

ETUC resolution on rebalancing the EU approach to fundamental rights

Adopted at the ETUC Executive Committee on 10-11 March 2015

Key messages

- The trade union movement is facing severe challenges in relation to the respect and promotion of fundamental rights. A rethinking of the EU institutional framework is indispensable to stop and correct these aberrations. The EU should be held accountable with regard to the respect of fundamental rights.
- The ETUC is very critical of the recent opinion of the Court of Justice on the draft accession agreement to the European Convention on Human Rights. The Court raised major objections and the EU accession may be considerably delayed – or even blocked.
- The ETUC recalls that there is a legal obligation upon the Union to accede to the ECHR. It is also indispensable for the future of social Europe and democracy in the Union. The Commission should therefore explore every possible option with a view to guarantee a meaningful accession to the ECHR in the foreseeable future.
- If a renegotiation of the draft accession agreement is nonetheless to be envisaged, it cannot undermine the rationale behind EU accession: ECHR principles take precedence over EU activities.
- The ETUC does not accept that Treaty changes continue to be negotiated in an intergovernmental forum, outside any democratic scrutiny. Furthermore, the discussions surrounding the next Treaty change cannot solely focus on whether or not to incorporate the fiscal compact. A wider consideration of the state of fundamental rights in the EU is essential, particularly if a Treaty change also proves to be necessary to speed up EU accession to the ECHR.

Introduction

The trade union movement is facing severe challenges in relation to the respect and promotion of fundamental rights. The well-known “Laval-quartet” jurisprudence of the Court of Justice of the European Union (‘the CJEU’) placed the supremacy of economic freedoms over fundamental social rights, which was then confirmed in subsequent case law. Furthermore, the present context of austerity threatens the social acquis throughout the Union and violates a number of fundamental rights¹.

Due to the current EU approach to fundamental rights, Member States face conflicting duties in international law. It is not possible for them to comply with both EU law and their human rights obligations derived from the ECHR, the European Social Charter and the ILO. A rethinking of the EU institutional framework is indispensable to stop and correct these aberrations. The EU should be held accountable with regard to the respect of fundamental rights. The primacy of the ECHR on human rights issues must be recognised. Trade unions should also be able to better use international instruments to improve the protection of fundamental rights, including in particular the ILO.

The adoption of a Social Progress Protocol is an absolute priority for the ETUC. This Protocol to be annexed to the Treaties should clarify the primary status of fundamental rights and the need for them to be observed in the daily activities of the Union.

¹ <http://www.etuc.org/press/austerity-illegal-european-trade-unions-demand-change-policy-troika-acts-against-eu-law-and#.VOtE5md0y70>

In parallel, it is necessary to start an in-depth reflection upon a fundamental change of the EU institutional framework. EU accession to the European Convention of Human Rights ('the ECHR') remains an absolute priority. Yet it is being jeopardised by a recent opinion from the CJEU. Convincing solutions must be found, including a democratic and meaningful Treaty revision via the drawing up of a Convention.

Accession to the ECHR – the EU cannot give up on direct external human rights control

The ETUC has long been calling for a speedy accession to the Convention. An improved protection of fundamental rights was a major factor in the ETUC decision to support the Lisbon Treaty. The ETUC actively contributed to the work of the relevant bodies negotiating the draft accession agreement.

The potential contribution of the ECHR to rebalance the EU approach to fundamental rights is considerable. Accession would allow EU activities to be controlled externally with regard to basic human rights requirements enshrined in the ECHR. Judgments like the Viking case, which prioritise economic freedoms over social rights could be challenged before the European Court of Human Rights.

In July 2013, the opinion of the CJEU was requested on the compatibility of the draft accession agreement to the ECHR with EU law. On 18 December 2014, the CJEU delivered a very negative opinion, considering that the draft agreement is incompatible with EU law. The main concern of the Court revolves around the autonomy of EU law from international instances. According to the CJEU, the European Court of Human Rights cannot review the compatibility of EU activities with the ECHR. The CJEU is also guarding its own exclusive jurisdiction to interpret EU law.

The ETUC is very critical of this opinion. The CJEU raised major objections and the EU accession may be considerably delayed– or even blocked. The ETUC is adamant that the accession process cannot be dropped. This is excluded by Article 6.2 TEU, which creates a legal obligation upon the Union to accede to the ECHR ("the Union shall accede to the ECHR"). Above all, accession to the ECHR is indispensable for the future of social Europe and democracy in the Union.

Article 218 TFEU describes the procedure applicable to the negotiation and adoption of agreements with third countries or international organisations. According to Article 218.11 TFEU, two possible paths of action normally follow a negative opinion of the CJEU on a draft international agreement. The draft agreement is renegotiated in line with the terms of the CJEU, or the European Treaties are revised.

The CJEU opinion is asking for the reopening of key aspects of the draft accession agreement. A successful renegotiation under these terms does not seem to be realistic. The ETUC underlines that EU accession to the ECHR benefits from a different, higher status than ordinary international agreements. The obligation to accede contained in Art 6.2 TEU should take precedence over the procedural considerations laid down in Article 218.11 TFEU. The ETUC therefore calls on the Commission to explore every possible option, including ways to overcome the CJEU opinion, with a view to guarantee a meaningful accession to the ECHR in a foreseeable future.

If a renegotiation of the draft accession agreement is nonetheless to be envisaged, the ETUC stresses that such renegotiation cannot undermine the rationale behind EU accession. In particular, a new accession agreement must at least guarantee the two following points.

Firstly, no additional privileges or immunities must be granted to the EU compared to the other Contracting Parties. This covers negotiation on the substance of human rights and their level of protection. The ETUC will also not accept the introduction of additional

procedural hurdles which would make access to the European Court of Human Rights more difficult (for instance make it obligatory to have prior involvement of the CJEU in co-respondent cases).

Secondly, the ECHR cannot be subordinated to the EU Charter of Fundamental Rights; the reverse must prevail. The CJEU argues in its opinion that the ECHR should be coordinated with the EU Charter of Fundamental Rights. The level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law should not be compromised. This is unacceptable for the ETUC. The EU Treaties state that the EU Charter of Fundamental Rights has “the same legal value” as the Treaties, which has been interpreted by the CJEU as meaning that in case of conflict between fundamental rights and other aspects of Union law, it is the exercise of fundamental rights which must undergo a strict justification and proportionality test.

It is likely that a change in the European Treaties will also be considered as a possible, longer term, option to overcome the CJEU objections. In such a scenario, a number of conditions must be fulfilled with a view to guarantee a revision process that is democratic and meaningful.

Treaty change – for a democratic and meaningful revision

The ETUC condemned the undemocratic methods adopted by some Member States to draft the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). This international Treaty was indeed adopted outside any EU legal framework. Its Article 16 nonetheless foresees that by 1 January 2018 at the latest, necessary steps will be taken to incorporate the TSCG into the legal framework of the EU.

The undemocratic methods used to draft the TSCG should not be legitimised via amendments to the Treaties by the back door. The ETUC does not accept that Treaty changes continue to be negotiated in an intergovernmental forum, outside any democratic scrutiny. Any Treaty change must go through the “ordinary revision procedure” foreseen in Article 48 TEU, which lays down that the European Council must decide by a simple majority to convene a Convention.

Furthermore, the discussions surrounding the next Treaty change cannot solely focus on whether or not to incorporate the TSCG. A wider consideration of the state of fundamental rights in the EU is essential, particularly if a Treaty change also proves to be necessary to speed up EU accession to the ECHR.

A rebalancing of the EU approach to fundamental rights presupposes that the work of a Convention includes at least the following objectives:

- Enabling direct external human rights control by the European Court of Human Rights.
- Creating a legal base for the EU accession to the revised European Social Charter and its Protocols, which offer an impressive framework for the protection of trade union and workers’ rights.
- Repositioning the activities of the Union within a wider international framework. Particular attention should be paid to the mainstreaming of International Labour Organization (ILO) Conventions within the EU internal legal order.
- Committing the Union to respect and promote fundamental rights in its daily activities. The role and effectiveness of the EU Charter of Fundamental Rights must be reassessed in light of the EU accession to the ECHR. The compatibility of legislative proposals with the Charter must be checked at all stages of every legislative procedure.

- In addition to the adoption of a Social Progress Protocol, the interaction between the economic provisions and the social objectives of the Treaties must be re-examined. The repositioning of economic activities within a wider social dimension should target in particular the provisions relating to freedom of establishment and provision of services, competition policy, economic and monetary affairs, and the progressive establishment of the internal market.