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EU Accession to the ECHR & mutual recognition

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Overview

1. Current relationship: fragmentation and accountability gaps
2. Why accession?
3. The AFSJ as a (future) site of contention
4. Developments in the absence of accession
5. Solutions?
6. Counterfactual

Current relationship

- No formal relationship
 - except reference to the ECHR in Article 6 (3) TEU and Article 52 (3) CFR
- **instead:**
 - **cross-fertilization**
 - Charter partly based on ECHR
 - until Charter's arrival: ECHR was main 'source of inspiration' for the CJEU in fundamental rights cases
- **and MS responsibility for EU violations of the ECHR**
 - *Matthews v United Kingdom*
 - “The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer”.
 - *Bosphorus v Ireland*
 - rebuttable presumption of compliance with the ECtHR where the MS had no discretion
 - *Connolly v 15 Member States*
 - for responsibility to occur applicant must have been in the jurisdiction of one of the MS

Why accession to the ECHR?

Callewaert in CMLRev 2018:

Firstly, as regards the procedure before the European Court of Human Rights (“ECtHR”), the current picture is still a distorted one, not reflecting the proper structure of the EU, with Member States having to face alone the implications of EU law under the Convention.

Secondly, in terms of the substance of fundamental rights, the status quo does not seem capable of ensuring a stable level of protection and legal certainty in the long term.

Last but not least, removing the legal obligation on the EU to accede to the ECHR would undermine the very idea of a collective understanding and enforcement of fundamental rights. This, in turn, could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether.

EU Accession to the ECHR

Challenges:

- **political:**
 - EU: unanimity in the Council consent of the EP (Art. 218 (6)&(8) TFEU)
 - Council of Europe: consent of all 47 CoE high contracting parties
- **legal:**
 - correct attribution of responsibility: MS or EU or both?
 - relationship between CJEU and ECtHR;
 - protection of the autonomy of the EU legal order.

The 2013 Accession Agreement

Draft Accession Agreement was negotiated and agreed in 2013

- complex mechanism for allocating responsibility between the EU and its Member State (**co-respondent mechanism**)
 - Problem: the autonomy of the EU legal order: ECtHR must not be given jurisdiction to decide the allocation of competences between EU and MS
 - hence: introduction of a co-respondent mechanism
- complex mechanism for involving the ECJ in cases where not reference had previously been requested (**prior involvement mechanism**)
- and lots more.

Opinion 2/13

Opinion 2/13: seven main issues with the 2013 accession agreement

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Coordination between Articles 53 CFR and 53 ECHR
- Protocol No 16
- Exclusion of jurisdiction over CFSP measures
- **Exclusion mutual trust/recognition cases**

The AFSJ as a site of contention

- 95 new cases in 2020 = second busiest area of ECJ activity
- AFSJ is particularly **fundamental rights sensitive**
- governed by the principle of mutual recognition/mutual trust
 - excludes (in principle) review by one MS of another MS's fundamental rights compliance (e.g. where a European Arrest Warrant is concerned)
 - instead: individuals must challenge fundamental rights compliance in the MS where the alleged violation is taking place

Developments in the absence of accession

Asylum and Refugee Law (MS has discretion – Bosphorus doesn't apply)



Developments in the absence of accession

Where MS has no discretion: Bosphorus presumption applies, unless:

Avotīnš v Latvia:

113. The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice [...] Hence, it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. [...]

116. [w]here the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union **are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism** where the protection of Convention rights cannot be considered manifestly deficient. However, **if a serious and substantiated complaint is raised before** them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.

Developments in the absence of accession

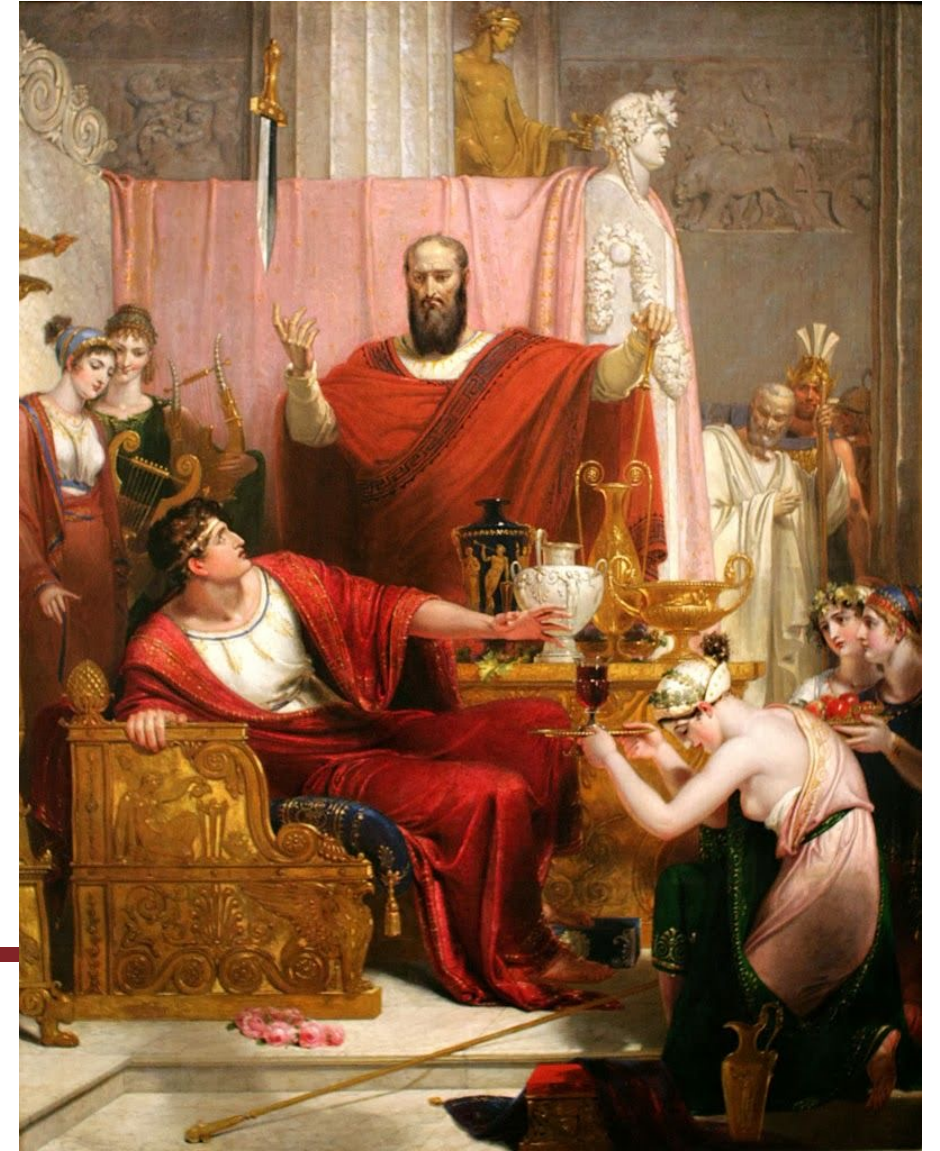
Hence re: EU Criminal Law (European Arrest Warrant)

- story not quite as straightforward, but
 - Avotiniš v Latvia (Brussels I case): ‘manifest deficit’ threat
 - Case C-405/15 *Aranyosi and Căldăraru* (overcrowded prisons=Art 4 CFR)
 - ECJ did not follow AG Bot’s consequentialist arguments that if exceptions to the EAW were allowed on the basis of prison conditions, the whole system would collapse
 - Case C-216/18 PPU *LM*: Art 47 CFR violations might result in duty to refuse execution
 - if there are substantial grounds for believing that that person will run a [real risk of a breach of the fundamental right to a fair trial] if he is surrendered to that State.
- **NB:** in *Bivolaru and Moldovan v France* (app nos 40324/16 et 12623/17): first time manifest deficit was found in a EAW case.

Developments in the absence of accession

What can we conclude from this?

- ECtHR case law has had an influence over the ECJ's softening
 - fairly obvious in asylum and refugee law
 - plausible argument that the same happened in EU criminal law
- Why?
 - the 'manifest deficit' threat



Accession conditionality in Opinion 2/13

➤ **With regard to mutual trust in the AFSJ, the ECJ held:**

it must be prevented that “the EU and the Member States [are] considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law [and] require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”.

➤ seems to go further than both ECJ case law and ECtHR case law as it contains no exceptions à la *MSS/NS/Tarkhel/CK* or *Aranyosi/Moldovan*

Recap: treatment of mutual recognition cases

Cases where MS has discretion (notably Dublin Regulation cases):

- *Bosphorus* does not apply
- applicant needs to show real risk of Article 3 violation

Cases where MS has no discretion (notably EAW)

- *Bosphorus* presumption applies
- but rebuttal (manifest deficit) if a serious and substantiated complaint is raised before the national court (and national court proceeds on the basis of mutual recognition)

Solutions?

Solution 1: “root and branch”

“Member States of the EU cannot be held responsible under the Convention for failing to carry out a review of another Member State’s compliance with Convention rights.”

- faithful to the wording of Opinion 2/13
- But does not account for the exceptions to mutual trust developed by the courts

Solutions?

Solution 2: current negotiations (CDDH47+1(2021)R12)

Article 5b – *Mutual trust under European Union Law*

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

Explanatory report:

- recalls ECJ/ECtHR case law on ‘exceptional circumstances’ (*Aranyosi/Avotins...*)
- mentions that mutual trust applies to non-EU MS under bilateral arrangements (see e.g. *Tarakhel*)

Risk: **might be struck out by the ECJ(again!)**

- **might not be strict enough (Op 2/13: ‘it must be prevented that’ MS are considered contracting parties in their relations with one another...**
- **“the autonomy trap”**

Further: unclear whether it would result in an indefinite continuation of *Bosphorus*

How might this provision be applied?

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

Would a cases like *M.S.S.* or *Moldovan* be within the ECtHR's jurisdiction?

- Challenges via EU law would of course remain possible
 - national courts asked to not comply with mutual trust on the basis of fundamental rights
 - national courts could still refer to the ECJ
- Open question: in how far could ECtHR second guess ECJ's findings?
 - Significance of the 2nd sentence? 'ensured' by whom?
 - Might we see an overall lowering of fundamental rights protection?

Thank you for listening



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