THE OPPOSITION OF THE CJEU TO THE ECHR AS A MECHANISM OF INTERNATIONAL HUMAN RIGHTS LAW

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Abstract: The Court of Justice of the European Union (CJEU) has the competence to adjudicate on matters of human rights within the European Union (EU). It does so on the basis of a number of internal sources, such as the EU Charter on Fundamental Rights or EU general principles of law. EU law also requires that these sources are inspired by the rights found within the European Convention on Human Rights (ECHR), although this obligation does not place the EU under the direct supervision of the ECHR system. This article examines the approach of the CJEU to human rights protection and in particular seeks to analyse what this tells us about the Court’s views about the role and purpose of the ECHR mechanism. The CJEU has rejected human rights monitoring of EU law by the European Court of Human Rights (ECtHR), an external body acting according to an external standard (the ECHR), despite the fact that case-specific external review is a fundamental aspect of the modern international human rights law system. At the apex of recent retreat from the ECHR is the CJEU’s Opinion 2/13, which suggests that any judicial scrutiny of EU law by the ECtHR (under a future EU accession to the ECHR) could only take place under strict constraints. This article suggests that the CJEU is unwilling to support the very purpose of the ECHR as an international human rights law mechanism.

Keywords: EU; ECHR; human rights; external monitoring; individual petition; autonomy

I. Introduction

It is common practice in international human rights law for governing authorities to be reviewed by international bodies in accordance with international standards of human rights.¹ This external monitoring, which constitutes an intrusion into state

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¹ For instance, the International Covenant on Civil and Political Rights (supervised by the Human Rights Committee); the International Covenant on Economic, Social and Cultural Rights (supervised by the Committee on Economic, Social and Cultural Rights); the International Convention on the Elimination of Racial Discrimination (supervised by the Committee on Racial Discrimination); and the American Convention on Human Rights (supervised by the American Court of Human Rights).

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sovereignty, is an essential feature of the institution of international human rights; it ensures that states live up to generally accepted human rights standards:

“from an original position of state-centric legal system, international law seeks to create a position in which the fundamental rights of the individual are a matter of international law, with international remedies available if these standards are not respected”.

Protection of human rights is commonly through a mechanism of petitions by aggrieved parties, which allows case-specific review of an alleged breach of human rights. This is an enforcement approach which has been prominent since the Versailles minority protection system post-World War I. While as a matter of technicality, human rights monitoring in the European Union (EU) is an internal affair, there has been an added element of reference to external standards and external monitoring. The Court of Justice of the EU (CJEU) monitors EU human rights protection in line with general principles of EU law and the EU’s own Charter of Fundamental Rights (EUCFR). This means that human rights in the EU are monitored by reference to an internal standard and by an internal body. As the EU is not a signatory of international human rights instruments — with the exception of only one instrument — external bodies, such as the Council of Europe’s European Court of Human Rights (ECtHR), which adjudicates on the European Convention on Human Right (ECHR), have no formal monitoring role. However, there has been some recognition in EU law of the importance of the ECHR for human rights standards in the EU. As we will see in Section IV, this arises through the historical case law of the CJEU and also art.6 of the Treaty on European Union (TEU). While not giving the ECHR legally binding authority over EU law, these sources serve to acknowledge the importance of the ECHR as a reference point for human rights in the EU.

The Council of Europe and the EU institutions have collaborated, for a number of years, towards greater integration of the ECHR into EU law. In 2013, they agreed to a draft proposal governing the conditions under which the EU should accede to the ECHR. This would require the EU to be a signatory of the ECHR. In 2014, in Opinion 2/13, the CJEU rejected the proposal, which would have placed the EU under the ECtHR’s direct external monitoring. The reasons behind this rejection,

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3 A Peters, Beyond Human Rights: The Legal Status of the Individual in International Law (Cambridge: Cambridge University Press, 2016) p.26. It is well to note that the individual was in fact at the heart of international law, tracing back to the sixteenth century: p.11.
4 See further, Section IV(A).
as explained in more in detail in Section IV(C), focused, *inter alia*, on the CJEU retaining autonomy over pronouncements on EU law in such a manner as to leave little scope for the ECHR to effectively conduct its external review functions. The CJEU was only willing to accept the ECHR as an international human rights law mechanism so long as such mechanism could operate without intruding upon the sovereignty or “autonomy” of EU law, suggesting that the CJEU’s current human rights monitoring system is efficient and adequate. The rejection by the CJEU of an effective external monitoring role for the ECHR was not entirely unexpected: it was made in a context where it was already developing a protectionist attitude towards internal monitoring of EU human rights vis-à-vis the ECHR. While there is a whole host of criticism relevant to this approach of the CJEU towards the ECHR, this article seeks to add to the existing scholarship analysis of how this may undermine the very purpose of the ECHR as an institution of international human rights law. The CJEU has in effect rejected the ECtHR as an external monitor and places formidable constraints on the ECtHR in offering case-specific review.

To demonstrate the claims of this article, Section II of this article examines how external monitoring and case-specific review have become essential characteristics of international human rights law. Section III outlines the alternative focus of the autonomy paradigm. Section IV examines the ways in which EU law has addressed human rights protection in relation to cases where EU law affects ECHR rights (the ECHR–EU intersection), probing whether this has furthered the autonomy of the

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8 This intersection has had a significant place in EU-ECHR debates, given the absence of a legally binding solution to the overlapping jurisdiction of both organisations.
V. Conclusion

This article has argued that the review of the powers of governing authorities for human rights breaches as against norms external to that authority and by a body external to the jurisdiction of that authority constitute intrinsic characteristics of the institution of international human rights.

It has demonstrated that — despite positive signs in early years — the CJEU has rejected these fundamental aspects of the ECHR. Instead, the CJEU has suggested that, in order to protect the autonomy of the EU, there must be constraints on the external monitoring mechanism of the ECHR to a point that the use of that monitoring mechanism would prove almost futile. It has further suggested that internal review of human rights by the CJEU is adequate for human rights protection. This gives EU autonomy undue weight, an unnecessarily broad meaning, such as to leave little room for the fundamental features necessary for an effective international human rights system. In light of this, the CJEU’s interpretation of the potential relationship between the EU and the ECHR shows an unwillingness to accept the role that international human rights plays in externally monitoring governing powers.

An analysis of origins of international human rights law shows that external human rights mechanisms are intended to review the powers of authorities and that to limit the review powers of international institutions is a rejection of the essence of human rights. The result of the CJEU’s Opinion 2/13 appears to be that the EU cannot accept an external monitor, even on its own terms.

Given that the turning point against the CJEU’s reliance on the ECHR correlated with both the development of its own legally binding human rights instrument (the EUCFR) in 2009 and the prospect of the ECHR becoming formally binding in 2016, it can be argued that the CJEU only accepts external standards where these have limited legal value.

It can also be argued that the CJEU believes that an internal human rights system substitutes (rather than complements) a system of external review. As such, the CJEU presents a fundamental opposition to the very purpose of the ECHR as an institution of international human rights law.