

"EU Accession to the ECHR"

Academy of European Law, Trier

**"Current Reflections on EU Equality
and Non-Discrimination Law"**

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Lisbon Treaty I

Art 2 TEU – Values of the Union:

- Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities
- MS are societies where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail
- **Digression: Stockholm Programme 2010** for an "open and secure Europe"

Lisbon Treaty II

Art 6 TEU – Fundamental Rights:

- Reference to the **Charter of Fundamental Rights**, which has the same legal value as the Treaties
- **EU accession to ECHR** is enshrined, terms to be negotiated
- **ECHR and common constitutional traditions** of MS remain general principles of Union law

EU Charter of Fundamental Rights – primary law alongside Lisbon Treaty

- **Link to Charter** (2007 version) in new Art 6 TEU (Lisbon Treaty version)
 - when the Treaty entered into force, the Charter became legally binding as primary law
- EU institutions and Member States are committed to implementing EU law
- **Enforceable** before the CJEU – for Member States, Parliament, Council and Commission → but usually no direct procedure for individual complaints
- Commission's **Implementation Strategy 2010**

Relationship of Charter to ECHR

- Charter contains **economic, social and cultural rights as well**
- Charter assimilates some ECtHR case-law
- Art 52 of the Charter: **Scope of rights** → the same as ECHR in the case-law of the ECtHR
- **ECHR consequently sets the standard for basic rights in Europe**
- **"Most favourable" principle** set down in Art 53, especially by comparison with ECHR

Relationship CJEU and ECtHR

- **"Two heads are better than one"**: Dual protection for human rights in Europe – a luxury?
- Divergent case-law versus requirement to take other decisions into account
- **ECtHR highest authority** for compliance with ECHR in the EU
 - **Case of *Matthews versus the United Kingdom*** (exclusion from right to vote for EU Parliament)
 - **Case of *Senator Lines versus 15 EU Member States*** (Provisional fine imposed by the European Commission)
 - **Case of *Bosphorus versus Ireland*** – "Solange" case-law from ECtHR in relationship to EU law

Relationship between Charter, ECHR and national protection of basic rights

- ECHR is minimum standard for Charter on civil and political rights
- All EU Member States parties to ECHR
- EU will accede to ECHR, so legislative acts of EU can be contested before ECtHR
- EU secondary law must respect Charter
- Any national act of law must respect basic rights recognised nationally and ECHR
- National transposition of EU law must respect basic rights recognised nationally, ECHR and Charter

Possible legal procedure

- A national court hearing a case makes a reference to the ECJ for a preliminary ruling on a matter concerning basic rights
- The national court uses this judgment as a basis for its ruling
- The decision of the final court of appeal in that country is challenged before the ECtHR, which decides that the country has violated a right enshrined in the ECHR; its reasoning gives rise to a conflict with the judgment of the CJEU
- "Solange" case-law from the ECtHR (Judgment *Bosphorus v. Ireland*)

Meeting of EU Council's Permanent Representatives Committee on 27/5/2010 I

Agenda:

Consideration of a draft decision granting the Commission powers to negotiate the EU Accession Agreement

- **Definition of essential directives for negotiation**
 - Distribution of competence within the EU legal system must not be influenced
- **Definition of scope of accession**
 - EU's ability to accede to all existing and future protocols should be ensured

Meeting of EU Council's Permanent Representatives Committee on 27/5/2010 II

- **Definition of EU participation in the Convention bodies**
 - The EU should have the right to designate a judge
 - Members of the European Parliament should be able to take part in meetings of the Parliamentary Assembly
 - The EU should have voting rights during meetings of the Committee of Ministers when it exercises functions in relation to the ECHR
- **Issues relating to proceedings before the ECtHR**
 - The EU should be able to take part in proceedings against EU Member States
 - EU Member States should be able to take part in proceedings against the EU
- **Determination of the EU's financial contribution**

Meeting of EU-CDDH with European Commission on 20-24 June 2011 I

- **Exchange of views with representatives of civil society:**
 - The **co-respondent mechanism** should apply to the minimum possible number of cases
 - The **criteria** for triggering the mechanism were seen as unnecessarily wide compared to earlier versions of the draft Accession Agreement
 - They welcomed the fact that applicants would receive **legal aid** for participating in such a procedure, and wished this to be reflected in the Agreement itself and not just the explanatory report
 - **Block voting** should be avoided when supervising the execution of judgments in order not to jeopardise the credibility of the Convention system

Meeting of EU-CDDH with European Commission on 20-24 June 2011 II

Other issues discussed:

- Conditions for application of the **co-respondent mechanism**
- Prior **involvement of the CJEU**
- **EU participation in the Committee of Ministers** of the Council of Europe
- **Supervision of the fulfilment of obligations** by EU Member States and by States which are not members of the EU

Draft Agreement:

Scope of the Accession (Article 1) I

- **Accession to ECHR and to Protocols 1 and 6 of the Convention**

- **Article 59 (2) ECHR to be amended:**
 - **EU may accede to the Convention Protocols (§ 2a)**
 - **The EU's status as a High Contracting Party shall be further defined in the Accession Agreement (§ 2 b)**
 - Provisions relating to privileges, immunities and the EU's participation in the Committee of Ministers are dealt with in the Accession Agreement
 - The Accession Agreement continues to have legal effects after the EU accedes to the ECHR and is subject to interpretation by the ECtHR

Draft Agreement:

Scope of the Accession (Article 1) II

- **Declaration that accession does not influence the competences of the EU or the powers of its institutions**
- Accession will impose on the EU **obligations with regard only to** acts, measures or omissions of its bodies or agencies (§ 2 c)
- **Decisions by the ECtHR** to which the EU is party are **binding on all EU institutions**, including the CJEU
- **The EU cannot be required to perform** an act for which it has no competence
- **Terms which explicitly refer to states** (eg "State Party"), are to be understood as **referring also to the EU** (§ 2 d)
- **Terms that refer more generally to the concept of a State** (eg "national law") are likewise to be understood as **referring also to the EU** (§ 2 e)

Draft Agreement: Reservations to ECHR (Article 2)

- **Reservations** to the Convention and the Protocols can be made in accordance with Article 57 of the Convention
- Amended wording of Article 57 (1) ECHR: The EU can make reservations to the same extent that States can

Draft Agreement:

Co-respondent mechanism (Article 3) I

- Addition of a paragraph 4 in Article 36 providing for the co-respondent mechanism:
- **EU can become a co-respondent to proceedings against one or more Member States**
- **Member States can become co-respondents in proceedings against the EU**
- **Condition for making the EU co-respondent:**
 - An alleged violation of the Convention calls into question the compatibility of EU law (primary and secondary) with the Convention rights at issue
 - The violation could have been avoided only by disregarding an obligation under EU law

Draft Agreement:

Co-respondent mechanism (Article 2) II

- **Condition for EU member States to become co-respondents:**
 - An alleged violation of the Convention calls into question the compatibility of a provision of the TEU, the TFEU or any other provision having the same legal value
 - The violation could have been avoided only by disregarding an obligation under those instruments
- **Any Party can request to become a co-respondent** if it meets the conditions
- The party that created the **legal basis for the act or omission** that led to the violation becomes a co-respondent (not the party responsible for the violation)

Draft Agreement:

Co-respondent procedure

Procedure for an EU Member State to become a co-respondent:

- A request must be submitted
- The Court can draw attention to the co-respondent mechanism as an option, but a request must still be made
- No Contracting Party can be forced to become a co-respondent
- The Court informs applicant and respondent of the request and gives them time to express views
- After considering the views of all parties to the proceedings, the Court decides whether the conditions have been met
- The decision to admit a Contracting Party as co-respondent may entail further conditions (eg legal aid to protect the applicant's interests)
- The Court may terminate a co-respondent's participation in the proceedings at any stage if the respondent and co-respondent indicate clearly that the conditions no longer pertain.

Draft Agreement:

Procedure for the EU as co-respondent

- **Before the ECtHR decision, the case is put to the CJEU** for an assessment of the compatibility of the provision with Convention rights
- **Without seizing the CJEU, the ECtHR** reviews the conformity of an EU act with the rights enshrined in the Convention if
 - the action was inspired by the subsidiarity principle,
 - the CJEU has not ruled on the reprehensible act or omission, but on its legal basis, or
 - the involvement of the CJEU has no influence on the competence and jurisdiction of the ECtHR, and the judgment of the CJEU is not binding on the ECtHR.

Draft Agreement:

Effects of the mechanism I

- **Co-respondent** participates as **party to the proceedings**
- If a violation is established, the **co-respondent is bound by the judgment of the ECtHR**
- The respondent and co-respondent can be **jointly responsible for the violation**
- If a violation is established, **the EU and the Member State will be held jointly responsible**, otherwise there is a risk that the ECtHR will rule on the distribution of competences between the EU and its Member States

Draft Agreement:

Effects of the mechanism II

- Agreement of respondent and co-respondent necessary in cases of **friendly settlement**
- Agreement of respondent and co-respondent necessary in cases of **unilateral declarations** with regard to violations of the Convention for which both are responsible
- **Requests for referral to the Grand Chamber** for review can be made by the respondent and co-respondent without the other's agreement; Grand Chamber decides on the admissibility of the review

Draft Agreement: Inter-Party cases (Article 4)

- **A State can refer the EU to the Court for an alleged breach, the EU can refer a State →**
- Amendment to the first sentence of Article 29 (2) ECHR: "Inter States" changed to "Inter-Party"
- Amendment to the heading of Article 33: "Inter-States" changed to "Inter-Party"

Draft Agreement:

Interpretation of Articles 35 and 55 ECHR

- Declaration that **proceedings before the CJEU do not constitute an investigation or settlement** that would render an application inadmissible in accordance with Article 35 (2b)
- Declaration that **CJEU proceedings do not constitute a "means of dispute settlement"** in the sense of Article 55 ECHR

Draft Agreement:

Election of judges (Article 6)

- **Members of the European Parliament** may participate with voting rights in sittings of the Parliamentary Assembly of the Council of Europe when it exercises its functions in relation to the election of judges pursuant to Article 22 ECHR
- The **number of MEPs** shall be the same as the highest number of representatives to which a State is entitled under Article 26 of the Statute of the Council of Europe
- The **modalities of the participation of MEPs** in the Parliamentary Assembly of the Council of Europe shall be determined by the Assembly in consultation with the European Parliament

Draft Agreement:

Committee of Ministers (Article 7)

- **EU participates with voting rights in the Committee of Ministers when the latter**
 - takes certain **procedural decisions**, eg pursuant to Article 39 (4) ECHR (Friendly settlements) and to Article 46 ECHR (Supervision of the execution of ECtHR judgments),
 - decides on the **adoption of protocols**,
 - decides on the **adoption or implementation of any other instrument or text** addressed to the ECtHR or to all High Contracting Parties, or relating to the functions exercised by the Committee of Ministers of the Parliamentary Assembly.
- **Exercise of votes by the EU and MS shall not cause prejudice to effective exercise of the supervisory functions of the Committee of Ministers under Articles 39 and 46**

Draft Agreement:

Participation in expenditure (Article 8)

- EU to pay an **annual contribution** equal to 34% of the highest amount paid in the previous year by any State
- This formula **may be adapted** if the proportion of the Ordinary Budget devoted to expenditure on the functioning of the Convention system deviates substantially in the current period →
- This may apply if in two consecutive years the proportion **deviates by** more than 2.5 percentage points from the agreed 34%

Concluding Remarks on Relationship ECtHR – CJEU

- **ECtHR's competence** to review the compatibility of EU law with rights enshrined in the ECHR does not affect the principle of autonomous interpretation of EU law.
- **EU will continue granting fundamental rights, to be guaranteed by CJEU *inter alia*.**
- EU accession to ECHR strengthens the coherence of legal protection for human rights **in Europe.**