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## THE COPENHAGEN HUMAN RIGHTS CRITERIA AND THE RELEVANCE OF THE POST COMMUNIST CONTEXT\*

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## The Copenhagen Human Rights Criteria and The Relevance of the Post Communist Context

Magdalena Żółkoś\*

### 1.- Introduction.

Many recent studies on the upcoming enlargement of the European Union (EU) have focused on the inclusion of human rights and minority rights issues in the political accession criteria<sup>1</sup>. Much attention has been devoted to how the mediocre record of human rights performance in the post-communist states has been addressed by the EU in its conditionality practices, as well as on the ‘transformative effects’<sup>2</sup> that these requirements have had on the legal and institutional design of domestic human rights structures in the future member states<sup>3</sup>. Said otherwise, there are two interlinked dynamics at work here:: (i) that of modified role that the human rights issues have played in the enlargement policies, and (ii) that of transformed domestic structures of human rights protection in the accession countries<sup>4</sup>.

These studies have underscored that the effects of the conditionality practices have been far-reaching and profound, though uneven and varying in different sectors and levels of reception. Although this study consents with such views to a great extent, it also stresses that the flexibility and malleability of the domestic structures have often been overemphasized and erroneously taken for granted. The aim of the present paper is thus to anchor the study of conditionality mechanisms deeper in

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<sup>1</sup> See e.g. Leszyński 1995, Napoli 1995, Storey 1995, Nowak 1999, Kasztołány 2000, Kuźniar 2000.

<sup>2</sup> Cf. Koskenniemi 1999, 99-100.

<sup>3</sup> The studies of how the EU governance structures affect human rights protection mechanisms in the accession countries have typically concentrated on the legal and institutional aspects of the protection (see e.g. Storey 1995, Hyde-Price 1998, Smith 2001). Discussions on the impact on more informal structures, i.e. political culture and mentalities of the governing elites, self-awareness and assertiveness of minorities and victims of human rights violations, employment of human rights language in various public discourses have so far received rather little attention.

<sup>4</sup> This distinction is of course purely instrumental, as in the conditionality practices these mechanisms are closely interlinked and the latter dependent on the former.

the understanding of the post-communist context of human rights, which it considers the main determinant of the actual ‘inflexibility’ or ‘rigidity’ of these structures. Its assumptions are that recognition of the post-communist political, societal, economic and cultural specificity is crucial for the successful and effective human rights conditionality of the EU.

This paper is divided into two distinctive parts: descriptive and evaluative. First, it describes some identifying characteristics of post-communism, which, it assumes, are of relevance for human rights situation in the Central and Eastern Europe (hereafter CEE)<sup>5</sup>. It also depicts the conception of the ‘new human rights approach’<sup>6</sup> of the EU taking into focus its two distinguishing attributes: (i) the increased importance of human rights issues as elements of membership conditionality, and (ii) the proliferation and complexity of requirements. The second, evaluative part consists of juxtaposing the EU policies of human rights conditionality through three human rights indexes developed by: International Helsinki Federation for Human Rights, High Commissioner of the Council of the Baltic Sea States and Danish Center for Human Rights. Resemblances and dissimilarities between them serve as a starting-point for evaluation of the appropriateness and thus possible effects of EU criteria in relation to the post-communist context.

This paper puts forth a working hypothesis that even though the EU has recently had significant (direct and indirect) impact on the design of legal and institutional human rights framework in CEE, the internalization of human rights values by its future members could be delayed by the insufficient appraisal of the post-communist context of human rights by the EU. More profound analysis points not only in the direction of certain flaws of the EU to address some of those human rights issues, which have gained paramount importance in CEE after the collapse of communism, but also calls for a debate on the EU as a human rights actor *per se*.

## 1. What is Post-Communism all about?

The problem with the term ‘post-communism’ is that it describes ‘an era by what preceded it rather than by what it actually is’ (Strohlein 1999). It indirectly admits

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<sup>5</sup> This paper uses the term of ‘Central Eastern Europe’ interchangeably with ‘Eastern Europe’, and addresses with it those post-communist countries (inclusive three Soviet successor states), which have gained status of applicant states: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

<sup>6</sup> Cf. Storey 1995.

that what used to compose a rather clear-cut entity (though with different local hues), has given place to a complex, multidirectional and indeterminate reality, which is much more problematic to identify in affirmative terms. It also opens up for a number of further vexed questions on e.g. what distinguishes it from communism, when did it start – and when does it end. It might seem that as an organizing category ‘post-communism’ explains less than it actually complicates.

However, this paper assumes, it is far from redundant. On the contrary, it is advantageous to the extent it creates possibility for viewing the present developments in the CEE concurrently simultaneously through the prism of ‘continuity’ and ‘change’.<sup>7</sup> The working definition of ‘post-communism’ that this paper adopts is thus of an era, which was initiated with the collapse of communist regimes in Europe, and which at the same time encompasses elements foreign to that regime and bears certain marks identifiable during those regimes. These ‘elements’ and ‘marks’ are widely defined and can belong to economic, political, societal or cultural domains.<sup>8</sup>

### **1.1 Many Different Conceptions, One Troubling Reality.**

This section of the paper recalls three different perspectives on the post-communist state, which derive from three recent publications on the subject:<sup>9</sup>

- (i) Intensity and overlap of the political, economic and societal transformations commenced in the late 1980s/early 1990s,
- (ii) The confrontation of CEE states with changes in international politics after the Cold War, phenomena of globalization, regional integration and commercialization of the regulative sphere,
- (iii) The ‘vacuum-syndrome’ in CEE after the demise of socialism understood as political project and ideology.

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<sup>7</sup> Cf. Wolchik 1995

<sup>8</sup> One of the numerous examples is the reformed health sector in Eastern European countries, which at the same time shifts away from the Soviet model of public provision of medical care, and still encompass some of its characteristic elements (like sector centralization, predominantly public provider, universal entitlement to health care, little degree of separation between purchasers, insurers, and providers). See Kornai and Eggleston 2001.

<sup>9</sup> These are: Jakobsen 1999, Staniszki 2001, Tismaneanu 2000.

These conceptions are not mutually exclusive, but can be regarded as parallel and complementary. Not only do they lay emphasis on diverse aspects of the post-communist era, but represent various analytical levels (and relate differently to the joint concepts of ‘continuity’ and ‘change’ included in the working definition above).

The first perspective accentuates the ‘change’ and tries to define post-communism mainly in affirmative terms. The second one views post-communism as a mirror-reflection of communism, and thus bring out elements of (conversed) continuity. The third one defines the starting-point of post-communism as a ‘lack’ or ‘vacuum’ that has come about after the 1989, and thus considers it mostly in negative terms. These three perspectives are further linked to three conceptual categories, which are, respectively:

- (i) The phenomenon of ‘triple-transition’;
- (ii) ‘De-politicization of power’ and development of ‘network states’;
- (iii) ‘Post-communist nostalgia’ and the emergence and proliferation of ‘political myths’.

First, most traditional, conceptualization of post-communism as a combination of different transformation dynamics called ‘triple-transition’ was developed, *inter alia*, by Jakobsen (1999).<sup>10</sup> With a focus on the recent democratic developments in CEE, he studies post-communism as a set of interrelated dynamics, which proceed in a linear order and signify gradual and constant relinquishment from the socialist system. The designation ‘triple-transition’ emphasizes simultaneous occurrence of three parallel and overlapping processes. All of them can be referred to as ‘the demise of communism’, where communism is understood in three different ways: as (i) the political ideology and system of governance, (ii) the economic regime and (iii) the general structure of the region (with the Soviet Union as the center and the republics and the quasi-autonomous states remaining within its sphere of influence). In the course of the initiated reforms, the communist system is being superseded by democratization, economical transformations and nation-building processes, respectively.

These transformations are, with different intensity, taking place simultaneously, but are not necessarily harmonious or mutually supportive. On the contrary, the past decade has proved the emergence of different tensions between them, clashes of

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<sup>10</sup> The term ‘triple-transition’ was originally coined by Claus Offe (e.g 1997). See also Przeworski 1993, Hyde-Price 1998.

their conflicting logics and even cases of mutual subversions. In addition, they are carried with greater intensity and are expected to be completed in much shorter time-duration than in the case of the Western European countries. The specific international context and the possible emergence of factors hindering their advancement adds to the list of challenges that the newly-established democratic countries must contend with on their way from communism to ‘the European family’.

The second perspective on post-socialism is introduced by Staniszkis (2001), who identifies it as a process of spontaneous montaging of ‘diverse interconnections and conflicting interests, and resultant of three mechanisms – initiated by political decisions, but [...] increasingly more autonomous and beyond state control’ (Staniszkis 2001, 90, my translation). These ‘post-communism-generating’ mechanisms include regional integration, globalization, and commercialization of the public capital<sup>11</sup>.

Those otherwise rather loosely related dynamics are having similar effect on the potency and management abilities of the post-communist state, as they all bring about certain degree of frailty and vulnerability to its structures.

Staniszkis evokes the paradigm of socialist power structure known as ‘power without politics’<sup>12</sup> (2001, 95), which signified that primary sources of the former were located beyond the domain of the latter. Accordingly, politics (at least in its traditional ‘Western’ sense)<sup>13</sup> became redundant and futile, or necessitated radical redefinition. In this sense, the post-communist state constitutes its antithesis as it is defined in terms of ‘politics without power’ paradigm. In the post-communist state ‘political decisions initiate certain course of events, but they don’t control it and have little bearing on its final result (oftentimes other than the intended one). Moreover, the ‘structural power’ (i.e. the power to decide on the rules of the game

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<sup>11</sup> The strategies of ‘commercialization of public capital’ or ‘commercialization of the regulative sphere’ (Staniszkis 2001, *passim*) refer to processes of managing certain public goods on a business basis for profit.

<sup>12</sup> See also Staniszkis 1992.

<sup>13</sup> Staniszkis precises those de-politicised channels of power in the communist state as related to its ideological and institutional design, which eliminated the party- and market- competition, and actually *equaled* state with both the party-system and the market (Staniszkis 1992, 62-88).

during the transition period) remains to a large degree beyond the sphere of democratic institutions' (Staniszki 2001, 95, my translation).<sup>14</sup>

The question of the transfer of power in the post-communist state and, which follows, location of its crucial components beyond the popular control (and, more generally, beyond the sphere of politics), is indirectly connected to more broad-spectrum transformations in the post-Cold War order: the crisis of the centralized 'state of authority' and the emergence of multi-centered 'network state' (Staniszki 2001, 94). The phenomenon of the 'network state', with its main underlying dynamics of (i) segmentation and decentralization of power, (ii) governance redefined into terms of 'management' and 'supervision', and (iii) obscured borders between the domains of politics, economy and society, is of course not limited to post-communist state, nor is it solely attributable to the end of the bipolarity in international politics. However, these countries, due to, *inter alia*, the lack of experience and goodwill of its elites, have turned out to be exceptionally helpless in the post-Cold War reality of modified 'state sovereignty', which basically results in their highly disturbed 'navigability'.

The last characterization of the post-communist state refers to the so-called 'vacuum-syndrome', which has been particularly perceptible in the early 1990s, and which describes emergence of a 'battle-field' for political ideas and ideologies absent or 'concealed' during the communist times. Tismaneanu (2000)<sup>15</sup> regards it as a confrontation between two antagonistic intellectual traditions: the liberal thinking, rooted in the dissident ideas of civil society and anti-politics on one hand, and the exclusive populist discourses of ethnocentrism and intolerance on the other.<sup>16</sup>

The post-communist situation creates favorable ground for the latter option. It is a 'fertile soil' for collective passions, worries, fantasies and disillusionments'; with the demise of communism 'new mythologies appeared, those which provide quick and comprehensive answers to painful dilemmas, and which are being a reaction to the lack of continuity, breakdown, all-pervading chaos [...] (Tismaneanu 2000, 18, my translation). Said otherwise, the end of socialist era in Eastern Europe and the

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<sup>14</sup> There are two variants of this mechanism: as a result of the dynamics of globalization and regional integration the 'structural power' is reallocated *above* the domestic democratic institutions, and as a result of the 'commercialization of the regulative sphere' – *below* it. However, deeper discussion on this issue would extend beyond the scope of this paper.

<sup>15</sup> Due to the impossibility to get hold of the English original text (published in 1998 by Princeton University Press), in this paper I have used the Polish translation.

<sup>16</sup> Tismaneanu is by no means alone in this position. See e.g. Kaldor 1999.

consequent hollowness and bedlam in the realm of political ideas has created a particularly susceptible environment to developments, which are intrinsically hostile, and even subversive, to democratic and liberal post-totalitarian discourses.

This situation has instigated emergence and increased popularity of various *political myths*. Tismaneanu (2000, 38-42) recognizes four major political mythologies, prevalent in the CEE at present: (i) myths of salvation, (ii) myths of nationalism, (iii) myths of de-communization, and (iv) myths of compensation. Although they originate around different issues (e.g. anti-liberalism, *communitarianism*, nation and ethnicity, anti-capitalism, chauvinism), political myths function in a similar way and have a number of distinctive traits in common. Apart from the aforementioned fact that they fill certain political vacuum, they also bring in the missing elements of stabilization and predictability, and have important consoling and compensating effects.

## 1.2 Human Rights in the Post-Communist Perspective.

The section above has introduced briefly three different perspectives on post-communism. The purpose of the following part is to take a step further and relate those characteristics to the contemporary problematique of human rights. Therefore, the question that this section addresses is how the post-communist context affects human rights in the CEE and how it changes the patterns of human rights violations and protection. In other words, how the present human rights situation in the former communist countries is conditioned by the characteristics of 'triple-transition', 'de-politicization of power', and 'political myths'.

The following model presents a set of inter-linked international and domestic factors, arranged in a non-hierarchical way, which are pivotal for different human rights dynamics in the CEE:



**Post-Cold War International Context**

- ⇒ End of ideological polarization, democratization, liberalization
- ⇒ Further inclusion of human rights in foreign politics  
(in bilateral and multilateral relations)
- ⇒ Emergence of alternative human rights actors
- ⇒ Emergence of alternative human rights norms



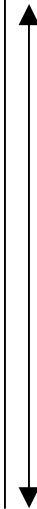
**Post-communist State**

- ⇒ 'Anarchy', not 'despotism' dilemma
- ⇒ Weakened as a human rights actor  
(both protector and potential violator)



**Post-communist transformations**

- ⇒ Democratization: civil and political rights
- ⇒ Market-reforms: economic and social rights
- ⇒ State- and nation-building: minority rights
- ⇒ Intensity, timing and overlap of changes



**Post-communist  
political myths**

- ⇒ Nationalism
- ⇒ Chauvinism
- ⇒ Misogyny
- ⇒ Antiliberalism

**Model 1. Post-communism and human rights.**

The first distinction that this model makes is that characterization of human rights in post-communism needs to include changes of more general nature in the international human rights regimes that occurred in the aftermath of the Cold War. More detailed discussion of this complex issue would extend beyond scope of this paper,<sup>17</sup> suffice to point here at three tendencies: (i) extension of the content of rights,<sup>18</sup> (ii) redefinition of the concept of human rights violations,<sup>19</sup> and (iii) development of alternative forms of human rights protection.<sup>20</sup>

<sup>17</sup> See e.g. Donnelly 1992, Falk 1998, Patman 2000.

<sup>18</sup> The idea of extending the category of rights qualified as 'human' is linked directly with the concepts of 'human rights development', 'human rights evolution' and 'generations of human rights'. It describes sequential occurrence of rights, i.e. the process in which access to certain goods or actions is assured in rights-terms. See Eide 1983, Drzewiecki 2000, Campagnoni 2000.

Next, the relation between the paradigms of ‘network state’ and ‘de-politicization of power’ and changes in human rights protection and violation are depicted. Far from denying state’s central role in formation of domestic framework of human rights regime, the main suggestion here is that with the end of communism alternative human rights norm-triads emerged on the national level, similarly to the abovementioned international one.<sup>21</sup> Not only has the post-communist state, to paraphrase the words of Max Weber, ‘lost its monopoly on violence’, which has been emphasized by the emergence and empowerment of non-state human rights violators<sup>22</sup>, but the transformations of 1989 signified also that democratic governance and human rights respect became cornerstones for legitimacy of the emerging states, as well as their recognition on the international arena. Paradoxically, in the course of its transformation from perpetrator of citizens’ rights into their safeguard, the post-socialist state has at the same time become potentially less effective and feeble. In other words, post-communism signifies more complex, multilateral and multipolar human rights situation, where the former state-centrism needs to be replaced by more inclusive and differentiated approach.

Third, both the modifications in international situation and in state-configuration contextualize further human rights changes instigated by the dynamics of ‘triple-transition’. Each of the processes brings different human rights problems in focus:

- (i) Democratization involves the issue of civil and political rights, esp. the so-called democratic rights<sup>23</sup>;
- (ii) Market-reforms and liberalization together with numerous economic and social problems (growing societal economic stratification, impoverishment, unemployment, etc.) involved the question of social

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<sup>19</sup> This characteristic indicates admittance of non-state human rights violations. Well-known example is the recent debate on violations of human rights done by multinational corporations and trans-border crime networks, and on corporate and individual responsibility for those human rights abuses. See e.g. Forsythe 2000.

<sup>20</sup> In the context of this paper it is important to point not only at human rights advocacy done by the civil society (in the framework of various NGOs and liberation movements), but also by international (intergovernmental and supranational) organizations, and developments of regional human rights regimes.

<sup>21</sup> See Galtung 1994.

<sup>22</sup> The ‘emergence’ of non-state human rights violators means also (political and legal) *re-conceptualization* of non-governmental or quasi-governmental powers as potentially accountable for human rights abuses. See e.g. Brett 2000, 411.

<sup>23</sup> See e.g. Jones 1994, Beetham 1999.

and economic rights, and a number of the so-called 3<sup>rd</sup> generation rights (e.g. women rights);

- (iii) State- and nation-building resulted very often in controversies around too narrow citizen definitions. Together with the issues of discrimination and exclusion, it also stirred discussions on the rights of minorities (in particular on the cultural and linguistic rights).

It should be recalled at that point that one of the main characteristics of these transformations is that they are taking place in a parallel manner, tend to trigger mutual tensions, are relatively intense and time-limited. Thus, they form a situation in which rapid accomplishment of legal and institutional protection of all rights is indispensable, in order to (i) alleviate the negative societal outcomes of the transition and (ii) ensure the durability, consolidation and the wide societal dissemination of the positive ones. At the same time, human right development (understood as *adaptation* and *effectivization* of international human rights norms) has to be conceptualized as yet another of the post-communist processes bogged down by the lack of resources, experience, information, political goodwill, etc.

Finally, the human rights situation in CEE is also heavily affected by the collision of diverse political ideas and ideologies, which have proved very limited societal understanding and support of the human rights rhetoric employed by the anti-totalitarian dissident discourse, and revealed worrying inclinations within the post-communist societies towards illusive political myths. The aforementioned myths of nationalism or vengeance may jeopardize further the post-communist project to guarantee full human rights protection to all inhabitants. They also point in another direction than merely provision of the legal and institutional aspects of that protection: in the former socialist states there is a problem with general recognition, awareness and appreciation of the human rights discourse, as well as their location in collective value systems. That may indicate some serious flaws in the common public sphere, (where not only the *issues*, but also the *rules* of public deliberation are still a matter of contention) , and have some explanatory force so as to why existence of the legal and institutional framework does not translate directly into the *de facto* human rights respect in those states. As the authors of the survey on the status of women in CEE stress, one of the main problems with the adaptation and realization of human rights law in the former communist countries is ‘the weak understanding of its background and the concept behind it’, as well as lack of the *cultural acceptance* of [gender] equality.<sup>24</sup> Or, as Will Kymlicka writes, ‘[the] legal and

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<sup>24</sup> See the report of International Helsinki Federation for Human Rights on gender (in-)equality, 2000, 17.

political reforms will only be successful and enduring if they are accompanied by changes in people's underlying hopes, fears and expectations [... ]'.

## 2. The New Human Rights Approach of the EU: Conditionality and 'Maximalism'.

The next question that this paper addresses is the place of human rights issues in the accession policies. These should be analyzed both as part of the so-called Copenhagen Criteria, and as related to states' affiliation with the Council of Europe (CoE), which is one of the EU membership prerequisites.

This analysis takes into account two contemporary human rights debates.<sup>25</sup> First, there is a debate between the so-called 'minimalists' and 'maximalists', which centres around the issues of how inclusive, spacious and detailed should the internationally recognized human rights catalogue be. Those two positions disagree on the very definition of human rights catalogue. The former one defines it as 'fundamental principles that can be met with the consensus of all people across all boundaries of culture, politics, religion and levels of economic and social development', whereas for the latter one human rights constitute 'a universal system of norms that should progressively expand and reshape itself to take account of every new social and technological innovations' (Storey 1995, 133 and 134). Another approach identifies those two positions as 'universalist' and 'moderate relativist'.<sup>26</sup> The former position argues for a detailed human rights catalogue, which 'cuts across' cultural and political differences among countries, whereas the latter emphasizes that norms and values are time- and place-dependant, and thus any project, which goes beyond formulation of a general and inclusive human rights framework, is a disguised attempt to exercise Western imperialism, and runs the risk of being misapprehended and fruitless.<sup>27</sup> The second debate takes place between the 'conditionalists' and the 'anti-conditionalists', which represent two opposite positions in the dispute on whether the level of human rights observance in a given country should be a condition for political decisions (like inclusion in certain organizations) or economic assistance.<sup>28</sup>

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<sup>25</sup> Storey 1995.

<sup>26</sup> Cf. e.g. Steiner and Alston 1995, 194-208.

<sup>27</sup> See Bergem, Karlsen and Slydal 1999, 151-153.

<sup>28</sup> See Bergem, Karlsen and Slydal 1999, 171-180.

It has been argued that contrary to previous enlargements (particularly the Mediterranean Enlargement, when the wider political context in the applicant countries also signified the importance of considering human rights situation in the pre-accession and accession period) we are now witnessing the development of the so-called EU 'new human rights policy'. This 'new approach' can be characterized as a relocation of human rights issues in the accession politics and gradual move towards the 'maximalism' and 'conditionality' positions. The increased degree of human rights 'conditionality', as well as the proliferation and complexity of requirements are observable both in regard to the Council of Europe membership, and EU membership:

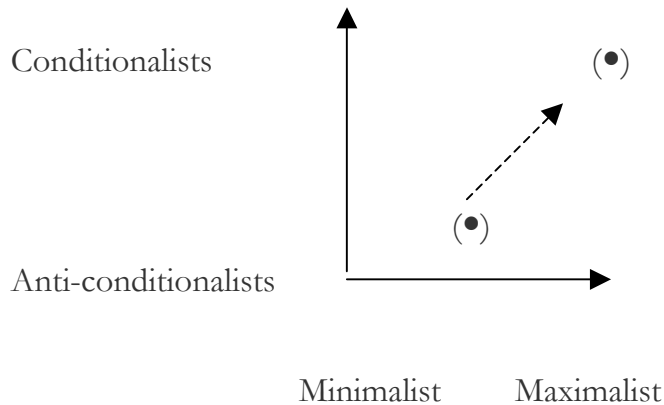
- In order to become members of the CoE, the post-socialist states must meet more requirements in more limited time-span than those that became affiliates during the period 1950s-80s: new regulations were introduced and some of the 'old' were specified (e.g. legislation on the minority issues, particularized conditions on democratic performance, acceptance of all control mechanisms of the CoE).<sup>29</sup>
- In order to become members of the EU, the post-socialist CEE states, in addition to being members of the CoE, were, also, obliged to meet the criteria of 'the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and respect of minorities' agreed upon in Copenhagen in 1993.<sup>30</sup>

Here, in general, similar tendencies to CoE accession can be observable: (i) minority and human rights issues have been named one of the top-priorities for the EU membership, (ii) have been included in the enlargement criteria and regularly assessed and reported on by the Commission since 1998, (iii) progress done in legislation adaptation and institutional developments by the candidate countries have been analysed in detail, widely commented on, and evaluated, and (iv) financial assistance have been granted and a number of projects launched in order to support human rights and democratic developments. In other words, contrary to the previous enlargements, the 5<sup>th</sup> one witnesses increased importance of human rights as one of the accession conditions, their higher degree of specialization, attention from both the norm-sending and norm-receiving parts, which translated also into financial and institutional assistance. That indicates some recognition from the side of the EU of human rights problems in the former communist states. Compared to the previous enlargements, this time the policy of the EU have undergone a significant shift towards the 'conditionalist' and 'maximalist' positions:

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<sup>29</sup> For more detailed information see Storey 1995.

<sup>30</sup> DG Enlargement, Information Website.



## Model 2. Transformation in EU human rights policy during the 5<sup>th</sup> enlargement.

The vertical relocation signifies the initial phase of the transformations; human rights considerations have gained greater political prominence as such and have been explicitly articulated as one of the prior restrictions or provisions upon which the actual enlargement can take place. It has been accompanied by the horizontal relocation as well: inclinations towards the maximalist position; i.e. proliferation specialization of the requirements.

### 3. European Human Rights Standards: does Poland Submit?

The modifications of the enlargement policy introduced in relation to the 5<sup>th</sup> enlargement suggest that the post-communist context and the specificity of the human rights situation in the applicant countries has been recognized and carefully addressed by EU. Guarantees of legal and institutional protection of human and minority rights have become one of the *sine qua non* for the CEE states to enter the 'European house', and have been cautiously defined and specified. However, the actual results of these policies remain unclear. Thus, the problem that this paper aims to address now treats on the effectiveness of the adopted legislation and developed institutions to address the acute human rights problems in the Eastern European region, and their ability to function within the post-communist domestic framework.

This question will be addressed in a comparative manner. The *content* of the EU requirements will be highlighted, as well as the *identified source* of human rights

violations and protection. The main assumption here is that EU can be analyzed as a human rights actor, which communicates its particular view on those human rights issues and dynamics it recognizes as pivotal (because of their scope, gravity and relevance for e.g. the questions of security and societal well-being). Thus, regardless of its communicative power, difference in methods and levels of action, EU human rights policy can be juxtaposed with the policy of other human rights actors. This paper compares what issues and actors have received most attention in the EU human rights policy towards Poland, and in the reports of three organizations:

- (i) Regional: International Helsinki Federation for Human Rights;
- (ii) Sub-regional: High Commissioner of the Council of The Baltic Sea States;
- (iii) National: Danish Center for Human Rights.

The hypothesis that this paper puts forth is that this juxtaposition proves that EU human rights policy lacks, at least in some important measures, necessary revisions and adaptations to the post-communist reality.

Even though the paper has so far aimed to delineate those human rights characteristic, which are in a varying degree accurate for all the post-socialist EU applicants, the second part will narrow its focus to Poland. Being among the '1<sup>st</sup> wave accession countries', Poland has strived to fulfill the political and economic criteria, which have had great effect on its domestic structures. Of course, this fact by itself by no means makes it exceptional in the rank of the accession countries. However, the main reason for selecting Poland as a case in this paper is its relative ethnic 'homogeneity'. The debates over the political accession criteria have been predominantly absorbed with the minority problems and minority rights in the CEE, possibly to the detriment of other important areas of human rights protection. This paper admits that there is a danger that the undoubtedly salient issue of minority rights guarantees may overshadow and divert attention from other human rights problems in post-communism. Thus, focus on Poland with its relatively uniform ethnic structure, gives an opportunity to observe how the EU has addressed and accommodated these issues in its policies.

### **3.1 Comparison of assessments.**

Progress, which each CEE country has made towards accession has been annually reported on by the Commission in its Regular Reports since 1998, where human and minority rights protection is analyzed under one of three sections that deal with the fulfillment of political conditions. The reports have been accompanied by

Strategy Papers(s), which include recommendations for further action. The section on human and minority rights protection in Poland has focuses on the following issues:

- Ratification of international human rights instruments;
- Domestic institutional developments (e.g. the office of the Commissioner for Human Rights Protection (1997), the office of *Ombudsman*);
- Domestic legal developments (e.g. Data Protection Law (1998));
- Freedom of expression (recognized strong independent press, )
- The treatment of asylum seekers (the aliens law (1997 and amendments in 2000));
- The work of non-governmental organizations;
- The question of the so-called ‘Vetting’ or ‘Lustration’ process;<sup>31</sup>
- The question of death penalty (abolished in 2000);
- The question of Roma population;
- The problem of abuses of power by the police;
- Legal protection of gender equality;
- Trafficking in human women and children;
- Prison conditions and detention facilities;
- Children rights;
- Minority protection (e.g. constitutional guarantees of the protection, parliamentary representation of the Germanophone minority, relations with the Jewish community).

The overall opinion has been mainly positive: Poland has been regarded as a country that respects and actively protects human rights of its inhabitants. In addition the major trend of improvement and continuous progress has been emphasized. Legal and institutional guarantees have been in focus, and state has been regarded as the primary human rights protector - and potential violator. The reports noticed either generally good condition of or major improvements in guarantees of freedom of

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<sup>31</sup> The term derives from Latin term *lustration* and has originally meant ‘purification through sacrifice’ (The Concise Oxford Dictionary). In the context of the post-communist reforms it has denoted process of disclosing and depriving of public functions those officials who were involved in e.g. secret services during soviet times.



expression, the role of NGOs in public debates, combating trafficking in human being, minority protection. The protection of economic, social and cultural rights has received relatively less attention, and mostly in the context of gender equality on the labor market. Issues, which have been recognized as still problematic and unimproved are mostly detainment conditions and abuses of power by the police. The so-called ‘Strategy Paper’ has not included recommendations for any significant assistance for strengthening human rights protection in Poland, and has in general tended to focus on problems with the fulfillment of the economic, rather than political, conditions. The following table compares the focus of EU policy with the subject matters undertaken by three European human rights formations:

Assessments by:	EU Commission <sup>32</sup>	International Helsinki Federation for Human Rights <sup>33</sup>	High Commissioner of the CBSS <sup>34</sup>	Danish Center for Human Rights <sup>35</sup>
<b>Rights in focus</b>	Mostly civil and political rights, Minority rights, Economic and social rights in relation to women, children, ethnic minorities	Different rights categories of the vulnerable social groups  (lack of the traditional division into rights ‘generations’, starting point: rights’ holders)	Not systematized rights-approach but focus on diverse human rights problems, which are relevant for the countries of the Baltic Sea  (inter-relation and inter-dependence of rights)	Four assessment categories: (i) Ratification of int. documents (ii) Civil and political rights (iii) Economic, social and cultural rights (iv) The policy of gender equality.
<b>Dimensions of protection:</b>	Legal and institutional	Legal, institutional and ‘actual’ (implementing, education, cultural context)	Legal, institutional and ‘actual’	Distinction between formal commitment and practical realization (both <i>de jure</i> and <i>de facto</i> )

<sup>32</sup> Based on the Regular Reports 1998-2002.

<sup>33</sup> Based on the following reports: *Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America*, 2002; *Religious Intolerance in Selected OSCE Countries*, 2000; *Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America*, 2001; *An Investigation into the Status of Women’s Rights in the former Soviet Union and Central and South-Eastern Europe*, 2000.

<sup>34</sup> Based on the following reports: *A Survey on the Situation in the Field of Local and Regional Democracy in the CBSS Member States*, 2000; *The Rights to Freedom of Religion and Religious Association*, 1999, *Working Conditions [...] in the CBSS Member States*, 1998; *Implementation of Certain Rights of a Child*, 1997.

<sup>35</sup> Based on Sano and Lindholdt 2001

				<i>de jure</i> and <i>de facto</i> protection)
<b>Identified human rights protectors</b>	State, little focus on NGOs and civil society	State and non-state actors (focus on empowerment of potential human rights victims)	State (esp. relevant national institutions) and non-state actors (individuals, groups, organizations on the domestic level, int. institutions)	State and non-state actors (involvement of the civil society, NGOs)
<b>Potential human rights perpetrators</b>	State	State and non-state	State and non-state actors	State and non-state actors (TNCs, individuals)
<b>Results of the evaluations</b>	Positive with minor considerations; assessments of gradual and noteworthy improvement	Positive as regards formal commitment, critical of the actual realization of rights and general betterment of the situation	Various	Positive concerning (i) and (ii), Critical concerning (iii) and (iv)

Table 1. Comparisons of assessments of human rights in Poland by EU and three human rights organizations.

Even a cursory analysis of the above records shows on the one hand striking similarities among the assessments of those three organizations, esp. in regard to actors and issues in focus, and some substantial differences between their assessment criteria and results and those of the EU. First and foremost, the focus of the EU has been predominantly placed on civil and political rights. Only few economic and social rights have been problematized (mostly in relation to gender discrimination problems and children rights), and cultural rights have received least attention (predominantly as a minority rights issue). The EU has recognized the importance of minority rights, but these have been defined predominantly in ethnic terms. This contrasts with the policies of all the three organizations, which have taken more inclusive approaches and stressed rights' interdependence and interrelation. They have either developed wide-ranging evaluation categories (like the Danish Center for Human Rights), or allowed for prioritization along different lines than the traditional division into three (or four)<sup>36</sup> generations of rights. The International Helsinki Federation identified those (political, civil, economic, social and cultural) rights, which are most problematic in the former soviet countries,

<sup>36</sup> Cf. Compagnoni 2000.

whereas the High Commissioner of the CBSS narrowed even more its scope of interest to those rights, which are of the greatest relevance for the post-communist countries of the Baltic Sea region. In addition, their work includes concern for the most recent so-called ‘solidarity rights’.<sup>37</sup> Therefore, these organizations seem to have recognized better than the EU that post-communism challenged the traditional division into different generations of rights, emphasized their mutual relations, and brought to the fore issues, which cannot be clearly characterized as e.g. either ‘economic’ or ‘political’.

Second, contrary to those three organizations, which have applied wider scope of analysis EU focused principally on the legal and institutional guarantees of the protection. Although these two undoubtedly constitute crucial dimensions of national human rights regimes, the questions is whether their provision is sufficient for assuring the actual *socialization* with human rights norms, their wider societal dissemination and embodiment in the collective value systems and behavioral patterns. The unanswered question of the EU policies is therefore how the undertaken measures translate into deeper societal transformations. This shows that the view of the EU human rights conditionality is mainly ‘change from above’, whereas the organizations supplement it with a more ‘underneath’ perspective.

Third, EU represents more ‘state-oriented’ approach than the three organizations, both as regards the mechanisms of rights protection, and the patterns of their violations. However crucial the role of the state remains in the post-Cold War order, one of the changes that post-communism has brought to the international human rights regime is the emergence of other human rights actors, more sophisticated relations between them, other levels of human rights protection and the need for conceptualization of non-state responsibilities for human rights violations. All of the three organizations seem to recognize that reality better than EU does and adapt to this multidimensional framework through development of both horizontal and vertical relations with other human rights actors, particular focus on the role of civil society and call for expanded concept of human rights violations, which cuts across traditional national-international, political-economic, and public-private divides.

Accordingly, EU has been most positive and optimistic in its evaluations and has shown fewest reservations (of admitted secondary importance). It has viewed Poland as country deeply committed to human rights principles, and emphasized constant progress and gradual betterment it has achieved. None of the three

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<sup>37</sup> These are also called ‘4th generation rights’ and include right to peace, development and clean environment.

organizations share its sanguinity. Not only do they highlight some serious flaws in the actual human rights condition in Poland, but also accentuate that the view of a linear progress and unremitting betterment implicit to EU reports is misleading in that regard that it overlooks the dynamics of ‘ebbs and tides’ so characteristic of the post-communist developments. In more general perspective, EU on one hand and those human rights organizations on the other, function with a fundamentally different recognition of ‘what post-communism is all about’. EU defines post-communism (or at least this is implicit in its human rights policies) as a bridge ‘from the East to the West’ that the CEE countries are crossing with difficulties but successfully. Post-communism is a transition phase with clearly defined ends, but deprived of substance of its own. Thus any discussion of ‘post-communist state’ or ‘post-communist transformations’ must be goal-oriented and future-oriented. On the contrary, the view that the other organizations are promoting is that post-communism in a way composes a self-regulating and self-determining entity and is ‘neither the east nor the west’ (and might never become one). It has its own life and its own dangers. This view opens up space for a discussion on different characteristics of post-communist state (cf. section 1.1), and creates more far-reaching perspective on the specificity of human rights in post-communism.

#### **4. Concluding remarks**

One idea running through this paper has been that the post-communist era introduces some distinctive traits to human rights situation in CEE, and that its recognition has become a precondition for any successful human rights policy in the post-Cold War times. These characteristics are numerous and diverse, and all together they form a complex structure which can be grasped provided that certain concepts are modified and certain policies introduced. This post-communist human rights model especially challenges state-centrism and the traditional division into different and separated generations of rights. Thus it calls for inclusion of non-state actors in this framework, extension of the concept of responsibility and ‘reconciliation’ between the traditionally antagonistic liberal and socialist human rights discourses. EU with its developed human rights politics towards the positions of ‘conditionality’ and ‘maximalism’ has played an important role in supporting democratic developments, and the respect for human rights in its future member states from CEE. However, with its conventional ‘from above’ approach, almost exclusive focus on the state and on formal guarantees of protection, and, what I claim to be flaws in its recognition of the significance of the post-communist context, EU might be less effective as a human rights actor than it is widely believed – and hoped for.

At the end of these deliberations, there are several major issues at hand. Provided this analysis is correct, and EU human rights conditionality policies suffer from certain flaws, what are the effects for human rights developments in the accession countries? The most optimistic scenario is that the remaining 'gaps' will be addressed and dealt with by other more 'percipient' and 'flexible' human rights actors. However, more gloomy view is that because of the lack of such political power and economic resources, as well as certain 'distortion of structures' the conditionality in its present form may lead to, those alternative human rights actors will turn out to be significantly less effective and influential. And at last there the last issue of the very *raison d'être* of the EU as a human rights actor. What I have named as 'flaws' does not necessarily indicate failures of its conditionality policies *per se*, but rather implies multiplicities of its objectives, interests and actors involved, and complexity and certain degree of 'rigidness' of its structures. As well as admittance that the end of the Cold War has not changed the fact that the fight for human rights is not necessarily always a 'positive-sum' game.

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