

# Charter of Fundamental Rights of the EU and Human Rights Protection in Europe

Professor Dr. Thomas Giegerich,  
LL.M. (Univ. of Virginia)

Europa-Institut, Saarland University  
Jean Monnet Chair for EU Law and  
European Integration

# Two Pillars of European Integration after 1945

- Council of Europe (1949)



- European Union (going back to the Schuman Declaration of 9 May 1950)



# Council of Europe (47 Members)

- Classical international organization
- No (supranational) power of direct intervention in the national legal orders of member states and no direct legal relationship with their citizens
- Main concern of CoE: protection of human rights
- Legal acts: recommendations (not legally binding); draft treaties (legally binding only for those member states that ratify them voluntarily)

# (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950) - ECHR

- First comprehensive human rights catalogue in treaty form worldwide (based on Universal Declaration of Human Rights [1948])
- Further human rights added by Additional Protocol (1952) and Protocols No. 4 (1963), No. 6 (1983), No. 7 (1984), No. 12 (2000) and No. 13 (2002)
- Numerous other CoE human rights treaties outside the ECHR system

# ECHR

- Collective Enforcement of Human Rights as Goal
- European Court of Human Rights (ECtHR) in Strasbourg ensures that Convention states observe their treaty commitments
- Persons claiming to be victims of human rights violation may file individual application with ECtHR against Convention state (Art. 34 ECHR)
- Judgments of ECtHR binding and enforceable by Committee of Ministers of CoE (Art. 46 ECHR)

# EU (28 Members)

- EU is a supranational organization with power of direct intervention in national legal orders of member states and direct legal relations with their citizens (citizens of the Union)
- EU law confers numerous rights on natural and juridical persons actionable in national courts (“direct effect”)
- EU law has primacy over national laws of all levels superseding without nullifying them

# European Economic Community (EEC): Nucleus of EU

- EEC Treaty (1957) did not include comprehensive catalogue of classical human rights – why?
- EEC Treaty included fundamental freedoms of the common (now: internal) market (see Art. 26 (2) TFEU) – difference to human rights?
- What economic human rights were affected by EEC regulation?

# ECJ begins to develop judge-made fundamental rights I

Stauder Case (1969):

“... the [secondary law] provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the Court.” (Case 29/69, Reports 1969, 419 para. 7)



# ECJ begins to develop judge-made fundamental rights II

Nold Case (1974): “As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States ...

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”

(Case 4/73, Reports 1974, 491 para. 13)

## ECJ begins to develop judge-made fundamental rights III

- Unwritten general principles of law protecting human rights are part of primary law with supremacy over secondary law (high rank)
- ECJ develops fundamental rights only gradually from case to case (fragmentary character)
- Natural and legal persons must study numerous ECJ cases to learn the scope of their human rights (inaccessibility)

# Codification of ECJ Method of “Finding” Human Rights in 1992

Art. 6 (2) (now Art. 6 (3)) TEU:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

# How to fix the fragmentary character and inaccessibility of EU human rights law?

## **Charter of Fundamental Rights of the EU (7 Dec. 2000), Preamble**

“... it is necessary to strengthen the protection of fundamental rights ... by making them more visible in a Charter.

This Charter reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention ... of Human Rights ..., the Social Charters adopted by the Union and the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”

The Charter was at first only solemnly proclaimed by the European Parliament, the Council and the Commission. Why?

# Current Status of Charter of Fundamental Rights

Art. 6 (1) (1) TEU (as amended by the Treaty of Lisbon 2007/2009):

“The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted ... on 12 December 2007, which shall have the same legal value as the Treaties.”

Why was Charter not made part of the Treaties?

# Precautionary Measures to “Protect” Member States I

Preamble: “... the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.”

(See also Art. 52 (7) of the Charter and Art. 6 (1) (3) TEU.)

# Precautionary Measures to “Protect” Member States II

## Art. 51 of the Charter

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. (See also Art. 6 (1) (2) TEU.)

# Precautionary Measures to “Protect” Member States III

- Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom
- Declaration (No. 53) of the Czech Republic on the Charter of Fundamental Rights of the European Union
- Declaration (No. 61) of Poland on the Charter of Fundamental Rights of the European Union
- Declaration (No. 62) of Poland concerning the Protocol ... [No. 30]



When are Member States “implementing Union law” and thus subject to the Charter under Art. 51 (1) (1)?

“The Court’s settled case-law indeed states ... that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. ... Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” (ECJ, Case C-617/10 - Åkerberg Fransson, ECLI:EU:C:2013:105)

When are Member States “implementing Union law” and thus subject to the Charter under Art. 51 (1) (1)?

- Whenever they either transpose directives or implement directly applicable legislative or other acts of the EU (ECJ, Case 5/88 – Wachauf) – Implementation Variant
- Whenever they obstruct the exercise of fundamental freedoms of the internal market relying on limitation clauses (Art. 36, 52 etc. TFEU) or unwritten overriding requirements in the public interest (ECJ, Case C-260/89 – ERT) as justification – Derogation Variant

When are Member States “implementing Union law” and thus subject to the Charter under Art. 51 (1) (1)?

Recent reference by French court in a case where a convicted criminal was removed from the electoral role according to French Criminal Code and Electoral Code: Compatibility with Art. 39 of the Charter?

ECJ, Case C-650/13 – Delvigne,  
ECLI:EU:C:2015:648, judgment of 6 Oct. 2015

Delvigne case shows close relationship between democracy and human rights.

## ECJ, Case C-650/13 – Delvigne I

24 The French, Spanish and United Kingdom Governments claim that the Court does not have jurisdiction to reply to the request for a preliminary ruling, since, according to those governments, the national legislation at issue in the main proceedings falls outside the scope of EU law. ...

28 It is necessary therefore to determine whether the situation of a Union citizen who, like Mr Delvigne, is faced with a decision to remove him from the electoral roll made by the authorities of a Member State and entailing the loss of his right to vote in elections to the European Parliament falls within the scope of EU law.

## ECJ, Case C-650/13 – Delvigne II

29 Article 8 of the 1976 Act [on Direct Elections to the European Parliament] provides that, subject to the provisions of that act, the electoral procedure is to be governed in each Member State by its national provisions. ...

31 Admittedly, as regards the beneficiaries of the right to vote in elections to the European Parliament, the Court has held ... that Articles 1(3) and 8 of the 1976 Act do not define expressly and precisely who are to be entitled to that right, and that therefore, as EU law currently stands, the definition of the persons entitled to exercise that right falls within the competence of each Member State in compliance with EU law.

# ECJ, Case C-650/13 – Delvigne III

32 However, as the German Government, the Parliament and the European Commission submitted in their observations, the Member States are bound, when exercising that competence, by the obligation set out in Article 1(3) of the 1976 Act, read in conjunction with Article 14(3) TEU, to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret.

33 Consequently, a Member State which, in implementing its obligation under Article 14(3) TEU and Article 1(3) of the 1976 Act, makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens ... must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter.

34 Accordingly, the Court has jurisdiction to reply to the request for a preliminary ruling.

## ECJ, Case C-650/13 – Delvigne IV

40 ... Article 52(2) of the Charter provides that rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties.

41 It must be noted in that regard that, according to the explanations relating to the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be given due regard for the purpose of interpreting it, Article 39(1) of the Charter corresponds to the right guaranteed in Article 20(2)(b) TFEU. Article 39(2) of the Charter corresponds to Article 14(3) TEU. Those explanations also state that Article 39(2) takes over the basic principles of the electoral system in a democratic State.

# ECJ, Case C-650/13 – Delvigne V

42 As regards Article 20(2)(b) TFEU, ... that provision is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of the right to vote in elections to the European Parliament, by providing that every citizen of the Union residing in a Member State of which he is not a national is to have the right to vote in those elections in the Member State in which he resides, under the same conditions as nationals of that State ...

43 Thus, Article 39(1) of the Charter is not applicable to the situation at issue in the main proceedings, since, as is evident from the material in the file available to the Court, that situation concerns a Union citizen's right to vote in the Member State of which he is a national.



# ECJ, Case C-650/13 – Delvigne VI

44 As regards Article 39(2) of the Charter, ... this constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament in accordance with Article 14(3) TEU and Article 1(3) of the 1976 Act.

45 It is clear that the deprivation of the right to vote to which Mr Delvigne is subject under the provisions of national legislation at issue in the main proceedings represents a limitation of the exercise of the right guaranteed in Article 39(2) of the Charter.

46 ... Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Article 39(2) of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others ...

## ECJ, Case C-650/13 – Delvigne VII

47 ... since the deprivation of the right to vote at issue stems from the application of the combined provisions of the Electoral Code and the Criminal Code, it must be held that it is provided for by law.

48 Furthermore, that limitation respects the essence of the right to vote referred to in Article 39(2) of the Charter. The limitation does not call into question that right as such, since it has the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled.

49 Lastly, a limitation such as that at issue in the main proceedings is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty. [That was the case in Delvigne.]

# Overview of Charter of Fundamental Rights of the EU I

- Most modern international human rights catalogue in the world – prove this assertion!
- 7 Titles: first six titles set forth substantive guarantees under the labels of dignity, freedoms, equality, solidarity, citizens' rights, justice; Title VII includes general provisions
- Distinction between rights, freedoms and principles not entirely clear (see Art. 52 (5), Art. 51 (1) (2))

# Overview of Charter of Fundamental Rights of the EU II: Art. 52 on Scope and Interpretation

- Para. 1: general limitation clause ( $\neq$  ECHR)
- Para. 2: Parallelism between Charter rights and Treaty rights
- Para. 3: Parallelism between Charter rights and Convention rights
- Para. 4: Parallelism between Charter rights and constitutional rights common to Member States

## Overview of Charter of Fundamental Rights of the EU III: Art. 53 on Protection Level

- Charter rights provide minimum standards which may be exceeded by Union law, international law or Member States' constitutions but not gone below (see Art. 53 ECHR)
- But Art. 53 does not permit Member States to give their national fundamental rights primacy over EU law outside the Charter (see ECJ, Case C-399/11 – Melloni, ECLI:EU:C:2013:107)

## Excerpts from the ECJ's Melloni Judgment I

56 The interpretation envisaged by the national court ... is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law [such as regulations, directives and decisions]. ...

57 Such an interpretation of Article 53 of the Charter cannot be accepted.

58 That interpretation ... would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

## Excerpts from the ECJ's Melloni Judgment II

59 It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order ..., rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State ...

60 It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

## Excerpts from the ECJ's Melloni Judgment III

62 ... Framework Decision 2009/299 ... effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant.

63 Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State ... would ... compromise the efficacy of that framework decision.



## Excerpts from the ECJ's Melloni Judgment IV

64 In the light of the foregoing considerations ... Article 53 of the Charter must be interpreted as not allowing a Member State [Spain] to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State [Italy], in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

# EU Accession to the ECHR

- Goal: To ensure direct external control of EU human rights compliance by ECtHR (credibility concern)
- Basis: Art. 6 (2) TEU; Art. 218 (8) (2) TFEU; Protocol (No. 8) relating to Art. 6 (2) TEU
- Instrument: Draft revised agreement on the accession of the EU to the ECHR (June 2013)
- Fate: ECJ, Opinion 2/13, ECLI:EU:C:2014:2454, finds numerous conflicts of that agreement with primary law (esp. autonomy of EU law)

## Negative ECJ Opinion on Draft Accession Agreement I

Protocol No. 8 provides that the accession agreement must fulfil certain conditions so as, in particular, to make provision for preserving the specific characteristics of the EU and EU law and to ensure that accession of the EU does not affect its competences or the powers of its institutions. It must be ensured that the interpretation of EU law by the ECJ binds the ECtHR.

## Negative ECJ Opinion on Draft Accession Agreement II

The approach adopted in the draft agreement, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU. In particular, this approach does not take account of the fact that, as regards the matters covered by the transfer of powers to the EU, the Member States have accepted that their relations are governed by EU law to the exclusion of any other law.

## Negative ECJ Opinion on Draft Accession Agreement III

In requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Parties which are not members of the EU but also in their relations with each other, the ECHR would require each Member State to check that the other Member States had observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States. In those circumstances, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

## Negative ECJ Opinion on Draft Accession Agreement IV

Art. 344 TFEU prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Treaties. The draft agreement still allows for the possibility that the EU or Member States might submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State or the EU in relation to EU law. The very existence of such a possibility undermines the requirements of the TFEU.

## Negative ECJ Opinion on Draft Accession Agreement V

With regard to the co-respondent mechanism, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions. The ECtHR could adopt a final decision in that respect which would be binding both on the Member States and on the EU. To permit the ECtHR to adopt such a decision would risk adversely affecting the division of powers between the EU and its Member States.

## Negative ECJ Opinion on Draft Accession Agreement VI

With regard to the procedure for prior involvement of the ECJ, the draft agreement excludes the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law by means of that procedure. Limiting the scope of that procedure solely to questions of validity adversely affects the competences of the EU and the powers of the Court.



# Negative ECJ Opinion on Draft Accession Agreement VII

Under the draft agreement, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, notably those whose legality the Court cannot, for want of jurisdiction, review in the light of fundamental rights. Such a situation would effectively entrust, as regards compliance with the rights guaranteed by the ECHR, the exclusive judicial review of those acts, actions or omissions on the part of the EU to a non-EU body. Therefore, the draft agreement fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in the area of the CFSP.

# Status of ECHR within EU Legal Order after Accession by EU

Art. 216 (2) TFEU: ECHR would rank above  
secondary Union law

Art. 218 (11) TFEU: ECHR would rank below  
primary Union law

# Current Status of ECHR within EU Law

Art. 6 (3) TEU identifies ECHR as source of unwritten fundamental rights norms of primary Union law, making it indirectly part of Union law)

Art. 52 (3) Charter directs courts to interpret Charter provisions – which are part of primary Union law – in conformity with ECHR, again making ECHR indirectly part of primary Union law

# Human Rights Protection against Individualized Sanctions Imposed by UN Security Council I

- Kinds of individualized sanctions: asset freezes and travel restrictions (*e.g.* against suspected supporters of international terrorism) which UN Member States are required to implement (Art. 25, 41 UN Charter)
- Transposition into EU law through a CFSP decision (based on Art. 29 TEU) and (in cases of asset freezes) a subsequent Regulation (based on Art. 215 (2) TFEU)

## Human Rights Protection against Individualized Sanctions Imposed by UN Security Council II

- Limited human rights protection at UN level: Delisting procedure (in the best case administered by Ombudsperson under UN SC Res. 2161 (2014) whose recommendations remain subject to veto by each permanent member)
- Lack of adequate protection at UN level necessitates subsidiary protection at European level

## UNSC Res. 2161 (2014), 17 June 2014, Annex II

15. In cases where the Ombudsperson recommends that the Committee consider delisting, the requirement for States [to impose sanctions] shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of [the] Report of the Ombudsperson ... unless the Committee decides by consensus before the end of that 60-day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity;

# UNSC Res. 2161 (2014), 17 June 2014, Annex II (continued)

provided that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and provided further that, in the event of such a request, the requirement for States [to impose sanctions] shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council.

# Luxembourg Courts Provide Protection against Individualized Sanctions I

Kadi I/1 (against original asset-freeze Regulation)  
General Court: in action for annulment (Art. 263 [4] TFEU), EU Regulation literally transposing SC Resolution on individualized sanctions can only be reviewed as to compatibility with *jus cogens* standards of international human rights law because these are the only standards also binding on SC (ECR 2005, II-3649 [T-315/01])



# Luxembourg Courts Provide Protection against Individualized Sanctions II

Kadi I/2 (against original asset-freeze Regulation)

ECJ: normal fundamental rights standards of primary EU law apply, leading to annulment of Regulation for violations of right to effective remedy despite international legal obligations of Member States under UN Charter (C-402/05 P etc., ECR 2008, I-6351). But under Art. 264 (2) TFEU, ECJ suspended annulment for three months to enable Commission to repair deficient Regulation.

# Luxembourg Courts Provide Protection against Individualized Sanctions III

## Kadi II (against amended asset-freeze Regulation)

- General Court: Voices misgivings over ECJ judgment of 2008 but feels bound by it and thus annuls amended Regulation (T-85/09)
- Advocate General of ECJ (ECLI:EU:C:2013:176): Proposes to set aside GC judgment and dismiss action by Kadi because GC limited Commission's margin of appreciation too much (deferential standard of review)
- ECJ (judgment of 18 July 2013, ECLI:EU:C:2013:518): Council's appeal dismissed; in contrast to Adv. Gen., ECJ applies strict standard of review because of lack of adequate judicial remedies at UN level

## Luxembourg Courts Provide Protection against Individualized Sanctions IV

ECJ does not even try to justify its decision under UN law (which does not directly bind the EU, but all the member states). Rather, ECJ takes a strictly dualist approach, distinguishing internal EU law (with which it is solely concerned) from external international law. ECJ compels member states to violate their obligations under the UN Charter.

## ECtHR also Provides Protection against Individualized Sanctions I

**Al-Dulimi v. Switzerland:** Since no equivalent human rights protection is available at UN level, Convention States remain fully responsible under ECHR for all human rights interferences undertaken to fulfil their UN Charter obligations (despite Art. 103 UN Charter? – mentioned only in dissents) - Chamber judgment of 26 Nov. 2013 (No. 5809/08) finds violation of Art. 6 (1) ECHR (4 votes to 3, case currently pending in Grand Chamber)

# ECtHR also Provides Protection against Individualized Sanctions II

**Bosphorus approach** (developed for EU) extended by Al-Dulimi to UNSC sanctions: Under Bosphorus, Convention States taking action in compliance with their commitments from other treaties may interfere with Convention rights only “as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.”

If no equivalent protection is provided by relevant organisation, ECtHR will review Convention State action under ordinary Convention standards and disregard that State’s other treaty commitments (Grand Chamber judgment of 30 June 2005 [No. 45036/98])

# Has the EU Become a “Human Rights Union”? - I

- Art. 2 TEU: Foundational values of the EU and common to Member States include human dignity and respect for human rights, including the rights of persons belonging to minorities
- Copenhagen Criteria for Candidate Countries of 1993 (later codified in Art. 49 TEU): “Membership requires that the candidate country has achieved stability of institutions guaranteeing ... human rights and respect for and protection of minorities ... “

# Has the EU Become a “Human Rights Union”? - II

- Art. 21 TEU – principles guiding the EU’s actions on the international scene and to be advanced by it include “the universality and indivisibility of human rights and fundamental freedoms” as well as “respect for human dignity”
- Art. 2 of the mixed Association Agreement EU-Ukraine (2014): Respect for human rights and fundamental freedoms, as defined in particular in the ECHR, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of the Agreement.

# “Copenhagen Dilemma” I

EU is strict with regard to compliance with the common values and standards on the part of candidate countries but lacks effective monitoring and sanctioning tools once they have joined the EU. There is a gap between

- Art. 258 TFEU (too subtle) and
- Art. 7 TEU, Art. 354 TFEU (too blunt - “nuclear option”).



## “Copenhagen Dilemma” II

How to fill that gap? EU must be able to react effectively to “systemic threat to the rule of law” in a Member State, including general deterioration of human rights situation.

Thus, new Rule of Law Initiative by Commission (11 March 2014) which distinguishes three stages:

# Rule of Law Initiative by Commission (2014)

1. Fact-check by Commission and dialogue with Member State concerned resulting in “rule of law opinion”.
2. “Rule of law recommendation” addressed to the Member State by Commission. Fixes time limit for solution of identified problems. Recommendation can be made public.
3. Monitoring of Member State’s implementation of recommendation by Commission.

[Art. 7 TEU remains as procedure of last resort.]

# Human Rights Protection through Secondary EU Law (Examples I)

- **General Data Protection Regulation (EU) 2016/679** of 27 April 2016 (OJ 119, p. 1) – based on Art. 16 TFEU
- **DIRECTIVE 2004/38/EC** of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ... (OJ L 158, p. 77) – based on Arts. 18, 21, 46, 50 and 59 TFEU

# Human Rights Protection through Secondary EU Law (Examples II)

- **DIRECTIVE 94/80/EC** of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ L 368, p. 38) – based on Art. 22 (1) TFEU
- **DIRECTIVE 2013/1/EU** of 20 December 2012 amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ L 26, p. 27) – based on Art. 22 (2) TFEU

# Human Rights Protection through Secondary EU Law (Examples III)

**Anti-Discrimination Directives** – based on Art. 19 (1), 157 (3) TFEU:

**DIRECTIVE 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22)

**DIRECTIVE 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, p. 16)

**DIRECTIVE 2004/113/EC** of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, p. 37)

**DIRECTIVE 2006/54/EC** of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, p. 23)

**DIRECTIVE 2010/41/EU** of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity ... (OJ L 180, p. 1)

# Human Rights Protection through Secondary EU Law (Examples IV)

**Minimum rules in criminal proceedings** – based on Art. 82 (2) TFEU:

**DIRECTIVE (EU) 2016/800** of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, p. 1)

**DIRECTIVE (EU) 2016/343** of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, p. 1)

**DIRECTIVE 2013/48/EU** of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, p. 1)