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EDITORIAL COMMENTS

Fundamental rights and common European values*

Initially, the protection of human rights in the European Union was not an issue for the IGC. However, the question of accession by the Community to the European Convention on Human Rights has now been put before the Court of Justice by the Council.[1] The oral pleadings, which took place in November 1995, showed that whatever the Court's answer may be – including the possibility of a refusal to give a reply on the question of competence, since no treaty of accession has been put before it – the view of several Member States is that an accession to the Convention is desirable.

In addition, the Westendorp report devotes a full section to the promotion of "European values".[2] There is therefore no doubt that the question will be on the agenda of the 1996 Conference.

In fact, the expected evolution of the European Union implies a serious need to re-examine the conditions of the protection of fundamental rights in the European Union area. The Essen Summit in December 1994 accepted the principle of an enlargement of the European Union to include Central and Eastern European countries, where democracy is still fragile. Actions are envisaged on the basis of the Second and Third Pillars: they may seriously affect the rights of individuals in the European Union – whether European citizens or not – without, under the present legal situation, any possibility of judicial control in the European system, as Article

* These editorial comments were completed before the Court of Justice handed down Opinion 2/94, on 28 March 1996. The Opinion will be commented on in detail in a forthcoming issue.

1. In its request for an opinion of 26 April 1994, based on Art. 228 EC.
2. Report of the Reflection Group, Messina, 2 June 1995, Brussels, 5 Dec. 1995.

L of the European Union Treaty excludes virtually any competence of the ECJ outside the Community pillar.

The issue is therefore not so much a restatement of the affirmed dedication of the European Union to human rights as a reconsideration of the practical degree of enforceability of such rights throughout the Union and the opportunity of formulating proper European values.

1. Is accession to the European Convention on Human Rights really a good idea?

Up until now, fundamental rights do not seem to be seriously threatened in the European Union, at least in the Community pillar. There has been a well-known development, in which the dialogue between the European Court of Justice and national constitutional courts – in particular the German and the Italian courts – played a decisive role. As a result of this, fundamental rights are clearly referred to in the European Union Treaty, at Article F(2):

> "The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and as they result from the constitutional traditions of the Member States, as general principles of Community law"

and also at Article 130U EC and Article K.2.1 TEU.

The ECJ, indeed, now has every reason to refer to the Convention and to take account of the case law of the Strasbourg Court. Some divergences of interpretation exist,[3] but these are not sufficient to claim that the implementation of Community law creates serious threats to fundamental rights and civil liberties. In the opinion of the *Bundesverfassungsgericht*,[4] in its judgment of 13 October 1993 on the Maastricht Treaty, fundamental

3. As an example, the two Courts have come to different solutions on the question of freedom of information concerning abortion. ECJ case 159/90, *Grogan*, ECR [1991] I-4735; ECHR Open Door & Dublin Well Woman v. Ireland, 29 Oct. 1992, A 246.

4. See Herdegen, "Maastricht and the German Constitutional Court: Constitutional restraints for an 'ever closer union'", 31 CML Rev., 235–262, with extracts from the Judgment (in English).

rights are satisfactorily guaranteed at least in the First Pillar.

Those who plead for the accession of the European Community – or European Union, whose legal personality it would then be necessary to recognize – to the European Convention on Human Rights, admit that this accession would have primarily "symbolic" significance. Its real significance is limited, as long as all the Member States of the European Union are – as is presently the position, and as will very likely be required in the future – members of the Council of Europe and High Contracting Parties to the European Convention on Human Rights. The symbolic significance of accession might be weakened by a decreasing confidence in the Council of Europe's system as a whole. In opening its ranks to new members, such as Russia, the Council of Europe seems to be inclined to make real politics prevail over a strict conception of the respect for human rights and the rule of law. The new members will also designate judges to the European Court of Human Rights; they will participate in the discussion of future amendments to the Convention.

On a somewhat different level, it must be admitted that quite significant technical problems would have to be solved on the occasion of the accession of the European Union or European Community to the Convention. These have been put forward by the United Kingdom in its pleadings to the European Court of Justice. For instance, Member States of the European Union have made various reservations to the different protocols of the Convention, as a result of which they are not all subject to the same obligations: it would be necessary to define the contractual obligations by which the EU/EC will be bound. The European Union would have to become party to certain institutions of the Convention. A European Union judge, either permanent or ad hoc, would have to be designated according to some procedure as yet undefined. It would be necessary to determine what "exhaustion of local remedies" would mean in the European Union framework, etc. However, none of these technical questions appears to be impossible to overcome.

The real difficulties lie elsewhere.

2. Scrutiny by an external judge

Accession to the Convention would not be justified by the idea of mere consolidation of a catalogue of rights to which the European Union al-

ready refers abundantly. A more substantial argument is that the European Union's legal system should be subjected to the scrutiny of an external judge, in the way that national legal systems of the High Contracting parties to the European Convention are subjected to the scrutiny of the Strasbourg Court. And therein lie serious problems.

Under EC law, most provisions of primary or secondary legislation are implemented by Member States. Even in the areas of exclusive EC competence, where EC institutions may make regulations which are binding and directly applicable in all Member States, such institutions have no direct power of enforcement at the national level. Member States have the responsibility "*to ensure fulfilment of the obligations arising out of the treaties*". If a question of fundamental rights is raised in connection with the implementation of EC provisions, reference to the ECJ is possible, through preliminary rulings at the initiative of national judges. The European Court of Justice requires the national authorities of Member States to respect fundamental rights as guaranteed by the European Convention on Human Rights, when they implement EC law.[5] Further, after a preliminary ruling of the ECJ, individuals retain the right to refer the matter to the Strasbourg Court, which may define its own standard as regards fundamental rights.

The system is obviously less satisfactory, and the lack of scrutiny by an external judge more apparent, in the areas where European Community institutions have a direct power of decision or implementation without intervention of Member States. This is the case, for instance, as regards the status of staff of the European institutions, and in connection with various aspects of competition law: granting individual exemptions under Article 85(3) EC, control of mergers under Regulation 4064/89. For these areas, the Court of First Instance and the European Court of Justice are exclusively competent.

Up to now, when implementing competition law or the EC staff regulations, the EC courts have consistently taken account of the fundamental rights guaranteed by the European Convention "*as general principles of Community law*". However, the rights guaranteed by the European Con-

5. Case 222/84, *Johnston*, [1986] ECR 1651, right to a judge and to fair and equal trial; Case 222/86, *Heylens*, [1987] ECR 4097, right to appeal to an administrative authority and to have the reasons of a decision duly stated.

vention – with the exception of the right to life (Article 2), the prohibition of torture (Article 3) and the prohibition of slavery (Article 4) – are not absolute. They are subject to evaluation. The Luxembourg Court which has the responsibility for the functioning of the EC system when imposing compliance with fundamental rights takes account of the requirements of Community integration. As for the Strasbourg Court, it is not the supreme court of an operational system; this may effect the way it determines standards of implementation when it has to adjudicate on principles enshrined in the European Convention.

From that difference of approach ensue certain divergences of interpretation. The classic example is that of the protection of the premises of an undertaking, where the Luxembourg Court has favoured the efficiency of the inquiry by the agent of the EC Commission,[6] whilst the Strasbourg Court has decided to protect this type of premises as though they were a private domicile.[7]

Do these few examples of divergence of case law, which could disappear if the European Community acceded to the ECHR, constitute a risk or an enrichment? Opinion 1/91 of the European Court of Justice[8] may be analysed as pleading against accession for reasons of autonomy of EC law. It is clear that in case of accession, the Court of Luxembourg would be subject to the Court of Strasbourg on questions of fundamental rights, and this would not be without implications for the future of EC law.

It is not merely a question of the prestige of respective judges – an aspect which must be taken into consideration – but also a question of the co-existence of two systems of international adjudication. The ECJ is not a local court; it is a court where the legal systems of the fifteen Member States are represented in the persons of the fifteen judges whose authority may compare with that of the judges of the Strasbourg Court. Some consider that the risk of a few divergences in case law is worth taking in order to maintain the total independence of the EC judges.

It is even arguable that a certain emulation – not to say competition –

6. Joined cases 46/87 & 277/88, *Hoechst*, [1989] ECR 2859.
7. Niemietz v. Germany, 16 Dec. 1992, A 251-B; Funke, Cremieux and Miailhe v. France, 25 Feb. 1993, A 256-A, B, C.
8. [1991] ECR I-6079.

between courts of equal quality and prestige may introduce a valuable incentive for a balanced development of European law as a whole.

For instance, on the difficult question of an AIDS test before the engagement of a worker, a question widely discussed in the Council of Europe, the European Court of Justice has rendered a double-edged judgment.[9] It stressed the right for the candidate to keep his state of health a secret, the legitimate interest of the future employer not being a sufficient justification to allow him to impose an AIDS test against the will of the candidate. However, in an *obiter dictum*, the European Court of Justice adds that if the candidate, duly informed, refuses to agree to a test which is considered by the doctor to be necessary in order to evaluate the ability of the candidate to hold the contemplated position, the potential employer (here the Commission) should not be obliged to take the risk of engaging such candidate. There are still no decisions of the Strasbourg Court on an equivalent issue; it will be extremely enlightening in the future to compare the views expressed in this case with those of the Strasbourg Court on such a difficult matter.

If, in the end, the Member States of the European Union decide against the accession of the Community to the ECHR system, with the consequence that an external judge will continue to be missing, the 1996 Conference should at least consider the extension of the *locus standi* afforded to individuals and legal persons. Article 173 EC should be amended so that any natural or legal person may institute proceedings in EC courts against any measure of secondary legislation if it has sufficient interest to do so. Even after recent developments of ECJ case law concerning the right of individuals to obtain compensation in domestic courts for non-compliance by Member States with EC obligations, EC law cannot claim to comply with fundamental rights standards if it does not allow all those concerned by individual decisions or regulatory measures to have access to judicial review.

As regards the Second and Third Pillars, their functioning raises a series of political and legal problems, including the absence of reference to judicial review – apart from the option, in the case of conventions, under Article K.3. Any initiative aimed at strengthening the decision-making process under the Third Pillar must involve some reflection on the guar-

9. Case C-404/92 P, X v. Commission, judgment of 5 Oct. 1994, para 31.

antees of fundamental rights, which are especially at stake in the areas covered by Article K.1. Theoretically, one could envisage the possibility of "*communitarization*" in this area, contained in Article K.9.; this would entail the recognition of the right of initiative of the Commission, majority voting rules in the Council and judicial control by the ECJ. As regards the guarantee of fundamental rights, the situation would then be equivalent to that described above. However, for various political reasons, such a development is very unlikely to be accepted by all Member States.

Various more modest proposals are being made in the perspective of the IGC. At all events, if decisions with legal effects are made under the Second and Third pillars, with direct effects for individuals, some sort of judicial control should be introduced. The compatibility of the various implementing measures with the terms of the European Union Treaty, including Article F(2), should be subject to possible review of their legality by the ECJ, at the initiative of Member States or EU institutions. It is likely that enforcement of these measures would take place at the domestic level. Therefore, it is assumed that the ECHR recourse system would be available. However, in order to guarantee a certain level of uniformity of interpretation of TEU provisions in the various Member States, it would be advisable to introduce a system of either optional or compulsory preliminary rulings to the ECJ; the ECJ would then have a chance to supervise the respect of fundamental rights as referred to in Articles F(2) and K.2(1).

3. A new catalogue of rights

The idea of a new catalogue of rights has been put forward by certain members of the Westendorp group. It would not be useful to repeat in the TEU, possibly with a different wording, the substance of the European Convention on Human Rights – which is incidentally more or less the object of Title VIII of the draft constitution approved by the institutional committee of the European Parliament on 24 January 1994.

Following the Westendorp group report, the Commission paid a polite tribute to the possibility of either accession to the ECHR or the inclusion in the Treaty of a charter of fundamental rights. In actual fact, though, the

Commission seems more interested[10] in the idea of promoting European values.

Indeed, the IGC could be the occasion for the Member States to take stock of the evolution of the whole European context since 1951, and to try to give an intelligible formulation of what they intend to do together during the coming century.

When European values are mentioned, reference is usually to a type of society based on non-discrimination, on equality between men and women, on tolerance. It seems equally essential to recall the conditions whereby the existing economic and social standards may survive in Europe. This may imply a common support for the Social Charter of 1989, the formulation of a principle of solidarity, and one could even add a right of access to public services of general interest.

Finally, in a period of globalization of the economy, of information and politics, the time may have come for the European Union to express clearly and solemnly its desire to defend its existence and values more efficiently against unfair competition and aggression of all kinds. If Member States have agreed to limitations of their own sovereign rights for the benefit of the Union, then European citizens are entitled to expect the European Union to guarantee the same level of protection of their social and economic rights as they had under the full sovereignty of their respective national States. European citizens need a powerful and efficient Union, which is not reluctant to show its willingness to be exactly that.

10. See press release of 6 Dec. 1995, "The Commission takes a position on the Westendorp report".