

Meeting EU "Standards" for Accession?

Alpha Abdikeeva

The candidate countries for EU accession are required to meet "European standards" of human and minority rights protection. This ostensibly reasonable and rightful requirement, however, begs the question: *what* standards? Anyone minimally familiar with EU law is aware that no clear and coherent - let alone binding - standards of either human rights or minority protection are to be found in the European Union.

Much has been said and written about the unfortunate omission of fundamental rights protection from original Community legislation. [1] Even more attention has focused on the role of the European Court of Justice (ECJ) in "curing" this deficiency. [2] It is assumed that the accession countries must meet high human rights standards to join the Union. But is this really so?

Judicial "standards"

All rhetoric notwithstanding, Community institutions have functioned and, after decades of existence, continue operating without proper legal basis or standards for human or minority rights protection. Instead of duly fixing the yawning legislative gap and articulating clear standards, Community institutions have long been arduously struggling to read fundamental rights into Community law as *economic integration objectives*. It is worth recalling instances of ECJ reasoning, whereby freedom of expression is judged necessary in order to advertise goods and services; [3] criminal justice and abortion are "services"; [4] a person's name is a trademark; [5] "home" is an undertaking; [6] living with a family enhances integration; [7] and refugees and women ought to be protected because they are workers. [8] Is this genuine protection of human rights?

If one is able to forget what human rights are really about - and is willing to accept that humans are "tools of integration" or a "factor of production" and hence warrant protection - then this "standard" of protection might seem adequate.

But what if not? What if fundamental rights serve no overarching public interest, such as fostering European integration? What if fundamental rights are too costly, and their uneconomical enforcement might hurt the fledgling and struggling Euro by eroding strict fiscal discipline? Would protection of fundamental rights in the EU be slashed? This seems to be a logical - if perhaps unfair - conclusion on the basis of such reasoning.

However, there can be no other tenable reasoning on the basis of existing EU law. Promoting integration remains the only available "standard" for judicial protection of human rights in the European Union. What lessons are to be learned from this?

The European "Constitution"?

Present-day EU law has only slightly improved from original Community law, where fundamental rights simply would not fit in the legal texts, and were more rhetorical, than binding, norms. [9] True, at least the 1997 Treaty of Amsterdam amending the Treaty of Maastricht establishing the European Union has incorporated fundamental human rights protection into primary law (Article 6). But *which* rights, exactly? Where are they listed? Who are the beneficiaries of those rights: all human beings or only those with "correct" origin? [10] How are beneficiaries made aware of their rights? Against whom are those rights enforceable and at which tribunal? These are not idle questions. The problem of rights visibility - or rather invisibility - in the EU successfully undermines even the best intentions to protect fundamental rights. [11] There is still no proper "European Constitution" or "European Bill of Rights". The much-awaited, promoted, and lobbied-for EU Charter of Human Rights, ostensibly intended to solve the problem of rights visibility in the EU, is disappointing. The list of rights painstakingly included in the Charter leaves much to be desired in terms of their quality and coherence. Minorities are

again not mentioned. Nor does the Charter have binding force, [12] leaving protection of fundamental rights in the EU where it was before: up in the air. Conversely, some other EU legal vehicles incrementally chip away from already meagre protection of specially vulnerable minority groups in the EU, such as refugees. [13] What does this teach accession candidates? Furthermore, remedies for rights violations in the EU were and remain illusory. There is no higher judge in the European Union than the ECJ, which is completely exempt from external review and lacks proper jurisdiction to hear human rights cases. [14] This would not pose a problem if the Court could at least be addressed directly by victims. However, EU legislation has effectively insulated the Court from individual petitions. [15] It is left entirely up to good will of national tribunals to determine whether or not to refer human rights cases to the ECJ. Member States are thus able to escape legal responsibility for alleged rights violations if these are caused by Community measures. EU institutions, in turn, are able to escape legal responsibility because Member States are not competent to review EU legislation. In addition, the EU - not being as such a party to any human rights treaties - evades providing redress for victims at international human rights fora. [16] Is such dodging a proper model of justice and human rights protection for accession candidates?

"Forgotten" minorities.

Minority protection, at present a *sine qua non* for accession, as outlined in the accession criteria, is altogether absent from EU law. The Member States have shown at best indifference, and at worst fierce opposition to elevating protection of their minorities to the level of integration objectives - or even fully recognising its relevance. A single, brief paragraph proposed to address minority rights in the EU was dropped from the initial draft of the EU Charter of Human Rights. Other EU initiatives generally do not go beyond words. For example, an EU initiative declaring an "anti-racism" year, failed to address the absence or incoherence of proper ethnic statistics, or to involve minorities in relevant projects. [17] Is this not a blatant manifestation of just how seriously minority rights are taken within the European Union?

Hopes are placed on the recently adopted EU Race Equality Directive (July 2000); however, the Directive can hardly compensate for serious legal lapses in primary law (Treaties). Ad hoc attempts to solve minority rights problems in secondary law prove insufficient, already because of inadequate basis in primary law and because secondary legislation (Regulations, Directives and Decisions) is inherently vulnerable to legal challenges. It is worth remembering that, in the past, such attempts by the Community consistently prompted the Member States to scrutinise and challenge their legal basis, or ultimately procrastinate and sabotage implementation. [18] What signal does this send to the accession candidates?

Reprehensible practices.

And what about practice of the EU Member States? Perhaps, those that have been jealously guarding their sovereignty regarding, *inter alia*, minorities could and would do a better job protecting minority rights than the European Union? This is very doubtful. It appears that pursuant to the "Copenhagen criteria" most of the current EU Member States would not have been eligible, were they to reapply for admission to the EU. Almost half of Member States have never ratified the minimum standard of minority protection, i.e. the Council of Europe's Framework Convention on the Protection of National Minorities, [19] while nevertheless requesting ratification from the accession candidates. Of those that have, many have entered reservations. [20] Is this good faith?

Some Member States patently deny the existence of minorities on their territory, while others categorise their minorities into first-, second-, and even third-class citizens. Moreover, some Member States practise and easily get away with treatment of minorities that would instantly disqualify from accession any candidate country, as has already happened to

Turkey. [21] Against this background even legitimate requirements put before accession candidates seem hypocritical. For instance, Hungary and the Czech Republic have been chastised for poor treatment of their Roma citizens. However, there has been no reaction to comparable accusations of poor treatment of Roma in Italy, Spain and Greece. The Baltic states are routinely reprimanded for harsh citizenship laws affecting political rights of the Russian-speaking population that arrived following annexation of the Baltics by the Soviet Union. However, Germany could for decades get away with denying citizenship to generations of guest-workers specifically invited into the country by the government. Romania has been encouraged to support the linguistic and cultural self-determination of the Hungarian minority. But France has no constitutional recognition of such rights - or indeed, of the legal concept of "minority". Furthermore, recent Amnesty International reports show a disturbing increase of maltreatment and torture in detention, particularly of suspected illegal aliens, in Germany, the UK, and Italy. How much worse can this get?

Such infamous practices of the EU Member States are by no means secret. But where are the EU sanctions against the Member States for on-going violations of their supposedly sacrosanct European "values and standards"?

Lessons?

Most of the questions posed above are periodically raised at the EU level, if to little avail. [22] Thus, a shy attempt to criticise Austria's veer towards xenophobia ended nowhere: the liberal vestige appears to be a fiction - there were neither developed procedures nor a discernible will to pursue this matter. [23] Further, members of the European Parliament have regularly queried the continuation of a "no standards" policy. [24] However, so far, absent consensus among the current Member States, questions alone cannot lead to the adoption of "European standards".

The "standards" remain only for those outside of the European Union, i.e. political criteria for accession to the EU. As some experts aptly put it, human rights and minority protection in the EU are essentially an export item. [25]

Returning to the original question of what "EU standards" of human and minority rights protection are to be met by the accession candidates, the answer appears truly disconcerting: there are none. If the European Union itself presently has any standards worth mentioning, they are double standards. Without immediate and meaningful measures to correct this situation the EU's example in human rights and minority protection risks being a bad one.

Footnotes

[1] See, for instance, G. Federico Mancini, *The Making of a Constitution for Europe* in 26 *Common Market Law Review* 596 (1989) who notes that the founding Treaties failed to "safeguard the fundamental rights of the individuals affected by its application".

[2] See, Joseph Weiler and Keith Lockart (1992), *'Taking Rights Seriously' Seriously* in 32 *Common Market Law Review* 57 (1995); Nanette Neuwahl and Alan Rosas, eds. *The European Union and Human Rights* 3 (Dordrecht, Kluwer International, 1995); Antonio Cassese, Catherine Lalumiere, Peter Leuprecht, Mary Robinson. *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000 / Agenda of the Comité des Sages and Final Project Report* 86 (Florence, EUI Press, 1998): "The ECJ deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter...".

[3] Case C-260/89, *Elleniki Radiophonia Tileorassi (ERT) AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

- [4] Case 186/87, *Ian Cowan v. Le Tresor Public* [1989] ECR 195; Case C-159/90, *Society for Protection of Unborn Children (SPUC) Ireland Ltd. v. Stephen Grogan and Others* [1991] ECR I-4685.
- [5] Case C-168/91, *Konstantinidis v. Stadt Altensteig Standesamt* [1993] ECR I-1991.
- [6] Case 374/87, *Orkem v. Commission of the European Communities* [1989] ECR 3283.
- [7] Case 59/85, *The State of Netherlands v. Ann Florence Reed* [1986] ECR 1283.
- [8] Case 149/77, *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena* [1978] ECR 1365. Also, *Joined Cases C-95/99 to C-98/99 and C-180/99*.
- [9] Some commentators speculate that human rights in the EC were no more than a vehicle of integration. See, Jason Jason Coppel and Aidan O'Neil, *European Court of Justice: Taking Rights Seriously?* in 29 *Common Market Law Review* 669-92 (1992).
- [10] Commentators note the omission from the Treaty of undertaking to protect rights "within a framework which fully respects the human rights of all, including non-citizens." See, Cassese et al. *Leading by Example* 104 (1998).
- [11] See, *Affirming Fundamental Rights in the European Union, Time to Act / Report of the Expert Group on Fundamental Rights* 9 (February 2000).
- [12] Article 51.2 states: "This Charter does not establish any new power or task of the Community or the Union, or modify powers or tasks defined by the Treaties".
- [13] The Schengen and Dublin Treaties significantly limit the right of refugees and asylum seekers to apply for asylum stipulated under established international law. If, for example, the Geneva Convention provides for the right to apply for asylum in any country, the Dublin Treaty considers all the Member States as "one" for the purposes of asylum application. In addition, the Schengen information sharing agreement raises concerns as to privacy and data protection, since now the Member States have full access to sensitive personal information, including but not limited to one's race, origin, and disability. See, Cassese, et al. *Leading by Example* (1998).
- [14] See, Andrew Duff. *The Treaty of Amsterdam: Text and Commentary* (1997) for a comprehensive critique of the reformed TEU.
- [15] *Ibid*.
- [16] Application 8030/77, *CFDT v. European Communities* [1978] DR 13, 231; Application 13539/88, *Dufay v. European Communities* [1989] DR 231. These cases involving rights violations of EC employees were turned down by the European Human Rights Court for lack of personal jurisdiction over the then EC. See, also, Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg* in Neuwahl and Rosas, eds. *The European Union and Human Rights* 248 (1995).
- [17] See, *Written Question E-0595/01*, 16 February 2001.
- [18] The fate of the adopted earlier secondary legislation may serve an ill omen for the new Race Directive. The Commission Decision on cultural integration of migrants has been challenged by several Member States and quashed by the ECJ as exceeding Commission's competence. The Council Regulation on social benefits for refugees has been challenged on similar grounds (*Joined Cases C-95/99 to C-98/99 and C-180/99* where Germany challenged the fact that the Regulation must also apply to refugees and stateless persons) and the Court's decision is still pending. The Council Directive on education in mother tongue for children of migrant workers, in the absence of an open legal challenge, has not been properly transposed by the Member States.
- [19] France, Belgium, Portugal, Greece, Luxembourg still have not ratified to the Framework Convention as of the date of submitting this article. See, the website of the Council of Europe, <http://www.coe.int/> for the list of ratifications and reservations. Last accessed 26 July 2001.



[20] Thus Germany only recognises the Danish, Sorbian, Frisian and Roma minorities; Denmark only recognises a German minority and only in a part of its territory (sic!). See, *ibid*.

[21] Accession negotiations with Turkey have been suspended on the account of the latter's poor human rights record (particularly as regards its treatment of the Kurdish minority). Cyprus also has been forewarned that its less than perfect human record may have negative repercussions for accession progress. See, Cassese et al., *Leading by Example* (1998).

[22] Experts note that "it would seem difficult for the Union, either as a matter of fairness or logical consistency, to be imposing requirements on applicant states to meet a level of Community *acquis* which has yet to be fully met [in the EU]". See, Cassese et al. *Leading by Example* 53 (1998).

[23] See, Written Questions E-2912/00 of 20 September 2000 and P-0644/00 of 25 February 2000.

[24] See, the website of European Parliament <http://europarl.eu.int/> for more questions accompanied by answers. Last accessed 26 July 2001.

[25] Cassese et. al. *Leading by Example* (1998).