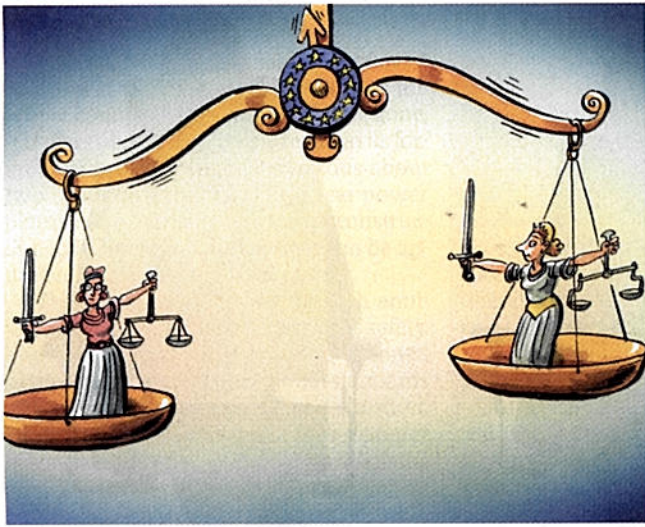


# Charlemagne | Supreme muddle

Europe's highest courts can be annoying, but they do more good than harm



**N**O WONDER Europeans find their institutions so bewildering. What is the difference between the European Council and the Council of Europe? It is not just syntax. The first is the European Union's top decision-making body, made up of the 27 national leaders. The second is the grandfather of European clubs, which has 47 members (among them Russia and Turkey) and plods along in Strasbourg. Even more confusing, the EU and the Council of Europe share the same blue flag with a circle of 12 stars and the "Ode to Joy" as their anthem. And both have similar-sounding courts. The European Court of Justice (ECJ) sits in Luxembourg and ensures compliance with EU law. The European Court of Human Rights (ECHR), under the Council of Europe, is guardian of the 1950 European Convention on Human Rights.

Both courts annoy most national politicians some of the time and infuriate some most of the time. Take Italy. The ECJ irritated it recently by ruling against its policy of jailing illegal migrants who do not obey expulsion orders. The ECHR, meanwhile, belatedly reversed its decision to ban crucifixes in Italian schools. Or consider Britain. The ECJ recently decided that insurance companies were not allowed to charge women drivers (less of an accident risk) a lower premium than all those impetuous men. The ECHR, for its part, caused apoplexy in London by ruling that Britain could not deny all convicted prisoners the right to vote.

To critics this is judicial activism gone mad, overturning the will of elected parliaments; European judges (not much distinction is made between the two courts) serving in the vanguard of the march towards federalism. Time to reverse course, they say. But how? Many would like to halt or turn back part of the European project. Italy's interior minister, Roberto Maroni, recently suggested abandoning the EU altogether. "Better alone than in bad company," he declared after a row over Tunisian boat-people. Yet leaving the EU after decades of economic and political intertwining is easier said than done (and became explicitly possible only under the 2009 Lisbon treaty).

Pulling out of the EU might mean falling back on the Council of Europe. That is, after all, the home of other non-EU European democracies such as Iceland, Norway and Switzerland. The council is the sort of body that even Eurosceptics ought to like: it is inter-governmental rather than *communitaire*, so that each

member wields a veto, and its parliamentary assembly is made up of national MPs who mostly exercise only moral persuasion. In contrast, the ever more powerful European Parliament is directly elected, voting on budgets and most EU laws. Yet the council is still a poor alternative to the EU. A country that wants to trade freely with the rest of Europe has to comply with its market rules. And even if it escapes the court in Luxembourg, it is bound by the one in Strasbourg (with judges from such dodgy places as Ukraine and Azerbaijan).

Others, especially some British Tories, want an alternative rupture: to withdraw from the ECHR, with domestic courts becoming supreme arbiters. If that means leaving the Council of Europe, so what? The trouble is that it also raises questions about EU membership. Accession to the human-rights convention is compulsory for EU applicants, though it is fuzzier for existing EU members. The Lisbon treaty gives legal effect to the charter of fundamental rights, which incorporates ECHR case-law (though some EU members have a partial opt-out). The EU is taking on more trappings of statehood—it has just won the right to speak in its own name at the United Nations—and is preparing to sign up to the human-rights convention, with rights akin to those for full members of the Council of Europe. The EU's actions, say in freezing foreigners' assets, may become subject to external legal scrutiny, with the ECHR acting as the EU's "supreme court".

To Eurosceptic purists, there is only one safe answer: to leave both the EU and the Council of Europe. But that would imply a degree of isolation that surely few voters would enjoy. Jean-Paul Costa, president of the ECHR, notes that the only country ever to withdraw from the convention was Greece under its junta. Today only Belarus stays clear of the Council of Europe.

## Fight from within

A more pragmatic option is to stay in and push for reform. That may be frustrating but is not hopeless. The EU is discovering limits to integration. Under pressure from France, Italy and others, the European Commission has proposed allowing members of the Schengen passport-free area temporarily to impose border controls if neighbours are flooded with migrants. Even those who are less dreamy about European unification have a vital interest in the EU's single market. Making it more open—even just preserving it—requires a dose of supranational power.

The ECHR, too, needs reform. Ministers meet this week to discuss how to clear a backlog of 140,000 (mostly frivolous) cases, improve the quality of some of its judges and restrain them from straying too far into domestic matters. Yet all countries gain from a democratic Europe, one pillar of which is the human-rights convention. Even democratic governments benefit from a degree of judicial restraint. And the ECHR operates in some dark areas that others cannot reach. Russia is often forced to pay compensation to victims of abuse in, say, Chechnya. The court has helped to improve the state of Turkey's prisons.

Judicial nonsense should be restrained wherever possible but may be a price worth paying for the protection of Europe's prosperity and freedom. And for those who resent the intrusion of supranational courts, but do not want to break up the institutions, there is hope. When the EU accedes to the human-rights convention, it is possible that judges in Strasbourg will restrain Eurocrats in Brussels and the court in Luxembourg, too. ■