The European Fundamental Rights' Protection System: The General Protection System - and the Specific Problem of the European Union Accession to the European Convention on Human Rights (The Lisbon Treaty and its Follow Up)

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A foreword

First of all, I would like to express two feelings. The first one is a feeling of gratitude for having been invited to Japan in order to deliver lectures. I am very grateful towards the Faculty of Law of Ritsumeikan University, and particularly to Professor Masahisa Deguchi, who has conceived and organised my visit. My second feeling is pride. Indeed, I am proud to address this international and learned audience, with participants from Asian and European countries, and to give the so-called keynote speech. I measure this honor and shall do my best to be worth of it.

I add an observation. I am convinced that international comparisons, especially in the field of human rights, are extremely useful. World globalization is not only economic and commercial. It is also, and should be, legal and judicial. That is why I am glad to participate to this seminar.

My speech, after a short historical introduction, will be divided into three parts:

First, I shall give a general, wide description of the European system or systems of protection of fundamental rights.

Secondly I'll deal with the specific issue of the accession of the European Union to the European Convention on Human rights.

Thirdly and finally I would like to look forward to the European future, from the legal and political points of view.

Introduction:

For historical reasons, there are two main different Europe, as regards organization and also fundamental rights.

Since the beginning of the years 1950, two different legal and political European

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systems have been created and have developed:

On one hand, the “big” Europe : it started with the adoption of the Status of the Council of Europe, signed in London in May 1949, gathering at the beginning 10 States, with its seat in Strasbourg, France. It was having the long-term ambition to cover the whole European continent; the objective of the creation of the Council was rather political. The aim was to reunify the continent, which had been profoundly divided during the First and the Second World Wars, with as a consequence millions of dead and injured persons and huge material destructions. The main mottos were peace, the rule of law, and human rights.

However, due to the climate of the then Cold War, the Soviet Union, as well as the Eastern and Central European States, which were generally under the Moscow influence, decided not to join the system. It will not be before the fall of the Berlin Wall (November 1989) and the disappearance of the Soviet Union (at the end of 1991) that all those States progressively entered the Council of Europe, with the support of the traditional member countries of the organization.

On the other hand, it exists a “smaller” Europe: it started with the Paris Treaty in 1951, establishing the European coal and steel community (CECA), and gathering at the time just six States (Belgium, Germany, France, Italy, Luxembourg and the Netherlands, but not the United Kingdom, which joined in 1972 only), with its seat in Brussels, and the ambition to create a unified market, first by a coal and steel “pool», then later on, in the middle run, enlarging itself to the whole economy. The first and main objective was clearly economical, but not without a political hidden agenda, namely to foster the reconciliation of countries through economy, and economic integration. The CECA was followed and accompanied by the Common Market (set up by the Treaty of Rome in March 1957), and they eventually became the European Communities.

To be complete, three countries, not members of the European Union (but of the Council of Europe) compose another set, namely the European Free Trade Area or EFTA. They are Norway, Iceland and Liechtenstein. They themselves have a Court, the EFTA Court of Justice, also located in Luxemburg. With all respect, it plays a marginal role, due to the small number of cases it has to adjudicate, and to the fact that it inspires itself narrowly of the ECJ case-law. Therefore I’ll not insist on the EFTA Court.

Both main systems have gone on and grown up, parallely, without formal connections between themselves. To give you just an example, the European Parliament, an E.U. important organ, sits in Strasbourg, but without any real link with the Council of Europe.

The common feature of the history of the two main organizations has been a continuous geographical enlargement.

Currently, the first and eldest system is still based on the Council of Europe, but its member States are now 47 (instead of 10), covering practically all Europe, including countries such as the Russian Federation, some ex-members of the former Soviet Union,

the Eastern and Central European States and Turkey, whilst the second system has changed its name. Its title is now the European Union (E.U.), with, instead of six, gathers 28 member States, now potentially 27, since the referendum in the UK in June 2016 gave a majority to the so-called Brexit, i.e. the decision to leave the European Union. As one knows, the concrete consequences of the Brexit are still subject to a negotiation process. All the 27 countries are also members of the Council of Europe, but 20 States of the latter are not members of the E.U. Those 20 include the Russian Federation, Turkey, Ukraine, Norway, Switzerland…and some other States, including of course the UK i

Later on I will add a few sentences about the Brexit.

I. The global protection of fundamental rights in Europe

1. The necessity to protect rights and freedoms in Europe appeared since the beginning as a priority of the young Council of Europe. The adoption by the United Nations, as early as in December 1948, of the Universal Declaration of Human rights, an extremely important instrument – even if with no legal binding effect – has obviously had a strong influence over the young Council of Europe organization. The idea was indeed to adopt at a regional level a system of protection inspired by the world-wide Declaration and it started with the European continent. Let me recall that a man, René Cassin, was one of the main darters of the Universal Declaration, before becoming in 1959 the First French judge, and in 1965 the first French President of the European Court of Human rights. In 1968, Cassin was granted the Nobel Prize for Peace, and in the following year he created the International Institute of Human Rights, a training and research institution, which I am the President of.

In fact, a treaty was rapidly drafted within the Council of Europe, and signed in November, 1950, namely the Convention for the protection of human rights and fundamental freedoms, more commonly titled the European Convention on Human rights (hereinafter "the Convention"). It was the first instrument elaborated within the Council of Europe. At the material time, two States, the United Kingdom and France, took an especially active part in the drafting of the Convention.

In the following decades, other regional and subregional instruments were adopted, n America, Africa, the Arab World or south-East Asia.

The European Convention, as an international treaty, has a double character and content. It is both a catalog of rights, principally civil and economic rights, which the States parties to the Convention undertake to guarantee to the persons within their jurisdiction, and a judicial, binding mechanism. This one has changed several times in its organization since its setting up. The changes have been brought by the means of several amendments to the Convention (14 in force), adopted by the member States.

Fundamentally, the mechanism is now consisting of a supranational tribunal, the Euro-

pean Court of Human rights ("the ECHR"), created by the Convention itself, which is unique and permanent. It is located in Strasbourg, with 47 States (or High contracting parties), and 47 Judges. The judges, working full-time and residing in Strasbourg, are appointed according a complex mechanism. Each member country submits a list of three candidates, men and women, to the Parliamentary Assembly of the Council of Europe, which after having heard the candidates, elects one out of the three by secret ballot, for a term which is presently a 9-year, non- renewable term.

Two main other Council of Europe organs take a part in this system of protection: the Parliamentary Assembly, which elects the Judges, and also adopts important soft law instruments, and the Committee of Ministers, which supervises the execution of the Court's judgments; without forgetting the Secretary General of the Council. According to the Convention, the persons living in Europe have a right of individual petition before the Court, against each and every of the 47 States. Some inter-State cases also exist; they are very few; however they are of an outstanding importance, legally and politically. But the normal procedure is the right of individual petition, or application. The States always constitute the defending party. The judgments of the Strasbourg Court are obligatory and legally binding. The number of cases has enormously increased with the lapse of time. In the current years, more than 50,000 new applications are sent each year to the Registry; but a large majority of them are rejected by the court as inadmissible, for various legal reasons.

2. At the level of the European Union ("the E.U."), the initial idea was not at all to protect fundamental rights. And the Communities or E.U. treaties had no provisions specifically relevant as regards human rights.

Nonetheless, it is true that, since the first period, a judicial mechanism had been put into force, namely the Court of Justice, located in Luxembourg, currently called the European Court of Justice, or ECJ (with 28 Judges and 11 advocate generals). The judges and Advocate Generals are directly appointed by the member countries.

Another court, the Tribunal of the E.U., is subordinate to the E.C., with a specific jurisdiction. It is composed of 44 Judges, with no Advocate Generals. Until 2016, there was also a Tribunal of the Civil service of the E.U. But it disappeared last year; its competences were then transferred to the Tribunal.

In reality, the original and still principal task of the ECJ has been to protect the law of the E.U., and to harmonize the economic, social and commercial regulation of the Common market. This is mainly achieved through the procedure called preliminary ruling: whenever a piece of European legislation is challenged or must be interpreted during the process of a trial before a national court, because this has an influence on the outcome of the litigation, the domestic judges may (and in some cases have to) send the question in debate to the ECJ, which settles the question and refers it back to the domestic court (which is bound by the ECJ's answer).

Progressively, since the beginning of the 70ies, the case-law of the ECJ has intro-

duced and developed the idea that it had to protect some fundamental legal principles of the E.U., including the protection of human rights, which belong to the common constitutional traditions of its member States or to the human rights treaties to which they are parties, including (mainly) the European Convention on Human rights itself and its case-law. This is facilitated by the fact that each Member State, individually, is also a member party to the Convention.

Moreover, the European legislation, as it is produced by the E.U. treaties and their bodies (the Council, the European Parliament, and the European Commission) has extended its scope, no longer merely to economic and financial matters, but also to political, new fields, such as security, justice, asylum right, immigration rights etc. The result is that more and more fundamental rights may be breached by the decisions made by the E.U., obliging the ECJ. to more apply the fundamental legal principles.

II. The problem of a unique or at least unified European protection of fundamental rights

Both courts, the ECJ and the ECHR, have made efforts to make their respective case-laws converge, when interpreting the Convention and/or the "fundamental legal principles" of the E.U. This is not at all a formal obligation, rather a wise way of avoiding contradictions and better protecting the rights and freedoms of the European citizens, at least of the ones living in the 28 (or 27 after the Brexit vote) States belonging to both the E.U. and the Council of Europe. This is achieved by the watch and knowledge of their respective case-laws, and by a deliberate intention, and in most of the cases convergence does exist (but not always).

Nevertheless, in order to strengthen and unify (or at least more formally harmonize) the protection, three avenues have been explored in the last twenty years:

1. The first attempt of having the **European Communities becoming a high contracting party to the Convention**

This attempt, probably premature, did fail. Actually, the Commission and the Council, in 1994, requested the opinion of the Court of Justice in Luxembourg about the legal feasibility of such an important political and legal move. However, in March 1996, the opinion provided by that Court resulted as negative. Its legal reasoning was based on the fact that the then Communities had no competence, under international law and their own status, to become a party to an international treaty such as the Convention.

2. The European Charter of fundamental rights ("the Charter")

This new instrument was drafted at the end of the 1990ies, within the E.U. The objective was to adopt a new catalog of fundamental rights, applicable to the E.U. coun-

tries and inside the E.U. organs, It is more or less similar in its content to the Convention, but a little wider (for instance, by the inclusion in the text of some social rights, not explicitly guaranteed under the Convention- they are protected under another Council of Europe instrument, the European social Charter, signed in 1961); and also more modern (for instance, by the introduction of some "new" rights, such as the rights in relation with Information technology or new technologies at large, or bioethics). Obviously, the 1950 Convention could not foresee technological or societal changes due to take piece fifty years after. The Charter was signed and proclaimed in December, 2000 at the European Summit in Nice, but without any legal binding effect at that time. Anyway it started to influence both the European Union and the Strasbourg court itself (by example in the case of trans-sexuals: *Christine Goodwin and others v.UK,* 2002).

3. The Lisbon Treaty

It is also a treaty of the E.U, the most recent for the time being. It was drafted in the years 2008-2009, after the failure in 2005 of the draft European Constitutional Treaty, and it entered into force on 1 December 2009.

It has had, in the field of human rights hereto concerned, two major effects: first, it gives a legal binding force to the Charter; and secondly it provides for the adhesion or accession of the E.U. to the Convention (the text of its Article 7 seems very clear "The Union shall accede to the European Convention on Human rights "). It is really an obligation.

Why is it so? What is the rationale of the accession?

To strengthen the protection of all European citizens, to avoid any contradiction when interpreting the Charter and the Convention – two instruments that are close, but different, - finally in order to get a unique, harmonized interpretation of Human rights in Europe. This was already the scope of the project in 1994-1996; the lack of competence founding the 1996 opinion is no longer an obstacle, due to the ulterior changes in the European treaties.

It has to be reminded that, without a formal accession of the E.U., as such, to the Convention, any petition against the Union or its organs before the Strasbourg Court is rejected as inadmissible *ratione personae* under international law, especially under the Vienna Convention on the law of treaties. Even, if an individual challenges before the Strasbourg Court a decision of a State party to the Convention, and if this decision has been made following a compulsory ruling of the E.U., the application is in principle ill-founded. This has been ruled out several times by the ECHR case-law, by example in the famous judgment of 2005, *Bosphorus v. Ireland*, and recalled, a contrario, in a judgment of 2012, *Michaud v. France*. However, the legal reasoning of the Court in Strasbourg is based on a presumption of "equivalent protection" under the E.U. legal system, a presumption which is rebuttable and can be rebutted in some concrete circumstances, due to a manifest lack or insufficiency of protection.

Unfortunately, the accession process- supposedly transforming the E.U. in a 48th high contracting party to the Convention – has started slowly, and eventually was stopped.

After lengthy negotiations following the entry into force of the Lisbon Treaty, a draft agreement between the Council of Europe and the E.U. was finally signed in April 2013 (more than three years after the entry into force of the Lisbon Treaty) in order to make the accession effective; but it had to be submitted for legal advice to the ECJ. And in December 2014 the ECJ, by its advisory opinion, raised several objections to the draft agreement and finally gave a negative advice to the acceptance of it, and to the accession itself. It is a somewhat surprising outcome, notably because the conclusions on the case of the ECJ's Advocate General, Ms Julian Kokott (German), expressed in June 2014, were in favor of a positive answer of the Court (with some reservations). Admittedly, an Advocate General's opinion is not binding, but is usually very influential.

III. The possible prospect

For the time being at least, the accession process of the E.U. to the Convention seems blocked. Admittedly, it's possible to imagine in the future another, revised agreement, able to overcome the ECJ Judges' objections (which are perhaps more psychological than purely legal…).But Europe is facing a period of doubt and skepticism, and the accession , despite the clear provisions of the Lisbon Treaty, seems not any more a priority for European leaders and decision-makers.

Some member States of the ECHR. or their supreme courts are rather critical, or even hostile, towards certain judgments of the ECHR. To give you just an example, by the *Hirst v. UK* judgment of 2005, several times confirmed by the Court, for instance by *Scoppola v. Italy* (2009), the Court considered as a violation of the Convention, not any prohibition of the right of vote of detainees, but a blanket (i.e.) an absolute prohibition of this right. Still U.K. and other States such as Russia want to maintain an absolute prohibition.

What is worse is that some countries which dislike a judgment of the Court contrary to an Act of their Parliament, or to a decision of a superior national court, despite the efforts of the Committee of Ministers of the Council of Europe, refuse to abide by the judgment and to execute it, which is discouraging, and could have a contagious effect towards other States.

Insofar as the ECJ is concerned, the problem exists much less. The main reason is that the most frequent way of making recourse to Luxembourg, as already said, is that a national judge sends a request for preliminary ruling. Logically, this judge will eventually follow the ECJ's opinion.

Is the current situation a desperate one? Not completely.

As regards the relationship between the ECHR and the ECJ, both Courts are still striving to avoid the worst risks of contradiction between themselves.

Moreover, it would be possible to the ECHR to exert a stricter judicial review over the decisions made by the organs of the E.U. Notions like equivalent protection, rebuttable presumption or manifestly insufficient protection are flexible and depend on Strasbourg Court's own appreciation.

Furthermore, as a follow up of the Brighton conference on the future of the ECHR, which took place in 2012, two new Protocols to the Convention, n° 15 and n° 16, were signed. They are not yet in force, but they contain interesting reforms. Among other provisions, the former decides the introduction of the Preamble to the convention of the principles of subsidiarity and of the national margin of appreciation, thus reminding the Court about its judicial obligations. And the latter creates an optional mechanism, somehow analogous to the preliminary ruling, enabling the superior domestic courts to send a request for advisory opinion to the ECHR, not binding but very influential; the aim is double : to prevent useless ill-founded applications to Strasbourg, and to harmonize the case-law in the States parties to the Convention.

As regards now the relations between States and the two courts, judicial diplomacy – a term which I was a user of when President of the ECHR- is more necessary. Misunderstandings maybe, and have often been, avoided by establishing a dialog with the national stakeholders (the courts and the political bodies).

However, the situation generated at the level of the E.U. by the *Brexit* decision is very worrying. With the only exception of Greece, that left the Council of Europe between 1967 and 1974, during the dictatorship of the Colonels, no State has abandoned the Council or the E.U. in the past. The British popular decision, which reflects a deep distrust of the people towards the European institutions (but also perhaps towards the elites), might inspire other nations, and will anyway not facilitate the protection of fundamental rights at European level. There are two main dangers: within the E.U., the risk is to have other countries, in particular those having joined the organization more recently, drawing argument from the Brexit to decide to do the same, through a referendum or not. Within the Council of Europe, the risk is that countries often condemned by the Strasbourg Court (such as Turkey or Russia) decide to apply a "leave" decision to the Council. I simply mention that the risks may even be double. For instance, a reestablishment of the death penalty in Turkey should lead to a frontal conflict with both the E.U., to prevent Turkey's accession, and the Council of Europe, to expose Turkey to a possible exclusion.

As a **conclusion**, I should say that it is very desirable that in the middle term, on one hand the Lisbon Treaty be finally implemented, which means the accession of the European Union to the Convention; and on the other hand the legal/political construction of Europe be resumed.

The main obstacles are not technical, but political. For instance the development of the plague of *terrorism* has spread over the continent fear, the need for safety more than for freedom, and a general spirit of nationalism and populism. It is of course the duty of

the States to protect their populations and to fight against terrorism, which constitutes a terrible violation of human rights; but one of the traps of the terrorists consists of obliging the States to put aside the usual tools of democratic societies and make recourse to exceptional ways of action. This is dangerous, and requires wide changes and a profound reflexion in Europe and in the whole World.

Thank you very much for your attention.

Jean-Paul Costa, 9 January 2017