Fundamental rights

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Publication date
2015
Document Version
Final published version
Published in
Britain's future in Europe: reform, renegotiation, repatriation or secession?

Britain's Future in Europe

Reform, renegotiation, repatriation or secession?

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Rowman and Littlefield International, London

Published by Rowman & Littlefield International, Ltd.
Unit A, Whitacre Mews, 26-34 Stannary Street, London SE11 4AB
www.rowmaninternational.com

Rowman & Littlefield International Ltd. is an affiliate of Rowman & Littlefield
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706, USA
With additional offices in Boulder, New York, Toronto (Canada), and Plymouth (UK)
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British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-78348-372-3

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

Printed in the United States of America

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4.1 Fundamental rights[*]

The 1993 Treaty of Maastricht codified standing case law developed by the EU's Luxembourg-based European Court of Justice (CJEU) in previous decades, stating in Article F that: "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 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".[18]

The Review on fundamental rights soberly presents a state of play on a topic that has become highly contentious in the political debate. The Review does not concern any specific EU competence on individual rights, since the treaties do not confer express competence on the EU to adopt legislation or to take specific action in this field. Instead, it addresses the EU's overarching competence on fundamental rights. The most important feature of this competence is the obligation resting on the shoulders of the EU, i.e.

[*] Section contributed by Steven Blockmans.

[18] To be clear on the 'abc' of the complicated institutional set up, the European Union's Court of Justice CJEU is quite separate from the Strasbourg-based European Court of Human Rights (ECtHR), which is part of the Council of Europe. The Strasbourg Court guards and implements the European Convention for Human Rights (ECHR), which also, however, figures in the jurisprudence of the EU, as the above quote shows, and this text further explains below.

its institutions *and* the member states in their role as agents of the Union, to respect fundamental rights, which are recognised by the CJEU as general principles of EU law, and reaffirmed in the Charter of Fundamental Rights of the EU.

The Review sets out how the EU legal order protected the fundamental rights of individuals long before the Charter was first proclaimed. The UK government's position is that the Charter did not alter the legal effect (meaning and scope) of fundamental rights in EU law: "they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretations. Both the Charter and the general principles of EU law are part of the EU's primary law. The courts can therefore refer to the Charter and the general principles interchangeably when applying fundamental rights to EU institutions and member states" (p. 34). This view is largely reflected in the evidence.

The most contentious issue discussed in the Review concerns the question of whether Protocol 30 to the Lisbon Treaty (on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom) presents an opt-out of the Charter. The Review states that "the Protocol is not, and never has been, an opt-out for the UK from the application of the Charter" (p.25). While it only applies to the UK and Poland (the Czech Republic having rescinded its initial inclusion under the Protocol) its purpose is rather to clarify, in legally binding terms, how the Charter applies to the EU institutions and member states. The UK government's position is that the Charter reaffirms the rights, freedoms and principles recognised in EU law, but does not create new rights or principles. This view is almost unanimously supported in the evidence and is consistent with the preamble to the Charter itself.

Chapter 4 of the Review is of most interest as it summarises the wide range of evidence submitted on the impact on the UK of the EU's competence on fundamental rights, in the following terms. "Beyond recognition that when [EU institutions and member states (within the scope of EU law)] act they should do so consistently with some form of human rights protection, [the evidence shows] little consensus on what constitutes the UK interest in this context. Views on whether the EU's competence on fundamental rights is being exercised consistently with the interests of the UK vary depending on

perspectives on the role of supranational human rights mechanisms and national sovereignty" (p.45).

This is particularly evident in the widely differing assessments of how the CJEU exercises its jurisdiction in high-profile cases, with the following formulations quoted in the report: from "naked grab of territory by the [CJEU]" to "there is little or no evidence of competence creep", and "the protection afforded to citizens' fundamental rights by the CJEU is insufficient when balanced against the rights enjoyed by business under EU law" (p.48).

Whereas EU law contains a wider array of rights than those protected under the UK's 1998 Human Rights Act or the 1950 Convention (ECHR), the evidence presented in the report indicates that EU fundamental rights have so far had a limited impact on domestic case law. Yet, respondents from civil society, academia and the legal profession have suggested that the EU guarantees that could offer a greater standard of protection are the right to a fair hearing (especially in the sphere of immigration and asylum) and the prohibition on discrimination.

An inherent problem with the multi-layered order of fundamental rights protection is that this partially overlapping system compromises legal certainty. Moreover, the complexity of the system means that enforcing fundamental rights is expensive for both litigants and the public purse. The evidence collected in the report nevertheless indicates a high degree of consistency between the level of protection afforded by EU fundamental rights and that afforded by the Convention. In part this is due to the CJEU following the jurisprudence of the Strasbourg Court.

As a founding member of the Council of Europe, the UK was one of the first to sign the Convention and it has been an ardent supporter of the Strasbourg-based court for decades. However, in recent years, a number of deeply unpopular judgments have sparked complaints against the overall binding nature of ECtHR judgments on British law, notably declaring illegal the ban on prisoners in jail from voting in elections, and the barring the deportation of alleged al-Qaeda terrorist Abu Qatada (who was repeatedly imprisoned but never prosecuted for any crime). With the rise of UKIP and anti-immigration sentiment, a storm has been

brewing over 'European' oversight of the UK's human rights track record.

Subsequent to the publication of the Review, an eight-page strategy paper of the Conservative Party (i.e. not the government) was published in October 2014 entitled "Protecting Human Rights in the UK", in relation to which Justice Secretary Chris Grayling of the Conservatives stated: "We can no longer tolerate this mission creep. What we have effectively got is a legal blank cheque, where the court can go where it chooses to go. We will put in place a provision that will say that the rulings of Strasbourg will not have legal effect in the UK without the consent of parliament. Effectively, what we are doing is turning Strasbourg into an advisory body."[19]

Grayling added that a new Conservative government (i.e. without the coalition with the Liberal Democrats) would withdraw from the ECHR if Parliament failed to secure the right to veto judgments from the ECtHR. Prime Minister Cameron had summarised the policy at a party conference in Birmingham in September 2014: "Let me put this very clearly: we do not require instruction on this from judges in Strasbourg."

Arguments about the alleged undue influence of the Court on national matters may be put into perspective with some statistics from the Strasbourg court. Between 1959 and 2013, the number of judgments involving the UK totalled 499 judgments, of which only 3% were found against the British government. By comparison, France has had 913 cases, Russia 1,475 (since 1996), Italy 2,268, and Turkey 2,994. The number of cases found against the UK is both quite small and arguably of secondary gravity compared to the many arising in Russia or Turkey. However, the collateral damage done to the ECtHR by the UK's withdrawal could be of major importance, with Russia and others exploiting the precedent.

Assessment

The evidence gathered by this Review shows that there is broad consensus that respect for human rights is in the national interest of the UK, which in 2015 proudly celebrates the 800th anniversary of the Magna Carta. As much as the EU fundamental rights system has

[19] www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document

been deemed beneficial to all sectors in the UK because it keeps the EU in check, so too is the ECtHR's primary function to provide external (independent, impartial and expert) scrutiny to prevent any member state from acting or mandating to act in a manner that is inconsistent with 21st century levels of human rights protection in Europe.

Conservative Party threats to withdraw from the Convention and ECHR are, in our view, a populist overreaction to a handful of adverse rulings from the Strasbourg Court and would be a major reversal of the human rights cause in Europe as a whole. The idea that the status of the Court's judgments could be reduced to advice for the British parliament has no chance of general acceptance by the member states in the Council of Europe.

Withdrawal from the Convention would link into the debate about Britain's possible exit from the EU. After all, respect for the rights and freedoms as guaranteed by the ECHR, as part of the general principles of EU law, is one of the pre-conditions for EU membership. Domestic protection of rights and freedoms under a new British Bill of Rights and Responsibilities might be less than under the Convention, and thus raise the question whether it was good enough to continue to satisfy EU membership criteria.

In other words, while the Conservative Party's target is mainly the ECtHR in Strasbourg, secession from the Convention there could have highly complicated and damaging impacts on the UK's relations with the EU, as well as undermining the general human rights system in Europe as a whole.

Postscript. The Lisbon Treaty sought to clarify the relationship between the EU and the Strasbourg Court by deciding in Article 6 TEU that: "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". Negotiations between the EU and the Council of Europe were therefore undertaken, and a draft agreement was drawn up. Subsequent to publication of this Review, however, in December 2014 the CJEU declared this draft agreement to be incompatible with EU law on a number of grounds (Opinion 2/13). This leads into

complex legal arguments that have been analysed elsewhere.[20] Suffice here to observe that the draft agreement is now at least put on hold, possibly indefinitely.

The evidence at a glance – fundamental rights

UK a strong supporter of human rights, going back to the Magna Carta
EU law links to Council of Europe's Convention and Court
A few Strasbourg judgments against UK prompts Tory ire
Secession from Strasbourg would spill over into EU competence
It would also damage the human rights system in wider Europe

[20] Adam Łazowski and Ramses A. Wessel, "The European Court of Justice blocks the EU's accession to the ECHR3", CEPS Commentary, 8 January 2015.