UK Constitutional Law Association

BY CONSTITUTIONAL LAW GROUP | DECEMBER 24, 2014 · 2:59 PM

Sionaidh Douglas-Scott: Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice

On 18 December 2014, the ECJ delivered its long awaited *Opinion 2/13* on the compatibility with EU law of the draft agreement for EU accession to the ECHR. The ECJ concluded, to the great surprise of many, that the accession agreement is not compatible with EU law. Indeed it found so many obstacles with the agreement that it has now rendered accession very difficult, if not impossible.

For a long time, it has been considered expedient that the EU should accede to the ECHR, in order to optimize its human rights protection. All EU Member States are already Contracting Parties to the ECHR, and there are many advantages to the EU itself acceding. First, a formal linking of the EU and ECHR could be seen as underlining the EU's concern for human rights, given that the ECHR is seen as part of European cultural and political heritage. Second, the accession would finally answer criticisms of double standards: that the EU requires accession of all Member States but not, before Lisbon at least, of itself. Third, and crucially, EU accession to the ECHR would alleviate the situation in which individuals find themselves when faced by possible breaches of the ECHR by EU institutions. At present, unless EU law has been implemented by some Member State act (in which case action would be against that Member State) there is no possible action in Strasbourg. This leaves a gap in judicial enforcement.

That being said, the ECJ concluded 2 decades ago in *Opinion 2/94* that, under the existing treaty provisions, there was no competence for what was then the Community to accede to the ECHR. The Lisbon treaty remedied this by amending Article 6(2) TEU to place an obligation on the EU to accede to the ECHR, and accession proceedings were opened. The mandatory accession procedure, set out in Article 218 TFEU, is cumbersome and complex. Nonetheless, in April 2013, a draft agreement on accession was agreed between the Council of Europe and the European Commission. Given that a number of member states – both from within and outside the EU – initially had reservations about the terms of EU participation in the Convention system, it is some achievement that agreement between them was reached, albeit in a regrettably secretive process on the EU side, as the action brought by Leonard Besselink for access to accession documents revealed.

However, the ECJ was also asked to provide an Opinion under Article 218(11) TFEU, which provides for a special procedure whereby a member state, or major EU Institution, may obtain the Opinion of the ECJ as to whether any agreement envisaged by the EU is compatible with the treaties. Notably, despite the fact that the three major EU institutions, as well as the EU's 28 member states, submitted at the Court hearing that the draft accession agreement was compatible with the EU treaties, the Court held that it is not. AG Kokott, in an Opinion delivered on 13 June 2014, had also found the agreement compatible with EU law, albeit in highly qualified terms. Given the ECJ's adverse holding, the agreement may not enter into force unless it, or the EU treaties, is revised.

The Court's reasoning in Opinion 2/13

Much of the Court's *Opinion* considers the arguments made by EU Institutions and Member States. Indeed, only just over one quarter of the judgement, about 8 web pages, actually sets out the Court's own position on compatibility of accession with EU law. This posting will now briefly consider, in order, each of the arguments made by the Court as to why, in its mind, accession would be incompatible with EU law.

First, and significantly, the Court was quick to point out that, to date, only States have been members of the ECHR. The Court disparaged the approach adopted in the draft agreement, which it believed treats the EU as a State, and thus ignored the intrinsic nature of the EU. In contrast, the ECJ has characterized the EU as 'a new legal order'. Interestingly, in *Opinion 2/13*, the ECJ asserted that, under international law, the EU is precluded by its very nature from being considered a State. While such a clear statement may come as a relief to those who fear the growth of the EU into a superstate, what follows in the Opinion amounts to a robust declaration of the autonomy of EU law, which has some troubling consequences, and ultimately led the ECJ to find the draft agreement incompatible with EU law. The Court structured the remainder of its arguments under the following headings:

a) The specific characteristics and the autonomy of EU law

The autonomy of EU law, and its specific, *sui generis* nature, has been a running theme throughout its legal history. EU Accession to the ECHR must therefore not disturb EU competences nor the interpretive monopoly of the CJEU in the interpretation of EU law, and Protocol 8 Lisbon treaty was drafted with this in mind, specifically stating that the accession agreement must 'make provision for preserving the specific characteristics of the Union and Union law.' The ECJ observed that, while after accession, the Strasbourg Court's interpretation of the ECHR would bind the EU, including the ECJ, nonetheless it would be unacceptable for the ECtHR to call into question the ECJ's findings in relation to the scope of EU law. The Court cited 3 specific ways in which the draft agreement failed to take account of the specific characteristics of EU law.

First, the ECJ was concerned that Article 53 ECHR, which gives Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR, should not compromise EU law. Although Article 53 of the EU Charter of Fundamental Rights appears to state something very similar to Article 53 ECHR, in the 2013 *Melloni* judgment, the ECJ held that Member States could not have higher standards than the EU Charter in cases where the EU has fully harmonized the relevant law. Thus the ECJ asserted that the ECHR should be coordinated with (the ECJ's interpretation of) the Charter, and found that there was no provision in the draft agreement to ensure such coordination.

Second, the ECJ was concerned that the principle of mutual trust under EU law, highly relevant in the context of the EU´s Area of Freedom, Security, and Justice, could be undermined. Much EU legal co-operation within the AFSJ, such as, for example, execution of European Arrest Warrants, is based on the presumption of human rights compliance throughout the EU. In contrast, the ECHR would require each Member State to check that other

Member States had actually observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States. The accession agreement contains no provision to prevent such a development. In those circumstances, the Court of Justice believed that accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

Third, the Court noted that Protocol 16 ECHR (only signed on 2 October 2013) allows ECHR states' highest courts to seek advisory opinions from the ECtHR regarding the interpretation and/or application of rights in the ECHR. Although the EU will not accede to this Protocol, the ECJ nonetheless perceived it as a threat to the autonomy of EU law, because ECHR states' highest courts might prefer to make a preliminary reference to Strasbourg on the compatibility of EU law with ECHR rights, rather than to Luxembourg.

b) Article 344 TFEU

The ECJ has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties and, consequently, the autonomy of the EU legal system. That principle is enshrined in Article 344 TFEU, which provides that EU Member States may not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Treaties. Given that the draft agreement did not exclude the possible use of the ECtHR to settle such disputes, the ECJ found that this undermined EU law.

c) The co-respondent mechanism

A large part of EU law is implemented by its Member States, and, therefore, it will seem logical for the applicant to proceed against the State. Yet, Member States often have no discretion as to whether, or how, an action emanating from the EU is implemented. In such cases, the root of the problem lies with the EU measure, rather than the Member State. Therefore, EU accession prompts tricky questions as to how responsibility between the Member States and the EU should be split. In order to address these problems, Article 3 of the draft accession agreement makes provision for a co-respondent mechanism to be established. It provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party. However, carrying out such a review would require the ECtHR to assess the rules of EU law governing the division of powers between the EU and its Member States. The Court of Justice held that to permit the ECtHR to make such an assessment would risk adversely affecting the division of powers between the EU and its Member States.

d) The procedure for the prior involvement of the Court of Justice

Regard for autonomy of EU law requires that the CJEU must have had the chance to interpret and rule on an issue of EU law before it reaches the ECtHR. The real problem emerges with indirect actions concerning EU law brought in the courts of the member states, and it is possible that, in such a case, a national court might not refer to the CJEU for a preliminary ruling – in which case the CJEU would be denied the ability to provide authoritative guidance on the treaties. A solution to this problem was offered by Presidents Costa and Skouris in a joint communication, which suggested that, as part of the accession agreement, an internal procedure for indirect actions should be introduced, so that the CJEU should have a chance to make a ruling in such cases. This idea was adopted by the draft accession agreement (Article 3 (6)).

However, the ECJ found fault with the draft agreement's terms, because, first, it did not reserve to the CJEU only (ie it did not exclude the ECtHR) the power to rule on whether the CJEU has already dealt with an issue, and, second, it did not permit the CJEU to rule on the interpretation, but only on the validity, of EU law.

e) The specific characteristics of EU law as regards judicial review in CFSP matters

Lastly, the Court analysed the specific characteristics of EU law as regards judicial review in matters of the common foreign and security policy ('CFSP'). The CJEU has limited jurisdiction over CFSP acts, and so it is possible that it would have no chance to interpret the EU law at issue prior to an ECtHR ruling in a case concerning the human rights compatibility of a CFSP measure in Strasbourg. In such a situation, the ECtHR would itself interpret EU law without the aid of the CJEU. This might jeopardize the autonomy of Union law, and also the ECJ's interpretative monopoly under Article 344 TFEU. For example, if as a consequence of an EU military action, a human rights violation were pleaded, it would appear that, post accession, an action against the EU in the Strasbourg court would be feasible. Such a situation would effectively entrust the exclusive judicial review, as regards compliance with the rights guaranteed by the ECHR on the part of the EU, to a non-EU body. Therefore, the ECJ held that the draft agreement failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts in the area of the CFSP**.**

Reflections on the Opinion

This Opinion undoubtedly makes it difficult for the EU to proceed with accession. The draft agreement was only achieved after tortuous negotiations and redrafts, mainly – but not only – due to objections within the EU itself. The Court's Opinion sets out so many objections to accession, some requiring treaty change, that one is prompted to think that the Court desired to make accession as difficult as possible. And this is so, even given the Court's somewhat privileged position as member of the Council Committee that negotiated accession, and the fact that its suggestions, in both a discussion document and a joint communication from the presidents of the ECtHR and ECJ, appear to have been accommodated.

The EU is required by the terms of its own Treaty, Article 6(2) TEU, to accede to the ECHR, and the Commission is open to an infringement action if it fails to do so. The history of EU integration provides many illustrations of ad hoc, pragmatic actions in the face of seemingly impossible practical difficulties. So accession may still be achieved. Nonetheless, the ECJ's Opinion makes it highly problematic for the Commission to proceed. There may indeed, be little prospect that non-EU ECHR states will acquiesce in renegotiating the agreement to suit the terms of the ECJ's Opinion. In such a situation, the Commission could not be blamed if non-EU action made it impossible to fulfil the obligation in Article 6(2).

What should our conclusions be if we value human rights? Peers characterizes the Court's Opinion as 'a clear and present danger to human rights protection' and I believe he is right. The Court's Opinion is shot through with statements on the autonomy and special position of EU law, and most particularly with concern for its own prerogatives as ultimate determinant of the EU legal order, rather than any abiding concern with human rights. Thus the old critique that the ECJ does not take rights seriously springs back to mind. As Leonard Besselink reminds us, we now know that we must take seriously the ECJ President's announcement at the FIDE Conference 2014: 'The Court is not a human rights court: it is the Supreme Court of the Union.' Indeed, there is something highly ironic in the ruling, in that the ECJ appears to be opposing ECHR accession for fear this might result in a loss of its sovereignty – a position uncannily similar to that taken by UK eurosceptics, who desire ECHR membership only on their own terms.

This is indeed doubly ironic, for the Court expresses these concerns about its constitutional position and autonomy of EU law, just at a time when, with the expansion of EU criminal powers through the AFSJ, human rights control over the EU has never been needed more. The ECHR has an important role to play in underlining that the EU principles of mutual trust and recognition, although lynchpins of European integration, must not threaten fundamental rights and subvert the very values of the EU.

Yet, were the EU to accede to the ECHR, in full compliance with the Court's requirements in *Opinion 2/13*, human rights protection in the EU would not be enhanced, for the EU would be shielded from many human rights claims, including many, if not most, in the highly controversial CFSP and AFSJ areas. Given all of the difficulties thrown out by the Court's Opinion, Besselink has suggested that the treaties should now be amended to insert the following 'notwithstanding protocol' to read as follows:

> **'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.'**

This is a dramatic suggestion indeed. But would all EU member states agree to such a protocol? The UK's present administration is unlikely to be very accommodating. Therefore, I reluctantly conclude that, in the light of the ECJ Opinion, those who value human rights no longer have any reason to pursue EU accession to the ECHR. Accession in compliance with the ECJ's judgement would not provide effective external control of the EU's actions. This is a pessimistic conclusion, but it is hard to conclude otherwise than that *Opinion 2/13* does not take rights seriously.

Sionaidh Douglas-Scott is Professor of European and Human Rights Law at Oxford University.

Suggested citation: S. Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' U.K. Const. L. Blog (24th December 2014) (available at http://ukconstitutionallaw.org).