

Ever Challenged Union: Exploring Ways Out of the Crises

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EU Human Rights Standards as an Essential Legal Aspect and connection between EU Law and National laws of Associated States in the framework of Eastern Partnership (In the light of EU-Ukraine Association Agreement)

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1. Human Rights protection in EU in general

Human dignity, freedom, democracy, equality, the rule of law and respect for human rights – these values are embedded in the EU treaties.

Central instrument for the protection of Citizen's rights is Charter of Fundamental Rights of the EU. Because of the different terminology we have to briefly explain the difference between human rights and fundamental rights. Human rights are considered to be those rights of individuals and connected claims which provide one's freedom and human dignity which can be forced by institutional guarantees¹ and which naturally belongs to every individual as a human being² independently on person nationality, race, sex, origin, religion, political preference, social background, etc.

Fundamental rights, on the other hand, can be defined as a human rights and freedoms guaranteed by the national and international law.³ In this respect there is doubtless conclusion that human rights is a term much wider than fundamental rights (in EU law originally used by European Court of Justice (ECJ) which developed the doctrine of fundamental rights).⁴

1.1 The Evolution of the protection of Human Rights in the EU

Original Foundation Treaties of the EC did not have any reference to human rights because of the fact that Council of Europe as a political organisation should take care of human rights and secondly because it was believed that the realisation of common interests will be kept within the economic dimension and will not intervene into human rights. There existed a huge gap in this field and the whole project of European Integration could be endangered. The ECJ solved this problem by its decisions when pronounced the Community doctrine of fundamental rights to be an integral part of general principles of law. This strategy was explicitly upheld in *Stauder*.⁵ In case *Internationale Handelsgesellschaft* the ECJ declared that EC law is inspired also by the constitutional principles of national systems of the Member States, which doesn't have to be explicitly included in the constitutional law of all Member States, but can be declared as a EC/EU principle even if its stated in just one Member State in case it is not contrary the aims of EU policies.⁶ In cases as *Nold*⁷, *Rutili*⁸ and *Hauer*⁹ and others ECJ pointed out the inspiration by the international treaties also in the field of human rights. An important source of inspiration is for sure the case-law of Strasbourg European Court of human rights (ECtHR).

¹ Sudre, F.: *Droit international et européen des droits de l'homme*. Press Universitaires de France, Paris 1995, p. 12.

² Blahož, J.: *Úvaha o podstatě lidských a občanských práv*. Právník, 1998, No. 10-11, p. 875-877.

³ Strážnická, V.: *Člověk a jeho práva*, Bratislava, 1994, p. 12.

⁴ Šišková, N.: *Actual Issues of the Creation of Constitutionalism in the Field of Human Rights at the EU level and its Prospects*. Europa Law Publishing, Groningen, 2008, p. 5.

⁵ ECJ Case 29/69 *Stauder* ECR (1969) ECR 419.

⁶ ECJ Case 11/70 *Internationale Handelsgesellschaft* (1970) ECR 1125.

⁷ ECJ Case 4/73 *Nold KG v. Commission* (1974) ECR 419.

⁸ ECJ Case 36/75 *Rutili v. Minister for the Interior* (1975) ECR 1219.

⁹ ECJ Case 44/79 *Hauer v Land Rheinland Pfalz* (1979) ECR 3727.

It is important to stress out the fact, that the ECJ takes all the above mentioned samples as a source of inspiration and only selectively adopts the suitable postulates. This attitude could be seen in Orkem¹⁰ case, where the ECJ stated restrictive interpretation of Art. 6 of ECHR when the rights for a fair trial can be applicable only on natural person, not the corporation (in favour of Community competition law). In past there were strong tendencies not to accept the Strasbourg court and its decisions, however, there is a visible development in last decade where the decisions of ECtHR are followed (for example in case Lentia¹¹).

The connecting point of the wide spectre of decisions, case-law and interpretation could be done at two levels – by the establishment of new Charter for the EU, in particular, Charter of Fundamental rights of EU, which was approved on the Nice Conference in 2000 but the way of her enforceability was much longer (had only declaratory status) also because of many provisions with vague formulation and wide restrictions which aggravated the position in front of the ECJ (the burden of prove stated in Art. 230 TEC).¹² Lisbon Treaty (2009) reduced such restrictions by the amendment of this provision and the catalogue became with the force of Treaty of Lisbon legally binding. Charter of Fundamental rights of EU is the modern catalogue of human rights with some provisions which cannot be found anywhere else (for example Art. 3, the bio-political provision). The legally binding character of the Charter can be demonstrated on case law ECJ decided after the Lisbon Treaty came into force. In case *C – 279/09 DEB Deutsche Energiehandels mbH und Bundesrepublik Deutschland* from 22. 12. 2010 the ECJ said that the Charter has the same legal value as the Treaties and the provisions are addressed to the Member States, while implementing the EU law. The necessity to implement the Charter by the Member States on different grounds and merits was decided in case *C-411/10 NS v Home Secretary* from 21. 12. 2011.¹³ The second option – the accession to the Convention on Human Rights was after the decades of consideration dismissed in 18 December 2014 however the Convention has been ratified by all European states, therefore is enforceable with small differences in implementation of the standards in Contracting States which we cannot explain here.¹⁴

Fundamental rights are also guaranteed by the national law of the Member states and it is important to mention that judicial protection by EU courts has only supporting character.

1.2 Principles on which the Union is based and their breach

The below-mentioned principles on which the EU is based are stated in the Preamble and Art. 2 TEU and the importance of the Art. 2, in particular, is immense. It is important to mention it in the first place, because the phrase “*principles on which the EU is based*” is used not only within the Foundation Treaties, Charter, in CJEU (ECJ) case-law and EU secondary law, but also in EU external relation law – for instance in the EU-Ukraine Association Agreement.

Preamble

„CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.”¹⁵

¹⁰ ECJ Case 374/87 Orkem (1989) ECR 3283.

¹¹ Case Lentia (1993), ECHR, Series A, No. 276.

¹² Working Group II, Working document 021 from 1. 10. 2002: „The question of effective judicial remedies and access of individuals to the European Court of Justice“ visited at: <http://european-convention.eu.int>

¹³ Moriarty, B., Massa, E.: Human Rights Law. Oxford University Press, 4th edition, 2012, pp. 194- 196.

¹⁴ Strážnická, V.: The interpretation Doctrine of the European Court of Human Rights, Europa Law Publishing, Groningen, 2008 pp. 89-107.

¹⁵ Details for the understanding of rule of law can be seen at: Mueller-Graff, Ch.: The idea of Rule of Law as the Foundation of the EU Acquis. In: From Eastern Partnership to the Association. A Legal and Political Analysis, Cambridge Scholars Publishing, Cambridge 2014, pp. 165-186.

Article 2 TEU

„The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.“¹⁶

The procedure resolving the breach of upper stated principles was originally introduced by Amsterdam Treaty (in the extent of serious and persistent breach, later in Nice Treaty the protection was extended of the prevention mechanism and lastly both were amended in Lisbon Treaty) can be started only in case of „serious and persistent breach” of the provisions and then the political criteria (Commission or member states proposal, Parliament consent, etc.) must be fulfilled.¹⁷

Once a serious and persistent breach has been established, the Council may suspend some of the Member State's rights under the Treaty (for instance the voting right). However, the country remains bound by its obligations. In case of change of the conditions, the suspension can be cancelled.

Art. 7 TEU is the article which provides the protection of the principles in case of “clear risk of a serious breach” which is called the prevention mechanism, but also in case of “serious and persistent breach” as stated below. Article 7 of the TEU gives the Council and the European Council a discretionary power to determine that there is a breach or a risk of a breach of fundamental freedoms. The Council also has the option of applying penalties but is not obliged to do so. The powers of the Council and the European Council are subject to democratic control by the European Parliament, which must approve their decisions. The Court of Justice only revises the whole procedure.¹⁸ As we can see the requirements for the procedure of human rights protection of Member States are very strict and political and therefore not really effective, however this issue is in the centre of discussion for a long time without changes and the experts still more frequently called this lack of action to be a political unwillingness of EU institutions.¹⁹

The above briefly stated EU human rights standards are guaranteed only by the Member States and have to be fulfilled by the new members before the accession with no doubts. However the main aim of this article is to go little back to the process before the possible Membership is completed (in case we accept not only the static but also the so-called dynamic association model) and to compare the process of protection of human rights provisions while they are breached – to the association of non-member European States (in particular Ukraine) and their duties and human rights standards and the evolution during the last decades because the process has changed radically.

2. European external relations – Eastern Partnership and Association

The first step into the connection with Eastern Europe (and latter association of Ukraine) was made in 2004 with the establishment of European Neighbourhood Policy (ENP)²⁰ which was primarily based on

¹⁶ Treaty of Lisbon available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF>, visited on 24. 5. 2015.

¹⁷ <http://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/>, visited on 12. 6. 2015.

¹⁸ <http://free-group.eu/2015/03/28/member-states-and-the-rule-of-law-dealing-with-a-breach-of-eu-values/>, visited on 23. 5. 2015.

¹⁹ Budó, G.: EU common values at stake: is Article 7 TEU an Effective Protection Mechanism? Documents CIDOB, May 2014, p. 8.

²⁰ Based on two essential documents of European Commission: European Strategy Paper (COM (2004) 373 final of 12 May 2004) and Wider Europe – Neighbourhood: A new Framework for Relations with our Eastern and Southern Neighbours (COM (2003) 104 final of 11 March 2003).

the attempts to help the countries like Ukraine, Georgia, Tunisia via cooperation, not the membership.²¹ The cooperation can be effective only if the economic and political systems of the non-member states are harmonised with *acquis communautaire* and these issues went to the establishment of the specific and concrete dimension of European Neighbourhood Policy – Eastern Partnership (EaP) which was officially introduced on Prague summit in May 2009.²² The main aims of EaP were stated on the bilateral side which should cover the intentions to bring the EU and partner countries closer together on many level of political and economic stability and future negotiations. The multilateral side should represent the democracy, rule of law and security in the whole EU – EaP region. The essential aspect of EaP was also the declaration of Commission which stated that “The EaP will be based on mutual commitments to the rule of law, good governance, respect for human rights, protection of minorities...”²³ This statement of the EU Commission was upheld on the Prague summit by the Declaration of the Heads of the State which indicated that “EaP will be on commitments to the principles of international law and to fundamental values like democracy, rule of law and the respect for human rights and fundamental freedoms”.²⁴ EaP as a part of the EU external actions is based on Foundation Treaties, Art. 21 and Art. 8 TEU in particular which encourage EU a) to develop relationships with neighbour states and b) to conclude for such purpose agreements with mutual rights, obligations and common actions.²⁵ Association Agreement is exactly the case of such agreement stated in Art. 8 TEU.

2.1 Association agreements

Association Agreements (AA or AAs) are international agreements that the EC / EU has concluded with third states with the aim of setting up an all-embracing framework to conduct bilateral relations as stated above. These agreements normally provide basis for the progressive liberalisation of trade (to various degrees: Free Trade Area, Customs Union...), because of the wide possibilities of association with EU, there is no legal doctrine or case law defining what the “Association with EU” is. The EU typically concludes Association Agreements either with international legal persons (states, international organisations) or association of dependent territories of EU member states without the status of international legal person in exchange for commitments to political, economic, trade, or human rights reform in a state. In exchange, the state may be offered tariff-free access to some or all EU markets (industrial goods, agricultural products, etc.), and financial or technical assistance.²⁶ Association agreements have been the part of EU law from its beginning, today one’s are based on Art. 217 TFEU in case of the association of all the objectives of the EU. The definition of Art. 217 TFEU was specified in *Demirel* case as “*an agreement with non-member country which must take part in Community system...Art. 217 must empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty*”.²⁷ In case of the association of selected areas of aims and policies the supporting articles cannot be defined in general. When the associated partner is not the international legal person the process is grounded on Art. 198 – 204 TFEU.²⁸

²¹ Hillion, Ch.: The EU’s Neighbourhood Policy towards Eastern Europe, In: Dashwood, A., Maresceau, M.: Law and Practice of EU External Relations, Cambridge University Press, 2008, p. 135.

²² EaP covers six states“ Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

²³ Communication from the Commission to the European Parliament and the Council: Eastern Partnership (COM (2008) 823 final of 3 December 2008).

²⁴ For details see: Council document 8435/09 of May 2009.

²⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17. 12. 2007).

²⁶ <http://eeas.europa.eu/association/>, visited on 1. 6. 2015.

²⁷ C- 12/86 *Demirel* case.

²⁸ Svoboda, P.: Evolution of Association Agreements in EU External Relations Law, p. 20 In: From Eastern Partnership to the Association. A Legal and Political Analysis, Cambridge Scholars Publishing, Cambridge 2014.

The first states which signed such agreements were Greece²⁹ in 1961 and Turkey³⁰ in 1963 explicitly providing the future possibility of membership.³¹ Since that, the association process continues and more and more states become partners of EU and later its Member States.³² AAs concluded between the EC/EU and non-member states can be further divided into the groups according to a period of time, when they were made or according to the content, mutual rights and obligation and the extent of the agreement.

2.2 Association Agreements of first generation

AAs which were settled in 60s and 70s between EC/EU, its Member States and Greece (1961)³³, Turkey (1963)³⁴, Malta (1971)³⁵ and Cyprus (1973)³⁶ (sometimes called the AAs of first generation) had no provisions declaring the protection of human rights at all. Agreements mainly focused on economic topics – development of free trade area, custom union, strengthening of trade and economic relations between the Parties (Turkey, Greece) and eliminate obstacles as regards the main body of trade (Malta, Cyprus).³⁷

2.3 Association Agreements of second generation

So called Euro-Mediterranean Association Agreements (sometimes called the AAs of second generation) were concluded in years 1998-2005 with 7 countries which neighbour with Mediterranean Sea (Egypt, Algeria, Jordan, Tunisia, Lebanon, Morocco, Israel), Libya (negotiations suspended in 2011)³⁸, Syria (in negotiation) and (Palestinian territory)) on the one side and European Union on the other side.³⁹

The primary aim of the treaties was to establish Free Trade Area and develop mutual economic cooperation between Member States, EU and the cooperating states as well as in agreements of the first generation. The difference from agreements of the first generation is, that the AAs covered the

²⁹ Accord créant une association entre la Communauté économique européenne et la Grèce. *Official Journal of the European Union* (in French). P 26/1963: 18 February 1963. pp. 294–342.

³⁰ Accord créant une association entre la Communauté économique européenne et la Turquie – Protocole n° 1 : protocole provisoire – Protocole n° 2 : protocole financier – Acte final – Déclarations". *Official Journal of the European Union* (in French). P 217/1964. 29 December 1964. pp. 3687–3697.

³¹ Preamble of Turkey-EC Association Agreement (1963), OJ 1964 L 217/3705, para 4.

³² Porto Agreement (1992) establishing EEA; seven agreements with Switzerland (1999); Stabilisation and Association Agreements with possibility of future membership (explicitly stated) concluded with Macedonia, Croatia, Albania, Montenegro, Bosnia and Herzegovina and Serbia (only one which is not enforceable yet); Euro – Mediterranean Association Agreements with Tunisia, Israel, Morocco, Palestinian Authority, Jordan, Algeria, Egypt, Lebanon, Syria (under negotiation) and Libya – they all are part of ENP; Association Agreement with Chile (2002); Agreement on trade, development and cooperation with South Africa (1999, not in force); ACP-EU Partnership Agreement with African, Caribbean and Pacific countries, former colonies of EU members. EU Association Agreement: Greece (1961), Malta (1970), Cyprus (1972); Sweden, Norway, Portugal, Island (1972); Poland, Hungary (1994), Romania, Bulgaria, Czech Republic, Slovakia (1995), Estonia, Lithuania, Latvia (1998), Slovenia (1999); Ukraine (2014).

³³ Ibid No. 29.

³⁴ Ibid No. 30.

³⁵ Accord créant une association entre la Communauté économique européenne et Malte. *Official Journal of the European Union* (in French). L 61, 14 March 1971, pp. 1-87.

³⁶ Accord créant une association entre la Communauté économique européenne et la république de Chypre. *Official Journal of the European Union* (in French). 1246/73, 21 May 1973. pp. 1-87.

³⁷ Phinnemore, D.: Association: Stepping-Stone Or Alternative to EU Membership?, Bloomsbury 3PL, 1999, pp. 41-42.

³⁸ <http://ec.europa.eu>, visited on 10. 6. 2015.

³⁹ Cihelková, E.: Vnější ekonomické vztahy Evropské Unie. C. H. Beck, 1st Edition, 2003, p. 376.

provisions stating standards on protection of human rights. Human rights clauses were negotiated in the context of the Barcelona Declaration (1995).⁴⁰

Barcelona Declaration was adopted at the Euro-Mediterranean Conference which took place before association agreements were finalised and were not legally binding for the parties.⁴¹ Parties agreed to act in accordance with the United Nations Charter and the Universal Declaration of Human Rights, develop the rule of law and democracy in their political systems, respect for human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms.⁴² According to Lorand Bartels,⁴³ even though the human rights clauses in the Euro-Mediterranean Association Agreements differs one from another in its extent and wording, we can try to divide divides them into three main categories:

1. An essential elements clause establishing respect for the principles of human rights and democracy as an essential element of the agreement.
2. A “non-execution” clause providing that “appropriate measures” may be taken in cases of failure to fulfil the obligations in the agreement, following consultations with the other party (except in cases of “material breach” or “special urgency”).
3. A provision defining these cases of a material breach or special urgency, and confirming that in all cases the “appropriate measures” must be “taken in accordance with international law”.⁴⁴

There are also some situations when the dispute arises, therefore the possible fourth category might be the provisions which secure the basis for dispute settlements or working groups to avoid the conflicts.⁴⁵

Bartels in his article deals with the problem of enforceability and interpretation of human rights provisions caused by the vague definitions of essential elements clause. Therefore to apply the human rights provisions it is important to decide, whether the essential elements clause defines the obligation or only the conditions on which the agreements are based. In case of the approach when essential element clause sets only the conditions it would exclude this clause from the legal significance and the non-execution clause will not be applicable. The contrary interpretation envisages from the Barcelona Declaration as a basic legal instrument of Euro-Mediterranean AAs and also from all the AAs (except from Israel and Tunisia) in which is stated that in case of so-called “material breach”⁴⁶ the essential element clause should be seen as an obligation.⁴⁷ In case of “normal breach”, the parties can act only through the Association Council instead of taking other steps. The procedure for declaration of breaching of human rights provisions is however still not clear and difficult to decide.⁴⁸

⁴⁰ Barcelona Declaration, adopted at the Euro-Mediterranean Conference 27-28 November 1995, available on http://www.eeas.europa.eu/euromed/docs/bd_en.pdf.

⁴¹ Bartels, L.: A Legal Analysis of Human Rights Clauses in the European Union’s Euro-Mediterranean Association Agreements. *Mediterranean Politics*, Vol. 9, No. 3 (Autumn 2004), pp. 368-395.

⁴² Barcelona Declaration, adopted at the Euro-Mediterranean Conference 27-28 November 1995, available on http://www.eeas.europa.eu/euromed/docs/bd_en.pdf.

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⁴⁴ Bartels, L.: A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements. In: *Mediterranean Politics*, Vol. 9, No. 3 (Autumn 2004), p. 373.

⁴⁵ Ibid.

⁴⁶ For details see: Bartels, L.: A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements. In: *Mediterranean Politics*, Vol. 9, No. 3 (Autumn 2004), p. 382-385.

⁴⁷ Ibid p. 380.

⁴⁸ Ibid p. 386.

2.4 Agreements of third generation with Central and Eastern European States (Europe Agreements)

The Europe agreements are association agreements between EU and its Member States and the Central and Eastern European countries that joined EU in 2004 or 2007. They formed the legal framework for the accession process of these countries to the EU with an almost identical content and structure.⁴⁹ The importance of the Association Agreements with Central and Eastern Europe states (sometimes called the AAs of the third generation) is visible in their higher standards and quality.⁵⁰ European Commission on 27 August 1990 used the term “European Agreement” in her Communication to stress the geographic position and cultural proximity, but also to emphasize the new form of integration which states the obligation for associated state to harmonize⁵¹ the national law with EU law.⁵² Europe Agreements were signed with Poland and Hungary (1991), Bulgaria (1992), Romania, Czech Republic, Slovakia (1993), Estonia, Latvia, Lithuania (1995) and Slovenia (1996). After the Copenhagen European Council in 1993 it was clear that the aim of the AAs is to prepare states for future membership. This preparation should be guaranteed by three criteria (Copenhagen Criteria) - 1) functioning market economy, 2) national institutions, which can guarantee rule of law, human rights and democracy principles and 3) preparation for implementation of *acquis communautaire*.⁵³ The upper mentioned Europe Agreements are sometimes divided into other two categories because of two ways in which they were settled but also because in the Agreements in the second way, there is an additional provision of special importance. It is a human rights clause which sets the obligation to associated state and its adherence is a *condition sine qua non* for the legal existence of the AAs. This clause can be seen for example in the AA with Czech Republic (in particular Art. 6):

“Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe as well as the principles of market economy, inspire domestic and external policies of the Parties and constitute essentials elements of the present Association.”⁵⁴

Art. 6 of the Czech-EU AA is not the reaction on deficiency in protection of human rights in Czech Republic, but the Art. 6 reflects the approach adopted in Council Declaration on 11 May 1992 which requires a similar clause in newly negotiated association agreements between EC/EU, its Members and third countries (members of OSCE).

An important part of Europe Agreement negotiated with Czech Republic (and Slovakia) includes a suspense clause in article 117 of the Agreement.⁵⁵ The suspense clause allows the Party to take

⁴⁹ eeas.europa.eu, visited on 25. 5. 2015.

⁵⁰ Cihelková, E.: *Vnější ekonomické vztahy Evropské Unie*. C. H. Beck, 1st Edition, 2003, p. 571.

⁵¹ For detailed division of the terms of Approximation, Harmonisation and Unification see: Šišková, N.: *The EU-Ukraine Association Agreement as an instrument of a new generation of so called „tailored“ association agreements: The Comparative view*. In: *From Eastern Partnership to the Association. A Legal and Political Analysis*, Cambridge Scholars Publishing, Cambridge, 2014, p. 115-134.

⁵² Šišková, N.: *The EU-Ukraine Association Agreement as an instrument of a new generation of so called „tailored“ association agreements: The Comparative view*. In: *From Eastern Partnership to the Association. A Legal and Political Analysis*, Cambridge Scholars Publishing, Cambridge, 2014, p. 108.

⁵³ Borzel, T., Risse, T.: *One size fits all! EU policies for the Promotion of Human Rights, Democracy and the Rule of Law*, Centre for development of Democracy, and the Rule of Law, Stanford University, 2004 p. 10.

⁵⁴ EU-Czech Republic Association Agreement, available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272009/2437.pdf, visited on 3. 6. 2015.

⁵⁵ Article 117

- (1) Parties shall take any general or specific measures required to fulfil their obligation under this Agreement. They shall see to it that the objective set out in this Agreement are attained.
- (2) If either Party consider that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the

appropriate measures if the other Party does not satisfy the obligations which arise from the Agreement e.g. also the human rights provisions. In case of serious breach of democratic principles and human rights, which are the essential elements of the Agreement, European Commission and its Member States can suspend performance of the Agreement.⁵⁶ Its scope is wider because the AA also includes the Joint Declaration for cases of special urgency (material breach of the human rights provisions as stated in Mediterranean Agreements). Otherwise all the European Agreements follow the procedure as upper stated - first to seek resolution within the Association Council administering the agreement, and in case of lack of success proceed to arbitration.⁵⁷

Czech Republic is, by article 6, bound to respect the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe.

Helsinki Final Act

Originally Helsinki Final Act was not legally binding document which was signed by 35 states, including USA, Canada and USSR in 1975 during Conference on Security and Co-operation in Europe which took place in Helsinki. It was a reaction on changing situation in Europe and Cold War and signatories tried to improve relations between the Communist bloc and the West countries. Helsinki Final Act contains 10 universally recognized principles⁵⁸, which are formulated vaguely⁵⁹ and can be split up into three “baskets”, which have remained intact as the three “dimensions” forming the basic structure of the OSCE: 1st - Confidence-building measures and certain aspects of security and disarmament, 2nd - Cooperation in the field of economics, science and technology and the environment and 3rd - Cooperation in humanitarian and other fields.⁶⁰ Human rights provisions fall into the 3rd basket and can be found in article VII *Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief*.^{61,62}

Association Council with all relevant information required for a thorough examination of the situation with a view to seek a solution acceptable to the Parties.

In the section of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.

⁵⁶ <https://www.euroskop.cz/167/sekce/asociacni-dohoda/>, visited on 1. 6. 2015.

⁵⁷ European Parliament, Directorate General for external policies of the Union (29. 9. 2005) available online: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/584/584520/584520en.pdf, visited on 1. 6. 2015, p. 5.

⁵⁸ I. Sovereign equality, respect for the rights inherent in sovereignty, II. Refraining from the threat or use of force, III. Inviolability of frontiers, IV. Territorial integrity of States, V. Peaceful settlement of disputes, VI. Non-intervention in internal affairs, VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, VIII. Equal rights and self-determination of peoples, IX. Co-operation among States, X. Fulfilment in good faith of obligations under international law, see Co-operation in Europe Final Act (Helsinki Final Act), available at: <https://www.osce.org/mc/39501?download=true>, visited on 10. 6. 2014.

⁵⁹ <http://www.humanrights.ch/en/standards/europe/osce/helsinki/>, visited on 13. 6. 2015.

⁶⁰ Tatham, F. Allan: Enlargement of the European Union, Kluwer Law International, 2009, p. 217,

<http://www.humanrights.ch/en/standards/europe/osce/helsinki/>, visited on 10. 6. 2014.

⁶¹ Co-operation in Europe Final Act (Helsinki Final Act), available at: <https://www.osce.org/mc/39501?download=true>, visited on 10. 6. 2014.

⁶¹ <http://www.humanrights.ch/en/standards/europe/osce/helsinki/>, visited on 13. 6. 2015, visited on 10. 6. 2014.

⁶² The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Charter of Paris for a New Europe (Paris Declaration)

Paris Declaration was adopted on the summit of European governments including Canada, USA and Soviet Union in Paris on 21 November 1990. The aim of the Declaration was further development of the Helsinki Final Act⁶³ and a reaction on new geopolitical circumstances in Europe – the end of the Cold War which opened dialog between East and West.⁶⁴ The Paris Declaration concretizes human rights and fundamental freedoms in the light of the Helsinki Final Act.⁶⁵

Paris Declaration in its wording proclaims the importance of democracy as the only governmental system and the importance of human rights. It proclaims the protection of human rights and fundamental freedoms which are the birthright of all human beings as well as non-discrimination and protection of minorities. The Declaration clearly establishes freedom of religion, belief, expression, movement and others important human rights and freedoms.⁶⁶

3. EU-Ukraine Association Agreement

EU-Ukraine Association Agreement (political provisions signed on 21 March 2014, remaining sections on 27 June 2014 and 16 September 2014 and is now under the process of ratification) is the newest representation of the AAs concluded with EaP states and EU and is unique on many levels (formal, legislative and even on the level of its acceptance caused by the facts and events which came to pass in Ukraine during last two years).

This AA differs from the previous ones (and upper mentioned) at first by its concept. EaP AAs are constituted as a document which take into consideration the specifics of each associating country and

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and wellbeing necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound. See Co-operation in Europe Final Act (Helsinki Final Act), available at:

<https://www.osce.org/mc/39501?download=true>, visited on 10. 6. 2014.

⁶³ <http://www.internationaldemocracywatch.org/index.php/osce-declarations/342-charter-of-paris-for-a-new-europe>, visited on 13. 6. 2015.

⁶⁴ <https://www.oscepa.org/about-osce-pa/history>, visited on 13. 10. 2015.

⁶⁵ Charter of Paris for a New Europe, available at: <http://www.osce.org/mc/39516?download=true>, visited on 13. 10. 2015.

⁶⁶ Ibid.

is tailored for the country.⁶⁷ In EaP Agreements⁶⁸ were already stated, that because of the difference of legal and political relations of the states of EaP, the approach of regulation cannot be unanimous, but on the contrary is based on so-called “variable geometry”.⁶⁹ EU-Ukraine AA only strengthens this tendency. Another difference is that EU-Ukraine AA is based political association not economic and is innovative in its attention to detail.⁷⁰ For demonstration, the Europe Agreements had around 124 articles and 130 pages all together with annexes and protocols. EU-Ukraine AA has 486 articles and annexes in an overall extension of 1200 pages.⁷¹ In compare to EU-Czech Association Agreement, this AA doesn't have any provisions which explicitly states the possible accession to the EU, however, it is not excluded either. In particular from Art. 1, 3 of the AA emerge that the Agreement shall not be prejudiced and leaves open future developments in EU-Ukraine relations. It is obvious that even though there was some attempts to adopt the measures to fulfil the obligations of EaP, the conditions of Association Agreements and requirements which burden Ukrainian institutions *de lege lata* or even *de lege ferenda* are very challenging.

The main guarantee of EU-Ukraine Association Agreement human rights standards is enacted in the Preamble and Art. 2 of the AA:

3.1 Article 2 of Association Agreement with Ukraine

*Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.*⁷²

The Association Agreement with Ukraine provides the higher standard of protection of human than was established in Association Agreement with Czech Republic. In the Preamble of EU-Ukraine Association Agreement, Ukraine undertakes an obligation to implement, among others, all the provisions and principles of Helsinki Final Act of 1975, the Charter of Paris for a New Europe (1990), the United Nations Universal Declaration on Human Rights (1948) and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950). AA also recognises the common values on which European Union is built – namely democracy, respect for human rights and fundamental freedoms, and the rule of law – are so essential elements of this Agreement. These common values and its scope can be found in Art. 2 TEU as stated in the beginning of this article.⁷³

Non-compliance with these human rights standards stated at Art. 2 EU-UA AA may result in suspension of obligations or general non-execution of the agreement because this provision constitute “essential

⁶⁷ http://eeas.europa.eu/top_stories/140912_ukraine_en.htm, visited on 10. 6. 2015.

⁶⁸ For details and differentiation in between EaP and Association see: Maresceau, M.: On Association partnership, pre-accession, accession, in: Maresceau, M. (ed.): Enlarging the European Union, Longman, London-New York, 1997, p. 3-12.

⁶⁹ Elsuwege, P. V.: Variable geometry in the European Neighbourhood Policy. The principle of differentiation and its Consequences, in: Lannon, E. (ed.): The European Neighbourhood Policy's Challenges, P.I.E. Peter Lang, Brussels 2012, p. 59.

⁷⁰ http://eeas.europa.eu/top_stories/2012/140912_ukraine_en.htm, visited on 13. 5. 2015.

⁷¹ Ibid.

⁷² Ukraine Association Agreement, available at:

http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf, visited on 10. 6. 2015

⁷³ Ibid.

elements” of the EU-Ukraine Association Agreement. Failed compliance or a serious breach of essential elements of the EU-Ukraine association deal may (and in cases of a special urgency-also will) be followed by appropriate remedy measures procedurally determined in the so-called suspension clause.⁷⁴

In case of dispute between the Parties, arising from interpretation, implementation, or good faith application of this Agreement, any Party shall submit to the other Party and the Association Council a formal request that the matter in dispute to be resolved (Art. 477(1)). If the dispute is not resolved within three months of the date of notification, any Party may take appropriate measures, according to Art. 478(1).

Article 478(3) establishes two exceptions when the Party does not have to wait three months to resolve a dispute and may act promptly and may take appropriate measures. These exceptions are:

- (i) denunciation of the Agreement not sanctioned by the general rules of international law;
- (ii) violation by the other Party of any of the essential elements of this Agreement referred to in Article 2 of this Agreement. In case of breach of human rights and democratic principles as essential elements of the Agreement, Member States can enforce their compliance and elimination of illegal state by appropriate measures.

3.2 Legal Force of EU-UA AA

Article 19(2) of the Ukraine Constitution⁷⁵ implies that properly ratified Association Agreement will not only be equal to the same status as national laws but will overrule national legislation when conflict between national law and AA arises. On the other hand, the Association Agreement cannot apply in a conflict of provisions of the Ukrainian Constitution because the legal system of Ukraine does not envisage direct enforceability of international agreements in the national legal order.⁷⁶

Roman Petrov⁷⁷, in his article deals with problematic of the implementation of the Association Agreement into Ukraine legislation. He states, that: “the objective of effective implementation and application of the Association Agreement can be achieved only by issuing a special implementation law that will clarify all potential conflicts of provisions of this agreement with Ukrainian law.”⁷⁸

An example can be an experience with ensuring implementation and application of the European Convention of Human Rights (ECHR) which Ukraine ratified the ECHR in 1997. The process of ratification of ECHR by Ukraine was divided into two laws. Firstly was ratified the ECHR in the special law, where Ukraine established the jurisdiction of the European Court on Human Rights (ECtHR). Secondly was ratified an application of case law of the ECtHR in Ukraine which imposed for Ukraine a

⁷⁴ Tyushka, A.: Empowered to Deliver: The Institutional Model and Implementation Arrangements under the EU-Ukraine Association Agreement, Romanian Journal of European Affairs, May 2015.

⁷⁵ Article 19(2) of Law of Ukraine “On International Treaties of Ukraine” provides that “If duly ratified international treaty of Ukraine contains other rules then relevant national legal act of Ukraine rules of the respective international treaty should be applied.”

⁷⁶ Petrov, R.: Constitutional challenges for the implementation of association agreements between the EU and Ukraine, Moldova and Georgia. *Legal issues of economic integration*, volume 42, 2015, pp. 6-7.

⁷⁷ Prof. Dr. Roman Petrov is Head of Jean Monnet Centre of Excellence since 2011 and Jean Monnet Chair in EU Law at the National University of Kyiv-Mohyla Academy since 2010. He lectured the very first Jean Monnet Module in EU law in Ukraine at the Donetsk National University. He is the founder and first elected President of the Ukrainian European Studies Association. Prof. Dr. Petrov frequently provides consultancy to state institutions in Ukraine, including the Parliament of Ukraine, Constitutional Court of Ukraine and Ministry of Justice.

⁷⁸ Petrov, R.: Constitutional challenges for the implementation of association..., p. 7.

duty of execution of all judgments of the ECtHR related to Ukraine. In accordance with these laws, judgments of the ECtHR are being formally accepted by the national judiciary as sources of law.⁷⁹

4. Conclusions

Principles of democracy, protection of human rights are deeply rooted in the history of Europe. The development in Europe has been affected by the geo-political situation in Europe and its neighbourhood when historic moments were impulses to debate upon the level of the protection. However, the process of embodying of human rights, common principles and its protection into the EC/EU Treaties and its emanation to the EU legislation in general haven't corresponded to the evolution of human rights in Europe mainly because of the primary economic character of European Communities.

European Union nowadays (even without the Accession to the Convention) is based on high protection of human rights, democracy and rule of Law and these standards require from its partners as well. Effective mutual co-operation with EU, its Member States and associated state is not possible if the associated state does not undertake an obligation to fulfil the criteria of human rights protection. Consistent European Neighbourhood policy should provide EU security and peace in the region of associated states.

We can observe increasing requirements on associated states in field of protection of human rights and respect for democratic principles, explained in the article, supported by the wider spectre of International Agreements. In EU-UA AA this requirements escalated, but the stipulated regulation corresponds to the overall scope of the Association Agreement. The EU-UA AA cover similar or same structure and fields of legislation as in EU Foundation Treaties. Nevertheless the articles are not identical when the same field is regulated, which is the consequence of unlike intentions in the process of integration. The provisions which are taken over from the Treaties (and which are very common in EU-UA AA) are called the "mirror legislation".⁸⁰ It is one way how to reach the disseminate the content of EU law into the AAs and later on to involve the national legislation of Associated State, which is in compliance with the term "Association" as it was described in Demirel case and mentioned in the Article. The other reason for the extent of the EU-UA AA we see in two different methods of interpretation. The first reason can be seen as a consequence of the Association with the more distant states, which went through diverse political, social and historical evolution and thus it is necessary to present the regulations clearly and precisely to avoid the disputes. The second interpretation is, that the well work-out AA should to prepare the Associated State – Ukraine for the possibility of future membership (which unfortunately doesn't seem real and will be according to us at least decade postponed due to current events in Ukraine) and to ensure and intensify the prevention. This interpretation raises two questions. If the Ukraine will be able to accomplish so many obligations which necessary have to be reflected in the changes of Ukrainian institutional system and significant intervention into the national law. The second question is if it is correct from the side of EU to impose such obligations to associated state, while the scope of human rights protection under the Art. 7 TEU (as briefly mentioned) is not effective and, therefore, the requirements put on Member States are after the accession much lower. All these issues outlined in the article are the topical issues of special importance and should be the subject matter of the deep research. Nevertheless, the process

⁷⁹ Ibid.

⁸⁰ Pauknerová, M.: Asociační dohoda – některé teoretické a praktické otázky, Právník, 1995, vol. 9, p. 841.

ratification of the EU-UA Association Agreement is according to us only the first step to help Ukraine to definitely resolve the actual conflict and to take this European state as an equal member of Europe.

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