

LESSONS FROM EUROPE: THE 50TH ANNIVERSARY OF THE TREATY OF ROME

A COMPARATIVE LAW SPECIAL ISSUE OF LEGALDATE THE EVOLUTION OF THE EUROPEAN UNION: A NEW SUPRANATIONAL LEGAL AND POLITICAL ORDER

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'... the community constitutes a new legal order in international law, for whose benefit the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals'

Van Gend en Loos (case 26/62) [1963] ECR I, para 12.

THE EUROPEAN UNION (EU) AT 50: FROM ECONOMIC TO POLITICAL UNION¹

European cities have witnessed the signing of many treaties over the centuries: the Treaty of Westphalia that concluded the Thirty Years War in 1648; the Treaty of Vienna that concluded the Napoleonic Wars in 1815 and the treaties signed in the old palaces around Paris that ended the Great War in 1919 and 1920. But the treaty that was signed in Rome on 25 March 1957 by France, Italy, West Germany, Belgium, the Netherlands and Luxembourg was different in one significant way. This treaty did not bring a conflict to an end, but instead opened up a new era of economic co-operation designed to promote social and political stability. This treaty built on the success of the European Coal and Steel Community (ECSC), created in 1952 to integrate key industries of France and West Germany, as well as those of Italy, the Netherlands, Belgium and Luxembourg. The statesmen gathered in Rome did two things: they established a free trade area or customs union between six European states called the European Economic Community (EEC) and it created the European Atomic Agency (Euratom). Of these new European institutions, it was the EEC that proved to be the really enduring success story.

The Treaty of Rome also established some of the key *supranational*² institutions (i.e. institutions operating above the level of the member states) of the EEC, turning the High Authority of the European Coal and Steel Community into the European Commission and establishing the Court of Justice (ECJ) to adjudicate and determine legal matters.

Following a period of stagnation throughout most of the 1970s, the 1980s witnessed considerable developments in the process of European integration. The first direct elections to the European Parliament were held in 1979. Between 1981 and 1986, the accession of the formerly fascist countries of Greece, Spain and Portugal expanded membership of the European club to twelve; the United Kingdom, Ireland and Denmark having joined in 1973. *The Single European Act 1985* gave the European project a further kick-start, alongside the development of a *people's Europe* aimed at giving Europeans social rights in relation to worker's rights and mobility.

Another milestone in the constitutional history of the EU was the Treaty on European Union (also known as the Maastricht Treaty), signed in 1992. This Treaty, which re-labeled the EEC and Euratom as the European Community (EC), included the contentious objective of promoting ever closer union. The prospect of political union suggested that the goal of European integration was the creation of a European super-state or a federal state of Europe. This was too much for some politicians and members of the public. So while expanding the supranational competencies of the EU to legislate in many new fields, it also contained some significant political brakes, including the *principle of subsidiarity*. This concept was designed to limit or constrain centralising tendencies of EU regulation.

STUDENT ACTIVITIES

1. List three key impacts of the Treaty of Rome. In what way did this treaty differ from many earlier European treaties?
2. Outline the main provisions of the Maastricht Treaty.
3. Explain the meaning of the statement 'principle of subsidiarity'.
4. Compile a time line showing the main dates and events in the development of the European Union.

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Subsidiarity promotes action as closely as possible to the citizen. It provides that the community should not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level.

Legal integration is one of the oldest features of the EU. Accession to the EU involves the weighty obligation to incorporate the body of EU law, called the *acquis communautaire*, into the national legal order. This translates into the adoption of thousands of *regulations, decisions* and *directives* (the latter are framework laws promoting legal harmonisation across member states). One of the effects of subsidiarity is that directives rather than regulations have become the norm for legislative development: while directives are binding in terms of objectives, they allow member states scope for local variation consistent with national legal traditions and practices.

A feature of EU law, distinctive from other legal systems established under international treaties, is that EU law may be directly effective in member states without further implementation under national law. The *doctrine of direct effect* was established by the European Court of Justice (ECJ) in the 1960s, which made treaty articles, regulations and directives potentially binding in member states without further implementation.ⁱⁱⁱ

Even if the directive is not directly effective, the ECJ has imposed on national courts an indirect obligation to interpret domestic law in accordance with directives: *Von Colson* (14/83). This is also known as the *doctrine of indirect effect*. This instance of judicial activism established the ECJ and EU law as one of the most significant drivers of integration. Another important doctrine established by the ECJ was the *principle of supremacy*, under which national courts are under a duty to apply and give supremacy to EU law over conflicting national laws. Failure to implement or transpose community law can result in fines, and an obligation on member states to pay compensation to individuals harmed by the member states' failure to implement or transpose these laws correctly. The deficiencies in the treaty in relation to human rights protection and the role of the ECJ in protecting and implying fundamental rights within EU law is discussed in the article by Johannes Krebbs.

STUDENT ACTIVITIES

5. Explain the concept of 'legal integration'.
6. How does a directive differ from a regulation?
7. Explain the 'doctrine of direct effect'. How does this differ from the 'doctrine of indirect effect'?
8. What is the 'principle of supremacy'? What are the implications of this principle for EU member states?

While the EU shares some of the constitutional architecture of its constituent nation states—a parliament, an executive and judiciary, the EU is neither a federal entity, nor a nation-state, nor a country of its own. It has no single, directly elected president although it does have a range of national symbols including a flag and an anthem. The EU is a union of twenty-seven equal members, which has pooled and limited its sovereign powers to coordinate action in particular fields. Some of the initiatives for Europe-wide policies come from the European Commission, which operates as the

bureaucracy of the Union based in Brussels. Other initiatives come from the heads of state and government of all the member states, meeting about twice a year and known as the European Council. Other policies can come from the Council of Ministers, a ministerial-level version of the European Council.

A central pillar of the European Union, and the foundation treaty, has been the creation of a single market, which is built on the free movement of workers, goods, services and capital. It is this integration that has turned the EU into the world's largest free trade zone covering a population of 490 million people. Much of Europe's cheap flights and extensive telecommunications networks can be attributed to the breaking down of economic barriers over the past fifty years. But this has not been without controversy. The infamous common agricultural policy may have protected some of Europe's farmers, but at the same time it has been a hugely expensive and inefficient exercise. So while being a zone of free trade *internally*, the EU maintains strong *external* barriers, raising questions of fairness in the EU's trade with developed and developing world countries.

Although a large degree of consensus exists in Europe about the benefits of economic integration, the prospects for political integration are not so rosy. Some people in Europe are uneasy about the loss of sovereignty from national states to supranational, European institutions. The debate about the Maastricht Treaty in 1991–3 demonstrated this. Further projects for European integration have also met with scepticism. The issue of an EU Constitution has proved to be a significant challenge, with the French and Netherlands electorates rejecting the constitutional treaty, a vote widely viewed as a rejection of the speed and direction of the European project, but not of the EU itself. Having dismissed the notion of a European Constitution, the French and Netherlands electorates have caused a re-think on how to proceed with the deepening or strengthening of European integration. The widening of this integration is also a point of controversy, particularly the possible accession of Turkey to the European Union. The prospect of Turkey joining the EU not only raises questions about Turkey's economic and human rights record, but also the question about Europe's boundaries: is Turkey part of Europe anyway?

THE FUTURE

The EU is a regulatory juggernaut promoting high levels of coordination and harmonisation in a range of fields as diverse as consumer protection, gender discrimination and environmental regulation. The construction of a single market is a reality, with high degrees of labour mobility and free circulation of goods and services. Nevertheless, the role of the EU, and its relationship to the national sovereignty of member states, is still very much in flux. At the beginning of the 21st century, the project of European integration has over half a century of progress to its name. The EU is the most advanced form of supranational integration anywhere in the world. In this sense, from the ruins of the Second World War, Europe has risen to meet serious economic and political challenges, and although the project is far from over, the achievements to date have been remarkable.

STUDENT ACTIVITIES

9. In what ways does the EU differ from a single nation?
10. Explain the central pillar of the EU. What have been its strengths and weaknesses?
11. What factors make political integration so difficult?

EXTENSION TASK

12. In small groups, discuss the pros and cons of political integration for EU members. Report your conclusions to your class.

FURTHER READING

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NOTES

ⁱ The present-day European Union has had several name changes in its history, most notably the European Economic Community (EEC) 1957–88 and the European Community (EC), 1986–93. The European Community became part of the European Union when the Union was established by the Treaty of Maastricht in 1993.

ⁱⁱ For a glossary of technical terms relating to the European Union see www.europa.eu/scadplus/glosary/subsidiarity_en.thm

ⁱⁱⁱ *Van Gend en Loos* (case 26/62). Unlike Treaty Articles, and EC Regulations, Directives have only limited direct effect, applying only after the time limit for implementation has expired and bind only member States rather than individual citizens: *Marshall* (case 152/84).

EUROPEAN AND AUSTRALIAN WINE LAW

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Wine law is a developing area in Australia, where as in Europe, wine law is an ancient practice. Wine law has developed in different ways in different countries. Wine is part of a country's culture and how it is regulated often says a lot about a country's identity. The basis for regulating wine is considerable. It is necessary to inform consumers what they are getting. This advice consists of:

- health information, such as the amount of alcohol and any additives used
- character information, such as the area where the grapes were grown
- grape varieties used and year of production
- processes used to make the wine.

The great wine-making regions of France are particularly famous and France has developed a system of 'appellations d'origine contrôlée' (AOC) to identify these regions and to protect them from the use of these names for wines not sourced from these regions. Some other European countries have followed France's example and have established their own system of protected names.

Germany has taken a different approach to wine regulation with an emphasis on the sweetness of the wine, presence of other chemicals, and quality as assessed by expert tasting panels, as well as identifying grape variety and place where grown.

There are ongoing efforts to harmonise global wine law. There is the Organization de la vigne et du vin (Organization for the Vine and Wine) (OIV) in Paris which encourages this process. The European Union has various techniques for harmonising the laws of its twenty seven Member States across many areas, and the World Trade Organization (WTO) seeks to promote freer world trade by encouraging agreement on product descriptions. However, there is also the possibility of countries or groups of countries such as the EU negotiating agreements with other countries such as Australia.

Australia, as a new world country, initially adopted European names for its wines. After all, the wines were made by European migrants from European grape stock and these names and styles were already familiar to the makers and their markets. There were some early suggestions that Australia should adopt distinctively Australian names for its wines, but these were rejected.

Australia has produced some excellent wines for over 150 years, but only in the 1980s did European producers start to become concerned about the share, particularly of the British market, that Australian wines were getting. They resented the Australian use of traditional European names like 'champagne', 'claret', 'moselle', 'port' and 'sherry'. French wine organizations took legal action in Australia against use of terms such as 'beaujolais'. European wine producers then used the muscle of the European Union to pressure Australia to sign the EC-Australia Wine Agreement ('ECAWA') in 1994. This involved Australia phasing out the use of these traditional European names and also the use of technical terms such as *méthode champenoise*, the method used to make the famous French sparkling wine 'champagne'. Australians could still use the method, they just could not call it that on the bottle. In return, certain Australian wine names would be protected in the EU.

The ECAWA forced Australian winemakers to become more imaginative naming their wines. A number of different approaches were taken. Australia had already started to develop a system of regions. There was also more stress on identifying the grape varieties used. For example, 'claret' from the Bordeaux region must contain a blend of cabernet sauvignon grapes and some other specified varieties. Australian producers educated their consumers that what they thought of as 'claret' is actually a cabernet sauvignon blend. Australian wine drinkers have thus become better informed about grape varieties than many of their counterparts in Europe. In France, AOCs are

actually prohibited from stating the grape varieties on the bottle. The permitted varieties are specified by law, but if consumers in Europe care what they are, they have to find out for themselves.

Some wine styles contain many grape varieties. This has created a dilemma for the Australian producers of white burgundy as this blend contains too many varieties to be conveniently identified on the label.

One feature of the French and Italian systems is that the wines of particular regions must contain only specified grape varieties. Australia has not imposed this restriction and this has led to experimentation both in what varieties are grown in particular areas and how they are blended. This experimentation has borne fruit with new blends finding popularity with drinkers. There have also been considerable benefits of cross-fertilisation with Australian wine makers working in Europe and European wine makers investing in Australia. There has even been more experimentation in Europe with wines such as the 'super tuscans' in Italy being developed outside the traditional region-variety structure.

The ECWA has been a great success for Australia with wine sales to the EU increasing ten-fold since the agreement was signed. Sales of European wine in Australia have also continued to grow, though it is one of the few areas of trade between the two where Australia enjoys a surplus. This is largely explained by the popularity of Australian wine in the United Kingdom.

STUDENT ACTIVITIES

1. What are the four 'pieces of advice' consumers require about their wine?
2. List the efforts being made to harmonise global wine law.
3. Why was it necessary for Australia to sign ECWA?
4. For Australia, what have been the consequences of having signed ECWA?
5. Outline the benefits of ECWA for Australia.

The expansion of the EU to twenty seven member countries has brought in some longstanding wine-producing countries including Hungary, Slovenia, Cyprus, Malta, Bulgaria and Romania. The famous Hungarian 'tokay' name will now be protected from use in Australia and also elsewhere in the EU. This will cause difficulty in Australia where the alternative name for the tokay grape is much less known. It has also caused difficulty in the Friuli region of Italy where 'tokay' grapes have been grown and 'tocai' wine made for several hundred years. The wine there is now to be called 'friulano' and will have to develop its reputation all over again.

There remains in Australia a dilemma as to the extent to which either governments or producer associations should regulate the industry. The Australian Wine and Brandy Corporation is an interesting blend of government and producer involvement in wine regulation. Many believe that Australia has benefited from having light regulation compared to Europe, but the question remains whether the current system enables Australian wines to develop their reputation.

Another dilemma is the amount of control government should have over production. In the EU, the Common Agricultural Policy provides payments to farmers to ensure

their prosperity. In return, authorities exercise a lot of control over what is planted and produced. Australia has neither the state assistance nor the controls, with the effect that the Australian wine industry tends to go through cycles of boom and bust. The situation is complicated by generous tax arrangements for farming meaning that some people who have earned their wealth in other ways go into wine production for tax reasons and as a hobby rather than to make a living. This has led to some very good wines being produced but makes it difficult to set policies to benefit the industry as a whole. Consumers have benefited from lower prices for good wine in boom times but have no assurance of adequate supplies, for example, when there is a drought.

Comparison Table

<i>European name</i>	<i>Australian substitute</i>
Champagne	Sparkling
Claret	Cabernet sauvignon blends
Burgundy	Pinot noir, chardonnay
Port	Liqueur (variety), tawny, ruby

CONCLUSION

This brings us to a final point about wine regulation: what about the environment? Grapevines are tough but they can be grown more intensively with more water and use of chemicals. An argument for using scarce water on them is that they return high value for the water used, but grape production must be seen as part of the overall agricultural mix. It may be that by driving lower value but still necessary production to more marginal land, grape production is contributing to environmental degradation and global warming. Producers and regulators face some significant dilemmas, but together they have created an industry of which Australians can be proud.

A second ECWA has been awaiting finalization for some time. It will set final dates for the phasing out of some traditional terms that were particularly well established in Australia and for which there is no easy substitute, for example, port and sherryⁱ.

STUDENT ACTIVITIES

7. Outline the three dilemmas in relation to wine production.
8. What are your thoughts as to what might happen in regard to each dilemma?

FURTHER READING

Visit the Australian Wine and Brandy Corporation web site at: <www.wineaustralia.com>

ⁱ The terms 'port' and 'sherry' derive their names from Oporto and Xerez, the Iberian cities from which the wines were shipped to England, their principal market during the eighteenth century.

EXTENSION ACTIVITIES

1. Research the origins of port and sherry. Can you devise suitable substitute names?
2. Find out more about the Common Agricultural Policy of the EU.
3. In small groups, study the labels on a variety of wine bottles and casks. Prepare a brief report on the information provided.

EQUALITY IN AUSTRALIA AND THE EUROPEAN UNION:

A comparative analysis of the legal framework

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INTRODUCTION

Equality is a general principle and ideal that is widely accepted and protected in modern societies. However, the principle of equality is often missing from the founding texts of nation states; for example, the Australian Constitution does not contain an express guarantee of equality. This paper will provide an overview of the development of the principle of equality in the law of Australia and the European Union (EU). It will consider one aspect of equality, the equal treatment of men and women with a focus upon the legal framework for the protection against discrimination on the grounds of pregnancy.

PURSUIT OF EQUALITY

There is no express protection in the Australian Constitution of a right to equality. The protections that are provided in the law today therefore do not derive from an entrenched constitutional right but are a result of recognition of Australia's obligations under international human rights instruments, political lobbying and shifting community values. In the early 20th century, the pursuit of equality in Australia was focused on gaining particular civil and political rights, such as equal voting rights. Over time the approach to equality broadened and equality was pursued in all aspects of society including the workplace.

A similar pattern can be observed in the European Union (EU). Initially, the recognition of equality for men and women was in relation to the specific right of equal pay for equal work. Equality has become more prominent in the legal framework of the EU as a result of the pioneering case law in the European Court of Justice (ECJ). This judicial activism can be contrasted with the political and social activism, which triggered change in Australia, most significantly achieved through federal legislation. To some extent, this may be a function of the difference between political and legal change within a nation state (Australia) and a supranational body (EU).

LEGAL FRAMEWORK IN AUSTRALIA

The pursuit of equality in Australia led to the development of anti-discrimination laws. The Human Rights and Equal Opportunity Commission (HREOC) is the body that is responsible for administering the federal legislationⁱ. At the Commonwealth level, parliament has enacted different statutes which each address a particular form of discrimination: see, e.g., *Sex Discrimination Act 1984* (Cth),ⁱⁱ *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth). The most recent federal statute to have been enacted is the *Age Discrimination Act 2004* (Cth).

Anti-discrimination laws protect people from being treated differently because of certain characteristics i.e. race, sex, disability or pregnancy. To succeed in a claim, the

complainant must show that they have been either directly or indirectly discriminated against. Direct discrimination occurs when you treat one person less favourably than another. For example, a pregnant woman must not be treated less favourably than someone who is not pregnant, in circumstances that are the same or not materially different: *Sex Discrimination Act 1984* (Cth) s 7(1). In contrast, indirect discrimination occurs when a condition is imposed that is likely to disadvantage a particular group. Pregnant women are also protected against this form of discrimination in the federal act: *Sex Discrimination Act 1984* (Cth) s 7(2).

Legislation has also been enacted in the states and territories such as the *Discrimination Act 1991* (ACT) and the *Anti-Discrimination Act 1977* (NSW). Unlike the federal legislation, the state and territory statutes cover many different forms of discrimination under the one act. There are now anti-discrimination statutes and corresponding Commissions in all of the Australian states and territories.ⁱⁱⁱ More recently, principles of equality are also receiving greater recognition in states and territories through the adoption of bills of rights: see, e.g. *Human Rights Act 2004* (ACT) ss 8 and 17.

LEGAL FRAMEWORK IN THE EUROPEAN UNION

Equality is protected in the European Union in a number of treaty articles and directives. It is interesting to trace the history of the principle of equality in the European Union from its narrow beginnings to see how it has become a goal or 'social policy objective in its own right' (Millns 2007).

(i) Treaty articles

From the very beginning, the equal treatment of men and women was recognised in Article 119 of the Treaty of Rome in 1957 in the form of equal pay for equal work. This Article later became Article 141 of the *Treaty establishing the European Community*. In conjunction with Articles 2, 3(2), and 137(1)(i), Article 141 promotes the equal treatment of men and women in matters of employment. With the *Treaty of Amsterdam* (which came into force on 1 May 1999) the scope and legal mandate of the EU broadened beyond its initial economic focus, with Article 13 providing that the EU may take *action* to combat sex discrimination generally.

Article 13 EC can be distinguished from the previous treaty articles in two ways. First, the power conferred on the Council to take action was not tied to discrimination in the workplace. For example, Article 137(1) EC specifically provides that the community shall support member states in respect of '(i) equality between men and women with regard to labour market opportunities and treatment at work'. Article 13, on the other hand, is not so limited. It provides that the Council 'may take appropriate action to combat discrimination based on sex . . .' Second, following the introduction of Article 13 the EU now held a positive obligation to combat discrimination more generally in the public and private sphere.

(ii) Directives

As noted above in the introductory essay, directives are a primary tool for implementing EU law and policy. In the late 1970s, Article 119 was supplemented by the Equal Treatment Directive 76/207/EEC.^{iv} Although silent on the issue of pregnancy discrimination, this directive was used by the ECJ as a basis for conferring legal protections of pregnant women within the workforce. The first pregnancy discrimination cases to come before the court were *Dekker*^v and *Hertz*.^{vi} Following the work of the ECJ a new Equal Treatment Directive 2002/73/EC was implemented.

In 1992, the Council introduced the Pregnancy Directive.^{vii} Although the ECJ was dealing with pregnancy cases under the Equal Treatment Directive (based on Article 235 EC) the pregnancy directive arose from health and safety concerns, supported by Article 118a EC^{viii} which strengthened existing protection for pregnant women.

STUDENT ACTIVITIES

1. Devise a definition of 'equality'. Compare your definition with those of others in the class and those found in dictionaries.
2. How has the concept of equality developed in both Australia and the European Union? What similarities and differences are evident?
3. Compare and contrast the legal framework for equality in Australia with that of the European Union. How has the pregnancy issue been addressed in both systems? Which approach do you consider to be most effective? Give reasons for your answer.
4. In groups, create a pregnancy discrimination scenario. Role play a hearing before HREOC or your appropriate State tribunal. (You may have to research the dispute-resolution authority first).

CONCLUSION

In both Australia and the European Union the law of equality has evolved gradually. In the European context, the initial desire to promote equality was an aspect of an economic right, and the concern to ensure a level playing field in the labour market. By the end of the century, equality was conceived as a fundamental human right, as the ECJ noted in Case C-50/96, *Deutsche Telekom Ag v Schröder* [2000]:

In view of that case-law, it must be concluded that the economic aim pursued by Article 119 of the Treaty . . . is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right [para 57].

Despite the absence of a general right to equality in the founding constitutional texts of Australia and the EU, some measure of legal protection may be found in ordinary federal, state and territory statutes (in Australia) and in treaty articles and directives (in the EU). The result is a layered and overlapping scheme of legal protection in both systems that aim to protect the basic human rights of pregnant women.

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- Millns, S. 2007, 'Gender Equality, Citizenship, and the EU's Constitutional Future', *European Law Journal*, vol. 13, no. 2, March, pp.218–237.

NOTES

- ⁱ See the HREOC website for more information on what this body does and for further information on the federal legislation: <www.hreoc.gov.au/>.
- ⁱⁱ For a history of the introduction of the Act see Professor Marian Sawyer, *The Commonwealth Sex Discrimination Act: Aspirations and Apprehensions*, <www.hreoc.gov.au/sex_discrimination/20thanniversary/women_work_equity/speeches/sawer.html>.
- ⁱⁱⁱ ACT—Human Rights Office; NSW—Anti-Discrimination Board; NT—Anti-Discrimination Commission; QLD—Anti-Discrimination Commission Queensland; SA - Equal Opportunity Commission; Tas—Office of the Anti-Discrimination Commissioner; Vic—Equal Opportunity Commission; WA—Equal Opportunity Commission.
- ^{iv} Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ('Equal Treatment Directive') *Official Journal L* 039, 14/02/1976 P. 0040–0042.
- ^v Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus ('Dekker') (C-177/88) [1990] ECR I-03941.
- ^{vi} *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* ('Hertz') (C-179/88) [1990] ECR I-03979.
- ^{vii} *Official Journal L* 348, 28/11/1992 P. 0001 - 0008, <www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1992&nu_doc=85>.
- ^{viii} C. Ellina, *Promoting Women's Rights: The Politics of Gender in the European Union* (2003), 63.

LEGAL UPDATE

by Margaret Beazer

RIGHT TO PRIVACY

In order to protect people's right to privacy, which was being threatened by unsolicited telemarketing calls, the *Do Not Call Register Act 2006* (Cth) has been passed by the Commonwealth Parliament to allow households to place their telephone number on a national Do Not Call Register. Telemarketing companies can face penalties if they make calls to these listed numbers.

THE RIGHT TO VOTE

The High Court began hearing the Vickie Lee Roach case in June 2007. Roach is an Indigenous woman who is a prisoner at the Dame Phyllis Frost women's prison in Victoria. She maintains that the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) is unconstitutional. This act prohibits prisoners from voting in federal elections. Roach has argued that these provisions are contrary to sections 7 and 24 of the Constitution, as well as the implied right of freedom of political communication. This case may result in the High Court having to consider whether there is an implied right to vote in the Constitution.

A NEW CONSTITUTION FOR EUROPE?

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INTRODUCTION

Europeans have long been debating the constitutional future of the European Union (EU).ⁱ The focus of discussion has been the need for a European Constitution, its possible content and scope. In late 2001 the European Council—consisting of the heads of state or of government of the EU member states—convened the European Convention on the Future of Europe to consider, among other things, the possible adoption of a constitutional text.ⁱⁱ The European Convention's deliberations ultimately led to the drawing up of a draft constitutional treaty, which was adopted by the Convention in June and July 2003 and signed in Rome on 29 October 2004. It was expected at the time that ratification of the Treaty would continue throughout 2005 and 2006.

THE TREATY RATIFICATION PROCESS

Treaty negotiation and adoption have been the preferred method of achieving European integration since the early 1950s. Treaties are formal agreements between national executives, which operate within the domestic legal order on the completion of several procedural steps including ratification. Sovereign states, such as Australia, regularly enter into treaties on a range of subjects including international trade, the environment and human rights. There are currently twenty seven member states of the EU.ⁱⁱⁱ Each has international personality and, therefore, the right of representation on the international stage. Each can sign treaties. Member states have together signed and adopted numerous treaties since the foundation of the European Economic Community (EEC) by the Treaty of Rome in 1957[ANU1]. None has attracted more attention than the Constitutional Treaty (CT).

The label 'Constitutional Treaty' immediately draws attention to a possible anomaly. Constitutions are usually organic documents that express the constitutional aspirations of a people and a polity (i.e. the political community). They usually require the endorsement of the people. Treaties, on the other hand, being the result of intergovernmental bargaining, usually do not.

Each member state of the EU must ratify the CT before it can come into force. The method of ratification depends upon national constitutional requirements. Most member states require ratification by parliament while some require a referendum to permit ratification. Many of the EU's member states opted to submit the CT to referendum, even if their national constitutions did not require it. The explanation for this choice lies in the desire to involve citizens in the constitutional process and, thereby, to improve the democratic legitimacy of the EU. Therefore, while citizens have not traditionally played an important role in the construction of the EU, and the CT does not represent a departure from the traditional, treaty-based

method of European integration, many member states seem to be more concerned with public endorsement of this particular treaty than previous treaties.

STUDENT ACTIVITIES

1. What is a treaty? Give examples.
2. In what way is the term 'Constitutional Treaty (CT)' a contradiction?
3. Outline the ratification options open to EU member states.

REJECTION OF THE CONSTITUTIONAL TREATY IN FRANCE AND THE NETHERLANDS

In a potentially fatal blow to the ratification process, France and the Netherlands rejected the CT in national referendums held in May and June 2005. Soon after, EU leaders decided to impose a 'period of reflection' amid fears that a bandwagon effect would see the Treaty rejected in member states still planning to have referendums. The period of reflection continues, apparently to enable debate to take place through parliamentary and citizens' forums. In reality the French and Dutch votes have thrown the process into disarray, with some member states postponing ratification (e.g. United Kingdom, Czech Republic, Denmark, Ireland, Poland, Portugal, Sweden) while others have pressed ahead either by referendum or parliamentary adoption or both.^{iv} All in all, eighteen member states have ratified the CT,^v including the newest member states Bulgaria and Romania, while two have rejected it.

Not surprisingly, there is disagreement among the member states on how to proceed. Some are against continued ratification of the CT while others have suggested a re-run of EU constitution polls in France and the Netherlands as a way out of the current impasse. The newly elected French President, Nicolas Sarkozy, has suggested a parliamentary ratified, simplified and renamed treaty with a focus on efficiency. The election of Sarkozy seems to make Germany's wish for the adoption of a text before the next European elections in 2009 more likely, as long as consensus can be achieved on a slimmed-down treaty.

WHY DID FRANCE AND THE NETHERLANDS VOTE 'NO'?

What seems clear from the French and Dutch votes is that many citizens are hostile towards the idea of a European constitution, believing that it would intensify current social and economic problems, namely:

- inequality between rich and poor
- the opening up of markets to cheap goods and labour (exacerbated by EU enlargement)
- increased environmental degradation

- loss of cultural heritage
- increased presence of non-EU nationals
- further erosion of national sovereignty.

That the French were also protesting against the national government, especially over the state of the economy, cannot be ignored. In the Netherlands there were fears about the effects of the CT on a smaller member state with liberal traditions.

Basically, there seems to be widespread disenchantment regarding the reduced capacity of national governments to protect domestic interests. This perspective is not confined to the EU. It finds expression in Australia as a consequence of globalisation. Nevertheless, the obvious question arises: what does the CT and its possible rejection mean for the EU's further development as a constitutional polity? This question entails consideration of the implications and actual significance of the CT.

THE EU ALREADY HAS A CONSTITUTIONAL CHARTER

In 1991 the European Court of Justice (ECJ) declared the EC Treaty 'the constitutional charter of a Community based on the rule of law.'^{vi} In fact the ECJ has ruled in landmark cases that individuals are accorded legal rights and have standing to enforce Community law within national legal orders (direct effect)^{vii} and that Community law has priority (supremacy) over conflicting member state law.^{viii} The judicially inspired 'supremacy' provision is in substance not unlike s109 of the *Australian Constitution*, which states that Commonwealth law prevails over inconsistent state law. Supremacy clauses, whether judicially endorsed or embedded in a constitutional document, operate to resolve conflict between the different levels of authority and are therefore emblematic of federal constitutional systems. In effect, legal (and political) decisions have shaped the relations between the EU and national legal orders to the extent that most commentators now recognise the EU as a constitutional order.

SO WHAT CHANGES WOULD THE CONSTITUTIONAL TREATY BRING?

On coming into force the CT would repeal the existing treaties. Importantly, the CT sets out numerous institutional changes, which are intended to streamline and facilitate decision-making processes in light of EU enlargement. However, other significant changes that bring the EU closer to a constitution in the strict sense are envisaged:

- the draft CT incorporates the provisions of the Charter of Fundamental Rights and Freedoms, proclaimed at Nice on 7 December 2000. These are the rights and freedoms usually associated with constitutions in the western tradition. The entitlements are grouped around six fundamental values—dignity, freedom, equality, solidarity, citizenship and justice. Specific provisions include the right to life, to education, to free expression, to property, to gender equality and to a dignified old age. For reasons similar to those often advanced for the incorporation of a bill of rights in the *Australian Constitution*,^{ix} most commentators view the incorporation of the Charter as a positive step.
- the CT envisages EU accession to the European Convention for the Protection of Human Rights

and Fundamental Freedoms (ECHR) 1950. Like the incorporation of the Charter within the Treaty, accession by the EU reinforces the EU's commitment to human rights protection. It prevents a gap from developing in the protection of rights where a member state is incapable of protecting rights through its action alone.

- the CT gives the EU a single legal personality under domestic and international law.^x

CONCLUSION

The nature of the CT is contested; its fate shrouded in doubt. Is the CT a treaty or a constitution? Is a new constitution necessary and what exactly would it achieve? In discreet ways, the CT would change or add to the current constitutional arrangements. The enlarged EU would arguably be better able to perform its functions and secure its objectives. The adoption of a constitutional text would also operate at the symbolic level, heralding the arrival of a new, more confident era of European integration. However, the consequences should not be overstated. EU constitutional development commenced in the 1950s and will not conclude on the formal adoption of a constitution. If the CT comes into force it will ultimately and appropriately be viewed as a single step, or an episode, in the constitutional development of the EU.

STUDENT ACTIVITIES

4. Outline the implications for the CT of the rejection by France and the Netherlands.
5. Six main reasons for rejection are stated. What do you understand each of these reasons to mean?
6. Explain 'supremacy provision'. What is the effect of such provisions in the EU?
7. What changes will the CT bring about?
8. Would you have voted yes or no to ratification? Give reasons for your answer.

EXTENSION TASKS

9. a. Investigate a treaty to which Australia is a signatory Present a brief report to the class.
- b. Research the bill of rights debate in Australia. Report on the arguments for and against.
- c. Research one non EU country other than Australia. How does the Constitution of that country protect human rights?
- d. Debate: Assume that your class is an EU member. Debate the proposition that 'we should adopt the CT'.

NOTES

ⁱ Joschka Fischer, then Foreign Minister of Germany, gave a thought-provoking speech at the Humboldt University in Berlin on 12 May 2000. During this speech, he called for political integration of the European Union along federal lines and the conclusion of 'a new European framework treaty, the nucleus of a constitution of the Federation'. See 'From Confederacy to Federation: Thoughts on the Finality of European Integration' in C. Joerges, Y. Mény and J.H.H. Weiler (eds) *What Kind of Constitution for What Kind of Polity?—Responses to Joschka Fischer* (Florence: European University Institute, 2000).

ⁱⁱ The European Council meeting in Laeken, Belgium, convened the European Convention on 14 and 15 December 2001.

ⁱⁱⁱ The EU has expanded from 6 original states to 9, 10, 12, 15, 25 and now 27 member states over a period of 50 years. The member states are: Germany, France, Italy, The Netherlands, Belgium, Luxembourg, United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Bulgaria and Romania.

- iv Luxembourg voters approved the CT on 10 July 2005 followed by parliamentary adoption; Estonia ratified on 9 May 2006 and Finland on 5 December 2006, both by parliamentary adoption.
- v Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, Slovenia and Spain have ratified the Treaty.
- vi Opinion 1/91 of December 14, 1991 [1991] ECR I-6079, 6080.
- vii *Van Gend en Loos v Nederlandse Administratie Der Belastingen* [1963] ECR I.

viii *Costa v ENEL* [1964] ECR 585.

ix Incorporation facilitates awareness of rights and duties, which in turn reinforces the protective response; rights and freedoms are justiciable; and protection of minority interests is guaranteed.

x Part 1, Title 1, Article 6. A EU endowed with its own legal capacity has the right to enter into legal relations, acquire rights and assume obligations in its own name and independently of its members.

ENVIRONMENTAL REGULATION IN THE EU

By **Karen Hussey**

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When the Treaty of Rome was signed in 1957 it made no mention of ‘the environment’ for two reasons: first, because the primary objective of the Treaty was to establish an economic union; and second, because environmental issues did not have the same prominence then as they do today. Just fifty years on, environmental policy is one of the most important and highly regulated areas of community competence. How, and why, did such a shift take place?

SOURCES OF ENVIRONMENTAL LAW IN THE EU

The European Community is founded upon treaties: ‘the transfer of sovereignty or powers from the member states to the institutions of the Community is limited to specific policies and specific procedures to be found in the treaties’. In the 1960s and 1970s, the development of environmental policy in the EU was *ad hoc*, with only a few policies relating to water quality and air pollution elevated to the EU level. However, the 1985 intergovernmental conference (IGC) gave European Community leaders their first real opportunity to incorporate environmental policy into the founding treaties and the changes introduced in the *Single European Act (SEA)* (1986) on how environmental policy and law could be made in the EU.

First, the SEA added a section on environmental policy under Title VII (Articles 174–176) of the Treaty of Rome. The addition of Title VII provided a clear legal basis for environmental policy in the community, and by stipulating that community policy ‘shall preserve, protect and improve the quality of the environment’, it allowed the community to propose legislation in areas in which it had not previously been able. It also included the provision that ‘environmental protection requirements shall be a component of the community’s other policies’ (Article 130r[2]) which meant that environmental protection had to be integrated into other policy domains such as transport, energy and agriculture. This provision was a precursor to the principle of environmental policy integration. Title VII greatly increased the powers of the Environment Directorate General of the European Commission (DGXI) both in proposing new laws and in assessing the environmental impact of laws and policies developed in other parts of the Commission.

Second, the SEA extended the use of *Qualified Majority Voting (QMV)* in the Council of Ministers to environmental policies that *related to the Single Market* (see below). The requirement of unanimity meant that policy-development was a lengthy

and difficult process, with the Commission having to please all the member states. Often this would result in a ‘lowest common denominator’ approach to policy-making, such that the final content of the law imposed only the minimum requirements, leaving the member states to impose stricter domestic measures if they desired (and provided they were not a barrier to free trade). Thus, the extension of QMV meant that no one member state could block a proposal, thus forcing reluctant member states to work even harder to reach agreement.ⁱ

Third, Title VII contained a provision according to which the community *could take action in the area of environment to the extent that it could do better than the member states acting in isolation* (Article 130r(4))—a precursor to the principle of subsidiarity (see below).

Further changes were made to QMV in the *Maastricht Treaty (1992)*. Where the SEA had introduced QMV in the Council of Ministers for environmental standards related exclusively to the single market, the Maastricht Treaty went further and extended QMV to almost all areas of environmental policy in the Council of Ministers, thus expanding the competence of the European Commission to areas such as natural resource management and water policy.

The reforms in the Maastricht Treaty also allowed the EU to engage in international environmental agreements with ‘third countries and with the competent international organisations . . .’ (Article 228(4)), and, furthermore, that the EU should ‘promote measures at an international level to deal with regional or worldwide environmental problems’ (Article 228(1)). Importantly, this provided the legal basis for the EU’s engagement in international environmental politics.

The *Amsterdam Treaty (1997)* further strengthened environmental policy as a Union responsibility and Article 2 in the preamble to the Treaty of Rome was rewritten to make one of the community’s goals ‘a harmonious, balanced and sustainable development of economic activities’.

DRIVERS OF EU ENVIRONMENTAL POLICY

A central pillar of the EU has been the creation of the single market which is built on the free movement of goods, services, capital and people. A consequence of the single market has been the need to avoid competitive disadvantage between member states. This, in turn, has resulted in ‘greener’ member states pushing for the

harmonisation of environmental standards upwards, exerting pressure for policy changes at the EU level—a *vertical influence* from member state level to EU level. Interestingly, European concerns relating to its economic competitiveness in the *global* trading system have seen a similar push for harmonization in the international trade system, through the WTO, resulting in considerable tension between the EU and Australia.

Differences that exist between consumer preferences in the member states have also influenced the EU's environmental policy, resulting in what is referred to as the *horizontal influence* of the member states. One example of many was the adoption, in the late 1990s, by the German baking industry of additional initiatives related to organic ingredients. This spilled over into the French baking industry, not through binding legislation, but merely through consumer expectation seeping from one market to another—the result was the transmission of environmental norms and expectations horizontally between the member states. Again, this was facilitated by the single market and the free movement of goods.

FUNDAMENTAL CONCEPTS IN EU ENVIRONMENTAL LAW

So who has responsibility for environmental law in the EU: the member states, or the EU? The answer provided by the EU treaties is that, in different ways, they both do. While the EU now has the legal competence to initiate and design environmental legislation (thanks to the treaty reforms described above), the responsibility for implementing those policies and laws lies with the member states. How this works in practice relies on a number of fundamental concepts.

Just as Australian law is a combination of Commonwealth and state/territory responsibilities, the EU has different levels of government: supranational (i.e. EU-level), member state, sub-state (i.e. the *Länders* in Germany), and local. To avoid the over-centralisation of policies to the EU-level (which would be politically sensitive), environmental law in the EU is grounded in the *principle of subsidiarity*: matters ought to be handled by the smallest (or, the lowest) competent authority (discussed in Wellings and Bronitt above).

Reflecting the subsidiarity principle, the preferred legal instruments for EU environmental policy are *environmental directives*, which, while binding in terms of objectives, allow member states scope for local variation in implementation, consistent with national legal traditions and practices.

Environmental policies in the EU are framed by *environmental action programmes* (EAPs) of which there have been six to-date. Designed to cover a five year period, the primary objectives for each of the EAPs are to set objectives and to provide the detail for environmental policy which is otherwise lacking in the treaties. Figure 1 outlines the main objectives of the current, sixth EAP (2002–2012).

Another principle in EU environmental law is *environmental policy integration*: the incorporation of environmental policies and objectives into other policy domains (Article 6 E.C). This principle was given a significant boost by the launch of the *Cardiff Process* (June 1998), requiring different Council formations to integrate environmental considerations into their respective activities. The Cardiff

Process has contributed to raising the political profile of integration, and has generated a sense of ownership of environmental integration in some Council formations, with positive knock-on effects on actions in other EU institutions and member states.

Figure 1: 6th Environmental action program 2002–2012



EU environmental law is also underpinned by the *precautionary principle*ⁱⁱ, and indeed it was the EU that proposed the text for Principle 15 of the 1992 Rio Declaration: ‘where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective action . . .’ which subsequently became the precautionary principle. The EU's support of the precautionary principle originated in Germany, and it was subsequently ‘regulated upwards’ to the EU-level in the late 1980s, along with the doctrine of best-available technology (BAT).

COMPLIANCE AND ENFORCEMENT

Each member state is required to translate EU environmental law into its domestic law, although the flexibility of individual laws and policies varies according to whether they are directives, regulations or decisions. Where a member state fails to implement or fully comply with EU environmental law, that law may have direct effect in national legal systems or give rise to liability in damages. Since 1992, the Commission may also seek an order imposing a significant fine on the member state for failing to implement an ECJ decision. These developments seek to address one of the main criticisms of the EU, namely that it suffers a significant implementation deficit.

CONCLUSION

The reforms of the treaties which took place between 1986 and 1999 did much to renegotiate the role of the Environment Directorate General into a more powerful part of the EU bureaucracy. The inclusion of Articles 2 and 3 in the treaties act as the ‘functional equivalent to constitutional obligations’ and remain the cornerstone for EU agenda-setting in the environmental domain.ⁱⁱⁱ The distinctive institutions, mandate and policy process of the EU affords it the opportunity to set long term agendas undeterred by political cycles or any single

national agenda. However, it is important to recognize that nowhere in the treaty does it stipulate that the EU must develop a *common* environmental policy^{iv}, or indeed an EU environmental policy. Rather, the EU has developed a series of policies relating to different environmental issues.^v Nevertheless, since the late 1980s a new legal and political framework has enabled the EU to develop significant and innovative policies in the environment domain, which has subsequently seen it emerge as an international environmental leader.

STUDENT ACTIVITIES

1. During the 1960's and 1970's, how was the environmental policy of the EU described?
2. The changes brought by the *Single European Act* (SEA), 1986 were significant. In addition to issues of air pollution and water quality, what other 'policy domains' could now receive environmental protection?
3. Why was the introduction of the Qualified Majority Voting (QMV) strategy important in the extension of environmental controls?
4. Outline the key reform of the Maastricht Treaty of 1992.
5. Two drivers of EU policy have been the pressures of 'vertical influence' and 'horizontal influence'. Explain your understanding of these terms.
6. Provide an example of an environmental problem that could be addressed by the 'precautionary principle'.

7. In terms of enforcement of environmental law, what is the major criticism leveled at the EU?
8. The shift towards stronger environmental policies through the various strategies outlined has seen the EU 'emerge as an influential environmental leader'. Would you agree or disagree with this claim? Explain your reasoning.

NOTES

- ⁱ Jordan, A. 1998. EU Environmental Policy at 25: The Politics of Multinational Governance. *Environment* 40(1): 14-45.
- ⁱⁱ While a comprehensive definition of the precautionary principle was never formally adopted by the EU, a working definition and implementation strategy for the EU context has been proposed in Fisher et al. (2006): 'Where, following an assessment of available scientific information, there are reasonable grounds for concern for the possibility of adverse effects but scientific uncertainty persists, provisional risk management measures based on a broad cost/benefit analysis whereby priority will be given to human health and the environment, necessary to ensure the chosen high level of protection in the Community and proportionate to this level of protection, may be adopted, pending further scientific information for a more comprehensive risk assessment, without having to wait until the reality and seriousness of those adverse effects become fully apparent'. See Elizabeth Fisher, Judith Jones and Rene von Schomberg. (eds) (2006), *Implementing the Precautionary Principle: Perspectives and Prospects*, Cheltenham, UK and Northampton, MA, US: Edward Elgar.
- ⁱⁱⁱ McCormick, J. 2001. *Environmental Policy in the European Union*. Palgrave. New York.
- ^{iv} The EU has two common policies: The Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP), both designed to protect the EU's domestic industries. Unlike environmental policies in the EU, the CAP and CFP are adopted and formulated by all the member states and rely on unanimity to make changes.
- ^v McCormick, J. 1999. *op.cit.*; Jordan, A. 1998. *op.cit.*

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS RELATIONSHIP TO THE EUROPEAN UNION

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INTRODUCTION

In the context of European human rights protection, there is the common misconception that the European Convention on Human Rights (the Convention) is a European Union (EU) treaty. However, the Convention does not form part of the *acquis communautaire*—the accumulated body of law of the EU; nor is the European Court of Human Rights (ECtHR), which is located in Strasbourg, in any way related to the European Court of Justice (ECJ), which holds office in Luxembourg. The EU is not even a signatory to the Convention.

Despite these facts, this post-World War II instrument has had a significant and indisputable influence on the development of the EU member states, and the EU as a whole. This has been due to first, the fact that in almost every stage of the development of the EU every member state had also been a signatory to the Convention, and second, the recognition and respect which the Convention enjoyed both with the EU institutions in general, and in the case law of the ECJ in particular.

THE CONVENTION SYSTEM

Before further analysing the relationship of the Convention to the EU, it is useful to consider the history of the Convention and its founding organisation, the Council of Europe (CoE). The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) is one of the core treaties of the CoE. The CoE is an international organisation, headquartered in Strasbourg, France, seeks greater unity between its member states by promoting human rights, parliamentary democracy and the rule of law, and by developing continent-wide agreements to standardise social and legal practices.

Today the CoE has 46 members—almost all European States including Russia—though at the time of its foundation in 1949 its membership was limited to a small number of Western European states that were drawn into cooperation more by a common ideology and fear of communism rather than common aspirations. In addition, the CoE member states wanted to avoid a repetition of the human

rights abuses during World War II, and the Convention was conceived as an instrument to achieve this aim.

The drafting committee of the Convention was strongly inspired by the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. However, the Convention differs from the Declaration in two significant aspects: first, it is legally binding for all state parties; second, it includes a proper complaint mechanism, allowing for external review of domestic legal action by the ECtHR, which was established by the Convention.

The Convention, which was signed in 1950, introduced a catalogue of basic civil and political rights and freedoms, such as the rights to life, freedom, dignity and a fair trial and the freedoms of expression and thoughts. Further rights were later added through additional protocols (14 to date). Although the member states carry the main responsibility for implementing and guaranteeing these rights, member states as well as individuals have, on the condition that they fulfil certain prerequisites, a direct right of action to the Strasbourg institutions. An action, however, has to be instituted always against a member state.

In the early stage of its existence, this system was arguably driven more by politics and diplomacy, than legal principle: some member states, and notably the United Kingdom and France, were concerned about the impact of an overseas court reviewing domestic law and judicial decisions from the perspective of national sovereignty. Notwithstanding these concerns, the Court developed over the years a modern and dynamic interpretation of the Convention, making the Strasbourg system into arguably the most developed human rights systems in the world.

After the fall of the iron curtain, many Eastern European states turned to democracy, joining the CoE and signing the Convention, thus further extending the influence of the Convention across the continent. While human rights organisations have rightly criticised that the Convention is not fully implemented in all signatory states, it has indisputably left its mark on the continent. The evidence of this can be seen in the enormous case load of the ECtHR. In 2006, for example, the ECtHR received over 50 000 applications and delivered 1720 judgements¹.

STUDENT ACTIVITIES

1. Explain the philosophy behind the Convention?
2. Why was the CoE considered to be a necessary development?
3. How does the Convention differ from the Universal Declaration of Human Rights?
4. Do you believe these differences to be advantageous to Europe? Explain.
5. Why were the United Kingdom and France hesitant about the Strasbourg system?
6. Outline the impact of the fall of the 'iron curtain'.

HUMAN RIGHTS PROTECTION WITHIN THE EU

Initially, the EU and its predecessors were primarily driven by economic considerations: none of the original treaties, including the Treaty of Rome, made mention of the protection of human rights. However, in the late 1960s and early 1970s, as human rights movements became stronger and with the imminent accession of Greece, Portugal and Spain to the EEC (countries newly liberated

from dictatorships) the need for human rights protection grew. It was at this time that the ECJ developed the position that fundamental rights were to be considered as a general principle of community law in decisions made by community institutions, on the basis that they derived from the common constitutional tradition of its member states. However, the ECJ remained reluctant to directly refer to and apply the human rights document that set the standard on a European level: namely the Convention.

It was in the *Hauer case*² in 1979 that the ECJ first cited the Convention alongside other national constitutional provisions in support of its reasoning. The political institutions soon followed suit. Reflecting this increased significance, a formal reference to human rights protection was included in the preamble of the *Single European Act 1986* and from then on such a reference appeared in every major EU treaty.

Although politically desirable, this had the effect of making the status of the Convention in EU law ambiguous: on the one hand, it was not as a document legally binding on the EU itself in its own right; on the other, it was treated as an authoritative instrument by the ECJ, setting out general principles of community law.

In order to resolve the ambiguity and particularly to avoid potentially competing interpretations and claims of jurisdictional competence of the ECJ and the ECtHR, a number of EU member states and its Commission were prompted to advocate for the EU's formal accession to the Convention. This would also have the effect, so they argued, of affirming the European identity and increasing the protection of human rights and the cohesion of the community.

ACCESSION ATTEMPTS

In 1979 the Commission adopted a memorandum regarding EEC accession to the Convention. It was always clear that accession would also raise complicated institutional questions of how to combine these two distinct legal systems.

In the mid 1990s, the ECJ, on request of the European Council, released its opinion 2/94 [1996] ECR I-1759, which clarified that accession of the EU to the Convention was not within its competence: the EU can only act where competence has been transferred from the member states to the community level, and human rights have not been included. The ECJ considered whether it was possible to imply such a competence, noting that Article 308 of the EC Treaty contained a general provision allowing the Council to take action in a field where it usually has no competence to act, on the condition that this action is necessary to attain one of the objectives of the community. The ECJ ruled, however, that the integration of the Strasbourg system would have consequences of constitutional significance falling outside the scope of the article.

RECENT EVENTS AND OUTLOOK

For the EU to become a signatory to the Convention it would require amendment of the EU Treaty. This has not happened to date due to a lack of political will. The community has, however, strengthened human rights through the adoption of a 'Charter of Fundamental Rights' in 2000, although this is not legally binding or a source of direct legal rights for citizens. While the interaction

between the different systems remains unclear, human rights advocates emphasise that the two documents are complementary and guarantee a higher standard of human rights protection within the EU.

Without question, human rights form a sound moral and political foundation for the European Union and the Convention, through largely indirect means, has come to play an important role in this field. However, a final solution for creating a consistent and unified scheme for human rights protection in Europe is still pending.

STUDENT ACTIVITIES

7. Explain what trends have been evident since the Treaty of Rome and the reasons for these?
8. To what extent do you think that the Convention should be binding on member states? Justify your answer.
9. Debate: 'That Australia should have a bill of rights in its Constitution'.

FURTHER READING

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- Pernice and Kranitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe' (WHI - Paper 7/04, Walter Hallstein-Institut, 2004), available at <www.rewi.hu-berlin.de/WHI/papers/whipapers704/paper0704.pdf>.
- <www.echr.coe.int>: the website of the ECtHR includes links to the Convention text, ECtHR case law and statistics.
- <www.coe.int>: CoE website.

NOTES

- ⁱ Further statistics are also available online, www.echr.coe.int
- ⁱⁱ Case 44/79, *Hauer*, [1979] ECR 3727.

BREAKING NEWS

by *Michael Longo*

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EU ADOPTS TREATY OF LISBON: PLANS FOR A CONSTITUTION ABANDONED

After a prolonged period of reflection occasioned by the rejection by French and Dutch voters of the Draft Constitutional Treaty (DCT), the European Council, meeting on 21–22 June 2007 in Brussels, abandoned the DCT once and for all. An Intergovernmental Conference (IGC) was convened on 23 July 2007 with the purpose of drafting a new 'Reform treaty' by the end of 2007 to take effect on 1 January 2009 in anticipation of the European Parliamentary elections in June of that year. The Reform treaty was approved in October and signed by the 27 member states in Lisbon on 13 December 2007. Member states have indicated they will, whenever possible, avoid putting the Treaty of Lisbon to referendum for the purpose of ratification. It appears that only Ireland will hold a referendum on the Treaty, with Denmark indicating that parliamentary ratification will suffice in view that the new Treaty does not involve a transfer of sovereignty. Contentious as this claim may be, the apparent expression of goodwill by member states towards the Treaty reflects a general consensus that the Treaty of Lisbon's institutional changes must be approved in order to ensure the efficient operation of EU decision-making in an enlarged Union.

The Treaty of Lisbon brings to an end the 'constitutional concept' of repealing all existing treaties and replacing them with a single text called a constitution. The new Treaty makes it clear that the existing treaties will be retained and amended to enhance efficiency, democracy and transparency while rejecting the DCT's explicit orientation to a constitutional settlement.

To this end, the European Council declared that the treaty establishing the European Community (EC Treaty) would be renamed the Treaty on the Functioning of the Union (TFU), while the Treaty on European Union (TEU) would keep its present name. While many of the institutional reforms proposed under the DCT have been retained, the word

'Constitutional' is not used and there will be no mention in the amended treaties of the symbols of the EU including the flag, anthem and motto though these will continue to exist. Moreover, the Treaty of Lisbon will drop the 'primacy of EU law' clause that had been proposed in the DCT, the European Council concluding that the IGC would instead adopt 'a Declaration recalling the existing case law of the EU Court of Justice.' The word 'community' has also been dropped all the way through in favour of the word 'Union', with the EU succeeding the EC. Thus, the EU will be endowed with a single legal personality, thereby strengthening its negotiating power.

Most of the changes, including the overhaul of the EU's institutions, agreed in the 2004 IGC will be integrated partly in the TEU and partly in the TFU. Protocols agreed at the 2004 IGC will be annexed to the existing treaties, including the Protocol on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950. Article 6 of the TEU on fundamental rights will be replaced with a text recognising the rights, freedoms and principles set out in the Charter of Fundamental Rights 2000, giving the Charter legal force (although, by virtue of a specific exemption, it will not apply to the domestic law of the UK). Importantly, the provisions on democratic principles agreed at the 2004 IGC, which aim to improve citizen participation in EU decision-making – viz. democratic equality, representative democracy, participatory democracy and the citizens' initiative – will form part of the new Title II of the TEU. The terms 'law' and 'framework law' proposed under the DCT have been dropped and the existing designations 'regulations', 'directions' and 'decisions' retained. There has been a clause inserted on withdrawal from the Union.

Many of the key reforms and institutional changes proposed under the DCT have therefore been salvaged in one form or another, though, significantly, the symbols and symbolism of a 'constitution' have been dropped.



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