

European Union Law, the European Convention, and Human Rights

by Nicholas Bamforth

In Western Europe, two separate sets of “European level” provisions—the European Convention for the Protection of Human Rights and Fundamental Freedoms (the convention) and the law of the European Union—protect human rights. Each body of law has its own authoritative final court—respectively, the European Court of Human Rights and the European Court of Justice—that rule on legal measures adopted at a national level. However, the relationship between the convention and European Union (EU) law and between the two European-level courts has long been complex and uncertain—not the least because all EU member states are signatories to the convention, but many convention signatories (for example, Turkey) are not members of the EU. While the new Treaty of Lisbon—a treaty between EU member states—allows the EU for the first time to apply for membership in the convention in its own right, it is unclear whether matters will be simplified or further complicated if it joins. In any event, the implications for the relationship between the two courts and for the legal systems of countries that are members of both the convention and the EU may be significant.

To explain these points, the nature of the convention and of EU law must first be considered. By

way of general (and very rough) analogy—at least, if Western Europe is moving in a federalist direction—it may be useful to think of the convention as covering much of the territory which, in the United States, is occupied by the Bill of Rights, and of EU law as occupying much of the territory inhabited in the United States by the Commerce Clause of the Constitution. One crucial difference is, however, that the European Community (the key component of the EU) has—unlike the convention—legislative capacity. Its institutions regularly produce regulations and directives that member states are obliged to comply with and that are designed to support treaty provisions.

The European Convention

The convention entered into force in 1953. It currently has forty-seven signatory states, including non-EU members such as Russia and Turkey. The convention protects a relatively mainstream list of substantive human rights: life; the prohibition of torture; the prohibition of slavery and forced labour; liberty and security; fair trial; no punishment without law; respect for private and family life, thought, conscience and religion; expression; assembly and association; marriage; freedom from discrimination; protection of property; education; free elections; and the abolition of the death penalty.

Signatory states to the convention are required by Article 1 to give effect to its provisions in national law, and Article 13 grants citizens the right to an effective remedy at a national level if convention rights are violated. However, this is subject to the overarching international law principle that the convention has such force at a national level as the constitutional systems of the signatory states allow. A litigant may take a case to the Court of Human Rights, but the effect at the national (as opposed to international) level of the remedy granted depends upon how, if at all, convention norms and convention jurisprudence are treated within the national legal system.¹ The court thus made clear in *Smith and Grady v.*

United Kingdom that while the effect of Article 13 “is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief,” it “does not go so far as to require incorporation of the Convention or a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations under this provision”².

The somewhat ambiguous nature of the convention is evident from a number of the court’s judgments. On the one hand, the court has emphasised that “the Convention comprises more than mere reciprocal engagements between contacting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which ... benefit from a ‘collective enforcement’”³, and that “[i]n interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights. ... [T]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective”⁴. On the other hand, the court has emphasised that it must not “lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose between different measures which they consider appropriate in those matters governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention”⁵. Furthermore, “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content” of the requirements of Convention rights and of the permitted restrictions on them, so that national governments retain a “margin of appreciation” when making the initial assessment of the need for an interference with a Convention right, although the court reserves to itself the role of making a final judgment as to whether the reasons cited for the interference were sufficient.⁶

European Union Law

The European Economic Community (EEC), as it was initially known, was established by the Treaty of Rome, signed in 1957 to establishment a common market, the approximation of economic policies, the promotion of harmonious develop-

ment of economic activities, the raising of the standard of living and increasing stability, and the promotion of closer relations between the member states. Free and undistorted competition was to be promoted throughout the common market area, and obstacles to this at the national level removed.⁷ Thus, the goals of the original community were very much economic, with broader forms of integration the likely result of the common market. In a similar vein, the prohibition of unequal pay between men and women⁸ was viewed as removing an obstacle to undistorted competition. This background is important for human rights since, as authors Paul Craig and Grainne de Burca have put it, as the community/union became gradually more interested in the area, new provisions “were grafted on to a set of treaties which, despite the broad range of powers and policies covered, were for a long time largely focused on economic aims and objectives. This legacy remains significant since, despite its constantly changing and expanding nature, the European Union’s dominant focus remains an economic one, and the debate over the appropriate scope of its human rights role remains lively and contested”⁹.

A crucial part of the significance of the expanding role of human rights in the EU is what might be described as the differing “legal weights” of EU law and convention rights. The central role played by the distinction between national and international law in the convention context was explained above. The European Court of Justice, by contrast, has long been keen to stress the conceptually unique nature of EU law — whether in the form of treaty articles, regulations, or directives — via the concepts of “direct effect” and “supremacy.”¹⁰ In *Van Gend en Loos*, the court said, “The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields”¹¹. The court expanded upon this in *Costa*, where it asserted, “By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply”¹². Consequently, provisions that have met the conditions laid down by the court for direct effect may be relied upon by litigants before national courts regardless of the position in national law. Direct effect provisions automatically take priority over conflicting rules of national law, which must in appropriate circum-

stances be set aside by national courts¹³; national legislation must be interpreted by national courts, as far as this is possible, in the light of the provisions¹⁴; and damages may be granted against national authorities where national legislation or executive action breaches them¹⁵. As such, it is possible to categorize “directly effective” EU provisions as having potentially stronger legal weight than convention rights in the national legal systems. This priority is a highly important point for human rights protection whenever those provisions are used to ensure the protection of specified human rights at a national level.

A crucial development in the community’s growing concern for human rights was the Treaty on European Union, which entered into force in 1993. The 1993 treaty changed the European Economic Community into the European Community, and established the European Union as the umbrella European body—with the community acting as one pillar of the structure alongside embryonic competences in justice and home affairs (later altered to police and judicial cooperation) and foreign and security policies. The treaty, as reinforced by the subsequent treaties of Amsterdam and Nice, stipulates that the European Union “is founded on the principles of liberty, democracy, respect for fundamental rights and fundamental freedoms, and the rule of law”¹⁶. Furthermore, the Union “shall respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to the Member States” (a provision made directly justiciable under the Treaty of Amsterdam)¹⁷. The Amsterdam Treaty also allowed for a member state which was responsible for a serious and persistent breach of such guarantees to be penalized¹⁸, made respect for human rights a condition of application for membership in the EU,¹⁹ and conferred broad competence on the community legislative institutions to act to combat discrimination based on racial or ethnic origin, religion or belief, disability, age, or sexual orientation, in addition to the originally prohibited ground of sex, with directives later being produced to deal with each of these areas.²⁰

In the meantime, an EU Charter of Fundamental Rights was given political approval. The charter is akin to a Bill of Rights for the EU; it makes provision for dignity (including the rights to life and to freedom from torture, slavery, and execution), freedoms (to, for example, liberty, association, expression, ownership of property, and private and family life, as well as social rights

such as work, education, conducting a business, and asylum), equality, solidarity (related to labor rights such as fair and just working conditions and a prohibition on child labor), citizenship rights (including to good administration), and justice (focused on the fairness of trials).

Obviously, some of these rights are already found in the European Convention, and the charter stipulates that “the meaning and scope of those rights shall be the same as those laid down by the said Convention”²¹. However, many of the social and employment-related rights are not the same, although they arguably reflect earlier case law of the Court of Justice. A claim affirmed by the statement in the charter’s preamble that it reaffirms rights found in the Treaty on European Union and the EC Treaties²² and the stipulation in the charter that it does not establish “any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”²³. Until the Lisbon Treaty, the exact legal status of the charter was unclear; it was frequently referred to by the Court of Justice,²⁴ and community legislative proposals were checked for compatibility with its provisions, but since the charter was not yet incorporated into the treaties it could not play a more direct role.

The Court of Justice has also played an important part in the development of human rights in EU law. While the court was clear that, in its pre-Lisbon form, the EU had no power itself to join the convention, it also noted that “fundamental rights form an integral part of the general principles of law whose observance the Court ensures”²⁵ and that respect for human rights was “a condition of the lawfulness of Community acts”²⁶. Since the 1970s, it began to draw inspiration from convention and the case law of the Court of Human Rights, when assessing the compatibility with the EC treaties of national measures as well as directives and regulations, arguably encouraging consistency with relevant rights at each level.²⁷ However, this creates a problem. The Courts of Justice and Human Rights may adjudicate only upon matters falling within EU law and the convention respectively, but the two bodies overlap in the area of human rights, and some cases potentially have both EU law and convention dimensions.²⁸ How far the two courts have in fact been consistent when dealing with topics that are potentially of concern to both is thus a debatable question,²⁹ and one with complex consequences where (as, for example, in Britain) there are different mecha-

nisms for protecting EU law and convention rights at the national level.³⁰

It is thus clear that while both EU law and the convention are intended to protect human rights, some rights are found in both bodies of law but others are found only in EU law. National law may be assessed by both the Court of Human Rights and the Court of Justice, but the Court of Justice deems itself to have stronger powers in relation to national measures while currently applying convention principles as a tool of interpretation rather than directly. The Court of Justice also has the power to refer to convention rights when assessing community measures. At a national level, relevant EU Treaty provisions, directives, and regulations have direct effect; convention rights have such force as they are granted by national law, the signatory state being liable only in international law if that force is sufficient.

The Treaty of Lisbon and Human Rights

How might the Treaty of Lisbon alter things? The treaty entered into force in December 2009. It amends the Treaty on European Union to grant recognition to the rights, freedoms, and principles set out in the Charter of Fundamental Rights, which is granted the same legal value as the treaties, and to allow the EU to apply to join the European Convention.³¹

In relation to the charter — from which Britain and Poland have secured an opt-out³² — the new legal status may simplify matters somewhat. The Court of Justice will be able to apply the charter directly, and where there is an overlap with the convention — as noted above — relevant rights will have to be given the same meaning and scope. As such, the potential for divergent interpretations of similar rights may perhaps be reduced. In addition, the Court of Justice now has an explicit treaty basis for giving effect to the other rights set out in the charter. This power is hoped to encourage the development of a more visible and accessible set of principles (although those who are opposed to the social rights may be concerned about this. Hence the British opt-out.).

However, were the EU to go ahead and join the convention in its own right, the relationship between the Courts of Justice and Human Rights likely will not be simplified. On the one hand, a protocol agreed to as part of the Lisbon Treaty specifies that accession to the convention shall not affect neither the competences of the EU or the powers of its institutions nor the situation of member states in relation to the European Convention.³³ On the other hand, these provi-

sions are very vaguely drafted, and as noted above the Court of Human Rights is concerned to ensure that the courts of signatories grant sufficiently effective remedies. As such, it is not clear how far the Court of Human Rights might feel emboldened in practice to adopt the position of a reviewing court that tests the compatibility with convention rights of actions taken by EU institutions, and perhaps also the assessments of national law adopted by the Court of Justice — something that would jeopardize the Court of Justice's practical status as the authoritative final court within its own sphere and that would serve to further unbalance the relationship between convention rights and EU law at national level.

Conclusion

To American eyes, the two principal Western European systems for the protection of human rights may well seem to be of bizarre complexity. In reality, the existence of the two separate systems is — like so much in the legal world — an accident of history. However, it is likely to be rather a hard accident to tidy up. The European Convention for the Protection of Human Rights and Fundamental Freedoms has a larger and more diverse membership than the European Union, including states (Russia, for example) that might never wish to join the EU. To some extent, the treaty makers and courts may therefore have to make the best of the difficult situation created by the existence of two systems. In relation more specifically to Western European nations, any proposal to reform the EU institutions and legal provisions tends to invoke, in political debate, bitter arguments about the extent to which those nations wish to move toward a fully federal system within the remit of the EU. It is hard to see how any attempt to rationalize the asymmetrical protection of human rights under EU law and the convention could avoid being dragged into the federalism debate. Perhaps it is that debate that Western European nations need first to resolve.

Endnotes:

- 1 See the essays in Conor Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague: Martinus Nijhoff, 1997).
- 2 (1999) 29 EHRR 493, para [135].
- 3 *Ireland v. United Kingdom* (1978) 2 EHRR 25, para [29].
- 4 *Soering v. United Kingdom* (1989) 11 EHRR 439, para [34].

- 5 *Belgian Linguistics (No. 2) Case* (1979) 1 EHRR 252, para [10].
- 6 *Handyside v. United Kingdom* (1976) 1 EHRR 737, para [8]. The generosity of the ‘margin’ varies according to the aim and magnitude of the interference and the nature of the Convention right affected by it: for detailed analysis, see Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford UP, 2nd edn., 2009), paras. 6.42 to 6.56.
- 7 See, generally, Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (Oxford: Oxford UP, 4th edn., 2008), ch.1
- 8 Article 141 E.C.
- 9 *EU Law: Text, Cases and Materials*, above, p.380.
- 10 *EU Law: Text, Cases and Materials*, above, chs. 8 & 10.
- 11 Case 26/62, *Van Gend en Loos v. Nederlandse* [1963] ECR 1 at 12.
- 12 Case 6/64, *Costa v. ENEL* [1965] ECR 505 at 593-4.
- 13 Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433.
- 14 Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/90, *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.
- 15 Case C-46/93, *Brasserie du Pecheur SA v. Germany* [1996] ECR I-1029.
- 16 Treaty on European Union, Article 6(1).
- 17 Treaty on European Union, Article 6(2).
- 18 Treaty on European Union, Article 7; see also Article 309 E.C. (as amended).
- 19 Treaty on European Union, Article 49.
- 20 This was via Article 13 E.C. For discussion, see Nicholas Bamforth, Maleiha Malik and Colm O’Cinneide, *Discrimination Law, Theory and Context: Text, Cases and Materials* (London: Thomson/Sweet & Maxwell, 2008), pp. 95-118.
- 21 Charter, Article 52(3).
- 22 Charter Preamble, fifth paragraph.
- 23 Charter, Article 51(2).
- 24 See, e.g., Case C-540/03, *European Parliament v. Council* [2006] ECR I-5769, para [38].
- 25 [1996] ECR I-1759, para [33].
- 26 [1996] ECR I-1759, para [340].
- 27 See, for example, Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; Case C-84/95, *Bosphorus v. Hava Yollari* [1996] ECR I-3953; But for an illustration of the limits to this, see Case C-299/95, *Kremzow v. Austria* [1997] ECR I-2629.
- 28 See, generally, Nicholas Bamforth, ‘Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap’, ch.1 in Catherine Barnard (ed.) (2006-7) 9 Cambridge Yearbook of European Legal Studies (Oxford: Hart, 2007).
- 29 See, generally, Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials*, above, pp. 418-26; Dean Spielmann, ‘Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities’, ch.23 in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford UP, 1999).
- 30 For a good example, see *Chief Constable of the West Yorkshire Police v. A. (No. 2)* [2004] UKHL 21, [2005] 1 A.C. 51.
- 31 Treaty on European Union, revised Articles 6(1) and 6(2).
- 32 Treaty on European Union, Protocol No. 15 (inserted via the Treaty of Lisbon).