

Human Rights Mechanism Of The European Union: An Anarchic Order?

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Abstract

This article focuses on development of both human rights policies and their institutionalisation in the EC/EU internal and external politics. It observes that the founding treaties of the EC/EU did not mention explicitly human rights because the EC was established as an economic entity. By the time as it has transformed into a social and political formation, human rights evolved and over the past three decades it becomes a leading agenda in both internal politics and one of the central parameters of the European Union's foreign policy. However, human rights policies and practices have not been coordinated by a specified body of the Union; instead all the EU institutions have got involved in one way or another. As the time passes, instead of creating a coherent and consistent system, new regulations and new actors have been introduced and the mechanism gets more and more complicated.

Keywords: *European Union, Human Rights, Mechanism, Institution, Instruments, European Commission, European Parliament.*

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Introduction

Europe was the battlefield of the two world wars that caused human catastrophes in the first half of the 20th century. The political climate, after the Second World War, was quite encouraging for establishing a regime aimed at protecting people (Smith 2010a, 152). According to Robertson and Merrills, the conditions that induced the United Nations to concern itself with the protection of human rights and fundamental freedoms had a similar effect in Europe. One of these conditions was a reaction against the Nazi and fascist systems that brought about the Second World War that caused such a devastation on millions of lives. And the second reason is that in the post-war period it was soon realized that the free systems of Western Europe needed protection against both a possible revival of pre-war dictatorships and the Soviet threat which had controlled half of the continent (Robertson and Merrills 1996, 120). The protection of democracy and the preservation of the rule of law needed institutions that will protect human individuals against all forms of totalitarianism and tyrannies. "Those foundations were the effective protection of human rights and fundamental freedoms" (Robertson and Merrills 1996, 120-121). To mention some of these institutions; Council of Europe (CoE) in 1949, European Union (EU) in 1952, Organization for Security and Cooperation in Europe (OSCE) in 1975 and the EU Charter of Fundamental Rights (hereinafter "the Charter") in 2000.

The human rights institutions and mechanisms mentioned above are the components of European systems which is larger than the European Union's one. It's very obvious that the Europe and the EU historically, politically and geographically are the two different entities, though they are used interchangeably sometimes. Both are historical, political and dynamic concepts that have different meanings to different people in different time. Majority of researches/analyses on this topic consider the above mentioned foundations as a whole as the European human rights mechanisms yet, they do prefer not to question/analyse/evaluate the EU system as a separate one. Thus it is very necessary to differentiate the two concepts/entities as well as their human rights mechanisms. This paper is going to focus on the EU mechanism alone and refers to the European system when necessary. Yet it is hard to differentiate the two properly, since they are mixed and integrated. Despite all these difficulties, it is obvious that the EU as an institution is not a member of human rights mechanisms in Europe: including the Council of Europe (Smith 2010b, 109) and the OSCE, though all the EU member states are also members of these institutions.

As a value-based political formation the EU has played a vital role in promotion and protection of human rights globally and within the continent. Yet the institutional-

ization of human rights has been the subject of discussion for a long time within the academic circles and among the politicians in the EU. Then what is the EU human rights mechanism? Or is there any integrated, coherent and consistent European Union human rights regime? What are the mechanisms within the EU and how are they effective? Which EU organ is responsible for human rights policies and practices? These are some of the questions that piece of work is going to focus on. In order to do this this article firstly, evaluate the notion, practices and legal basis of human rights developed during and after the Cold War and afterwards. Then it focuses on conditionality of human rights in the EU relations with third countries as well as the candidate states. In the third part it discusses the role of the main EU institutions in promoting and developing human rights in internal and external relations of the Union and last but not least it puts forward some prospects for a coherent, integrated and consistent EU human rights mechanism.

European Union and Human Rights: The Cold War Period

Europeans have a long tradition of human rights. The basic documents on which human rights conventions and policies are based Baehr argued are "...of western origin; the Virginia Bill of rights of 1886 and the French Declaration of Rights of Man and Citizens of 1789" and Magna Carta (1215) (European Commission 2007, 5) Both documents contain a list of human rights in the sense of individual liberties" In addition to historical documents there were also movements and activities that pushed forward human rights in history. There were workers (Chalhoun 1983, 485-504) and slavery abolition (OHCR 2002, 3) movements in the 19th century, minority issues (Mazower 2004, 379-398) in the late 19th and very beginning of 20th century, then League of Nations (1919) with some references to human rights, the UN Charter (1945) establishing one of the main UN's task as the protection and promotion of human rights in international politics and last but not least, the Universal Declaration of Human Rights of 1948. Being developed on this tradition, European and the EU human rights regime has shown a parallel evolution with the EU integration process and gained momentum after the Cold War.

The place of human rights within the EU has been subject of political, intellectual and academic debate over many years (Brownlie and Goodwin-Gil 2006, 806). Human rights were not mentioned in the founding treaties of the EU, since the original focus of the European communities was economic restoration of Europe (Steiner, Alston and Goodman 2007, 1014; Smith 2010b, 109) and preservation of its democratic systems against authoritarian threats in the post war period. Yet among the treaties

of the Community the Treaty on European Union was the first that explicitly acknowledged human rights in EU law: “the Union shall respect fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms” (Article F (2)).

The Treaty of Rome, the founding treaty of the European Community/European Union did not mention human rights explicitly, yet there were some references to some contemporary human rights. Such as Article 7 prohibits discrimination between EC/EU citizens; article 48 sets up the freedom of workers movements throughout the EC/EU; and article 119 focuses on the principle that men and women should receive equal pay for equal work. As the Community has expanded human rights have become an important subject of its institutions both in its internal and external affairs (Boyle 1999, 155). Patten (2000) summarizes the development of the EU human rights policies in internal and external relations as follows:

The Treaty of Rome in 1957 made no explicit reference to human rights. They were not mentioned before 1987 and the Single European Act. But they were included explicitly in the 1992 Maastricht Treaty. Then, 40 years after Treaty of Rome, Article 6 of the Treaty of Amsterdam was included to reaffirm that the European Union “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”. This article also recognises importance of coherence with the European Convention on Human Rights: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’. It is this and our concrete actions in the field of human rights which epitomise the transformation of the EU from economic entity into political body... We also have a legal framework for human rights in our external policy. Liberty, democracy and the rule of law are objectives of both our CFSP (Article 11) and development cooperation (Article 177). And we have human rights clauses in all new agreements with third countries.

As it is clear from the quotation, human rights gains importance within the Union as it transforms from a pure economic formation into a social and political one. Laeken Declaration on the Future of the European Union (2001) explains how the EU has been transformed from an economic into a political gathering. It asserts that “the European Union has thus gradually come into being. In the beginning, it was more of an economic and technical collaboration.” Direct elections to the European Parliament,

strengthened the Community's democratic legitimacy, in last thirty years. Over the last two decades, "construction of a political union has begun and cooperation been established on social policy, employment, asylum, immigration, police, justice, foreign policy and a common security and defence policy."

Human rights regime of the EU, if there is any, is a multiple-fold one: The EU member states are subject to a wider range of obligation from the UN to the Charter. Thus the system is complicated enough to cause some deficiencies in promotion and protection of internationally recognized human rights and fundamental freedoms. On one hand there is a UN mechanism on the other hand there are regional mechanism(s). The obligation of the EU member states stems from different sources. Such as "The Member States of the European Union are subject to a range of human rights obligations derived from the 'core' human rights treaties elaborated under the aegis of the UN." and at the same time "the EU and its Member States are required to ensure that they act consistently with the EU's own internal human rights rules" (Butler 2008, 6) which consist of European Convention on Human Rights and the regulations on human rights by the EU institutions, including the Charter on the Fundamental Freedoms. As for the regional mechanism(s) there are at least three different arrangements; the CoE, the OSCE and the EU's own mechanism. The OSCE has a broader agenda and more member states comparing to the CoE and the EU. Thus when human rights are concerned in the European context, it is much more meaningful to focus on both the EU and CoE (Convention mechanism) systems. Human rights performance of the EU member and candidate states are patrolled through both CoE system² and the European Union mechanism that has been developed in the last few decades, particularly after the Cold War. Çakmak (2003, 84) claims that although the human rights mechanism of the Union and that of the CoE "are not fully harmonized at the present time, they have been converging over the time. In that sense, they are inseparable and completing each other." The European Convention Plenary Session also supports the idea that these two mechanisms are completing each other. It was encouraging in the Plenary Session that;

...in terms of constitutional coherence, the incorporation of the EU Charter on Fundamental Rights has been juxtaposed to the Union's accession to the European Convention on the Protection of Human Rights. The solution being suggested implies that the Union's respect to human rights gets rocksolid checks and balances, both internal and external ones. The former will be guaranteed by

2 CoE mechanism composed of the European Convention on Human Rights (1952) and the European Court of Human Rights (1959).

the jurisprudence of the European Court of Justice in Luxembourg, the latter then by the European Court of Human Rights in Strassbourg (Kohout 2002, 1).

From the very beginning until late 1970s EU Yet, as Dagi asserted, by the time the structure, goals and means of the EU evolved. "The EC of 1970s was not the same community of the 1950s, which was a pure economic integration project. In the 1970s social policies were discussed as a result of changes taken place not only in the community itself, but also in the international arena. In other words, the detente period provided room for a change in the Community's politics." (Dagi 1997, 120-125).

In late 1970s human rights has been discussed not only among intellectuals but also among the EU institutions as well. Bilen claims that the most important step was the adoption in 1977 of a Joint Declaration on the protection of fundamental freedoms by the European Commission, the Council of Ministers and the European Parliament (Bilen 2005, 19). Therefore, human rights policies gained importance and different EC institutions started to put forward human rights issues both within the community as well as in its foreign policy. Although, originally, the European Parliament and European Political Cooperation (EPC) were mainly responsible for human rights the other institutions of the Community were also dealing with the issue one way or another. For instance, the European Court of Justice wasn't initially keen on to address human rights, yet later on in late 2000s the court was asked to reconcile provisions of Community law with citizens of the EU member state. Thus a set of jurisprudence on human rights and fundamental freedoms emerged (Smith 2010b, 109-110; Steiner, Alston and Goodman 2007, 1015). The Court's jurisprudence was eventually inserted in the Amsterdam and Maastricht Treaties which also stresses a strong enforcement in the case of serious and persistent violations of human rights by the member states.

The Amsterdam Treaty also establish a procedure (Article 7) whereby certain membership rights in the EU can be suspended if "a serious and persistent breach" of human rights is deemed to exist within a member state. This was reformed again by the Nice Treaty – following the Haider debacle in Austria- to improve the procedures and to allow for action to be taken before a serious breach occurs (Steiner, Alston and Goodman 2007, 1015).

Although, the European Union's commitment to human rights has been in the process of evolution, especially since the last decades of 20th century, it is not wrong to claim that European Union has had the commitment to human rights since the beginning of the European Communities (Boyle 1999, 155). Yet the commitment is not adequate to protect human rights particularly in the anarchic international order.

Besides commitment, binding instruments and enforcement mechanisms needed.

Transition from Copenhagen Criteria to the Charter

The end of the Cold war provided a proper climate for further realization of human rights policies not only in Europe but in all over the world. It was turning point for the EU human rights policies. Thus, Article 6 of Maastricht Treaty in 1993 included, explicitly, the policy “to develop and consolidate democracy, the rule of law, and respect for human rights and fundamental freedoms”. The principles put down in Maastricht had been accepted as requirement for EU membership in the same year in Copenhagen. Therefore, human rights become a determinant factor in EU’s foreign relations as well. With the establishment of Common Foreign and Security Policy (CFSP), the role of human rights became vital in the relations with the third parties. Since then, the EU insists on human rights because it believed that a peaceful continent of Europe as well as international relations can only be achieved through realization of promotion and protection of human rights and fundamental freedoms. Laeken Declaration manifests the role of the EU concerning human rights in the changing world i.e. in the new world order of post-Cold war :

What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law (Laeken declaration of the EU 2001).

In 1999 the European Council decided to draft a charter of rights that covers the rights set out in the European Convention on Human Rights, the European Social Charter and new rights such as “right to asylum”.³ The Charter of Fundamental Rights of the European Union (hereinafter “the Charter”) was later on unanimously approved by all the relevant EU organs, such as the European Commission, the Eu-

3 Article 18th of the Charter is about right to asylum that stating “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

ropean Parliament and the European Council (Brownlie and Goodwin-Gil 2006, 806) all of which approved a Joint declaration on human rights in 1977. The preamble of the Charter (2000) states that “The people of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.” And continue focusing on the indivisibility and universality of all rights by saying “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.” The Charter is claimed to “aim to bring about a truly *Ius Commune Europaeum* of human rights standards” (Wounter 2011, 7). The Charter goes on by restating all human rights instruments relevant to the EU mechanism in the preamble that:

...reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

The Charter is binding not only on all the EU organs but also on the EU member states as well. Article 51st states that “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.” According to Jan Wouters, the Charter not only regulate the EU’s internal human rights activities but also the external ones. Referring to the Treaty on European Union (Article 177) which stresses that “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.” Community has an obligation in its policy of economic, financial and technical cooperation measures with third countries, as pursuant to the EU Treaty Article 181a(1), provides that one of the objectives of the Union’s CFSP must be “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. In sum, The Charter,

like the EDHR(1948) and the Vienna Declaration and Programme of Action (1993), brings together into a single text all the civil, political, economic, social and cultural rights enjoyed by people within the EU. The Charter has become legally binding across the EU with the entry into force of the Treaty of Lisbon. Thus, EU organs must respect the rights enshrined in the Charter. The Charter applies not only to the institutions but also to EU countries in case they implement EU law (EC website, April 19, 2012) . Human rights responsibility of the EU and its member states is not limited with binding law elements but also with some so-called soft law instrument developed by the EU institutions. In this regard, Wouters (2011, 6) also mentions some EU soft-regulations regarding human rights by claiming that;

Obviously, the EU is also bound by its own declarations on this subject matter, the main ones of which are (i) the 'declaration on human rights' adopted at the Luxembourg European Council of 28-29 June 1991, which reaffirms that 'respecting, promoting and safeguarding human rights is an essential part of the international relations and one of the cornerstones of European cooperation as well as of relations between the Community and its member States and other countries': (ii) a resolution of the Council and the Member States of 28 November 1991 on human rights, democracy and development, which sets out guidelines, procedures and priorities on this matter; and (iii) the declaration of the EU on the occasion of the 50th anniversary of the Universal Declaration on Human Rights of 10 December 1998, which states that 'both internally and externally, respect for human rights as proclaimed in the Universal Declaration is one of the essential components of the activities of the Union' and which announces.

Although Wouters asserts that the EU is bound by its own declarations on human rights, unlike treaties and conventions the declarations, in international law are not binding legally. They are unilateral declaration of will to comply certain responsibilities. They do led public pressure on the institutions and the related states, thus they are also important instruments for promotion and the protection of human rights, yet it's hard to claim their binding on either member states or EU institutions.

In numerous of communications and declarations adopted by the European Union Institutions on human rights⁴ it's claimed that the EU seeks to support the univer-

4 Some of them are the European Union and the External Dimension of Human Rights Policy, COM (95) 567 final; The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final; Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: the Challenges of the Partnership between the European Union and the ACP States, COM (98) 146 final and Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries, COM (99) 256 final. Communication on EU Election Observation and Assistance COM (2000) 191 final.

sality and indivisibility of human rights - civil, political, economic, social and cultural - as reaffirmed by almost all internationally recognized human rights instruments. The Communication from the Commission to the Council and the European Parliament in 1995 sets out the conditionality clause, human rights in relations with the third parties and CFSP via arguing that the "Treaty on European Union 1993 marks a new phase in EU policy on human rights" and makes human rights a precondition for the EU membership as well. Article F(2) states that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." It continues by saying that "With regard to external action, the Treaty states that it is one of the main objectives of the common foreign and security policy to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. In the same way, European Community development cooperation policy shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms?" Hence more, "These provisions constitute a decisive advance in the development of an essentially economic Community into a political body" (Commission of the European Communities 1995, 5).

The Resolution on the communication from the Commission to the Council and the European Parliament reorganizes human rights policies within the EU's internal and external affairs particularly after the Cold War. In order to reassure the place of human rights in the EU, after mentioning Articles 3⁵, 6⁶, 7⁷ and

5 The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies...

6 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

7 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State...

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council....

11⁸ of the revised Treaty on European Union and articles 177⁹ and 300¹⁰ of the revised Treaty establishing the European Community, it focuses on previous resolutions and, in particular, the resolution of 12 December 1996 on human rights throughout the world in 1995-1996 and the Union's human rights policy.¹¹ Then it argues that “the gradual evolution of a human rights policy from the Treaty of Rome to the Treaty of Maastricht has broadly been positive and has responded to public expectations, and must now be regarded as part of the *acquis communautaire*”.

As it is seen from all EU's hard and soft law regulations after the Cold-War, human rights become of the main factor that shape its both internal and foreign relations. As parallel to the global human rights understanding, unlike the ideological perception of the Cold-War period, the EU started to accept all the rights and freedoms, including social, economic and cultural ones as equal, indivisible and universal. Hence more, all these rights have been mentioned in one document, the Charter (2000, Preamble). This new perception strengthened not only human rights commitments of the Europe but also institutionalization of the rights policies across the Union. Despite all these positive developments and optimistic climate in the first two decades after the Cold war, the human rights mechanism of the Union was unable to escape from its sophisticated, complex and untidy structure. Still there are multiple actions, multiple actors, duplications, mass and complexities remained. It is convenient to for the EU human rights formulation to assert that the more regulations and institutions led to a more complex and more sophisticated mechanism.

8 1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:— to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

2. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

9 1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:

— the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them, — the smooth and gradual integration of the developing countries into the world economy,

— the campaign against poverty in the developing countries.

2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

10 1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. .

11 The text of the resolution is available on <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A4-1996-0400&language=EN> (17.04.2012).

Human Rights Conditionality: A Smart Key?

Conditionality in general involves two parties yet, the process proceeds one-way. i.e. the powerful party impose some criteria that need to be met by the weak parties. They are rewarded as long as they fulfil their requirements set up by the other party. The relationships are not conducted between equal actors on equal footing, but based on unequal relationships among unequal actors. One party in our case, the EU determines conditions which has to be accepted and fulfilled by the third parties whether they are candidate countries or trading partners. Fulfilling the conditions usually paves the way for more integration with the EU (Dobbels 2009, 5). Yet for third countries, it is perceived to be a two-way process. Particularly nationalists and anti-EU membership segments of the society see both sides as equal negotiating partners, the idea which is against the notion of conditionality.

Through association, bilateral trade agreements and cooperation agreements, the EU aims to improve the development of third countries and to support regional organizations. The EU thinks that in a democratic system, with respect for human rights, development can be achieved. Thus, EU agreements on trade and cooperation with 'third countries', encompassing all non-EU countries and EU applicant-countries, comprise "essential element clauses": conditionality for human rights (Zwagemakers 2012, 3).

Over the past three decades conditionality has become one of the central parameters of the European Union's foreign policy and a key instrument of the enlargement process (Dobbels 2009, 3). Yet, Anastasakis and Bechev argues that conditionality is not a new phenomenon, it "has always been part of EC/EU policies in one way or another, directed towards Member States, candidates or third countries" (Anastasakis and Bechev2003, 5). One of the first hints of a collective external policy in the area of human rights, Andrew Clapham asserts, came in 1978 at the Copenhagen European Council meeting when the Heads of the States and Governments declared that "respect for maintenance of representative democracy and human rights in each member states are essential elements of membership of European Communities" (Clapham 1999, 633). Its significance rose in the 1980s and, particularly, the 1990s with the practice of setting out both political and economic conditions. Anastasakis and Bechev argues that multidimensional conditionality with political, social and economic features including democratization and market economy was first applied to Central and Eastern European Countries (CEECs). It targets integration with the EU, if not only membership. "In the case of the candidate states, conditionality and accession are two sides of the same coin. Meeting the EU set of targets brings candidates

closer to the coveted goal of membership, in that they achieve a greater degree of convergence with its socio-economic standards as well as its political values." (Anastasakis and Bechev 2003, 5). Shortly they claim (6);

Since 1993, therefore, EU conditionality has been firmly embedded in the enlargement framework. The Copenhagen criteria have been widely accepted as the main point of reference in assessing the success of transition in CEE and individual candidates' progress towards the EU, giving the EU a powerful leverage to influence the outcome of the reform efforts in the individual candidate countries. They were further clarified and extended by the Accession Partnerships and by the process of accession negotiations.

Human rights conditionality has played a vital role in promotion and protection of human rights yet there are several points need to be clarified in this matter. First of all, "conditionality clause" is an uncertain and a vague concept. Because, conditionality, like all other human rights instruments in the world, provides a prescription not a guide to human rights. Thus it can be interpreted according to the demands/interests/perception/applications of the parties, particularly the powerful party, i.e. the EU. Mostly, this uncertainty gives room for flexibility and decrease tensions between the parties. It has played a positive role in promoting human rights so far but it also sometimes plays a negative one, depending on the conditions. For instance, human rights policies of the EU that somehow ignoring and negligible since 9/11 and particularly since 2009, with global financial crisis, is a good example of negative effect of this flexibility. The second problematic area in conditionality is that, it is not clear what the EU mean exactly by conditionality, since there was no human rights bill of the EU till the Charter was adopted in 2000. Even the Charter itself does not cover all rights classified in the UN human rights conventions. Yet Nowak claims that though the EU neither adopt its own bill of human rights nor acceded to the European Convention on Human Rights(ECHR), the European Court of Justice developed its human rights jurisprudence on the understanding that basic human rights are the ones specified in the ECHR and constitutional tradition common to the member states (Nowak 1999, 687). Yet this jurisprudence also is unable to answer the questions put forward. Then what are the basic human rights in the EU's foreign relations? More importantly what is the constitutional tradition common to the member states? Attempt for clarification here caused new vagueness and uncertainties. In sum, the EU and member states applied any human rights standards that mostly served their own interests and also human rights. Particularly politicians could put anything in the box and impose it on the third parties or candidate countries as a component of and

requirement of the conditionality. The size of the box depends on both the human rights commitment of the EU politicians and or bureaucrats and their interests. Human rights thus have been used as a selective tool of foreign policy which sometimes caused a negative effect on human rights promotion and protection.

Human rights conditionality has led the EU transformed into a value-based gathering. In 1990s and 2000s it has successfully fulfilled its role in promoting human rights across the globe, particularly in the continent Europe. Yet it is hard to claim that the same role has been played by the EU in the recent years due to several reasons. There are different opinions on why the EU has stepped back or it is perceived as such. First argument is that the EU is too busy with its internal affairs including economic and the financial crises, integration, deepening and latent conflict between members states on preservation their own national interests. Another view claims that 9/11 events has changed the perception of the Western World, including the EU from value-based foreign policy to a security- cantered one. Another opinion focuses on the EU's transformation gradually from a trading and value based power, towards a military or strategic power. The last but not least, it is claimed that the EU has not get what it had expected from the value-based policies. Each of these views to some extent explains different dimensions of the story, yet a combination of all gives a satisfactory explanation why there is decrease in EU's commitment to and practices of human rights in the last few years.

Regarding the shortcomings of human rights conditionality in the EU Nowak also stresses several points some of which are parallel to ones mentioned above: first of all Nowak claims that there is a lack of EU bill of human rights. Second, the EU is not a party to neither ECHR nor to the UN conventions. Third, the competence of the ECJ to review the human rights conditionality in the accession and sanctions is very limited and uncertain. And finally, the practice of the Union in applying human rights conditionality towards third countries is selective (Nowak 1999, 698). In order to overcome these shortcomings Nowak (1999, 698) proposes several policy changes such as:

- *The Union and its member states need to take the indivisibility and interdependence of all human rights seriously, i.e. accord economic, social, cultural and other rights equal status to civil and political rights, both in internal and external policies;*
 - *The implementation of policy of the human rights "conditionality" at all levels, i.e. vis-à-vis Member States in the sanctions procedure under Article 7 TEU, vis-à-vis candidate countries in accession procedure under Article 49 TEU, and vis-à-vis third countries in the context of all three "pillars", needs to be based on legal and judicial*
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rather than on economic and political criteria;

- *The union should define the concept of human rights in Article 6(1) TEU by either adopting a comprehensive EU Bill of Rights which, as the legal basis for the "EU Human Rights Agenda for the Year 2000", should reflect all fundamental human rights presently codified in the European and international human rights law; or by acceding to all major European and international human rights treaties and, thereby, making the measures taken by its organs subject to review by the competent European and international human rights monitoring bodies.*

Human rights have been one of the essential elements of the EU's internal and external politics, particularly in the post-Cold War period. Yet as it has been discussed above, there is an uncertainty, looseness and inconsistency in the EU human rights mechanism. This inconsistency and uncertainty also is apparent for the actors involved in human rights policies. The question is which institution of the EU is responsible for the EU's human rights policies in internal and external relations? Who determines the politics and who applies it? What about the monitoring? The following section tries to elaborate on these questions.

Human Rights Actors of the European Union: An Equation with Multiple Unknowns?

Almost all institutions of the the European Union, in one way or another deal with human rights, yet the three most important ones playing a role in shaping, implementing and patrolling human rights policy: the European Commission Commission (hereafter "the Commission"), the European Parliament(hereafter "the Parliament") and the European Court of Justice. The Council of the European Union, formerly known as the Council of Ministers, also plays a determining role in human rights field. The Council holds legislative and executive powers and is the main decision-making body of the Union. Generally, the Council takes decisions on a proposal from the Commission and in association with the European Parliament with a qualified majority in the Council. Human rights in international affairs are normally dealt with by the Foreign Affairs Council (Icelandic Human Rights Centre 2012). In addition to these main bodies of the Union, the Fundamental Rights Agency(FRA) is also playing a vital role in the promotion and protection of human rights policies within the EU. It does not shape or apply human rights law or policies by itself yet, "it is charged with providing the relevant institutions and authorities of the Community and its Member States with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action relat-

ing to human rights.” (Icelandic Human Rights Centre 2012). Last but not least, the immense jurisprudence of the European Court of Human Rights in the EU member states needs not to be ignored. To be honest the picture is not that much clear, when it's coming to the details. Indeed, the EU human rights mechanism, if it is accepted as such, is a mess in terms of the regulations, actors involved and the way it works.

Starting from late 1970s, particularly with the introduction of the Charter in 2000, the above mentioned institutions have begun to be informed by human rights more expressly in their work both internally and externally. As the initiator of legislation the European Commission, has stated that legislative proposals will pass through a human rights impact assessment to ensure compliance with the Charter. “It has also begun ‘mainstreaming’ particular elements of human rights across different policy areas.”(Butler 2008, 10). Apart from several members of the Commission getting involved with human rights, it also set up some committees to deal with the issue as well. The Council has adopted a series of regulations to inform the EU organs and Member States on the promotion of human rights in foreign relations. “The Council and Commission also produce Annual Reports on human rights.” (Butler 2008, 10). The Parliament also established several Committees that deal with the issues of human rights. The Parliament has no power to legislate yet it may formally ask the Commission to do so. And frequently it calls the Commission, the Council and Member States to take steps and issue regulations for the protection and promotion of human rights in their internal and external matters. Furthermore, the Parliament issues resolutions directed towards third countries where human rights abuses are alleged to have taken place. Therefore, it can be easily claimed that the Parliament plays an active role in patrolling the steps taken by the Commission, the Council, and the Member States as well as with third countries that the EU has relations with (Butler 2008, 10). The European Court of Justices refrained from the beginning to intervene in human rights sphere yet, since 1970s onwards; it started to develop a set of jurisprudence regarding human rights. The turning point here in providing the ECJ with the mechanism of sanctions against the member states was Treaty of Amsterdam (Steiner, Alston and Goodman 2007, 1015). The equation regarding human rights actors in the EU is indeed, full with the unknowns. Thus to simplify it, this section will only be focusing on the task and responsibilities on main three bodies of the EU, namely the Commission, the Parliament and the Court.

Projecting Human Rights Role of the Commission

Being regarded as the EU's executive body, the Commission is responsible for

implementation of the EC/EU treaties and the negotiator of external agreements. Its members- the commissioners-, are appointed by the Member States, yet they do not represent their states but work independently pursue the Union's interests. The Commission on behalf of the EU "participates actively in international conferences and in the work of international organisations", thus contribute to the promotion and protection of human rights. The predominant task of the Commission regarding human rights is its responsibility for ensuring EU countries respecting fundamental rights when implementing EU laws and also that its own proposals for new laws are compatible with human rights (European Commission 2012). Not only internally but also the Commission "represents the EU externally, for example in conducting dialogue and participating in démarches on human rights issues to third countries." (Icelandic Human Rights Centre, 2012). Hence more, it performs its human rights duties through attaching human rights in economic relationships, trade and development agreements.

The Communication of the Commission in 2001 (6) summarizes human rights duties and responsibilities of the Commission in external relations and the method it needs to pursue as follows;

To promote human rights and democratisation objectives in external relations, the EU draws on a wide-range of instruments... Some constitute traditional diplomacy and foreign policy, such as démarches and interventions in UN Fora, and sanctions. Others include financial co-operation instruments, and the bilateral dialogues, which complements them. Some are more innovative, and potentially underused, namely Community instruments in policy areas such the environment, trade, the information society and immigration which have the scope to include human rights and democratisation objectives. These tools should be used in a coherent manner, to achieve synergy and consistency and to ensure maximum effective use of resources to promote sustainable development and respect for human rights and democratisation world-wide. The Commission, which shares with the Council a Treaty obligation (Article 3 TEU) to ensure the consistency of its external activities as a whole, should work to ensure that these different instruments are used coherently and effectively. This effort needs to be made both internally, and with the Commission's main institutional partners, the European Parliament and the Council.

Several members of the European Commission get involved with human Rights. The president of the Commission coordinates such activities by the commissioners who deal with justice, fundamental rights and citizenship, foreign affairs and security

policies, international aid, humanitarian aid and crises response, enlargement and European neighbourhood policy etc. Several committees created to deal with human rights.

In recent years the periodic consultations between European Commission and non-member states covers a range of human rights situations. The Commission also chairs the Committees of Member States which are responsible for the Community's cooperation instruments, such as European Initiative for Democracy and Human Rights (EIDHR), European Development Fund (EDF), Technical Assistance to the Commonwealth of Independent States (Tacis), Asia and Latin America (ALA), Mediterranean (MEDA), etc. The Commission "should ensure that the approach taken in these Committees is consistent both with CFSP positions taken by the Council, and with other Committees." (European Commission 2001, 7). The Commission also contributes Annual Report on Human Rights by the Council established in 1999 (European Commission 2001, 6). In general, the Commission's tasks regarding human rights are getting increased as new regulations and policy areas introduced within the Union.

The Parliament without Parliamentary Powers

The Parliament, as the only democratically elected Union body, is one of the main institutions that deal with the protection and promotion of human rights. The Parliament has legal and political powers to deal with human rights in internal and external affairs of the union, yet on the other hand it has also structural, legal and political constraints while carrying on its duties. As Parliaments power and responsibilities increased in 1970s, it began to show more concern for human rights. The first example of its activity in human rights field was the *Joint Declaration on Human Rights of the European Parliament, Council and Commission in 1977* which was first initiated by the Parliament. It was followed by *Parliament's Draft Treaty on European Union in 1984* that was based on the notion of developing a European constitution and then *Parliament's declaration on a List of Fundamental Rights in 1989*. In 1990s the Parliament's activity in human rights continued increasingly, including the *Committee on Institutional Affairs' Draft Constitution (1994)* and *the Report of Treaty of Amsterdam in 1997*. Furthermore, almost every standing committee in the Parliament deals with human rights in one way or another. In addition to these legal activities the Parliament started to introduce Regular Annual Reports on Human Rights in the world and within the Union. Not only in internal affairs but also in developing human rights in the Union's foreign relations, the Parliament has played an outstanding role particularly in intro-

ducing humanitarian aid, inserting human rights in cooperation policy, improving human rights in parliamentary delegations and lastly its budgetary power in human rights (Rack and lausegger 1999, 801-823).

The 1987 Single Act (Article 310 (238)) provided the Parliament with the power to withhold its approval to international. Furthermore, as the Union democratized the power of the Parliament has increased. On its official web-site the Parliament claims that it has persistently called for the protection of human rights to be the focus of a common foreign policy. "Parliament has placed particular emphasis on linking respect for human rights to agreements with third countries, which are predominantly developing countries. It has constantly backed the Commission in calling for the insertion of a clause on respect for human rights in such agreements." It continues saying that "Parliament's assent prerogative in the ratification procedure for these agreements has clearly lent greater force to its exhortations and most agreements now contain such a clause." (European Parliament 2012).

The parliament has been dealing for human rights even before they were specified in the EU regulations. The reason as Rack and Lausegger claimed was to increase its power within the Community and the good example of this was conditionality clause on which the Parliament has performed an important role (Rack and Lausegger 1999, 801). The following paragraph is summerizing the role of the Parliament in promoting human rights within and outside the Union.

The Parliament contributes actively to the development of a coherent EU policy in the field of human rights. It has moreover an important role to play in treaty-making processes with third countries because of the need for its assent to most international agreements. It undertakes human rights missions to countries outside the EU, draws up reports on specific human rights situations as well as thematic issues, and regularly sends a delegation to sessions of the UN Human Rights Council. In addition, the Parliament adopts resolutions, issues declarations and submits questions to the Council and the Commission on human rights issues. The Parliament publishes an Annual Report on human rights in the world and the European Union's human rights policy (Icelandic Human Rights Centre 2012).

Apart from the above mentioned activities the Parliament awards an individual or an organisation the Sakharov prize for freedom of thought each year. Hence more, within the Parliament there are several commettees dealing with human rights one way or another. These are " the Committee on Public Freedoms and Internal Affairs; the Committee on Juridical Affairs and Citizens' Rights; and the Committee on

Women's Rights. A Subcommittee on Human Rights is established under the Committee on Foreign Affairs" (Icelandic Human Rights Centre 2012).

As democratic participation increased within the EU, the power of the Parliament is extended but, "the Parliament's role in the interplay among the institutions is unfortunately a long way from reaching that of an elected representative assembly" (Rack and Lausegger 1999, 837). The parliament has been playing a vital role in developing human rights policy and practices of the Community yet there are some structural, formal and political constraints to go further. First of all the ability of the Parliament is limited with the Community's instruments which are subject to very divergent interpretations. Secondly, the system suffers from a certain lack of "social legitimacy" in the sense that public is often reluctant to accept the right of the Union to legislate particularly in as sensitive area such as human rights. Lastly, the parliament suffers from image problem in the member states comparing to other EU institutions (Bradley 1999, 841-842). The parliament, along with other institutions needs not fine principles and worthy objectives but clear rules and regulations that specify their responsibilities concerning human right in the Union's internal and external affairs (Bradley 1999, 858). Uncertainty is sometimes helpful in realizing ideals including human rights at the international level, but the progress has not been always linear in the case of the EU human rights policies.

The Role of the Court Deepens

The European Court of Justice (ECJ) refrains to deal with human rights till late 1970, yet afterwards it has "protected the fundamental rights within the Community sphere as being part of the unwritten general principle of Community law" (Spielmann 1999, 760; De Witte 1999, 863; Bradley 1999, 858). Despite the vagueness and uncertainties of the concept of the general principle of Community law, the ECJ performed its role in a fainthearted manner for a while. Thus a set of jurisprudence on human rights and fundamental freedoms emerged (Smith 2010b, 109-110) The turning point here in providing the ECJ with the mechanism of sanctions against the member states was Treaty of Amsterdam. "The Amsterdam Treaty also establishes a procedure (Article 7) whereby certain membership rights in the EU can be suspended if "a serious and persistent breach" of human rights is deemed to exist within a member state." (Steiner, Alston and Goodman 2007, 1015). Yet, this authorization did not solve all the problems; first, the problem of "which rights?" that has always been the subject of discussion remained unsolved. In other words, in the cases introduced by the ECJ increasing reference were made to "civil and political rights"

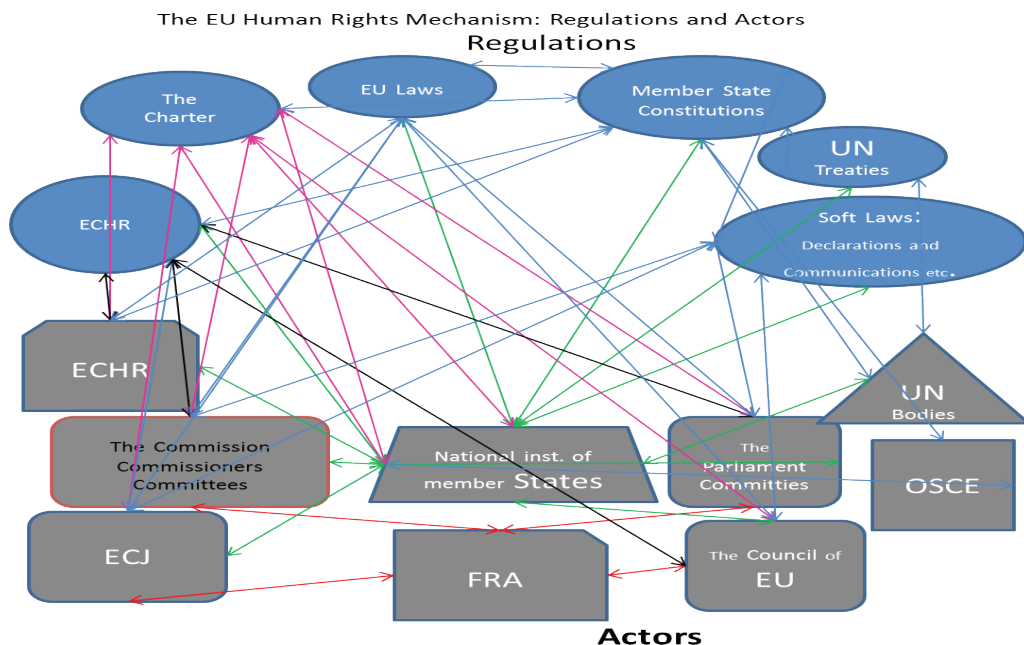
rather than the other rights of economic, social and cultural in nature. Second, the role of the ECJ with regard to human rights in external affairs is still unclear (De Witte 1999, 886-887). Though some of these issues are half solved by the Charter, the uncertainties are still out there. As the Union's integration expanded and increased the role of the Court concerning human rights will deepen as well. Therefore, the ECJ like all other institutions of the EU is limited with its mandate that is shaped by the union's instruments.

Finally, despite some constitutional attempts, the conflict between the ECHR and the ECJ remain to be a subject of discussion and is going to remain so in the future. Although The European Convention Plenary Session in 2002 tried to delimit their jurisprudence, in practice it is hard to realize it. It was encouraging in the Plenary Session (2002, 1) that;

...in terms of constitutional coherence, the incorporation of the EU Charter on Fundamental Rights has been juxtaposed to the Union's accession to the European Convention on the Protection of Human Rights. The solution being suggested implies that the Union's respect to human rights gets rocksolid checks and balances, both internal and external ones. The former will be guaranteed by the jurisprudence of the European Court of Justice in Luxembourg, the latter then by the European Court of Human Rights in Strassbourg.

In this case who is going to decide which case will be accepted internal or external and in which context? If there is no an upper authority – and obviously there is not- then who is going to solve the conflict therein? In this context more regulations and more institutions does not solve the problem but rather they much more complicate the EU human rights mechanism.

In general, as it can be easily observed from the above analysis, the EU institutions getting involved in human rights obviously have constitutional, structural and formal barriers. But more importantly, practices and human rights commitment of the institutions and the decision-makers have changed according to political, economic and social developments within and outside the Union. This constitutes a tremendous threat for the promotion and protection of human rights not only within the EU but also worldwide. As a value-driving global actor, the EU has played a leading role in the global human rights ideals in the last 60 years, but the inconsistency and uncertainties in the tasks of institutions endangered the future.



The shape shows how the EU human rights mechanism is complicated.

Final Remarks: Prospect for the Future

Alston and Weiler claim that there is a paradox in the human rights policies of the European Union; on one hand the EU defends strongly human rights both in its internal and foreign policy while on the other hand, it lacks a comprehensive or coherent policy at either level (Alston and Weiler 1999, 6). Human rights are thought to be tool used in a country's foreign relations rather than its internal affairs. Yet, the external and internal dimensions of human rights policy cannot be properly kept separate compartments. They are, indeed, two sides of the same coin. When the EU is concerned there are several additional reasons why a concern with foreign policy also necessitates a careful consideration of the internal policy dimensions (Alston and Weiler 1999, 8-9):

First, the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements. Secondly, in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and authentic internal policy can have no hope of being taken seriously. Thirdly, as the next millennium approaches, a credible

human rights policy must assiduously avoid unilateralism and double standards, and that can only be done by ensuring reciprocity and consistency. Finally, the reality is that a Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy or consistency. As long as human rights remain a suspect preoccupation within, their status will remain tenuous.

The problems are not limited with structural and formal barriers as Alston and Weiler claimed but also constitutional ones. For instance, Butler (2008, 11-21) mentions several other challenges to the realization of human rights in the European Union. And these are first, limits of the "General principles" of the EU law. Because the "scope of human rights as recognised by the 'general principles' of EU Law has been based predominantly on the European Convention"; second, limits of the Charter of Fundamental Rights of the European Union. Butler asserts that though the Charter "is an important development in the EU's human rights framework, and goes beyond the range of rights recognised in the European Convention, it does not encompass all those rights protected by the UN human rights treaties"; third, lack of recognition of positive duties. Historically and philosophically Europeans tend to give more weight to negative rights than positive ones. And thus "the depth of obligations accepted by the EU is generally more restrictive than that stipulated in the UN treaties"; fourth, is adequacy of impact assessment, i.e. the Commission's Guidelines on Impact Assessment, "does not sufficiently guarantee that human rights are systematically addressed as part of the legislative process"; fifth, limitation to the mandate of European Union Agency for Fundamental Rights (FRA), since "Firstly, the FRA is not empowered to scrutinise Member States on an individual basis with regard to those areas that fall within EU competence. Secondly, the FRA conducts its studies thematically and, accordingly, cannot produce a more comprehensive overview of the status of human rights implementation in the EU. Thirdly, the FRA is not permitted to act upon individual complaints delivered to it alleging violations of human rights. Finally, despite being the EU's only dedicated human rights body, the FRA is not given a role in screening policy or legislative proposals or assisting the Commission in its Impact Assessments"

The EU with its history, size of economy and its member countries is one of the key actors in global politics. Thus, the Union cannot be a credible defender of human rights in multilateral international platforms without having a comprehensive, coherent and effective human rights policy (Alston and Weiler 1999, 15). Alston and Weiler propose the following as the principle characteristics of the Union's new human

rights policy (Alston and Weiler 1999, 19-20):

- *Acceptance of the fact that there is a need for a comprehensive and coherent EU human rights policy based on a clarification of the constitutional ambiguity which currently devils any discussion of Community action in this field;*

- *The development of more consistent linkages between internal and external policies and the promotion of greater interaction and complementarity between the two levels;*

- *The establishment of detailed, systematic and reliable information bases upon which the various actors (including Members States, The Commission, the Council, the European Parliament and civil society) can construct integrated, calibrated, transparent and effective policies;*

- *Strengthening the coherent and unity of external human rights policies through the development of more principled, predictable and transparent procedures and criteria in relation to aid and its suspension;*

- *Facilitating a more principled and consistent European policy in response to serious violations of human rights among interlocutors and partners. Such a policy would also relate to third countries which are not covered by the two new proposed Community regulations.*

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