

JUSTICE *futures* series



HUMAN RIGHTS AND THE FUTURE OF THE EUROPEAN UNION



Advancing access to justice, human rights and the rule of law



Human Rights and the Future of the European Union

A **JUSTICE** *futures* paper

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This paper is the third of a 'Futures' series, designed to celebrate JUSTICE's 50th anniversary in 2007, in which staff members and others raise interesting and provocative ideas about the future direction of policy in essay form. It does not necessarily represent JUSTICE policy, but it does draw on JUSTICE's considerable experience as a leading human rights and law reform organisation.

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What do we want from Europe?

JUSTICE shared its 50th anniversary year in 2007 with the Treaty of Rome, which in 1957 established the European Economic Community (EEC). This was the first step on the path towards what we now know as the European Union (EU). 2007 saw agreement on a treaty on the EU's future development. This included an opt-out by the UK from the EU Charter of Fundamental Rights and Freedoms. As the treaty moves through the process of Parliamentary approval, now seems a fitting point to take a look at the future of the EU through the prism of human rights. This paper highlights some of the key questions facing the EU regarding fundamental rights in the 21st century.

As discussions in the UK focus on the debate about whether we need a referendum about the Reform Treaty to the European Union (the Reform Treaty), it is time to look at the fundamental question – what do we really want from 'Europe'? And more particularly, how do we see the future role of the EU in Europe?

The EU constitutional project fell at the hurdle of popular support. But, the apparent popular reasons for not supporting the Constitutional Treaty in France and the Netherlands were contradictory. Some voted no because they wanted 'less Europe', some because they wanted 'more'. The governments that recently agreed the text of the Reform Treaty needed to take into account both positions to guarantee a future for the European Union. It remains to be seen through the national ratification processes whether they have been successful.

The pros and cons of membership of the EU, economic, social and political, are varied and complex: this paper will focus on a single aspect – what impact do we expect the European Union to have on human rights? Do we feel that the EU is becoming a bureaucratic colossus whose dabbling in human rights is trampling over our sovereign state? Do we fear that the EU will take our rights away or that it will force new rights down our throats like an over-zealous nanny superstate? Do we want the EU to set standards in human rights protection across the world or to mind its own business and set its own house in order? And can 'we' (European citizens, nationals of EU member states) ever agree on what 'we' want from the EU?

Before we can address what we expect from 'Europe', we need to look at what 'Europe' is and how the EU fits into Europe. Is 'Europe' a philosophical ideal or a geographical fact? Should the EU be the economic driver in Europe while the Council of Europe protects human rights and the Organisation for Security and Cooperation in Europe (OSCE) looks to our security?

Where should the EU draw the line?

The EU of the 21st century is clearly a very different beast from that of the 20th century. The euro is official currency in 13 countries and, thanks to the recently extended Schengen Agreement, people can travel freely through 24 nations¹ without border controls. Enlargement of the EU has almost doubled its membership from 15 to 27 in the past four years.

Like any important EU development, enlargement had its vociferous detractors as well as its ardent supporters. On 1 May 2004, with the accession of ten former communist states to the European Union, many felt that geographical Europe had been finally reunited within political Europe after decades of separation by the Iron Curtain. Others, however, feared that a wave of cheap labour and people seeking benefits from the poorer accession countries would flood the 15 established member states. In the rapidly expanding area of cooperation on justice and home affairs, there were muttered fears about the security of Europe's expanded borders and the standards of justice and human rights protection in 'new' member states as well as scaremongering about waves of organised crime from Eastern Europe. Following the additional enlargement on 1 January 2007, the jury is still out on the real impact of enlargement on EU member states both 'new' and 'old' and on the EU itself. The possibility of further enlargement of the EU raises a number of questions.

According to Article 49 of the Treaty on European Union (the TEU), which constitutes the legal basis for any accession, the EU is open to all European countries. However, in order to join the EU, a country must also adhere to the principles of Article 6(1): freedom, democracy, respect for human rights and fundamental freedoms and the rule of law. They must also fulfil what are known as the Copenhagen Criteria, creating conditions for integration by adapting their administrative structures. The Copenhagen Criteria include:²

Political criteria: *The applicant country must have achieved stability of its institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;*

Economic criteria: *It must have a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the EU;*

¹ In addition to 22 EU member states, Norway and Iceland are in the Schengen zone.

² http://ec.europa.eu/information_society/activities/atwork/_documents/dgenlargementbrochure/sld005.htm;
http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm.

Criteria of the adoption of the *acquis*: *It must have the ability to take on the obligations related to membership, including adherence to the aims of political, economic and monetary union.*

For the purposes of this paper, the political criteria are clearly the most relevant, but the first question is: what is a European country? If it is a geographical question, how can the EU deal with countries that straddle two continents? If it is a cultural question, how does it sit with the increasingly multicultural nature of many European societies? If it is a political question, how does the EU distinguish itself from the 47- member state Council of Europe?

There are currently three candidate countries with ambitions to join the EU in the not too distant future – Croatia, the Former Yugoslav Republic of Macedonia (FYROM) and Turkey. All are members of the Council of Europe and signatories to the European Convention on Human Rights, but the question of Turkey's accession to the EU in particular has opened up a number of debates at the heart of what Europe is or should be. Turkey is a bridge between the European and Asian continents and has been a member of the Council of Europe since 1949, yet some European leaders feel that Turkey's accession to the EU is a bridge too far.³ On the other hand, Turkey's borders with countries such as Iraq, Syria and Iran, have led some to the view that:

*[the accession of Turkey] would give the EU a decisive role for stability in the eastern part of the Mediterranean and the Black Sea, which is clearly in the strategic interest of Europe.*⁴

EU member states, it seems, cannot even agree on where Europe starts and finishes geographically – Turkey will ultimately only be able to join the EU if there is a consensus on that.

The internal social and political debates within Turkey and the tension between the secular and the religious; the difficulties that Turkey has in dealing with the respect for human rights while ensuring security in the face of a very real terrorist threat; and freedom of expression pitted against freedom from discrimination are all issues that have been raised by those who see Turkey's accession as a threat to the EU. But they are also issues with which the EU must already grapple. During the negotiations on the EU Constitution, there was some discussion as to whether or not the preamble

³ For example, France's President, Nicholas Sarkozy, reportedly said while still a presidential candidate: 'I want to say that Europe must give itself borders, that not all countries have a vocation to become members of Europe, beginning with Turkey which has no place inside the European Union ... Enlarging Europe with no limit risks destroying European political union, and that I do not accept.' Reported in <http://www.turkishpress.com/news.asp?id=159133>, 14 January 2007.

⁴ Carl Bildt, Swedish Foreign Minister, quoted in, 'Top Swedish Official Backs Turkey for the EU', *International Herald Tribune*, 11 December 2006, <http://www.iht.com/articles/2006/12/11/news/sweden.php>.

should contain a reference to Europe's common Christian heritage. In the end, the idea was discarded, as having no place in the pluralistic, multicultural society that is Europe. It is surely right that outdated notions of what it means to be European should not be allowed to shape the future of Europe.

Negotiations on accession to the EU have been accompanied by a flurry of activity in candidate countries to improve the protection of human rights and to strengthen the rule of law in preparation for meeting the Copenhagen Criteria. It seems clear that the impetus to join the EU is a good thing for human rights in accession states, but does that mean that there will be a backlash if the promise of EU accession is denied? And does it mean that once inside the EU, a member state can be complacent about human rights in the knowledge that since it has joined the club there will be no more scrutiny and no further consequences for a poor human rights record? In order to maintain human rights standards in the EU, the possibility of suspending membership rights in cases of serious breach of the principles on which the EU is founded, including human rights, needs to become a reality. Article 7 TEU allows for this eventuality but it has never been used. In October 2003, a Commission communication on the application of Article 7 TEU was met with resounding silence from both the Council of the EU and the member states that would be ultimately responsible for its application. At the moment, it seems to be a hollow provision.

The absorption capacity of the EU – that is its ability to integrate new member states across institutions and policies – is a final consideration to be taken into account when deciding on possible future enlargement. This may, and should, be the real deciding factor in how far the EU can extend its borders while still retaining an organisational identity distinct from other European organisations. The EU has pushed the boundaries in some areas, such as anti-discrimination law and international judicial cooperation in criminal and civil law, going beyond the groundwork set in place by the Council of Europe. Those developments were possible amongst a small group of countries that sought to build up genuine trust and could more or less agree on the directions that they wanted to take. The importance of those developments can be put down, in some part, to their enforceability and general implementation: their impact is felt by ordinary people within the EU. If the EU is to continue acting in this way, it will need to take care not to outgrow its institutions.

The future of human rights in the EU and the credible role of the EU in promoting human rights in the world will depend, to a large degree, on how the EU now defines its borders. The EU cannot afford to let its future borders be defined by prejudice. At the same time, it needs to be realistic about how far it can expand while still maintaining its effectiveness and integrity.

The EU and the Council of Europe – sharing the European space?

The EU is a relatively new actor on the European human rights stage. It shares its membership with the concentric circles of various European organisations, most notably the Council of Europe (47 member states), which has an extensive mandate to address human rights, democracy and the rule of law in Europe. So why does the EU need to address human rights at all?

Jean-Claude Juncker pointed out that:

The Council of Europe and the European Union were products of the same idea, the same spirit and the same ambition. They mobilised the energy and commitment of the same founding fathers of Europe. Both the Council and the Union adopted as their watchword the maxim coined by Count Richard Coudenhove-Kalergi between the wars: ‘A divided Europe leads to war, oppression and hardship; a united Europe leads to peace and prosperity.’⁵

Having grown side by side over the past half century with an underlying but subdued sort of sibling rivalry, it now seems, sadly, that the two organisations are engaged in an unsightly scrap over the inheritance left them by the founding fathers – human rights in Europe.

The Council of Europe holds the moral high ground – its Convention on the Protection of Human Rights and Fundamental Freedoms (the ECHR) is the watchword for human rights in Europe. The European Court of Human Rights has provided a beacon for the enforcement and development of human rights standards across the world. Arguably, these, combined with the extensive and more specific human rights machinery⁶ that the Council of Europe has put in place, have created the environment of peace, stability, respect for human rights and the rule of law that the EU needed in order to develop its own unique identity.

While all its member states are also members of the Council of Europe, the EU itself is not, although the ECHR does form part of the EU *acquis* (the entire body of law of the European Communities and Union). This means that the EU institutions are not directly bound by the Council of Europe’s human rights standards or scrutinised by its human rights bodies. No matter how we see the *future* of the EU, it is already an organisation with legislative powers which impact directly on the rights of people within the EU, whether positively, for example through anti-discrimination directives,

⁵ Council of Europe-European Union: ‘A Sole Ambition for the European Continent’, Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg to the attention of the Heads of State or Government of the Member States of the Council of Europe, 11 April 2006.

⁶ For example, the European Committee for the Prevention of Torture, the European Commission on Racism and Intolerance, etc.

or, potentially, negatively through legislation which allows for the seizure of assets or arrest and transfer across borders. It is also a political and economic force that has the power to influence the respect for human rights across the world. Increasingly, it is taking on the role of providing policing and military support outside its borders. The EU is, de facto, affecting human rights and therefore needs to factor human rights into its institutions and activities.

There is space for both organisations in Europe, but if they are going to continue cohabiting for the benefit of European human rights, the Council of Europe and the EU will just have to learn to play nicely together. The Council of Europe will need to stop viewing the EU as a younger sibling who cannot be trusted to play with its toys in case it breaks them. The EU will have to stop behaving like the spoilt younger sibling who refuses to share its sweets with the elder. Jean-Claude Juncker's report⁷ sets out a useful road map for the ways in which the two organisations could work together and complement each other in the field of human rights: two of the elements he identifies should be highlighted here in the context of the future of human rights in the EU.

A crucial step in ensuring coherence in the European approach to human rights is the accession of the EU to the ECHR. The Reform Treaty provides for such accession. The impact of this was outlined by Juncker:

EU accession to the ECHR will not affect the division of powers between the EU and its member states provided for in the Treaties. Nor will one organisation – the European Union – be in any way subordinated to the other – the Council of Europe. Accession will, however, subject the EU institutions to that external monitoring of compliance with fundamental rights which already applies to institutions in the Council's member states. Accession will also allow the EU to become a party in cases directly or indirectly concerned with Community law before the European Court of Human Rights. This will allow it to explain and defend the contested provisions. The binding effects on the EU of any decision by the Court that the ECHR has been violated will also be strengthened, and the execution of judgments by the EU, when this is a matter for it, will be guaranteed.⁸

The question of accession to the ECHR is so important to the future of the EU that it should not be dependent on wider considerations about the development of the EU through the Reform Treaty. If, for whatever reason, the Treaty is not approved within

⁷ Juncker, n5 above.

⁸ Ibid, p8.

the member states, they should try to address the issue of accession to the ECHR separately by way of a protocol.⁹

The jurisprudence of the Court of Justice of the European Communities (in Luxembourg) and the European Court of Human Rights (in Strasbourg) already demonstrates that the EU and the Council of Europe can have a complementary effect on human rights in Europe. Strasbourg case-law is considered and applied in the Luxembourg court, and the Strasbourg court considers European Community protections of human rights to be equivalent to those contained in the ECHR. Human rights developments in the EU, such as the EU Charter of Fundamental Rights and Freedoms (the Charter), colour the interpretation of ECHR rights by the Strasbourg court. Although this symbiosis currently continues without a legislative basis, coherence in the development of human rights jurisprudence in Europe will only be guaranteed by accession of the EU to the ECHR.

The expansion of the Council of Europe to 47 member states and the consequent workload has put a severe strain on the resources of its human rights enforcement machinery, notably the European Court of Human Rights and the Office of the European Commissioner for Human Rights. The European Court of Human Rights is the beating heart of human rights in Europe and it is in all our interests that it should be supported in this role. The European Commissioner for Human Rights carries out regular check-ups on the state of human rights in Europe, highlighting potential trouble spots. The EU has a vested interest in maintaining the Council of Europe's human rights machinery, both in terms of its member states and implementation of the principles on which the EU is founded, and in terms of its neighbourhood policy and stability in wider Europe. The Council of Europe needs the financial resources to ensure that its human rights machinery can function effectively and the EU needs to play its part in ensuring that those resources are available.

The EU Charter – pushing human rights forward in Europe?

The Charter arose out of a debate on human rights in the EU, started in 1998 to mark the 50th anniversary of the Universal Declaration of Human Rights, and was finally proclaimed in 2000. It was designed not to define new fundamental rights but to codify the rights that the EU has to respect. To that end, it contains not only the civil and political rights that are established in the ECHR but also those that have derived

⁹Article 48 TEU: 'The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

Amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.' See also Juncker, n5 above.

more broadly from the evolution of society, social progress and scientific and technological evolutions. The additions to the ECHR found in the Charter are not new in Europe; they are rights and freedoms guaranteed by other EU or Council of Europe instruments or established in case-law. The Charter is, therefore, a codification and a clarification of what already exists rather than an aspirational wish list. The Reform Treaty incorporates it into the EU Treaties and gives it binding legal force – for the majority of EU countries that have not negotiated an opt-out in the form applying to the UK.¹⁰ The way in which the Charter is incorporated into EU treaty law will send a clear signal as to the way human rights will feature in the future of the EU.

So what exactly are the issues in the Charter which go beyond the ECHR? The Charter is divided into six chapters – dignity, freedoms, equality, solidarity, citizenship and justice.

Dignity – The chapter on dignity explicitly rejects the death penalty. This reflects developments in the Council of Europe through Protocols 6 and 13 to the ECHR, which effectively abolish the death penalty in all circumstances. No EU member state can therefore have the death penalty, but such an explicit exclusion is a welcome clarification of the values of the EU and should mean that any moves by a member state to reintroduce the death penalty would result in the suspension of rights of EU membership. A Polish parliamentary vote on a bill to reintroduce the death penalty, which was defeated by a margin of only three votes, shows that the danger of this happening within the EU is not theoretical.¹¹

Dignity also covers the field of bioethics, so that the human body can under no circumstances be the object of either commerce or eugenic practices and consent is required for every medical action. As science develops apace, a clarification of these values sets a benchmark for European practices in this field.

Freedoms – Many of the rights contained in the chapter on freedoms are lifted straight from the ECHR. There are some interesting additions, however, and the codification in some areas of the evolution of the case-law of the European Court of Human Rights. Two additions that codify existing protections under other human rights instruments are the explicit right to asylum and the prohibition on expulsion or extradition where there is a significant threat of imposition of the death penalty.

New additions include the protection of personal data, freedom of the arts and sciences, the freedom to choose an occupation and to engage in work and the freedom to conduct a business. Given the increasing use of databases containing

¹⁰ Article 6.

¹¹ 198 votes for, 195 for and 14 abstentions, www.warsawvoice.pl/view/6870/.

personal data at EU level and the exchange of personal data between member states, a justiciable right to the protection of personal data at EU level is something that should be welcomed.

The right to marry and the right to found a family as provided for in the Charter have been used to read in an extension of the right contained in the ECHR to reflect a new European understanding of this right, which no longer restricts marriage to a union between a man and a woman.¹² The Charter is due to be incorporated into the Treaties in a way that would limit the exercise of these rights in accordance with national law, however, which means that the obligations imposed on member states through the Charter in this field will not go any further than those already imposed by the ECHR and its interpretation through case-law in the European Court of Human Rights.

Equality – The Charter prescribes equality before the law, including a provision on discrimination on the basis of nationality, and forbids discrimination in general. As such, it is a welcome extension to the ECHR where discrimination is only prohibited in so far as it affects the rights and freedoms contained in the ECHR. It therefore reflects the stand-alone prohibition on discrimination contained in Protocol 12 to the ECHR. This chapter contains provisions on equality between men and women in all areas, rights of the child, rights of the elderly and rights of persons with disabilities – all issues covered by EU directives. In relation to the rights of minorities, however, provisions are vague and indirect, being covered by the general prohibition on discrimination and the affirmation of cultural, religious and linguistic diversity.

Solidarity – The provisions on social rights (Title IV of the Charter) are those of most concern to the UK and highlighted in the protocol to the Reform Treaty. A critical view of the provisions, however, shows them to be weak and representative of a political compromise. There is, therefore, no right to work, but there is a right of access to placement services; there is no right to housing, but there is a right of access to social and housing assistance. These provisions, already weak, are further undermined by the distinction between ‘rights’ and ‘principles’: the provisions containing ‘principles’ are not directly enforceable by the individual, but rather appear as a kind of guideline for the legislator. The right to strike and the right to benefit from medical treatment are further limited by the application of national laws and practices. The addition of the reconciliation between family and professional life is a welcome protection.

Citizenship – Perhaps the most important right in this chapter is the right to good administration – that is the right to have one’s affairs handled impartially, fairly and

¹² Christine Goodwin v UK 35 EHRR 18.

within a reasonable time by the institutions, bodies, offices and agencies of the Union. It is difficult to see why this would not be politically popular.

Justice – The chapter on justice mostly takes over the provisions from the ECHR but does expand their scope or modernise them in some ways.

The right to an effective remedy and to a fair trial, for example, explicitly makes reference to legal aid being made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. While this codifies the current situation under the ECHR, it does not, however, give the individual a clear and enforceable right to legal aid.

The principles of legality and proportionality of criminal offences and penalties are of particular importance as the EU starts to legislate on approximation of sanctions in criminal law – the provisions do not allow a heavier penalty to be applied at sentence than that which was applicable at the time of the offence being committed and, in the case where, at the time of sentencing, a lower penalty is applicable, imposes that lower penalty. The right not to be tried or punished twice in criminal proceedings for the same criminal offence is now extended to cover the whole of the EU, whereas previously (except in the application of the Schengen Convention), the right was only applicable within a state. This is a protection that should be welcomed with open arms in the era of the European Arrest Warrant (EAW) and fast-track surrender procedures across EU borders.

An opt-out on rights?

The question of the Charter becoming a part of the Treaty was one of the fault lines of the debate in the UK about the future of the EU. As a result, the Reform Treaty includes a protocol with the following provisions:

Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.

It is surely a matter of national shame that the UK and Poland are the only two member states out of 27 that have felt that they should not be bound by the provisions of the Charter. We should have nothing to fear and everything to gain from the Charter becoming a legally binding instrument. Its incorporation into the EU Treaties will not mean that it becomes a competitor to the ECHR, but rather that the provisions of the ECHR and other rights already applicable within the EU will apply to the EU institutions and legislators and, within quite extensive limitations, to the application of EU law in member states. The Charter is a document that was negotiated and agreed inter-governmentally; it is a coherent codification of the current human rights framework, not a radical departure from the status quo. The credibility of the EU requires that the Charter be justiciable as the EU continues to develop in such a way that its institutions, policies and activities impact on fundamental rights. It is one thing to be excluded from travel without border controls and currency exchange in Europe, but does the British public really want to become an underclass in Europe in terms of the enjoyment of their fundamental rights in relation to the EU institutions?

EU Fundamental Rights Agency

The original proposal for an EU Fundamental Rights Agency (FRA) was met with scepticism in some quarters, in particular from the Council of Europe. Discussions around what the scope and tasks of the FRA should be were characterised again by, on the one hand, the fear that the EU was dabbling in fields in which it had no business and duplicating the work of the Council of Europe and, on the other hand, the sense that the EU was not taking seriously enough its responsibilities with regard to fundamental rights within its borders. The result, launched in March 2007,¹³ has been an agency described by Amnesty International as:

based on a fragmented and minimalist conception of 'fundamental rights' that bars it from addressing the most pressing human rights challenges in the EU today.¹⁴

¹³ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L53/1, 22 February 2007.

¹⁴ 'Towards a comprehensive European human rights system', the speech that Amnesty International would have made at the inauguration of the EU Fundamental Rights Agency, Amnesty International EU Office, 1 March 2007.

The mandate of the FRA is limited strictly to European Community law.¹⁵ What this means, in concrete terms, is that many of the EU's activities will be excluded, in particular those with the greatest potential to impact on human rights and those with the most limited judicial oversight through the European Court of Justice. So, for example, the FRA will not be able to deal with: counter-terrorism; the EAW; police cooperation, including the exchange of personal data in the context of criminal investigations; exchange of evidence in criminal proceedings under the European Evidence Warrant (EEW) – all areas where developments in the EU have potentially serious consequences for the fundamental rights of those concerned. Neither, it seems, will the FRA be able to address issues related to the EU's external activities, whether involving police or the military, nor with the external dimension of asylum and immigration questions, such as interception on the high seas or cooperation agreements with third countries – issues of increasing concern to human rights groups.

The narrow mandate of the FRA is truly an opportunity lost for the advancement of human rights in the EU. It was no doubt facilitated by the defensive posture of the Council of Europe, articulated by Jean-Claude Juncker, that:

*the future Agency must be strictly complementary to the Council of Europe's human rights observation and monitoring instruments. It is essential that its mandate be limited to human rights issues which arise in connection with the implementation of Community law, i.e. strictly within the EU's internal legal system. It may never be extended to general observation, using its own procedures and resources, of the human rights situation in Council of Europe member states.*¹⁶

For those who do not want to see 'more Europe', this was clearly a golden opportunity to restrict the possible expansion of EU activity in fundamental rights.

The fears expressed in relation to duplication and lack of coherence in the European human rights framework were, however, sadly short-sighted and unimaginative. It is clear that there is no need for the EU to duplicate the work of the numerous Council of Europe human rights bodies in relation to standard-setting and monitoring of the human rights situation in Europe. It is also clear, however, that the EU could take the work of those bodies and build upon it in a way that reflects the particular nature of the EU, as opposed to the Council of Europe, and that the FRA could have been the ideal body to translate the work of the Council of Europe into advice and proposals that are relevant for EU institutions and member states alike.

¹⁵ I.e. the founding treaties (primary legislation) and the provisions of instruments enacted by the Community institutions by virtue of them (secondary legislation such as regulations, directives etc).

¹⁶ See n5 above.

The FRA could have been used, for example, to analyse the reports of the European Committee for the Prevention of Torture and the European Commissioner for Human Rights, along with European Court of Human Rights case-law in relation to EU member states, in order to identify issues which might undermine the smooth functioning of judicial cooperation in criminal matters. If prisons in some EU member states were found by the Council of Europe bodies to systematically fall below internationally accepted standards, this would make it difficult for other member states to return people to those countries in compliance with their own human rights obligations, both nationally and under the ECHR, thus threatening the effectiveness of the EAW system. The FRA would then be able to provide advice to EU institutions and to member states as to how to address the problem within the EU framework, either through technical assistance and advice or through additional legislation or policy development which would ensure the coherence of the EU's approach to judicial cooperation. In addition, the FRA could provide an invaluable resource to the EU in its increasingly active involvement in both military aspects of crisis management, and engagement with third countries in the fields of police cooperation and agreements on managing asylum and immigration. These developments are continuing and are at the heart of human rights concerns about the EU and the lack of accountability for actions taken by the EU outside the Community framework. The fact of these developments, however uncomfortable some may be with them, will not simply disappear by looking the other way. Ultimately the credibility of the EU in terms of human rights will rest on accountability and clarity as to the human rights framework in which these highly sensitive activities are being carried out. The FRA would be one way of casting light on these difficult issues.

Justice and home affairs – implications for human rights

The expansion of the EU's activities, particularly in the field of justice and home affairs, means that a coherent and credible approach to human rights in the EU is now indispensable. Developments, such as the EAW and the EEW, while not necessarily having a negative impact on human rights protections in EU member states, clearly show that the EU's activities in this field now have the potential to have a practical impact on individual rights in the EU. Increased judicial cooperation, for example, is going to have implications for the right to a fair trial, the right to liberty, the right to protection of personal data and the right to private and family life. Systematic analysis of the potential impact of the policies and legislation of the EU on fundamental rights is needed as a matter of urgency if the EU is not to fulfil the prophecy of those who believe that it is a negative force on our rights and freedoms.

Attempts within the so-called ‘third pillar’¹⁷ to codify the application of fundamental rights in criminal justice in the EU have highlighted a clear danger that if the EU acts as a standard-setter in areas where unanimity is required, it may well set standards that are, in fact, lower than those already binding its member states through the ECHR and other human rights instruments.

The stalled debates on the proposal for a Council framework decision on procedural rights for suspects and defendants in criminal proceedings are an obvious example of this. Heralded originally as a policy development which would balance the prosecution-driven developments, such as the EAW, with heightened protections for suspects and defendants in the EU, negotiations between member states in the Council have degraded the proposed text to such an extent that it is no longer clear that it would improve rights protection. Rather, it may even undermine the standards that have been established through the case-law of the ECHR.

Likewise, the European Data Protection Supervisor (EDPS) strongly criticised the negotiations on a proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters in a series of opinions, saying that:

*the EDPS is well aware of the difficulties in reaching unanimity in the Council. However, the decision-making procedure cannot justify a lowest common denominator approach that would hinder the fundamental rights of EU citizens as well as hamper the efficiency of law enforcement.*¹⁸

What is more, the EDPS continues to raise concerns that the proposal could lead to a de facto lowering of standards of protection of personal data in Europe, currently governed by the Council of Europe Convention 108,¹⁹ which would make it incompatible with member states’ existing international obligations.

If the EU risks setting standards of rights protection below those already binding on its member states through the Council of Europe, it clearly should not be working on setting standards at all. Rather, it should focus on applying and implementing the standards already applicable in Europe to all its work and encouraging effective implementation of those standards in EU member states.

¹⁷ Matters relating to police and judicial cooperation where decisions are taken by the Council of Ministers ie by the council of member states.

¹⁸ Third opinion of 27 April 2007 on the proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, OJ C139, 23 June 2007, p1, para 6.

¹⁹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe, 28 January 1981.

The EU institutions and agencies, as well as EU legislation more broadly, already have the potential to impact seriously on human rights. Already the work of agencies, such as Eurojust and Europol, as well as EU databases, such as the Schengen Information System (SIS), have the potential to impact significantly on human rights and the scope, mandate and scale of these is constantly evolving. If its institutions are not governed by a clear and coherent legally binding and enforceable human rights framework, the EU risks becoming a black hole for fundamental rights rather than a champion of those principles of human rights, democracy and the rule of law on which it was founded. What is more, without foresight and clarity, the EU is in danger of being hijacked by member states that may seek to bypass or backtrack from inconvenient obligations at Council of Europe level by sleight of hand in the EU legislative process.

Conclusion

This paper began by asking what it is that ‘we’ want from Europe and more particularly the EU in terms of human rights. However, it is clear that the notions of both human rights and the EU seem to be so divisive both nationally and internationally, that in this context it is difficult to identify a collective ‘we’. In conclusion, therefore, here follows one possibility – a vision of an EU grounded in a strong and effective human rights framework.

In this context, the future of the EU depends upon its truly embracing human rights in a concrete and enforceable manner rather than simply as declaratory principles. This surely means ultimately making the Charter a legally binding instrument in EU law by incorporating it into the Treaties with no exceptions or national opt-outs. The EU cannot afford to allow member states to create first and second-class citizens in terms of fundamental rights – that way lies the end of a meaningful union. It may be time to ask what place member states that are not prepared to sign up to the full panoply of fundamental rights and freedoms guaranteed by EU law, and in particular the Charter, have in the future of the EU.

As the EU expands its policy and activity areas, it needs a specialised agency to advise institutions and member states on the fundamental rights implications of new policies and proposals and also to alert them to the implications at EU level of the human rights situation in member states and third countries as identified by the Council of Europe’s human rights machinery. The EU must also accede to the ECHR in order to maintain coherence in the European human rights framework. If the EU is serious about fundamental rights, the mandate of the FRA needs to be radically redrawn and the Council of Europe’s human rights mechanisms must be given the resources to fulfil their role effectively. In addition, the European Commission, as guardian of the EU treaties, should have a Directorate General (DG) purely dedicated

to fundamental rights and able to make its voice heard independently of the security imperatives which often drown out the fundamental rights agenda in the current DG Freedom, Security and Justice.

Finally, it is time for the EU to take a careful look at the way it deals with membership and fundamental rights. In an expanding EU, if all member states are not committed to the same exemplary standards of fundamental rights and to pushing forward the rights agenda in Europe, the EU will fail its citizens. Tough decisions will need to be taken regarding each accession process to ensure that membership of the EU is a hallmark of a high standard of human rights protection in practice. Those decisions need to be based on objective evidence of those standards, not on prejudice or on political opportunism. Even more importantly, the EU needs to be prepared to stand up for its collective principles by suspending the rights of membership of member states that fail to abide by them. There is no room for complacency about human rights in Europe in the 21st century.

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