under attack for allegedly instigating other Member States.

As lessons from the situation, the "wise men" recommended the creation of a Human Rights Office for the European Union, as well as the implementation of preventive and supervising procedures

within the European Union's treaties. These recommendations can be seen as basic precursors to the instruments now set in Art 7 TEU.

3. Hungary as litmus test for Art 7 TEU

Now, in 2011, it is Hungary's current presidency of the Council of the European Union that was off to a rough start, as the governing Hungarian conservative Party Fidesz came under attack for a number of legislative reforms that were seen as dangerous to basic democratic rights. Most prominent among these changes, after an expansive revision of the country's constitution, was a reform of media law threatening the freedom of press within the country.

While different political representatives on national levels called for a suspension of the rotation, there was – as often – not a definitely strong reaction on the European Union level. The Commission's announcement to review the Hungarian bill in respect to its accordance with the European Directive 89/552/EEC (Television broadcasting) seemed to have an effect, as the Hungarian government revised the Media regulations and in February issued an amendment.

Nevertheless, serious doubts about the concordance of the state of the Hungarian constitution and political system with the values set forth in the European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Rights, both (despite the fact that the European Union is not yet party to the Convention) of which are seen as main catalogues for the values claimed to be foundation of the Union in Art 2 TEU.

The European Parliament as well tried to take action in the situation, but with limited support of national governments and the other European Institutions. In the end, it seems that other geopolitical (r)evolutions took away interest and attention from the situation in Hungary, and Hungary could continue the Presidency without further debate.

4. The Instruments of Art 7 TEU

The situation seems to have made it obvious that the instruments provided in Art 7 were to be handled very restrictively by the European Institutions. This is for one explained by the level of discordance with the values that are the conditions of a reaction based on Art 7. The council can determine only a "serious breach" or the clear risk thereof.

There seems to be no leverage for an action on anything less clear, or slightly less than serious, breach of the values that are claimed to be the foundation of the European Union.

The high threshold for such a breach to be determined by the council (unanimity) shows that this “ultima ratio” nature of these measures is not an accident, but intentionally set by the Member States, unwilling to grant the European Institutions too much possibility to interfere with their interests.

B) OUTLOOK

So what does this mean for further situations like the dubious reforms in Hungary or the government participation of an extremist Party like Jörg Haider’s Freedom Party? It seems that the European Union has learned only half the lesson from the Austrian situation in 2000: European reactions against extremist tendencies in national governments can further fuel populist Euro-criticism and insofar become counter-productive.

But on the other hand, the Austrian situation could have been handled very differently had the European Institutions had a repertoire of instruments used to prevent such a situation or instruments that allowed for truly effective sanctions.

The Hungarian example seems to have shown that even though these instruments seem to have been created within Art 7 TEU, they are not as effective as optimists would have hoped with the ratification of the Lisbon Treaty. Given the serious limits that the member states have implanted into the treaty, it seems doubtful whether a more extensive interpretation could have made a different usage of the instruments possible.

On the other hand, it is rather obvious that the Commission lacks the determination to promote the Democratic values of the European Union with the same determination that has been shown in regard to the economic freedoms of the market. Beside the Commission, it is usually the European Court of Justice that is (proud to be) called the “motor of integration”. Yet while the court is at the moment intentionally left out of these decisions, it also has often not displayed the same attitude towards fundamental and democratic freedoms than to those of an economic nature. As of late, however, a shift in the jurisdiction of the ECJ has become visible, and the ECJ seems more willing and able to offer protection for fundamental rights and freedoms.

Nevertheless, there seems to be a serious need for a change in attitude within the European institutions (the European Parliament being the one institution clearly set out to promote common political values across Europe).

Obviously, the basic requirements will have to be provided by the Member States. Yet any movement on the topic, or even any discussion thereof, could prove helpful towards this change in

attitude. Progressive members of the Commission, the Court or other institutions will most likely be thankful for any tailwind they can get.

Furthermore, any move towards an accession (in whichever way, shape or form) of the European Union to the European Convention on Human Rights could provide important momentum. Again, even the discussion of the topic could prove very beneficial, as it would, for example, most likely motivate the European Court of Justice to show that it is just as much a warrant for the protection of democratic rights as the European Court for Human Rights.

Potentially, it is also the European Court of Justice that could be used to implement a system better fit to assess the “gray areas” of human rights violations or other dangers to democratic freedoms. The European Union works with a well-established system of Commission bringing cases of breaches of Union law to the Court of Justice. It seems like a rather obvious choice to extend this system, or institute analogue instruments, to the more “political” issues of democratic values. However, this will most likely, on the national levels, be received as a step back into the direction of a “European Constitution”, that seemed so impossible to promote.

HUMAN RIGHTS AND THE THREATS TO NATIONAL SECURITY

By Cosmin Doru URSU, Lawyer, Romania

The Romanian approach to include the press as a *vulnerability* in National Defense Strategy symbolises the need for the European Union to assume its responsibilities in order to clarify what aspects can be placed in this area. Both the regard of the media as a threat to national security and the interpretation given to the art. 51 of the Charter of the Fundamental Rights of European Union by the Committee on Petitions have gathered different viewpoints. In Europe, however, the case on the freedom of the media has led to lots of heated debates.

In order to fully understand the terms defined I will quote from what the National Defense Strategy to explain what Risks, Threats and Vulnerabilities mean:

- In the area of national and security defense, the term **“risk”** is defined as being the probability of significant damage to the interests, values and national security objectives.
- In the context of this strategy, the term **“threat”** is used to define factors of foreign origin which seriously affect the interests, values and national security objectives.
- The factors from within society which enhance the action of threats are called **“vulnerabilities”**.

I will not dwell on the risks and threats, as it is not them which are sensitive topics today, but the vulnerability. To be more specific, I will refer to the paragraphs from the national security strategy which defines media as "being one of the vulnerabilities to the security/national defense."

The vulnerabilities for Romania are:

- *organized crime*, the pressures and influence which it attempts to have on state institutions, on the media and on some representatives of the political class;
- the phenomenon of *ordered media campaigns* with the precise aim to denigrate the institutions of the state, by spreading false information about their work; *pressure of media companies* on the political decision in order to obtain economic or relation benefits from state institutions;

Claiming that the media represent vulnerability in national defense requires, logically speaking, applying measures to limit this threat and keeping it under control. Even if the National Defense Strategy has no force of law, once adopted, it requires measures to put the liquidation threat into practice. As legislation for protection against possible terrorist attacks exists already (terrorism being considered a national threat) legislation to limit freedom of expression (it also being regarded as a danger for the nation) should also be adopted. Furthermore, it is likely that interception warrants to be issued by simplified procedures, as those concerning national security now. Journalists will be then thought of as terrorists.

It is obvious that the role of the media is to inform the public regarding all public matters and with it there comes the risk that the government institutions be criticized. The risk of journalists misinforming the public and “disseminating false information” is a risk assumed by any democracy in

defense of the right to freedom of speech. It is the media's responsibility to disseminate information and it is the public's right to receive and assess the information.

The including of the press campaigns references into Vulnerability Chapter in National Defense Strategy can be seen as a violation of Article 11 of the Charter of Fundamental Rights, Article 10 of the European Convention on Human Rights and Article 6 of the Treaty on European Union. However, in spite of the Lisbon Treaty being enforced, which includes the European Union's Charter of Fundamental Rights, the Commission still does not have the capacity to act in cases of such violations, if there are attached to national security.

As recent cases show, the existing legislation in the field of the media does not constitute an absolute guarantee of its freedom as national legislation fails to offer adequate guarantees. On the other hand, Article 5 of the Treaty on the European Union, the 'subsidiarity principle', is often evoked as a ground to object to a media law.

Media freedom is an essential foundation for our democracies, thus the question - *whether an EU institutional change is really necessary or it is only a matter of interpretation of the Treaties* - is a valid one.

The global institutionalization of human rights – including the freedom of speech - has also, and more importantly, resulted in new constellations of rights bearers, addressees, and sanctioning authorities in which the classical relation of national state and individual is re-embedded in a larger field of states, international organizations, and transnational movements.

In fact, a number of measures have been taken by several countries in this direction. Progress is under way through action plans or national strategies, reforms, new laws introducing remedies. It is clear, however, that sovereignty elements are in favour of community bodies. The same applies in the case of the Council of Europe, but only in the field of human rights in relation to mandatory jurisdiction of the Court of Human Rights and the opportunity for individuals to lodge an appeal directly in front of it. It is obvious that the complicated and interesting problems – from the legal point of view - have thus been approached, especially in the case of the EU. Member states of the E.U. have made the constitutional revisions and that would make the transfer of sovereignty elements possible and thereby European integration.

Participation of European member states to the building of the E.U. has been based on adapting sovereignty to the imperatives of international interdependence and to those resulting from the development of European organizations formed by these states. It was not meant to be a legal procedure to limit national sovereignty.

EU member states have clearly mentioned in their constitutions the possibility to transfer some characteristics of their sovereignty to European institutions, transfer which becomes virtually irreversible and has involved an increasing number of skills, thus leading to a new legal order.

With the purpose to clarify the powers of the Union and member states, the rapporteur Alain Lamassoure made a proposal in the European Parliament. It was made simultaneously with the

presentation of its "Report on the division of powers between the EU and member states". Although it contains several persuasive ideas, his attempt does not, unfortunately, simplify the decision making process, creating in fact unnecessary categories, which will actually raise suspicion if member states had been asked to re-divide sovereignty with the Union. Our interest is to simplify and not to deepen the EU decision-making philosophy within the framework of the EU, having the principles of subsidiarity and proportionality as foundation.

The European Union has seen a remarkable evolution which may lead to a possible states federation in the future. Community law, both the original and the derived one, is governed by the principle of immediate application in domestic law and by the principle of the force superior to that of the national law, its compliance being guaranteed by the common jurisdiction.

In the building of the EU, the political environment was both the reformer and the promoter, it was the one which drew the judiciary system within, so as to intervene and restore the rule of law. Basically, the EU history shows that reforms have started and have been driven by political factors, the framing of normative expressions of new accomplishments being the following step. From a legal perspective, the EU has constantly developed the "legal heritage", often designated in its French sense - *the acquis communautaire* - which is actually a sum of basic treaties and the basic instruments of Community, the legislation which derives from these, legal decisions (issued by the Europe Court of Justice) and juridical-related decisions (for instance those of the Competition Committee) decisions issued by the Community institutions and non-binding instruments such as opinions and guidelines (for example those issued by the Economic and Social Committee) and the resolutions adopted by Parliament and the Council of Ministers.

The primacy of politics over the judiciary is obvious from the widely used Article 308 (formerly 235) of the Treaty of Rome, which represented a political solution to resolving many problems in the regulation of certain matters which were not the original tasks of the European Commission or Council. The article stipulates that "if the reaching of a goal of the Community – within the functioning of the common market - calls for action from the Community, without this Treaty [Treaty of the European Economic Community] providing the necessary powers required to this end, the Council takes appropriate measures acting unanimously, based on a proposal from the Commission and after consulting the European Parliament". This has been an open approach which has allowed member countries to resolve ambiguous situations in which decision had to be taken in Brussels, but no individualized legal basis had existed. Although seen by Euro skeptics as not only a legislative blur but also as an abuse from the EU, this legislative procedure allowed the development of the EU towards the political-institutional cooperation among its members, in the spirit of the European efficiency and pragmatism.

Legislation reform is not enough. It is also compulsory to increase the resources of the institutions in charge with the supervising the application of the human rights.

Both the present and the future of the concept of sovereignty within the EU point towards radical changes. The transfer of sovereignty from member states towards the EU institutions has already taken place and it is an illusion to imagine that it is actually reversible. All the governments of the member states are aware of that: the most compelling evidence being even the most skeptical

countries (see Ireland, the United Kingdom or the Nordic countries) which have neither asked nor wished to be out of the European Union, since the benefits by far outweigh the costs of cooperation. However, the transfer of sovereignty does not allow European institutions an action different from the decisions taken at a national level, specific to any member states.

Therefore, it is time the Court of Justice began to assert a greater role for itself in the human rights area, by expanding the applicability of Community fundamental rights standards to certain types of action taken by the Member States, thus giving the Court the authority to invalidate Member State action - when it falls short of the level of protection afforded to fundamental rights under Community law.

