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The future of EU human rights law: Is accession to the ECHR still desirable?

CES Conference 2021

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With the support of the
Erasmus+ Programme
of the European Union

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

Of fragmentation and accountability gaps: the current EU-ECHR relationship

1. Inconsistency and fragmentation
 - two (partly) parallel systems with courts interpreting the same rights
 - evidence that ECJ takes inspiration from ECtHR and even *vice versa*
 - coordination does not always work, however
2. Accountability gaps
 - The rule in *Matthews*:
MS may transfer powers onto the EU, provided that Convention rights continue to be secured. MS responsibility therefore continues even after such a transfer.
 - Exception 1: *Bosphorus* presumption
 - Exception 2: the *Connolly* gap

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.



The AFSJ as a (future) 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

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”.

Developments in the absence of accession

Asylum and Refugee Law



Developments in the absence of accession

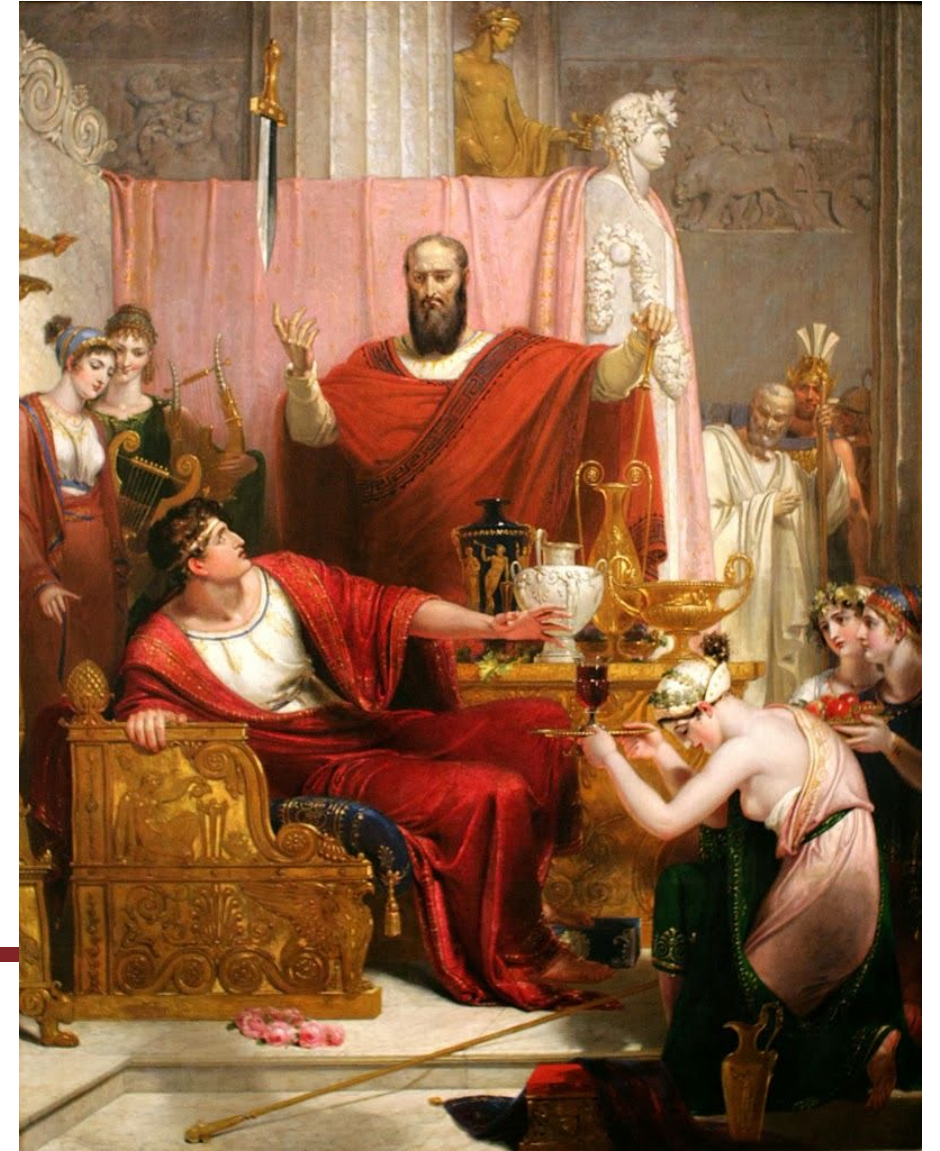
EU Criminal Law (European Arrest Warrant)

- story not quite as straightforward, but
 - Avotīņš v Latvia (Brussels I case): ‘manifest deficit’ because of mutual recognition?
 - ECtHR very critical of ECJ’s strict stance in Opinion 2/13, instead requires that:
 - “if a serious and substantiated complaint is raised before [MS courts] 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.
 - 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



Solutions?

EU proposal (CDDH)47+1 2021 R9, para 4 [paraphrased in the report]

1. The High Contracting Parties recognise that the Convention must be interpreted and applied taking into account the special importance of mutual recognition mechanisms established by EU law, which are founded on the principle of mutual trust, in the relationship between the member states of the EU.

2. The principle of mutual trust requires those member states, when implementing EU law (notably in the area of freedom, justice and security), to consider – save in exceptional circumstances - that fundamental rights have been observed by the other EU member states.

But: might be struck out by the CJEU (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”:

Safer route, perhaps:

“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.”

Counterfactual: what if accession had happened?

EU proposal: “The principle of mutual trust requires those member states, when implementing EU law (notably in the area of freedom, justice and security), to consider – **save in exceptional circumstances** - that fundamental rights have been observed by the other EU member states”.

What are ‘exceptional circumstances’?

- Manifest deficit situations?
- Something else entirely?

Would a cases like *M.S.S.* or *Bivolaru* 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: would ECJ be prepared to make the same concessions?

Question even more pressing if the other solution adopted (total exclusion of cases relying on failures by one MS to review measures of another MS).

Conclusion

Is EU accession to the ECHR (still) a good idea in light of the ECJ's demands?
Or is today's pluralism the way forward?