

Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice

A Role for Proportionality?

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Introduction

The Area of Freedom, Security and Justice (AFSJ)¹ aims to *secure* the enjoyment of *freedom* within a borderless European space both by Europeans and non-Europeans who sought access to European territory.² Quick and efficient cooperation among authorities of the Member States was necessitated in several policy areas. For this reason, additional unnecessary checks were abolished, which reveals a high level of trust. Member States trust each other to offer a sufficient level of fundamental rights protection, which then allows the mutual recognition of decisions made by national authorities (judicial or not). The existence of mutual trust could be seen as the cornerstone of this area, without which its operation becomes dysfunctional. It should be noted that mutual trust and mutual recognition are two separate concepts and principles of EU law that are, however, interlinked. Mutual trust is the prerequisite of mutual recognition. The latter is the end result. Mutual recognition is only realised due to a presumption of compliance with fundamental rights that gives rise to mutual trust.

The doctoral and post-doctoral research that led to the writing of the book first observed the imbalance of interests in the context of mutual trust. This was evidenced by the interpretation by the Court of Justice of the European Union (hereinafter 'the Court' or CJEU) of instruments that result in the mutual recognition of decisions issued by the authorities of Member States. Mutual trust among Member States regarding the protection of fundamental rights was often noticed to be demanded by the Court rather than properly constructed or even thoroughly checked. Trust was blind and recognition was absolute for some time before they were both qualified by the Court's more recent interpretation. This initial misunderstanding of mutual trust stemming from a compelled presumption of compliance with rights' obligations has been to the detriment of the protection of fundamental rights.³ Despite jurisprudential developments that shifted this

¹ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47, title V.

² European Council, 'Presidency Conclusions' (Tampere Presidency Conclusions) (1999) Tampere 15 and 16 October 1999 OJ C332 E, paras 1–9.

³ For an account of mutual trust see Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55(2) *CML Rev* 489; Rosaria Sicurella, 'Fostering a European Criminal Law Culture: In Trust We Trust' (2018) 9(3) *New Journal of European Criminal Law* 308; Petra Bård and Wouter van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*' (2018) 9(3) *New Journal of European Criminal Law* 353; Mattias Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom,

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imbalance, the equilibrium is not fully restored. It is here that this book contributes, by thoroughly discussing the principles of mutual trust, mutual recognition, the protection of fundamental rights and the impact of the principle of proportionality to the protection of fundamental rights.

Proportionality is a principle of constitutional law with regard to the limitation of rights in numerous national and international jurisdictions. According to the principle of proportionality, everything should be in proportion and nothing should be in excess. Given the general sense of imbalance in mutual recognition instruments, the value of proportionality offers an attractive hypothesis. The principle seeks balance and rejects excessive choices, as it defines a balanced legal choice when two interests compete with each other. As a matter of EU law, the principle is enshrined in Article 52(1) of the Charter of Fundamental Rights of the European Union (the Charter).⁴

The imbalance between security and migration control interests and the protection of fundamental rights in this context renders the exploration of the potential of a proportionality-based analysis essential and topical. However, the study of this principle in the AFSJ has not yet attracted the attention it deserves, creating a gap which calls for this research. This book sits aside existing literature⁵ on EU constitutional and AFSJ law, but makes an original contribution – that is, offering a framework of a proportionality-based analysis for the AFSJ, as well as original ideas on mutual trust and the protection of fundamental rights in this context.⁶

Security and Justice after LM' (2019) 15 *European Constitutional Law Review* 17; Adam Łazowski, 'The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldaru' (2018) 14 *Croatian Yearbook of European Law and Policy* 1; Helmut Satzger, 'Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant' (2018) 8 *European Criminal Law Review* 317; Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 *German Law Journal* 468; Cecilia Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) 25(1) *European Law Journal* 37; Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31(1) *Yearbook of European Law* 319.

⁴ Charter of Fundamental Rights of the European Union (the Charter) [2012] OJ C326/391.

⁵ Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19(4) *European Public Law* 759, 759; Ermioni Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6(1) *New Journal of European Criminal Law* 32; Sarah Haggemüller, 'The Principle of Proportionality and the European Arrest Warrant' (2013) 3 *Oñati Socio-Legal Series* 95; Joachim Vogel and John Spencer, 'Proportionality and the European Arrest Warrant' (2010) *Crim LR* 474; Tomasz Ostropolski, 'The Principle of Proportionality under the European Arrest Warrant – with an Excursus on Poland' (2014) 5(2) *New Journal of European Criminal Law* 167; Dan Helenius, 'Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?' (2014) 5(3) *New Journal of European Criminal Law* 349; Ester Herlin-Karnell, 'The Domination of Security and the Promise of Justice: on Justification and Proportionality in Europe's "Area of Freedom, Security and Justice"' (2017) 8(1) *Transnational Legal Theory* 79.

⁶ Herlin-Karnell's recent, fascinating book *The Constitutional Structure of Europe's Area of 'Freedom, Security and Justice' and the Right to Justification* is in fact an original and comprehensive take on several constitutional principles that govern the AFSJ. See Ester Herlin-Karnell, *The Constitutional Structure of Europe's Area of 'Freedom, Security and Justice' and the Right to Justification* (Hart Publishing 2019).

Moreover, there is not yet an independent monograph on proportionality covering the AFSJ as a whole rather than EU criminal law only. This is because the discussion on proportionality became topical after the problem of the disproportionate use of the Framework Decision on the European Arrest Warrant (FDEAW) was raised,⁷ which triggered the research for this project, alongside the overall imbalance of the area. However, the monograph expands on mutual trust instruments of the AFSJ as a whole. The exploration of proportionality, at a wider constitutional level, beyond the remit of EU criminal law, was deemed more fascinating than simply exploring the impact of the principle merely in the narrow context of the FDEAW. The problematic nexus between rights violations and mutual trust is identified beyond the narrow context of the FDEAW. Further factors contribute to the originality of the monograph. Most of the existing monographs either study the wider constitutional framework of EU criminal law only, or more generally the AFSJ, with reference to a range of constitutional principles, including the principle of proportionality, but with the result that the latter's account has remained underexplored to a significant extent.

Therefore, and more broadly, the book will sit neatly with existing literature adding an original perspective to EU AFSJ law scholarship.⁸ Most scholarship offers an insight into questions of constitutional importance in relation to EU criminal law. However, they usually focus on EU criminal law only, whereas this

⁷European Commission, 'Report from the Commission to the European Parliament and the Council of 11 April 2011 on the Implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States' (2011) 8; European Commission, Implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant – The Issue of Proportionality – Meeting of experts (2009) 4.

⁸Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012) Herlin-Karnell's book considers the principle of effectiveness in EU criminal law at a constitutional level and through the case study of EU financial crime. This is another relevant contribution, considering the constitutional dimension of EU criminal justice. Herlin-Karnell explores the balance between effective EU action and adequate protection of individual rights. The principle of proportionality is particularly explored in the context of financial crime. Although this monograph considers EU criminal law from a constitutional perspective, as the present book does, the differences between the two are clear, as the research questions and the scope of the research are different. I discuss two different case studies, one on the FDEAW and another on the Dublin system, and I adopt a more holistic, rights-oriented approach. Also see Valsamis Mitsilegas, *EU Criminal Law after Lisbon; Rights, Trust and the Transformation of Justice* (Hart Publishing 2016). Mitsilegas' fascinating monograph focuses on constitutional aspects of the AFSJ law, as does the present book. In one of the chapters, mutual recognition, mutual trust, and proportionality are especially considered, in cases where a European arrest warrant (EAW) is issued for trivial offences. However, Mitsilegas' monograph focuses essentially on the impact of the entry into force of the Lisbon Treaty on EU criminal law, while the present book focuses on a totally different question and pursues a different aim. Mitsilegas' analysis embraces several aspects of the constitutional arena of EU criminal law whereas in this book I am only focusing on one aspect of it, whilst employing a perspective which stretches beyond the remit of EU criminal law. In particular, this book considers the impact of proportionality as a human rights concept within transfers of individuals, in general, within the AFSJ. Moreover, the book does not see proportionality primarily as a limit to mutual recognition, as Mitsilegas's monograph does, but as a safeguard against excessive breaches of human rights, which could eventually pose limits to mutual recognition.

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book focuses on constitutional concepts such as mutual trust, mutual recognition, proportionality and fundamental rights, as encountered in the whole AFSJ and with reference to two case studies from two distinct policy sub-areas – which are EU criminal and asylum law. Therefore, this book offers, on the one hand, a holistic perspective, and, at the same time, it submits a narrower hypothesis, as shaped by the exploration of the framework and the impact of proportionality to the protection of rights.

Proportionality could have different roles in the AFSJ, ie proportionality of penalties, proportionality of restrictions on rights, proportionality of exercising competences and *ultima ratio* in criminalisation. The book focuses on only one function of the principle, that of proportionality, being the guardian of fundamental human rights from disproportionate restrictions. The rest of the functions, although acknowledged, are beyond the remit of this book, thus allowing for a thorough and focused analysis. The book considers the impact of a proportionality-based analysis on the protection of fundamental rights in the context of AFSJ instruments that rely on mutual trust. To formulate a normative framework of analysis, the book discusses the application of the principle by the Court, theorises the principle and then offers an account for the AFSJ, which is then applied and tested in two case studies.

In the special context of the FDEAW, such an analysis would establish whether any interference with the fundamental rights of defendants or suspects is justified, when considering the surrender of the individual. Correspondingly, in the context of the Dublin III Regulation, a proportionality-based analysis would determine whether an interference with the fundamental rights of asylum seekers is justified when considering the transfer of an asylum seeker under the Dublin system. The result of this analysis would – in theory – inform a decision of a national authority on whether a Member State is eventually allowed to transfer the individual concerned to the country specified by the law. The book hence offers a contribution to the scholarship on the AFSJ from the angle of constitutional principles that govern the area and especially from the perspective of the protection of fundamental rights.

Research Questions

The first questions I pose concern the operation and development of mutual recognition and mutual trust. I ask how they are formed and used and then ask how they should be understood and developed. Then, I move on to consider whether and how proportionality could make a difference. In this respect, I ask whether any proportionality-based analysis is generally employed in this context by the Court or by the judicial authorities. The next question I pose is how exactly a proportionality-based analysis should be understood in this area, and how it should be employed, where necessary. This question is addressed at a theoretical level, and then discussed from the perspective of the AFSJ. Then, I ask what

proportionality would mean for the two case studies and how it could be applied there. The final question I pose concerns the impact of the principle of proportionality. So, I ask whether it could actually enhance the protection of fundamental rights of individuals in the context of mutual recognition instruments. Therefore, the book is organised based on these core questions. This is absolutely timely given the Court's recent turn in *Aranyosi*⁹ in March 2016 and in *LM*¹⁰ and *ML* in July 2018,¹¹ which confirm and clarify that the presumption of compliance 'with fundamental rights' is rebuttable.

Findings and Arguments

First, it is submitted that the development of mutual trust in a direction that does not rely on a conclusive presumption of compliance is welcome as trust is not dogmatic but is constantly informed by assumptions and arguments. This should also be reflected in our understanding of mutual recognition, which should be an active one. Authorities must be other-regarding in the sense that they should be really engaging with other states' rules when they can no longer presume compliance. In this respect, I examine the input of proportionality. I argue that a proportionality-based analysis is not generally used by the Court in the examined context of the book but I also argue that there is a slow dynamic of emergence of a proportionality-based analysis, which is enabled by the Court timidly rebutting the traditionally rigid presumption of trust. Second, I argue that a proportionality-based analysis would establish whether fundamental rights breaches, associated with a transfer of an individual, in the framework of mutual trust, are disproportionate to suspend a transfer. Third, the book argues that the principle of proportionality could have a significant impact on the protection of fundamental rights in the context of mutual trust instruments, but only in light of a proper and consistent definition. The impact of a proportionality-based analysis is significantly affected by the general constitutional limits regarding the structure of the principle of proportionality. Since a proportionality-based analysis is neutral and open to various theories, the results of balancing are subject to the selected theory of rights embedded in the test.

The general limit of the principle's impact on restoring the equilibrium in the context of mutual trust in the AFSJ becomes even more problematic in areas of law where fundamental problems might exist. The impact of the principle of proportionality could be significantly altered by the specific circumstances of the particular case studies where it could be applied. For example, at a particular level,

⁹Joined Cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldaru* ECLI:EU:C:2016:198.

¹⁰Case C-216/18 PPU *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586. The case is also known as *Celmer*.

¹¹Case C-220/18 PPU *Generalstaatsanwaltschaft v ML* ECLI:EU:C:2018:589.

the impact of a proportionality-based analysis is especially highlighted in the case of the FDEAW. The application of the principle to interferences with relative rights would contribute to the qualification of mutual recognition and eventually to the protection of fundamental rights from disproportionate restrictions. On the other hand, the same cannot be argued for the Dublin III Regulation of the Common European Asylum System (CEAS).

Scope

It is only the function of the principle of proportionality relevant to fundamental rights limitations that is studied. In this way, the principle of proportionality would eventually have a restrictive effect on the EU policy goals of quick cooperation. This should be contrasted with the traditional use of the principle of proportionality in the internal market, where the proportionality of the national measures restricting free movement rights has to be proven. There, in the internal market, proportionality has essentially acted as the guardian of EU free movement rights, having a restrictive effect on national public interests, including sometimes the protection of fundamental human rights. So, the functions of the principle with regard to the delimitation of the EU competences and the exercise of criminalisation fall outside the scope of the study. Furthermore, the book does not study clashes between fundamental rights, but only cases where rights are restricted by public interests.

Moreover, the two case studies on the FDEAW and the Dublin III Regulation of the CEAS constitute examples of the application of a proportionality-based analysis. The central argument could in theory be generalised and applied to other instruments of mutual recognition of the AFSJ. However, this should take place in a reserved and careful way. The legal environment of other instruments could seriously affect the impact, intensity and conduct of a proportionality-based analysis. Therefore, although the two case studies in the book constitute examples of mutual recognition instruments, the application of the argument is only conducted in these two contexts. As a result, the arguments put forward are pertinent to this particular context of application, and any further application of these arguments to other case studies could carefully take place as a separate exercise. With this in mind, the argument could be helpful beyond the confines of these case studies.

Choice of Instruments

Furthermore, a methodological question would concern the reason why these instruments were chosen as case studies, as opposed to other mutual trust instruments. These two measures were chosen for a number of reasons, enabling to the maximum extent a commentary on the application of the theoretical argument.

First, the FDEAW is praised as a successful instrument of cooperation and the Dublin III Regulation of the CEAS is criticised as not being particularly successful. On the one hand, the FDEAW had to be chosen as the first and exemplary measure of mutual recognition and the Dublin III Regulation as one facing many fundamental problems and raising scepticism. The case studies had to represent both contexts of positive and negative mutual recognition.¹² Thus, the FDEAW is an example of positive mutual recognition, where Member States recognise each other's decisions, based on which they have to surrender an individual. On the other hand, the Dublin III Regulation is based on negative mutual recognition, which means that Member States recognise the responsibility of other Member States to examine an application and thus escape from the obligation to take charge of an applicant. Based on this, they have to transfer an individual. The FDEAW and Dublin III also represent different fields of law, the one being criminal and the other asylum law, and thus the idea can be tested in two different areas. Although cooperation in civil matters could also have been chosen, this would limit the extent of analysis with regard to the application of the theoretical argument and the rights in question. An additional case study could therefore limit the depth of analysis given the constraints of a monograph. Moreover, although cooperation in civil matters could have been chosen as an alternative, I chose to engage with the FDEAW and the Dublin III Regulation because they both pose particularly sensitive questions about fundamental rights of individuals who find themselves in vulnerable positions. Furthermore, they are both sensitive to national sovereignty, and they are both infamous for their concern with the protection of fundamental rights. Finally, both laws entail the physical transfer of individuals and the relationship between the cooperating Member States.¹³ This common element could further help reflection and comparability. In summation, I chose these case studies to reveal the general applicability but also the limits of a proportionality-based analysis.

Structure

The first chapter of the book sets out the foundational concepts of the research problem. It exhibits the existing problems with regard to the imbalance existing in the AFSJ as manifested by the operation of mutual recognition in it and the need

¹² On the latter distinction see Elspeth Guild, 'Seeking Asylum; Storm Clouds Between International Commitments and EU Legislative Measures' (2004) 29(2) *European Law Review* (2004), 198,-218, at 206.

¹³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L180/31, Section VI on 'Transfers', arts 29–33; Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (FDEAW) [2002] OJ L190/1, ch 2 on the 'Surrender procedure' arts 9–25.

to boost the protection of fundamental rights. The second chapter explores the principle of mutual trust, which is linked to mutual recognition, yet distinct. The third chapter theorises proportionality. It studies a proportionality-based analysis from a theoretical and institutional viewpoint in general constitutional terms. It also employs a specific EU perspective to construct a framework of analysis for the AFSJ, and particularly for the context of mutual trust. Thereafter, the book tests the framework of analysis by applying it to the two case studies. Firstly, a proportionality-based analysis is discussed in the context of the FDEAW, and secondly with regard to the Dublin III Regulation, which further inform the account of a proportionality-based analysis. The discussion is accompanied by an insight into the specific rights interfered with by the particular procedures. Finally, the last chapter offers some reflections on the interdependent relationship between mutual trust, fundamental rights and proportionality by revisiting these three pillars of the book in light of the findings relating to the research questions. It lastly offers suggestions for the way forward for EU criminal justice and the CEAS.