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The European Union's Commitment to Fundamental Rights

From Rhetoric to Reality

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Table of Contents

Table of abbreviations

AVMS Directive	Audiovisual Media Services Directive
CFSP	Common Foreign and Security Policy
CRPD	UN Convention on the Rights of Persons with Disabilities
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECRI	European Commission against Racism and Intolerance
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
FPÖ	Austrian Freedom Party
FRA	European Union Agency for Fundamental Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
KEHI	Hungarian Government Control Office
MEME	Association of Hungarian Electronic Broadcasters
MEP	Member of the European Parliament
MLE	Association of Hungarian Publishers
MTE	Association of Hungarian Content Providers
NMHH	National Media Infocommunications Authority
OHCHR	Office of the High Commissioner for Human Rights
ÖRT	Advertising Self-Regulatory Body
ÖVP	Austrian People's Party

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

"Freedom is a timeless value. The United Nations Charter calls for encouraging respect for fundamental freedoms. The Universal Declaration of Human Rights mentions freedom more than twenty times. All countries have committed to protecting individual freedoms on paper – but in practice, too many break their pledge". The words of Ban Ki-moon at the fourth Annual Freedom Online Coalition Conference in 2014 have never seemed more appropriate in the history of the European Union than now. Since its creation as the European Coal and Steel Community, the EU has evolved into one of the champions of fundamental rights. From a market integration oriented union, the EU has developed a strong commitment to fundamental rights through various steps. Article 2 of the Treaty on the European Union now enshrines fundamental rights as essential values of the EU: "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". In addition, all EU Member States have become party to the European Convention on Human Rights of the Council of Europe, and the Charter of Fundamental Rights of the EU became legally binding in 2010 with the entry into force of the Lisbon Treaty. However, the EU itself is not party to some of the main treaties its Member States ratified, such as the ECHR and most UN treaties, and has shown reluctance to advance in that direction. Indeed, while the Lisbon Treaty provides for the EU's accession to the ECHR, we shall see that there are still many obstacles to the achievement of this accession.

Still, with two entities in charge of protecting human rights, in addition to further international treaties, EU Member States should theoretically be an example in safeguarding fundamental rights.

Yet, while advocating for the respect, protection and promotion of fundamental rights worldwide, in the EU itself major breaches are occurring. Although accession is conditioned by the Copenhagen criteria, which includes provisions for the respect of human rights, once this accession is achieved, it

may be challenging for the EU to ensure its Member States abide by the high standards it has set. One of the most blatant examples of an EU Member State not living up to its human rights commitments is Hungary. Indeed, since Viktor Orbán came into office as Prime Minister in 2010, the country has undergone major reforms that have led to the watering down of fundamental rights and the rule of law. For instance, freedom of the press is under great pressure and the independence of the judiciary system of the country has been questioned. The EU is facing major difficulties tackling Hungary's attitude and actions, and there seems to be a lack of consensus around the course of action to adopt and the tools to use to remedy the situation. While Article 7 of the Treaty on the European Union provides for sanctions in case of a "serious and persistent breach" of the values enshrined in Article 2 TEU, resorting to this mechanism involves a high degree of political commitment, which EU officials do not seem ready to take on.

This thesis will demonstrate how the framework for the protection of fundamental rights in the EU has indeed become a very comprehensive one in theory, but in practice presents significant shortcomings that have led to the erosion of fundamental rights in certain EU countries.

The first chapter will examine the historical and political developments that led the EU to grow from an initially economic oriented organization, to one identifying fundamental rights as essential values. The second chapter will analyze the framework for the protection of human rights within the EU, the instances EU citizens can turn to when faced with violations of their rights, and the interaction between the Court of Justice of the EU and the European Court of Human Rights. It will evaluate whether the EU's toolkit for the protection of fundamental rights is sufficient. Finally, in a third chapter, the theory will be confronted with the practice of the reality of fundamental rights in the EU, especially through a case study of the current situation in Hungary. This will be the occasion to determine whether the theoretical framework designed by the EU is adapted, effective and efficient.

This thesis relies on the work of authors and scholars who worked on the topic of fundamental rights, international law and EU law, such as Christian Tomuschat, Giacomo Di Federico, Paul Gragl, Paul Craig and Gráinne de Búrca. The case study is, to a great extent, based on reports of human rights organizations such as Human Rights Watch or Amnesty International; on documents, publications and reports of EU institutions and the Council of Europe; as well as on the work of scholars such as Jan Werner Müller and Wojciech Sadurski.

In the context of this work, the terms “fundamental rights” and “human rights” will be used interchangeably, as the EU Agency for Fundamental Rights has determined that “’the term ‘fundamental rights’ is used in the European Union to express the concept of ‘human rights’ within a specific EU internal context”. Additionally, while references may be made to legislation, decisions, rulings etc. that occurred under the predecessors of the EU (the ECSC or the EEC), the Union shall be referred to as the EU for legibility purposes.

I. Historical and political reasons that made fundamental rights essential values in the EU integration process

A. Fundamental rights and the sovereign State

Today, it is commonly accepted that human rights are an integral part of the European Union values. This is a significant evolution from the initial objective of an organization focused on market integration. However, the acknowledgement of human rights as general principles that States have a responsibility to respect and uphold was achieved after quite a long process, from the initial conception of human rights as an exclusively domestic matter to a shift to more responsibilities given to international and supranational organizations.

The very concept of fundamental rights is quite recent. The emergence of the sovereign State gave rise to the idea that the State is responsible for ensuring the security of its citizens, and for protecting them from external aggression, thus legitimizing the power of the State. However nothing protected the citizens from abuses of that very State. The notion of fundamental rights emerged only later with the development of the modern democratic State, the concept of separation of powers and of the rule of law. The development of instruments to enforce and implement fundamental rights provisions thus surfaced to reconcile the sovereignty of States and the protection of individuals against this very State power[1]. The State then remains responsible for ensuring the protection of its citizens in the general anarchy of the international order, but measures are also taken to ensure that this State does not exceed its authority.

This duality in the protection of human rights, especially in the early stages of the modern State, can be linked to two theories of international relations: realism on the one hand and liberalism on the other hand. In his book *Human Rights: Between Idealism and Realism*, Christian Tomuschat puts

[1] Tomuschat, C. (2014). Human Rights: Between Idealism and Realism (3rd ed.). Oxford: Oxford University Press.
[2] Tomuschat, C. (2014).
[3] Tomuschat, C. (2014).
[4] Brems, E. (2001). Human Rights. The Hague: Kluwer Law International.

forward the duality between the "protection of human rights by denial of human rights" and the "protection of human rights by recognition of human rights". The first proposition can be linked to the Hobbesian realist theory according to which the State holds general power over the members of the polity and ensures their protection not only from external threats, but also from abuses from other members of the polity. Indeed, according to the realist theory and the maxim *homo homini lupus* peace cannot be achieved in an anarchic state of affairs without a strong ruler. The State is thus vested with the authority to prevent civil war and its authority can only be challenged if it fails to carry out its task.

This conception of the relation between power and the citizens, characteristic of authoritarian States, is contested by the liberal theory of authors such as John Locke, Montesquieu, Rouseau or Kant, that argue for the "protection of human rights by recognition of human rights" where the individual is at the center of the political organization and where mechanisms such as the separation of powers have to be designed to protect the citizens from the power of the State. This was the basis for the 1789 *Déclaration Universelle des Droits de l'Homme et du Citoyen* and the American Constitution[2].

Still according to Tomuschat, human rights and their international protection and promotion develop throughout three stages: first an identification stage determines what constitute human rights; the second phase corresponds to the process of making these rights binding through "a set of rules establishing true rights which may be invoked by their holders before any bodies vested with decision-making authority"[3]; and finally the third stage sets up enforcement mechanisms.

Besides, it is worth mentioning that fundamental rights are not a static concept, they evolve with time. Indeed, as societies evolve, new rights may emerge. For example, there was initially no mention of economic and social rights, or environmental rights in the UN Charter, the first universal fundamental rights instrument. They were added later on with additional

[2] Tomuschat, C. (2014).
[3] Tomuschat, C. (2014).

Protocols to existing documents. Similarly, new rights linked to technological progress emerge when that technology starts representing a risk for individuals' rights.

This evolution of fundamental rights can be illustrated by the concept of generations of human rights developed by the Franco-Czech jurist Karel Vasak[4]. First generation human rights are defined as "negative rights" or civil and political liberties, requiring states to "abstain from interfering with personal freedom"[5]. Freedom of speech is one example of these rights. Second-generation human rights would be "positive rights" – generally economic and social rights – which states must ensure, such as the right to work or to health. Finally, third generation rights are described as "collective and developmental" rights and include the right to peace or the right to a clean and healthy environment for example. There is a high degree of interdependence between first and second-generation human rights, as "both sets of rights are necessary for life in full dignity"[6].

The emergence of new rights and the relation between the various generations of rights have given rise to many debates. Third generation human rights can show rather complicated to interpret, especially because defining the substance as well as the bearers and holders of these rights can be quite intricate. Contrary to the right to freedom from torture, the right to health may take a different meaning in developed and developing countries and thus cannot be regarded as a universal right that is valid at all times in all countries. Christian Tomuschat has argued that third-generation rights should rather be defined as general objectives that the international community has committed to uphold, which does not mean that they do not have juridical implications. The emergence of new rights and the relation between the various generations of rights has also prompted many debates, questioning whether one generation of rights may be in conflict with another. Conflicts between two categories of rights can arise for two main reasons:

[4] Brems, E. (2001). Human Rights. The Hague: Kluwer Law International.
[5] Tomuschat, C. (2014).
[6] Tomuschat (2014).

either because of opposing views on the meaning and scope of one same right; or because the restriction of one right may be necessary for the protection of another. For example the right to economic development can clash with the right to a clean environment[7].

Until the second half of the 20th century, States were the center of the international order. As a consequence, human rights standards were set more or less individually by each State, if set at all. In France, the *Déclaration des Droits de l'Homme et du Citoyen* ensured minimum rights to French citizens from 1789. In 1791, the *United States Bill of Rights*, enshrined in the American Constitution as its ten first amendments, also established basic rights. While they remained rather limited, these were some of the first documents ensuring rights to the people. Other countries drew on these documents to draft human rights documents, but each were free to include the provisions they deemed fit; hence a set of variable human rights standards in different countries. After the Second World War (WWII), there was a change of position of the State in terms of human rights, shifting from the highest actor in the hierarchy to a secondary actor, as the international community – mainly the UN – then took the higher-ranking position. States still hold an important position in the international order though, as established by Article 2 (1) of the Charter of the United Nations[8], and the principle of non-interference in sovereign States' affaires remains a cornerstone of the international order. Indeed, in order for an international organization to function, it needs the consent and support of the States party to it. In addition, States remain sovereign over their territory, which implies that only they can ensure the implementation of provisions set forward by the organization. They are essential for a stable and peaceful international order, but "their achievements and failures are not beyond any scrutiny"[9] anymore. While it is

[7] European Commission - Directorate-General for Economic and Financial Affairs of the European Commission, (2004). European Economy. The EU economy: 2004 review. [online] Available at: http://ec.europa.eu/economy_finance/publications/publication451_en.pdf [Accessed 25 Jun. 2015].
[8] "The Organization is based on the principle of the sovereign equality of all its Members"
[9] Tomuschat, (2014).

true that generally, only few remedies exist to tackle States' non-compliance with international law, and thus human rights breaches, incentives do however exist, especially in an ever-more interconnected and globalized world. Sanctions from different States may be applied, and States are encouraged to comply with fundamental rights norms to maintain their reputation and legitimacy. Furthermore, though heavily criticized[10], the principle of Responsibility to Protect endorsed at the 2005 World Summit and defined as the "enabling principle that first obligates individual States and then the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"[11], aims to limit the States' ability to use the principle of non-interference to turn on their own population. Chapter 7 of the Charter of the United Nations also provides for measures in case of "threats to the peace, breaches of the peace, and acts of aggression", insofar as human rights abuses can be considered a threat to peace.

Finally, the International Criminal Court (ICC), established by the Rome Statute of the International Criminal Court in 1998 and which came into force in 2002, is responsible for prosecuting individuals responsible for genocide, crimes against humanity and war crimes. Additional ad hoc tribunals were also created to prosecute crimes committed in former Yugoslavia and Rwanda. In fine, only a limited number of cases were tried and the ICC has been criticized for only bringing to justice easy targets, especially in Africa, while heads of States and warlords are rarely prosecuted. In addition, some countries also adopted specific legislations to allow national courts to prosecute crimes against their nationals committed abroad. The UK for example had Augusto Pinochet convicted, and Spanish judges also prosecuted leaders of Latin American military dictatorships.

[10] Serrano M., (2011), The Responsibility to Protect and its Critics: Explaining the Consensus, Global Responsibility to Protect 3, 1–13 Available at: http://yale.edu/polisci/conferences/sovereignty/mserrano.pdf default [Accessed 22 Jun. 2015].
[11] Unric.org, (2015). Responsibility to Protect. Available at: http://www.unric.org/en/responsibility-to-protect?layout=default [Accessed 22 Jun. 2015].

B. Fundamental rights in Europe: historical developments

The international context

The major step forward in human rights happened after WWII in reaction to the atrocities committed in Europe, and the realization that mechanisms were needed to prevent States from turning on their own population. In this context, leaders of the world decided on the creation of an organization aiming at ensuring international cooperation and "maintain[ing] international peace and security"[12]: the United Nations. Its purpose and mandate were established by the United Nations Charter signed on 26 June 1945, in San Francisco, after the United Nations Conference on International Organization. It came into force on 24 October 1945 and established the Statute of the International Court of Justice. The UN Commission of Human Rights was then charged with the drafting of a document defining basic human rights to be protected and promoted. This resulted in the drafting of the Universal Declaration of Human Rights (UDHR) and its adoption by the General Assembly of the United Nations on 10 December 1948. It was followed by the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the General Assembly of the UN, and later the drafting of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (ICCPR) that came into force in 1976 as the "most recognized international human rights document"[13].

For the first time in history, States had ratified a common document establishing the rights of all human beings through a comprehensive list of rights. Over 30 Chapters, the UDHR covers a wide range of economic, social, cultural, political, and civil rights. Article 1 reflects the ambition of the UDHR and the basis of its development:

[12] Charter of the United Nations (1945), Article 1.
[13] Brosig, M. (2006). Human Rights in Europe. Frankfurt am Main: Lang.

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*[14]

Article 2 establishes the universality of the Declaration and the principle of non-discrimination:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."*[15]

The list of rights covered by the Declaration is then drawn in Articles 3 to 27. Traditional rights and freedoms are listed in Articles 3 to 20[16]. Article 21 establishes the right to political participation in political affairs of one's country, and Articles 22 to 27 cover economic, social and cultural rights[17]. It was complemented in 1966 by the ICCPR and its two Optional Protocols, in an attempt to include a wider range of rights. The combination of these documents forms the International Bill of Human Rights, which came into force in 1976.

The Council of Europe and the ECHR

In Europe more specifically, WWII had many consequences, the first of which was the creation of the Council of Europe in 1949, with initially 10 members. The aim of the organization was "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their

[14] Universal Declaration of Human Rights, Article 1.
[15] Universal Declaration of Human Rights, Article 2.
[16] Right to Equality; Freedom from Discrimination; Right to Life, Liberty, Personal Security; Freedom from Slavery; Freedom from Torture and Degrading Treatment; Right to Recognition as a Person before the Law; Right to Equality before the Law; Right to Remedy by Competent Tribunal; Freedom from Arbitrary Arrest and Exile; Right to Fair Public Hearing; Right to be Considered Innocent until Proven Guilty; Freedom from Interference with Privacy, Family, Home and Correspondence; Right to Free Movement in and out of the Country; Right to Asylum in other Countries from Persecution; Right to a Nationality and the Freedom to Change It; Right to Marriage and Family; Right to Own Property; Freedom of Belief and Religion; Freedom of Opinion and Information; Right of Peaceful Assembly and Association
[17] Right to Social Security; Right to Desirable Work and to Join Trade Unions; Right to Rest and Leisure; Right to Adequate Living Standard; Right to Education; Right to Participate in the Cultural Life of Community

economic and social progress"[18] and promote cooperation between European countries in the fields of human rights, democracy and the rule of law. The commitment to these values is enshrined in the Statute of the Council of Europe:

> *"Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation; reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;"*[19]

In 1953, the members of the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that established a set of rights and freedoms to be protected and ensured by all signatories, such as the right to life, the prohibition of torture and slavery, etc. The ECHR also provided for the creation of the European Court of Human Rights (ECtHR) in charge of ensuring Member States' compliance with the Convention and before which anyone who feels his or her rights have been violated by a State party to the ECHR can bring a case. The ECHR was largely inspired by the UDHR, and thus ensured the enforcement of the latter in Europe. It was complemented by the European Social Charter in 1961, adding economic and social rights to the fundamental rights enshrined in the ECHR. One other major document drafted by the Council of Europe is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment adopted in 1989, which together with the ECHR is one of the most recognized conventions of the European system of human rights[20].

The ECHR thus established the primary importance of human rights and fundamental freedoms as "the foundation of justice and peace in the world" and was the first document to make those rights binding. The Convention itself includes mainly civil and political rights – such as the right to life, freedom of expression, or freedom of thought, conscience and religion

[18] Statute of the Council of Europe, Article A a) (1949)
[19] Statute of the Council of Europe, Preamble (1949)
[20] Brosig (2006).

– and provides for a system of protection of these rights and for remedies. It also enshrines the prohibition of torture and inhuman or degrading treatment or punishment, slavery and forced labor, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms secured by said Convention. The scope and the rights ensured by the Convention have evolved through time, adding new rights to be applied to new situations and conditions. Protocols have thus been added, such as Protocol No. 13 providing for the abolition of death penalty in all circumstances in 2003, or Protocol No. 12 prohibiting discrimination of the enjoyment of the rights of the Convention based "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The framework, scope and application of the ECHR shall be further discussed in the following chapter.

The European Union: from market economy to promotion of fundamental rights

Another consequence of WWII was the creation of the European Coal and Steel Community (ECSC) in 1951, designed to guarantee peace through economic cooperation.

Originally designed to ensure peace after the atrocities of two consecutive and highly destructive wars in Europe, the EU was however primarily intended as an economic union with the objective of creating a common market, from the ECSC, through the European Economic Community (EEC) and to the EU. Human rights were initially mostly entrusted to the then newly created Council of Europe and the ECtHR. While the theory of democratic peace according to which democracies do not fight each other could be applied to European integration, the guarantee of peace as designed by the founding fathers of the EU, Jean Monnet, Robert Schumann and Konrad Adenauer, was based on the idea that a shared economy, especially in the sectors of coal and steel, would create a common market and ensure growth and thus secure peace. The inclusion of human rights provisions in the initial treaties was also complicated by the fact that Member States were rather

reluctant to include political provisions and give up sovereignty to the newly established intergovernmental institution.

However, this does not mean that there was no provision whatsoever for human rights: although there was no charter of human rights until the EU Charter was proclaimed in 2000, human rights were considered essential values and were mentioned in the Treaty establishing the European Economic Community as Article 177 (2) reads:

> "*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*".

These rights were always considered "general principles of law", as asserted in Article 6 of the Treaty on European Union (TEU):

> "*The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to member states as general principles of Community law*".

In addition, although it was never used, Article 7 of the TEU establishes sanctions, including the suspension of voting rights for Member States found in "serious and persistent breach of the values mentioned in Article 2"[21]. Besides, some fundamental rights were established as *secondary legislation*, such as the Equal Treatment directives, while other specific treaty items provided basis for legislation in specific fields, such as non-discrimination, through Article 19 of the treaty on the Functioning of the European Union (TFEU).

Incorporation of fundamental rights in the context of the EU

The lack of a European Bill of Rights as such until 2000 led to fundamental rights in the EU being developed by the Court of Justice of the European Union and its case law. In 1964, the Court established the principle of supremacy of EU law over domestic law of the Member States, thus

[21] "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." (Art.2, TEU)

ensuring uniform application of EU law. In the 1970s, it established through various cases the direct effect of EU law in Member States (meaning that the application of EU law within the Member States is determined by that very EU law and not by the domestic legislation of the Member States), the supremacy of EU law and the preemption of EU law over domestic law. However, this dominance of EU law made it necessary for fundamental rights protection to be dealt with at the European level[22]. Indeed, the German and Italian Constitutional Courts rapidly pointed out that the supremacy of EU law could not be asserted as long as the protection of fundamental rights in EU law was inferior to that of domestic constitutional provisions. This led the ECJ to declare fundamental rights general principles of EU law[23] following the 1969 ruling of the *Stauder* case.

The cases brought before the Court from then on set the basis for the development, enforcement and promotion of human rights in the EU. In 1977, the principle of non-violation of the jurisprudence of the ECJ was recognized by the Council, the Commission and the European Parliament. Based on this jurisprudence and thanks to the growing role of the European Parliament after the first direct elections of 1979, a policy of protection of fundamental rights reconciling three levels of fundamental rights provisions – the international level with the UDHR; the regional level with the ECHR; and the national level with the domestic constitutional traditions – could be developed even without a formal legal basis[24]. Nevertheless, as a consequence of the lack of an official document establishing fundamental rights in the EU, human rights protection relied mostly on negative rights, that is principles requiring States to "abstain from interfering with personal freedom"[25]. Any attempts by the Commission and the Parliament to introduce positive rights –

[22] Di Federico, G. (2011). The EU Charter of Fundamental Rights. Dordrecht: Springer.
[23] Balducci G. (2008). The study of the EU promotion of human rights: the importance of international and internal factors. University of Warwick and College of Europe. Available at: http://www2.warwick.ac.uk/fac/soc/garnet/workingpapers/6108.pdf [Accessed 22 Jun. 2015]
[24] Balducci (2008)
[25] Tomuschat (2014)

concrete rights that States must ensure for their citizens – were blocked by the Council.

However, the evolution of the EU, its enlargement and its growing competences made fundamental rights increasingly relevant – especially with the development of the Area of Freedom, Security and Justice. The Copenhagen criteria set up in 1993, to which any country seeking membership must conform, includes a political criterion with provision for human rights that demands "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". But it was the Maastricht Treaty that established the respect of fundamental rights as essential values of the Union:

> *"The Union shall respect fundamental rights, as guaranteed by the [ECHR] [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law"*[26].

The 1997 Treaty of Amsterdam further strengthened this commitment to fundamental rights with Article 6 of the TEU:

> "*[...] 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".*

The ECJ also saw its competences increased through the Amsterdam Treaty.

The Charter of Fundamental Rights of the European Union: the first bill of rights of the EU

Because fundamental rights were described in a very broad way in the treaties and because there was still no "catalogue of human rights" as such, citizens did not have a clear picture of their rights[27]. In addition, while there was a *de facto* protection of fundamental rights in legal practice, there was also a political will to have a stronger codification of this protection at the EU level that would not rely solely on Council of Europe documents or EU case law[28]. The decision was then taken to draft a formal legal document that would clarify these rights. As a result, in 1999, a convention chaired by former

[26] Article F, Maastricht Treaty.
[27] Tomuschat (2014).
[28] Di Federico (2011).

German president Roman Herzog was appointed by the European Council. The outcome of this was the elaboration of the initially non-binding EU Charter, proclaimed in Nice in December 2000, which gives a comprehensive list of rights to be protected. These rights were classified under three headings: dignity, freedoms and equality. This was not meant to replace domestic provisions for the protection of human rights but was intended to apply only to EU law, allowing Member States to retain their sovereignty. The Charter was also meant as a response to the democratic deficit the EU was experiencing, with the assumption that democracy is never complete without a comprehensive system of protection of fundamental rights[29].

The rights enshrined in the EU Charter are divided into 54 articles and 6 Chapters: Human Dignity, Freedoms, Equality, Solidarity, Citizenship and Justice. It includes both first generation human rights such as freedom of thought, conscience and religion (Article 10), and second generation human rights like the right to social security and social assistance (Article 34); as well as environmental protection (Article 37)[30]. An additional Chapter clarifies the scope and interpretation of the Charter, most importantly stating that the Charter applies only "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"[31]. It also reaffirms the fact that the Charter does not give additional competences to the EU ("This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"[32]). Besides, the fact that the EU Charter is to a large extent based on the ECHR – which is established as a minimum standard for the EU Charter – avoids contradictions between the two documents.

[29] Di Federico (2011).
[30] "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development"
[31] Article 51, EU Charter.
[32] Article 51, EU Charter.

The Charter includes new rights such as economic and social rights – including a wider range of rights corresponding to the contemporary reality – which can be seen as a great step forward. But some of these second-generation human rights, such as the right to work, the right to health, etc., show impossible for the EU to enforce because it would overstep the limits of its competences. This implies that individuals would be entitled to take a case before a court to claim their right to education, for example, while education is not an EU competence[33]. It is generally admitted that these rights should not be interpreted literally but should be seen as desirable general objectives. The presence of these positive rights gave rise to concerns that the EU intended to expand its competences – even though it was clearly stated otherwise in the text – and that it would interfere with national prerogative. This led to the UK and Poland to request reservations and opt-outs from the Charter when it eventually became legally binding with the Lisbon Treaty. These reservations could undermine the effectiveness of the Charter and the establishment of these positive rights as common values of the EU.

While it does have weaknesses, the Charter serves its purpose in the sense that it guarantees rights to its citizens all the while ensuring a coherent development of a framework for this protection between the Member States level and the EU level, positioning the ECJ as the overseer of this process[34]. Additionally, it was meant to establish a more constitutional legal order in the EU at a time when the current state of affairs was considered insufficient and when there was a growing political call for a "Constitution for European citizens" as the Laeken declaration of the Convention on the Future of Europe mandated by European Council stated in 2001[35]. The EU Charter was included in the Constitutional Treaty that would give it legal binding force. After the rejection of the Constitutional treaty following the French and Dutch

[33] The Union only has Supporting competence in the field.
[34] Di Federico G. (2011).
[35] European Parliament, (2015), The Treaty of Nice and the Convention on the Future of Europe, Available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.4.html [Accessed 22 Jun. 2015].

referenda, the EU chose to amend existing treaties to give the Charter binding legal force.

Changes brought about by the Lisbon Treaty

The Lisbon treaty was the answer to the failure of the Constitutional Treaty. In terms of fundamental rights, it brought two main changes: it gave legally binding force to the EU Charter as projected by the Constitutional Treaty, and it opened the way for the EU's accession to the ECHR.

Article 6 (1) of the TEU provides for the status of primary law of the EU Charter:

> *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

Consequently, the Charter is no longer an "external source relied upon to affirm autonomous general principles of law"[36], and is now integrated into the EU legal order. The provisions of the Charter are expressly addressed to EU institutions and bodies in the context of Union law implementation[37], and cover a wide range of fundamental rights. The scope of the EU Charter is wider than the initial ECHR, before the additional European Social Charter, as it includes social and economic rights. This catalogue of human rights gives citizens a clearer understanding of their rights and of the possible remedies in case of breach by EU bodies and institutions or government authorities of the Member States. It is designed as an instrument for the development of an EU legal order in the field of fundamental rights.

The introduction of a new legally binding human rights document implies that it has to function with the previously existing instruments; in this case, the EU Charter has to coexist with the ECHR. Both the EU Charter and the ECHR provide for this coexistence: Article 52 (3) of the Charter establishes the equivalence of the scope and meaning of the rights in the ECHR and the Charter. The Convention then serves as a minimum standard

[36] Di Federico G. (2011).
[37] Article 51 (1) EU Charter.

setting, which, as mentioned in Article 52 (3), shall not prevent the EU from applying more stringent legislation. However this does not mean that the risk of conflicting decisions between the ECJ and the ECtHR are impossible. The ECJ may indeed decide to prioritize one right over another for the purpose of EU legislation and thus be found in breach of the Convention. Limitations to certain rights are however constrained by the principle of legality, necessity and proportionality and can only be made if they "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"[38]. Besides, the accession to the ECHR contributes to the harmonization of the provisions of both frameworks. Nevertheless, this harmonization could be hampered by the opt-outs of Poland and the UK aiming at limiting the risk of the ECJ overturning domestic courts' decisions. Many different interpretations of the impact of this protocol have been put forward: Jan Jirásek argued that it amounts to the Charter not being binding in Poland and the UK[39], while Paul Craig and Grainne de Burcá maintain that it is "unlikely that it will have any significant effect in practice". Indeed Article 1 of the Protocol reads:

> *"The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".*

The primacy of the ECJ had already been established before that, hence the interpretation of the provision as being empty[40].

One other challenge posed by the bindingness of the Charter lies in the balance between the rights provided to individuals by the Charter and the freedoms provided for by the EU Treaties, mostly in terms of balance between fundamental freedoms and fundamental rights. In *Commission v. Germany*,

[38] Article 52 (1) EU charter.
[39] Jirásek, J. (2008). Application of the Charter of Fundamental Rights of the EU in the United Kingdom and Poland according to the Lisbon Treaty. Faculty of Law, Masaryk University. Available at: https://www.law.muni.cz/sborniky/cofola2008/files/pdf/evropa/jirasek_jan.pdf [Accessed 22 Jun. 2015].
[40] Craig, P. and de Búrca, G. (2011). EU Law: Text, Cases, and Materials. 5th ed. OUP Oxford.

Advocate General Trstenjak issued an Opinion on the matter advocating for a "symmetrical" reconciliation and concluded this process is a two-way street: while the protection of fundamental freedoms may indeed require a restriction of fundamental rights, it is also clearly the case that to ensure fundamental rights, fundamental freedoms may need to be restricted[41].

The second major development introduced by the Lisbon Treaty in terms of fundamental rights is the provision for the accession of the EU to the ECHR. The accession would rectify the incoherence of the EU not being party to the Convention while all its Member States are. It will provide for the possibility for EU citizens to bring cases before the ECtHR in case of a breach of their rights by EU institutions or bodies. Indeed as long as the EU is not party to the ECHR, individuals cannot bring cases against the EU itself before the ECtHR when laws and practices of the EU are in breach of fundamental rights. Their only option is to bring cases against States for implementing EU decisions. The EU would thus be placed under the external control of the ECtHR whose decisions and judgments would thereby be binding.

The accession aims at creating a more coherent framework for the protection of fundamental rights across the European continent. Accession has long been envisaged, and has been reviewed before. Indeed, in 1996, the Council charged the ECJ to examine the possibility of an accession. In its Opinion 2/94, the Court ruled that the EU did not have the competence to join the ECHR and that it would be incompatible with the treaties.

This however did not put an end to the accession aspirations. Treaty amendments were indeed made, as Article 6 TEU was modified to include provision for accession. Additionally, as the Opinion warned against the potential changes accession would bring to the EU legal order, mainly in terms of increased competences for the EU. Article 6 TEU also provided for control of these modifications: "Such accession shall not affect the Union's competences as defined in the Treaties." Furthermore, Protocol 8 of the TEU and TFEU provided that accession shall "preserve the specific characteristics

[41] Schlachter, M. (2011). Reconciliation between fundamental social rights and economic freedoms..

of the Union and Union law", "not affect the competences of the Union or the powers of its institutions," not "affect the situation of Member States in relation to the European Convention," and not "affect Article 344 of the Treaty on the Functioning of the European Union" (the latter providing that disputes concerning Treaties shall be resolved by the mechanisms set-out in the treaties). This however proved insufficient for the ECJ to validate accession when it was asked for its opinion in 2013. Indeed on 18 December 2014, the ECJ issued its Opinion 2/13 and held that "the Accession Agreement is not compatible with the EU treaties because it undermines the autonomy of EU law"[42]. We shall go into more details about the reasons and consequences of this Opinion in the next chapter.

Protection and promotion of fundamental rights have gained momentum in recent years, and the EU's commitment to human rights is nowadays well established, at least in principle. Many improvements have been made in the fields of protection and promotion of human rights, from their inclusion in treaties to the creation of a proper bill of rights spelling out a comprehensive list of rights. In 2007, the European Union Agency for Fundamental Rights (FRA) was created to take up the tasks of the former European Monitoring Centre on Racism and Xenophobia (EUMC) with a broader mandate. It is in charge of "collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the [EU] Charter"[43], and of providing expert council to EU bodies, Member States, EU candidate countries and potential candidate countries, and of "raising awareness about fundamental rights"[44]. It does not have a mandate to intervene in specific cases but investigates "broad issues and trends".

[42] Łazowski A. and Wessel R.A., (2015), The European Court of Justice blocks the EU's accession to the ECHR, . Available at: http://www.ceps.eu/system/files/CEPS%20Commentary%20Lazowski%20and%20Wessel%20on%20ECHR.%20docx.pdf [Accessed 22 Jun. 2015]
[43] Council Regulation establishing a European Union Agency for Fundamental Rights.
[44] Ec.europa.eu, 2007.

Another step forward was the appointment of the first Commissioner responsible for fundamental rights. Indeed, in 2010 Viviane Reding was named European Commissioner for Justice, Fundamental Rights and Citizenship. Frans Timmermans, Vice President and European Commissioner for Better Regulation, Inter-Institutional Relations, Rule of Law and Charter of Fundamental Rights, has now taken over this position in the Junker Commission.

The EU has enhanced its capacity to harmonize and integrate fundamental rights policies, and has increased its cooperation with the Council of Europe. However the intricateness of the system and available options for European citizens to have their rights asserted can pose many challenges, as seen with the complexities brought about by the EU's accession to the ECHR. The next chapter will examine the issues posed by a system that may appear rather fragmented and will show that a coherent system is key to a successful regional human rights regime.

II. The EU's institutional framework for the protection of fundamental rights

A. Fundamental rights in the EU: what remedies in case of breaches?

As we have seen, the framework for fundamental rights in the EU is intricate. This leads to citizens not being quite aware of the procedure to follow in case of breach of their rights. Protection of fundamental rights in the EU is characterized by a multi-layer system of protection. Currently, citizens can turn to various institutions to have their rights upheld: they can first bring their case before their national courts; if this fails, they can call upon the ECtHR, which is not an EU institution; or finally, if their case falls under EU competency, they can invoke EU law in the treatment of their case either before national courts or the ECJ, or even both (See Appendix 1 for illustration). This multiplicity of options can be seen either as a guarantee of alternatives in case one court fails to protect human rights, but can also be seen as very complex and difficult to understand for many EU citizens.

National instruments

Fundamental rights protection is first and foremost the responsibility of the Member States. All States must respect, protect and fulfill fundamental rights as enshrined in the treaties, the EU Charter and the ECHR. This means they must "not interfere with or restrict human rights", ensure the existence of laws and mechanisms preventing violations by State and non-State actors, and "take positive action to ensure the enjoyment of human rights".

National judges, with the guidance of the ECJ, are in charge of ensuring the Charter is respected in the implementation of EU law. In cases not falling under the scope of the EU, each national judicial system has a responsibility to enforce fundamental rights according to their national constitutions and according to the ECHR, as each of them is party to it. Citizens must then take their case to the relevant national authorities, which can be either the government, the national courts or specialized human rights bodies.

Additionally, national courts are competent for cases brought against individuals, as opposed to national or EU entities. If all domestic remedies are exhausted, citizens can appear before the ECtHR in Strasbourg in case of fundamental rights breaches by the Member States.

European Union instruments

When implementing EU law, Member States are placed under the supervision of the EU, which shall ensure the EU Charter is well respected. All EU institutions must respect EU Charter provisions throughout any legislative process. Pursuant to Article 227 TFEU, citizens are entitled to submit a petition to the European Parliament about cases in the scope of EU law. Petitions can be filed to request "the European Parliament to take a position on a matter of public interest, like human rights"[45]. If the claim is deemed admissible after examination, the European Parliament can open an infringement procedure or take political action to remedy the situation. Fundamental rights are the main motive for petitions to the Parliament.
Individuals can also file a complaint with the European Commission, which then has the authority to launch an infringement procedure against the Member State accused of not having complied with EU law. If citizens consider their claim hasn't been dealt with properly by the Commission, they may turn to the European Ombudsman in cases related to "poor or bad administration by a body of the EU"[46].

The ECJ, based in Luxemburg, is not a fundamental rights court per se. It ensures EU law, treaties and the EU Charter are adequately interpreted and applied in the Union, both by EU bodies and institutions and by Member States. It does not interpret national law as such, but only national law that derives from EU law. But it does have jurisdiction over fundamental rights issues arising from EU law. Citizens whose rights have been violated by EU

[45] Ec.europa.eu, (2015). Petition to the European Parliament - Justice. Available at: http://ec.europa.eu/justice/citizen/complaints/petition/index_en.htm. [Accessed 22 Jun. 2015].
[46] Fra.europa.eu, (2015). Where to turn for help | European Union Agency for Fundamental Rights. Available at: http://fra.europa.eu/en/about-fundamental-rights/where-to-turn [Accessed 23 Jun. 2015].

institutions or Member States in the process of implementing EU law can take their case before the ECJ.

Apart from when they are implementing EU law, Member States are not placed under the supervision of the EU. This is explained once again by the reluctance of States to give up sovereignty, and by the lack of democratic legitimacy of EU institutions. There is however still a monitoring system in place for the protection of fundamental rights in Member States. Indeed, Article 7 (2) TEU provides that:

> *"the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations".*

The consequences of the establishment of such breaches are also provided for in Article 7 (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 the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".*

While, to date, this procedure has never been resorted to, it was considered in 2000 after, Joerg Haider's far-right Freedom Party (FPÖ) scored second in Austria's elections. There were concerns that a coalition between the center-right party Austrian People's Party (ÖVP) and the FPÖ was a symptom of increasing intolerance towards "non-whites and foreigners in Austria"[47]. The EU presidency (at the time Portugal) informed the Austrian government that Austria would be subject to sanctions should the FPÖ be included in the ruling coalition. No concrete human rights violations had been committed at that time and a fierce debate broke out on the lawfulness of the strategy. Sanctions were applied by the – at the time – EU 14 who declared that they would not "promote or accept any bilateral official contracts at a political level with an

[47] Berit Freeman, H. (2002). Austria: The 1999 Parliament Elections and the European Union Members' Sanctions. Boston College International And Comparative Law Review, 25(1). Available at: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1162&context=iclr [Accessed 22 Jun. 2015].

Austrian Government integrating the FPÖ", would not provide any "support in favor of Austrian candidates seeking positions in international organizations", and that "Austrian Ambassadors in EU capitals would only be received at the technical level"[48]. Those sanctions were lifted after a few months and did not have a substantial impact. They did however reaffirm the EU's commitment to fundamental rights values and was meant as a moral message. More recently, it has been debated whether Hungary complies with basic requirements of EU law, following the implementation of various reforms jeopardizing the rule of law in the country. We shall go into more detail of this case in the final chapter.

The European Council and the Commission publish, since 1999, an Annual Report on Human Rights with an overview of all relevant EU policies. The creation of the European Union Agency for Fundamental Rights also contributed to a better monitoring and awareness raising system.

The European Court of Human Rights

When individuals have exhausted all available domestic remedies for cases falling outside the scope of the EU and relating to breaches under the ECHR, they may bring their cases before the ECtHR. Cases can be brought by individuals, non-governmental organizations, or groups of individuals. The jurisdiction of the Court is generally divided into three categories: inter-State cases, cases brought by individuals against States, and advisory opinion cases. The majority of cases brought are those by individuals against States.

Any individual can bring a case against a State party to the ECHR if that State is in breach of their rights under the Convention. A judge rapporteur has to determine if a case is admissible or not. A case may be inadmissible if it does not fulfill the criteria of *ratione materiae* (if the field of the complaint is not relevant to the Court), *ratione temporis* (if the timeframe is mismatched) or *ratione personae* (if the person bringing the case or the person against whom the case is brought does not fall under the jurisdiction of the Court). It

[48] Berit Freeman (2002).

can also be that the case is not admitted because all domestic remedies have not been exhausted or for other motives such as the case already being examined by the Court or another international entity. If the case is admissible, a Chamber of seven judges will require the prosecuted State to present its arguments for the case. It is the Chamber that will decide by a majority on the case. If it is ruled that the contracting State has violated fundamental rights, the national legislation has to be modified to comply with the ruling. Additionally, the Court may sentence them to pay material or moral damages to the claimant and to cover the expenses incurred by the case. In cases of individuals against individuals, the State has to take measures to rectify the violations. Judgments are binding and the Committee of Ministers of the Council of Europe is in charge of ensuring that they are respected. In general, States tend to respect these rulings.

Inter-State cases are very rare but a State of the Council of Europe is entitled to bring a case against another State that the Court will then review.

Advisory opinions on the interpretation of the ECHR are requested from the Committee of Ministers and are non-binding.

B. The EU's further commitment to fundamental rights

The accession of the EU to the ECHR

It is now clear that the EU relies on two different legal orders. On the one hand, the ECtHR is responsible for ensuring that high contracting parties to the ECHR grant everyone under their jurisdiction the rights enshrined in the Convention and for developing adequate sanctions in case of breach. On the other hand, the EU legal order and the ECJ "shall ensure that the interpretation and application of the Treaties the law is observed"[49]. Created around the same time to broaden and develop cooperation among European States, the two systems initially had very different objectives and have

[49] Article 19 (1) TEU.

therefore been referred to as "twins separated at birth"[50]. With an initial ECSC based on economic integration, the division of competence between the two systems seemed self-evident. However with the growing importance given to fundamental rights in the EU, the line between the two jurisdictions became increasingly blurred. The two courts do not function in complete isolation from one another and the growing focus on fundamental rights in the EU led them to cooperate. The ECJ made increasing use of the ECHR to establish its own system of protection of fundamental rights, basing its decisions on previous decisions of the ECtHR. However, this also led to the two courts having different interpretations of the same text, which led to contradictory jurisprudence, hence a need for more cooperation. Additionally, with a growing number of competences transferred to the EU and the latter not being party to the ECHR, it became increasingly complicated to prosecute violations of the Convention resulting from the application of EU law. The States then became subject to claims, and were caught between their obligations to implement EU law as Member States and their responsibility to respect the ECHR. Accession to the ECHR would contribute to closing the gap in the interpretation and would make the EU and its institutions subject to the supervision of the ECtHR. Furthermore, it seems rather controversial that ratification of the ECHR should be requested from any State candidate for accession to the EU, while the latter is itself not party to it.

Thus accession to the ECHR would allow for a more coherent system of human rights protection across Europe, consequently enhancing their fulfillment. Besides, it would prevent diverging human rights standards between the ECJ and the ECtHR. The EU would be held accountable for breaches of the ECHR caused by its own legislation and would be under the external supervision of the ECtHR for human rights matters. Citizens would have the possibility to file complaints against the EU and its institutions before the Strasbourg Court.

[50] Gerard Quinn, (2001), The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth, McGill Law Journal, Available at: http://lawjournal.mcgill.ca/userfiles/other/1034544-46.4.Quinn.pdf [Accessed 22 Jun. 2015].

However, accession will also have other consequences for the EU and its legal order. One of the main concerns brought up is the risk of loss of autonomy of the EU's legal system[51]. Accession would mean that the Luxemburg Court would be under the scrutiny of the Strasbourg Court. The ECJ is rather reluctant to give up competences they have acquired from the sovereign States. As a consequence of these concerns, provisions were incorporated into the Lisbon Treaty where accession was enshrined, in order to preserve the specificities of EU law[52]. This has not sufficiently reassured skeptics who fear that the Strasbourg Court may infringe upon the Luxemburg Court's jurisdiction.

Accession must therefore be designed to serve both the purpose of protecting human rights and ensuring the autonomy of the EU's legal order and the preservation of its specificities. At the same time, the purpose of accession is not to adapt the Convention system to the EU's legal order; otherwise it would amount to the Convention's accession to the EU order. Accession is further complicated as it is the first time that "the accession of on international organization (the EU) to another international treaty regime (the Convention) and its judicial enforcement machinery (the Strasbourg Court)"[53] has been envisaged. In his book, *The accession of the European Union to the European Convention on Human Rights*, Paul Gragl describes the question of which court shall hold the final decision on matters of human rights when EU law is concerned as "a tale of two courts struggling for the upper hand in interpreting and applying Union law". This is a good illustration of the competition taking place between the two courts and rendering accession a very complex matter.

[51] Halberstam, D., (2015), "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, The German Law Journal, Available at: https://www.germanlawjournal.com/index.php?pageID=11&artID=1669, [Accessed 22 Jun. 2015].

[52] Namely Protocol No 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

[53] Gragl, P., (2013), The accession of the European Union to the European Convention on Human Rights. HART Publishing.

In order to understand the concerns related to the autonomy of the EU legal order, it is important to define the term "legal autonomy". Gragl, in the words of Anne Peters[54], defines it as "self-legislation or the legal authority to govern domestic affairs without external interference"[55]. This relates directly to the independence of the ECJ from the legal systems of the Member States and the supremacy of EU law over national law. The autonomy of the EU's legal order over the legal order of Member States was enshrined in 1964 in *Costa v. ENEL* where the Court ruled that Treaties have "created their own legal system". This was contested by the Solange doctrine that arose from the 1974 ruling giving German constitutional rights prevalence over EU law in case of conflict between Union law and fundamental rights guaranteed under the German Constitution. This is partly what led to fundamental rights being proclaimed basic principles of Union law.

Article 19 (1) TEU, asserts the legal autonomy of the ECJ by establishing the ECJ's competence to interpret and apply treaties[56]. Another reference is Article 344 TFEU, which establishes the ECJ as the exclusive authority entitled to settle disputes related to treaty interpretation or application[57]. This is also an attempt to ensure uniform interpretation and application of Union law.

Some, like Olivier De Schutter[58], have argued that the EU's accession to the ECHR would not jeopardize the autonomy of Union law. The ECJ would remain the one entity competent to rule on cases related to EU law. In the "Final report of Working Group II", the European Convention addressing the "Incorporation of the Charter/ accession to the ECHR" stated that:

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[54] Peters, A., (2001), Elemente einer Theorie der Verfassung Europas, Berlin, Duncker and Humbolt.

[55] Gragl, 2013.

[56] Article 19 (1) TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."

[57] Article 344 TFEU: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

[58] De Schutter O., (2010), L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : feuille de route de la négociation, Faculté de Droit de l'Université Catholique de Louvain. Available at: http://www.europarl.europa.eu/document/activities/cont/201004/20100427ATT73610/20100427ATT73610FR.pdf [Accessed 22 Jun. 2015].

> *"the European Court on Human Rights could not be regarded as a superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the ECHR. The position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court at present".*

Indeed, the ECJ is considered the Supreme Court of the EU and the ECtHR is not entitled to overrule National Supreme Courts' judgments and can only give declaratory rulings. However the hybrid nature of the EU causes debate as to the definition of the EU's legal authority, as the EU is neither an international organization, nor a federal polity, but rather a supranational one.

After the ECJ ruled that accession was incompatible with EU law in December 2014, questions around the motives behind that decision have arisen. The Court put forward five main reasons for the incompatibility of the accession under the terms of the Draft Accession Agreement[59]. First, the ECJ claimed that it did not take into account the specificity of the characteristics of EU law. The second motive for the refusal of the propose Accession Draft lies in the fact that the ECJ considers that allowing the ECtHR to settle disputes between Member States violates Article 344 TFEU. Thirdly, the co-respondent system established by the Agreement is deemed incompatible with EU law in that it gives the ECtHR the possibility to interpret and rule on EU matters and distribute the responsibility of ECHR breaches between the EU and the Member States, which according to EU law is exclusively the ECJ's competence. Fourth, the Draft Accession Agreement did not respect the prior involvement of the ECJ before the ECtHR is entitled to rule on matters related to EU law, thus not allowing the ECJ to rule on the interpretation of EU law. Finally, the ECJ considers the Draft Agreement incompatible in terms of the rules governing Common Foreign and Security Policy (CFSP) in that non-EU courts should not be entitled to review EU acts. This poses the question of remedies for individuals who are victim of breaches of fundamental rights in

[59] Peers, S., (2015), The EU's Accession to the ECHR: The Dream Becomes a Nightmare, The German Law Journal. Available at: https://www.germanlawjournal.com/pdfs/Vol16-No1/PDF_Vol_16_No_01_Special_213-222_Peers.pdf [Accessed 22 Jun. 2015].

the context of CFSP, as the ECJ itself does not have any competence in that field. Seeing that it has no authority anyway, refusing any other court to have jurisdiction is equivalent to denying victims from remedy.

Following the refusal of the terms of the Draft Accession Agreement, the ECJ proposed a series of amendments that would, in their view, make accession possible. However, these amendments are designed to accommodate EU law, rather than to protect human rights. The question can be asked whether this reflects a refusal of the EU to be ruled by fundamental rights provisions. In a highly controversial statement, the president of the ECJ, Vassilios Skouris, affirmed the ECJ's status as a Supreme Court rather than a human rights court in May 2014: "The Court of Justice is not a human rights court; it is the Supreme Court of the European Union". This can be seen as another symptom of the Court not prioritizing fundamental rights. In addition, some influential Member States, such as the UK, seem to welcome the refusal of accession. The UK has long attempted to limit the jurisdiction of the ECtHR. Such positions of strong Member States could have influenced the decision of the Court to invalidate the Accession Draft.

Thus, while it is undeniable that there has been a growing concern for fundamental rights in the EU, this ruling seems to evidence the priority given to safeguarding sovereignty of the ECJ over fundamental rights. The failure of the ECJ to accept the jurisdiction of the ECtHR not only hampers the implementation of a coherent system of protection of fundamental rights, but also prevents consistent action against deterioration of fundamental rights protection in some Member States. Fundamental rights thus remain a highly sensitive topic in the Union, which can be explained not only by unwillingness from the EU institutions, but also by concerns emanating from Member States' in terms of their constitutional identity.

The relation between the ECJ and the European Court of Human Rights

The two Courts pursue different objectives: the ECJ is responsible for ensuring the legality of Union law, and thus seeks to maintain the autonomy

of the European legal order; while the ECtHR is the guardian of human rights in ECHR party States and seeks to maintain its position in that respect. At first, the ECtHR did not receive cases brought by individuals dissatisfied with the ruling of the ECJ and claiming the ruling did not abide by ECHR standards[60]. The ECtHR initially denied those appeals, considering they were *rationae personae* inadmissible[61]. Faced with growing pressure to hold the EU accountable under human rights standards, the ECtHR started to change its position. This change of position resulted in the development of the equivalent protection doctrine, after the 1986 Solange II case when the German Federal Constitutional Court held that as long as fundamental rights standards of the ECJ were "substantially similar" to those of German Constitutional law, a case brought against the EU on grounds of conformity with German human rights standards was inadmissible by the German Constitutional Court. In doing so, the German Court retained its jurisdiction to rule over human rights standards while avoiding conflict with the ECJ. In 1990, the ECtHR referred to this judgment to apply this principle to the relation between the ECJ and the ECtHR and ruled that:

> *"The transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection. […] The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance."*[62]

This decision enabled a better dialogue between the two courts and established the presumption that fundamental rights are equally protected in the EU as under the ECHR. However, EU law is not completely exempt from the supervision of the ECtHR, as shown by the *Bosphorus* case. Indeed, in 1993, two aircrafts rented by Bosphorus Airways to Yugoslav Airlines, were

[60] See for instance *Confédération Française Démocratique du Travail v. the European Communities,* ECtHR, 2015, Case-law concerning the European Union. Available at: http://echr.coe.int/Documents/FS_European_Union_ENG.pdf. [Accessed 22 Jun. 2015].
[61] De Hert P. and Fisnik K., (2012), The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights, The German Law Journal, Available at: https://www.germanlawjournal.com/pdfs/Vol13-No7/PDF_Vol_13_No_07_874-895_Developments_DeHertKorenica.pdf. [Accessed 22 Jun. 2015].
[62] M. & Co. v. Federal Republic of Germany, European Commission of Human Rights, Decision on Admissibility, No. 13258/87, Dec. 9 February 1990.

seized in application of a community regulation implementing a sanction regime decided by the UN against former Yugoslavia. The case was referred to the ECtHR after first being tried by the Irish High Court and the ECJ that ruled that the detention of the aircraft was lawful. The ECtHR in turn also ruled that the Irish action was lawful under the ECHR, noting that Ireland had no room for maneuver as it was implementing an EU regulation. It is not the outcome of this ruling that matters here, but rather the precedent it set for the ECtHR to be able to review the legality of an EU Member State's action when transposing EU law.

Even if the EU is still not party to the ECHR, the two courts have been increasingly cooperating in recent years. They hold bilateral meetings since 1998 and the ECJ growingly refers to ECtHR jurisprudence in its rulings and vice versa[63]. The recourse to ECtHR jurisprudence has served as a legitimization mechanism for the ECJ and the ECHR is increasingly utilized by the ECJ. Thus even if there is a lack of comprehensive coordination, the two courts are able to interact, even thought the EU maintains its will to remain autonomous.

C. Is the framework sufficient?

Over the course of its existence, the EU and its Member States have developed a solid framework of human rights protection. The coming into force of the Lisbon Treaty reinforced this framework, giving the EU Charter a solid position in positive law. Fundamental rights are now established as "general principles" of EU law and the common values on which the EU is founded are designed to ensure a certain level of coherence all the while preserving the national identities of the Member States. Some scholars see the system as sufficient and efficient. Indeed, when asked about this topic in June 2015, Christian Tomuschat expressed his confidence in the current system, considering that it needs "no general overhaul". For him, "the time when it was necessary to search for common principles in the jurisprudence of the

[63] Di Federico, G. (2011)

ECJ is long over". In his opinion, a challenge could be the "lack of knowledge on the part of national judges" who need to be aware of their obligation under both national constitutions and the EU Charter when implementing EU law.

However, there has been some criticism towards the current system of protection of fundamental rights in the EU. Similarly to the ECHR, the EU itself is not party to most UN treaties (with the exception of the Convention on the Rights of Persons with Disabilities), while all the Member States are. It has been argued that this creates a risk of a two-tier system, as some of the Member States' obligations under UN treaties are more extensive than under EU law. The right to food for instance is not included in the EU Charter but is well developed under the UN. Thus, where Member States retain competence they will operate in line with UN (or ECHR) obligations. However, in areas of shared competence or exclusive competence of the EU, the latter's regulations apply. While the ECJ has been taking increasingly into account the jurisprudence of the ECHR, it has been more reluctant to draw on UN treaties for its rulings. Yet, the ECtHR frequently bases its rulings on UN treaties, especially because the Convention was drafted in 1953 and additional rights have emerged since. Thus, the ECJ should be able to rely more on UN treaties. In addition, the EU strongly encourages Member States to ratify UN treaties and conventions. Therefore, it would only be logical for EU standards to match UN standards. Furthermore, this uniformity would allow the EU to strengthen its role and credibility as an international actor in the field of fundamental rights.

Another issue identified is the lack of positive duties outlined by the EU. Indeed, while EU Member States have the obligation to "respect, protect and fulfill" human rights under international law, the EU itself focuses more on the "respect" part, which can be described as a "negative duty"[64]: it requires States and the EU not to act in any way that would be contrary to fundamental rights standards. There is no doubt that the EU is committed to ensuring its

[64] OHCHR, Regional Office for Europe, (2011). The European Union and International Human Rights Law. Available at: http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf [Accessed 22 Jun. 2015].

legislation respects principles of fundamental rights. However, enforcement is often seen as a matter of concern. The ability of the framework to actually prevent human rights breaches in Member States remains limited, especially when the breaches occur beyond EU competences. Article 7 of the TEU is meant as a remedy, however its application is constrained not only by judicial matters, but more importantly, by political considerations and interests. Its use has great political implications and consequences, and Member States and EU institutions are reluctant to resort to it. The political nature of Article 7 makes its use very complicated, especially because its activation requires unanimity of the Council to determine the existence of a "serious and persistent breach" and a majority of four fifths of the members of the Council as well as the approval of the European Parliament to declare that there is a clear risk of a serious breach. Thus, the EU institutions and Member States are often left helpless when faced with countries implementing legislation hostile to fundamental rights and freedoms. An illustration of this was Jean-Claude Juncker's greeting of Viktor Orbán at the EU summit in Riga ("Hello dictator"). While EU officials are aware of the wrongdoings of the country, there seems to be no other option than "naming and shaming".

In addition, as previously mentioned, recourse to the ECJ can only be brought by individuals who suffered violations of their rights or by the Commission. All national remedies have to first be exhausted, which implies that the trial of a case can take quite a long time.

Furthermore, the EU relies on the principle of mutual recognition, which forces national authorities to respect the decision of other Member States, even if they fail to observe some fundamental rights standards. For instance, an arrest warrant issued in one Member State should be respected by its partners[65]. The principle of mutual trust also applies, meaning that Member States operate under the assumption that their European partners ensure fundamental rights protection in their actions. An example of this is the asylum policy under the Dublin Regulations: a State may send migrants back

[65] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA, Article 1(1), OJ L 190, 18.7.2002, p. 4.

to the country of first entry in the EU. In doing so, they assume that human rights provisions will be respected in the country of first entry. It has been shown that this is not always the case. Indeed, Belgium and Greece were both found in breach of the ECHR because of the detention conditions in the reception centers in Greece and because the asylum applicant faced expulsion back to Afghanistan without proper examination of his case[66].

It is undeniable that the Copenhagen criteria play a major role in developing and strengthening respect for human rights in candidate countries for EU membership, as they must have "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". However, once accession is achieved, it becomes more complicated to ensure this compliance, as seen in the case of Hungary for instance.

Thus, there is still room for improvement in the EU's fundamental rights policy. As previously mentioned coherence plays a major role in ensuring enforcement, credibility and legitimacy. Major legal steps have been taken in this direction. What could now allow for improvement is political will, both from the part of Member States, and from the part of EU institutions. Indeed, violations still do occur and sometimes, a resolution of the situation seems to incur considerable difficulties.

[66] ECtHR [GC], M.S.S. v Belgium and Greece, Application No. 30696/09, 21 January 2011.

III. The reality of human rights in the EU

A. General overview

The last European elections have resulted in a large success of populist and Eurosceptic parties, which is not only a symptom of the growing constraining dissensus in the EU, but also a source of worry for fundamental rights. It underlines the need for a comprehensive and coherent strategy around fundamental rights in the Union. This improvement of human rights mechanisms in the EU has long been advocated for, especially by former Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding[67]. In March 2014, the European Commission adopted a rule of law mechanism to be "activated in situations where there is a systemic breakdown which adversely affects the integrity, stability and proper functioning of the institutions and mechanisms established at national level to secure the rule of law"[68]. This mechanism enables the Commission to first assess, based on relevant information, whether there are indeed systemic threats to the rule of law in a Member States. In a second phase, if the threats are confirmed and the situation has not been solved, it may issue a "rule of law recommendation" to the Member State in question to call for the resolution of the situation. In a third stage of monitoring, the Commission will ensure the recommendation is applied and may resort to Article 7 TEU if results are unsatisfactory (See Appendix 1). On the international level, the European Commission and the High Representative of the European Union for Foreign Affairs Security Policy, Federica Mogherini, agreed on an EU Action Plan on Human Rights and Democracy for the period 2015-2019. This plan is designed for the EU to promote and respect "human rights in all areas

[67] European Commission, (2010). Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention of Human Rights. Available at: http://europa.eu/rapid/press-release_SPEECH-10-33_en.htm [Accessed 21 Jun. 2015].
[68] European Commission, (2014). European Commission presents a framework to safeguard the rule of law in the European Union. Available at: http://europa.eu/rapid/press-release_IP-14-237_en.htm [Accessed 22 Jun. 2015].

of external relations without exception"[69]. While the EU remains a powerful actor in the promotion and protection of fundamental rights, both within its borders and beyond, breaches still occur within the Union and the situation is far from perfect.

Migration and Asylum policy

With the recent major humanitarian migrant situation causing thousands to die at sea, the EU had to review its migration policy. Indeed, since the beginning of this year, 51,000 migrants [70] arrived in the EU, and 1,800 died [71] in the process of crossing the sea. Under these circumstances, the EU committed to take in 20,000 migrants [72] over this year and the next, and to increase the budget allocated to refugee resettlement schemes. It also aims at creating a better share of responsibility between countries in order to reduce the burden on some countries such as Italy or Greece. However, by virtue of treaties, some Member States – the United Kingdom, Ireland and Denmark – still do not take part in this repartition, showing a lack of coherence. Additionally, the measures proposed by the Union have come under heavy criticism for not being sufficient. A Commission plan put forward by its president Jean-Claude Juncker proposes to divide among EU Member States 40,000 of the migrants currently in Italy and Greece [73]. This proposal faced major reluctance, especially from France and Germany, prompting Juncker to denounce the "hypocrisy" of certain Member States. All previous plans have been focused on border control, with Frontex as a major actor, rather than on facilitating legal migration and improving access to asylum procedures.

[69] European Commission, (2015). EU proposes new Joint Action Plan on Human Rights and Democracy. Available at: http://europa.eu/rapid/press-release_IP-15-4893_en.htm [Accessed 22 Jun. 2015].
[70] Human Rights Watch, (2015). Word Report 2015 - Events of 2014. Available at: http://www.hrw.org/world-report/2015 [Accessed 21 Jun. 2015].
[71] Human Rights Watch, (2015).
[72] Human Rights Watch, (2015).
[73] Human Rights Watch, (2015).

Cases of summary returns by Member States such as Bulgaria, Greece and Spain continue to be reported, as well as excessive use of force[74]. In addition, in many instances, the individual circumstances – including family situations – of migrants are often not taken into consideration adequately in the context of returns to the first country of entry in the EU, under the Dublin Regulations and bilateral readmission agreements. Furthermore, conditions in reception centers have also been strongly criticized, especially in Italy, Bulgaria, Greece and Cyprus. Access to basic services such as healthcare has been reported as not available for undocumented migrants in Spain, Belgium, Bulgaria and France[75].

Moreover, Malta has reportedly been detaining migrants for extensive periods in spite of its commitment to end this practice. Croatia's asylum and migration system is still not satisfactory as asylum seekers are still subject to detention. In France, in May and July 2014, migrants and asylum seekers have been massively evicted from camps in Calais without being provided any alternative accommodation, prompting only little reaction from the EU. A positive development is the bill proposed by the French government aiming at increasing accommodation facilities and at simplifying asylum procedures. It has yet to be implemented and is being discussed in the Parliament. [76]

In Greece, increased border control along the Turkish border and claims that Greek border guards are responsible for collective expulsions and pushbacks of migrants have raised concerns among human rights defenders. In addition, Greece has been condemned by the ECtHR for acts of inhuman and degrading treatment on migrants in detention in eight cases since 2013. There has however been progress in the asylum system in Greece. [77]

In Italy, some positive steps have been taken, despite the still poor conditions of resettlement centers. The maximum immigration detention has

[74] Amnesty International, (2015). Amnesty International Report 2014/15 The State of the World's Human Rights. Available at: http://www.amnestyusa.org/research/reports/state-of-the-world-20142015-0 [Accessed 21 Jun. 2015].
[75] Human Rights Watch, (2015).
[76] Amnesty International, (2015).
[77] Human Rights Watch, (2015).

been reduced from 13 to 3 months and undocumented entry on the territory has been decriminalized, even though it is still an administrative offense. The ECtHR has however ruled that Italy's practice of summary returns to Greece, without previous check for protection needs and with a risk of degrading and inhumane treatment, was unlawful.

Spain has been responsible for multiple pushbacks in the enclaves of Ceuta and Melilla. The Spanish Guardia Civil is under investigation for having fired rubber bullets and tear gas at migrants attempting to cross the border, which resulted in the death of 15 people in February 2014.

Finally, after long debates, the United Kingdom's High Court held that asylum applicants were denied the right to legal representation to prepare their case in the context of the "detained fast track procedure", thus putting them at risk of being sent to countries where they would face persecution, torture and other ill treatments[78].

Discrimination and violence

The EU has long since committed to principles of non-discrimination, enshrining it in various treaties. The TEU and the Lisbon Treaty establish it as a prevailing principle of society[79]. Those treaties also commit the Union to "combat social exclusion and discrimination, and [...] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child"[80]. This commitment has been mirrored by the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) of 2000, which were major steps forward in ensuring equality and non-discrimination. These, however, do not prevent all forms of discrimination and EU countries still have room for improvement.

Roma communities are under major pressure and are subject to discrimination, social exclusion and deprivation in a wide range of EU

[78] Human Rights Watch, (2015).
[79] Respectively in Article 2 and Article 1 (a) of the Lisbon Treaty.
[80] Article 4 TEU.

Member States. According to the FRA, Roma women are disproportionately affected[81]. Roma children have been segregated in education for years in Czech Republic and Slovakia. In that context, the European Commission initiated an infringement procedure against Czech Republic in September 2014 for breach of the Race Equality Directive[82]. The Commission is now assessing the progress in tackling the issue as the Czech government has set forward a proposal.

Roma communities remain under the threat of eviction in many countries, including France, and face obstacles in access to healthcare, social assistance and education, in Croatia for instance[83]. Indeed in France, the bill on immigration under discussion gives rise to many concerns. It involves banning citizens from other EU countries from travelling in France up to three year if they are considered a threat to "fundamental interest of society" or "abuse of law"[84]. It seems to be targeted at Roma populations.

Racial discrimination and violence has been reported as increasing in various EU countries, including France, Germany and the United Kingdom. The Human Rights Commissioner of the Council of Europe, Nils Muižnieks, expressed concerns in January 2014 about increasing anti-Semitism in Europe. According to the French National Consultative Human Rights Commission, attacks and threats against Muslims have increased for the third year in a row in 2014. In various instances, racial motivation is not taken into account as aggravating circumstances by judicial authorities. For instance, in

[81] European Union Agency for Fundamental Rights, (2014). Roma survey – Data in focus: Discrimination against and living conditions of Roma women in 11 EU Member States. Brussels. Available at: http://fra.europa.eu/sites/default/files/fra-2014-roma-survey-gender_en.pdf [Accessed 22 Jun. 2015].

[82] European Roma Information Office, (2014). European Commission infringement proceedings against the Czech Republic send a strong signal that discrimination against Roma will not be tolerated. Available at: http://cloud2.snappages.com/ecc3fa83da15cf423fe3aaa342f545fa355b24f3/ERIO%20Press%20release_EC%20infringement%20proceedings%20against%20CZ%20_260914_final.pdf [Accessed 21 Jun. 2015].

[83] Human Rights Watch, (2015).

[84] Ministère de l'Intérieur, (2014), Direction Générale des Étrangers en France, Le projet de loi relatif au droit des étrangers. Available at: http://www.immigration.interieur.gouv.fr/Immigration/Le-projet-de-loi-relatif-au-droit-des-etrangers [Accessed 22 Jun. 2015].

April 2014, following the murder of a Pakistani worker in Athens, the perpetrators were indeed sentenced to life imprisonment. However, the racial motivation of the crime was not taken into account by the court. Greece did however improve response to hate crimes, as its anti-racism law came into force in September 2014, removing obstacles to access to justice for people victim of racial violence.[85]

In an October 2014 report, the FRA found high rates of bullying, harassment and discrimination against lesbian, gay, bisexual and transgender (LGBT) people in various countries of the EU. While the recent referendum in Ireland resulted in the approval of the amendment of the Constitution to allow same sex marriage, it is still banned in some EU countries, namely Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia. In Croatia for instance, the Constitution was amended in 2013 to ban same sex marriage.

Even though the EU is the most progressive gender regime in the world, many forms of gender inequality still persist within the Union. Gender pay gap remains an issue, as well as violence against women. According to the 2014 FRA Report on violence against women – the first EU-wide report one violence against women – one in three women in Europe experience violence in their lives, since the age of fifteen[86]. The Council of Europe Convention on preventing and combating violence against women and domestic violence, which came into force in August 2014, is a step forward in preventing domestic violence, but has yet to be ratified by some EU Member States, while some have not even signed it yet, namely Bulgaria, Czech Republic, Ireland and Latvia.

Persons with disabilities still have substantial difficulties in participating in political affairs, and in 15 EU Member States people with intellectual of psychological disabilities placed under legal guardianship are denied the right to vote. In Spain, the number of people with disabilities who

[85] Human Rights Watch, (2015).

[86] European Union Agency for Fundamental Rights, (2014). Violence against women: an EU-wide survey. Available at: http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf [Accessed 22 Jun. 2015].

have been deprived of their right to vote has increased by 172% between 2003 and 2013[87].

Counter-terrorism measures

It is a valid argument to say that not all human rights absolute and that public security may, in some cases, justify the limitation of some rights. However in no case should it be inferred that security should always prevail over human rights. After the 9/11 attacks, States started implementing increasingly stringent counter-terrorism measures. At the international level, the UN Security Council Resolution 1373 was adopted and introduced legally binding obligations upon States to implement counter terrorism measures. It also provided for the creation of a new body in the UN system, the Counter-Terrorism Committee (CTC), as well as the 1267 Sanctions Committee establishing a listing of individuals and entities with links to al-Qaida and providing for a sanctions regime for these affiliations. In the 2004 Resolution 1566, the UN Security Council established that terrorism is "one of the most serious threats to peace and security"[88], thus stressing the importance of combating it. The question that can be, and has been, posed is that of whether terrorism amounts to a violation of human rights. As human rights usually fit into a vertical relationship between States and individuals, it would seem that as terrorism is the result of a non-State actor's actions, it does not correspond to this description. However, the evolution of the world and of society, brought about mainly by globalization, has given non-State actors a growing role[89]. It is undeniable that terrorism does affect human rights, especially the right to life, the right to physical integrity, the right to health, etc[90]. Martin Scheinin, the first United Nations Special Rapporteur on human rights and counter-terrorism, has described acts of terrorism as "the antithesis of human

[87] Human Rights Watch, (2015). Word Report 2015 - Events of 2014.
[88] UNSC Resoltion 1566, (2004), Available at: http://unrol.org/files/n0454282.pdf
[89] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010). International human rights law. Oxford: Oxford University Press.
[90] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010).

rights"[91]. But the wording violation is debated. According to the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, while counter-terrorism, Ben Emerson, the term violation should be aimed at the authors of terrorism, not at the acts themselves. In addition, the definition of terrorism itself is not always agreed upon, which creates the risk of misuse of the term by States to justify their actions, especially when these actions are debatable from a human rights perspective. Counter-terrorism measures have been known to hamper human rights, not only those of suspected terrorists, but also those of citizens whose rights are affected by these measures. Martin Scheinin uses the metaphor of a pyramid to describe the effects of counter-terrorism measures on human rights. At the top of it only a limited number of people affected by violations of human rights (mainly suspected terrorists subjected to torture or arbitrary detention for instance), and at its bottom, society as a whole impacted by counter-terrorism measures in their daily life – for example in terms of right to privacy. He stresses the fact that in between the top and the bottom of the pyramid, some specific groups are especially impacted, such as ethnic minorities, victims of discriminatory profiling. He thus underline the importance of "keeping all counter-terrorism legislation under careful public scrutiny"[92].

In concrete terms, violations of human rights in the context of the fight against terror have been reported on many occasions. The use of torture became quite widespread after 9/11 and States have used the argument of the non-applicability of the UN Convention against Torture and the ICCPR to extraterritorial activities to carry out activities involving acts of torture abroad. In addition by labeling their activities "enhanced interrogation technics" (USA), or "moderate physical pressure" (Israel), governments have

[91] Ohchr.org, (2011). Osama bin Laden: statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism. Available at: http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E [Accessed 23 Jun. 2015].

[92] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010).

tried to legitimize their activities involving torture or ill-treatments[93]. The right to liberty has also been put under pressure, for instance in the case of Spain using *incommunicado* detention despite it being prohibited[94]. Finally, the right to non-discrimination is also often put into question, especially because of the profiling methods used by State authorities. For instance, following 9/11, the German government launched a screening program to identify "sleeping" terrorists allowing police authorities to collect information on individuals through public and private databases[95]. In that context, some criteria were set for the targeted population: they should be male, between 18 and 40 years old, current or former students, Muslim and have birth links or the nationality of a country with a mostly Muslim population[96]. The German Constitutional Court declared the procedure unconstitutional in 2006. In the UK, even before 9/11, under section 44 of the Terrorism Act 2000, police authorities were authorized to stop and search people on pretext of preventing terrorism without concrete ground for suspicion. This mainly impacts minorities and the legislation is considered illegal by the ECtHR[97]. Furthermore, a law approved in July 2014 provides for the removal of citizenship for naturalized UK citizens involved in terrorism[98] or any action "seriously prejudicial to the vital interest"[99] of the country. This provision applies even in cases where this would leave the person suspected stateless.

More recently, in the wake of the attacks on the French satiric newspaper Charlie Hebdo, on 7 January 2015, counter terrorism measures seem to be growing. In France, the proposed surveillance law is highly

[93] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010).
[94] Hrw.org, (2014). Submission to the UN Human Rights Committee on Concerns and Recommendations on Spain | Human Rights Watch. Available at: http://www.hrw.org/news/2014/07/31/submission-un-human-rights-committee-concerns-and-recommendations-spain [Accessed 23 Jun. 2015].
[95] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010).
[96] Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. (2010).
[97] European Court of Human Rights, (2015). Terrorism and the European Convention on Human Rights. Available at: http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf [Accessed 23 Jun. 2015].
[98] House of Commons Library, (2015). Deprivation of British citizenship and withdrawal of passport facilities. Available at: http://www.parliament.uk/briefing-papers/SN06820.pdf [Accessed 21 Jun. 2015].
[99] British Immigration Act, 2014, Section 6, Article 66

debated for being intrusive and detrimental for the right to privacy. The counter-terrorism law adopted on 24 June 2015 includes provisions limiting freedom of movement, as people suspected of being involved in terrorist activities or of posing a threat to security upon return are banned from going abroad. Until then, apology of and incitement to terrorism was regulated by the 1881 law on the freedom of the press[100]. The new law transfers the crime of apology of and incitement to terrorism from the 1881 law to the Penal Code, thus leading to a new infringement regime.

B. Case study: The erosion of fundamental rights and the rule of law in Hungary

Human rights in Hungary

In April 2010, Viktor Orbán's conservative Hungarian Civic Alliance (Fidesz) secured a two-third majority after the elections[101]. The result of the 2014 elections was the same. Ever since, they have used this majority to impose repressive laws curbing a wide range of rights and freedoms with only very little, if any, public consultation, going as far as modifying the Constitution. The 2013 Fourth Amendment of the Constitution brought about many provisions seriously hindering fundamental rights and the rule of law. Many of the legal modifications have had the effect of lowering the control of the executive and have been very harmful for the rule of law and fundamental rights. Public institutions have been under pressure after major positions were assigned based on political preferences, freedom of the press has been

[100] Legifrance.gouv.fr, (2015). Loi du 29 juillet 1881 sur la liberté de la presse | Legifrance. Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119 [Accessed 21 Jun. 2015].

[101] Than, K. and Szakacs, G. (2010). Fidesz wins Hungary election with strong mandate. Reuters. Available at: http://www.reuters.com/article/2010/04/12/us-hungary-election-idUSTRE63A1GE20100412 [Accessed 21 Jun. 2015].

drastically restricted and discrimination against various groups has been enacted in the Constitution[102].

Freedom of the press and freedom of speech

In May 2010, the newly elected government initiated a series of reforms of the law on media, controlling the contents of the media material. While it is clear that freedom of the press is not an absolute right – as opposed to the right to life for instance – and that limiting certain content such as defamation or hate speech is important, it is also true that this task has to be carried out by an independent body and not a government-controlled body, as is the case in Hungary. The new legislation prompted rapid concerns from the international community. The Venice Commission of the Council of Europe, the Secretary General and the Commissioner for Human Rights of the Council of Europe, and the European Commission called for amendments to be made to the new legislation. However, their reaction did not suffice to push the Hungarian government to make significant changes to the legislation that was eventually adopted. Since 2010, Hungary's score on the Freedom House's scale for freedom of the press has gone from 23 to 35 in 2014 (0 being the best score) and its press status has gone from being free to partly free[103].

Following the 2010 amendment of the Constitution concerns have been raised as to the system of appointment of the President of the National Media Infocommunications Authority (NMHH) and the Media Council, that are supposed to be independent authorities in charge of ensuring "undisturbed operation, in compliance with pertaining legislation in force, of the media and the markets for electronic communications, postal and information technology services". It is now the President of the Republic who will appoint the President of the NMHH, upon nomination of the Prime Minister. As the President is a member of the ruling party, this gives the government *de facto*

[102] Human Rights Watch, (2015). Hungary: Outstanding Human Rights Concerns. Available at: http://www.hrw.org/news/2015/02/18/hungary-outstanding-human-rights-concerns [Accessed 21 Jun. 2015].
[103] Freedomhouse.org, (2014). Hungary | Freedom House. Available at: https://freedomhouse.org/report/freedom-press/2014/hungary#.VX7pshPtmkr [Accessed 21 Jun. 2015].

power over those institutions as it allows the executive to appoint Fidesz supporters to the position[104]. In addition, the members of the Media Council are elected by a two-third majority of the Parliament after being nominated by a nominating committee composed of delegates from each parliamentary faction. As the ruling party has a supermajority in the Parliament, this allows them to appoint the members of the Media Council as well. The current five members of the media Council are all Fidesz supporters[105]. In February 2011, the Council of Europe stated that "The provisions regarding appointment, composition and tenure of existing media regulatory bodies demand amendment not least because they lack the appearance of independence and impartiality, quite apart from a de facto freedom from political pressure or control"[106].

A major restriction upon freedom of the press has been the ruling of the Constitutional Court – where the judges are also appointed by the ruling party – making website operators responsible for comments on their posts or news-related remarks that would be in breach of media law. The new media law states that contents should be "balanced", of "relevance to the citizens of Hungary" and "respect human dignity". While "respect for human dignity" seems reasonable – although arguably broad and vague – the two other criteria are open to interpretation. Media outlets face a 700,000 € fine in case their output is considered "'insulting' to a particular group or 'the majority' or is deemed to violate 'public morality'"[107]. This has a direct effect on the way news is reported and is a clear threat to free speech and Internet freedom. In addition, radios are now required to ensure that 60% of the broadcasting is music, which limits the room for political contents. ATV, a TV station quite

[104] Medialaws.ceu.hu, (2015). Media Law in Hungary | CMCS. Available at: http://medialaws.ceu.hu/media_authority_independence_more.html [Accessed 21 Jun. 2015].
[105] Nielsen, N. (2012). Hungary's media crackdown slips off EU radar. Euobserver.com. Available at: https://euobserver.com/justice/114899 [Accessed 21 Jun. 2015].
[106] Council of Europe, (2011) "Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media," para. 39, February 25, 2011, Available at: https://wcd.coe.int/ViewDoc.jsp?id=1751289 [Accessed 21 Jun. 2015].
[107] Hrw.org, (2011). Hungary: Media Law Endangers Press Freedom | Human Rights Watch. Available at: http://www.hrw.org/news/2011/01/07/hungary-media-law-endangers-press-freedom [Accessed 21 Jun. 2015].

critical of the government, was sentenced in June 2014 for violation of the media law on the grounds that they had qualified the political party Jobbik as "far-right". The Court based its sentence on the fact that the party did not describe itself as far-right – even though their political line clearly is far-right as shown by many anti-Semitic, racist and anti-Roma comments from members of the party[108] – and that this description could be detrimental to the party as it gives a "biased" opinion to the viewers. The same month, Gergo Saling, editor-in-chief of Origo.hu, an independent news website, was let go after the publication of a series of articles critical of the government, including reports on misuse of public funds by State Secretary Janos Lazar[109]. Also in June 2014, a law introducing a tax on advertisement in media was passed, which had direct consequences for the functioning of RTL Klub, one of the last independent TV channels in the country, which relies mostly on advertisement for its funding. There have been reports by employees of public and private media organizations denouncing "growing self-censorship by journalists and editors"[110] for fear of fines or layoff. The Center for Independent Journalism, a Hungarian non-profit and non-political organization promoting ethical, fact-based journalism and independent media, stated that radio stations "tend to select and to frame the news in a way that is favorable for the incumbent center-right government".

The media law also provides for a system of co-regulation, which makes former independent bodies responsible for ensuring compliance with the rules imposed by the National Media Infocommunications Authority. The latter signed an agreement with several Hungarian "self-regulatory bodies", including the Association of Hungarian Content Providers (MTE), the Advertising Self-Regulatory Body (ÖRT), the Association of Hungarian

[108] ECRI, (2015), The ECRI report on Hungary published in 2015 documents the far-right position of Jobbik. Available at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-V-2015-19-ENG.pdf [Accessed 21 Jun. 2015].
[109] Mappingmediafreedom.org, (2014). Hungary: Editor of news portal fired | Mapping Media Freedom in Europe. Available at: https://mappingmediafreedom.org/?kohana_uri=reports/view/87 [Accessed 21 Jun. 2015].
[110] Freedomhouse.org, (2014). Hungary | Freedom House. Available at: https://freedomhouse.org/report/freedom-press/2014/hungary#.VX7pshPtmkr [Accessed 21 Jun. 2015].

Publishers (MLE), and the Association of Hungarian Electronic Broadcasters (MEME). This creates a risk of these bodies being used for censorship under the authority of the NMHH.

In 2011, MTI – the Hungarian news agency – was established as the official source for public media. This government-funded agency whose neutrality has been questioned, provides news and pictures free of charge, creating a competition that news agencies functioning with subscriptions cannot keep up with.

As a consequence of the provisions of the media law and the amendments to the Constitution, freedom of the press is put under great pressure. After a visit in Hungary in July 2014, Nils Muižnieks, Council of Europe Commissioner for Human Rights, declared that "the mere existence of some provisions, such as severe sanctions, chills media freedom and pushed a number of media outlets towards self-censorship"[111]. Media pluralism is threatened by the tax on advertising and limitations on political promotion, as non-State media rely greatly on advertisement for their funding. Still according to Nils Muižnieks, "urgent action is needed to improve media freedom, including by repealing or reformulating the provisions of the Media Act on opinion and political views; extending the protection of sources to freelance journalists; excluding print and online media from the registration requirements; strengthening the independence of media regulatory bodies; and decriminalizing defamation". Though the EU has been able to have some provisions repelled, major obstacles to freedom of the press and freedom of speech remain and the Union seems helpless.

Civil Society and freedom of association

Non-governmental organizations receiving funding from abroad are under increasing pressure in Hungary. The government leads smear

[111] Coe.int, (2014). Hungary: progress needed on media freedom, anti-discrimination measures and migrants' rights -. Available at: http://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/hungary-progress-needed-on-media-freedom-anti-discrimination-measures-and-migrants-rights/pop_up?_101_INSTANCE_ugj3i6qSEkhZ_viewMode=print [Accessed 21 Jun. 2015].

campaigns against various NGOs accusing them of funding irregularities. In April 2014, the organization Norway Grants was accused by the Chief of the Prime Minister's Cabinet of funding groups related to opposition parties. Following this, the Hungarian Government Control Office (KEHI) was tasked in June 2014 to carry out financial inspections on three NGOs managing foreign aid funds. No prior notification was given to those organizations. The legality of these audits was highly contested, as the funds were not part of the Hungarian budget, which implied that only the Financial Mechanism Office had the authority to order such audits, as required by bilateral agreements between Hungary and Norway. In July 2014, Orbán referred to Norway Grant's partners as "paid political activists who are trying to assert foreign interests in Hungary". In addition, 13 other NGOs were qualified as "left-leaning" and "problematic". The KEHI also had the tax number of four NGOs related to Norway Grants suspended for non-cooperation in the audit. As a result, these organizations are unable to issue invoices and are excluded from the tax scheme allowing taxpayers to donate 1% of their income to civil society or religious organizations. The offices of two NGOs managing Norway Grant's were searched in September 2014 for allegations of mismanagement of funds. Computers, files and servers were confiscated. After the investigation, the KEHI announced it would press criminal charges against several NGOs. [112]

Intimating NGOs critical of the government and attempting to ban international funding for local NGOs is often used to undermine independent organizations. As the State will not allocate any fund, their one source of funding is foreign funds. By proscribing them, the government effectively hinders these NGOs ability function and thus express concerns on the government's actions.

[112] Human RIghts Watch, 2015.

Discrimination and exclusion

Roma populations are victim of considerable discrimination in Hungary. They have been subjected to ethnic profiling and excessive targeting by police. According to the UN Committee on the Rights of the Child, Roma populations are discriminated against by health practitioners and are denied health services. Roma children remain victim of segregation in education and are placed in separate classrooms in standard schools, or are sent to special-needs schools, where an excessive number of Roma children are placed. Furthermore, the predominantly Roma population of the neighborhood of the city of Miskolc, known as Numbered Streets, are facing forced eviction after the government declared the houses of the neighborhood "old and inadequate"[113].

Other groups face discrimination and restricted rights in Hungary. People with certain disabilities are deprived of the right to vote. Indeed, the new Constitution introduces limitations on the right to vote for people with "limited mental capacity". Disenfranchisement is subject to a court decision, however it has resulted in many citizens being deprived of their voting rights, which is in breach of the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD). The United Nations Committee on Rights of Persons with Disabilities has voiced serious concerns about the provisions depriving people with "limited mental capacity" of the right to vote.

LGBT people are also victim of discrimination. Textbooks used in the non-compulsory religion classes and backed up by the government refer to homosexuality as a "deadly sin". More concerning is the fact that biology textbooks label homosexuality a "mental disorder"[114]. Same-sex marriage has besides been revoked in the Constitution in 2012. LGBT people are also excluded from the notion of family under a number of pieces of legislation.

[113] Černušáková, B. (2014). 'Numbered Streets': The Hungarian neighbourhood where everybody could be left homeless. Amnesty Blog. Available at: http://www.amnesty.eu/en/news/blog/numbered-streets-the-hungarian-neighbourhood-where-everybody-could-be-left-homeless00048/#.VX8MJRPtmko [Accessed 21 Jun. 2015].
[114] Nielsen, N. (2014). Hungary and Finland in uphill battle for gay rights. Euobserver.com. Available at: https://euobserver.com/lgbti/124097 [Accessed 21 Jun. 2015].

The 2013 changes applied to the Constitution define family as a "marriage and parent-child relationship", hence excluding same-sex couples that cannot marry. It also excludes partners cohabiting outside the bond of marriage. This implies that people not considered as constituting a family enjoy lower constitutional protection, which goes against the ECHR as Article 8 enshrines the right to family life. Additionally, sexual orientation is not included in the non-discrimination clause of the Constitution.

Domestic violence remains inadequately handled, as victims encounter difficulties in requesting protection, the police are often accused of hostile responses. In 2014, Hungary signed the Convention on preventing and combating violence against women and domestic violence, but has yet to ratify it.

In March 2013, the government amended the Constitution to criminalize homelessness. A first attempt in that direction was countered by the Constitutional Court in November 2012. Not withstanding that ruling, the government decided to resort to constitutional amendment to introduce provisions criminalizing homelessness in 2013. Under the new legislation, homeless people are forbidden to reside in public spaces and are subject to fines and even imprisonment[115]. Since November 2013, homelessness is banned in public areas in most of the city center of Budapest. According to Human Rights Watch, "by December 2014, at least 420 homeless people have been charged with a misdemeanor for infringing the ban"[116].

Independence of the judiciary

The new Constitution that came into force in 2012 includes a series of provisions that pose serious risks for the rule of law and the independence of the judiciary in Hungary. The Fourth Amendment to the Constitution introduced a wide range of constitutional provisions, including the

[115] Gall L., (2013), Dispatches: Criminalizing Hungary's Homeless, Available at: http://www.hrw.org/news/2013/10/01/dispatches-criminalizing-hungary-s-homeless [Accessed 21 Jun. 2015].
[116] Human Rights Watch, (2015). Hungary: Outstanding Human Rights Concerns.

criminalization of the homeless, the control of the government over universities, new requirements for religious groups and measure limiting the independence of the judiciary. Under the new Constitution, candidates for judicial positions are nominated by the National Judicial Council. However, the President of the National Judicial Office –who is appointed by the Parliament, and thus by the ruling party who has a majority – has the authority to reject the candidates nominated by the National Judicial Council. This clearly hampers the independence of the judiciary system.

In addition, the power of the Constitutional Court, which is supposed to balance the power of the executive, has been restricted by the Fourth Amendment to the Constitution. While it used to have the authority to review laws related to budget and taxation matters, this competence has now been taken away. Besides, the Constitutional Court is no longer able to hear cases brought by NGOs in the name of public interest (*actio popularis*). It is also not able to rule on the contents of constitutional amendments, which is how the government managed to criminalize homelessness.

Furthermore, since the Constitutional Court was restructured in 2011, four new judges were appointed in addition to the initial 11. The consequence of this restructuring is that a majority of the judges sitting at the Court are appointed by the ruling party[117].

Finally, Articles 12 and 19 of the Constitution provided for the invalidation of all decisions made by the Constitutional Court before the entry into force of the new Constitution, making them null and void for any new case. This allowed for a completely new interpretation of the law in line with the government's directions. In addition, the Court is no longer competent to review constitutional amendments and ensure their compatibility with constitutional principles. It now only has competence to report on the validity of the procedure of amendment.

[117] Human Rights Watch, (2015). Hungary: Outstanding Human Rights Concerns.

Freedom of religion

In 2011, the Church Act imposed re-registration on all recognized churches and religious groups. In order to do so, they had to prove that they their existence dated back at least 20 years and that they counted at least 1,000 members. This has been recognized as a violation of freedom of religion by the ECtHR[118]. Hungary has yet to repeal this provision. The main consequence of this is that churches not registered and thus not recognized by the State are not eligible for subsidies, which introduces differential treatment of religious groups. Many churches have been deregistered, including the Methodist Church and the Dzaj Bhim Buddhist congregation, which carried out social work with homeless people and Roma communities. Religious groups that have been denied the status of Church can register as religious associations. However this implies that they are not eligible for State funding for their social activities and the services they provide. These services are of particular importance for vulnerable groups, who are thus also affected by the Church Act.

Hungary has thus implemented a significant number of legislative acts that run afoul many of the principles upheld by the EU. The main issue of the new Constitution in the country is that it seriously hampers the checks and balances imposed on the executive. The question now is whether the EU is equipped to deal effectively with such breaches.

The Reaction of the EU

As fundamental rights values and the rule of law came to have a predominant place in EU Treaties, it could be inferred that they have become an inalienable value in all EU Member States. However, recent events in Hungary are only one example that breaches still happen. The question that

[118] IFEX, (2014). European Court rules Hungarian church act violates freedom of religion - IFEX. Available at: https://www.ifex.org/hungary/2014/09/11/church_act/ [Accessed 21 Jun. 2015].

arises from these situations is that of the tools available for the EU to prevent these violations or to respond to them. While the TEU clearly establishes fundamental rights as essential values, the possible course of action the EU could adopt in case of violation remains rather unclear, except for the "nuclear option"[119] of Article 7. The Hungarian case is a good illustration of the weakness of the framework for the protection of fundamental rights in the EU. The main difficulty in responding to fundamental rights violations in Hungary is that many of the actions carried out by the Hungarian government and raising concerns for human rights fall under the competence of Hungary itself. These breaches thus fall outside the scope of EU law, which, as previously mentioned, only applies when Member States implement EU initiatives.

In the face of this lack of efficient tools and judicial legitimacy to tackle these issues, the Union has resorted to indirect tools in order to pressure Member States to review their line of conduct. To that end, while fundamental freedoms are sometimes seen as being in conflict with fundamental rights, there is an opportunity to make them complementary[120]. Indeed fundamental freedoms can be used as "activating conditions"[121] to allow the EU to intervene in case of violations of fundamental rights and the rule of law falling under the scope of EU competences.

An example of the complementarity between fundamental rights and fundamental freedoms can be seen in the 2011 communication between Neelie Kroes' – at the time Commissioner for the Digital Agenda – and the Hungarian government about the new media legislation. In her letters to the Hungarian government, Kroes used the 2010 Audiovisual Media Services Directive (AVMS Directive) to argue that while national governments are entitled to require balanced coverage from broadcasters, these provisions had

[119] The expression "nuclear option" was first use in that context by former President of the European Commission José Manuel Durão Barroso in 2012.
[120] Dawson M. & Muir E., (2013), Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law, 14 German Law Journal, Available at: https://www.germanlawjournal.com/pdfs/Vol14-No10/14.10.4%20Dawson%20&%20Muir.pdf [Accessed 21 Jun. 2015].
[121] Dawson & Muir, 2013.

to abide by the principle of proportionality, as provided for by Article 5 TEU. As the Hungarian provisions on balanced coverage applied not only to television broadcasting, but to all forms of media, it was deemed disproportionate. In addition she used the freedom of establishment and free provision of services enshrined in the TFEU as an argument in this case:

> *"These provisions could constitute an unjustified restriction of the freedom of expression and information. More generally, such wide imposition of the balanced coverage obligations – which in addition is drafted in quite general terms, leaving a rather large room for interpretation – could create an obstacle to the freedom of establishment and the free provision of services guaranteed by Articles 49 and 56 TFEU, as it could deter the establishment in Hungary of media service providers from other Member States and the provision of media services in Hungary"*[122].

She thus used market freedoms to make a case for fundamental rights. Framing the action both in fundamental freedoms and fundamental rights thus allowed to ensure that the Commission did not overstep its area of competence, which would have prompted critiques, especially from national governments insisting on the preservation of national sovereignty. A similar approach had been adopted in 2010 in a dispute between the Commission and France about Roma expulsions. Indeed, the Commission invoked the freedom of movement to dispute the legality of the expulsions, thus acting in an area of well-established EU competence.

Similarly, the Commission expressed "serious concerns" about the compatibility of the new Constitution with the rule of law after the Fourth Amendment to the Hungarian Constitution was adopted in March 2013[123]. The Commission threatened to "start infringement procedures" if the expressed concerns were not addressed.

However, the most critical report on the situation in Hungary was the Tavares report voted on 19 July 2013 by the European Parliament and

[122] Letter from Neelie Kroes, Vice-President of the European Commission, to Tibor Navracsics, Deputy Prime Minister of Hungary, of 21 January 2011. Available at : http://mediamonitor.ceu.hu/archive/archive-fulllist/ [Accessed 21 Jun. 2015].
[123] EU Commission, (2013), Press release, IP/13/327. 12.4.2013: The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary, Available at: http://europa.eu/rapid/press-release_IP-13-327_en.htm [Accessed 21 Jun. 2015].

recommending the creation of a "new mechanism to enforce Article 2 TEU effectively"[124]. The report mentioned the possibility of the creation of a "Copenhagen Commission" composed of experts and charged with the monitoring of the compliance with the Copenhagen criteria. This Commission would then publish recommendations to Member States and EU institutions "on how to respond and remedy any deterioration of the values enshrined in Article 2 TEU"[125]. Despite the detailed account of the deterioration of the rule of law in Hungary and the precise recommendations of the report, no concrete action was taken to implement it.

The previously mentioned actions were not legal actions brought against Hungary, but merely communications and recommendations. The EU did however bring three infringement procedures against Hungary in 2011. While they did not officially target fundamental rights issues, these infringement procedures were designed to tackle breaches of fundamental rights indirectly. The first was about the independence of the Hungarian Central Bank, and was based on breaches of Articles 130 and 127 TFEU, Article 14 of the Statute of the European System of Central Banks and of the European Central Bank, Article 4 of Council Decision 98/415 "on timely consultation of the ECB". The second concerned the judiciary and the forced retirement of judges at the age of 62 instead of 70, and relied on violations of Directive 2000/78 that "prohibits discrimination at the workplace on grounds of age". The third tackled the independence of data protection authorities, and was based on breaches of Article 16 TFEU, Article 8 of the EU Charter and Directive 95/46 that "requires Member States to establish a supervisory body to monitor the application of the so-called Data Protection Directive in

[124] European Parliament, (2013). Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN#title2 [Accessed 19 Jun. 2015].
[125] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315 [Accessed 19 Jun. 2015].

complete independence"[126]. We shall not go into details on the case concerning the independence of the Central Bank, as it is outside the scope of this study. The infringement procedure was officially closed on 19 July 2012 after amendments were made to the status of the Central Bank, in line with the requirements of the Commission[127]. These concessions were mainly the result of the pressure exercised by the negotiations between Hungary and the IMF and the EU on a bail-out package for the country, which shows the impact of economic incentives in such matters.

The case involving the judiciary was referred to the ECJ[128]. By reducing the retirement age from 70 to 62, the government effectively pushed around 10% of the people holding the most senior positions in the judiciary out of office. This included around 20% of the members of the Supreme Court and a significant number of judges from the lower courts[129]. Lacking the legal authority to prosecute Hungary on grounds of the independence of the judiciary, the Commission based its arguments on age discrimination. The ECJ swiftly ruled against Hungary in an attempt to act before the judges were dismissed. However the Hungarian government withheld the implementation of the judgment until the judges were let go, and then as an enforcement of the judgment, provided compensation for the laid-off judges. As it was a discrimination case, compensation was technically a reasonable remedy. Hence, while Hungary was condemned, the Commission's action failed to effectively prevent the government from removing the judges and replace

[126] European Commission, (2011). European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary. Available at: http://europa.eu/rapid/press-release_IP-12-24_en.htm [Accessed 18 Jun. 2015].
[127] European Commission, (2012). Commission closes infringement procedure on the independence of the Hungarian central bank. Available at: http://europa.eu/rapid/press-release_IP-12-803_en.htm [Accessed 21 Jun. 2015].
[128] European Commission, (2012). Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary. Available at: http://europa.eu/rapid/press-release_IP-12-395_en.htm [Accessed 18 Jun. 2015].
[129] Lane Scheppele, K. (2014). Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber). Eutopialaw. Available at: http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/ [Accessed 18 Jun. 2015].

them with judges of their own choosing, thus hampering the independence of the judiciary system[130]. This shows the limits of the EU instruments of protection of fundamental rights. Not only does the EU not have the power to act directly on fundamental rights matters – in this case, because the breaches occurred outside of the implementation of EU law, thus making the EU Charter inapplicable – but even the action undertaken failed to produce the expected results and rectify the situation.

A similar scenario was developed in the case of the data protection infringement procedure. In 2011, a new data protection authority was set-up by the government, thus causing András Jóri, former Hungarian data privacy ombudsman, to be dismissed before the end of his term when his office was closed. The head of the new data protection body was subsequently appointed by the President of the Republic – member of Fidesz – upon nomination of the Prime Minister. This prompted the Commission to bring a case against Hungary to the ECJ on the grounds that this was in breach of Data Protection Directive 95/46, which provides that the authority in charge of data protection shall "act with complete independence"[131]. The Commission argued that dismissing the data protection ombudsman before the end of his term was in breach of the provision on the independence of the authority in charge of data protection. In addition, the new rules of the data protection authority provided that the Prime Minister and the President of the Republic could dismiss the supervisor of this authority on arbitrary grounds. In 2012, Hungary adapted the rules concerning the National Agency for Data Protection, in order to abide by EU independence standards. The case was however still tried as the dismissal of András Jóri was maintained. The Grand

[130] European Commission, (2013). European Commission closes infringement procedure on forced retirement of Hungarian judges. Available at: http://europa.eu/rapid/press-release_IP-13-1112_en.htm [Accessed 18 Jun. 2015].
[131] Article 28 (1), Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281.

Chamber of the ECJ ruled against Hungary on 8 April 2014[132]. This was not the first case involving violations of the independence of data protection officers in the EU. Indeed Germany and Austria have been prosecuted on those grounds before, though for much less significant offenses that allowed for an effective remedy[133]. This was much more complicated in the Hungarian case. Indeed, the only possible remedy would have been to give András Jóri his position back. This would have involved dismissing the new data protection Commissioner, thus creating the same breach by terminating his term before the end – as Hungary argued in an attempt to have the case dismissed. While the case was not rejected on these grounds, the question of the remedy remained a moot point.

Thus, while in both situations the EU won their cases, Hungary still managed to remove the people appointed under the previous governments, to replace them with people of their choosing. Again, the enforcement mechanisms proved insufficient to effectively prevent breaches.

As the breaches were framed in essentially domestic Hungarian matters, the question of the legitimacy of the EU to intervene in Member States' affairs arises. In the face of the inefficiency of previously mentioned tools, some scholars have argued in favor of "reversed Solange" procedure that would allow for the protection of fundamental rights in EU Member States where the ECJ and EU institutions cannot act themselves[134]. Indeed this approach developed by Armin von Bogdandy et al. built on the ECJ's ruling in *Ruiz Zambrano* and suggest to link fundamental rights and citizenship. In that context, an EU citizen would be entitled to bring a case before the ECJ against a Member State violating their rights as enshrined in Article 2 TEU. This would allow to remedy the lack of application of the EU Charter in domestic

[132] European Commission, (2014). Court of Justice upholds independence of data protection authorities in case against Hungary. Available at: http://europa.eu/rapid/press-release_MEMO-14-267_fr.htm [Accessed 18 Jun. 2015].
[133] Dawson & Muir, 2013
[134] von Bogdandy et al., (2012), Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States Common Market Law Review49.2, 489-519. Available at: http://people.unica.it/iphumanrights/files/2013/07/EU-citizens-Von-Bogdandy-Cherchi.pdf [Accessed 21 Jun. 2015].

matters. This is particularly important in Bogdandy's view because the lack of an effective remedy to fundamental rights violations is not only a problem for citizens victims of violations. It is also a threat to the fundamental values of European integration and could result in serious systemic problems, especially in terms of mutual confidence, one of the founding principles of the Union. According to Bogdandy, "a massive deterioration of fundamental rights protection in some Member States might eventually threaten fundaments of European integration, namely the principle of mutual confidence and the premise that the Union can rely on the functioning polities of the Member States"[135]. Wojciech Sadurski, jurisprudence professor at the Centre for Europe of the University of Warsaw, backs this argument, stressing the fact that the credibility of the EU's commitment to fundamental rights is at stake in the sense that if the EU does not implement these measures in this case "no one will take them seriously in the future"[136].

Some scholars also strongly advocate for the use of Article 7 of the TEU. The question is whether the amendments to the Hungarian Constitution and the policies implemented constitute a "clear risk of a serious breach […] of the values referred to in Article 2". Sadurski, argues that Hungary "blatantly and clearly" violates principles of democracy and human rights protection and maintains that the use of Article 7 here is clearly appropriate[137]. Reports from human rights organizations, such as Amnesty International and Human Rights Watch, also feed into this argument. However the recourse to Article 7 requires strong political commitment and the MEPs remain very divided on that question, which has made the possibility of such action highly unlikely. Certain scholars in favor of a procedure involving Article 7 have argued that the Article itself should undergo some modifications. In his paper,

[135] von Bogdandy, Armi, (2012), A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom, VerfBlog, available at http://www.verfassungsblog.de/en/a-rescue-package-for-eu-fundamental-rights-illustrated-with-reference-to-the-example-of-media-freedom/ [Accessed 21 Jun. 2015].
[136] Sadurski W., (2012), Rescue Package for Fundamental Rights; A Comment by Wojciech Sadurski, Verfassungsblog, available at: http://verfassungsblog.de/rescue-packagefundamental-rights-comments-wojciech-sadurski/ [Accessed 21 Jun. 2015].
[137] Sadurski W., (2012).

Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order[138], Jan Werner Müller argues in favor of a system of gradual sanctions in the context of application of Article 7, such as the freezing of cohesion funds or substantial fines. He argues that the European Commission should then be able to trigger these sanctions upon recommendation of the previously discussed Copenhagen Commission and with the consent of the European Parliament, but not that of EU Member States. He even goes as far as to envisage the expulsion of a Member State in case where "democracy is not just slowly undermined or partially dismantled, but where the entire edifice of democratic institutions is blown up or comes crashing down"[139]. While exclusion of a Member State is not envisaged by EU treaties, the other propositions put forward could present certain advantages. First, gradual sanctions would allow Article 7 not to be a "nuclear option", relying more on possible financial sanctions. Secondly, the triggering from part of the Commission based on a Copenhagen Commission decreases the risk of political interference in the process, which seems to be one of the main obstacles to the enforcement of Article 7, all the while maintaining the legitimacy of the process through cooperation with the Parliament.

The activation of Article 7 was brought up in 2015 after Prime Minister Orbán's unclear declarations about bringing back death penalty in Hungary. MEPs warned that the death penalty would trigger Article 7 procedure, stressing that it was "incompatible with the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights on which the union is founded"[140]. After Orbán's statement, President

[138] Müller J. W., (2013), Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order, Translatlantic Academy, Paper Series, no. 3, available at: http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf [Accessed 20 Jun. 2015].

[139] von Bogdandy, A., (2012).

[140] European Parliament, (2015). Hungary: MEPs condemn Orbán's death penalty statements and migration survey. Available at: http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey [Accessed 20 Jun. 2015].

of the Commission Jean-Claude Juncker immediately called for the retraction of his statement, which Orbán eventually did.

A remedy based on sanctions may however be perceived as too punitive, as Floris De Witte[141] and Marco Dani[142] argue. Such proceedings can be seen as bureaucratic and technocratic, even with the input of the European Parliament. In addition, the question of the efficiency of external intervention can be posed. Many authors, including Francis Fukuyama, believe that the rule of law is an institution that has to be implemented domestically with the support of all citizens and that it is not something that can be "simply copied from abroad"[143]. Thus, there is a necessity to take domestic factors into account before implementing any external intervention. Müller also stresses this argument, saying that "as long as there is some reasonable hope that national politics will be self-correcting, outside intervention would be illegitimate"[144].

The Commission did however react to critics about its inaction in the Hungarian case. Pushed by Viviane Reding, the Commission announced on 11 March 2014 the creation of a mechanism for the protection of the rule of law in the EU. Designed as an early-warning mechanism, it is not meant to replace Article 7 TEU, but rather to complement it. As previously mentioned it functions as a three-stage procedure (see Appendix 2) and is meant to reduce the "nuclear" aspect of Article 7 and provide preliminary steps. It empowers the Commission to investigate any potential breach in Member States, even if

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141 De Witte F., (2013), Less Constraint of Popular Democracy, More Empowerment of Citizens, Verfassungsblog, available at: http://www.verfassungsblog.de/en/less-constraint-ofpopular-democracy-more-empowerment-of-citizens/#.UX5E80a2iM8 [Accessed 20 Jun. 2015].

142 Dani M., (2013), Opening the enforcement of EU fundamental values to European citizens, Verfasssungsblog, available at http://www.verfassungsblog.de/de/ungarn-was-tunmarco-dani/#.UX5EXEa2iM8 [Accessed 20 Jun. 2015].

143Birdsall N., Fukuyama F., (2011), The Post-Washington Consensus: Development After the Crisis, Foreign Affairs, vol. 90, no. 2., 52. Available at : http://iis-db.stanford.edu/pubs/23124/foreignaffairs_postwashingtonconsensus.pdf [Accessed 21 Jun. 2015].

144 Müller J. W., (2011), Should Brussels resist Hungary's 'Putinization'? Or do EU member states have a 'democratic over-ride'?, Open democracy, available at: https://www.opendemocracy.net/jan-werner-mueller/should-brussels-resist-hungarys-%E2%80%98putinization%E2%80%99-or-do-eu-member-states-have-%E2%80%98democ [Accessed 20 Jun. 2015].

it concerns internal affairs – although this was already implicitly provided for by Article 7 (1). However, the non-binding nature of the recommendations seriously hampers the effectiveness of the mechanism. In case the Member State under scrutiny proves reluctant to cooperate, the last resort remains Article 7 TEU, which does not solve the previously mentioned issues. In addition, the framework and the Commission's Communication on the matter fail to provide a clear definition of what represents a "systemic threat", which is crucial for the activation of the mechanism.

The Council was quite critical of this new mechanism, arguing that it represented an overstep of the Commission's competences and an intrusion into Member States' internal affairs. As a response, the Council set-up an annual rule of law dialogue based "'on the principles of objectivity, non-discrimination and equal treatment of all Member States"[145]. This seems quite inadequate in the face of the many issues raised in the EU, if only in the case of Hungary. It does however reflect the Member States' reluctance to empower the Union with the ability to interfere with domestic rule of law matters.

While it would be an overstatement to say that the EU is not willing to tackle fundamental rights issues effectively, it is also undeniable that some other concerns seem to have been prioritized. Although the argument of the limited competence of the EU in these matters does indeed apply, it would not be the first time that the Union would push its competences to cope with emergency situations. In the context of the Eurozone crisis, measures were implemented to face the economic situation, and more often than not, they did push the limits of EU competence in fiscal affairs. Many of these measures, such as the Stability and Growth Pact or the European Stability Mechanism, were not part of the provisions under primary EU law. Thus there is contrast between the Union's ability and determination to take political or economic measures. What has been described as the spillover effect by Ernst B. Haas

[145] Robert-schuman.eu, (2015). Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction. Available at: http://www.robert-schuman.eu/en/european-issues/0356-upholding-the-rule-of-law-in-the-eu-on-the-commission-s-pre-article-7-procedure-as-a-timid-step [Accessed 20 Jun. 2015].

seems to happen as described by the neofunctionalist approach mainly in economic affairs, and much less in political matters. Some, like Müller, have argued that this is due to the fact that the Union is focusing on how to deal with the worst crisis of its history, i.e. the Eurozone crisis[146]. On the other hand, others have argued that it reflects the limits of the ever-closer Union envisaged by its founders. Moravcsik argues that "the movement toward the 'ever-closer union' of which the EU's founding fathers dreamed when they signed the Treaty of Rome in 1957 will have to stop at some point; there will never be an all encompassing European federal state"[147].

The Hungarian case shows the complexities of the toolkit available for EU institutions to maintain their founding values in Member States. While candidate countries are subjected to the conditionality of the Copenhagen criteria, it appears that this conditionality has a much lesser impact, if any, once accession is achieved. Some, such as Jenne Mudder and Jan Werner Müller, have asked the question whether the EU has "any leverage over a member country once it gains admission to the European club"[148]. It is now clear that the instruments available have to be improved if the EU is to first of all ensure respect of fundamental rights and the rule of law within its border; and second, maintain its credibility as an organization based on the values enshrined in Article 2 TEU. EU law does include legal provisions to address issues such as those raised by the Hungarian case. However, they appear rather inadequate and limited in the face of breaches occurring in domestic matters of Member States. An approach based on sanctions runs the risk of lacking legitimacy and not finding support in the country itself. Thus, any

[146] Müller, J. (2012), Europe's Perfect Storm. The Political and Economic Consequences of the Eurocrisis. Dissent. Available at: http://www.princeton.edu/~jmueller/DISSENT-Eurocrisis-JWMueller.pdf [Accessed 19 Jun. 2015].
[147] Moravcsik A., 2012, Europe After the Crisis: How to Sustain a Common Currency? Foreign Affairs, vol. 91, no. 3, 68. Available at https://www.princeton.edu/~amoravcs/library/after_crisis.pdf [Accessed 21 Jun. 2015].
[148] Mudde J., (2013), Jan Werner Müller, Defending Democracy Within the EU, Journal of Democracy, vol. 24, no. 2, 139. Available at: http://www.journalofdemocracy.org/article/defending-democracy-within-eu [Accessed 21 Jun. 2015].

reaction must involve legitimacy at the EU level, but must also involve the Hungarian society itself.

Conclusion

The evolution of history and society has prompted fundamental rights, their perception and protection to evolve as well. From negative rights and their limited impact on duty bearers, more and more positive rights have emerged, forcing States to ensure their fulfillment. At the same time, States have lost their position at the center of the international order, with international organizations gaining more and more weight. At the world level, the UN is the main standard setter and the treaties drafted by the organization are in general ratified by a large number of States. In Europe, the Council of Europe is the main guardian of fundamental rights, but the EU has also developed into an organization regarding fundamental rights as essential values. Both the Council of Europe and the EU developed after WWII to ensure that this would never happen again. The Council of Europe was always meant to be an organization upholding fundamental rights. The EU on the other hand was primarily designed as a market integration union, and the development of fundamental rights as essential values emerged as a gradual process. From upholding fundamental rights through the case law of the ECJ, the EU eventually adopted a legally binding Bill of Rights with the EU Charter gaining primary law status under the Lisbon Treaty. Steps were taken before the EU Charter was drafted. The Copenhagen criteria were included in the Maastricht Treaty in 1992, compelling candidate countries to abide by certain standards, including the respect of democracy, the rule of law, human rights. The Maastricht Treaty also enshrined fundamental rights as “general principles of Community law”. Furthermore, Article 7 TEU provides for the monitoring of potential fundamental rights breaches in Member States as well as for sanctions in case breaches happen, including the possibility of suspending the Member State’s voting rights. Finally, the EU’s commitment for the protection of human rights was asserted with the creation of the FRA in 2007 and the appointment of a Commissioner in charge of fundamental

rights issues in 2010. The establishment of the rule of law framework of the EU by the Commission further asserted this commitment.

The functionalist approach suggests that the broadening of the EU's competences has created a need to uphold fundamental rights to ensure citizens remain protected under the new framework. But it can also be argued that the development of fundamental rights standards was the result of a growing EU concern for these fundamental rights. This may also be explained by a need for an increased EU legitimacy at a time of growing constraining dissensus.

Having two organizations regulating fundamental rights could be seen as an additional guarantee for the protection of EU citizens. However, while cooperation between the Council of Europe and the EU – and more specifically between the ECJ and the ECtHR – has improved over the years, much progress still has to be made to achieve a coherent system of protection of fundamental rights. The ECJ's rejection of the Draft Accession Agreement on the accession of the EU to the ECHR is an example of the EU's reluctance to be put under the supervision of another organization. The autonomy of the EU legal order has been put forward as the main argument for the refusal of the ECJ to approve of the Accession Draft. Ironically, while the EU requires States to surrender some of their sovereignty for the sake of European integration, the Union itself is rather reluctant to apply its own recommendation for the sake of human rights.

The EU is not the only actor to blame for this lack of coherence. States still play a major role in the application and protection of fundamental rights. Even though it is argued that they have lost their position as highest-ranking actors, they remain the ones that ultimately ensure that fundamental rights are guaranteed.

Despite the fact that EU citizens are protected under both the EU Charter and the ECHR, it appears that the framework remains insufficient. Major breaches have occurred and still occur, leaving the EU with only few solutions. The Copenhagen criteria loses much of its significance once

accession is achieved, and Article 7 TEU has never been activated. The fact that provisions for remedies in case of breach do exist but are not made use of demonstrates that despite a theoretical growing commitment to the protection of human rights, the actual commitment of the EU has its limits. Triggering Article 7 requires States to engage into a political battle with their partners, which they are not ready to do. In addition, as there is no middle ground between inaction and the heavy sanctions provided for by Article 7, States see it as a "nuclear option" that would have far too heavy consequences. Solutions such as the creation of a Copenhagen Commission in charge of monitoring fundamental rights standards and that would have the capacity to intervene in less drastic proportions in case of breach have been suggested. However, it is often argued that there would be a risk that the EU would then need to extend its competences, which the Member States are not ready to accept.

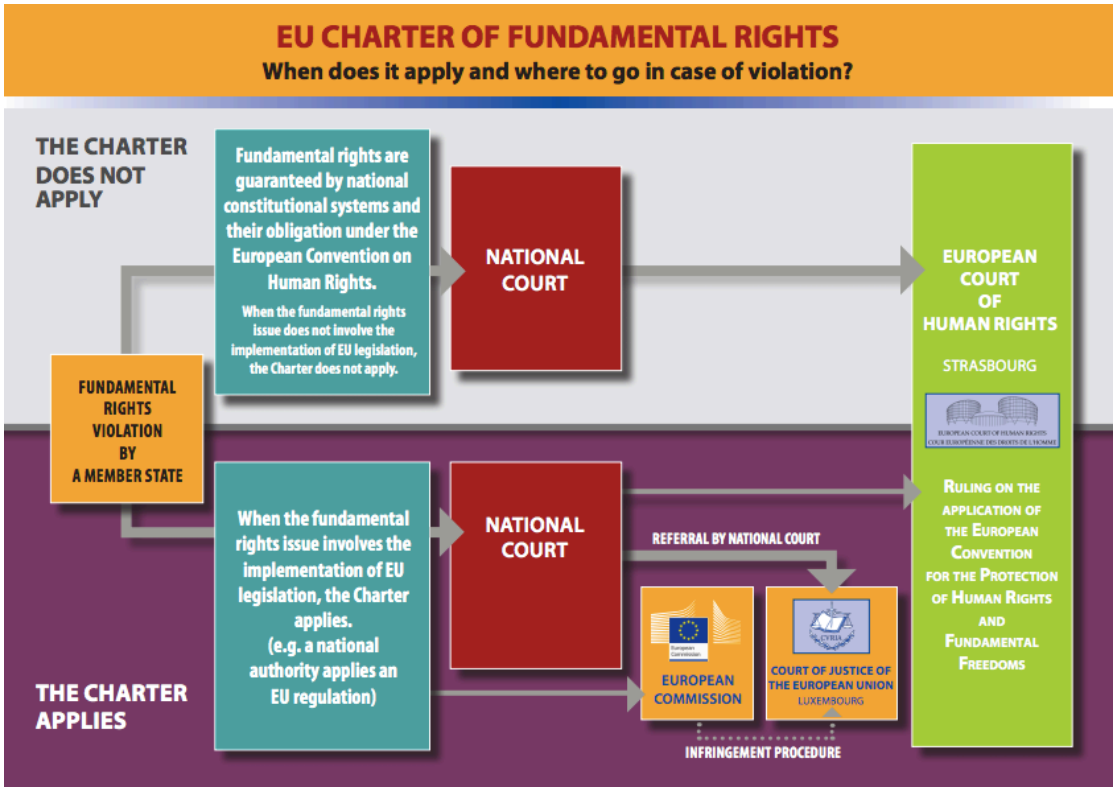
The lack of effectiveness and the lack of use of fundamental rights tools have had major consequences in various instances. Studying the case of Hungary has shown that despite the high standards set by the EU in terms of human rights, it has been unable to prevent and efficiently react to breaches in Hungary. The only way for the EU to intervene has been to act indirectly on matters in which it has competence in order to tackle fundamental rights breaches. Faced with the clear impediment of the independence of the judiciary system, it had to invoke non-discrimination clauses to start infringement procedures. It also had to resort to indirect motives to tackle the independence of the data protection authority. In both cases, even when Hungary was condemned, it did not prevent breaches from occurring as no remedy was found. The amendment to the Hungarian Constitution was harshly criticized and even if some provisions were repelled, the main sources of concern were not addressed. The lack of freedom of the press has concrete consequences on the population and has contributed to the rise of euroscepticism in the country, as the only information available is the one provided by the government and is pushing in that direction. With civil

society under increased pressure, the main actors that could give a critical perspective of the government are suppressed, leaving the population with only government approved content.

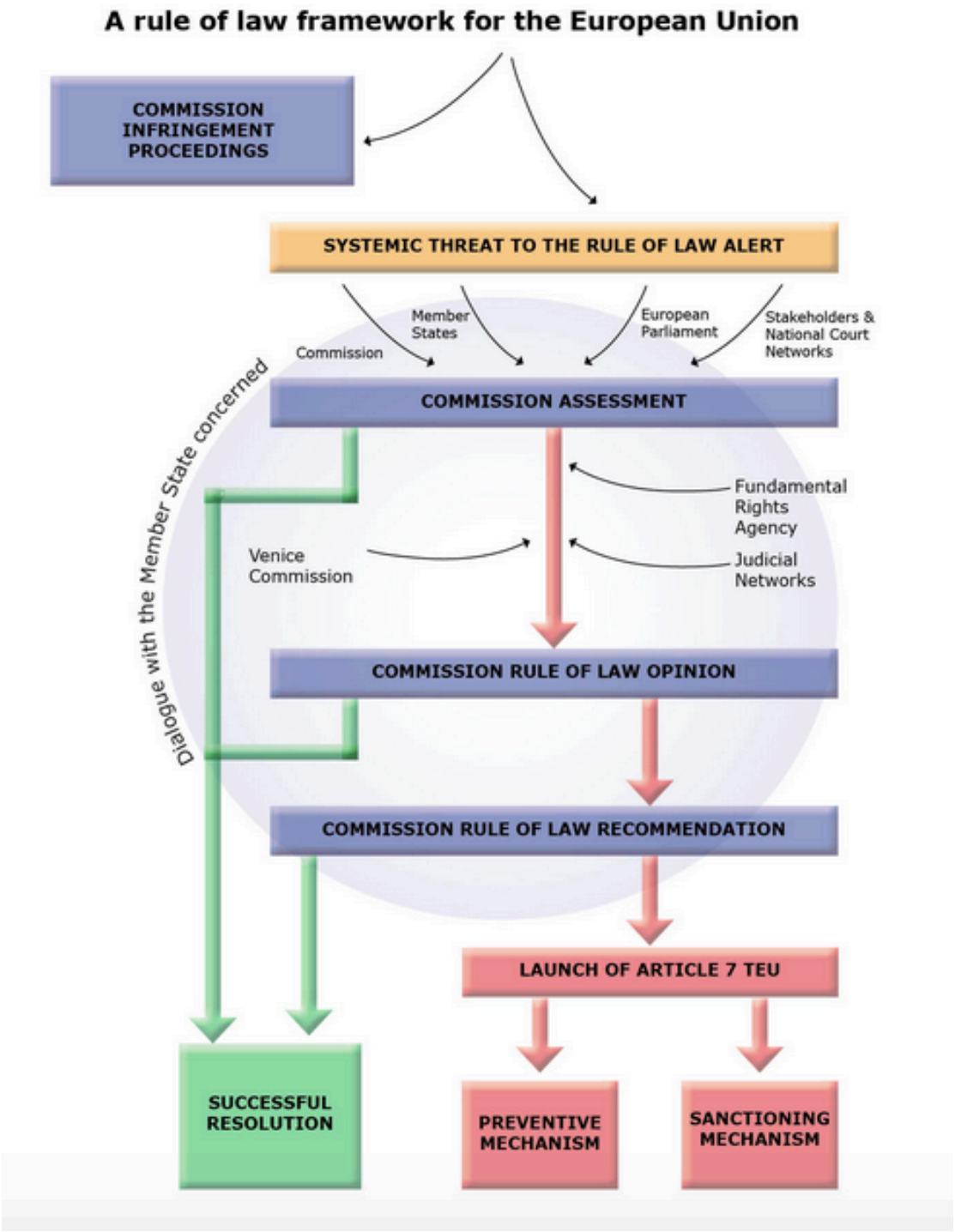
EU officials are perfectly aware of the situation in the country, as shown by Jean-Claude Juncker publicly saying "the dictator is coming" at the EU summit in Riga. Yet no concrete action has been taken and Viktor Orbán and his government have been pushing further the repressive reforms. Some statements even sound like taunts to the EU or attempts to test the limits of EU institutions' tolerance. Indeed, with statements implying that the government is contemplating opening discussions on the reestablishment of the death penalty in the country, the Hungarian government prompted immediate reaction from EU officials stating that this would be motive enough to activate Article 7 TEU. Similarly, in the midst of the major migrant crisis in the EU, the Hungarian government stated that it would suspend provisions on the readmission of migrants to the first country of entry into the EU as provided by the Dublin Regulations. It promptly retracted this statement after Brussels demanded clarifications and assurance that this would not be enforced.

Thus, while Hungary, and all EU Member States, are bound by both EU law ensuring fundamental rights standards, and by the ECHR as well as UN treaties, breaches continue to occur, and the international community remains helpless. President of Chile, Michelle Bachelet, said in 2008: "The respect for human rights is nowadays not so much a matter of having international standards, but rather questions of compliance with those standards". The Hungarian situation is a perfect – and rather worrying – case in point confirming her statement.

Appendix 1: The complaint mechanism under the EU Charter and the ECHR



Appendix 2: The EU rule of law framework



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