

THE CHANGING EUROPEAN CONTEXT ON FUNDAMENTAL RIGHTS PROTECTION: THE ACCESSION OF THE EU TO THE ECHR

Valbona Sanxhaktari

PhD Cand., Legal Expert, Department of Legislation, Monitoring of Programs and Anticorruption,
Office of Prime Minister, Albania, valbona.sanxhaktari@gmail.com

Abstract

After negotiations between the Council of Europe and the European Union have successfully been concluded in April 2013, the EU accession to the Convention is now legally tangible and imminent. Notwithstanding any political obstacles, the Union will eventually become both the forty-eighth High Contracting Party and the first non-State signatory to the Convention. After more than thirty years of discussion, the adverse effects of two parallel and juxtaposed legal regimes will be overcome by the integration of the European Union into Strasbourg's human rights protection system, which means that divergences in human rights standards will expectedly cease to occur and that a greater degree of coherence in the field of human rights protection will be assured.

In the course of the *Kadi* case law, we can observe a changing appreciation of the rights enshrined in the ECHR, moving from dismissal to increased referencing to the ECHR and the case law emanating from Strasbourg. As is well-known, the judicial dialogue between the two courts has a long historical pedigree. Ever since *Nold*, the ECHR serves as a significant source of inspiration for the fundamental rights present in the EU legal order. However, a key development recently enhanced the relationship between the CJEU and the ECtHR. Already the Constitutional Treaty and the Lisbon Treaty afterwards made the accession of the EU to the ECHR an obligation for the EU. As a result of this development, it was foreseeable that the ECHR, instead of merely being a source of 'inspiration' for EU human rights law, would become binding upon the EU as a matter of law.

In this paper we argue that the Luxembourg—Strasbourg relationship is structurally conditioned by the looming accession of the EU to the ECHR. This helped tip the balance in favour of due process in both courts. Both the entire process of EU accession to the Convention and the Accession Agreement do, in fact, constitute a giant leap for European human rights. Accession will be a historic achievement and thus pivotal in overcoming existing incoherencies in the case-law of the ECJ and the ECtHR and in closing considerable gaps in the European system of fundamental rights protection.

Keywords: fundamental rights, accession of EU to ECHR etc.

1. INTRODUCTION

To paraphrase the European Union's future accession to the European Convention on Human Rights (ECHR) in the words of the first man on the moon, one might say that what appears like a small step from the outside, may be a giant leap for Europe. In a historically unprecedented move, a non-State entity, an international organization *sui generis* will accede to a human rights treaty and subject itself to this treaty's judicial supervision regime. In this vein, accession intends to end this anomaly and enhance the EU's credibility as a human rights actor within the "greater Europe" of the Council of Europe. After more than thirty years of discussion, EU-internal setbacks in the form of *Opinion 2/94* finding a lack of EU competence to accede to the Convention, and the eventual entry into force of both Protocol No. 14 and the Treaty of Lisbon, the last years have seen the successful completion of negotiations on the final Agreement on EU Accession to the Convention and its Explanatory Report in April 2013.

This article can nevertheless only cover a selection of the most pressing legal issues involved, since a complete analysis would go beyond the extent of this contribution. Therefore it examines the scope and legal effects of accession, both for the EU and the Convention system; deals with the procedural aspects of accession (the co-

respondent mechanism, inter-Party cases, and the prior involvement procedure) and their relation to the Union's legal autonomy. It highlights as well the institutional interlacing of the EU and the Council of Europe and the former's future involvement in the latter's bodies, e.g. in the Parliamentary Assembly and in the Committee of Ministers (in order to participate in the supervision of enforcement of ECtHR judgments. The future participation of the EU in the expenditure related to the Convention and the Union's relations to other agreements do not raise substantial legal issues in this respect and will therefore be disregarded in this analysis.

2. THE SCOPE AND LEGAL EFFECTS OF ACCESSION

On 14th October 2011, the Steering Committee for Human Rights of the Council of Europe published the draft agreement on the Accession of the EU to the European Convention on Human Rights. The document is a result of intensive and hot debates that were revolving around the question of EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms for already several decades. This topic attracted a lot of attention not only because of its significance for the development of ECHR and evolution of EU law, but also due to many practical questions which arose trying to fit the system that was created having in mind states, for EU as a phenomena of international cooperation. Glancing back at the historical developments, one can see that the idea that EU should accede to the ECHR had been circulating for a while. It was proposed by the Commission already in 1979, and repeated eleven years later. On 30 November 1994, the Council referred this question to the Court of Justice of European Union (CJEU), which issued its Opinion 2/94. Herein the CJEU held that EU accession to the ECHR was not possible – the Community law as it existed at the time, provided no legal basis for such accession. The Lisbon Treaty rectified the situation by establishing in Article 6(2) Treaty on European Union (TEU) that EU shall accede to the ECHR and Protocol 8 to the Lisbon Treaty setting the guidelines of such participation. The factual procedure for bringing about its accession had begun in 2010 when the Steering Committee for Human Rights (CDDH) of the Council of Europe and the European Commission were given mandates to prepare the necessary legal instrument and the wheels of accession were put in motion. The two core difficulties that were at issue were related to the fact that EU is not a state, but a supranational organization of states and that EU is not going to become a party to the Council of Europe. Nevertheless, all the negotiations saw as their target the idea that EU should be treated same like other High Contracting Parties to the ECHR as far as this is possible due to the different nature of EU. The analysis below tries to look at how this idea is embodied in the text of the Draft Agreement.

3. TECHNICAL ISSUES OF EU PARTICIPATION

When working on the draft, two institutional issues caused discussion: how to apply the one judge per high contracting party rule (Article 20 ECHR) and, secondly, how EU should take part in the work of the Committee of Ministers of the Council of Europe. As to the judge from EU side, the Draft Agreement provides for no exceptions for EU. EU will be appointing one judge to the European Court of Human Rights ("ECtHR") having same term of office, equal status as the other judges and on equal basis taking part in the work of the Court. This means, that contrary to what was suggested, the EU judge will participate in all the cases, not only the ones related to EU law. To have the EU judge elected, EU will have to provide the Parliamentary Assembly with a list of three candidates (similarly to states, contracting parties to ECHR) for election[8]. It is interesting to note, that since all EU Member States are parties to the ECHR and the EU judge will most probably have a nationality of at least one EU Member State, this is likely lead to the situation that two of the judges in the ECtHR will have the same nationality. Accordingly, this might encourage the Court to revise its internal procedures in order to avoid such a situation where two judges from the same state sit in the same case. As the Committee of Ministers of the Council of Europe has powers such as execution of judgments and friendly settlements rendered by the Court, the question on EU participation in its work has also attracted attention. The solution suggested by the Draft Agreement is that EU is granted a right to participate in the Committee of Ministers (with voting rights), when decisions related to the ECHR are taken. Again, some precautions are taken to insure "effective exercise" of the Committee's of Ministers supervisory functions. Firstly, to avoid the possibility that the EU Member States, together having a majority in the Council of Europe, block decisions related to the supervision of the execution of judgments and friendly settlements in cases involving the EU, the Draft Agreement requires to modify the rules of procedure of the Committee of Ministers. Secondly, the Draft Agreement states that the EU is precluded from voting in cases where the Committee of Ministers supervises the fulfillment of obligations by one of the EU

Member States. Though it was taken as self evident, it is worth noting that EU agreed to contribute to the expenditure relating to the functioning ECHR. The contribution is fixed at 34% of the highest contribution made in the previous year by any State to the budget of the Council of Europe. Counting the data for this year, that would be about a bit over €9 million out of EU budget exceeding €140 billion, not a considerable amount considering a fact that recently European Parliament voted to spend €2 million on homeopathy for animals.

4. SUBSTANTIAL ISSUES OF EU PARTICIPATION TO THE ECHR

Following the worries expressed by several of its Member States, EU will not accede to all protocols of ECHR. According to the Draft Agreement, EU accedes only to the ECHR and Protocol No.1 (peaceful enjoyment of one's possessions, the right to education and the right to vote) and, quite symbolically, to the Protocol No. 6 (abolition of the death penalty). Those are the protocols that have already been ratified by all of EU Member States. Therefore, no objections to EU participation in them were brought.

Concerns had also been expressed with respect to the fact that the ECtHR might involve in review of primary law of the EU. Quite surprisingly, the Draft Agreement does not exclude that. One might notice that EU Member States may become co-respondents in cases, where an application before the ECtHR raises a question whether the provision of the EU Treaties is compatible with the ECHR.

As to the future of the so-called *Bosphorus* (equivalent protection) test (established in *Bosphorus v Ireland*), the Draft Agreement sheds no light: it is not clear if and how this test will be applied in the future, and whether it should apply to all EU-related cases, including the ones against the EU. From one side, keeping the equivalent protection test would mean the continuity of the ECtHR practice and bilateral respect to the decision making procedures in EU, from the other side it would favour the EU contradicting to the idea of EU participation in the ECHR on the equal footing with the other High Contracting States.

5. SOME PROCEDURAL QUESTIONS ON THIS ISSUE

Some procedural questions of EU participation arose as a result of division of competences between the EU and its Member States and duty of Member States to implement EU law. In EU law related cases, when private party seeks to challenge a national measure implementing EU law there might be a problem in identifying an appropriate addressee. This was remembered when drafting EU Protocol no. 8, which requires that the accession agreement to include the necessary mechanisms ensuring that proceedings by non-Member States and individual applications are correctly addressed to Member States and/ or the Union as appropriate.

Here, the ECHR system applied for states was unsuitable and some new formula was needed. The Draft Agreement offers a solution by suggesting co-respondent, or co-defendant, mechanism. According to it, EU member states and EU may ask to be involved in cases before the ECtHR as co-respondent party. Two scenarios are possible in this regard: (i) one or more EU Member States are main respondents and EU is involved as co-respondent; or (ii) the EU is the main respondent and one or more EU Member States are co-respondents. Under the first scenario, EU may become a co-respondent if it appears that the alleged violation of the ECHR calls into question the compatibility with the Convention rights at issue of a provision of EU law, and where that violation could have been avoided only by disregarding an obligation under EU law. The second scenario might arise and EU Member States can become co-respondents where a provision of EU primary law is allegedly in breach of the ECHR.

It is interesting to note that the Draft Agreement specifically addresses situations where EU would be involved in a case as a co-respondent and CJEU has not yet had the opportunity to give its decision on the compatibility of EU law provision in question with the ECHR. Here, privileging the CJEU to national constitutional courts, the Draft Agreement provides for the possibility for the CJEU to make an assessment "quickly", so that the proceedings before the ECtHR are not unduly delayed.

Additional question might arise on how the exhaustion of domestic remedies rule would be applied in cases involving EU law. Since the usual admissibility requirements would continue to apply, in cases where individual would be challenging EU legal acts, this would go through annulment procedure (Article 263 Treaty of the Functioning of EU), Court of Justice being the last instance case (appeal from the General Court). However, in cases where individual would question legality of national law, implementing EU law, exhausting domestic remedies would only require climbing the ladder of national courts (they could decide to refer the case for a

preliminary ruling).

So did the Draft Agreement succeed in fitting EU into the ECHR system designed for states? Probably yes, but by modifying the system and by not always staying with the idea of equal footing.

6. CONCLUSION

This contribution demonstrates that both the entire process of EU accession to the Convention and the Accession Agreement do, in fact, constitute a giant leap for European human rights. Accession will be a historic achievement and thus pivotal in overcoming existing incoherencies in the case-law of the ECJ and the ECtHR and in closing considerable gaps in the European system of fundamental rights protection. International law has never seen before the accession of an international or supranational organization as legally integrated as the European Union to a human rights treaty regime with a judicial monitoring mechanism as sophisticated as that of the Strasbourg Court. After negotiations between the Council of Europe and the European Union have successfully been concluded in April 2013, the EU accession to the Convention is now legally tangible and imminent. Notwithstanding any political obstacles, the Union will eventually become both the forty-eighth High Contracting Party and the first non-State signatory to the Convention. After more than thirty years of discussion, the adverse effects of two parallel and juxtaposed legal regimes will be overcome by the integration of the European Union into Strasbourg's human rights protection system, which means that divergences in human rights standards will expectedly cease to occur and that a greater degree of coherence in the field of human rights protection will be assured. Subjecting EU law and the actions and omissions of the EU institutions to the external control of the ECtHR means to close an enormous lacuna in the protection of human rights in Europe, as the Member States cannot longer hide behind the institutional veil of the EU and the EU itself cannot longer escape any obligations due to the ECtHR's lack of jurisdiction *ratione personae* in a post-accession world. Besides wallowing in the obvious advantages of accession, we must, however, at the same time acknowledge that there are major legal problems in the context of accession, most notably the possible dangers to the autonomy of EU law.²⁷³ The Accession Agreement represents – despite its overall clarity and concise briefness – a *tour de force*, which had to walk the fine line of balancing the EU's legal autonomy with the overall functioning of the Convention regime. The introduction of the co-respondent mechanism is to be welcomed as an effective method of both maintaining the EU's legal autonomy and enabling individual applicants to overcome certain procedural gaps in the European multi-level maze of human rights protection. Notwithstanding this groundbreaking and innovative mechanism, there is a serious risk that the co-respondent mechanism may become so complicated that well-meant solutions might create even more issues in this regard. This fact demands the adoption of detailed internal rules specifically designed to address and solve these issues.

The ECJ's special position within the Convention system after accession is owed to the Union's particular legal order and its success as an integration organisation. At the same time, however, one could argue that the prior involvement of the ECJ amounts to an undue privilege amongst the High Contracting Parties and that this step raises doubts about the EU's degree of integration to join the Convention on an equal footing with the other High Contracting Parties. At the end of the day, it is nevertheless clear that despite all these practical issues, EU accession to the Convention is the missing apex within the European edifice of human rights protection. Thirty years of political and academic discussions and three years of diplomatic efforts have finally resulted in an instrument which is capable of resolving the legal problems regarding the EU's specific and autonomous legal system. Certainly, the negotiators could only consider those issues that had already arisen at the time of drafting. Thus, the Luxembourg and Strasbourg Courts are called upon to balance any shortcomings of the Accession Agreement by properly interpreting and applying the relevant provisions of European human rights law. Eventually, these courts must bear in mind that the purpose and objective of accession is not to distinguish themselves in judicial battles with their respective counterpart, but to cooperate in order to improve the protection of human rights for individuals in Europe.

REFERENCE LIST

Cathryn Costello, "The Bosphorus Ruling Of The European Court Of Human Rights: Fundamental Rights And Blurred Boundaries In Europe". *Human Rights Law Review*. 2006, 6(1), p. 87–130

Commission Communication On Community Accession To The European Convention For The Protection Of

Human Rights And Fundamental Freedoms And Some Of Its Protocols. SEC (90) 2087 Final, 19 November 1990

Jacqué, "The Accession Of The European Union To The European Convention On Human Rights And Fundamental Freedoms", 48 *Common Market Law Review* (2011) 995, p. 995

Leonard Besselink, "The EU And The European Convention Of Human Rights After Lisbon: *From "Bosphorus" Sovereign Immunity To Full Scrutiny?"*" <[Http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=1132788](http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=1132788)> Accessed 7 December 2011

Lock, "End Of An Epic? The Draft Agreement On The EU's Accession To The ECHR", 31 *Yearbook Of European Law* (2012), 162-197.

Martin Kuijer. "The Accession Of The European Union To The ECHR". (2011) 3(4) *Amsterdam Law Forum* <[Http://Ojs.Ubv.u.Vu.Nl/Alf/Article/View/240/428](http://Ojs.Ubv.u.Vu.Nl/Alf/Article/View/240/428)> Accessed 7 December 2011

Memorandum On The Accession Of The European Communities To The Convention For The Protection Of Human Rights And Fundamental Freedoms. COM (79) 210 Final, 2 May 1979. *Bulletin Of The European Communities, Supplement 2/79*

Sionaidh Douglas-Scott, "Case Comment On *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland*", (2006) CMLR, p. 243-254

Stubberfield, "Lifting The Organisational Veil: Positive Obligations Of The European Union Following Accession To The European Convention On Human Rights", 19 *Australian International Law Journal* (2012), 117, p. 117.