COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 September 2003

Restricted
CDL (2003) 59
English only

Opinion No. 256 / 2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

IMPLICATIONS OF A LEGALLY-BINDING EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS ON HUMAN RIGHTS PROTECTION IN EUROPE

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PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE; INTERACTION BETWEEN STRASBOURG AND LUXEMBOURG

1. Introduction

When, on 2 October 2000, the first Convention, under the presidency of Roman Herzog, adopted its report on the Charter of Human Rights for consideration at the European Council of Nice, four things were clear: (1) at that moment of time the Charter would only get the status of a solemnly proclaimed document[1]; (2) it would, nevertheless, have legal effects immediately[2]; (3) it would constitute one of the core elements of the future constitutional treaty of the European Union (EU)[3]; and (4) its adoption raised the issue of its relationship with the European Convention on Human Rights (ECHR).[4]

2. The Charter and its relation to the ECHR

The situation in which, for the legal guarantee of human rights in the EU, the relevant EU documents merely refer to the common constitutional traditions of the Member States, the generally recognized principles and existing human-rights treaties, is no longer satisfactory. Even though the Court of Justice has skilfully filled the gaps with its praetorian jurisprudence, this "solution de dépannage"[5] has become insufficient in a situation where the powers of the EU Institutions extend to areas which not only affect the economic relations but also social life, security, legal cooperation *etcetera.*[6] And, indeed, the fact that the ECHR has established a common European area of fundamental rights as a constitutional order for almost the whole of Europe[7], including the European Union as such[8], does not make the

[1] See Addendum IV of the Conclusions of the European Council of Cologne of 3-4 June 1999. The Charter was solemnly proclaimed by a joint Proclamation of the Presidents of the European Parliament, the Council of Ministers and the European Commission on 7 December 2000. See also Declaration 23 of the European Council of Nice.

[2] See Hans Christian Krüger & Jörg Polakiewicz, "Proposals for a Coherent Human Rights Protection System in Europe; The European Convention on Human Rights and the EU Charter of Fundamental Rights" , 22 *Human Rights Law Journal* (2001), pp. 1-13 at 1.

[3] See Lucia Serena Rossi, "«Constitutionnalisation» de l'Union européenne et des droits fondamentaux '', 38 *Revue trimestrielle de droit européen* (2002), pp. 27-52 at 38-39.

[4] Krüger & Polakiewicz, *loc. cit.* (note 2), at 2.

[5] R. Lecourt, "Cour europénne des Droits de l'Homme et Cour de Justice des Communautés européennes'', in : Franz Matscher & Herbert Petzold (eds), *Protecting Human Rights: The European Dimension; Studies in honour of Gérard J. Wiarda*, Cologne etc. 1988, pp. 335-340 at 336.

[6] Giorgio Malinverni, "Le droit communautaire devant la Cour de Strasbourg '', in Andreas Auer, Jean-Daniel Delley, Michel Hottelier & Giorgio Malinverni (eds): *Aux confins du droit ; Essais en l'honneur du Professeur Charles-Albert Morand*, Basel 2001, pp. 265-291 at 265-266, who refers to a resolution of the European Parliament of 18 January 1994 of the same tenor.

[7] See Evert Albert Alkema, "The European Convention as a Constitution and its Court as a Constitutional Court", in: Paul Mahoney, Franz Matscher, Herbert Petzold & Luzius Wildhaber (eds), *Protecting Human Rights: The European Perspective; Studies in Memory of Rolv Ryssdal*, Cologne etc. 2000, pp. 41-63; G.F. Manchini, "The Making of a Constitution for Europe", 26 *Common Market Law Review* 1989, pp. 595-614.

inclusion of human rights in the constitutional basis of the EU less desirable, as holds also true for the legal systems of the Member States of the Council of Europe.[9] The ambition to provide the European Union with a full-fledged constitution implies the inclusion of a mature and contemporary catalogue of human rights. In accordance with Article 53 of the ECHR, the EU constitution may provide more extensive safeguards for the protection of human rights than the ECHR does. Therefore, discussion should not focus on the wrong issue. What is lacking – and will not be filled by a legally binding EU Charter - is that the EU, or the Community, is *also* legally bound by the ECHR within that European constitutional order, and that its acts and omissions are *also* subject to "external" international review.[10] Apart from the argument that it seems increasingly anachronistic that the European Union should be the only "legal space" left in Europe which is not subject to external scrutiny by the Strasbourg Court[11]there is the strong argument that States should not be put, or rather left, in the position where they may evade part of their obligations under the ECHR through membership of the EU. [12]

The inclusion of human-rights provisions in the EU constitutional treaty accentuates the question of the relationship between the EU and the ECHR, and, for that matter, between the jurisdiction of the Court of Justice of the European Community and the Court of First Instance, on the one hand, and the European Court of Human Rights, on the other hand. The necessity to regulate these relationships have become even more acute now that the EU Institutions gain power over areas where human rights are more frequently at stake, such as that of immigration, asylum and visas, and that of police, security and judicial cooperation.

3. The risk of diverging interpretations of human-rights standards in Europe

The risk of diverging interpretations of common European standards[13] would have been reduced, had the Convention made every effort to draft the Charter in terms identical to those of the ECHR, as far as regulation of the same rights and freedoms is concerned. For not very sound and not well founded reasons that approach was not followed. Instead, the option was chosen to include a "switch provision" to connect the two documents. Article 52 , paragraph 3, of the Charter reads as follows:

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[8] See J.H.H. Weiler & N.J.S. Lockhart, "'Taking rights seriously' seriously; The European Court and its fundamental rights jurisprudence", 32 *Common Market Law Review* (1995), pp. 579-627.

[9] Philip Alston, *The European Union and Human Rights*, Oxford 1999, at 15: "The Union cannot be a credible defender of human rights in multilateral fora and in other countries while insisting that it has no general competence of its own in relation to those same human rights". See, in this context, Opinion 2/94 of the Court of Justice of 1996. On that Opinion, see P. van Dijk, *Judicial Protection of Human Rights in the European Union – Divergence, Coordination, Integration*, Exeter Paper in European Law No. 1, Exeter 1996, at 8-10.

[10] Krüger & Polakiewicz, *loc. cit.* (note 2), at 4. : "Does it really make sense to make ratification of the ECHR a condition for EU membership, when the EU itself and its legislation are wholly exempt from supervision by the Convention bodies ?".

[11] *Ibidem* at 4.

[12] Malinverni, *loc. cit.* (note 6), at 266.

[13] See R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg", in: R. Lawson & M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe; Essays in Honour of Henry Schermers*, vol. III, Dordrecht etc. 1994, at 219-252.

> Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

And Article 53 provides as follows:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Thus, the problem of deviating formulations seems to have been solved to a large extent. However, in actual practice, differing wording will tend to lead to differing interpretations, while in certain cases it is not easy to determine whether and to what extent the same right or freedom is at issue.[14] In any case, the risk of diverging interpretation in the case-law of the Luxembourg and Strasbourg Courts remains. Although, as the President of the Luxembourg Court of Justice said in a speech before the Strasbourg Court,

> la Cour, comme d'ailleurs le tribunal de première instance, a manifesté clairement sa volonté de respecter non seulement les dispositions de la Convention mais aussi la jurisprudence de la Cour européenne des Droits de l'Homme, de plus en plus citée dans la jurisprudence[15]

the risk of diverging interpretations even manifests itself within one and the same court, let alone between two courts of different entities, different jurisdiction and different areas of competence, no matter how sincere the intentions are and how great the efforts to coordinate.[16] Especially as far as the scope of limitation clauses, and the margin of appreciation left to the domestic authorities, are concerned, there is a real risk of diverging interpretations.[17] Even good intentions on the part of the Luxembourg Courts cannot totally

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[14] See, *e.g.*, Articles 8 (protection of personal data) and 13 (freedom of arts and sciences) of the Charter as compared to Article 8 of the ECHR (right to respect of private and family life).

[15] *Discours de M. Gil Carlos Rodríguez Iglesias, Président de la Cour de justice des Communautés européennes ; Audience solennelle de la Cour européenne des Droits de l'Homme à l'occasion de l'ouverture de l'année judiciaire*, 31 January 2002. Indeed, reference to the ECHR in the EU Treaty should be taken to imply the obligation to take the Strasbourg case-law also into consideration: K. Lenaerts, "Fundamental Rights to be Included in a Community Catalogue", 16 *European Law review* (1991), pp. 367-390 at 377; *idem*, "Fundamental Rights in the European Union", 25 *European Law* review (2000), pp. 575-600 at 580-581; van Dijk, *op. cit.* (note 9), at 10-14.

[16] Krüger & Polakiewicz, *loc. cit.* (note 2), at 6.

[17] In that context, it is highly regrettable and totally unjustified that the drafters of the Charter have opted for a general limitation clause (Article 52, para 1) instead of specified clauses for the separate rights and freedoms. See Françoise Tulkens, "Towards a Greater Normative Coherence in Europe / The Implications of the Draft Charter of Fundamental Rights of the European Union", 21 *Human Rights Law Journal* (2000), pp. 329-332 at 330-331.

exclude this. First of all, these Courts will have to decide issues on which there is not yet any fixed case-law of the Strasbourg Court, while the latter may at a later occasion differ of opinion. But, secondly, the Luxembourg Courts will have to decide human-rights issues in the broader context of Community law and the purposes and functions of European integration, while the Strasbourg Court pronounce only on the human-rights issue, leaving the context to the domestic court to decide. This may also result in different interpretations or applications, and most probably increasingly so.[18] In general, the Luxembourg Courts appear to take a more restrictive approach towards the rights and freedoms concerned, and a more lenient approach towards limitations.[19] Not only may this create legal uncertainty and result in lack of equal treatment for the private parties involved, it may also subject Member States of the EU to conflicting obligations to execute judgments of the respective Courts.

4. Coordination and cooperation between the Courts

The foregoing explains why the adoption of the Charter should have been - and its incorporation into a binding treaty must *a fortiori* be - accompanied by a binding regulation of the relationship between the Luxembourg and Strasbourg jurisdictions.[20] Especially the long debated possibility of accession of the European Union (or the European Community) to the ECHR, and its institutional and substantive complications, should have been discussed and decided upon.[21] Failing that, in the meanwhile the European citizen will increasingly have to face cumulating international procedures without sufficient canalisation and coordination.

The present situation leaves several gaps in the EU system of implementation of the ECHR, and protection of the rights laid down therein, notwithstanding the admirable efforts made by the Court of Justice to fill some of them.[22] It may not cause surprise, therefore, that

[18] Krüger & Polakiewicz rightly refer to Opinion 1/91 of the Court of Justice concerning the establishment of a European Economic Area: "The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives; *loc. cit.* (note 2), at 8.

[19] See Article 52, para 1,of the Charter which refers to "objectives of general interest recognised by the Union" as a general limitation ground. For examples, see Krüger & Polakiewicz, *loc. cit.* (note 2), at 6-7; Rossi, *loc. cit.* (note 3), at 43-45.

[20] See Council of State of the Netherlands, *Information on the draft Charter of Fundamental Rights of the European Union, provided at the request of the State Secretary for Foreign Affairs pursuant to section 18(2) of the Council of State Act,* 4 October 2000, Documents of the Second Chamber 2000-2001, 21 501-20A, p. 7.

[21] See, *e.g.*, the Communication by the European Commission of 19 October 1990 "on the accession of the Community to the ECHR and the Community legal order, SEC(90)2087, and the previous 1979 Memorandum, *Bulletin of the European Communities*, Supp. 2/79; Resolution 1068 (1995) of the Parliamentary Assembly of the Council of Europe of 27 September 1995 and its Report "on the Accession of the European Community to the European Convention on Human Rights", Doc. 7383, as well as Recommendations 1439 (2000) and 1479 (2000) of its Committee on Legal Affairs and Human Rights ; Resolution A5-0064/2000 of the European Parliament "on the drafting of a European Union Charter of Fundamental Rights", where the Intergovernmental Conference was called on "to enable the Union to become a party to the ECHR"; the 1998 Report of the *Comité des Sages* "Leading by Example: A Human Rights Agenda for the European Union for the Year 2000". See also Francis G. Jacobs, "Human rights in the European Union: the role of the Court of Justice" , 26 *European Law Review* (2001, pp. 331-341 at 339.

[22] Krüger & Polakiewicz, *loc. cit.* (note 2), at 4.

those who deem themselves victims of violation of any of their rights under the ECHR by a Community Institution and have no effective remedy under Community law, try to lodge a complaint in Strasbourg against one or more Member States. Not only are such applications in fact directed against the wrong entity; the EU (European Community), whose legislation or legal measure is at stake, cannot even play any part in the procedure.

In 1990, in Application 13258/87, the European Commission of Human Rights, although recognising in principle the responsibility of the Member states for acts performed in execution of Community acts, took the position that respect of human rights by the Institutions of the European Community was sufficiently guaranteed and did not require a review by the national authorities for their conformity with the ECHR. It considered

> that it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 of the Convention was respected in the underlying procedures.[23]

The Court followed more or less the same line of reasoning but reached a different conclusion in respect of effectiveness, most clearly in *Matthews* in 1999.[24] The Court held the United Kingdom responsible for a violation of Article 3 of the First protocol to the ECHR by a decision of the EU Council of Ministers to recommend a treaty concerning the election of the members of the European Parliament. The Court held as follows:

> Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but it is a treaty within the Community legal order. The Maastricht treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.[25]

Here, not only the gaps in protection under Community law but also the distorted nature of the remedy came clearly to light. The United Kingdom was found to be in failure, but the violation of Article 3 of the First Protocol could only be remedied by all EU Members together. At the moment the case of *Senator Lines* is pending before the Grand Chamber of the Strasbourg Court.[26] It regards a complaint against the fifteen Member States concerning a fine imposed by the Commission, and maintained by the Court of First Instance and the Court of Justice. If the complaint will be hold to be well founded, this could lead to the obligation of the Member States, individually and collectively, to pay indemnification for a Community act and a Community procedure in which they have not participated.

It may be that the Court, after the inclusion in the EU Constitutional Treaty of a human-rights catalogue, will be willing to follow the "effectiveness" approach of the Commission.

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[23] 64 *D&R* pp. 144-146.

[24] See Malinverni, *loc. cit.* (note 6), at 271-274.

[25] ECHR 18 February 1999, para. 33.

[26] See Malinverni, *loc. cit.* (note 6), at 275-276.

However, that wouldn't solve the problem but, on the contrary, pave the way for diverging interpretations by the European Courts. Would the Strasbourg Court, on the contrary, persist in its *Matthews* line, it would open the way for a considerable stream of applications against judgments of the Luxembourg Courts. Not only would this prolong the total duration of procedures which are already too long; it would also add to the heavy caseload. This makes it clear that coordination between the two systems is an urgent matter to create legal certainty and legal unity, and to protect the effectiveness of both systems.

5. Accession of the Union to the ECHR and devices for interaction

Legal certainty and unity would be created, should the EU (European Community) accede to the ECHR. In that situation all final acts of both the Union Institutions and the Member States could be submitted to the Strasbourg Court for reviewing their conformity with the ECHR. This would include final judgments of the Court of First Instance and the Court of Justice. The adoption of the Charter nor its inclusion in a EU Constitutional Treaty would stand in the way of accession, nor make it less desirable.[27]As judge Tolkens rightly point out, this would not create any formal hierarchy between the Courts nor affect the EU's autonomy, but establish a mechanism of judicial cooperation with respect of each others jurisdiction in their respective areas, as is the case between the European Courts and the (highest) domestic courts.[28]The tasks of the Courts would be complementary.[29]However, even then a mechanism should be introduced to avoid as much as possible that both international jurisdictions would have to pronounce on the same ECHR issues.

The suggestion was made to give the Luxembourg Court the power to ask for an advisory opinion to the Strasbourg Court "on legal questions concerning the interpretation of the Convention and the protocols thereto"; a power that Article 47 ECHR confers upon the Committee of Ministers.[30] Different from the latter power, however, the Luxembourg Courts' requests would as a matter of course precisely deal with "questions relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto".[31]

It is submitted, however, that a system of preliminary rulings, by analogy with Article 234 of the EC Treaty, might well be a more appropriate and more effective tool to avoid diverging interpretations than that of advisory opinions. A preliminary judgment would be binding for the requesting Court of Justice or Court of First Instance as far as those elements are concerned, which they need to take into account for deciding the case before them. To avoid too large a stream of requests for a preliminary ruling it should be regulated that the Luxembourg Courts may apply the doctrine of "acte clair" and "acte éclairé as developed in the Court of Justice's case-law with respect to the Article 234 procedure. On the other hand, the Strasbourg Court should be granted discretionary power to decline to give an answer, if the issue raised has already been clarified, is pending before it in another case, or is not of sufficient importance for the uniform interpretation of the ECHR. It may be expected that the

[27] Jacobs, *loc. cit.* (note ..21), at 340; Rossi, *loc. cit.* (note 3) at 46.

[28] Tulkens, *loc. cit.* (note 17), at 331. Thus also Rossi, *loc. cit.* (note 3) at 46.

[29] .Krüger & Polakiewicz, *loc. cit.* (note 2), at 8-9.

[30] Thus, judge Tulkens, *loc. cit.* (note 17) at 331-332; judge Fischbach, *RUDH* (2000), pp. 7-9 at 9.

[31] See the restriction in the second paragraph of Article 47.

Strasbourg Court, in answering preliminary questions concerning the ECHR, will base itself on its "living instrument"-doctrine and take the Charter into account.[32] The procedural details can be worked out in consultation between the Courts and inserted in their respective Rules of Procedure. Finally, a time limit should be set for the Strasbourg Court, to avoid unacceptable delays in the already very protracted duration of the Luxembourg proceedings. Indeed, the latter will have to fulfil the requirement of a "reasonable time" of Article 6 of the ECHR.

A more radical device to bring about legal uniformity would be the establishment of a super court; a European Court of Appeal[33], a *Tribunal des Conflits*, a *gemeinsamer Senat.* This court would have jurisdiction to decide issues of interpretation of the ECHR which have been referred to it by any of the Courts involved. However, it is obvious that this would be a very costly and cumbersome solution, while it would without any valuable reason detract from the general jurisdiction of the Strasbourg Court in the area of the ECHR.

In conclusion, taking into consideration that the EU will have its own human-rights system and that this system will further develop and will receive a more explicit and formal constitutional basis, its relationship towards the ECHR will also have to be formalised. By far the best solution will be accession of the EU (European Community) to the ECHR. This will raise several institutional, procedural and substantive issues, but these can all be solved if the political will is there to do so.[34] Accession will create clarity about the relation between the two human-rights documents and between the two Courts, and will guarantee legal unity and legal certainty. It will, however, also lead to longer procedures and a heavier caseload for the Strasbourg Court. Therefore, even in the case of accession, a mechanism will have to be established for reducing the number of applications to the Strasbourg Court from judgments of the Luxembourg Courts. The preliminary-ruling procedure as described above, with its modalities and restraints, could serve as such a mechanism. If accession will not take place, or in the meantime, the preliminary-ruling procedure could also serve to avoid, or at least limit diverging interpretations of the contents and scope of the rights and freedoms laid down in the ECHR.

6. Concluding observation

It is the Venice Commission's opinion that legal and material preparatory measures for accession of the EU to the ECHR should be continued in order to be timely prepared when the political momentum for accession is there. The Venice Commission is at the disposal of the organs of the Council of Europe and of the EU involved, to assist in this endeavour if requested.

In the meantime, an amendment of the ECHR, or an additional protocol, should be drafted to empower the Court of Justice of the European Community and the Court of First Instance to ask the Strasbourg Court for preliminary rulings concerning the interpretation of

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[32] For an example of reference to the Charter in interpreting Article 12 of the Convention, see ECHR 7 July 2002, *Goodwin*, par. 100.

[33] H.G. Schermers, "The Eleventh Protocol to the European Convention on Human Rights", *European Law Review* 1994, pp. 367-382 at 382.

[34] See the report, prepared by the CDDH at the request of the Committee of Ministers, ……See also the several proposals, made by Krüger & Polakiewicz, *loc. cit.* (note 2), at 11-13.

the ECHR and its Protocols. In this drafting the Venice Commission could also assist if desired.

Finally, as was emphasized by President Rodríguez Iglesias of the Luxembourg Court[35] and several other personalities involved[36], the most effective device for bringing about normative coherence in the interpretation of human rights norms is regular contacts and exchanges of view among the members of the domestic and the different international jurisdictions.[37] The Venice Commission might well be an appropriate "neutral" convenor of such meetings. [38]

[35] See his speech (note 15).

[36] See, a.o., judge Tulkens of the Strasbourg Court, *loc. cit.* (note 17) at 329.

[37] On coordination and mutual consultation also at the level of the Registrars: Van Dijk, *op. cit.* (note 9), at 14-15.

[38] Thus, also, judge Tulkens, *loc. cit.* (note 17)

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