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The Framework for Fundamental Rights Protection in Europe under the Prospect of EU Accession to ECHR

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Abstract

Issues of human rights have always been crucial in the continent of Europe. The institutionalization of fundamental rights for European citizens remained a matter of much discussion among legal scholars for decades. With the amendment of the Lisbon Treaty, major changes were forwarded within the Union regarding that matter; one of those is the accession of the Union to ECHR. The purpose of this paper is to discuss major institutional aspects of this accession and propose solutions, after addressing certain difficulties on one hand and on the other, to draw the new picture of judicial protection of fundamental rights in Europe.

Keywords: human rights in Europe, EU accession to ECHR, judicial protection in Europe

1. Introduction

A possible accession of European Union (hereinafter: EU/the Union) to the European Convention on Human Rights (ECHR/the Convention) has been discussed in legal society for more than thirty years. The topic had widely opened after the 1979 Commission Memorandum where the major pros and cons were underlined and practical problems were addressed. This discussion led to an official request to the European Court of Justice (ECJ/the Court) in relation to the legality of such accession; the outcome was included in opinion 2/94 that found such accession incompatible with the European Community (EC/the Community) Treaty.

However, the whole argumentation regarding EU accession to ECHR had originated earlier, the first approach of the sensitive issue of fundamental rights protection at an EU level was directed by the ECJ that had envisaged the conceptual influence of the Convention to the EU and developed the doctrine of Community protection of fundamental rights.

Technical problems arose from the other part as well. The ECHR was constructed for States to participate in so the accession of an organization such as the EU would demand significant amendments. A relevant proposal from the Council of Europe’s point of view was manifested in the Steering Committee for Human Rights Study of 2002.

With the enforcement of the Lisbon Treaty and the signature and ratification of Protocol 14, technical problems seemed to have been put in some order. But this is the easy part of the story. The Union is an organisation with special characteristics and that creates interpretational issues regarding its accession to the Convention.

Furthermore, different perspectives derive from a possible accession of EU to the ECHR. As all EU member states will hold their present status as members of the Convention, the EU will unavoidably develop judicial relations with them as well as with non-EU members within the legal umbrella of the ECHR.

The aim of this paper is to understand and analyse the institutional changes that a possible accession to ECHR may bring to the system of fundamental rights protection in EU. This will be achieved by trying to identify the position of the ECHR in the EU legal order and later to define the formation of the relations among the ECHR Member States and EU in view of the accession of the latter in the Convention from a judicial standpoint.

2. Legal Basis

2.1 The New Article 6, par. 2, Section 1 TEU and Further Process

Under the precise rule of the Court in opinion 2/94 it needed a Treaty amendment for the Community (of the time) to accede to the ECHR as an outcome of the absence of an explicit competence. This amendment was forwarded and a specific provision was entered in the Treaty establishing the Constitution for Europe, a Treaty that was never
enacted. However, the matter of accession was not removed from the EU agenda and subsequently was included in the Treaty of Lisbon which finally came into force on 1st of December 2009. According to the new article 6, par. 2, section 1 TEU: “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

The way that this provision is formulated describes the Union’s accession not simply as a wish or a general idea, but more as a duty. In general terms, provisions are technically enounced in either an obligatory or a more permissive mode within the EU legal system; this is usually expressed with the terms “shall” and “may” respectively. The term “shall” exactly reflects the sense of obligation within a future time instead of the term “may” that gives more freedom in acting (Tilliman, 2010). Article 8 TEU could be an example for both categories; par. 1 dictates that the Union shall develop good relations with neighboring countries, whilst par. 2 states that the Union may conclude specific agreements with those countries. Hence, the terminology used in article 6, par. 2, section 2 underlines the importance on this issue.

The above mentioned provision should not be examined independently of article 2 TEU. This article, outcome of the Lisbon amendment as well, illustrates the democratic qualities and values of the Union that form part of the common EU identity and inserts a general background for the protection of fundamental rights within the Union to be based on and therefore materialized. This basis has an explicit presence within the autonomous EU legal order and all the more in the forefront of the Treaty and takes a symbolic approach in providing the Union with the obligation to accede to ECHR (Piris, 2010).

A major matter that the Lisbon Treaty establishes is the legal personality of the Union, in article 47 TEU. From the enactment of the Treaty of Rome, the Member States intended to attribute legal personality to the Community to act in international scene by concluding international agreements (Frid, 1995; Leal-Arcas, 2006) under the principle of conferred powers. The situation became far more complex after the creation of the European Union, a new entity that was based in the three pillar system. The two new pillars (Common Foreign and Security Policy, Justice and Home Affairs) that were introduced in the Maastricht Treaty, along with the existing European Community, substantially changed the institutional framework around the Community (McGoldrick, 1997). Therefore an issue arose regarding the legal personality of the Union itself, an open issue until the Lisbon Treaty era. Under the Lisbon framework the three pillar system is abolished (Craig, 2008) and is replaced with a merged legal personality for the Union which leads to the ability of the latter to participate in international agreements.

For the completion of the accession, an international agreement in the form of an accession treaty need to be concluded according to the parameters set in article 218 TFEU. Under the new architecture of the Union’s external relations action, this provision entails all procedural matters for negotiating and concluding an international agreement. As seen throughout article 218 TFEU, mainly the Council determines the organization of the Union’s negotiation process, while receiving recommendations from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy regarding topics of the ex-second pillar (par. 3) and is finally responsible for concluding the agreement (par. 6). In the case of EU accession, the consent of the European Parliament is required for the conclusion of the agreement (par. 6, section a, issue ii), while the Council’s final decision on concluding the EU accession agreement shall be taken unanimously and ratified by the member states in conformance with their constitutional requirements (par. 8).

An issue that may raise problems regarding the conclusion of an agreement for EU accession to ECHR is deriving from article 218, par. 11 TFEU. According to that provision, any of the formal EU institutions involved in the process (Council, Commission, European Parliament) as well as every member state may seek an opinion from the ECJ as to whether the agreement is compatible with the Treaties. The term “compatibility” refers to both the procedural provisions of the Treaties (i.e. article 218 TFEU) and provisions of substantial nature (ECJ Opinion 2/00; De Baere, 2008). Both situations do not really affect a possible accession since the reasons that made the accession incompatible with the Treaties have been already expressed (ECJ Opinion 2/94) and surpassed through the Lisbon amendment. What may affect the conclusion of an accession agreement regarding “compatibility” is whether it may also include review of specific clauses of the agreement between the EU and the ECHR as the agreement will still be “envisaged” under the concept of article 218 TFEU (ECJ Opinion 1/75; Arnell, 1999; Echkebout, 2004). In a positive response, re-negotiations will become necessary if the Court finds asymmetries between clauses of the drafted agreement and the Treaties; this process may end to be highly time consuming especially if the initial negotiations have reached final stages.

From a more practical approach the European Commission and the Council of Europe started official negotiations on the 7th of July 2010 with Viviane Reding, Vice-President of the Commission and Thorbjørn Jagland, Secretary General of the Council of Europe representing the two bodies (Council of Europe, 2010a). The elaboration of a


**Case law**


Case C-283/81 CILFIT [1982] ECR 3415.


Case C-84/95 Bosphorus vs. Minister for Transport, Communications et al. [1996] ECR 1-3953.

Case C-299/95 Kremzow vs. Austria [1997] ECR 1-2629.


Case C-112/00 Schmidberger vs. Austria [2003] ECR 1-5659.

Case C-36/02 Omega [2004] ECR 1-9609.


App. No. 24833/94, Matthews vs. UK [1999].