

## **The Fundamental Rights Agency: a minimalist conception of human rights**

By Dick Oosting

The European Council took even insiders by surprise with a sudden decision in their December 2003 meeting to set up a human rights agency in Vienna. The Commission has now presented its formal proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights (FRA)<sup>1</sup>, and the agency, which is to incorporate the existing EU Monitoring Centre on Racism and Xenophobia, is to be operative in January 2007.

The establishment of the agency is the latest in a series of developments in the field of human rights in the EU, including the adoption of the Charter of Fundamental Rights in 2000, the establishment of an EU Network of Independent Experts in Fundamental Rights in 2002, a Commission communication on the possible application of Article 7 of the Treaty on European Union (TEU) in 2003 regarding human rights compliance by EU Member States, and the establishment in 2004 of a Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities headed by Commission President Barroso.

On the face of it, these developments constitute a significant process of shaping a domestic component of the EU's overall human rights policy in terms of standards, their institutional anchoring and their implementation within the EU. The reality, however, is rather more sobering.

With the EU's constitutional process in limbo, the prospects of making clear progress is weakened in the area of human rights as in so many others. The Charter of Fundamental Rights, which was to be incorporated into the proposed EU Constitution, now remains in the form of a declaration. The planned accession of the EU to the European Convention on Human Rights is for the same reason delayed, and perhaps in doubt altogether. Shamefully, the 2003 Commission communication on Article 7 TEU to this day remains without response by the Council. Now the EU appears to be heading for a minimalist concept for its proposed Fundamental Rights Agency (FRA).

As expected, the Commission proposes a geographical remit essentially focusing on the EU itself and on candidate countries, while the regulation would confine the objective of the agency to "provid(ing) the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".

In other words, the substantive mandate is limited to the Community and Member States applying Community law – i.e. excluding Member States' human rights observance generally. There is only a small window left open in that the agency will be allowed to pursue its activities in areas referred to in Title VI TEU, that is police and judicial cooperation in criminal matters.

The FRA is hailed as a reflection of the EU's ambition that standards and policies are not just pious intentions but are applied in practice, and that for the EU, human rights are not just a matter of relations with third countries but also require attention at home. However, the critical factor in the debate on the FRA and the shaping of an EU domestic human rights policy is that the scope of that debate is limited to compliance with fundamental rights within the framework of Community law. In other words, rights compliance when Member States act autonomously, outside that framework, is not to be covered.

Despite glowing statements about the EU defending and promoting fundamental rights and values at home, the truth is that it excludes much of what the average citizen would expect it to cover. In an

---

<sup>1</sup> COM (2005)280 final.

unfortunate but telling turn of phrase, Luxembourg Justice Minister Luc Frieden stated at the time of the presentation of the Commission's proposal last June that the agency "should not interfere with monitoring Member States' compliance with human rights".

Amnesty International believes it is politically and morally unacceptable for the EU to keep turning a collective blind eye to structural human rights problems within its own borders. Over the past year we have appealed in vain to the Commission to fulfil its role as guardian of the treaties over the expulsions of "illegal immigrants" back to North Africa, without due process and in breach of international human rights obligations. In a recent report we have demonstrated a significant human rights deficit in the EU's counter-terrorist effort<sup>2</sup> and called for an examination of the threats to the balance between security and human rights. The government's primary duty is to protect its citizens, but serious questions arise from the recent warnings by the UK Government about changing "the rules of the game" in the fight against terrorism and about exempting itself from certain human rights obligations related to the absolute prohibition of torture and of *refoulement* to countries where serious human rights abuses occur.

Amnesty International welcomes in principle the creation of an EU Fundamental Rights Agency after repeatedly calling for effective monitoring and correction mechanisms. However, what we see is a strong push for a minimalist conception of the agency in order to ensure that something is put in place quickly that fits existing structures and that does not offend political sensitivities. The agency is being discussed in the context of what is still very much an *ad hoc* approach to fundamental rights policy in the EU, when instead, a rethink is required of the way in which the EU deals with the promotion and protection of fundamental rights within its own borders.

The essence should lie in improving individual protection throughout the EU. To achieve this, the respect for individual rights should be the cornerstone of the law-making and policy processes in the EU. It calls for raising the corrective capacity of both national and collective systems to enable them to respond to structural abuse with structural improvement. This in turn should serve to ensure that human rights protection in law and practice is the effective backbone of the mutual trust and recognition on which the EU aims to build its "area of freedom, security and justice."

In reality, EU law and policy increasingly extend into precisely those areas that Member States try to shield. With the "Hague Program" in November 2004 the Council set out to provide new impulses encompassing the functioning of the European Arrest Warrant and similar instruments of judicial cooperation, common minimum standards on the rights of suspects and defendants in criminal proceedings, the conduct of police cooperating across borders and alternatives to pre-trial detention. It is impossible to divorce these developments from the actual practice in Member States. The "area of freedom, security and justice" is built upon mutual trust between Member States in each other's justice systems. As it develops, it will be necessary to ascertain whether or not that trust is solidly founded in protection of individual rights. Effective cooperation to fight serious crime including terrorism will depend on it.

For that reason, we need an agency that is empowered to identify weaknesses in the way these systems operate. There is already plenty of monitoring being carried out, by the Council of Europe, by United Nations treaty bodies, by the EU Network of Independent Experts, by national human rights institutes and by NGOs. But there is very little in the way of analysing and shaping all that information into remedial action or of translating it into the EU framework. It is precisely that function that is missing in the system, and it is precisely that function that Amnesty International believes the agency should fulfil.

If the agency is to add meaningfully to the protection and promotion of fundamental rights in Europe, it should not be a mere extension of the EU institutions, adding a new layer to an already complex network of agencies and bodies. Instead, there is a strong need for an independent and competent agency that is not barred from but empowered to identify the weaknesses in the existing systems of human rights protection within the EU, and to raise the corrective capacity of both national and collective mechanisms to respond to abuse with structural improvement and effective prevention.

---

<sup>2</sup> *Human rights dissolving at borders? Counter-terrorism and EU criminal law*, Amnesty International EU Office, May 2005

The Commission's proposal does not offer that prospect. Its governance system would exert tight controls over work program and priorities, so even if one could interpret the limited mandate to allow for more than is envisaged - considering that human rights compliance is indispensable for effective judicial cooperation - it is not likely that the agency will be given much rope. And although there is good reason nevertheless to support the agency to pursue issues that it can deal with, at the same time ways must be found, and pressure exerted, to ensure that the glaring deficit in the EU's domestic human rights policy will no longer be ignored. That deficit must be addressed if the EU is to remain credible in its overall human rights effort, and if it is serious about placing fundamental rights and values at the heart of all its endeavours.

The question is, if the agency is not going to do it, who will?

Dick Oosting  
Director  
Amnesty International EU Office

This article was first published in The European Policy Centre's online policy journal Challenge Europe: [www.theepc.be](http://www.theepc.be)