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## The Protection of Fundamental Rights in the EU Post-Lisbon

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The Lisbon Treaty was signed by the EU leaders on 13 December 2007, and became effective on 1 December 2009. It was expected that the key modifications in relation to presidency of the EU, foreign policy, voting system and option of withdrawal would significantly amend the operation of the whole EU body. However, this essay will focus on the human rights particularly. Since the Lisbon Treaty entered into force, two radical changes have been made in relation to fundamental rights. Firstly, the Charter of Fundamental Rights of the European Union was provided with the same legal force as the treaties. Secondly, the new Treaty made it possible for the Union to sign the international treaties; therefore green light has been given to the EU to accede to the European Convention of Human Rights. This essay will be written from two perspectives: at what level the protection of fundamental rights in the EU stands at the moment and what problems lie under the changes provided by the Lisbon Treaty.

### The Charter of Fundamental Rights

There is no doubt that the new legal status of the Charter of Fundamental Rights had a great impact to the area of the protection of human rights. Most commentators seem to be more or less satisfied with this change; however T. Marguery in his article distinguished some essential uncertainties that have to be taken into account. [<sup>1</sup>]

The significance of the Charter seems to be at risk for three main reasons. Firstly, the distinction between the rights, principles and freedoms is somewhat unclear. The distinction originated from the case of *Stauder*, where the German legal term 'Grundrechte' appeared to have an application for a variety of rights and freedoms that are guaranteed by the Federal Republic Law. [<sup>2</sup>] The explanation of the differences is not provided within the Charter. Dr. Marguery implied that if the European Court of Justice followed strict interpretation, it would mean that a citizen could only bring a claim against an act that implemented the principle, which would definitely reduce the scope of the protection of fundamental rights. Thus, it was decided to seek for clarification in the case of *Advocaten voor de Wereld*, where the ECJ made it possible for a citizen to bring a claim against an act, which is not directly implemented. [<sup>3</sup>] Although there is no clear and unanimous explanation on how the distinction works, it is agreed that it should not undermine the significance of the Charter.

Another issue is the UK-Poland Protocol. [<sup>4</sup>] This protocol is occasionally referred to as an 'opt-out' from the Charter. The UK signed the protocol arguing that they have all the rights protected in their national law and that there is no need to sign any other legislation. However, Catherine Barnard argued that from the UK's perspective, it was more likely to be a political question, rather than an operational. [<sup>5</sup>] She suggested the protocol was presented to assure the British society that the Charter was dissimilar to the Constitutional Treaty. P. Craig and G. de Búrca stated that, albeit the protocol is sometimes called to be an 'opt-out' from the Charter, it is unlikely that it might have some significant consequences in practice. [<sup>6</sup>]

The final issue arises from the interaction between the Charter and Explanations relating to the article 51 of the CFR. The article states that provisions of the Charter apply to the member states only when they implement Union law. [<sup>7</sup>] On the other hand, the Explanation states that, according to the case law of the ECJ, it is necessary to respect fundamental rights, when member states 'act in the scope of Union law'. [<sup>8</sup>] Therefore, the Explanation noticeably

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contradicts the concept laid down in the Charter. AG Cruz Villalon in his judgment on the case of *Fransson* implied that the relation between the different concepts depends on the facts of the case and that every different situation requires a different approach. <sup>[9]</sup> Hence, there is no unanimous decision on how article 51 should be interpreted.

In the case of *Scattolon*, AG Bot argued that authors of the Charter had no desire to make such vagueness and the only way to explain this is that authors wanted to receive some different analysis on this topic. <sup>[10]</sup> He also spoke against the restrictive approach, which is currently followed by a number of academics on the basis of article 53, which stated that none of the provisions should be interpreted in a restrictive manner. <sup>[11]</sup> Consequently, Viviane Reding in her observations stated and indirectly closed down the debates to article 51, declaring that, whether we choose the broader or the narrower interpretation, it does not alter the standard of the Charter. <sup>[12]</sup> At first glance, it appears that these issues might have some detrimental consequences, however all these uncertainties have been justified.

The great significant of the Charter was revealed in the joined cases of *Volker* and *Eifert*, where a turning point in the case law of the court was indicated. <sup>[13]</sup> In this case, the Charter operated to examine the validity of a secondary legislation. Eva Nanopoulos proposed that it is probable that AG Sharpston in this case equalised the ECHR and the Charter, but despite the equivalence, still referred to the latter in his ruling. <sup>[14]</sup> Additionally, she argued that even though the Charter was used to annul the second legislation for a breach, according to the 6(1) Treaty on the Functioning of the European Union. It is not considered to have a higher status than other sources of fundamental rights. Subsequently, in the case of *Test-Achats*, where the ECtHR followed the case of *Volker* and *Eifert* found the article 5(2) Directive 2004/113 illegal. <sup>[15]</sup> Andrea Peripoli suggested that the ECJ in its ruling distinguished the Charter to be not only a primary source of fundamental rights, but also the only source – indirectly contradicting E. Nanopoulos' statement. <sup>[16]</sup> Despite the contradictions between the commentators, the case of *Volker* and *Eifert* remains to be revolutionary and presents that today the Charter has unlimited protection to fundamental rights.

## Accession to the ECHR

It is specified in the article 6(2) of the Treaty on European Union that the EU 'shall accede' to the ECHR. <sup>[17]</sup> After the Lisbon Treaty came into force, the issue relating the accession has attracted much debate and is currently a hot topic amongst the scholars. It is decided unanimously that the accession would have some beneficial impact to the protection of human rights. Loreta Šaltinytė in her article distinguished the main benefits from the accession. <sup>[18]</sup> The legal protection of EU people would meaningfully increase and become more comprehensible. Case of *Matthews* indicated that EU protection of fundamental rights is not equivalent to that of the Convention. <sup>[19]</sup> The problem that arises in such cases is that member states have no precedent on which they could rely on and enable remedies. <sup>[20]</sup> Secondly, the danger of the two courts reaching dissimilar interpretations of human rights standards would be considerably diminished. Lastly, the chance of external analysis seems to be a remarkable thing. Considering that there is never too much protection of fundamental rights – a double managing system from two different legal authorities seems to be even more shielding. This is where the big discussion started and resulted in the 'Draft Agreement'. <sup>[21]</sup> The document has drawn a lot of attention not only because of its importance in relation to fundamental rights, but also due to the practical issues it deals with. Tobias Lock implied that one of the main reasons, why the accession brought so much tension is that the agreement to the ECHR might jeopardise the EU autonomy. <sup>[22]</sup> The analysis below will try to examine the specific threats and resolution methods to the EU characteristics in relation to the draft paper and comments by relevant scholars.

Analysing the draft paper, some technical issues appear. Firstly, all the provisions of the ECHR refer to its parties as to 'states', while the EU is a political union. In this case some amendments in relation to the wording of the provisions shall be made. Secondly, the question of the EU involvement in the regulatory bodies of the ECHR should also be examined. According to the principle of equality all the contracting parties to the ECHR must enjoy the same legal status. Therefore, the EU should participate in both the appointment of judges and the Committee of Ministers. Conversely, Martin Kuijer criticised that the principle of 'the one judge per party' might breach the standard of judicial independence. <sup>[23]</sup> Accordingly, the Court has to revise the situation in order to escape judges' bias, where two judges from the same state examine an identical case. However, these are just technical issues that might be easily resolved and do not affect the autonomy of the EU at large.

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Adam Weiss in his article emphasised two main ways in which the EU independence could be safeguarded from the accession and the scope of protection of fundamental rights might be widened. <sup>[24]</sup> The co-respondent mechanism and the prior involvement of the ECJ are referred to the procedural issues within the accession. According to the draft agreement the co-respondent mechanism creates an option for the EU member states or the EU to be involved in the cases before the ECtHR as a co-respondent. There are different situations in relation to this mechanism. First, where one or more EU member states are the main defendants, the EU is then involved as a co-respondent and vice versa – the EU is a defendant, and one or several member states act as co-respondents. The prior involvement principle works, where the EU is a co-respondent and the ECJ can make its assessment before the case goes to the court of Strasbourg. Albeit the Presidents of the Strasbourg and Luxembourg Courts have favored both mechanisms, the situation did not escape criticism. <sup>[25]</sup> T. Lock emphasised the complexity of such mechanisms and the great difficulty balancing between the two managing systems. That being said it is vital to investigate, what effect these two principles might have in relation to possible victims of violations of fundamental rights.

In the case of *MSS*, Belgium acted in a zone, where EU law should be applied, but where the state could have acted differently and still not violated the EU law. <sup>[26]</sup> According to Adam Weiss the co-respondent mechanism in such cases does not seem to be appropriate. It is suggested that the EU would act in a defensive attitude and would not be too prolific. On the other hand, it seems that the prior involvement principle would provide the EU with a chance to deliver a complete resolution to the ECtHR and help to solve the case. In this particular case, the ECtHR could only act in its restricted jurisdiction, whereas with the assistance of the ECJ the scope of protection of fundamental rights would be significantly broadened. However, Jana Kralova stated that it does not sound inappropriate to use the co-respondent mechanism in such scenarios, since the EU needs to have a possibility to protect its regulations before the ECtHR. <sup>[27]</sup> Moreover, she argued that the co-respondent mechanism could only function with the prior involvement of the ECJ, since only an application of the co-respondent might create a submission of the case for the prior involvement. The co-respondent mechanism was originally created to locate, where the violation of the Convention occurred (*Bosphorus*). <sup>[28]</sup> In relation to this case, T. Lock criticised the complexity of the co-respondent mechanism. Thus, he found a way how to practice this application in cases such as *MSS* and to avoid a defensive attitude from the EU side. He implied that in such cases, the co-respondent could only join the proceedings at the request of the original respondent. In that case, the respondent should measure the situation by itself and prepare the defence. This approach protects the autonomy, but narrows the scope of the mechanism's application, but despite that, this solution seems to be the most appropriate. It is evident that the 'Draft Agreement' instigated many discussions and that there is no unanimous decision on relevant topics in relation to accession. However, it is expected that relevant answers will be found and the EU will easily accede to the ECHR.

The analysis above shows that the Lisbon Treaty has made a huge step towards a more sophisticated and improved security of fundamental rights. Although, at first sight, it appears that all the encountered issues with the Charter might have some detrimental consequences, all the indecisions are justified after proper scrutinisation. Evaluating the case law in relation to the Charter it materialises that not only it is the primary source to which the ECJ take account while making the decisions, but also it is the only source. In relation to the accession to the ECHR, some issues occur regarding the co-respondent mechanism and the prior involvement of the ECJ as well as some minor technical inadequacies. However, accurate examination reveals that these are just inconsequential issues to which the answers will be easily found by the EU.

## Endnotes

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<sup>3</sup>. *Advocaten voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) [2007] E.C.R. I-3633; [2007] 3 C.M.L.R. 1 at [48]-[54]

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- <sup>7</sup>. Charter of Fundamental Rights of the European Union (2000/C 364/01), article 51
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- <sup>18</sup>. Šaltinytė, Loreta, 'European Union Accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe?', Mykolas Romeris University jurisprudence, 2010, 2(120), p. 177-196
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