Ensuring respect for fundamental rights in European Union member states

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It is an honour to deliver this keynote for the session concerning ensuring respect for fundamental rights in European Union member states. As my Office functions within that other, older and broader European organisation, the Council of Europe, my observations will inevitably reflect the Council of Europe perspective on this issue. Questions relating to the protection of fundamental rights within the EU and in the EU countries are being raised increasingly and persistently, and concrete answers are needed more than ever. The unique perspective of the Council of Europe must be part of these answers.

The Council of Europe, with its 47 member states, is the specialist organisation when it comes to human rights questions in Europe, with an impressive array of international human rights standards, many of which are legally binding conventions. Of course, the most visible one of these is the European Convention on Human Rights, opened for signature 64 years ago here in Rome, together with the European Court of Human Rights, the crowning achievement of the European human rights architecture. But there are other key documents, such as the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Framework Convention for the Protection of National Minorities, and a whole host of other key European standards. This is a constantly growing list, more recent additions including conventions on action against human trafficking, or the prevention of violence against women and domestic violence. Many of these standards are accompanied by independent monitoring mechanisms, as well as assistance programmes to help those states who fail to implement them.

My Office, which was established in 1999, is among the more recent additions to the Council of Europe system, as member states felt the need to have an institution which can focus on any human rights issue in any member state at any time. I have thus a mandate which allows me to have a global vision of human rights and, if necessary, react immediately to developments. The independence of my Office is guaranteed by a 6-year non-renewable mandate, with an election process designed to ensure legitimacy. I receive no instructions and can focus on what I consider to be priority issues in member states. My role is non-judicial, I do not deal with individual complaints but engage in a dialogue with member states and try to raise awareness on human rights issues through my reports, recommendations, etc. My mandate also provides for full impartiality – I treat all member states in the same way, with no distinction whatsoever between the 28 member states of the Council of Europe which are also members of the EU and the others.

Co-operation between the Council of Europe and the EU has always been very strong and intricate. Not only are many Council of Europe standards part of the EU acquis, but the EU is also the main partner of the Council of Europe for a huge number of assistance programmes in non-EU member states. The EU, unlike the Council of Europe, was not born with a specific human rights mandate, but it developed substantial rights-based policies oriented towards the accession of new member states, many of which were based on Council of Europe standards. Thirteen years ago, the adoption of the European Charter of Fundamental Rights sparked hope that the EU would place more emphasis on the human rights dimension and contribute to the protection and promotion of human rights in its member states. This hope was reinforced in 2007, with the establishment of a specialised European Union agency on fundamental rights and the reforming Treaty of Lisbon, which sets out the Union's obligation to accede to the European Convention on Human Rights.

How have these expectations played out? I think I have a unique perspective on this issue: since I was elected Human Rights Commissioner almost two years ago, I had full country visits followed by reports to 16 countries, more than half of which (nine) were EU member states (Portugal, Austria, Finland, Italy, Czech Republic, Spain, Greece, Estonia, Denmark). I have also engaged several other member states through substantive letters sent to the authorities (Croatia, Ireland, Slovenia, France, UK). I have otherwise visited or had media interventions in almost all remaining EU member states.

Serious, often very pressing, human rights problems exist in all these countries, without exception. The topics I have most frequently encountered so far have been:
- Impact of the financial crisis on the protection of human rights of vulnerable groups (Portugal, Spain, Estonia);
- Migration and asylum, as well as racism and xenophobia against migrants (Italy, Greece, Austria, Germany, Hungary, Denmark);
- Exclusion of Roma and anti-Gypsyism (Czech Republic, Portugal, Greece, France, Slovakia, Romania, Sweden, Italy);
- Police misconduct (Greece, Spain, Czech Republic, Slovakia);
- LGBT rights (Portugal, Croatia, Finland, Ireland);
- Administration of justice (Italy).

And yet, despite the new legal and political framework which gives it competence in some of these areas and notwithstanding the good work done by the Fundamental Rights Agency, the EU's performance in tackling human rights shortages in its member states has been far from satisfactory in many cases. While EU's pull factor and the accession processes have had very positive effects on human rights protection in negotiating states, there is a marked complacency vis-à-vis existing member states, which makes me think that human rights are conceptualised as an issue "for export" rather than for domestic consumption in the EU. This became clear to me during my meetings with representatives of EU institutions, who generally wish to discuss the situation of human rights outside the 28 member states and are reluctant to address issues within the EU.

How can we explain this complacency? One of the working assumptions of the EU and a premise on which many EU policies are based is the equivalence of protection and mutual trust. Free movement of goods is possible, for instance, because there is a presumption that a product put on the market in a member state is sufficiently safe for consumption in another one. Similarly, the thinking goes, we can have a European Arrest Warrant because suspects would have equivalent levels of guarantees for a fair trial if they are surrendered for proceedings in another member state.

But when human rights are concerned and the assumption of equivalent protection does not correspond to reality, and the EU institutions lack either the competence or will to force member states to respect their human rights obligations, the EU policy itself can cause significant damage. This was very clearly demonstrated with asylum seekers returned under the Dublin system: it took several years and a judgment of the European Court of Human Rights (following an intervention of my predecessor) until Dublin returns to Greece ceased in a systematic fashion – even though it was perfectly obvious by that stage that the asylum system in Greece amounted to inhuman and degrading treatment.

This is why complacency in such matters not only leads to human rights violations, but can also undermine viability of a common policy altogether. Presumption of sufficient human rights protection should never be allowed to transform into a convenient fiction for the sake of keeping the system going. When there are indications that an EU member state faces a human rights problem, there has to be enough peer pressure to encourage that member state to comply with its obligations. Here the Council of Europe could play a very important role – in many cases, we ring the alarm bells of systemic human rights problems a long time in advance. These then need to be taken up by EU institutions and member states. In many cases, however, this does not function very well.

The picture I draw from my work so far is that EU institutions, in particular the European Commission, have been all too weak in addressing a number of human-rights issues in member states. True, the EU has limited legislative competence for many core human-rights areas which are better dealt with by the Council of Europe, such as freedom of expression, the prohibition of torture, and the right to a fair trial. However, I think the EU is also failing where it has a stronger competence.

One of the most topical of these issues is migration. The EU's inaction, and sometimes complicity with widespread criminalisation of irregular migration, lengthy detention of migrants, "push-backs", and inadequate asylum procedures expose this problem well. The accountability of an EU agency itself, FRONTEX, is being questioned. I have already mentioned the system of Dublin returns, which is unravelling due to legal challenges at both national and European levels. However, scrapping or fundamentally overhauling it remains a taboo subject for debate. The contradictions of the EU migration policy have recently been put in very stark evidence in the Syrian refugee crisis. The EU has been encouraging Turkey and other neighbouring states to keep their borders with Syria open, while some EU member states resort to "push-backs" or make their territories entirely inaccessible to Syrian refugees. As a result, the EU's credibility as a voice for human rights has been severely tarnished.

The EU's scant progress on human rights also affects EU citizens. The fiscal consolidation processes have illustrated this very well. Without any real public participation, the EU has dictated a cure of austerity to heal public deficits. The result is that in many EU countries children's health and prospects are worsening, unemployment, in particular youth unemployment, is skyrocketing, and vulnerable groups, such as older people, are facing destitution because of cuts to the welfare system. A more transparent process, which should have included the establishment of social protection floors in line with the European Social Charter, might have yielded very different results.

The situation of persons with disabilities is also a very telling example, despite the fact that the EU is party to the UN Convention on the Rights of Persons with Disabilities, the first human rights treaty it has acceded to. A crucial provision of this treaty is the right of persons with disabilities to live independently and be included in the community. Still, in many EU countries persons with disabilities are placed in institutions where they are forced to live in unspeakable indignity. Worse still, I continue to receive reports that EU structural funds are sometimes used to refurbish existing institutions or even build new ones.

Finally, incomplete anti-discrimination frameworks have led to very uneven levels of protection on different grounds. EU member states often justify shortcomings by pointing to the EU anti-discrimination directives, which provide more protection on grounds of race and ethnicity than they do, for example, on grounds of sexual orientation. Other states find no serious obstacles in Brussels to keeping very weak anti-racist legislation or in implementing Roma integration strategies that do not include measures to combat anti-Gypsism.

These examples show that the EU has still a long way to go before claiming any victory in integrating human rights in the construction of Europe. While the EU's promise on human rights is to be welcomed and supported, its deeds have to improve if it wants to leave a positive imprint on Europe's future. I go even further and submit to you that the widespread perception of the weakening of the idea of European integration has been closely linked to the ineffectiveness of the EU in tackling human rights issues at home.

In order to get there, the EU has various options available. Firstly, it needs to enforce its own standards more stringently and consistently in human rights areas where it has a strong competence, including anti-discrimination, gender equality, rights of persons with disabilities, data protection and some aspects of asylum and migration. Secondly, whenever it lacks the requisite competence, rather than trying to set up parallel mechanisms and to reinvent the "human rights wheel", the EU should more systematically appeal to external mechanisms. As an organisation specialised in human rights, the Council of Europe has a key role to play here. For example, there have been tentative efforts in the EU to tackle problems relating to the judiciary, entirely through the prism of economic efficiency. Would it not be preferable instead for the EU to more actively take up the pilot judgments of the European Court of Human Rights against its member states, knowing that these judgments group whole categories of similar cases where domestic courts have been inefficient?

I take heart in the fact that the European Parliament echoed some of these sentiments in a resolution it adopted on 27 February on the situation of fundamental rights in the European Union. I look forward to a better scrutiny of human rights in EU member states and better co-operation between the EU and the Council of Europe on these issues.