

The Lisbon Treaty Evaluated: Impact and Consequences

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Minority Rights in the European Union after Lisbon

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I. INTRODUCTION

The European Union is home to almost five-hundred million people. About forty-five million of them, or nine percent, are considered to belong to one of the many national minorities. Some of these forty-five million may have rejoiced at the Treaty of Lisbon while some may not expect many changes.

The Treaty of Lisbon includes three major points that warrant consideration in the context of minorities. For one, persons of minorities are for the first time explicitly mentioned in EU primary law. For another, the Charter of Fundamental Rights (CFR) receives the status as an internationally legally binding document. Thirdly, it is envisaged that the European Union will accede to the European Convention on Human Rights (ECHR).

Whether or not this will lead to innovations or improvements for members of minorities across Europe is the object of discussion in this paper. The paper falls into four major parts. Firstly, a short overview of the legal and institutional situation of minorities before the Lisbon Treaty is given. Secondly, art. 2 TEU¹ will be examined closely and the question of minority definition will be discussed. Thirdly, the Charter of Fundamental Rights will be scrutinized through a minority lens and the possible consequences of the new legal status of the Charter are at the centre of attention. Fourthly, it is time to find out whether the accession of the EU to the ECHR will have special consequences for members of minorities. A short section is devoted to other points made in relation to minorities in the European Union.

Each of the three main topics warrants a detailed analysis of its own; however, the aim of the paper is to give a more general assessment of the Lisbon Treaty regarding members of minorities. This is done in the closing part.

A note on terminology is necessary. I use the terms minorities and national minorities. This is based on the fact that the EU itself is not consistent on the usage of terms. When using the simple term minority in my own words, I have national minorities in mind but cannot *per se* exclude other groups. When referring to the Treaty on European

¹ TEU = Treaty on European Union.

Union, I use the term minority without attaching any qualification to it, as this is what the EU itself does not do. In the context of the Charter of Fundamental Rights, minorities are always national minorities, as this is what the CFR refers to in art. 21.

II. MINORITIES BEFORE LISBON

Of course, minorities existed in the EU before the Lisbon Treaty. They were, however, largely left to themselves in the legal context. There were no legal provisions in any of the treaties on the European Union. Members of national minorities could benefit from secondary law aimed at general issues but the EU was reluctant to deal with national minorities. Minorities and their members needed to rely on human rights. Minorities in candidate states were arguably in a better situation. The Copenhagen Criteria include ‘the respect for and the protection of minorities’²

The European Parliament several times faced initiatives in the field of minority rights. Already in the first legislative period of the Parliament, the Committee of Legal Affairs started to draft a Charter of Minority Rights. The draft was never voted upon. A proposed Charter of Group Rights a few years later met a similar fate and minority rights disappeared from the standard setting agenda of the European Union.³

It was only gradually that the European Union and the Council of Europe have become active in the same fields. With the expansion of the European Community from an economic entity to a larger, more encompassing European Union, the field of human rights has become important to the EU as well. The Copenhagen Criteria and the human rights mentioned in the Treaties light the path the EU takes in the field of human rights. A key in this development is the establishment of the Fundamental Rights Agency. Originally established as the European Monitoring Centre for Racism and Xenophobia in 1997, it was converted into the European Union Agency for Fundamental Rights (FRA) in 2007.

The FRA is not the monitoring body of the Charter of Fundamental Rights; however, its activities are, of course, closely related to the Charter. One important thing

² European Council in Copenhagen 21-22 June 1993, ‘Conclusions of the Presidency’, at 7. A. iii).

³ The Committee on Culture continued to work on soft law regarding minorities in the field of culture and language. Several resolutions were passed over the years. They do not constitute legally binding EU law. See Toggenburg, ‘The EU’s Evolving Policies’, at pp. 3-5.

where the Agency and the Charter differ is the scope of law. The Charter deals with cases where Union law is implemented. The FRA deals only with issues of Community law, which does not extend to the whole field of EU law.⁴ Furthermore, the FRA has to coordinate its activities with the Council of Europe in order to avoid duplication and further synergies.

The FRA is no minority institution. It deals with a number of issues that are laid down in the multi-annual framework. Currently, minorities are part of this framework⁵ and issues touching on unequal treatment in employment, education and ethnic discrimination have been part of the FRA's predecessor's portfolio.⁶ The conclusion of the FRA are not binding, though the fact that independent experts are called in and close cooperation with the Council of Europe and the OSCE is envisaged,⁷ should add to the political weight of its reports and recommendations.

On the institutional side, the European Commission has included a Commissioner of special relevance to minorities. In the first Barroso Commission from 2004 to 2009, the post of Commissioner for Multilingualism was created. The importance of language for minorities is undisputed. The Commissioner's mandate was twofold – the conservation of European multilingual heritage but also securing that people understand each other. In his time, he focused on translation issues and the learning of foreign languages. Regional and minority languages were only a small part of the large language package of the EU.

Since 2010, Viviane Reding has been Commissioner for Justice, Fundamental Rights and Citizenship. These are all areas of special importance to minorities. Among other things, the Commissioner will be the guardian of the Charter of Fundamental Rights and she will be strong on gender equality and on justice.⁸ A Commissioner on these issues is an improvement to previous commissions. However, the areas are wide and whether minorities will receive special attention remains to be seen. The concept of justice is especially relevant to the least advantaged. However, minorities are not the only

⁴ See art. 3 (3) 'Council Regulation Establishing a European Union Agency for Fundamental Rights'.

⁵ Minorities are part of the non-discrimination efforts of the FRA. See Art. 2 (b) 'Council Decision 2008/203/EC'.

⁶ For examples of issues that are of special relevance for members of minorities see Toggenburg, 'Exploring the Fundament of a New Agent in the Field of Rights Protection', at pp. 623-624.

⁷ See chapter II of the 'Council Regulation Establishing a European Union Agency for Fundamental Rights'.

⁸ http://ec.europa.eu/commission_2010-2014/reding/about/mandate/index_en.htm.

disadvantaged group. Gender equality or rather the lack thereof in some minorities has been regarded as a major problem for minorities; however, I find it doubtful whether the Commissioner has minority women in mind when speaking of gender equality. Being a guardian of the CFR is subject to the institutional set-up and the powers of the Commission. All this being said it is not unlikely that minorities and their members will benefit from this Commissioner. However, this may often be within a larger framework and not because of targeted minority policies.

Around the same time the Lisbon Treaty entered into force, the Intergroup for Traditional Minorities, National Communities and Languages was established at the European Parliament. The intergroup serves as a forum for issues related to its portfolio. It increases awareness of those issues and ‘strives to initiate European legislation that will strengthen national minority protection.’⁹

One last point to be raised in this chapter concerns the so-called Race Directive. It is a Council Directive targeting foremost discrimination in relation to employment but which also covers education, social protection and social advantages.¹⁰ The Directive repeatedly refers to racism and xenophobia that are combated with this Directive. Discrimination because of ethnic origin is of special importance to members of minorities.

III. NEW ARTICLE 2 TEU

With the entry into force of the Lisbon Treaty, minorities are now mentioned in two important documents of EU primary law. The Charter of Fundamental Rights is discussed below. The other document is the Treaty on European Union. The present article 2 provides for the values upon which the European Union is founded. Among these is ‘respect for human rights, including the rights of persons belonging to minorities.’ It is this last part that warrants attention.

One significant change between the above mentioned Copenhagen Criterion on minorities and art. 2 TEU is that art. 2 speaks of the *persons* belonging to minorities. This is clearly a statement in favour of the individual dimension; art. 2 is not about collective

⁹ <http://galkinga.hu/en/new/261/>.

¹⁰ Art. 3 of the ‘Council Directive 2000/43/EC’.

rights. Also, the wording places the rights of persons belonging to minorities in a human rights context. It has been argued that human rights make up a more advanced normative system and thus members of minorities enjoy minority rights as *lex specialis* in the larger context of all human rights which are also applicable to members of minorities. General human rights and special minority can thus have a mutually reinforcing effect.¹¹

When examining art. 2 TEU with minority eyes, the formulation ‘minorities’ sticks out. Usually, the term minority is qualified in some way. This is done by adding ‘national’ or ‘ethnic’ or ‘religious’ or ‘linguistic’ or any combination of these terms to the word ‘minorities’. One also finds the distinction of ‘old’ and ‘new’ minorities where the old minorities are national minorities or those minorities covered by the international treaties on minorities and the new minorities are immigrants, asylum seekers and others. No qualification whatsoever is attached to the term ‘minorities’ in art. 2. TEU.

A noted advantage of this is that the treaty avoids the never ending discussions on the definition of minorities.¹² While I agree that one need not discuss what a national minority is, I find the discussion is simply moved to a different question; namely what is a minority? Now, we start at a lower level as the first restriction to for example national minorities as the CFR states has been omitted. There is thus ample room to discuss whether the so-called new minorities are covered by art. 2 TEU. Regarding minorities, words are often easy to agree on but problems occur when a group and the state do not agree on the group’s existence as a minority. This problem has not been solved by the new art. 2 TEU.

Whether unconsciously or deliberately, so as to let sleeping dogs lie, this issue is as good as absent from the academic discussion. One might argue that it is clear from the larger context – taking into account that art. 21 CFR speaks of national minorities – that also art. 2 TEU naturally refers to national minorities. The answer to this argument could be that if the same was meant, then why were two different terms used. This argument would point out that it is not the same minorities that are covered by the two articles.

A possible answer could be the general approach to the definition of minorities which is still characterized by the first OSCE High Commissioner on National Minorities

¹¹ Drzewicki, ‘National Minority Issues and the EU Reform Treaty’, at p. 142.

¹² Drzewicki, ‘National Minority Issues and the EU Reform Treaty’, at p. 142.

who said he would know a minority if he saw it. The existence of minorities is a fact and needs no clear definition. While this has worked more or less well in the context of the Council of Europe and the OSCE, it is questionable whether quiet diplomacy and intergovernmental pressure would work the same way within the EU framework. Also, the issue is at a more basic level. While the issue about Roma constituting national minorities in some countries but not in others may be raised at the Council of Europe, this is a very specific and closed issue. For example, whether or not immigrant groups are covered by art. 2 is a question of different nature. Potentially, it touches on several groups, sometimes of substantial numbers, in every single member state and leads to further questions about the classification of immigrant groups. It is far from being a closed issue.

Another answer could be that it is possible that all member states, whether explicitly or tacitly, agree that traditional minorities are trouble enough and that they all agree that the term ‘minorities’ should be understood in the narrowest sense possible. In this regard, one has to note that art. 2 TEU is of very general nature and refers to the basic values of the European Union. It may be this last argument which weighs the most. The general term is flexible and open for interpretation. Difficult to be challenged, this offers a way to get all member states on board. Adding minorities to EU primary law is a commitment, but one that comes at little direct costs. This addition is, of course, backed up by the legalization of the Charter of Fundamental Rights which explicitly includes members of national minorities. Alone, art. 2 TEU could easily be seen as a lofty promise. For sure, there is no evidence of frantic activities by member states in the field of minorities following the entry into force of the Lisbon Treaty.

IV. THE CHARTER OF FUNDAMENTAL RIGHTS

1. Legal Status of the Charter

Art. 6 (1) TEU states that the Charter of Fundamental Rights ‘shall have the same legal value as the Treaties’. The Charter’s legal status is thus elevated considerably. The Charter was originally proclaimed in 2000 and adapted in 2007. Although member states

agreed on the Charter, it did not become a legally binding treaty between the states. Neither was it adopted as EU secondary law. Nevertheless, there was an expectation to conform to the Charter and the European Court of Justice has relied on the Charter in support of its arguments.

The change in legal standard is not an issue of interest only to minorities. Nevertheless, it is worth exploring the change in this paper as it is the first time that members of minorities can go a judicial way explicitly referring to their membership of a national minority. There are many more issues connected to the legal elevation than are addressed here. For one, the inclusion of all would go beyond the scope of this paper. For another, not all details connected to change in legal status are equally relevant for minorities.

Specifically important to minorities is that the legalization of the Charter addresses the challenge of double standards. This is a challenge referring to the possibility that member states and candidate countries are measured with two different yard sticks. The respect for minorities as a precondition for membership is now complemented with the legalization of the CFR so that respect for minorities also is an obligation for member states. This prevents minority standards from being lowered or disregarded after accession to the EU.

At the same time, the new legal status now also binds EU institutions; actors who were not addressed by the Copenhagen Criteria. Art. 51 CFR lays out the field of application of the Charter. These provisions are directed at ‘institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity.’ Member states are addressed ‘only when they are implementing Union law.’¹³ Art. 51 CFR thus establishes a strong link between the Charter and art. 2 TEU which requires the European Union to respect fundamental rights.

While institutions are under any circumstances bound by the Charter, the member states have more freedom. Member states are only obliged to respect fundamental rights when acting within the scope of the Union law.¹⁴ The term ‘member state’ is fleshed out in the Explanations. The Explanations explicitly state that the article not only addresses the

¹³ See also Explanations Relating to the CFR, explanation on art. 51, para. 2 citing the case-law of the ECJ.

¹⁴ See Explanations Relating to the CFR, explanation on art. 51, para. 2 citing the case-law of the ECJ.

central authorities but that it also applies ‘to regional or local bodies, and to public organisations, when they are implementing Union law.’¹⁵ It is thus clear, who is addressed by the Charter. This is especially noteworthy for minorities as they in day to day life often meet regional or local authorities rather than the central government.

The Lisbon Treaty repeals the pillar structure of the EU. The jurisdiction of the Court of justice is thus extended to previously restricted areas, though subject to special regulations. Regarding the Charter of Fundamental Rights, it can thus be invoked regarding many more issues and actions of the institutions and member states.¹⁶

The CFR does not lack behind in meaning of scope of articles that are included both in the CFR and the ECHR. The meaning and scope of those rights meets at least the ECHR standard, but Union law can provide more extensive protection. This ensures a minimum of consistency between the CFR and ECHR. The Explanations include a specific list which CFR rights correspond to which ECHR rights and thus have the same meaning and scope and where the scope is slightly different.¹⁷ Consistent and coherent standards should hereby be ensured.

At first sight, it seems odd that no link is made between art. 21 CFR and art. 14 ECHR on non-discrimination. A closer look, though, reveals that art. 21 CFR covers more grounds upon which discrimination is prohibited. Whether or not attention has to be paid to the fact that the CFR speaks of ‘membership of a national minority’ while the ECHR speaks of ‘association with a national minority’ is left unanswered here. The different wording is not addressed in the Explanations. It may be remarkable, though, that the Explanations state that as far as art. 21 CFR corresponds to art. 14 ECHR, the CFR-article applies in compliance with it.¹⁸ One may thus wonder, in how far this different wording in relation to national minorities has a deeper meaning.

¹⁵ Explanations Relating to the CFR, explanation on art. 51, para. 2.

¹⁶ The United Kingdom, Poland and the Czech Republic, though, enjoy special coverage by the Charter. Under Protocol 30 to the TFEU, no European or national courts in the countries can find that national laws, provisions, practices or actions are inconsistent with the fundamental rights, freedoms and principles the Charter reaffirms. See art. 1 of the Protocol No 30 annexed to the TFEU on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. For application of the Protocol to the Czech Republic see Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic.

¹⁷ Explanations Relating to the CFR, explanation on art. 52.

¹⁸ Explanations Relating to the CFR, explanation on art. 21, para. 1.

Overall, articles 51 and 52 CFR paint a restrictive picture. There a number of safeguards. For example, it is stated repeatedly that national laws and practices have to be taken full account of. There is a two-tiered system in the form of distinction between rights and principles and some of the addressees are only under certain circumstances obliged to adhere to the Charter. One probable effect of the change of legal status is that more actions by EU institutions and member states will be challenged before the ECJ. Even in the years before its legal bindingness, though, the Court has already relied on the Charter; neither as an independent source of law nor as a source creating new rights, but still as one of several sources in the argument.¹⁹

Minorities will now benefit from a legal document that has a legal enforcement mechanism attached. The Convention with the ECtHR assuring implementation mentions minorities in the context of non-discrimination.²⁰ However, for a claim to be accepted at the ECtHR, one condition is that all national remedies have to be exhausted. The Framework Convention and the Language Charter, treaties specifically targeting minority issues, have monitoring mechanisms attached but no court system. Members of minorities may thus for the first time directly access a non-national court based on claims of discrimination because of membership of a national minority.

It is certainly the case that even though the new status is an important accomplishment, the expectations need not be too high. The change in status has received attention; however, it has been contended that it is ‘unlikely that the Charter will have more far-reaching effects.’²¹ This seems to be a realistic assessment regarding minorities.

2. Article 21 CFR and other Articles of Relevance to Minorities

One article of the Charter of Fundamental Rights warrants closer attention. It was earlier mentioned in relation to the corresponding article in the ECHR. It is art. 21 CFR which is the only article explicitly mentioning national minorities.

¹⁹ See for example Case C-540/03 European Parliament v Council of the European Union, at paras. 35-39. See also Syrpis, ‘The Treaty of Lisbon’, at pp. 231-232.

²⁰ Art. 14 ECHR.

²¹ Syrpis, ‘The Treaty of Lisbon’, at p. 231.

Art. 21 deals with non-discrimination. It lists more than ten different grounds upon which discrimination is prohibited. One is ‘membership of a national minority’. A number of terms may also be applicable to members of national minorities even though the term ‘minority’ is not attached: ‘race’, ‘colour’, ‘ethnic or social origin’, ‘language’, and ‘religion’. The Explanations do not explain any of the terms used. Indeed, the Explanations on art. 21 only address issues of overlap or seeming contradictions or incompatibilities with other articles of EU treaties.

Members of minorities are relatively well covered by art. 21. They can choose to base their claims on terms like language or religion or, if there is basis for it, choose the more general basis of national minority. These two ways may be especially important to Roma and national minorities not recognized as such by their respective states. For example, under the Framework Convention, Roma are not considered a national minority in Denmark. Members of Roma in Denmark who feel discriminated against because of being Roma could base their claims on ethnic or social origin instead of going the way of membership of a national minority. The same would be applicable for members of unrecognized minorities as for example the Bretons in France.

Art. 21 CFR might be the one article using the term minority; however, there are other articles of relevance for members of minorities. There are, of course, those general human rights like freedom of religion and freedom of expression that have a special quality for minorities. Art. 22 CFR, on the other hand, speaks of the respect of cultural, religious and linguistic diversity. Even though this belongs to the principles and not the rights, it is a provision of special interest to minorities.

Diversity itself is one of the very key terms of the European Union. It features in the slogan *united in diversity* and is probably meant to soothe EU sceptics that see the development of the EU towards an almighty entity that erases states and national identities alike. Clearly, diversity is a concept that works in favour of minorities. The question now is, whether art. 22 CFR is applicable to intrastate affairs. Diversity is usually regarded at the inter-state level, meaning that the diversity of the member states is respected. The Explanations link art. 22 CFR to art. 167 TFEU. This article refers to the cultures of the member states and the respect of their national and regional diversity. Regional diversity takes a different approach from the national approach and autochthonous minorities that

live condensed in one area may be able to refer to themselves in the context of regional diversity. Paragraph 2 speaks of the knowledge and dissemination of the culture and history of the European *peoples*. Whether sub-national groups such as minorities are included is questionable. It is well known that at least for international lawyers, minorities and peoples are not the same. Art 3. (3) TEU refers to the Union's rich cultural and linguistic diversity. No further qualifications are made and as minorities contribute to cultural and linguistic diversity, they may feel covered by this article. Diversity is a broad term and there are possibilities for minorities within it.

There are other articles that are of special importance to minorities. However, these are general human rights that are equally applicable to all people. These articles include the right to freedom of religion (art. 10 CFR), the right to freedom of expression and information including imparting information and ideas across borders (art. 11 CFR) and the right to freedom of assembly (art. 12 CFR). These are rights that once breached would be to the detriment of members of the majority and minority alike; however, withholding these rights from members of minorities might threaten the existence or survival of the minority. Therefore, these articles are of special importance to minorities.

3. Intermediate Conclusion

The Charter of Fundamental Rights will change some things but not everything. It has been pointed out that the Charter cannot fulfil the high expectations it may have induced at its proclamation and which have been renewed with the Lisbon Treaty. According to this reasoning, the references to human rights, participation and democracy in the Treaties reduce the significance of the Charter. Also, the Charter is only one of two – the other being the ECHR – documents that need to be adhered to. A third argument is based on art. 6 (3) TEU which speaks of general principles of the Union's law. They also play a role and must be considered alongside the Charter of Fundamental Rights. Lastly, the fact that the Charter is not part of the Treaty but has the same legal value suggests some reservations by the member states towards the Charter.²²

²² De la Rochere, 'Challenges for the Protection of Fundamental Rights in the EU', at pp. 1178-1780.

The Charter features several articles of importance to minorities. However, they do not constitute new areas of minority law, or only in that far as this it is now law instead of being in this limbo state the CFR was in before the Lisbon Treaty. It remains to be seen which consequences the new legal status has for the Charter as a whole.

The Charter's legal status is high, but only so because the Lisbon treaty says so. One could speak of conferred but not inherent importance which the Charter would have were it part of the Treaties. Thus, there is no 'special dignity'²³ over the Charter. It is also unclear how the Charter may be amended in the future; there are no provisions.

V. EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Already in 1996, an advisory opinion was requested from the European Court of Justice on a possible accession of the EC to the ECHR. At the time, the answer was negative. Apart from the problem that the ECHR was at the time only open to states and not international organization other issues were even more important. One of those is the issue of the EU courts' exclusive jurisdiction in matters of EU law and the autonomy of the Community legal order. Other issues raised at the time included one regarding the judgements of the ECtHR only having indirect effect; this means the ECtHR could only oblige states to bring about a certain result but could not repeal or amend national law. The issue of who judges on what – the ECJ on the ECHR or the ECtHR on EU law – was also regarded a major issue.²⁴ All these issues and others those raised by member states at the time were addressed by the ECJ; some issues the court concurred with, others it saw as unproblematic. The important result was that accession could only happen with a treaty amendment as the Community had no competence to accede to the Convention.²⁵

This problem has now been solved. Not only has the Treaty on European Union been changed but with the entry into force of Protocol No. 14 to the ECHR, new art. 59

²³ De la Rochere, 'Challenges for the Protection of Fundamental Rights in the EU', at p. 1781.

²⁴ See Opinion 2/94 of the Court 'Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms', at paras. I (9-10)

²⁵ Opinion 2/94 of the Court', at para. 36.

ECHR allows for the European Union to accede to the ECHR. The article does not provide for a general opening for international organizations to accede to the ECHR but targets the European Union directly.

The official talks regarding the EU's accession to the ECHR began on 7 July 2010 and have as of yet not been concluded. The talks are conducted by the European Commission for the EU and by the Steering Committee for Human Rights on behalf of the Council of Europe. There are number of issues that need clarification. Foremost, this concerns issues of jurisdiction between the two courts (see below) but also internal EU issues need to be addressed.²⁶

There is, of course, a very basic question to be asked and that is whether accession is really necessary. Why do EU institutions need to be bound both by the Charter of Fundamental Rights and to the European Convention on Human Rights; especially when the Charter's Explanations explicitly point out the overlaps? Well, therein lays the answer. There are overlaps between the two documents but there are also differences. The ECHR focuses exclusively on civil and political rights. The Charter, on the other hand, includes provisions of economic and social nature. Also, at the time of adoption of the Charter in the year 2000, an accession of the European Union to the ECHR was far from around the corner of happening. It was felt that the EU needed a document that mirrored the development the EU itself had taken from an economic entity to the comprehensive political system it was involving into.²⁷

What is in this accession for minorities? Is there anything at all in it? The answer is difficult. Again, it is a matter of the larger framework and context. The relations between the two courts will not be unique to the area of minorities but there will be a general agreement on the relations. Again, the larger context needs to be examined before focusing on the consequences for minorities and their members. There are many issues still unclear about the accession so it is difficult to give definite answers.

There are two main arguments that oppose each other regarding accession. On one hand, linkages between the European Union on the one hand and the ECHR and the

²⁶ For a good discussion on internal EU legal questions such as mixed agreements and exclusive ECJ jurisdiction which become important regarding accession to the ECHR see Lock, 'The ECJ and the ECtHR', at pp. 388-395.

²⁷ Defeis, 'The Treaty of Lisbon and Human Rights', at pp. 415-416.

ECtHR on the other are argued to lead to a European unified regime in human rights; no double standards, no different standards but one coherent system. The opposing argument for one sees the dangers of merging two so different systems as the European Union and the Council of Europe and for another sees problems of hierarchy between the two courts.

Certainly, one conceptual problem worth noting is the basic approach. The ECtHR applies the human rights of the ECHR to everyone. Within the EU framework, some rights depend on EU citizens while other rights are applicable to everyone within the EU. Another point refers to the possibility of two courts ruling on essentially the same issue but one (the ECJ) basing its rulings on the Charter of Fundamental Rights and the other (the ECtHR) basing its judgment on the ECHR. This does not necessarily lead to a unified regime but requires cooperation and mutual respect. It is likely that the ECtHR needs some time for adjustment as it then not only deals with states but also with EU institutions. However, it has been contended that in other cases the EU was given deferential treatment and that there might thus be more of a close cooperation between the EU courts and the ECtHR rather than the ECtHR acting as a superior court towards the EU courts.²⁸

It is not yet entirely clear, in what form accession will take place. However, it will most probably mean that EU institutions will be subject to the jurisdiction of the European Court of Human Rights. This means that the ECtHR could be called to rule on whether EU institutions are in breach of the European Convention on Human Rights. The ECJ is one of the EU institutions and thus, the ECtHR could rule upon ECJ rulings regarding rights covered by the ECHR. The EU Committee on Constitutional Affairs has stated that ‘the Court of Human Rights must be regarded not as a higher court but rather as having special jurisdiction in exercising external supervision over the Union’s compliance with obligations under international law arising from its accession to the ECHR.’²⁹ In how far it is possible for the ECtHR to have external supervision but no higher status (in the narrow field of the ECHR) remains to be seen.

Art. 52 (3) CFR linking the Charter to the Convention, speaks only of the Convention and not the connected case-law of the ECtHR. The Explanations, however,

²⁸ Syrpis, ‘The Treaty of Lisbon’, at p. 234. For the same assessment see also Lock, ‘The ECJ and the ECtHR’, at p. 386.

²⁹ Committee on Constitutional Affairs, ‘Draft Report on the Institutional Aspects of the Accession of the European Union’, at p. 4.

state clearly that the reference to the Convention and Protocols not only refers to those documents but includes the case-law of both the ECtHR and the ECJ.³⁰ At first sight this would mean that the ECJ is bound by the case-law of the ECtHR in those cases where the rights overlap. Art. 52 (7) CFR sheds light on the issue. The Explanations are not legally binding; they ‘shall be given due regard’ by the courts of the Union and of the Member States’. While the case-law of the ECtHR thus is not binding on the ECJ, we can nevertheless expect that the ECJ will take it into account and regard it as highly relevant. This would also support the aim of streamlining the two regimes.

Owing to the fact that all EU member states are members of Council of Europe and parties to the ECHR, one could argue that members of minorities already in the past could bring their claims before an international court. Indeed, in the past years, cases involving members of minorities have become a regular occurrence.³¹ Yet, the link between the European Union and the ECHR elevates judicial possibilities to a new level.

The newness of EU accession to the ECHR is, of course, that the ECHR then will bind EU institutions. Today, states are parties to the ECHR and all EU member states are also parties to the ECHR. Once accession is implemented, there will be the possibility for individuals to hold the EU accountable in the field of human rights. The EU and its institutions determine many aspects of life in the European Union. It may thus seem fitting that the EU institutions will also be held accountable using the same yardsticks as the member states.

VI. OTHER POINTS OF CRITIQUE

There are some other points that have been noted about the Lisbon Treaty and minorities. They shall not be discussed here in depth but they deserve mentioning. They touch on the Commission, budgetary issues and a missed opportunity regarding the Fundamental Rights Agency.

³⁰ Explanations Relating to the CFR, explanation on art. 52, at para. 4.

³¹ For an overview of cases concerning members of minorities in the year 2008 alone see Cariolou, ‘Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities’.

As was pointed out in the first part, the Commission is slowly coming to terms with human rights and the ‘soft’ part of being common union. The Commissioner for Multilingualism was a first step followed by the Commissioner of Justice, Fundamental Rights and Citizenship. One can indeed wonder why the EU did not find it necessary to focus on human rights as they are both prominent in the context of enlargement and the common foreign and security policy. There is not Commissioner for Human Rights and Viviane Reding has a larger, albeit related, portfolio. Funding in the area of human rights is still limited.³²

Another negative point made refers to the Fundamental Rights Agency. It has been argued that the Treaty of Lisbon could have turned it into the monitoring body of the Charter of Fundamental Rights.³³ While the Agency is closely related to the CFR, it does not make state visits to receives state reports on the implementation of the Charter. This is a known procedure for many international treaties including the Minority Treaties under the auspices of the Council of Europe. Whether this is a feasible idea requires further thought. Monitoring bodies are usually considered to be helpful. However, one should keep in mind that we are working within the framework of the European Union which has its own legal order. Also, the Charter is no international treaty, at least not really. Whether principles of international law can or should be applied in this context is an interesting question.

One point that deserves attention but is not a point of critique as such is the question as to the underlying thoughts on the role of the EU towards minorities. The question is what role the EU sees for itself and what role the member states are willing to give to the European Union. It has been pointed out that a direct link between the EU and minorities could lead to several consequences. For one, the EU could come up with a definition of the term ‘minority’. For another, this definition could or would be applied throughout Europe. This would thirdly lead to a new European minority regime.³⁴

³² McDermott, ‘Human Rights and the Lisbon Treaty’, at p. 745 referring to Weiler, Joseph, ‘Human Rights, Constitutionalism and Integration’ in: Eriksen et al. (eds.), *Developing a Constitution for Europe*, Routledge 2004.

³³ McDermott, ‘Human Rights and the Lisbon Treaty’, at p. 746.

³⁴ Toggenburg, ‘Minorities (...) the European Union’, at p. 278.

This line of thought has its weaknesses. They range from lack of competences over concerns about subsidiarity to problems with the multi-layered set-up of the European Union. Between the EU and a minority is always the state and states do not seem to be ready to give up their intermediate position. Minorities are a trickier question than often times assumed. There is little reason to expect that traditional minorities including unrecognized minorities will be able to eliminate the state-level from their relations with the European Union. It is this basic cautious approach of the member states that heavily influences the possibilities for the development of the EU as an actor in the field of minorities and minority rights.

VII. CONCLUSION

It has been argued that the above discussed issues introduce substantial change concerning minority rights in the EU.³⁵ I agree that the framework has been changed. Members of minorities now have more legal opportunities. Yet, standard setting is only meaningful if implementation follows. In other words, if the Charter of Fundamental Rights and EU accession to the ECHR lead to higher minority standards or through legal actions bring states to respect and protect their minorities better, one can speak of meaningful implementation. The new legal framework offers opportunities for minority policies in the EU. If, on the other hand, the paper simply remains paper, all legalization is worth little. While I certainly expect some changes, I would not want to welcome a better era of minority protection before it has actually shown itself.

Regarding art. 2 TEU, it is, from a minority viewpoint, a big step forward to be recognized in EU primary law. If this will lead to radically new thinking and recognition of so far unrecognized minorities is doubtful. We may, at least at the theoretical level, expect more on definitional issues regarding the term minorities.

The Charter of Fundamental Rights and the Explanations show a split, yet to international lawyers not unknown, approach. It is an approach of ‘yes, but’. Yes, the member states do want further commitment. But they also want to make sure that no

³⁵ Drzewicki, ‘National Minority Issues and the EU Reform Treaty’, at p. 143.

unwanted surprises await them. Thus, a restrictive development is envisioned. Subsequent implementation of the Charter can go two ways. Either, the restrictions are closely upheld or the Charter will lead to a significant development. It is up to all involved, from EU institution over the institutions in the member states on all levels and civil society to the EU courts, to fill the Charter with life and endow it with further relevance.

It is likely that the accession of the EU to the European Convention of Human Rights will lead to some confusion for a time. The EU and the ECtHR will have to find a meaningful way of co-existence. There is certainly a good possibility to move human rights forward in the EU context; however, going the judicial way is a long and slow process. In how far the ECtHR will be willing to develop human rights law for or rather of the European Union remains to be seen. Hopes should not be too high.

Overall, the Lisbon Treaty introduces changes that affect minorities in the European Union. However, most of these changes are not unique to minorities. Therefore, it is a moot undertaking to predict this or that specific development in the area of minority rights. Members of minorities have new and more chances to be heard. It is up to them to make themselves heard. However, it is also up to the EU institutions and member states to let minorities be heard. Minority rights, as with all other rights, are not of much use if they only remain empty promises on paper. Set standards must now be implemented.

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