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Why, after all, it is a good thing for the EU to accede to the European Convention on Human Rights

June 24, 2013

The draft accession agreement has many objectionable features. Never has the citizens' perspective been the EU concern during negotiations. Diplomatic secretiveness, an exceptional treatment of the European Court of Justice in honour of its claimed constitutional 'prerogatives' (the 'prior involvement' procedure), and the complications of a 'co-respondent mechanism', resulted naturally. And yet, accession would be a good thing.

By Leonard Besselink

The new [draft agreement](#) on the EU accession to the European Convention on Human Rights (ECHR) was negotiated after a first draft was found unacceptable by EU member states. This was a dismal failure on the part of the EU and its member states to live up to their commitment stipulated in Article 6 (2) of the EU Treaty[1] and for which the ECHR had created the legal opportunity in its Protocol No. 14, supported by all non-EU members of the Council of Europe[2]. This time, it would seem, the EU is not going to spoil the party. The member states are expected to agree with the draft agreement. The draft agreement will be submitted to the Court of Justice of the EU (Art. 218(11) TFEU), which can be expected to give its *fiat* since the major conditions the Court had formulated prior to and during the negotiations for the compatibility of an accession agreement with the Treaties (and in particular its own 'prerogatives' within the EU system), have been lived up to.

Good, useful or neither?

There are many reasons the accession negotiations could make one think the accession is neither useful nor a good thing.

The citizens' perspective has been totally absent at all stages of the negotiations. The protection of their rights has not figured in any of the working documents and reports on the negotiating rounds which have seen the light. Predominant was the attitude of member state executives, which never like new obstacles in the way of effective government. This attitude was copied by the EU institutions in their own way, including the Court of Justice which found that the unconditional power of fundamental rights scrutiny of the ECtHR over EU decision-making as the ECtHR exerts it over acts of member state authorities, would interfere with what it called its 'prerogative' within the EU legal order to decide on the validity of EU acts.[3]

Domestic EU constitutional prerogative

Hence, an extremely complicated procedure for the sake of the ECJ's prerogative is created which does not exist for any of the other domestic highest national highest courts in a similar position, named as 'prior involvement'. Under this procedure a case that is being dealt with in Strasbourg is suspended in order for it to be dealt with first by the ECJ; and this can occur in cases in which it has not had the chance to adjudicate on the lawfulness of the relevant provision of EU law. The procedure would be aimed at the assessment of the legal basis of the provision of EU law at the basis of a complaint to be decided upon in Strasbourg.[4] It takes place in the undergrowth of the procedural jungle called the 'co-respondent mechanism', which putatively has been created to protect the interests of the complainant in case he is successful in Strasbourg and is faced with the question who is liable when the complaint involved the EU and a particular Member State.[5] Somehow the resultant procedure seems more aimed at securing the rights of involved Member States and the EU than those of the plaintiff – the wish of the Member State whether to be involved or not remains decisive for it to become a co-respondent. So the citizen who is put in the right by the ECtHR will still have to see how he actually gets it if the co-responsible member state (or the co-responsible EU for that matter) had declined the 'invitation' to become co-respondent during the procedure (Art. 3 Draft Accession Agreement).

Accession as a toy in EU diplomacy

Another particularly infelicitous aspect of the process of accession was the failure on the part of the EU to observe the openness and transparency pertinent to issues of constitutional rights of citizens, as it was observed during the first Convention, which drafted the Charter on Fundamental Rights, as well the second Convention drafting the Constitutional Treaty. Instead the Council and Commission reverting to the full secrecy of high diplomacy, stating that what they called the 'strategic objectives' of accession could not be revealed to their counterparts, let alone the EU citizens – this notwithstanding the statement of some Member States that the negotiating mandate which to this day is secret, contains at least in part what in effect is already contained in the Lisbon Treaty and its relevant annex, as well as unnegotiable unilateral choices which are accepted without further ado by the other parties around the table since these determine the object of what is negotiated. Openness did not come from the EU, but from the Council of Europe, which published important working documents, agendas and the reports of meetings of the negotiating groups on a [special website](#).

Putative lack of added value

Lastly, various commentators have already for some time been asserting that accession adds little to the protection of citizens' rights, since the ECHR rights are already protected in EU law, also against acts and omissions of the institutions.

And yet the accession is a good thing...

Those who say that the fact that ECHR rights are protected already and hence formal accession is superfluous overlook two closely related points. Firstly, all the original states party to the ECHR were vociferously stating that the ECHR would change little to their national orders since the ECHR rights merely codified what was already law: each of them claimed already to be protecting all the relevant rights. Secondly, this very position – however mistaken it turned out to be – did not take away the reason for becoming a party to the ECHR. To the contrary, the protection of citizens' rights and freedoms was considered so important that states were willing to commit themselves internationally to their observance, followed by an equal commitment unconditionally to submit their compliance to that international commitment to the supervision of an external, international judicial body. It is here, in the external anchoring of the EU to the values of protection fundamental rights and freedoms and submitting itself to the

supervision of the ECtHR, that the very meaning and great importance of the EU accession is to be found. By acceding to the ECHR, the EU makes clear to the non-EU members of the Council of Europe that it commits itself to the values enshrined in the ECHR as enforceable rights, under the external supervision of the ECtHR. This is the prime commitment. Some of this may seem to have been lost in the result of the accession agreement, but not the main idea of an eventual external anchoring of the most fundamental of constitutional values.

It is true that there are many blemishes in the process of the negotiation of the accession, of which we summed up some important ones. We have to be aware, though, of the redeeming effect of history and of practice in the course of time. The German constitution was born under circumstances that many German constitutional scholars found falling short of a true constitutive act of an authentic *pouvoir constituant*. Yet, the very constitutional practice under the *Grundgesetz* provided it retroactively with most of the legitimacy it was initially feared to lack.

So yes, accession to the ECHR is, after all, a good thing.

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[1] Art. 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

[2] Art. 59(2) ECHR: '2. The European Union may accede to this Convention.'

[3] *Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, section 8, p. 4.

[4] Art. 3(6) Draft Accession Agreement: '6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.'

[5] The other sections of Art. 3 Draft Accession Agreement.



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