Reconciling Mutual Trust and Individual Fundamental Rights

Outline

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Introduction

- The Treaty of Lisbon appeared to herald a new, promising era for the protection of fundamental rights within the EU

- Specifically, Article 6(1) TEU bestowed on the Charter of Fundamental Rights 'the same legal value as the Treaties', whilst Article 6(2) TEU stated unequivocally that, 'The Union shall accede to the [ECHR]'

- After a long period of negotiation, the Commission presented the draft agreement on accession to the ECHR to the Court of Justice of the European Union ('the CJEU') for its Opinion pursuant to Article 218(11) TFEU

- Opinion 2/13 of the CJEU threw into sharp relief the difficulties associated with giving effect to the commitment in Article 6(2) TEU *whilst at the same time respecting the requirements of Protocol 8*, namely that 'The agreement … shall make provision for preserving the specific characteristics of the Union and Union law …' (Article 1) and that 'The agreement … shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions …' (Article 2).

- Opinion 2/13 identified five basic reasons why the CJEU considered the draft agreement on accession as it stood to be incompatible with EU law

- Today, will focus on just one sub-part of one of those reasons: that the ECHR obligation on Member States to check up on each other's observation of fundamental rights is incompatible with the 'high level of mutual trust' that Member States are required to show each other

Why is mutual trust a sacred cow?

- the completion of the single market necessitated the creation, in parallel, of the AFSJ

- however, much of the subject matter of the AFSJ is politically very sensitive: issues such as criminal law, immigration and asylum and family law are all very close to national identity / sovereignty (these are also, of course, areas which are very important indeed from a fundamental rights perspective); and Member States are each sure that their system is best

- there was therefore considerable unwillingness to harmonise and to endow the EU with single EU-wide instruments (the European Arrest Warrant – 'EAW' – being a notable exception that can partially be explained by 'post-9/11 solidarity')

- the solution found was to borrow from the tried and tested technique of mutual recognition of qualifications in the single market and re-label it 'mutual trust'

- The 'Conclusions of the Tampere Council' consecrated this new concept of 'a high level of mutual trust' and it has since become enshrined in the CJEU's case law on (e.g.) *ne bis in idem* and Schengen area free movement; treatment of asylum applications under the Dublin Regulation; and treatment of child abduction cases under the Brussels IIa Regulation

- The sacred cow is now very sacred indeed (see, e.g., Case C-467/04 Gasparini; and (of course) Opinion 2/13)

- But how could the CJEU, in Opinion 2/13, have come to a conclusion that is so at odds with the protection of individual fundamental rights?

Two dogs, different collars

- CJEU – defending the system that the-EU has built to create the AFSJ

- EC(t)HR (the 'Strasbourg court') – concerned exclusively with the question, 'were this individual's rights violated?'

Is there a way forward?

- It seems unlikely that the CJEU is about to abandon mutual trust

- Can a solution be found within the framework of EU law / a (new) draft agreement on accession?

- At legislator level, crucial that new AFSJ instruments (and old instruments as they are overhauled and updated) are really subjected to serious fundamental rights scrutiny (*not* tick-the-box-for-Charter/ECHR-compliance)

- NB that 'Insofar as [the] 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 ECHR]' – indeed, 'This provision shall not prevent Union law providing more extensive protection' (Article 52(3) of the Charter) – so, *in theory there should not be a problem, ever*

- In reality, there *may* be a problem because procedures / circumstances in an individual Member State B may fall short of the necessary standard of protection and Member State A (under the principle of mutual trust) should not scrutinise Member State B but should send the individual there in application of the principle of mutual trust

- Provided there is adequate access to the courts in Member State B and those courts do their job, there should be protection in Member State B (but, perhaps that may not always automatically happen *before* the individual suffers a violation of his fundamental rights)

- If there is a violation and the case reaches the Strasbourg court having exhausted all domestic remedies in Member State B, it is hard to see how (much) blame / responsibility could be put onto Member State A (it was merely complying with its EU law obligations and applying the doctrine of mutual trust); however

- Responsibility for the violation (and for paying appropriate compensation) should then lie squarely with the EU as a co-respondent

- This – or something like this – has (perhaps) the potential to offer a way forward, but it may sometimes be a sub-optimal solution for the individual

- Reality is, however, that *whenever* a case has to get as far as the Strasbourg court for review and fundamental rights protection, 'the system' has let the individual down

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