

THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE EUROPEAN COURT OF JUSTICE

The impact of European Union accession to the European Convention on Human Rights

by

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This is, in one respect at least, an appropriate date for our discussion. The original text of the European Convention on Human Rights recalls that it was 'done at Rome' on 4 November 1950, 55 years ago today.

55 years later, the Convention has established itself as the fundamental constitutional text on human rights for the whole of Europe, with +45 States parties all of whom are subject to the compulsory jurisdiction of the European Court of Human Rights ("the Strasbourg Court").

In another respect, however, this might be thought to be an inappropriate time for our discussion, since this conference was conceived on the assumption of the entry into force of the European Constitution, an assumption which is now, to say the least, uncertain.

Among the profound changes in the European Union which the Constitution would have wrought, it would have introduced far-reaching new arrangements for the protection of fundamental rights.

On the one hand, it would have introduced, as Part II of the Constitution, the European Union's own Charter of Fundamental Rights, thus giving it not merely legal force, but constitutional status. On the other hand, it would have provided for accession by the European Union to the European Convention on Human Rights, entailing as a corollary, with the necessary institutional modifications, acceptance by the European Union of the jurisdiction of the Strasbourg Court.

However, the prevailing uncertainty over the future of these arrangements in no way precludes useful discussion of the main themes of the relationship between the European Union and the European Convention on Human Rights. Indeed it perhaps makes such discussion all the more relevant. In particular, the failure (at least for the time being) of the process for incorporating the European Union Charter leaves the

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European Convention on Human Rights as the prime source of identifying fundamental rights in Europe.

That has indeed been the approach of the ECJ over the years. I will start by outlining briefly the position as it now stands in EC law.

First, in recent years, there has been a remarkable development in the case-law of the European Court of Justice. It now cites systematically, almost routinely, the case-law of the Strasbourg Court. This is remarkable particularly since the European Court of Justice does not systematically cite the case-law of any other Court, and indeed cites any other case-law only very rarely.

Indeed the European Court of Justice has even followed the Strasbourg case-law to the extent of re-considering its own previous case-law in the light of later Strasbourg case-law: that occurred notably in *Roquette* (2002) when the European Court of Justice appeared to reconsider its *Hoechst* (1989) case-law in the light of the Strasbourg Court's judgement in *Chappell* and later *Casey* concerning the search of business premises under Article 8 of the Convention.

But the traffic is not only in one direction: the Strasbourg Court also appears to have reconsidered its case-law in the light of European Court of Justice case-law. That may have occurred in *Goodwin v UK*, concerning the rights of transsexuals to marry in their assigned gender, where the Strasbourg Court referred to the European Court of Justice case of *P v S and Cornwall County Council*.

Most recently there has also been a remarkable development in the case-law of the Strasbourg Court. It has acknowledged the extent of review by the European Court of Justice for compliance with the European Convention on Human Rights, and has accepted that review as limiting the need for intensive scrutiny by the Strasbourg Court itself. In its judgment of 30 June 2005 in the *Bosphorus* case, the Strasbourg Court had before it a question of possible violation of the Convention which had already been considered by the European Court of Justice in a reference from the Irish Supreme Court. After careful analysis of the system of protection of fundamental rights in the European Union, and after reviewing the treatment of the *Bosphorus* case in the opinion of the Advocate General and by the judgment of the European Court of Justice, the Strasbourg Court was satisfied with the system of control of the observance of Convention rights under EC law and concluded on that ground that there was no need for that Court itself to re-examine the issue of a violation.

The Court took the view that State action taken in compliance with the obligations flowing from membership of an international or supranational organisation is justified "as long as" (one might say "Solange") the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention itself provides.

By "equivalent" protection of fundamental rights, the Court states that it means a "comparable" rather than "identical" system of protection; a very welcome position, and one which could be taken as a model by other courts. The Court explains that any requirement that the organisation's system of protection be identical could run counter to the interests of international co-operation – an interest which is described as a legitimate interest of considerable weight.

After surveying extensively the system of protection of fundamental rights in European Community law – including the system of remedies, the Treaty provisions on fundamental rights and the case-law of the European Court of Justice – the Court finds that the system of protection can be considered to be equivalent to that of the Convention system.

What then of the changes which would have been introduced by the Constitution?

While the failure of the Constitution, and the reasons for the failure, are certainly to be regretted, it is possible to find some consolation in the specific context of fundamental rights. Although competition is in general a valuable technique for achieving economic progress and is central to the concept of the common market, it is not clear that competition between fundamental rights instruments within the same legal order has a positive value. Moreover, in the particular case of the European Institutional complex, the constitutional entrenchment of the Charter might be seen as liable to cause confusion. There was certainly much to be said for the idea that the European Union should have its own charter of rights, particularly suited to its own competences and activities and expressing its own values. As it finally emerged from the negotiating process, however, the Charter might be liable to be confusing, or even misleading; for example:

1. Rights apparently proclaimed without qualification in the Charter would have to be understood in the light of so-called "explanations" – the "small print" added during the negotiations - which significantly reduce their scope.
2. Certain provisions are intended to do no more than reproduce the rights contained in the European Convention on Human Rights, but do so in different language.
3. Confusion might be caused by the inclusion within the same instrument of judicially enforceable rights and of rights which are not contained in the European Convention on Human Rights, notably social and economic rights, and which in some respects are not obviously justiciable.
4. The greater the significance attached to the European Union Charter, the more difficult it might be (as indeed it has already proved to be) to explain to the general public, and even perhaps to lawyers and judges, that the Charter is not an all-purpose human rights instrument for the European Union but on the contrary is intended to have a rather limited scope, being addressed only to the European Union institutions, and to the Member States only when they are implementing European Union law. And even on the latter point there may be cause for confusion: the

Member States would be subject to the Charter where they were implementing European Union law, but to the European Convention on Human Rights where they were acting on their own. The borderline between the two situations is not always easily discernible.

Moreover, once it was established that the Member State was, in a particular instance, implementing European Union law, it would be subject simultaneously to three sets of guarantees: the Charter, the Convention and its own Bill of Rights – it might be thought, one layer too many.

The other relevant aspect of the European Constitution, accession by the European Union to the European Convention on Human Rights, may also be seen as having advantages and disadvantages, the outcome of a cost-benefit analysis not being entirely obvious even after 25 years of debate. Opinions are still divided on this issue.

If the need arises to re-consider which aspects of the Constitution should be preserved, then ideally all options should be examined. It may be necessary to decide on priorities. Although accession of the EU to the ECHR is an idea now firmly entrenched, and preparations for accession have been made in the 14th Protocol, it should not be regarded as too heretical to consider whether in the current situation accession has the highest priority compared with other reforms for the protection of fundamental rights.

It should first be recalled that, in the absence of accession, the current situation as regards substantive law is perhaps little different from what it would be on accession, since, as pointed out above, the European Court of Justice regards the European Convention on Human Rights as if it had legal force for the European Union, and particularly over the past ten years follows very closely, regularly cites, and systematically seeks to apply, the case-law of the Strasbourg Court.

Many arguments have been advanced in support of the idea of EU accession. Some of the arguments are however, when examined, rather weak: for example, that the EU should accede because its Member States are Parties, or because it regards accession as a condition of membership of the EU, or because it has a human rights policy in its relations with third countries. Such arguments are weak, in my view, because they do not touch on what ought to be the central question, which is whether EU accession would strengthen the protection of human rights in the EU.

The strongest argument for accession has seemed to be that when Member States transfer powers to the EU, the exercise of those powers, previously subject to the jurisdiction of the ECtHR, ceases to be subject to that jurisdiction. That argument seems, of course, especially powerful when new Member States join the Union, and was therefore particularly resonant in the period leading up to the great enlargement of 2004.

The argument seems to overlook, however, the fact that the EU is a decentralised system in which the exercise of the EU's powers, in relation to individuals and

undertakings, is almost always entrusted to Member States. In most cases the legality of Member State action can be reviewed by the ECJ, either directly at the suit of the European Commission or indirectly on a reference from a national court. In the course of that review the ECJ can examine the conformity of the Member State action, or of the underlying EU measure, with the ECHR. And the conduct of the Member States, when exercising those powers, can in principle be subject to further review by the ECtHR, as was demonstrated in its *Bosphorus* judgment of 30 June 2005, discussed above. Moreover in that judgment the Court of Human Rights held in effect that, so long as there was an effective system of protection of human rights, ensured through the Community's judicial system, no further scrutiny by the ECtHR was necessary.

It would seem paradoxical therefore, in the light of the *Bosphorus* judgment, to accept what might have seemed the strongest argument for EU accession. The main purpose of accession would be to secure scrutiny by the ECtHR; but in the standard case, that Court would renounce such scrutiny.

The same might be said of those relatively few cases where the Community institutions exercise power directly over individuals and undertakings, but where there is a direct action available before the ECJ: notably where measures are taken affecting the rights or interests of officials of the institutions, or where the Commission takes measures enforcing the competition rules and international trade rules against companies. Indeed there is an even stronger objection here. For here there is already in place a multi-layered system of judicial protection, with appeals available to the Court of First Instance and then to the ECJ, and in staff cases a potentially three-tier system starting at the level of the new and highly qualified EU Civil Service Tribunal. It might seem wholly superfluous, and designed to cause confusion rather than allay anxiety, if there were a further appeal available from one set of European courts, in which the issues had already been examined two or three times, to another European Court. And again the Court of Human Rights might renounce further scrutiny.

But then it may be said that there may be other cases where there is no effective judicial review, either at national or at Community level, and where the ECtHR would provide the only remedy. The main examples seem to be on the one hand cases where the rules on the standing of individuals and companies are too restrictive, so that the applicant is denied standing, or on the other hand cases where the EU body concerned cannot be sued.

Both categories are certainly important, even if the latter category is more significant potentially, as new bodies are set up which might exercise powers over individual and companies. Yet it seems little short of perverse to advocate accession to the ECHR as a means of providing a remedy which is not otherwise available. The solution should rather be to extend the jurisdiction of the EU courts to enable them to review such action and where appropriate to grant a remedy. Indeed the absence of such a remedy would itself be a violation of the Convention.

One great merit of the European Constitution in this area is that it would do away with the three-pillar structure and, in doing so, would extend the jurisdiction of the ECJ. However there would still remain significant restrictions on the Court's jurisdiction, both in relation to what used to be called "Justice and Home Affairs" and in relation to the Common Foreign and Security Policy.

It is not easy to explain the persistent resistance of the Member States to conferring jurisdiction on the ECJ, especially in areas where the liberty of the individual is directly in issue. If the explanation is a fear of a hyper-active Court, such a fear is not justified. Even in the sensitive field of the common foreign and security policy, the Court could be relied upon not to overturn decisions of high policy, but rather to ensure the protection of the interests of individuals. A good example is the approach of the Court where it has an analogous jurisdiction, namely in the implementation of trade sanctions imposed by resolution of the Security Council of the United Nations – sanction measures which are implemented for the European Union by EC regulations under the Community pillar of the EC Treaty, and the interpretation of which is therefore within the jurisdiction of the Court. The Court's approach has been consistently prudent, yet effective.

It is particularly difficult to explain the apparent contradiction that the authors of the Constitution were not willing to improve access for individuals to challenge Community measures: the current restricted access, noted by the ECtHR in the *Bosphorus* judgment, could itself infringe the ECHR.

Perhaps the explanation lies in a final argument advanced in support of EU accession to the ECHR, namely that it is of symbolic importance. This seems to me a particularly weak argument, but it is perhaps a revealing one.

The explanation is perhaps that political leaders – and indeed some eminent lawyers who have adopted the same approach – regard symbols as of greater importance than substance.