Mutual Trust in the Area of Freedom, Security and Justice

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1.1 Introduction

Context

• Central pillar to the European Integration project.

• Two negative obligations laid down in ECJ Opinion 2/13:
  1. to not demand higher protection of fundamental rights than imposed by EU law
  2. to not check if other MS have been complying with their obligations save in exceptional circumstances.
1.2 Introduction

Research Question(s)

• Therein the research question arises:
  • firstly, how is mutual trust to be defined? As a dynamic value, how is the trust earning process to be comprehended legally?
  • secondly, how to solve the problem that its conception as an obligation to presume that MS are complying with EU fundamental rights leaves room for the possibility that actual violations may not be detected while also ensuring that the autonomous EU legal system still functions?
• Methodology - doctrinal, dogmatic, multidisciplinary.
2.A.1 Contours of mutual trust as limits to MS cooperation in the AFSJ

Origins

- Mutual recognition’s success as a tool of economic integration - ECJ case Cassis de Dijon.
- Hereon, the mutual trust principle found its way into plethora of EU legislations and policy documents.
- Soon enough it began to be cited as the rational for mutual recognition - It is because of mutual trust that MS recognise each other’s judicial decisions.
2.A.2 Contours of mutual trust as limits to MS cooperation in the AFSJ

Cooperation in EAW

- (2002/584/JHA) FDEAW
- Replaces interstate extradition eliminates dual criminality requirement for 32 offences
- Grounds for refusal to cooperate limited to those outlined under Art. 3, 4, 4a.
- **Radu** - non opportunity to be heard not crucial in halting cooperation.
- **Aranyosi** - systemic deficiencies in detention conditions posing a risk of Art. 4 violation created an exception to cooperation.
- **LM** - risk of violation of Article 47 Charter at risk - rule of law situation in Poland.
2.A.3 Contours of mutual trust as limits to MS cooperation in the AFSJ

Dublin Cooperation

• Regulation 604/2013 (Dublin III) allocates responsibility of examining asylum applications
• hierarchical criterion under chapter III - unaccompanied minors, family reunification, previous visas/stays, irregular entry & voluntary examination.
• Mutual trust based cooperation entailing default transfer arrangements between between MS
2.A. 3 Contours of mutual trust as limits to MS cooperation in the AFSJ

Dublin Cooperation

• Limits to cooperation:
  • *Abdullahi* - under Dublin II only systematic deficiencies may be raised.
  • *N.S. and M.E* - may v. must examination on own accord in systemic deficiencies.
  • *C.K.* - transfer itself may not lead to violation of FR.
  • *Ghezelbash* - (Under Dublin III) incorrect application of criterion under Chapter III may be raised to prevent transfer.
  • *George Karim* - (Under Dublin III) ground of Art. 19(2) Dublin III not taken into account could be raised.
  • *A.S.* - Art. 13 i.e. irregular crossing could be raised by individuals.
  • *Abubacarr Jawo v Bundesrepublik Deutschland* - mere more favourable conditions in another MS cannot be a ground to limit cooperation.
2.A.4 Contours of mutual trust as limits to MS cooperation in the AFSJ

• Persisting questions to this approach:
  • Limiting mutual trust based cooperation being curtailed in face of evidence of real risk of violation of FR still leads to following issues.
    • The burden of compliance with FR is transferred to executing authority.
    • Functioning of autonomous EU system is not maintained.
  • In this case is a better outcome promised by further harmonisation?
    • If so, how are objections based on MS constitutional identity to be addressed?
  • Can mutual trust be contextualised despite diversity under current constitutional arrangement?
**2.A. 5 Contours of mutual trust as limits to MS cooperation in the AFSJ**

## Summary

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Scenario 1 without exceptions</th>
<th>Scenario 2 with exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence of risk of violation of FR may be assessed by EA</td>
<td>No. Presumption operates.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Is individual to be transferred?</td>
<td>Yes.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Functioning of autonomous EU legal system ensured?</td>
<td>Yes.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Individual’s EU fundamental Rights preserved?</td>
<td>Unverifiable.</td>
<td>Yes.</td>
</tr>
</tbody>
</table>
2.B.1 Mutual trust in multilevel constitutional system of the EU

Treaty Basis

• Could Article 4(2) TEU (equality clause) read with Art. 2 TEU (European values) be the legal basis for the principle of mutual trust?
2.B.2 Mutual trust in multilevel constitutional system of the EU

Horizontal and vertical relationship: EU and MS
2.B.3. Mutual trust in multilevel constitutional system of the EU

What is a multilevel Constitutional Framework?

• Origins in BvG’s Maastricht decision - characterised EU as a *staatenverbund*.
• Scholars (Pernice and others) propounded the idea of *verfassungsverbund*.
• The EU is not slated to become a federal state in the traditional sense.
  • But note its supranationality in direct effect and primacy of EU law i.e. not a classical international organisation.
• Instead the EU can be defined as-
  • a multilevel framework where state sovereignty is reduced to give way to EU legal order
  • resulting in a system where the EU and MS legal orders interlock
2.B.4 Mutual trust in multilevel constitutional system of the EU

• What is a multilevel constitutional framework?...Contd.

• **Sovereignty**: traditional notions of sovereignty were associated with monopoly of force wielded by monarchs (in monarchies) and by people (in democratic states)

• An alternative conception pertains to monopoly on use of force as well as internal and external self determination as to content and form of state authority - such as drawing up of a constitution.

• In EU context, sovereignty is pooled and shared by different levels of government.

• Conceptualise as a **staatenverbund** - sovereign power conferred upon by MS but remains that of EU’s alone.

• **Staatenverbund** denotes the outer body

• Normative content denoted by **verfassungsverbund** - constitutionalisation as it is occurring is rendering constitutions more and more open to peaceful coordination leading to interpenetration and interlocking of national and supranational legal orders.
2.B.5 Mutual trust in multilevel constitutional system of the EU

• While national law tolerates homogenisation requirements of EU law, it also forms the largest reservoir of European constitutional law.

• Unity in this intertwined legal orders will be attained through effective conflict solving in a shared legal space.

• In a nutshell a *verfassungsverbund* is characterised by ‘contentwise interaction, mutual interdependence and mutual interlinkage’ between Eu consti provisions and MS consti provisions. This however applies to the normative content of the two legal orders as a whole.

• Illustration in practical setting - preliminary ruling procedure.
2.B.8 Mutual trust in multilevel constitutional system of the EU
2.B.9 Mutual trust in multilevel constitutional system of the EU

• sincere cooperation obligation is always mutual - refer to EU-friendliness principle in MS constitutions - also in everyday interaction

• According to this obligation under Art. 4(3) TEU, the EU friendliness principle has to be seen as an embodiment of mutual respect for one another and a willingness to ensure the functioning and the stability of the shared system based on procedural solidarity.

• ECJ in Slaughter Premium Judgment (1973)

"In permitting the Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."
2.B.10 Mutual trust in multilevel constitutional system of the EU

- Role of Art. 4(3) TEU

- In a multilevel constitutional system, decision making is done through procedural solidarity under the umbrella of Art. 4(3) TEU.

- legally structured mechanisms for reciprocal participation.
  - But such process should not be reliant on goodwill of the institution.
  - It also cannot allow a ‘collapse back into the dictates of divergent legal authorities or threaten the extinction of that very divergence.’
3. Mutual trust in multilevel constitutional system of the EU

Conclusions

• How does this understanding function in practice for mutual trust?
• Scenario 1: Mutual trust will derive from the default state of trust that a fellow MS is discharging their duties under EU law as required.
• Scenario 2: If however a MS does become aware of human rights violations, then a possible reaction cannot be to turn a blind eye. Better approach, seeking assurances, accepting take charge requests after expiry of time limit.
• Scenario 3: In extreme cases, cooperation maybe halted. In such a scenario, by directing the MS to not transfer and examine the application oneself.
  • systematic deficiencies - N.S.
  • Individualised assessment - A.S.
Sources

• Calliess and Schnettger, The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism, Cambridge University Press, 2019
• Sharma, In Mutuality we Trust: Assessing Impact of judicial rulings pertaining to 2015 Migration Crisis, Berliner Online Beitrag 113, edited by Chair of Public Law and European Law, Prof. Dr. Christian Calliess, LL.M. Eur Freie Universität Berlin.