

Ermioni Xanthopoulou. *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice – A Role for Proportionality?* Oxford: Hart Publishing, 2020.
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In “Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice – A Role for Proportionality?”, ERMIONI XANTHOPOULOU proposes an approach to the principle of proportionality as a criterion to justify limitations on fundamental rights due to the functioning of the principle of mutual recognition within the European Union’s Area of Freedom, Security and Justice (AFSJ).

After an introduction of the problematics, Chapter 1, under the title “Mutual Recognition: From Passive to Active Recognition”, focuses on the origins of the mutual recognition principle, starting with its development by the Court of Justice of the European Union in the *Cassis de Dijon* judgment, and highlighting the challenge it represents for national sovereignty. This principle, based on the idea of equivalence that guides the European Union’s internal market, has been transferred to the AFSJ. In this regard, homage is paid to the Tampere Council, which resulted in the identification of the need to recognize judicial decisions between Member States, and in the call for mutual recognition as a cornerstone of judicial cooperation in the Union.

Still in the same Chapter, the Author analyses the principle of mutual recognition (especially regarding European arrest warrants) and the development of this model of interstate cooperation. In this sense, the Author establishes the evolution of the principle, classifying it, at first, as passive recognition and, later, as active recognition. This evolutionary analysis is based on the reasons for refusing cooperation, on the emergence of fundamental rights as a priority in European Union law, and on the functioning of the principle of mutual recognition. The Author invokes the *Aranyosi*, *LM* and *ML* cases as a jurisprudential turning point that emphasises the protection of fundamental rights as a priority and encourages judicial authorities to communicate with each other. Communication is, in fact, an important condition between trusting parties. I agree with this logic because the existence or absence of confidence is sometimes related to factual issues, such as prisons conditions, and, by increasing communication, judicial authorities can learn more from each other and gain trust in the other Member State’s law.

Recognizing that the current model of cooperation in the AFSJ is far from perfect, ERMIONI XANTHOPOULOU proposes the ponderation of the principle of proportionality as a step to determine whether the restriction of a fundamental right caused by interstate cooperation is disproportionate enough to prevent such cooperation and mutual recognition. A proportionality-based analysis is developed in this book as a step forward in the determination of whether a restriction on a right associated with a transfer is so unnecessary, or so excessive, as to prevent the transfer.

In Chapter 2, called “Mutual Trust: From Blind to Gained Trust”, the Author begins by recalling that mutual trust, on which the mutual recognition model is

based, presumes the respect for fundamental rights. Throughout the book, the Author focuses on mutual trust regarding cooperation through the European Arrest Warrant and the Dublin III Regulation concerning asylum law. Here, the evolution of mutual trust is traced, starting with its affirmation, in the *Radu* and *Melloni* cases, as blind and a priority over the protection of fundamental rights. The second phase of mutual confidence, according to the Author, begins with the *Aranyosi* judgment, in the context of the Framework Decision on the European Arrest Warrant, and, in the field of the Dublin system, with judgment *N.S. and others*. This second moment, described as qualified system of trust, is marked by limits to trust under strict conditions, which means that the presumption of respect for fundamental rights is refutable. Finally, the third phase is the one moving towards an individual assessment, where trust is challenged in concrete cases.

ERMIONI XANTHOPOULOU also stresses the idea of the ‘Age of Distrust’ that we are currently experiencing due to recent developments that have affected cooperation between Member States, such as ‘Brexit’ and the Polish rule of law crisis. As such, this context raised questions in terms of cooperation between States within the scope of the Area of Freedom, Security and Justice. As a consequence, deserved trust was defended as a substitute for blind trust between States. The European Court of Justice (ECJ) has been called upon to intervene and revisit the limits of mutual trust in cases of execution of the European arrest warrant and of the Dublin system’s transfers, demonstrating how relevant the need is to rethink the relationship between fundamental rights and the mutual recognition principle.

Entitled “Deconstructing Proportionality”, Chapter 3 of the book proposes an analysis of the proportionality principle from a theoretical and a legal perspective and its role within the European Union. This principle, applied by the ECJ in the *Cassis de Dijon* and *Internationale Handelsgesellschaft* cases to justify restrictive measures on fundamental rights in the internal market also plays a fundamental role in substantive criminal law, since criminalization and the application of a criminal sanction should be *ultima ratio*. In this way, the Author clarifies that this principle allows to verify, in the first instance, whether the rule which allegedly violated the fundamental right pursues a legitimate objective and, in a second moment, if it allows to establish whether the limitation of the fundamental right is adequate and necessary to achieve that purpose.

In the following chapter (“The Quest for Balancing in the AFSJ Case Law: Needle in a Haystack”), ECJ case law occupies a central position: *Kozłowski*, *IB*, *Leyman*, *Wolzenburg*, *Lopes da Silva*, *Jeremy F.*, *Radu*, *Melloni*, *Aranyosi* and *Căldăraru*, and *LM* cases, regarding the European Arrest Warrant Framework Decision, and *Abdullahi*, *K v. Bundesasylamt*, *NS* and *ME*, *Puid*, and

Ghezelbash, regarding the Dublin system. After this jurisprudential reference, ERMIONI XANTHOPOULOU concludes that the AFSJ must respect fundamental rights in the post-Lisbon era and, as such, mutual recognition must yield in respect to fundamental rights, in the light of the principle of proportionality.

The fifth Chapter, called “Constructing Proportionality for the Area of Freedom, Security and Justice”, promotes the consideration of the place of fundamental rights in this specific area. ERMIONI XANTHOPOULOU considers that fundamental rights and principles must assume an essential role in the evolution of both the transnational criminal system and the Common European Asylum System, and explains that this priority can be achieved through the application of the proportionality test. However, this criterion may not be strict in all cases, and this leads us to the following chapters. In these, and based on ECJ case-law, the Author demonstrates the impact, functionality, and limits of an analysis based on proportionality in the execution of European arrest warrants (Chapter 6) and transfers under the Dublin System (Chapter 7).

On the one hand, it is possible to conclude that the principle of proportionality is revealing in order to understand whether the surrender of individuals to the issuing State interferes disproportionately in their fundamental rights, although the Author draws attention to the challenge of this “Trojan horse”, which introduces moral and policy choices. On the other hand, it should be noted that the application of this test will not be particularly useful in terms of transfers under the Dublin System, since this instrument is not as successful as the European arrest warrant.

Finally, conclusions are drawn up under the heading “Reflecting and Looking Ahead”, in which the Author recalls that her approach focused on the difficult relationship between the fundamental rights of the AFSJ’s cooperation systems, seeking to demonstrate the usefulness of applying the principle of proportionality to balance this relationship.

In fact, the form of mutual trust has changed, overcoming the naive idea that it should be blind, and a new stage, which allows for exceptions and casuistic consideration, has been reached. Even so, cooperation cannot be hindered. The good faith of States must preside over it. Still, during this cooperation, violations of fundamental rights have occurred, which have driven the presumption of mutual trust into a crisis.

This book presents a contribution which seeks to minimize unjustified restrictions on fundamental rights in the fulfilment of these forms of cooperation. The Author concludes that this criterion of the proportionality test is generally used by the ECJ. The test can be used to determine whether the breach of fundamental law caused by the functioning of cooperation between Member States is sufficiently disproportional to prevent the transfer or delivery of persons.

However, this test can only be introduced when faced with non-absolute fundamental rights, and in order to be useful, it must be accompanied by a recognition of the central place of fundamental rights in the European Union's constitutional order.

Carrying out a comparative analysis between the two identified cooperation instruments, the Author defends the potential of the principle of proportionality under the European arrest warrant, although the conceptualization and effectiveness problems of the Dublin III of the CEAS Regulation may compromise the usefulness of this criterion.

The Author ends with a word dedicated to fundamental rights and constitutional freedoms, the heart of European legal culture since the end of World War II, which calls for current substantive protection, and in which the criterion of proportionality, recognized in the Charter of Fundamental Rights of the European Union, could play a role in preventing excessive violations. Therefore, whenever the core essence of the right of the person involved in the transfer is affected by an unjustified limitation, this transfer should not occur.

Indeed, if the creation of a secure AFSJ calls for better and more adequate protection of fundamental rights, the underlying mutual trust cannot be based on a non-existent presumption. In the post-Lisbon era, it is urgent to revisit the symbiotic¹ and often difficult relationship between the protection of fundamental rights and mutual trust, and to find solutions to ensure an adequate level of rights safeguard and to refute a presumed trust. Mutual recognition should be based on the realistic degree of trust that exists in the European Union, even if that leads to the need for an individual analysis before the transfer of persons from one Member State to another. In this regard, ERMIONI XANTHOPOULOU provides a fundamental contribution to recalibrate trust, adjusting it to the European reality and preventing unjustified restrictions on fundamental rights.

This book demonstrates that trust cannot be a static obligation and it should be realistically constructed under a proportionality-based analysis, which would fit into an active model of mutual recognition.

"Mutual trust must not be confused with blind trust", KOEN LENAERTS and other Scholars would say.² As such, it is imperative to find a safe and balanced threshold between the violation of fundamental rights and the effectiveness of judicial cooperation in the AFSJ, without forgetting that mutual confidence must be earned and verified in concrete terms.

1 Vide VALSAMIS MITSILEGAS (2015). "Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice", *New Journal of European Criminal Law* 6, 4, pp. 457-480.

2 Cf. KOEN LENAERTS (2017). "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", *Common Market Law Review* 54, pp. 805-840; and GEORGIOS ANAGNOSTARAS (2016). "Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldaru", *Common Market Law Review* 53, pp. 1675-1704.

In this respect, I believe relationships could grow better in adversity nurtured by mutual suspicion, rather than by an unquestionable trust. This is the time for the Union to redraw the shape of trust.

