Human Rights Protection in Europe: Between Strasbourg and Luxembourg

Although Europe has been considered a leading example for regional human rights mechanisms, these mechanisms are far from simple, due to the complexity of the European legal system and the actors involved. To understand this, a brief historical overview of the European system is necessary.

After the Second World War, the European process of co-operation and integration was centered around two different regimes. One, supervised by the Strasbourg-based Council of Europe, dealt with democracy, human rights and the rule of law. The other, concerned with economic integration, was represented by the European Coal and Steel Community (1951), the European Economic Community (1957), and the European Atomic Energy Community (1957); this ultimately developed into the European Union (EU). 1

Each regime is distinct from and autonomous of the other, yet both operate in the context of human rights. This might seem surprising, given that human/fundamental rights were only incorporated into the European Convention on Human Rights (ECHR) – one of the main instruments of the Council of Europe – while remaining absent from the EU founding treaties in 1951 & 1957. Likewise, the EU is not a party to the ECHR nor any other human rights instrument, and therefore, is not bound by them.

There are two reasons for this addition of human rights considerations at the EU level. First, the expansion that has accompanied economic integration in Europe has directly impacted many social issues, including those of human rights. Ultimately, the two areas of concern are intertwined. Second, despite the absence of accession to the ECHR, the EU later recognized respect for human rights as a condition of the lawfulness of its actions, which obligates the European Community not only to refrain from violating human rights, but to ensure that they are observed. Such recognition is articulated in various EU documents such as the EU Treaties, the EU Charter of Fundamental Rights and the Charter of Fundamental Social Rights of Workers. For its part, the EU must guarantee the protection of human rights at the regional level; without such protections, European integration would not have been possible.

The overlapping of the two regimes in this regard is clearly manifested in two different legal institutions: the European Court of Human Rights (ECtHR), and the European Court of Justice (ECJ). The former, which belongs to the Strasbourg-based Council of Europe, has been the main safeguard for human rights protections in Europe. Its duty is to monitor the implementation of these protections under the ECHR, with a jurisdiction that primarily includes questions relating to the national laws of Council of Europe member states.

In contrast, the ECJ, which is based in Luxembourg, is not a human rights guardian per se. Rather, it is the highest legal institution established by the European Union, designed to uphold the process of economic integration among various member states. Its mandate is rather specific: to deal with any issues relating to the interpretation and application of EU law, or national law that derives from EU law, but not national law per se. This jurisdiction includes the fundamental freedoms and human rights within that EU law.

The overlapping functions of the two legal institutions are complicated by the fact that both involve different mechanisms and methods. There is no formal linkage between them, aside from a certain degree of overlap whereby EU members are also members of the Council of Europe. Moreover, since as mentioned earlier the EU is not a party to the ECHR, it is not subject to scrutiny by the ECtHR nor bound by its decisions. Similarly, the ECHR and its Strasbourg judicial mechanisms technically do not apply to EU’s actions, although EU members, as parties to the ECHR, have an obligation to respect the Strasbourg system in any circumstances even when applying or implementing EU law. In other words, EU member states would be subject to the EU Charter of Fundamental Rights whenever implementing EU law, and to the ECHR where they are acting on their own. 2 However, the boundary between these two conditions is not always apparent. European law, in many cases, has been incorporated into national law, as has ECHR. Thus, EU member states are subject to three distinct layers of human rights protections: the EU Charter of Fundamental Rights, the ECHR, and its own human rights law.

Such a plurality of human rights standards and overlapping mechanisms, on the one hand, can have some positive impact. First, from the perspective of substance, the three
different layers may complement each other to provide broader human rights protection in Europe. Second, from the perspective of implementation, the joint powers of the ECtHR together with the ECJ can serve as a double safeguard for human rights protections, at the national as well as regional level.

On the other hand, this pluralism may lead to uncertainty about human rights standards in Europe. For instance, both institutions can scrutinize the same human rights issue from different perspectives, sending mixed messages to member states. This is due especially to a lack of legal connection and hierarchy between these two institutions. The case involving the right for private and domestic life, where Luxembourg decided that such right does not apply to companies (Hoechst AG v. Commission) while Strasbourg ruled later that it does (Niemietz v. Germany), is an example of such disagreement. Of course, this kind of example is rare and the exception rather than the rule, but its very existence implies of this possibility may also happen in the future.

The multiplicity of standards impacts the work of both ECJ and ECtHR. They must maintain their respective boundaries and separate functions. At the same time, they must monitor each other’s activities in order to balance the various human rights standards existing in different countries, and avoid any possible conflict of interpretation. This, undoubtedly, is not easy.

Nevertheless, the two institutions have attempted to tackle such a challenge through a relationship of informal cooperation, particularly in the context of legal cases. Despite the ECJ’s initial reluctance to apply findings of the ECtHR, in its later cases, the former has cautiously relied upon the interpretations applied by Strasbourg case law as a “source of inspiration” for its judgment. This signifies the ECJ’s openness in diverging from its normal policy when necessary.

The same attitude has been adopted by the ECtHR. Although its work is primarily based on its own document, namely ECHR, the EU Charter of Fundamental Rights and the ECJ’s decisions have been used as references in Strasbourg cases. Moreover, despite efforts to maintain its distance from the EU by avoiding any assessment of the latter’s conduct, in several cases, the ECtHR has also encountered national law that was implementing EU law. This kind of compromise may indeed fill the legal gap resulting from an absence of connection. But it does not solve the larger problem: a lack of external controls over the two bodies to ensure harmonious and complementary interpretation. Without a clearly demarcated relationship between the ECtHR and ECJ, both will remain essentially separate, and potential conflict may still appear. Thus, under current practice the ECtHR interprets the ECHR with human rights as the sole consideration, whereas the ECJ interprets human rights based on other considerations, including those of an economic and social nature. The risk is that the same issue will appear before both Courts, but that their respective objectives and approaches will lead the Courts to arrive at different conclusions. To avoid this scenario, it would be helpful to speed the process of ECHR’s accession by the EU. Such an action would not only reconfirm the present level of integration between the two institutions, but also address the diversity of standards and questions of external control. By joining the ECHR, the ECtHR will have jurisdiction over human rights protections at the EU level, and therefore can scrutinize case law emanating from the ECJ. This, ultimately, is the best way to establish and preserve a harmonious dynamic of interpretation between the two organizations.

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