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HUMAN RIGHTS POLICY OF THE EUROPEAN UNION AND THE ADJUSTMENT OF UKRAINIAN LEGISLATION TO EUROPEAN STANDARDS

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Introduction

After obtaining its independence Ukraine opened a new stage of development. The country changed its communistic appearance and took a way of democracy and human rights protection. That way required the adopting of the new legislation and taking effective steps to join the world community. One of the main achievements in this direction was adoption of the Constitution on 26 June, 1996 and ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 17 July, 1997. This ratification has opened by itself the mechanism of human rights protection as it is stipulated by this Convention and pledged its resolve to meet the requirements, which Ukraine took upon its accession to the Council of Europe. For the first time the Ukrainian citizens have obtained the real right to apply for protection of their violated rights and freedoms directly to international bodies, in this case it is to the European Court of Human Rights in Strasbourg (as set by the Article 55 of the Constitution of Ukraine). That right has some restrictions with certain requirements, according to the formal mechanism of complaint stated by the Convention, nevertheless, to a large extent it adds to national mechanisms of human rights protection and creates conditions for the execution of supplementary supervision over its observance by all branches of power. Development of the legislation in accordance with requirement of the European Court of Human Rights already has a long history. I feel that the most important task now is to adjust the Ukrainian legislation and human right protection mechanism to the European Union standards. In my research I want to observe these requirements and find an appropriate way for the Ukrainian lawmaking initiative.

1. Ukraine on a way to the EU: adaptation of the new law to harmonize with the EU requirements.

The level of human rights protection is one of the main indicators of the legal system efficiency. Human rights mechanism is used to test legislation of European countries on development of the overall legal structure.

The forthcoming accession of the Central and Eastern European countries to the EU will be one of the most crucial and complex challenges faced by Europe in the post-cold war period. However, one of the approach for the successes and failures of the enlargement process will partly depend on political, economic and legal reforms in neighboring countries.¹

Enlargement will not only shape the future political and economic outlooks of the new Europe, but will also, more importantly, test the democratic legitimacy of the integration, because it presumes the importation of the huge European legal heritage into the candidate countries' legal systems. The results of these efforts are very much expected by countries, such as Ukraine, that associate themselves with the future, enlarged Europe and have thereby refused the legacy of socialistic legal systems.² One of the main issues in the process of enlargement is adjustment of legislation, which requires transparency, legal certainty and uniformity of harmonization of legislation.

The changes of the Ukrainian legal system in the direction to Europe started shortly after independence. Ukrainian proclaimed the decision to get on a new political course for the accession to the European Union structure. For that, in 1994 Ukraine signed the Partnership and Cooperation Agreement (PCA) with the European Community. By signing and subsequently ratifying the PCA,

¹ Roman Petrov, *Recent Development in the Adaptation of Ukrainian Legislation to EU Law*, European Foreign Affairs Review, 8, 2003, at 125.

² *Id.* at 125.

Ukraine has accepted the commitment to ensure that its legislation will be gradually made compatible with that of the Community.

As a political objective, Ukraine prioritized the integration into international political and economic structures and, consequently, membership in the Council of Europe. This organization has some legal requirements to countries that want to be a member. The first attempt made by Ukraine to go along with these requirements was to ensure a minimum conformity of legislation in the spheres of democracy and human rights protection. As a result, Ukrainian criminal, penal and civil legislation underwent substantial changes, such as the abolition of the death penalty and consequently the adoption of a new criminal code, and new criminal procedural and civil procedural codes. These reforms show the first steps towards the achievement of European legal standards into the developing Ukrainian legal system,³ but it is only a beginning.

As stated by the European Council at Copenhagen in 1993, the EU membership requires that the candidate country has achieved, *inter alia*:

stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy able to cope with competitive pressures and market forces within the EU; and the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.⁴

Therein, the Copenhagen criteria for membership in the EU were formally legitimated and accepted as a basic framework for integration efforts in Ukraine. To organize the sufficient legal basis of execution of the requirement of the PCA, Ukraine lawmaking body has designed the concept of adaptation of national law to the EU legislation. Currently this concept is exclusive to Ukraine and at minimum, it satisfies a light PCA approximation commitment, and at maximum, it ensures that the EU

³ Petrov, *supra* note 1, at 126.

⁴ European Council, Presidency Conclusions: European Council in Copenhagen, 21-22 June 1993, available on <http://europa.eu.int/scadplus/leg/en/lvb/l33021.htm>

pays attention to the European objective of Ukraine. Furthermore, the adaptation of Ukrainian legislation to *acquis communautaire*⁵ provides some expectation that the EU might present a new model of joint relations, which give possibility to enhance level requested for accession to the EU.

The PCA entering into force on 1 March 1998 presents the Ukrainian government with serious questions about possibility within national legal system to find the methods and means of the implementation and enforcement of the PCA provisions. It was apparent in 1994 then the Ukrainian legal system, based on the inherited socialistic legal system, required substantive hard work to achieve the prerequisites for legal, economic and political changes required by the PCA.⁶ At the beginning of the integration process the government of Ukraine took the direction toward the process of adaptation of national legislation to the EU legal standards. In that way Ukrainian government found one of legal mechanism used in lawmaking process. This is a notion of approximation, which is generally applied in that process of accession.

Since 1998 the President and the Government of Ukraine have adopted a set of laws to implement the PCA. The Verkhovna Rada and the Government of Ukraine adopted currently about 80 legal acts of integration of Ukraine into the EU. The general framework of the integration process was set up in the Strategy of Integration of Ukraine into the EU (Strategy of Integration).⁷ This document determines the major priorities of the executive power, which are aimed at the vital objective of obtaining EU membership.⁸ Also the great value is that the President of Ukraine advocated that “joining the European political, economic and legal area and, subsequently, acquiring associate membership of the EU constitute the major priority of the Ukrainian foreign policy in the medium

⁵ According to the Law of Ukraine: *On the National Programme of Approximation of Ukrainian Legislation to the European Union Legislation*: “*Acquis communautaire* – shall mean the legal system of the European Union, including the European Union legal acts adopted within the framework of the European Community, Common Foreign and Security Policy and Common Policy on Justice and Home Affairs.”

⁶ Petrov, *supra* note 1, at 133.

⁷ Edict of the President of Ukraine ‘On approval of the *Strategy of Integration of Ukraine to the European Union*’, 11 June 1998, 615/98, available on <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=annot>

⁸ “The initial deadline to qualify for the full membership in 2007 was recently extended to 2011. The deadline to acquire the WTO membership was set up at 2003 and now very close to finish.” Proclamation of the President of Ukraine to the Verkhovna Rada of Ukraine ‘European Choice, Conceptual foundations of the strategy of economic and social development of Ukraine in 2002– 2011’, 20 June 2002.

term.”⁹ This action of the heard of state had an effect that executive agencies took that direction for corresponding institutional support and established the purpose of accelerating the process of integration to the EU and of implementing the PCA.¹⁰

The adaptation of Ukrainian legislation to the EU law was formally begun in 1999 when the Cabinet of Ministers of Ukraine issued the Concept of Adaptation of Ukrainian Legislation to the Legislation of the EU (Concept of Adaptation), where the official meaning of the adaptation process was established. The general aims and scope of the adaptation process in Ukraine were already broadly defined in the Strategy of Integration, as the

approximation of national legislation with contemporary European legal systems in order to safeguard the development of political, business, social, and cultural activism of Ukrainian nationals, to provide the economic growth of Ukraine in the EU, and to facilitate the gradual increase of well-being of Ukrainian nationals to the EU level.¹¹

Recently, however, legal acts issued by the Government of Ukraine seem to apply concurrently and, sometimes interchangeably, definitions of ‘adaptation’, ‘approximation’, ‘harmonization’, ‘unification’, and ‘incorporation’ without clarifying the difference in their content. According to the Strategy of Integration, the adaptation process in Ukraine was aimed at implementing the PCA, entering into partial agreements with the EU, and making Ukrainian legislation increasingly similar to the EU laws. The Concept of Adaptation formulates the notion of ‘adaptation’ as a “gradual and coherent process, which encompasses three basic stages, each of them guaranteeing certain level of conformity of laws, in the specified spheres of priority.”¹²

⁹ *Supra* note 7, para 7 of the preamble.

¹⁰ Ruling of the President of Ukraine ‘About the list of the governmental authorities responsible for fulfillment of the tasks defined by the *Strategy on Integration of Ukraine to the European Union*’, 27 June 1999, 151/99-rp (amended by Edict of the President of Ukraine, 6 July 2000, 240/2000), available on <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=annot>

¹¹ *Supra* note 7.

¹² Decree of the Cabinet of Ministers of Ukraine, *Concept of Adaptation of the Legislation of Ukraine to the Legislation of the EU*, 16 August 1999, available on <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=annot>

The first step of adaptation aims to develop the Ukrainian legal system in accordance with the Copenhagen criteria, approximating Ukrainian legislation in the priority areas involved in the PCA and other international treaties that relate to the EU–Ukraine cooperation, and within the priority directions those stated by the Concept of Adaptation.¹³

The second step of adaptation will include the reconsideration of Ukrainian legislation in force in the directions, specified in Article 51 of the PCA with a purpose to ‘approximate adequacy’ with EU legislation. Also, this step expects the establishment of the norms of legal assistance require for the establishment of a free trade area between Ukraine and the EU, and the consequent preparation of Ukraine for associate membership in the EU. It is expected that this step of adaptation is likely to commence in time for the transition membership period of the first wave of accession of the Central and Eastern European countries into the EU.¹⁴

The third step of adaptation is not defined perfectly well. It could be started upon the EU’s recognition of Ukraine’s sufficient progress in accomplishment of the tasks set for the first and second step of adaptation. This step of adaptation is aimed at preparing Ukraine for the negotiation of an accession agreement with the EU and the subsequent harmonization of the entire Ukrainian legislation with the whole *acquis communautaire*.¹⁵

Shortly after the Concept of Adaptation came into force, the President of Ukraine issued the comprehensive Programme of Integration to the EU (Programme of Integration)¹⁶ which included a framework of short, medium, and long term objectives for the executive branch to integrate Ukraine into the EU. The Programme of Integration accesses the level of openness of the domestic market, economic policies, social protection, regional cooperation, life and environmental standards, and a broad range of other issues, which arise along with adaptation of the policy on integration to the EU. The Programme of Integration has both declarative and normative effects, and offers the detailed

¹³ Petrov, *supra* note 1, at 134.

¹⁴ *Id.*, at 135.

¹⁵ *Id.*

¹⁶ Programme of Integration to the European Union, approved by the Edict of the President of Ukraine, 14 September 2000, 1072/2000, available on <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=annot>

guidelines as well as political course for the executive authorities for the implementation of the PCA and other measures directed at the integration of Ukraine into the EU.¹⁷ The Programme of Integration outlines possibilities and choices of Ukraine's potential membership in the EU. Additionally, it evaluates the accurate objectives of political, economic and legal reforms through the careful analysis of the current state of democracy and rule of law, protection of human rights, administrative and judicial reform, and economic development in Ukraine.

For the completing the priority of the Programme of Integration, the Cabinet of Ministers of Ukraine issued the Adaptation Action Plans¹⁸ that provides an accurate list of organizational and legislative measures to be enforced and adopted. As example, the 2002 Yearly Action Plan pays particular attention to the cooperation with international institutions and enforcing international conventions (accession into the WTO is regarded as one of the major priorities for the time being). On this time the government of Ukraine is taking final negotiations on the issue of accession into the WTO.

2. The EU human rights policy in the context of enlargement.

At the European Council held at Nice in December 2000, the European Union declared the Charter of Fundamental Rights, Drafted by the European Council at the meeting in Cologne in 1999. The document affirms the commitment of the EU to common values in the areas of social policy and states the importance of human rights, minority rights, and anti-discrimination principles in the European economic integration. The Charter addresses fundamental social rights and not just the basic "fundamental freedoms" similarly denominated in the Treaties Established European Union (TEU) such as, "freedom to provide services," "free movement of people," and the like.

¹⁷ Petrov, *supra* note 1, at 135

¹⁸ Action Plan for fulfillment of priority provisions of the Programme of integration in 2002 adopted by the Ruling the Cabinet of Ministers of Ukraine on 28 January 2002, available on www.rada.kiev.ua

From this we can see that social values of human rights not been ignored by the EU legal system. It first emerged as a part of national law and with time has transformed a common human value into international law with a human rights tradition becoming a decisive factor in the modern concept of the state. The EU legal system, built on the principle of 'supranationalism', originated and developed after human rights had become a part of international law. Statement of the Charter of Fundamental Rights in 2000 complemented the process of institutional building within the EU, the main result of which was the ever-closer union of member states and enlargement to include Central and Eastern European states. There was the clear understanding that consolidation of the institutional, political and economic bases of the EU could not be completed without guaranteeing a high level of protection of human rights and fundamental freedoms.

The EU as a separate body has long managed to proceed without a separate law establishing human rights basis, relying instead on all-European and international instruments as the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948, and the European Convention on Human Rights and Fundamental Freedoms adopted by the Council of Europe on 1950. The EU Court of Justice (ECJ) has, however, paid substantial attention to questions connected with human rights. In certain respects, this situation has arisen as a consequence of opposition to the ECJ and some EU institutions. For a long time, the EU has provided judicial protection for rights of only an economic character, these being rights associated with, the free movement of goods, the freedom to provide services, the free movement of capital, and labor issues. All these have connection to the creation of the common market.

The developing case-law of the Court of Justice of the European Communities relating to 'general principles of European Community law' – and its increasing reference to the European Convention on

Human Rights and other sources of fundamental rights – suggests that the European Convention may have been accommodated into the corpus of European Community law.¹⁹

As a result, the issue of human rights protection has only become pressing with the entering into force of the Maastricht and Amsterdam Treaties.

Another thing which is to be regretted is that TEU does not make up for the absence of an enforcement mechanism in matter of human rights which is independent of the Community institution. The Community is not a party to the ECHR and therefore, it is not subject to control mechanisms. The European Commission of Human Rights has rejected as inadmissible application of human rights violations by Community institutions by stating that the Community is not a party to the ECHR and Union itself is unable to sign up to the ECHR because it is not a sovereign state. Thus, for instance, applications against the European Parliament have failed because of a lack of jurisdiction *ratione personae* of the European Commission of Human Rights.²⁰

As an example, civil servants of the Community have no other remedies against infringements of their human rights by their employer (European Community body), because of the principle of ‘supranationalism’ of that institution. So, individuals in Member States whose rights are infringed by the Community cannot complain in Strasbourg against the Community institutions. Acts promulgated by the Community enjoy a sort of “immunity from the Convention.”

The Charter is a text from the EU, which currently has 27 Member States. Also, the scope of protection provided by these two bills is different. The ECHR relates mostly to civil and political rights, while the Charter covers additional aspects, such as workers’ social rights, bioethics, and political rights of Union citizens. The text of Charter does not establish new rights, but assembles

¹⁹ Drzemczewski Andrew, *European human rights convention in domestic law*, Clarendon press-Oxford-1983, at 229.

²⁰ Nanette A. Neuwahl, *The Treaty on European Union: A Step Forward in the Protection of Human Rights?* The European Union and Human Rights, Nanette A. Neuwahl ed., *International Studies in Human Rights*, Vol. 42, 1995. at 18.

existing rights that were previously scattered over a range of sources. These sources include the ECHR, as well as various international conventions drawn up by the Council of Europe, the UN and ILO, various sources derived from EU treaties themselves and from the case law of the ECJ.

When considering the reasons why the Charter was adopted, one legitimate question which can be asked is why, having an effective regional system for human rights protection based on the ECHR to which all EU member states are signatories, the EU managed to create a new legislation and system of human rights protection? Possible answer for that is that the Charter is a compromise between the ECJ, the EU member states and the European Commission, and it is organized as an alternative to the EU becoming a signatory to the ECHR.

The previous existence of various normative levels of fundamental rights protection in Europe is favorable to the progress of the rule of law and anthropocentric value. There is a strong tendency toward harmonisation of the several levels. The ECHR has the strong influence both on EC law and member States' Constitutional Law...The new Charter will continue this process and also add autonomous elements to the protection of fundamental rights. It will give important impulses to the creation of a complete European Constitution valid for the member states of the growing EU.²¹

The Charter is the consolidation of the judicial doctrine of the ECJ incorporating into EU law common European standards on human rights protection as defined in numerous documents of the Council of Europe. Becoming a signatory to the ECHR could lead to substantial changes in the judicial system of the EU with the ECJ, as the EU's highest judicial authority, having to concede competence in favor to the European Court of Human Rights in Strasbourg which would have jurisdiction to revise decisions of the ECJ covered by the ECHR. It was feared that this might lead to the judicial and legal system of the EU being undermined.²²

²¹ Rainer Arnold, *A Fundamental Rights Charter for the European Union*, The Tulane European and Civil Law Forum, 2000/2001.

²² Alston, P. and Weiler J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', *European Journal of International Law*, 9 (4) 1998, 626-657.

Also the ECJ trying to decide that issue and “the Court reasoned that the EC treaty did not authorize the EC institution to sign the ECHR and in that way to submit the ECJ to the control of the Strasbourg Court.”²³

The reaction of the Council of Europe was expressed in Recommendation 1439 of January 25, 2000, in which the Parliamentary Assembly noted that the Charter might supplement but cannot fail the system of human rights protection in Europe, and that adoption of the Charter should not lead to the creation of parallel systems for human rights protection. The Parliamentary Assembly recommended that negotiations with the EU on amendments to TEU be started as soon as possible in order to avoid any form of competition between these two systems.²⁴

Meanwhile, the existence of the ‘unwritten Bill of Human Rights’ in EU law suggested that a bill or equivalent be drawn up. Moreover, it was noted that the ECJ recognizes that EU Law consists not only of the Treaties, but also of secondary legislation and common principles of law, in particular, fundamental rights and the principles of the constitutional law of member states. And since all the member states had signed and ratified the ECHR, the EP (European Parliament), the Commission and the Council pay substantial importance to it when performing their duties.²⁵

Adoption of the Charter does not imply disadvantages in the ECHR, contrarily, it signals an improvement in the system for human rights protection in the EU, especially in the sphere of social and economic rights. The functioning of this system will potentially lead to the European Court of Human Rights differentiating between applicants from the EU member states and countries of Central and Eastern Europe with less developed protection within their national legal systems. From this it may be

²³ Rainer Arnold, *A Fundamental Rights Charter for the European Union*, The Tulane European and Civil Law Forum, 2000/2001.

²⁴ *Recommendation 1479, Charter of fundamental rights of the European Union, adopted by the Assembly September 2000* (Strasbourg: Council of Europe, September 2000) available on http://www.coe.int/T/E/Human_rights/

²⁵ *European Community Law (Selected Documents)*, Minnesota: West Publishing Co., 1993, at 214.

possible to conclude that the ECHR is likely to lose its position as the most effective regional instrument for human rights protection in Europe. At the same time, adoption of the Charter represents a step forward in the establishment of and respect for common values, rights and freedoms.

The Charter also has a specific role in relation to the forthcoming enlargement of the EU. All the candidate countries will adhere to the ECHR, which provides a more than adequate guarantee of fundamental rights. However, the list of rights included in the Charter presents a more precise definition of the common values that must be respected in a wider geographical entity.

The treaties establishing the Court of Justice of the European Union had obvious purpose of interpreting and enforcing the EU treaties, and it is apparent that there could be no relief for alleged human rights violations by supranational Union institutions within the framework of a commercial and economic organization. The Court of Justice declared that fundamental rights were part of their general jurisprudence and asked the European Court of Human Rights for guidance. As it relies more and more on European Court of Human Rights case law for the fundamental rights aspects for its decision-making, and given that all member states of the EU have ratified the ECHR and accepted the European Court of Human Rights jurisdiction, the two bodies of law are drawing closer together under common constitutional principles.

3. Economic and social rights in the EU policies.

One of the most important issues of European human rights policy is development of economic and social rights. Those rights are very important for the EU and very problematic for Ukraine as of its economic situation. This represents the reasons to pay particular attention to development and requirement of the EU policies in the spheres of economic and social rights.

In the EU economic, social and cultural rights are as much important as civil and political rights due to the principle of the indivisibility of human rights that is the core issue of the EU policy. This

principle not only reflects the doctrine embodied in the Universal Declaration of Human Rights and the Council of Europe's human rights regime, but also it represents the consensus on the importance of the European social model. However, the Union's rhetorical commitment has hardly been matched by its practice.²⁶ This is true in both the internal and external directions of the EU policy.

In terms of the Community itself, the revisions to the social rights provisions of the Amsterdam Treaty fell considerably short of the proposals made by a range of expert groups, as well as in the report of the *Comité des Sages*, chaired by Maria de Lourdes Pintassilgo.²⁷

In addition, there is a strong tendency in the great majority of Community documents to focus on social policy, designed to promote social protection or overcome 'social exclusion', rather than to focus on 'social rights'.²⁸

The Treaty of Amsterdam refers non-restrictive terms to respect for human rights and fundamental freedoms, and the preamble to the Single European Act refers to the fundamental rights recognized in the European Social Charter. The Court of Justice has long referred to the constitutional traditions common to the Member States in identifying applicable human rights standards and, as a result, one would expect to find a range of references to economic and social rights.

In relation to the Community's internal social policy, note should be taken as for the importance of some factors, such as promoting accession by the Community to the European Social Charter; encouraging all Member States to ratify ILO Conventions; and improving the standing rules of the European Court of Justice in relation to social rights issues.

²⁶ Sciarra, 'From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy', in Alston, P. and Weiler J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', *European Journal of International Law*, 9 (4) 1998, 626-657 at 63.

²⁷ *For a Europe of Civic and Social Rights*, and the Report of the High Level Panel on the Free Movement of Persons, presented to the Commission on 18 March 1997, available on http://europa.eu.int/comm/index_en.htm

²⁸ 'Social Action Programme 1998-2000, Commission Communication', Doc. Com (98) 259 of 29 April 1998, available on http://europa.eu.int/comm/justice_home/doc_centre/intro/doc_intro_en.htm

In terms of the role of social rights in the Union's external relations, two examples of the inadequate attention accorded to them must suffice. The first concerns the criteria for future accession to the Union. In Agenda 2000 the Commission made reference to the compliance of applicant states with the European Social Charter and the UN Covenant on Economic, Social and Cultural Rights, although minimal attention was actually devoted to the relevant rights.²⁹

The second, more surprising example concerns the EU extensive development cooperation activities. In their landmark resolution of 28 November 1991 on human rights, democracy and development, the European Council listed a range of positive measures to be taken, but only one was potentially of direct relevance to social rights: ensuring equal opportunities for all.³⁰ This is vague and flexible concept, but it is often considered to be compatible with policies, which accord a low priority to social rights. A similar concern applies to the Commission's 1998 policy statement in the context of the Lome Convention, which from a social rights perspective speaks only of the goal of "promoting pluralist civil society in a context of sustainable social and human development."³¹ This broad language does not refer to any specific social rights-related policies, however.

Two problems arise from this issue. One is that investment in social development has been accorded a low priority in most the EU aid, even though increased attention is given now to health and education.³² The other is that there remains a very significant difference between general social sector funding and support for economic and social rights as human rights. The time has come for the Union to end its second rule treatment of these rights and to develop and fund a specific program for the promotion of economic, social and cultural rights. Consistent with this approach, it is time for the

²⁹ Agenda 2000, Commission of the European Communities, COM 2000 final, 2 vols.

³⁰ European Council, Landmark resolution 28 November 1991, available on <http://europa.eu.int/scadplus/leg/en/lvb/l33021.htm>

³¹ Communication from the Commission to the Council and the European Parliament entitled '*Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States*', 12 March 1998 para 2, available on http://europa.eu.int/comm/justice_home/doc_centre/intro/doc_intro_en.htm

³² ADE final report, *Evaluation of EU Aid to ACP Countries managed by the Commission, Phase I*, (July 1997).

Union to move beyond the old social clause debate by exploring new approaches.³³ That debate sought to link respect for certain human rights with participation in trade agreements and preference schemes.³⁴

The existing human rights clauses in the EU agreements provide an ideal basis upon which to pursue a more systematic approach to economic and social rights,³⁵ and to promote the rights which have been the prime focus of the social clause debate. As a result, it is possible to state that the Community should deal more with social rights in external relation and promote the acceptance of the human rights principles in monitoring and accountability.

4. The EU and the European Convention on Human Rights.

As it was stated above, the Treaty of Amsterdam commits the Union to “respect fundamental rights, as guaranteed by the European Convention.” The ECHR has also obtained particular significance because of the level to which it has been cited in the case law of the Court of Justice. The latter has also tended to interpret its provisions in line with the approach adopted by the European Court of Human Rights. The result is that the Convention has played a fundamental role not simply in providing a mechanism of protection, but also in emphasizing the European commitment to human rights. The European Convention system has become more than a legal instrument for deciding human rights problems; it is now a part of the cultural self-determination of Europe.

As the Council of Europe grows and the ECHR is ratified by new Member States, and new legal traditions and understandings, it is disappointing that there is no explicit Community voice within the ECHR. Such a voice would have enabled the sensibilities and experiences of the Community to form an integral part of the evolving jurisprudence and extra-judicial activity of the European

³³ European Parliament, *Summary Record of Presentations made at the Public Hearing on the Human Rights Clause in Trade Agreements* (1996), available on <http://europa.eu.int/institutions/parliament/>

³⁴ Resolution on human rights throughout the world in 1995-1996 and the Union’s human rights policy, 12 Dec. 1996, at 94, para 68, available on http://europa.eu.int/comm/justice_home/

³⁵ See *supra* Riedel and Will, ‘Human Rights Clauses in External Agreements of the European Communities’, in Alston, at 65.

Convention system. This, almost as much as any other reason, requires accession to the ECHR to remain a live objective.

The setback regarding the ECHR should not prevent other similar activity. The Community could agree, without amending the Treaties, to the European Social Charter, to the Convention of the Council of Europe on Data Protection and to the Vienna Convention on Human Rights and Application of Biology and Medicine and others.

By the same token, taking account of the spirit of subsidiary, as union of State Members, the Community as such does not need to be a member of all human rights treaty regimes. It could, nevertheless, still play an important role in encouraging its Member States to adhere to the various instruments noted above as well as, for example, the Council of Europe's Framework Convention for the Protection of National Minorities and to the most human rights oriented conventions of the ILO.

As a result of a series of contentious debates during the drafting of the Convention, the Charter seeks to protect the role of the European Court of Human Rights as the authoritative interpreter of the rights in the ECHR.

The Charter, in effect, requires the Community courts to interpret rights in the Charter that "correspond" to rights in the ECHR as having the equivalent meaning to that decided by the European Court of Human Rights. The issue of which rights in the Charter are equivalent to those in the ECHR is not set out in the Charter, but in the explanatory memorandum commissioned by the Presidium.³⁶

Lacking authoritative status, however, the question becomes whether the Charter has to be made formally legally enforceable, this list of "corresponding" ECHR/Charter provisions should be given a more authoritative status.

³⁶ Convention document CHARTE 4473/00, available on http://europa.eu.int/comm/justice_home/doc_centre/intro/doc_intro_en.htm

Rather like the spectre at the feast, however, a much more substantive issue continues to haunt discussion of the future status of the Charter: whether the Union/Community should accede to the European Convention on Human Rights. Indeed, in a move that surprised some, we have seen that the Laeken European Council specifically asked the Convention to consider whether the EC should accede to the European Court of Human Rights. Rather less prominent, but also worth considering, is the related question of whether the EU/EC should accede to the European Social Charter.³⁷

“We have been reminded of the difficulties that a proposal to accede would have, not only in the context of EC Member States’ unease, but also the potential difficulties that the requirement of unanimity to amend the ECHR.”³⁸ Here the problem arises of how to ensure after accession, that the autonomy of Community law remains intact, whilst ensuring that the Convention continues to be interpreted consistently.

Some have suggested that two options are worth considering. One involves the use of the advisory opinion mechanism that already exists in the European Convention on Human Rights, possibly combined with a variation on the preliminary reference procedure, resulting in a procedure whereby the ECJ could refer a question relating to the ECHR to the Court of Human Rights, which would then give an advisory opinion to the ECJ on the meaning of the Convention, which the ECJ would then apply. More problematic, and less discussed, is the sensitive issue of which judges of the Court of Human Rights should sit on cases dealing with the Community/Union and, in particular, whether judges from countries that are not members of the Community should sit on cases arising from the application of Community law. In this

³⁷ Lammy Betten, *The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?*, 2001 *International Journal of Comparative Labour Law and Industrial Relations*, at 151.

³⁸ Aalt Willem Heringa, *Editorial: Towards an EU Charter of Fundamental Rights?*, 7 *Maastricht Journal of European Law* 111 (2000), at 114.

context, the membership of the Court of Human Rights dealing with such cases may be open for discussion.³⁹

5. Current problems of Ukraine in human rights adaptation and possible ways their solutions.

Currently, Ukraine is on a way to harmonize its legislation to the EU standards and one of the most important aspects here is adjustment to Community's human rights protection mechanism. This problem is very close dependant on other pillars of the EU and development in all spheres. The future of the EU – Ukraine relations and deepening cooperation between them is conditional on safeguarding the essential elements in the PCA, fulfilling hard obligations and making all efforts to approximate national laws to the EU laws. Ukraine appeared to be the only PCA country that clearly promulgated its European objectives to enhance mutual partnership and cooperation with the final establishment of a free trade area with the EC. The initiation of the comprehensive program of adaptation of national legislation to the EU laws indicates the seriousness of European objectives in Ukraine. Indeed, Ukraine is willing to adjust its national laws to the EU legal rules, which have no binding force in relation to itself, and in the framing of which Ukraine has no real participation.⁴⁰ This voluntary harmonization of Ukrainian legislations to the EU legislations has purpose of all major legal reforms undertaken by Ukrainian government since the PCA entrance into force. However, the scope of the EU legislation to be approximated by Ukraine still not stated clear and remains differences of understanding. None of the EU institutions have been explicit in defining the scope of the EU legislation that could be considered as a basis for approximation. The PCA does not refer the *acquis communautaire*, and, in particular, EC general principles that constitute the core of EU legislation. Similarly, neither the PCA nor other EU

³⁹ Françoise Tulkens, Towards a Greater Normative Coherence in Europe, The Implications of the Draft Charter of Fundamental Rights of the European Union, *Human Rights Law Journal* 329 (2000), at 331.

⁴⁰ A. Evans 'Voluntary Harmonization in Integration between the European Community and Eastern Europe' (1997) 22 *European Law Review*, at 214.

legal source clearly specifies what has to be done by Ukraine to achieve that clause. As a result, the national legislature found itself in quite a difficult situation when it had to choose either between the blind acceptances of the whole *acquis communautaire*, or the consecutive approximation of Ukrainian laws to the EU primary and secondary legislation as defined by the PCA priority areas. Facing such problem, government of Ukraine took the following model of approximation.⁴¹ Article 1 of the Strategy on Integration explicitly states that “adaptation of Ukrainian legislation to the EU laws comprises of approximation with the contemporary European system of law.” The Verkhovna Rada of Ukraine defined the adaptation as a “stage by stage adoption and implementation of legal acts drafted *with consideration of EU laws ... as far as financial, political and social consequences of such adaptation are appropriate for Ukraine*”⁴² Thus, on the one hand, the adaptation of Ukrainian legislation to the EU laws gives to the Ukrainian government possibility to guide the process of adaptation in accordance with national interests. On the other hand, it slows down the speed of the approximation reforms in Ukraine.

On March 2003 the Ukrainian government and the EU issued the “Joint report on the implementation of the partnership and cooperation agreement between the EU and Ukraine.”⁴³ General principles of that document show some principles, which may help to find strict direction for adaptation of the legislations. The main issue of that report is connected with respect for democratic principles and human rights; market economy; regional co-operation; possibility of establishing a free-trade area.⁴⁴ Also the EU expressed its willingness to help Ukraine in its process to adapt the legislation and consult with the Committee for European Integration to conduct appropriate amendments to the PCA. The EU side also takes occasions to inform Ukraine about developments in the EU and enlargement. There have been regular exchanges on international issues, including democracy and human rights, in

⁴¹ Petrov, *supra* note 1, at 140.

⁴² Law ‘About the Concept of State Programme of Adaptation of Ukrainian laws to EU laws’, 21 November 2002, no. 228-IV. available on www.rada.kiev.ua

⁴³ Available on <http://www.delukr.cec.eu.int/site.php/page2803.html>

⁴⁴ Joint report on the implementation of the partnership and cooperation agreement between the EU and Ukraine, Title I art. 2-5, available on <http://www.delukr.cec.eu.int/site.php/page2803.html>

different parts of the world. On the basis of considerable progress made since Ukraine's independence, as well as since the entering into force of the PCA, both parties conclude that Ukraine progressively developed democratic principles and human rights and the rule of law. This has also been recognized by OSCE and the Council of Europe.⁴⁵ The EU is studying the development of democracy and human rights in Ukraine and has made some recommendations.

On the occasion of the Ukraine parliamentary elections in March 2002 progress was recorded in political culture and a higher level of engagement of the society in management of the State through political parties, development of civil society and the NGOs sector, and the freedom of assembly. The EU acknowledged these achievements but also called on Ukraine to address the shortcomings identified in this context. The July 2002 Summit noted that the elections had 'demonstrated Ukraine's commitment to achieving further democratization of Ukrainian society'; it also supported 'the commitment of Ukrainian authorities to strengthen the judiciary, freedom of the media, human rights, and civil society, and agreed that co-operation and EU assistance in these areas should be intensified'. Effective implementation of this commitment is of great importance to both sides in support of common European values.⁴⁶

In addition, the EU has raised concerns about the development of judicial reform and implementation of the legislation. The EU has also continuously raised particular concerns in connection with rights and freedom of journalists. The EU underlined that "actions that would amount to undue influence on journalists and owners of media outlets would hamper the democratization of Ukrainian society. The EU called on Ukraine to address the deficiencies and shortcomings as identified in this context, notably the freedom of mass media and the protection of journalists."⁴⁷ Media legislation needs to be changed in accordance with OSCE and Council of Europe standards.

⁴⁵ *Id.*, at para 16.

⁴⁶ *Id.*, at para 17.

⁴⁷ *Id.*, at para 18.

There are additional issues on which Ukraine should make strong efforts. First of all, this is the rule of law. Despite the fact that the principle of rule of law is stipulated in Article 8 of the Constitution of Ukraine and in a number of other legislative acts, its substance has not been properly defined in the doctrine and used in practice. One of the most pressing problems in Ukraine is the recognition of the supremacy of human rights and freedoms over the state and the direct effect of the Constitution and its provisions, which determine the rights and freedoms of individuals. The legislation must provide direct provision for courts to enforce them to implement directly the principle of rule of law. The legal system and law enforcement should correspond to the principles of legal certainty and proportionality, which form the basis of legal order in the EU and its member states. In order to provide the effective implementation of rights and duties by the citizens, there is a clear need to provide society the possibility to take part in the lawmaking and upgrade the social level of legal awareness. Educational institutions, NGOs, and the mass media should play significant roles. Individuals should be informed about their rights and possess means to protect them. In particular, access to court and legal assistance should be guaranteed, including free legal assistance to the poor people in cases of infringed human rights. Ukrainian NGOs should play vital role in building civil society and they have possibility to influence society. They may engage more in human rights protection activities and educate people about legal ways of protection in Ukrainian courts, as in international or European system of human rights protection.

Some initiatives should be introduced to improve institutional co-operation and capacity for the process of transition. Therefore, it is necessary to make the examination of drafts initiated by any parties. “The implementation of this process could be entrusted to the governmental body responsible for co-coordinating the adaptation process.”⁴⁸ The same procedure should be required for amendments, proposed by members of Parliament, to draft legislation that is to be harmonized with the EU *acquis*

⁴⁸ Petrov, *supra* note 1, at 139.

communautaire. This function can be placed within the competencies of the Committee for European Integration.

In the process of adapting Ukrainian legislation to the EU rules and regulations, the *acquis communautaire* is a key element of Ukraine's European integration. This should cover the legal system in general and include current legislation, the drafting of new legislation, law enforcement and procedural rules. In order to ensure the effective implementation of the adaptation process, there is a substantial need to involve all branches of power: parliament and executive bodies at the law drafting stage, judicial institutions at the law enforcement stage. Adaptation is not an isolated process, and must be accompanied by legal, judicial, administrative, economic and other reforms.