

EU HUMAN RIGHTS PROTECTION UNDER THE TREATY OF LISBON

The aim of my paper is to show the recent proposed changes of human rights protection in the EU based on the Treaty of Lisbon (further referred as “TL”). The TL is the last reform of the EU primary law and its ratification process in all EU Member States has been finalised in November 2009. The paper will focus both on the outline of the present state of human rights protection in the EU from the historical perspective and changes brought by the TL.

European Communities (1952, 1958) were founded as economic communities; their purpose was the economic integration. In the 50s there was also a proposal to establish the European Political Community whose aim was, among others, the human rights protection. However, this proposal did not pass in the Member States and only the economic integration through the Treaty establishing the European Economic Community (since 1993 called European Community, further “TEC”) and through the creation of the European Community (further “EC”) was realised. Consequently, there was no provision on the human rights protection in the TEC; its aim was to create common market – that is the free movement of goods, persons, services and capital among Member States.

However, it was very soon clear that due to the direct effect of EC law in national law and its supremacy over national (constitutional) law the realisation of these economic freedoms is closely linked to individuals and their rights. Individuals demanded their protection before national courts and the European Court of Justice (further “ECJ”) was under the preliminary ruling procedure less than 234 TEC required adjudicating in this respect. In its early judgements the ECJ refused to scrutinize the Community legislation due to the human rights breach: it did not accept the reasoning based on the national constitutional rules and human rights protected therein (1) and in the TEC itself there was no provision in TEC which would concern human rights protection.

The situation changed after a decade of ECJ’s hesitance at the end of 60s. In its case *Stauder* (2) it proclaimed that the *human rights* must be protected by the ECJ *as general principles of Community law*. However, the case *Stauder* was finally decided without an application of human rights doctrine and the ECJ decided by comparing different language versions of the EC law.

One year later in case *International Handelsgesellschaft* (3) the ECJ ruled that in case of a clash of human rights guaranteed by the German Constitution and Community legislation, the EC law must prevail even over national constitutional rules. This led to a “resistance ruling” of German Federal Constitutional Court in case called *Solange I* (1974). It stated that in the conflict between Community law and the guarantees of fundamental rights in the German Constitution, the guarantee of fundamental rights in the German Constitution prevails as long as the competent organs of the Community have not removed the

conflict of norms in EC law (4). The judgement of German Constitutional Court was a big threat for the uniform application of EU law in all Member States. The ECJ's reaction was a much extended protection of human rights as general principals of law in many subsequent cases. This case-law now forms the basis for the protection of human rights in the EU. This change induced the German Constitutional Court to modify its approach and in Solange II decision (1986) it found the EU standard for the protection of human rights in the EC sufficient and there is no need to decide on diapplication of EC law in Germany.

As the process of constitutionalisation of the EC/EU went on, there were various attempts to increase human rights protection in the EU primary law. *The TEU* in the 90s put a direct referral to human rights protection in the primary law. According to the art. 6 the European Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law. A direct referral to the general principles of law is a codification of the ECJ's case-law in this area. Further, in its art. 7 the TEU created a suspension clause and EU mechanism to initiate proceedings against a Member State that would breach human rights.

A significant attempt was made by the project of the *EU Constitution* (formally Treaty founding a constitution for Europe; 2003). Under this proposal the Charter of Fundamental Rights of the EU (5) – formally a declaration made in Nice in 2000 by the European Parliament, Council and the Commission – should have become a separate part of the EU Constitution and, thus, it would have acquired a constitutional character. However, the EU Constitution project failed due to refusal in referenda in France and the Netherlands in 2006.

However, the last proposal for revision of primary law was successful and the so called the *Treaty of Lisbon* (6) (further "TL") entered in force in 2009. The human rights protection changed in several ways.

The most important direct change is new status of the *Charter of Fundamental Rights* of the EU. Unlike the EU Constitution the TL did not put the whole text of the Charter in the primary law. But under the new art. 6 TEU the EU recognises the rights, freedoms and principles set out in the Charter and they shall have the same legal value as the EU primary law. Thus, the Charter will become part of the constitutional order of the European Union and will be binding and potentially directly applicable in relation to EU institutions and the Member States. There is a strict limit – the Charter is binding on the Members States only if they implement EU law (comp. Art. 51 of the Charter), therefore there is no general application against Member States.

This is important as in the ratification process in the Czech Republic there were doubts that the Charter may be used even in relation to the post World War II property claims of Germans who had to leave Czechoslovakia in 1945. This is not possible both *rationae tempore* and *ratione materiae*. Still, the Czech Republic as the last Member state to ratify the TL required an exception from the application of the Charter before national courts. A similar exception was negotiated by the United Kingdom (because of the social rights protection in the Charter and its

specific apprehension in the UK) and in Poland (especially because of the fear that the traditional family protection could be diminished by the all EU standard). Effects of these exceptions are not clear as the human rights are already protected as general principles of law and definitely the ECJ will not stop formulating the EU standards for human rights protections in relation to EU law application in the Member States. This might mean that these standards will be formulated by the ECJ in relation to the Czech Republic, Poland and the UK without a direct referral to the Charter but with a referral to art. 6 TEU. A subsidiary argumentation may be done also by means of the Charter as is done already in the ECJ's case-law.

Further, under the TL the EU *shall accede to the European Convention* for the Protection of Human Rights and Fundamental Freedoms and, consequently, it will become part of the Strasbourg human rights control mechanism. This tries to deal with the present state of affairs where the EU Member States are subordinated to the Strasbourg court and have to comply with the human rights standards contained in the European Convention. On contrary, even though the EU adjudicates in many fields previously occupied by the Member States, it is independent on the Strasbourg control mechanism and in practice we can find examples of a divergent case-law of both courts.

The question is whether and when the EU will fulfil its goal contained in the art. 6 as under the Protocol 8 to the EU Treaty before the accession several questions must be solved:

- 1) preservation of the specific characteristics of the Union and Union law, in particular with regard to the specific arrangements for the Union's possible participation in the control bodies of the European Convention; the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate;
- 2) the accession may not affect the competences of the Union or the powers of its institutions;
- 3) the accession may not effect the situation of Member States in relation to the European Convention and their derogations.

To summarize it may be noted that the human rights protection in the EU was previously closely connected with a fear of the ECJ that the adjudication of national courts could lead to disapplication of the EU internal market law in individual Member States and this would threaten the uniform application of the EU law in the whole Union; it would also threaten the position of the ECJ as a "supreme interpreter" of the EU. In recent years the human rights protection becomes more a topic of the process of the EU constitutionalisation. By recent changes that reflect the 50 years development in the EU, under the TL the EU gained its own human rights catalogue which is common only to states and it will endeavour to accede to the European Convention which, again, is open only to states. Evidently more federal features are present in the EU constitution building. The further development is open.

Literature

1. 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community] ECR 17, para. 3.
2. 29/69 Stauder v. City of Ulm [1969] ECR 419, para. 7.
3. 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 3
4. Comp. Craig, P., de Búrca G., EU Law: Text, cases and materials, Oxford University Press, Oxford 2003, P. 285–315.
5. Official Journal of the European Union, C 303 of 14 December 2007.
6. Official Journal of the European Union, C 306 of 17 December 2007.

Stehlík, V. EU human rights protection under the Treaty of Lisbon [Text] / V. Stehlík // Права людини в умовах сучасного державотворення: теоретичні і практичні аспекти: збірник тез доповідей за матеріалами IV Міжнародної науково-практичної конференції студентів і молодих вчених (11-12 грудня 2009 р., м. Суми). – Суми: УАБС НБУ, 2009. - С. 123-127.