



Analysis

The EU's accession to the European Convention on Human Rights: a cause for celebration or concern?

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Internal negotiations over whether to accede to the ECHR have been mired by problems and highlight fundamental shortcomings with the EU's decision making process. An insistence on secrecy and an emphasis on "strategic priorities" have come to take precedence over individual rights.

For nearly 40 years, there have been plans for the European Union (or its predecessor, the European Community) to accede to the European Convention on Human Rights, and thus submit the actions of its institutions to the jurisdiction of the European Court of Human Rights. In December 2009, when the Lisbon Treaty came into force, Article 6(2) of the Treaty finally provided a legal basis for this accession.

Negotiations between the EU and the Council of Europe for the purpose of formulating a legal instrument for accession took place between June 2010 and June 2011, although they were not entirely successful. Disagreement between EU Member States over the minutiae of the legal instrument seems to be the primary cause of the delay.

Following a brief outline of the current situation for judicial human rights protection in the EU the substance of the accession agreement is covered; this is followed by a discussion of the EU's need to accede to the ECHR and its current relationship with human rights; elements of the accession agreement that will lead to discussions over whether the EU can yet be considered a state; and the fact that the accession procedure, on the EU side, has been marred by a lack of transparency.

Human rights protection in the EU

It is a common mistake that the European Court of Human Rights is an organ of the European Union. It was in fact established by the Council of Europe in 1953, and has 47 signatory states, 27 of which are EU Member States. This will rise to 28 with the accession of Croatia to the EU.

Individuals are able to submit a case to the European Court, located in Strasbourg, only after the exhaustion of all domestic remedies. It therefore functions as a court of 'last resort' for those dissatisfied with the final decisions of the highest national courts. While all EU Member States are required to be party to the European Convention, its provisions are frequently undermined or

flouted by the actions of those states – the purpose of the European Court is to try and provide external scrutiny of state action.

The EU's own high court is the European Court of Justice of the EU, which “settles legal disputes between EU governments and EU institutions”. It is also possible for “individuals, companies or organisations [to] bring cases before the Court if they feel their rights have been infringed by an EU institution.” [1]

Until the EU accedes to the European Convention on Human Rights it will remain impossible to submit the actions of EU institutions to the scrutiny of the European Court of Human Rights.

The substance of the accession agreement

The legal instrument to be agreed between the EU and the Council of Europe will cover a number of issues. There are 12 articles in the most recent (but not finalised) version of the *Draft legal instruments on the accession of the European Union to the European Convention on Human Rights*, covering:

- *Article 1: Scope of the accession and amendments to Article 59 of the Convention*
- *Article 2: Reservations to the Convention and its Protocols*
- *Article 3: Co-respondent mechanism*
- *Article 4: Inter-Party cases*
- *Article 5: Interpretation of Articles 35 and 55 of the Convention*
- *Article 6: Election of Judges*
- *Article 7: Participating of the European Union in the Committee of Ministers of the Council of Europe*
- *Article 8: Participation of the European Union in the expenditure related to the Convention*
- *Article 9: Relations with other Agreements*
- *Article 10: Signature and entry into force*
- *Article 11: Reservations*
- *Article 12: Notifications*

Negotiations between the EU and Council of Europe Member States within the *Informal Group on Accession of the EU to the Convention* (CDDH-UE) led to the production of a ‘final version’ of the *Draft legal instruments* in July 2011. However, EU Member States have still not managed to agree upon their position, and negotiations look set to continue well into 2012.

The implications of Article 1 are discussed at some length below (under the heading ‘A distinct legal entity’). Article 2 of the *Draft legal instruments* modifies Article 57 of the Convention, in order to allow the EU to make reservations to particular provisions of the ECHR “to the extent that any law of the European Union then in force is not in conformity with the provision.” However, laws passed following accession must conform with the provision that is subject to reservation, and reservations

have to be specific, “preferably restricted to a particular right” and not be general in nature. [2] There is no indication that the EU is intending to make reservations to any of the Convention’s articles.

Article 2 also deals with the issue of the Protocols to the Convention. There are only two Protocols to which every EU Member State is a signatory – ‘the Protocol’, concerning property, education and elections, and Protocol number 6, concerning the abolition of the death penalty, except in times of war or “imminent war”. The other protocols deal with the issues of civil imprisonment, free movement and expulsion (Protocol 4); criminal matters (procedure, appeals, compensation, double jeopardy - Protocol 4) and family; discrimination (Protocol 12); and the total abolition of the death penalty (Protocol 13).

As it is only the Protocol (i.e. the first Protocol, to which a number was not given) and Protocol 6 that all Member States have both signed and ratified, it is only the provisions of these Protocols that will apply to the EU upon its accession.

The co-respondent (or ‘co-defendant’) mechanism dealt with in Article 3 concerns the possibility of joint participation of both the EU and concerned Member States in a court case, in order “to avoid the situation where Member States alone bear the duty to defend the EU law’s conformity with the ECHR”. [3]

A submission by Amnesty International and the AIRE (Advice on Individual Rights in Europe) Centre to the CDDH-UE highlighted some of the issues surrounding the co-respondent mechanism, their main concern being that depending on the wording of Article 3, the mechanism may be overused and lead to the over-complication of cases, and the unnecessary involvement of the EU where fundamental principles of EU law may not be the primary issue at stake. [4]

A submission to the CDDH-UE from national human rights institutions also raised the concern that in cases where the EU and a Member State or Member States are acting as co-respondents, “the gulf between the legal resources at the disposal of applicants and...State and EU legal experts will likely render it more difficult for applicants to overcome admissibility criteria and be successful in their application”. In such a situation, applicants would require an extended timeframe to prepare and submit their applications. Such extensions “should not be excessive but should be reasonable...Overtly stringent requirements would frustrate the equality of arms requirement enshrined in the Convention”. [5]

Judging from discussions that took place in the EU’s Working Party on Fundamental Rights, Citizen’s Rights and Free Movement (FREMP) in November, there is some way to go before agreement is reached on the specificities of this article. Further discussion was deemed necessary on at least two of the sub-articles. [6]

It appears there is no dispute amongst EU Member States on the substance of Articles 4, 5 and 6 as they appear in the Draft agreement. Article 7, however, saw both the UK and French delegations in FREMP raise “strong objections”. Article 7 deals with the voting rights of the EU and its Member States within the Council of Europe’s Committee of Ministers, the body responsible for supervising the execution by parties to the ECHR of the judgements of the European Court of Human Rights.

It seems that most ire was reserved for a proposed amendment to the Committee of Ministers’ rules that would limit the voting rights of the EU and its Member States when supervising “judgements in

which the EU, on its own, or along with one or more Member States, has been found in breach of the Convention.” Bloc voting is of course undertaken by the EU Member States in a number of international fora, and the UK and French delegations felt that the proposed Draft agreement put this principle under threat. Currently the EU does participate in the Committee of Ministers, but has no voting rights.

One concern is that were the EU and its Member States to coordinate positions within the Committee, it could affect the execution of judgements handed down against the EU or its Member States. The UK and France seem to favour “a procedural safeguard mechanism whereby High Contracting Parties which are not EU Member States may question judgements concerning the correct execution of a judgement.” [7] This proposal was questioned by a number of the other delegations. As with other issues, further discussions were considered necessary.

The remaining articles deal with expenditure by the EU related to the Convention, and the implementation of the agreement. It would however seem that the UK’s enthusiasm for austerity has reached the negotiations, with its delegation “insisting on further clarification of the financial implications...this was to be considered as a precondition for its assent to the draft Accession Agreement.”

The provisional agenda for Council meetings under the Danish Presidency foresees an “Orientation debate with a view to concluding the accession agreement” taking place during the JHA Council on the 8 and 9 March 2012.

The need for accession

Article 6(2) of the Lisbon Treaty states that the EU “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms,” and that the provisions of the ECHR shall therefore “constitute general principles of the Union’s law.” (*Lisbon Treaty*)

The Stockholm Programme states that accession should be “rapid”, and invites the Commission “to submit a proposal on the accession of the EU to the ECHR *as a matter of urgency*,” (emphasis in original) due to the fact that it will “reinforce the obligation of the Union, including its institutions, to ensure that in all areas of its activity, fundamental rights are actively promoted.” (It may of course be noted that promotion and protection are entirely different concepts.)

The Spanish presidency of the EU noted that the issue of accession “ranks amongst the highest priorities”. Work on accession continued under the Belgian presidency during the second half of 2010, with the subsequent Hungarian presidency also stating that the issue would be “a top priority.”

Clearly, there is a significant impetus within the EU’s institutions for accession to the ECHR. One reason for this is certainly to do with the global image of the EU as a promoter and protector of human rights standards. In March 2010, as the EU Member States were attempting to coordinate their approach to negotiations with the Council of Europe, Viviane Reding (at the time Vice-President of the European Commission for Justice, Fundamental Rights and Citizenship) made a speech to the European Parliament’s Constitutional Affairs Committee, stating that becoming a signatory to the ECHR would “enhance the credibility both internally and externally of the EU’s strong commitment to fundamental rights.”

“An ambitious and comprehensive rights policy”

Of course, accession is not merely a propaganda exercise; its political and legal implications are significant. Joining the Convention system of rights protection is “one out of four key components of an ambitious and comprehensive EU fundamental rights policy.”

The other three components are the Charter of Fundamental Rights becoming legally binding following the entry into force of the Lisbon Treaty; the Stockholm Programme’s priority of “promotion of fundamental rights...setting the strategic guidelines for developing an area of freedom, security and justice in Europe”; and “the creation of the new ‘Justice, Fundamental Rights and Citizenship’ portfolio” which “shows the importance that President Barroso attaches to strengthening this area of the Commission’s action.”

Quite how seriously the EU’s human rights obligations are taken by its policy-makers is open to question. A damning report from Human Rights Watch [9] discussing “Europe’s own human rights crisis” suggests that, moving beyond “the fine words...human rights in Europe are in trouble.” Intolerance towards minorities (in particular Muslims); the persecution of the Roma and an increase in policies that trade rights for ‘security’ is indicative of failure’s by European governments and EU institutions to respond effectively to human rights issues.

In May 2011, FREMP produced *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies*. [10] These were produced in order to try and ensure that fundamental rights (as laid out in the EU Charter) were taken into account during preparatory work undertaken in the Council’s numerous working parties and preparatory bodies. The guidelines provide advice on checking whether proposals affect fundamental rights; thinking “from a fundamental rights perspective”; examining legislative proposals in relation to jurisprudence, and so on. Unfortunately, the first sentence of the guidelines states that they “should be considered as non-binding advice.”

“A distinct legal entity”

Perhaps the most significant political effect of accession will be the recognition of “the Union’s specificity as a distinct legal entity vested with autonomous powers.” The ability of individuals to take legal proceedings against EU institutions makes necessary the representation of the EU as a specific legal entity. It will be represented at the Court by its own representative judge, and will be able to participate in the Committee of Ministers (the Council of Europe body responsible for, amongst other things, supervising the execution of judgements).

It should be noted that the accession agreement negotiated between the EU and the Council of Europe will make clear that the EU is not considered a state. Whether it will be defined in anything more than the negative is currently unknown. In October 2011, the informal working group established between the EU and the Council of Europe (CDDH-UE) discontinued its work. Despite a year of negotiations, “given the political implications of some of the pending problems, they could not be solved at this stage by the CDDH or the CDDH-UE.” The CDDH therefore considered “it had done all it could, as a steering committee,” and transmitted its report and the draft legal instruments “to the Committee of Ministers for consideration and further guidance.”

Reading the final version of *Draft legal instruments on the accession of the European Union to the ECHR* produced by the CDDH-UE, the potential political implications become apparent. The ‘final

version' of the document, produced in July 2011, refers to the fact that the "specific legal order of the European Union" means that the Convention system "requires certain adjustments." These adjustments, according to the July 2011 *Draft legal instruments*, include making applicable to the EU the terms 'State', 'State Party', 'States' or 'States Parties' where they appear in the Convention.

The same applies to the terms 'national security', 'national law', 'national laws', 'national authority', 'life of the nation', 'country', 'administration of the State', 'territorial integrity', 'territory of a State' or 'domestic', which "shall be understood as relating also, *mutatis mutandis* [the necessary changes having been made], to the European Union." [11]

Unsurprisingly, the possibility of interpreting this as meaning that the EU should be considered a state was considered unacceptable by EU Member States' delegations. Discussions on the CDDH-UE draft in the EU's Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) saw the UK in particular seeking more specificity. Its delegation was successful in having an amendment made to the Preamble so that it would read "having regard to the specific legal order of the EU, which is not a state." [12]

Furthermore, following "informal discussions and by way of compromise" the Presidency suggested further changes to both the sections referred to above. The proposed compromise was to have any reference to 'State', 'State Party', 'States' or 'States Parties' within the Convention as "referring also to the European Union as a non-State party to this Convention." It was further proposed that references to 'national security' etc. be qualified with that statement that "they shall be understood as relating also, *mutatis mutandis*, to the European Union, insofar as they relate to matters falling within the competence of the European Union." (p.4)

A further series of suggestions were made by the Presidency in order to allay the disquiet of Member States about further potential references to the EU as constituting a country, having a State administration, or being able to refer to its 'national security', the 'economic well-being of the country', or its 'territorial integrity'.

It seems that on these issues, and on many others, Member States' disagreements will not be resolved any time soon. Nevertheless, the very fact that the EU is deemed able to accede to the European Convention will be enough for some to consider it as now constituting a state. Following the UN General Assembly's resolution on the participation of the EU in the work of the UN (permitting EU representatives the right to present the General Assembly common European positions; the right to present proposals and amendments; and the right of reply regarding positions of the EU) [13] it was suggested by a UK Conservative MEP, Daniel Hannan, that according to the 1933 Montevideo Convention on the Rights and Duties of States, the EU could be considered as a state. [14] Accession to the ECHR is likely to lead to significant further debate on the issue, regardless of the wording of the accession agreement itself.

"Too nutty for Monty Python"

The 'story so far' of the EU's accession to the ECHR has been marred by problems other than those of disagreement between the Member States. One particular instance of refusal to make public documents related to the negotiation procedure has been described as "even too nutty for Monty Python," by the applicant.

Frank Schmidt-Hullmann, head of the international department for the German trade union *IG Bauen-Agrar-Umwelt*, applied to the Council of the European Union for access to a document outlining the negotiating mandate decided upon by the Council. Access was refused on the basis that “full release” of the requested documents:

Would reveal the Union’s strategic objectives to be achieved in the international negotiations...[enabling] the Union’s negotiating partners to assess the measure of the Union’s willingness to compromise. [15]

Mr Schmidt-Hullmann argued against the Council’s refusal to publish the document, noting that:

A Danish version of the full document – which coincidentally, also happens to be the mother tongue of the other party’s chief negotiator – was, for many months, freely available to download from the Internet. The other party in the negotiations should therefore already have the text and hence there is no longer any need to maintain confidentiality. [16]

A subsequent investigation by the Council found that it was in fact a later version of the requested document that had been released in full on the internet, containing the final version of the negotiating directives – nevertheless, the principle of Mr Schmidt-Hullman’s request continued to apply.

The final response of the Council was to remove the document from the internet – stating that publication of its full contents “had occurred only due to human error” – and to re-classify the document. This unintentional act required “a correction in order to safeguard the public interest in the Union’s international relations as described above.” [17]

This position could not, however, be agreed upon by all Member States delegations to the Working Party on Information, which considered Mr Schmidt-Hullman’s application. Denmark, Estonia, Finland and Sweden took the view that:

The remaining parts of the documents do not, at least entirely, come under the said exception [protection of the EU’s negotiating position]. The Convention is of a special nature and EU’s objectives in the negotiation process are largely based on the text of the Treaty and/or the protocol attached to it, and access to the documents should be extended at least on these parts. [18]

Non-governmental organisations that were occasionally party to negotiations within the CDDH-UE seem to share a similar view. In the final report of the CDDH-UE, they:

Emphasised that the people whose human rights are at issue in this process should be kept at the centre of the debate and that there was a need for greater transparency in the proceedings in the EU. [19]

Another, unnamed, applicant seeking access to the documents outlining the EU’s negotiating mandate was also refused access following their initial request. They argued that the very point of the negotiations was to improve the EU’s mechanisms for the protection of human rights, and thus should be released:

Clearly, and until proven otherwise, negotiation of a treaty EXCLUSIVELY designed to protect the fundamental rights of citizens is by definition a process of fundamental importance (and

great relevance in terms of both Community law and Member States' constitutional law) and great interest to the citizens whose rights are at issue.(...)

Ensuring that the negotiations are public should be a factor for raising awareness of the fundamental human rights guaranteed by the Convention and the Union Treaties, and therefore would be fully in line with the obligations to promote and protect human rights to which the Union itself has subscribed. [20]

Again, the Danish, Finnish and Swedish delegations argued for the release of at least some portions of the negotiating mandate. Other delegations decided that disclosure was not in the public interest and would harm the EU's negotiating position.

It should be noted that over a period of just over a year (from July 2010 to September 2011), an increasing number of sections of a copy of the *Draft Council Decision authorising the Commission to negotiate the Accession Agreement* (10602/10) were released. However, not one line of the negotiating mandate included within the document was ever made public.

Summary

Europe is able to boast one of the most extensive judicial systems of rights protection in the world, and the accession of the EU to the ECHR will certainly reinforce this. However, the character of the EU's internal negotiations highlights some of the problems with the EU's decision making process – an insistence on secrecy and an emphasis on 'strategic priorities' above the consideration of the rights of individuals.

Endnotes

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