Human Rights: The Best is Yet to Come

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Article I-7 and Part II Draco[1]

1. Introduction

Now that the EU Constitution has been adopted, one might be inclined to think that the debate on the position of human rights in the legal order of the European Union has come to an end. For more than 25 years academics and politicians have discussed the desirability of EC/EU accession to the European Convention of Human Rights and have argued for or against a separate bill of fundamental rights. That is all over now: Article I-7 of the Constitution provides for Union accession to the European Convention, whereas part II incorporates the Charter of Fundamental Rights.

It would seem, therefore, that a solid framework for the protection of human rights in the EU legal order has been put in place. The rest will be a matter of implementation: taking fundamental rights into account when drafting and executing European legislation; invoking these rights before the Court of Justice; lodging complaints with the European Court of Human Rights when the EU institutions, despite everything, failed to secure these rights. All very important, albeit that some may find the daily application of human rights not as sexy as the large constitutional questions of the past.

So is this the 'end of history' for human rights? Quite the opposite. The best is yet to come! To begin with, the EU Constitution remains to be adopted, and EU accession to the European Convention requires agreement from the other side as well, i.e., the Council of Europe and its 45 Member States. However,

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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these are more or less technical issues, and they are hopefully of a temporary nature. Other questions and challenges remain, and it is the present author's firm belief that the adoption of the EU Constitution will only be the stepping stone to a truly fascinating new phase in the on-going development of European human rights law. In this short contribution I will explore some of the issues that are likely to arise. In doing so, the significance of fundamental rights to the EU will be analysed along three axes or dimensions.

2. The EU and fundamental rights: A dynamic relationship in three dimensions

2.1 *First dimension: self-constraint*

The first dimension is one of self-constraint. Ever since the landmark cases of *Handelsgesellschaft* and *Nold* in the early 1970s, the Union is in a process of accepting and acknowledging that it is bound by fundamental rights. Recent cases show that this is still a very dynamic branch of EU law: take *Baustahlgewebe* in which the Court of Justice actually found a Community violation of fundamental rights for the first time in history, or *Connolly,* on the freedom of expression for Community civil servants, or again *Roquette Frères* where the Court accepted that the Commission must comply with the requirements of the right to respect for private life when searching business premises.

This submission to fundamental rights, self-imposed by the ECJ, was subsequently enshrined in the Treaties of Maastricht (Article F TEU, as it then was) and Amsterdam (Article 6 TEU). The adoption of the Charter of Fundamental Rights of the EU, in 2000, represented the next step in this development. The Charter contains a wide variety of rights: civil and political rights, economic, cultural and social rights. It combines classic and innovative provisions, from the prohibition of slavery to the right to good administration – in short, it is an attempt to formulate the 'state of the art' in human rights. Yet the Charter did not play a prominent role so far. Presumably because of its political nature, the ECJ has refrained from applying it, although the Court of First Instance and a number of Advocates General were less hesitant.

It is quite predictable that the incorporation of the Charter into the EU Constitution will change the status quo. Once the Constitution enters into force, there is nothing to prevent the ECJ from applying the Charter. Likewise it will be difficult to ignore the Charter in the legislative process. Here is a first set of questions that arise: will the 'new' Charter have a real impact on EU law? For instance, will the right of access to documents 'benefit' from its inclusion as a 'fundamental' right in the Charter? Will the interpretation of the Charter's rights and freedoms be in line with the jurisprudence of the European Court of

Human Rights? What contents will be given to new rights, such as the right to good administration? Will the concept of human dignity, which features prominently in Article II-1, be used in practice? Since it is one of the Union's stated ambitions to create an 'Area of Freedom, Security and Justice', one may also wonder to what extent the 'constitutionalisation' of fundamental rights will affect the balance between individual freedom and collective security.

A second set of questions relates to the duty-bearers. It is one thing to accept that the institutions are bound by fundamental rights, but what about the agencies and entities such as Europol and Eurojust? How will one ensure in practice that these bodies respect the rights and freedoms of the Charter? Will rights be accompanied by effective remedies? On this issue, will Article II-47 (right to an effective remedy) entail an improvement of the individual's standing before the ECJ in 'classic' annulment actions directed against the institutions? In *Jégo-Queré* the Court of First Instance relied on Article 47 of the Charter in order to widen the individual's access to court, but the ECJ did not go along. Will the ECJ's position change after Article 47 has been incorporated in the Constitution?

Thirdly it will be interesting to see if the institutional balance within the EU will change as a consequence of the incorporation of the Charter into the EU Constitution. Will the ECJ assume more control over EU policies through the application of fundamental rights? It would seem that the Member States have taken measures in order to prevent just that development. On the one hand, the scope for judicial interpretation is limited by the explanations of the Charter provisions. These were prepared by the Praesidium of the 'first' Convention (which drafted the Charter) and updated by the Praesidium of the 'second' Convention (which drafted the Constitution). The Member States underlined repeatedly the importance that they attach to these explanations. When the Constitution was finally adopted, a clause was added to Article II-52, expressly stipulating that the explanations 'shall be given due regard by the courts of the Union and of the Member States'.[2]

On the other hand, pressure from, *inter alia*, the UK and the Netherlands resulted in the introduction of a new paragraph 5 to Article 52:

> 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts [...]. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.

[2] Article II-52(7) as in the 'Provisional consolidated version' of the Constitution (Doc. CIG 86/04 of 25 June 2004). See also the declaration contained in Annex 10 to Doc. CIG 85/04 (18 June 2004), in which the Heads of State and Government expressed their agreement to the Constitution.

Clearly this clause seeks to keep the ECJ out of the area of policy decisions in cases about socio-economic rights. The explanation to Article II-52(5) asserts:

> 'Principles may be implemented through legislative and executive acts [...], accordingly, they become significant for the Courts only where such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or by the Member States'.

It remains to be seen whether all these attempts to reduce the potential influence of the Court will be successful. Leaving aside the question what 'due regard' means in practice, and whether the explanations are as helpful as the Member States believe, it should be pointed out that the conceptual difference between 'rights' and 'principles' is rather foggy. Arguably many provisions contain a bit of both. No one will deny that Article II-23 (equality of men and women) contains 'rights' – but the provision itself refers to the 'principle of equality'! In fact *every* right has a hard core that lends itself to judicial review, surrounded by softer layers that are directly applicable only to a lesser extent or perhaps not at all. The 'classic' right to life clearly has a hard core, in the sense that the authorities should not arbitrarily deprive one of his life. But the further one goes in deriving positive obligations from the right to life (such as the obligation to offer protection against domestic violence, or against murderers who are after a politician, or against wanton violence on the street) the more leeway one should grant the authorities. One may thus reach the point where the authorities are still obliged to try and prevent violence, but where there is no more subjective entitlement to protection. The same is true for social rights: a hard core (for instance one should not evicted from his home on arbitrary grounds) and a softer penumbra (in most legal orders one does not have an enforceable entitlement to a house).

Against that background the question arises how Article II-52 will affect the competence of the courts. Does the presence of 'principles' in a provision entail that the ECJ will not be competent to adjudicate the 'rights' in that provision as well? That could hardly be the meaning of the Charter.

This short discussion has silently led us to a fourth set of questions, about the nature of human rights. It is quite possible that the practical application of Article II-52 will lead to new insights into the justiciability of rights. How will the ECJ deal with the distinction between 'rights' and 'principles'? Or, more in general, how will the combination of civil and social rights in a single human rights instrument work in practice?

2.2 *Second dimension: external review*

The second dimension of the relationship between the EU and fundamental rights is about external review. It is one thing for the EU to assert that it is bound by fundamental rights, it is quite another thing for the EU to submit itself to supervision by external bodies. The *Opinion 2/94* of the ECJ made that abundantly clear.

Article I-7 of the Constitution asserts that the Union 'shall' accede to the European Convention. This formulation[3] conveniently ignores that accession will require agreement from the Council of Europe and its 45 Member States. It is true that the new Protocol 14 to the ECHR contains a clause, Article 17, to this end: 'The European Union may accede to the Convention'. The explanatory memorandum, however, warns us that this does not settle the matter:

> 'It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view. [...] At the time of drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter's possible accession to the Convention, simply because the European Union still lacked the competence to do so. This made it impossible to include in this protocol the other modifications to the Convention necessary to permit such accession. As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty'.[4]

It remains to be seen how this 'second ratification procedure' will proceed. It will be interesting to watch the negotiations that will precede this accession: some non-EU Member States, such as Turkey and Russia, may believe that they have an interesting bargaining chip here.

So for the time being the EU is not a party to the ECHR. In the past this situation did not prevent claims about the Union from being brought in Strasbourg, and it is likely that similar complaints will be lodged in the near future. In deciding these cases, the position of the Convention bodies has evolved and continues to evolve. Admittedly, complaints addressed against the EC itself

[3] As in the 'Provisional consolidated version' of the Constitution (Doc. CIG 86/04 of 25 June 2004). Interestingly, the Draft Treaty as presented by the Convention had used more cautious terms: 'the Union *shall seek* accession' (Doc. CONV 850/03, 18 July 2003). The very first draft of this provision (Article 5 as it then was) was even less enthusiastic: 'the Union *may* accede' (Doc. CONV 528/03, 6 February 2003).

[4] Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194; adopted 13 May 2004), Explanatory Memorandum, paras. 101-102, to be found at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

were simply rejected since cases can only be brought against the High Contracting Parties. Applicants who tried to bring a complaint against the Member States (or one of them) instead, did not seem to get much further. But a closer look at the case-law reveals an interesting development with respect to the second group of cases.

In one of its very first decisions, case 235/56 of 1958, the European Commission of Human Rights held that if a State party to the ECHR concludes another international agreement which disables it from performing its obligations under the Convention, it will be answerable for any resultant breach of its obligations thereunder. In 1990, however, the Commission observed in *M. & Co* that the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights receive an 'equivalent protection'. In that case Member States are not obliged to review the acts of 'their' organisation for compliance with human rights, even if this might result in breaches of human rights in individual cases. Since the ECJ was considered to offer this 'equivalent protection', complaints about alleged Community violations were rejected without much ado. Apparently the Commission did not want to put any obstacles on the road of European integration. Likewise in *Pafitis*, a case concerning the reasonable-time requirement of Article 6 ECHR, the Court refused to take into consideration the time needed by the ECJ for a preliminary ruling, since 'to take it into account would adversely affect the system instituted by Article 177 of the EEC treaty and work against the aim pursued in substance in that Article'. Thus judicial restraint characterised the first Strasbourg decisions concerning Member State responsibility for Community action.

In 1999, however, the European Court seemed to take a different approach. In *Matthews* the Court observed that while the Convention is not opposed to the transfer of powers to international organisations, Member States responsibility continues even after such a transfer. The facts of the case were atypical, though, and a more straightforward decision of the Strasbourg Court was needed. The case of *Senator Lines*, which squarely raised the issue of Member State responsibility for decisions of the CFI and ECJ, seemed destined to become the leading case in this area; it was assigned to the Grand Chamber of the European Court of Human Rights. Unfortunately the case was declared inadmissible in March 2004 on factual grounds. Other cases, including *Bosphorus Airlines v. Ireland* and *Emesa Sugar v. the Netherlands* are still pending. They raise the question to what extent individual Member States may be held responsible for ECJ decisions which are implemented by the domestic courts or by other authorities.

In conclusion it is clear that, much like the 'first dimension' of the relationship between the EU and fundamental rights, the 'second dimension' is still un-

folding. The accession of the EU to the European Convention will raise legal and political questions; in the meantime we will need to clarify the extent to which EU Member States may be held responsible for EU violations of the Convention.

2.3 *Third dimension: promotion of human rights*

In the two 'dimensions' discussed so far, the Union's role was essentially passive. The third 'dimension' relates to the Union in an active role: advocating compliance with human rights, both at a global level and *vis-à-vis* the Member States.

As far as the Union's external human rights policy is concerned, a remarkable evolution has taken place. Following a number of *ad hoc* reactions to large scale violations of human rights, a human rights clause has been included in virtually all economic and co-operation agreements between the Communities and third countries since the 1990s. On the one hand the clause aims to confirm that human rights are part of the political dialogue between the Contracting Parties. On the other hand, it aims to provide a legal basis for restrictive measures in response to human rights violations. Besides, the Union responds to violations of human rights through diplomatic channels or even by submitting *amicus curiae* briefs to the US Supreme Court in death penalty cases. Article III-193(1) of the EU Constitution confirms that the Union's action on the international scene 'shall be guided by, and designed to advance in the wider world, the principles which have inspired its own creation, development and enlargement: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms', etc.

Yet the Union's external human rights policy has been criticised as inconsistent and unpredictable. No doubt this is partly caused by the political considerations that are inherent in foreign policy: competing interests will always need to be balanced. But there are certain legal issues that can be addressed in order to make the Union's policy more transparent. Which rights are covered by the human rights clause? What amounts to a 'breach' of these rights? Is it conceivable to introduce a form of judicial review if one of the Contracting Parties (usually the EU) finds that there has been a breach? In addition it will be important to strengthen and rationalise the institutional framework for EU action in the field of human rights. In this respect Article III-193 of the EU Constitution, in its version of 18 June 2004, promises that the Union shall ensure consistency between the different areas of its external action and between these and its internal policies:

> 'The Council and the Commission, assisted to the end by the Union's Minister for Foreign Affairs, shall be responsible for ensuring this consistency and shall cooperate to that effect'.

Foreign policy is a notoriously sensitive area where each of the Member States has its own particularities and preferences. As one observer noted, human rights are currently the concern of all, but the responsibility of none. It remains to be seen if this will really change once the Constitution enters into force. So there are some challenges ahead.

But it is the position of the EU *vis-à-vis* its own Member States that raises the most interesting and sensitive questions of a constitutional nature. Are the Member States obliged, *as a matter of EU law,* to respect fundamental rights? Which fundamental rights? Should the EU develop its own human rights policy in order to actively promote human rights in the Member States? Do the EU institutions have a role to play in supervising domestic compliance with human rights standards? Can they take measures, or should they be able to do so, if a Member State violates human rights? Should the capacity of the Union to involve itself with domestic human rights be limited to situations were violations threaten to disturb the internal market? Or should *any* violation of human rights be a concern to the Union? If so, how does this relate to the activities of the Council of Europe, and in what way will this affect the position of the European Court of Human Rights? What is the impact of the introduction of European citizenship, the creation of an 'Area of Freedom, Security and Justice', and the incorporation of the Charter?

Like in the 'first dimension' discussed above, it was the ECJ that initiated this discussion. The Court decided in the late 1980s that the general principles of Community law, including fundamental rights, do not only bind the institutions, but also the Member States where they implement Community law. It later added that the same applies if Member States restrict the fundamental freedoms (free movement of workers, of services, of goods, of capital): any such restriction should be in conformity with human rights. This has led to a constant flow of cases, usually through the preliminary rulings procedure, where it was argued that national authorities violate human rights: *Grogan, Demirel, Cinétèque, Konstantinidis, ERT, Kremzow* and more recently cases such as *Carpenter, Baumbast, Österreichischer Rundfunk, Lindqvist, Karner* and *Booker Aquaculture.* Interestingly, for individual applicants it may be more attractive to try and get their human rights case before the ECJ than before the European Court of Human Rights: any first instance court can put preliminary questions to the Luxembourg Court, whereas Strasbourg can only be accessed after exhaustion of domestic remedies. It is of course not excluded that the same case is subsequently examined by the ECJ and the ECtHR – which in turn raises the issue of the risk that the interpretation of human rights standards will diverge.

The judicial interest in domestic compliance with human rights was gradually joined by political interest and legislative activities. In the early 1990s the

European Parliament started to discuss human rights in the Union and adopted annual resolutions on this issue. Measures to fight discrimination and racism were adopted. Harmonisation occurred in areas where the internal market suffered from diverging national standards, for instance in the field of data protection. The developments in the field of criminal justice, such as the European Arrest Warrant, have led to discussions concerning the rights of the defence with a view to establishing common minimum standards.

On a more general note the Treaty of Amsterdam introduced Article 7 TEU, allowing for measures against Member States if there is a serious and persistent breach of the fundamental values on which the EU is based, notably human rights. Following the crisis surrounding the participation of the right-wing *FPÖ* in the Austrian government, the procedure of Article 7 TEU was enhanced by the Treaty of Nice, allowing for action if there is only a serious risk that things may go wrong in a Member State. Arguably this change was also prompted by the prospect of the accession of ten new Member States, many of whom had not had the opportunity in the past decades to develop a human rights culture. The arrangement of Article 7 TEU returns in Article I-58 of the EU Constitution. A question for the future is which policy instruments will be used to apply Article I-58 in practice, and which level of transparency and objectivity the Member States are willing to accept.

One may assume that not all Member States are keen to see the EU play a very active role with respect to their own domestic policies. This sentiment can explain Article II-51(1) of the EU Constitution:

> 'The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity *and to the Member States only when they are implementing Union law*'.

At the same time one cannot help noticing that the political mechanism of Article I-58 may be triggered by human rights violations that are completely unconnected to the functioning of the internal market. Rightly so: if respect for human rights and adherence to democracy are preconditions to membership, then it is only logical that continuing respect for these principles is a legitimate cause of concern for the Union – even if the victims happen to fall in a situation where the authorities are not implementing Union law.

If the Union is competent to take measures against Member States in case of serious and persistent breaches of human rights, then it has a legitimate interest in gathering information about the level of human rights protection in the Member States. Against this background the European Commission established, in 2002, a Network of Independent Experts on Fundamental Rights. It

produces annual reports on the protection and promotion of human rights in the Member States and by the EU institutions; in addition it issues thematic observations and gives replies to specific questions put to it.[5] For obvious reasons the EU Charter is used as the reference standard, thereby showing the relative usefulness of Article II-51. It will be interesting to see how the Network develops in the coming years, and how its activities will be combined with the new Human Rights Agency, the establishment of which was decided by the European Council in Milano (2003). One potentially promising area would be the exchange of 'best practices' in the field of human rights.

In this connection there is one final development that should be mentioned. To many, the essence of Europe is the diversity of its nations. One of the challenges facing the Union is to strike the right balance between preservation of national identity, also in the sphere of human rights, and securing overall compliance with minimum standards to an extent that the Union can actually function. *E pluribus unum*, as the Americans would have it. But the very coexistence of diverse cultures may easily develop into a source of tension. Spouses who have contracted a same-sex marriage in the Netherlands may wish to travel to another Member State with the aim to continue their marital life there. Pregnant women who wish to obtain an abortion will travel from Ireland to Great Britain. Soft drugs which are freely available in one Member State will be sold to citizens from other Member States that pursue a zero tolerance policy. The EU Constitution does not give guidelines on how to deal with these and other consequences of diversity, which the free movement of persons makes visible. It will therefore be necessary to develop a 'private international law of human rights'.

3. Questions

It was no other than professor Joseph Weiler who asserted almost ten years ago that the Luxembourg human rights jurisprudence had been analysed and commented upon *ad nauseam*.[6] That may have been true ten years ago. But the Union has moved on and is about to enter uncharted territory. This prospect cannot fail to wet the appetite – and that is of course good news for the *European Constitutional Law Review*!

Academics and politicians face all sorts of new questions. To mention only a few of those encountered in this article: will the 'new' Charter have a real im-

[5] On the Network see <http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm>.

[6] J.H.H. Weiler, 'European Citizenship and Human Rights', in Winter a.o. (ed.), *Reforming the Treaty on European Union*, The Hague 1996, p. 77.

pact on EU law in general and on the 'Area of Freedom, Security and Justice' in particular? What about the justiciability of its rights? What about remedies, also against agencies such as Europol? Will the institutional balance within the EU shift as a consequence of the incorporation of the Charter? Will the Union actually accede to the European Convention of Human Rights? How will cases against the EU Member States, denouncing EU violations of human rights, be solved in the meantime? Will it be possible to enhance the consistency and transparency of the Union's external human rights policy? Will the ECJ continue to develop into a human rights court? Should the EU develop its own internal human rights policy in order to actively promote human rights in the Member States? If so, how does this relate to the activities of the Council of Europe, and in what way will this affect the position of the European Court of Human Rights? Will the Union be able to strike the right balance between preservation of national identity, also in the sphere of human rights, and securing compliance with minimum standards to an extent that the Union can actually function?