

On the Charter of Fundamental Rights of the European Union and the EU accession to the European Convention on Human Rights

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Abstract

After a short presentation of the Charter of Fundamental Rights and its features, the paper is focused on the European Union's accession to the European Convention of Human Rights. As part of the Treaty of Lisbon implementation, this process is not an easy one. The author intends to identify and raise questions on this process, and to emphasise some technical and procedural difficulties, by comparing the two main European human rights systems. Europe has to face many changes and challenges: the recent entry into force of the Treaty of Lisbon, the "new status" of the Charter of fundamental rights (as a legally binding instrument) and the beginning of the process of EU's accession to the European Convention of Human Rights. This paper is intended to point out some aspects of this new era of the European construction.

Key words: human rights, European human rights law, accession, Treaty of Lisbon, European Convention

JEL classification: K33, F13, F59

1. Introduction

Closely related to the European construction process, the fundamental rights in the European Union have acquired some characteristics: of instruments for establishing a common area, of preservation of the primacy of the European law, of constitutive elements of European citizenship (de Schutter, 2004). Considered a true „Bill of Rights”, the Charter of Fundamental Rights of the European Union contains within its six titles, provisions concerning the rights, freedoms and principles it guarantees (Ciuca, 2008). An analysis of the text reveals that Dignity (Title I), Freedoms (II), Justice (VI) cover articles 2-12 of the European Convention and articles 1 and 2 of Protocol no. 1, Solidarity (Title

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IV) refers to some of the rights in the European Social Charter. Title V, regarding citizenship, contains the specific rights of the EU citizens.

The legal framework of the Charter is made up of „rights”, „freedoms” and „principles” (art. 6 of the Treaty of Lisbon). The category of „rights” covers the rights recognized by the European Convention with the same sense and extent granted by this document. The specification that the Charter makes (art. 52 para.3) refers to the increased possibility of protection within the Union of these rights which are „minimum standards”.

The phrase „fundamental rights as resulting from the common constitutional traditions of the Member States” (used both in the preamble to the Charter and in Art. 6 para.3 of the Treaty of Lisbon) indicates that both these rights and those specified by the European Convention on Human Rights represent, in the law of the Union, general principles (da Salvia, 2009). In keeping with the text, these rights are to be interpreted according to these traditions.

As for the „principles”, they remain at the disposal of the institutions and of the Member States in applying EU law and exercising their powers, but only for the interpretation and the control of the legality of some acts.

Moreover, paragraph 5 of article 52 explains the difference between the rights and the principles contained in the Charter: while subjective rights should be respected, principles should be observed. Principles can be implemented by legislative or executive acts, adopted by the Union in accordance with its powers, and by the Member States through the EU law implementation. The rights may be invoked before the Court against a Community measure or a national implementation measure and the principles can be sanctioned by the court only when they refer to a measure that carries them out. As a result, one can not directly invoke a principle because it does not generate a subjective right in his favor (Jacqué, 2009).

2. On the legal nature of the Charter of Fundamental Rights

The respect for human rights is one of the principles generally recognized by European Union law and its content was developed in the case law of the European Court of Justice, in accordance with international agreements and common constitutional traditions of the Member States.

The preamble of the Charter emphasizes the need to „strengthen the protection of fundamental rights in the light of changes in the society, social progress and scientific and technological development by making those rights more visible ...”. As a result, the Charter put together the rights recognized in the European Union and confirmed by the Treaty of Maastricht, in a catalog of rights and principles.

With the entry into force of the Treaty of Lisbon, the Charter becomes a legally binding instrument. The famous Article 6 (1) of the European Union

Treaty, amended by the Treaty of Lisbon, states that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights, which shall have the same legal value as the treaties within the legal order of the Union.

Of course, the problem which *prima facie* becomes obvious is that, in terms of Public International Law, the Charter is not a treaty. We are not in the presence of the well-known elements included in the text of the Vienna Convention on the Law of the Treaties (1969): international agreement, concluded between states, in written form and governed by international law ... The Charter was not signed nor ratified by the Member States. Its provisions have been included in Part II of the Treaty establishing a Constitution for Europe (signed in Rome, on October 2004) and, even if the treaty was signed by the Member States, it never entered into force (being rejected, as one knows, by France and the Netherlands). Nevertheless, the Charter will have the same legal value as the treaties under the Union's Law.

A second issue concerns the relationship between the Charter and other relevant Human Rights instruments and specifically, the European Convention on Human Rights. Since the Charter is not a treaty in the light of Public International Law, it seems to be evident that this relationship does not fall under the Vienna Convention on the Law of the Treaties either. Therefore, Member States will preserve their existing obligations to the European Convention on Human Rights.

The Treaty of Lisbon which amends art. 6 (2) of the EU Treaty requires the EU to accede to the European Convention on Human Rights, yet stressing that „this accession shall not affect the Union's competences as defined in the treaties”.

A protocol containing specific provisions related to accession refers (in art. 2) to the preservation of the competences of the Union and the powers of its institutions as such. Therefore, the Charter has juridical value of primary legislation within the order of the European Union, which means that its application will be limited to the area of the EU law. Moreover, the text of art. 51 (2) is enlightening in this regard: “The Charter does not extend the field of application of Union law beyond the powers of the Union, or establish new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

The Union's secondary legislation shall comply with the provisions of the Charter on Human Rights since its legally binding nature is that of primary Union Law. On the other side, the obligations assumed by the Member States in the area of International Human Rights Law will not be affected by the EU's accession to the European Convention.

3. EU's accession to the European Convention on Human Rights

Accession is a part of the implementation of the Treaty of Lisbon, it is not left up to the Member States, but it is imposed to them as an imperative (in the wording of art. 6).

The issue of accession can be approached from the perspective of the dialogue between the European Community / Union and the Council of Europe, the perspective of the institutional relations between the two organizations and also that of the provisions of the Community treaties. On the other hand, we further intend to point out a number of issues that arise during this process which is not at all an easy one.

1. The discussions on the relationship between the Council of Europe and the European Communities in the area of human rights protection (and related precisely to the Communities' accession to the Convention) are not a novelty. It is enough to mention the 1979 memorandum of the Commission concerning accession, the 1994 working document of the Commission on accession, the openness of the European Parliament when asking the Commission and the Council to start preparations for this purpose. On the other hand, the Council of Europe often reiterates in the content of the recommendations and resolutions of the Parliamentary Assembly the need for reinforcement of human rights protection across Europe. The Protocol no. 14 to the European Convention, adopted in 2004 (and entered into force on June 1, 2010) which aims also to increase the efficiency of the European mechanism (through changes at the level of the structure of the Court, by introducing new rules on the admissibility of individual complaints, by granting new competences to the Commissioner for Human Rights (Ciuca, 2006) introduces an amendment (to art. 59 of the Convention) which allows EU accession to the European Convention.

On the same line of offering support to the accession by the two European regional organizations stand the obligations to respect the provisions of the European Convention on Human Rights imposed to the candidate state for the EU integration and also to the countries outside Europe receiving support in the area of democracy and human rights (Machińska, 2009).

2. The institutional cooperation between the two organizations concerning the process of the EU accession to the European Convention started with an exchange of letters between the Secretary General of the Council of Europe and the European Commission President (as early as 1987), which displayed the readiness to ensure the participation of the representatives of the European Commission at the proceedings of both the Ministers' Conferences and of the committees established by the Committee of Ministers, and to draw up a draft treaty to that effect.

2005 and the Summit of the Heads of State and Government of the Council of Europe (Warsaw) materialized into the drafting of an action plan

emphasizing the idea of improving the relationship between the two organizations on the matters of democracy and the rule of law.

The Juncker Report, as a form of personal and inter-institutional involvement in the field of human rights (Machińska, 2009), paved the way for cooperation on human rights, democracy, rule of law, education, culture, intercultural dialogue and institutional dimension and was followed by the signing of a memorandum of cooperation in these areas by the two organizations.

The creation of the European Union Agency for Fundamental Rights as a system to provide the necessary information to the bodies, offices, Community agencies and Member States and to coordinate the EU activity with that of the Council of Europe represented a further step in the accession process.

4. The provisions of the treaties concerning EU accession

In view of the prospective accession to the European Convention, the European Council raised the question of compliance with the Treaty establishing the European Community. The Working Group II established for this purpose has stressed the need for coherence between the EU and „Greater Europe” and for assuring similar guarantees for citizens.

A very brief analysis is sufficient to conclude that Community treaties adopted over the years have paved the way for this step. The Maastricht moment has become a reference point due to the introduction of the guarantee of human rights in accordance with the European Convention and the common constitutional traditions of the Member States, by encouraging and developing democracy and the rule of law, cooperation in the sphere of justice and home affairs (the famous Pillar III) in the light of the European Convention. The Treaty of Amsterdam extends the scope of the competences concerning the protection against racism, xenophobia, discrimination based on sex, race, ethnic origin, religious or sexual orientation, age or disability. In addition, it creates legal instruments to protect the foundations of the Union (which, according to the TEU are the principles of liberty, democracy, human rights) in cases of serious violations.

While the Treaty of Nice recommended the EU Member States to monitor and confirm the rights of the European Convention, the Treaty of Lisbon established art. 6 (2) of the TEU as the basis for accession to the Convention. This text guarantees that the accession to the Convention will not affect the EU powers warranted by treaties and establishes that human rights encompassed by the European Convention and arising from the common traditions of the Member States are part of the Community law, as its general principles.

5. Issues raised by EU accession to the European Convention

Of course, the EU accession to the European Convention aims to reinforce the human rights protection system within the European Union, but, at the same time, it aims at a greater consistency in guaranteeing the rights in the order of the Union, within the scope of the European Convention and at the level of the internal law of the States. Difficulties, however, appear to be multiple and the rights protection system tends to get complicated. Both the relations between the three juridical orders (Community, international – of classic type – and internal) and the division of competences between the courts called to hear cases from within or at the limits of these systems will be confusing. For example, on this last point, if the treaty on the functioning of the European Union excludes from the competence of the Court of Justice the Union's activities connected to External and Common Security Policy, except the restrictive measures regarding the individuals (Jacqué, 2010) , the Strasbourg Court could, on the contrary, decide on the acts committed by the EU in external interventions, based on the provisions of the European Convention which also covers issues of jurisdiction of the Member States.

It also may raise the question whether, after accession, the EU status in the Community order will be identical to that of conventional international law commitments within this order or whether the case law of the European Court of Justice on the status of international commitments will be applicable to the European Convention.

Along the same line, which will be the place of the European Convention in the juridical order of the Union? According to the current case law of the European Court of Justice in Luxembourg¹ the European Convention, as a EU commitment, must be inserted somewhere „below the law defined by treaties and above the secondary legislation” (Wróbel, 2009) (that is, in the hierarchy of Community law sources, somewhere after the Charter of fundamental rights). Nevertheless, in time, the case law of the European Court of Justice could set standards of protection based solely on the Charter of Fundamental Rights, which includes a wider range of rights and principles than the European Convention on Human Rights.

Given the fact that the Charter of Fundamental Rights contains both rights existing also in the Convention and rights which are not guaranteed by the latter, which will be the relationship between the content of the rights and principles in the Charter of Fundamental Rights and those in the catalog of the European Convention?

Article 52 (3) states that the determination of the value and purpose of the rights guaranteed by the Charter is done in light of the rights and freedoms of

¹ Joint cases C-21.24/72 International Fruit Company NV and others vs. Produktschap voor Groenten en Fruit, ECR 1972, 1219, p. 6.

the Convention, but only when they correspond to the rights guaranteed by the Convention. The analysis of the meaning and purpose of the rights in the Charter and those in the Convention should therefore require checking the correspondence of a right in the Charter with a right in the Convention, the determination of their meaning and purpose and also of the protection level of a right in the Convention in light of article 52 (3) of the Charter. But even when a perfect match (although the mentioned text does not require this) exists, the risk to grant a greater purpose and protection than that guaranteed by the Convention is still present.

As human rights protection systems, the Council of Europe and the European Union are asymmetrical in terms of influence, the level and purpose of juridical protection. The lack of complementarities, the institutional and procedural differences are visible. The fact that the members of the EU are, at the same time, Member States of the Council of Europe can be seen as a connecting factor, but, on the other hand, it can generate a series of problems (some conflicts of case law or differences concerning the obligations undertaken by EU Member States and those contracting parties of the Convention but non-EU members etc.).

A question that is increasingly recurrent in the discussions on accession is concerned with the protocols to the European Convention. Since the Treaty of Lisbon only refers to the Convention, which should be the interpretation with respect to the Additional Protocols? The answers on these options are divided: either the Union is to accede only to the protocols already ratified by the high contracting parties, which would obviously narrow the scope of protection of fundamental rights (as an example, Protocol no. 12 regarding non-discrimination is not ratified by all contracting parties but, in terms of content, it coincides with EU law); or those protocols that correspond to certain competences of the EU are to be retained; or the Union is to accede to all the protocols concerned with rights guaranteed by the Charter of Fundamental Rights (Wróbel, 2009) (the version that seems to be the most accurate).

Finally, in procedural terms, the accession agreement requires unanimity of the Member States of the Council and the approval of the European Parliament. The many issues that can be raised, such as those mentioned before, as well as the possible reservations which the states theoretically might formulate, show us that this process will be a difficult and lengthy one. However, the entry into force of the Protocol no. 14 to the European Convention (that took place on 1 June 2010) which amends this document and states that the EU accession represents a milestone in the history of the two organizations and in the reform of the European human rights protection system.

6. Instead of conclusions

Both the Council of Europe and the European Union are regional organizations created by the will of states on basis of the international treaties but they act in different manners, according to their aim. After years of progress in their activity they are now prepared for a new step: to put together their experience and their expertise in the human rights field. The accession of the European Union to the European Convention of Human Rights (as the main document of another European organization) is a difficult task. By comparing the two systems it is not surprising to observe the differences and to try to find logical answers to questions related to the place of the European Convention in the juridical order of the Union, to the new relationship between the content of the rights and principles in the Charter and in the Convention's catalog, to the fate of the Convention's protocols etc.

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