The Future of EU Accession to the ECHR after Opinion 2/13

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Relevant Questions

• What did the CJEU say in Opinion 2/13?
• Can we blame the CJEU for this decision?
• Could we expect that?
• Should we renounce the Accession after Opinion 2/13?
Structure

• Intro (premises + background)
• Analysis of the Opinion
• Possible Solutions?
Legal Background: the pillars

- Effects of an international agreement concluded by the EU (Art. 216 - 218 TFEU)
- To be read with Haegeman (181/73)
- And with other decisions of the Court (International Fruit, 21/72-24/72, Bresciani, 87/75; etc...)
- EU law as a special legal order (Van Gend en Loos; Costa/Enel)
How did we get here?

- Art. 218 TFEU, par. 11

- “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”
Art. 216 TFEU

• 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

• It is necessary to look at the case law of the CJEU
JUDICIAL POLITICS MATTERS!

• “AN AGREEMENT CONCLUDED BY THE COUNCIL UNDER ARTICLES 228 AND 238 OF THE EEC TREATY IS, AS FAR AS CONCERNS THE COMMUNITY, AN ACT OF ONE OF THE INSTITUTIONS OF THE COMMUNITY ... FROM THE DATE IT COMES INTO FORCE, ITS PROVISIONS FORM AN INTEGRAL PART OF COMMUNITY LAW”.

• Mendez “automatic incorporation”(2010)

• If they are part of EU law thus the CJEU is THE interpreter but can this work with the ECHR? ECtHR vs. CJEU?

• Par. 180 Opinion 2/13.
• “No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.... It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.”

• Art. 6 TEU post- Lisbon
Art. 6

“2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties”
“We are almost there...”

- View of AG Kokott “Yes but..”
- Delivered in June 2014 but published with Opinion 2/13.
- Caveat.
- “Secretive process on the EU side” (vedi: Besselink v. Council T-331/11)
Draft Agreement (par. 49 et seq).

The following documents were sent by the Commission to the Court as annexes to its request:
– the draft revised agreement on the accession of the European Union (‘EU’) to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft agreement’), 12 articles;
– the draft declaration by the EU to be made at the time of signature of the Accession Agreement (‘the draft declaration’);
– the draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party (‘draft Rule 18’);
– the draft model of memorandum of understanding between the EU and X [State which is not a member of the EU]; and
– the draft explanatory report to the Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft explanatory report’, and, together with the other instruments referred to above, ‘the draft accession instruments’ or ‘the agreement envisaged’).
Opinion 2/13: general remarks

- “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” (Douglas Scott)
- 8 parts but the essence is in section n. 8 (points 144-258) …
The Opinion in 5 (perhaps 6 or 7?) points

• 1. Specific Features of EU law (covering arts. 53 Charter and ECHR and Protocol 16 and mutual trust);
• 2. 344 TFEU and monopoly over interstate disputes
• 3. Co-respondent mechanism
• 4. Prior Involvement
• 5. Jurisdiction of the CJEU in the area of CFSP
Protocol 8 (par. 42 et seq.)

Article 1

The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union’s possible participation in the control bodies of the [ECHR];

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.
Protocol 8

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by Member States derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 TFEU.’
Art. 344 TFEU

«Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein».

Mox Plant case (C-459/03)
Art. 52.3 and 53 of the CFREU (par. 44 -45)

- 52.3 «‘In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’»
- 53 ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States’ constitutions.’
“It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised. However... allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.» (Melloni, C-399/11)
The sui generis nature of EU law (par. 157 et seq)

Par. 160-161, par. 166
Par. 167: «These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’».

Mutual Trust (par. 168)
Cooperation national judges and CJEU and mission of the CJEU (par. 174)
Par. 179 ss. On autonomy. Hageman (par. 180)
Par. 181 «external control», par. 183 **untouchable core** (all the ‘classics’ of the Court, par. 170)

Interpretative Jelousy (**184**) par. 185-186. (**asymmetry**)
a) Art. 53 ECHR (par. 189-190)

- “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”
- Faculty, not obligation
- “Paradoxically, in attempting to protect the autonomy of EU law, the CJEU gives an interpretation to art.53 of the ECHR without relying on the Strasbourg Court’s case law regarding this Article. If the CJEU would have done so, it would not of have found support for its interpretation. Instead, the CJEU appears to project its interpretation of art.53 of the EU Charter onto art.53 of the ECHR” (Lambrecht)
- Part. 189. Par. 190 “However, there is no provision in the agreement envisaged to ensure such coordination». What does coordination mean? (Lock)
b) Mutual Trust

- Important par 191-192
- "The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law" (par. 193).
- Par. 194-195.
The «revenge»

- Delegitimation of the Dublin system
- MSS v. Belgium and Greece, 2011
- Tarakhel v. Switzerland, 2014
- NS CJEU
- Canor, «Horizontal solange: “An ever closer distrust among the peoples of Europe”» (2013) CMLR
c) Protocol 16 (à la Melki)

- It is not part of the Agreement (par. 197), lack of coordination par. 199
- Problem: relationship with national judges
- Problem in any case (AG par. 140)
- "In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties." (par 198).
2. 334 TFEU (Protocol 8)

- Art. 33 ECHR (par. 205 et seq.)
- «Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.»
- par. 207 «Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law», par. 208 «The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.»
Three Points on the s.c. Correspondent mechanism (ratio 215 par.)

- Description Art. 3 Agreement (par. 55 et seq. Opinion), respect par. 222…
- par. 223-225.
- Par. 226-228, breach of Protocol Art. 3, par. 7 Agreement «according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.».
- Par. 229-230 the exception (which was introduced in the text in a second moment)
- Doubts of the AG (par. 231-233) but we can fix it…par. 235 AG (AG par. 265 and 175-179)
4. Prior involvement (par. 55, 6 and 235 et seq.)

- Interpretive jealousy (Mox Plant), 238-239 par.
- 241, full information; Par. 242-243 and bùwhat about the questions of interpretation?(but AG said that this can be traced back to the explanatory report rather than to the Agreement, par. 130 ss);
5. CFSP

- “Thou shalt have no other courts before me” (Michl), par. 252-256
- “This leaves only one point, namely the problem of the lack of jurisdiction of the Court in the field of the CFSP. All the beautiful words of the Court on this subject cannot hide that here the emperor is naked. The Court has no jurisdiction except in two well-circumscribed cases and that is it. That the Court in Strasbourg will have something to say about upholding fundamental rights in the CFSP can only be welcome news” (Kuijper).
 Comments

• Defence «My main concern, then, is not for the reputation of the Court, but for a sensible project of accession that gives due consideration to the constitutional quality of the Union” (Halberstam)

• «Structurally, the ECJ seems to understand autonomy in a similar way as national constitutional courts conceive of sovereignty: EU law should reign supreme in its jurisdiction and any encroachment by another authority must be put under the ECJ’s check” (Komárek)
What should we do?

- Art. 218 TFEU two alternatives
- Lock: let’s go to renegotiate
- Alonso: complicated (Russia and Turkey)
- Kuijper (interpretative declarations)
Consequences

Jurisdiction of the CJEU over CFSP: only with a Treaty change

As for the rest: we can find a solution by means of clarifications or unilateral declarations (Kuijper, Halberstam e AG Kokott)
Consequences

- “The Court is not a human rights court: it is the Supreme Court of the Union” (President CJEU)
- ‘Let us not forget, however, that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State” (President ECtHR)
• Lisbon: too much for the EU?

• Other symptoms: no clear scope of application of the Charter (Åkerberg Fransson, Siragusa)

• Art. 7 TEE “sleeping giant” (Hungary *docet*)

• Crisis of Values
THANK YOU!
FOR MAKING THIS A GREAT SHOW!

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