

# Relationship of the Charter to the ECHR and national human rights provisions

## The Charter of Fundamental Rights ERA Training Seminar

Dr Tobias Lock

Lecturer

School of Law

[t.lock@surrey.ac.uk](mailto:t.lock@surrey.ac.uk)

[www.surrey.ac.uk](http://www.surrey.ac.uk)



- Introduction: the EU and the ECHR
- Challenge of ‘competing’ legal orders ostensibly aiming at ensuring the protection of fundamental rights
  - relationship of the Charter to national human rights provisions
  - relationship of the Charter to the ECHR
  - competing legal orders?
- EU Accession to the ECHR
  - Overview
  - Role of the accession of the EU to the ECHR – its impact on the application of the Charter
  - Judicial remedies in fundamental rights cases post EU accession to the ECHR



# The EU and the ECHR

- EU not a party to the ECHR, but all of its Member States are

- 47 parties to ECHR
- European Court of Human Rights in Strasbourg (ECtHR)
- Direct access to ECtHR for anyone

- 
- 27 MS of the EU
  - CJEU in Luxembourg
  - Access to CJEU mainly via preliminary reference procedure



Source: <http://en.strasbourg-europe.eu/member-states,44987,en.html>

# The EU and the ECHR

- Before the entry into force of the Charter, CJEU relied on unwritten fundamental rights (general principles of EU law)
  - ECHR was an important ‘source of inspiration’ for CJEU when defining those principles
  - former AG Jacobs: Court scrupulously follows the case law of the ECtHR
- This is reflected in Art. 6 (3) TEU, which refers to ECHR:

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’
- Furthermore: Art. 52 (3) CFR stipulates that ECHR is minimum standard

# Challenge of 'competing' legal orders

Fundamental rights are typically protected on (at least) three levels

- ECHR
- EU
- National fundamental rights guarantees
  - Sub-national level (e.g. regional fundamental rights)

How does the Charter relate to these?

- No direct impact on national human rights guarantees
  - Art. 6 (1) (2) TEU:

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
  - Hence no extension of Charter rights to purely national context
- Indirect impact?
  - Hard to say
  - National courts might in the future be tempted to construe equivalent national fundamental rights in line with CJEU's interpretation of Charter rights

- Where domestic rights provide for better protection, can they be relied upon?

## **Art. 53 CFR**

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 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.**

- CJEU in Melloni (C-399/11, paras 55-64):

Art. 53 **does not** allow a national court to apply domestic fundamental rights against a measure of EU law as this would undermine the principle of primacy!

## Interpretation of the rights in light of the ECHR, Art. 52 (3)

- Art 52 (3) mentions the ECHR as a minimum standard:  
‘In so far 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.’
- For corresponding rights: see explanations to the Charter Art. 52 (7):  
‘The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.’
- Explanations not binding but persuasive.



## Article 52 (3) CFR

Article 2: Right to life

= Article 2 ECHR

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

=Article 3 ECHR

Article 5: Prohibition of slavery and forced labour

=Article 4 ECHR

Article 6: Right to liberty and security

= Article 5 ECHR

Article 7: Respect for private and family life

= Article 8 ECHR

Article 9: Right to marry and right to found a family

= Article 12 ECHR, but wider scope

# Article 52 (3) CFR



Article 10: Freedom of thought, conscience and religion

= Article 9 ECHR

Article 11: Freedom of expression and information

= Article 10 ECHR

Article 12: Freedom of assembly and of association

= Article 11 ECHR, but wider scope

Article 14: Right to education

= Article 2 Protocol 1 ECHR, but wider scope

Article 17: Right to property

= Article 1 Protocol 1 ECHR

Article 19: Protection in the event of removal, expulsion or extradition

= Article 3 ECHR

# The Charter and the ECHR

## Consequences:

- ECHR as a minimum standard
  - i.e. Articles to be interpreted like corresponding Convention Articles
  - This means that case law of European Court of Human Rights is of great importance,
    - Cf. Case C-400/10 PPU *McB.*, para 53:  
'Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.'
- Important for absolute character of rights: e.g. Art. 3 ECHR is absolute, hence Art. 4 CFR must be absolute, too!
- But: Charter may provide for greater protection

## Current situation under the ECHR

- EU is not a party and cannot be sued in Strasbourg
- But EU Member States can be held responsible instead
- *Matthews v United Kingdom* (EU primary law)
  - According to EU's Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar
  - Applicant complained to ECtHR arguing there had been a violation of her right to vote under Art. 3 Protocol 1 ECHR
  - Court:

“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer”

# Current situation

- *Matthews* (continued)
  - UK was held responsible for depriving UK citizens in Gibraltar of their right to vote in EP elections (Art. 3 Prot 2 ECHR)
  - *Matthews* established the principle that Member States of the EU cannot evade responsibility under the ECHR by transferring powers to the EU
- *Bosphorus v Ireland* (EU secondary law)
  - piece of EU legislation (Regulation) demanded that Yugoslavian aircraft be impounded
  - *Bosphorus* airlines had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland
  - *Bosphorus* argued that violation of its right to property under Art. 1 Protocol 1 ECHR

# Traditional relationship

- *Bosphorus* continued
  - Court reaffirmed general responsibility of MS under *Matthews*
  - But introduced new rebuttable presumption:
    - EU offers protection of human rights which is equivalent to the ECHR
    - If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations
    - Presumption can be rebutted if in a particular case the protection was ‘manifestly deficient’
- What does ‘discretion’ mean?
  - Where Directive: discretion (always?) exists
  - where this is so: full review by ECtHR

## Traditional relationship

- Mind the gap: *Connolly v 15 Member States of the EU*
  - EU staff dispute: Commission official had been sacked
  - Difference to *Matthews* and *Bosphorus*: no Member State had got involved
    - Purely EU-internal dispute
  - Complaint was deemed inadmissible since act not attributable to MS for lack of involvement
- **Thus there is a gap in the protection at present where no Member State was involved**

# Competing legal orders?

- Basic framework
  - European Court of Human Rights will only accept applications where all domestic remedies have been exhausted, Art. 35 (1) ECHR
  - Court of Justice of the EU: direct access extremely restricted, Art. 263 TFEU
    - Only where an EU act is addressed to an individual (or it is of direct and individual concern to them): e.g. fine issued by EU
  - Normally CJEU involved via preliminary reference procedure, Art. 267 TFEU
    - Request for reference sent by national court to CJEU as part of domestic procedure



## Competing legal orders?

- What should a lawyer do?
- Two situations
  - **Purely domestic situation (no EU law involved):**
    - Apply to domestic courts, exhaust legal remedies and then go to Strasbourg
  - **Where EU law is involved:**
    - Where MS authorities have acted
      - Application to domestic courts (with possible reference to CJEU by domestic courts)
      - If domestic remedies exhausted: Strasbourg
    - Where EU authorities have acted (e.g. competition law)
      - Apply to General Court of EU (possibility of appeal to CJEU)
- At the moment: no way to go to Strasbourg

# EU accession to the ECHR

- Original position
  - No legal basis for EU accession in EU Treaties, Opinion 2/94
  - No basis in ECHR (only open to states)
- NOW: Legal bases for accession
  - Lisbon Treaty: Article 6 (2) TEU
    - “The EU shall accede to the ECHR”
  - Protocol No 14 ECHR
- Negotiations since July 2010 (informal working group)
  - Draft agreement in October 2011
- Further negotiations since
  - Timeframe ???

# Overview of EU accession

- The EU will become a party to the ECHR
  - hence the EU will be able to act as respondent in Strasbourg
  - main fields of application:
    - violations of human rights by EU institutions, e.g. European Commission in cartel proceedings, staff disputes, etc (Connolly-gap)
    - also where MS acted on basis of EU law (*Bosphorus*-type cases)
- Any effects on EU law?
  - no immediate effects
  - EU accession will not change the ambit of the Charter rights
    - ECHR is already the minimum standard, Art. 52 (3)
- Main issue of (practical) relevance
  - who will be responsible in Strasbourg?

# The problem of shared responsibility



- The unusual character of EU membership of the ECHR
  - MS implement EU law (often without discretion)
    - who should be responsible in such cases: EU or MS or both?
    - is a problem as both EU and MS will be parties
- Solution in draft agreement: co-respondent mechanism
  - in some cases the CJEU will be involved in proceedings as well

# The co-respondent mechanism in the draft accession agreement



Amendment to Article 36 ECHR:

“The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”

# The co-respondent mechanism (draft)



2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

# The co-respondent mechanism (draft)

Draft distinguishes two situations:

1. Application directed against Member State
  - EU may become co-respondent if compatibility with Convention of a provision of EU law is at stake
  - Notably: *Bosphorus*-type situations
2. Application directed against EU
  - Member State(s) may become co-respondent(s) where compatibility with Convention of EU primary law is at stake
  - *Matthews*-type situations

Rationale:

- Responsibility before ECtHR should mirror the ‘true’ responsibility for an act or omission

# The co-respondent mechanism (draft)

What to do in practice?

- The applicant may choose to hold MS or EU responsible or both together
- Best way: hold the party responsible which has acted vis-à-vis the applicant
  - Usually a national authority
  - Co-respondent mechanism will then be applied (or not), but this should not affect the applicant's chances of success
- In some co-respondent cases: CJEU will be involved
  - Decision on CJEU involvement will be made by EU
  - Still not clear if and how applicant will be represented before the CJEU



# Overview of judicial remedies post EU accession

- Not many changes in practice
- Usual route will be through the domestic courts
- Example: facts of *Bosphorus* case
  - Airline would have to instigate proceedings against impoundment of its aircraft in domestic court
    - If argument is made that EU Regulation on which impoundment is based is flawed, national court may make a reference to CJEU
  - Once domestic remedies exhausted: application to Strasbourg against the MS
    - EU can come in as co-respondent
    - If CJEU has not yet spoken: will be involved
- Judgment by Strasbourg: end of case

Thank you for listening.