Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Unchartered Territory beyond Blind Trust

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Abstract

The purpose of this article is to observe the evolving relationship of mutual trust and fundamental rights in the Area of Freedom, Security and Justice (AFSJ) of the European Union (EU). The Court of Justice of the EU (CJEU) has long prioritized the effectiveness of instruments based on mutual trust through an unimpeded system of mutual recognition. Arguments based on a violation of fundamental rights were understood by the CJEU as contradicting the presumption of compliance, refuting mutual trust, and, subsequently, hindering the automaticity of mutual recognition. However, the CJEU has now accepted, both in criminal and asylum law, that the presumption of compliance should not be conclusive, that mutual trust is not blind and mutual recognition should not be absolute, where it specifically prescribes so. Rights are arguably now being taken seriously. The article observes an emergent, but carefully controlled dynamic of rights-based assessment through case-by-case analysis by illustrating three phases of mutual trust. However, the article argues that this dynamic is slow, unclear and inadequate. It suggests that national authorities should take a proactive role, promoting real and constructive relationships of trust and allowing an individual assessment of rights violations via exercising a rights-based review. The latter is based on a proper understanding of trust, as an evolving concept based on evidence. Respect for rights, terminological clarity, enhanced judicial communication, and acknowledgment of shared values are the way forward for the unchartered territory of mutual trust.

Word Count:

Keywords: ‘European arrest warrant’, ‘Dublin III Regulation’, ‘fundamental rights’, ‘mutual trust’, ‘mutual recognition’

Table of Contents

Introduction

According to the principle of mutual recognition, Member States recognize each other's rules and cooperate without the need to set any additional checks and guarantees. The foundation of mutual recognition relies on a high level of mutual trust between Member States, accepting that 'while another Member State may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state'.[1] Mutual trust, in its turn, is founded on a presumption of compliance with rules on the protection of fundamental rights which are commonly accepted by Member States, offering a common denominator that renders different approaches equivalent.

Mutual trust constitutes the basis for several instruments of the Area of Freedom, Security and Justice (AFSJ).[2] For example, under the Framework Decision on the European Arrest Warrant (FDEAW), a European arrest warrant (EAW) is a judicial decision issued by one Member State and transmitted to another, in order to arrest and surrender a person for the purpose of his prosecution, or for the execution of a sentence or a detention order.[3] Another notable measure, operating on the basis of mutual trust, is the Dublin III Regulation concerning the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged by a third-country national.[4] One Member State is identified as being responsible, while the rest trust that the treatment of asylum seekers satisfies their obligations to respect fundamental rights in light of their participation in the European Convention on Human Rights (ECHR) and in the Geneva Convention.[5]

Against this background, the Court developed the *doctrine* of mutual trust, that has been understood as a duty rather than as a social construct that needs to be determined. Arguments based on rights violations have generally been dismissed by

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[1] COM(2000)495 Final, "Communication from the Commission to the Council and the European Parliament; Mutual recognition of final decisions in criminal matters".

[2] To name but a few, Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, O.J. 2009, L 294/20; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1 (as amended by Council Framework Decision 2009/299/JHA of 26 Feb. 2009, O.J. 2009, L 81/24); Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, O.J. 2011, L 338/2.

[3] FDEAW op. cit. *supra* note 2, Arts 1(1), 9(1), 10. Judicial cooperating authorities trust each other enough to function in strict time-limits and without many formalities. See, Art 1(2), 15(1), 17.

[4] 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), O.J. 2013, L 180/31.

[5] Convention (IV) relative to the protection of civilian persons in time of war (Geneva, 12 August 1949); Dublin III, op. cit. *supra* note 4, Preamble, Recital 3.

the Court as disputing the duty of presuming compliance, shattering the premise of trust and effectively hindering cooperation. Still, with particular reference to asylum law, the presumption of compliance was rebutted early on, but, in the field of the Framework Decision on the European Arrest Warrant (FDEAW),[6] the Court has been timid in recognizing limits to the doctrine of mutual trust. The nexus between rights and trust, though, is far from clear, while remaining challenges exist.

Lots of ink had already been spilt on the relationship between mutual trust and fundamental rights before the ground-breaking judgment in *Aranyosi*.[7] To date, and after the latter judgment, the problem has also received some attention in the research literature.[8] However, a systematic, holistic understanding of how relevant, recent developments, after *Aranyosi*, could contribute to the evolution of trust, is now needed. This article analyses the development of case law on the FDEAW and the Dublin III Regulation, and evaluates how the notion of trust has evolved from the perspective of protecting fundamental rights through three distinct phases. It specifically focuses on the unchartered territory of mutual trust in the nascent phase of recent, rights-oriented case law of the Court. It observes that while we are still in a phase of carefully controlled derogations as far as the FDEAW is concerned, we have now slowly been moving towards a phase of an emergent individual assessment as far as the Dublin III Regulation is concerned.

The article argues that the presumption of compliance which mutual trust is relied upon, may be rebutted whenever there is a strong, convincing argument suggesting actual lack of compliance with fundamental rights law. Against this framing argument of fundamentally reconsidering the doctrine of mutual trust, the article contributes to the understanding of the principle with a focus on the unchartered territory beyond 'blind trust'. It specifically suggests and discusses several elements that could be key to the evolution of mutual trust which are respect to rights, terminological clarity, enhanced communication and strengthening shared values. It is argued that we need to clarify our terminology when discussing trust and recognition, understanding their linear relationship. In light of this, respect for fundamental rights should be translated

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[6] FDEAW op. cit. *supra* note 2.

[7] For recent contributions see, *inter alia*, Bribosia and Weyembergh, "Confiance mutuelle et droits fondamentaux: «Back to the future»", (2016) CDE, 480; 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", 31 YEL (2012), 319; Larsen, "Some reflections on mutual recognition in the Area of Freedom, Security and Justice" in Cardonnel, Rosas and Wahl (Eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012).

[8] Lenaerts, "La vie après l'avis: exploring the principle of mutual (yet not blind) trust", 54 CML Rev. (2017), 805-840; Anagnostaras, "Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldararu", 53 CML Rev. (2016), 1675–1704; Hong, "Human dignity, identity review of the European arrest warrant and the Court of Justice as a listener in the dialogue of courts: Solange-III and *Aranyosi*", 12 EuConst (2016), 549-563; Wischmeyer, "Generating trust through law? Judicial cooperation in the European Union and the "principle of mutual trust", 17(3) GLJ (2016), 339-382.

into limiting the doctrine of mutual trust even in light of breaches of other rights than prohibition of torture. Additionally, the encouragement of national authorities to engage in an active dialogue and communication is extremely significant from the perspective of building real trust, which does not rely on presumptions but on knowledge built by evidence. Knowledge can be gained through mutual learning. Lastly, trust requires the existence of shared values, which need to be acknowledged, celebrated and reinforced though harmonization of areas which have been diversely regulated but are based on such shared values.

The FDEAW and the Dublin III Regulation are specifically discussed by the article for a number of factors, which enable a holistic discussion on mutual trust. First, on the one hand, the FDEAW is the exemplary measure of mutual recognition, and the Dublin III Regulation is the one facing many fundamental problems and raising skepticism. Second, the FDEAW is an example of positive mutual recognition whereby Member States recognize each other's decision 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 recognize the responsibility of other Member States to examine an application and thus escape from the obligation to take charge of an applicant.[9] They also both entail the physical transfer of individuals, and are infamous for fundamental rights implications. Therefore, they offer a great combination for comparability but also diversity in the discussion on mutual trust. Still, as they represent two fundamentally different areas of EU law, any generic conclusions regarding mutual trust should be drawn carefully.

Three Phases of Evolution

The article observes three phases in the case law of the CJEU regarding mutual trust and rights. These refer to both the FDEAW and the Dublin III Regulation, yet do not coincide chronologically. Rather, they refer to qualitative elements of the case law regarding mutual trust. The first phase refers to what is identified by the literature as 'blind trust'. This is a long phase as far as the FDEAW is concerned, and ended in 2016, with the judgment in *Aranyosi*, whereas, in the context of the Dublin system, it had already ended in 2013, with the judgment in *N.S.* and *Others*. The second phase has therefore started with the above-mentioned judgments. Limits to trust under strict conditions, though, are endemic of this second phase. The third phase of case law is the one moving towards an individual assessment, where trust is challenged in specific cases, but not necessarily because systemic deficiencies exist in the prison or reception conditions of a Member State. This nascent phase, which began with *C.K.* and *Others*, has arguably not started yet for the FDEAW. Although *Aranyosi* calls for an individual assessment, it does not depart from the generic requirement to prove systemic deficiencies, which has to be satisfied in the first place. This section demonstrates the

[9] On the latter distinction see, Guild, "Seeking asylum; Storm clouds between international commitments and EU legislative measures', 29(2) ELR (2004), 198-218, at 206

changing trend and shift from one phase to the other, before putting forward how mutual trust should be truly understood.

The Phase of Blind Trust

It is evident that the Court's reasoning in this first and long-standing phase of case law on the FDEAW extensively focused on the efficacy of the surrender system, to the detriment of fundamental rights. For this reason, insisting on presuming the compliance of authorities with rights obligations was deemed necessary to maintain the mutual trust between national authorities, which needed to cooperate efficiently as a matter of principle.

During the first phase of case law on the FDEAW, Member States were strictly obliged to act upon a EAW and only derogate based on optional or mandatory grounds for refusal, which are listed in the FDEAW.[10] This had resulted in a rigid regime where even the protection of mutual recognition *per se* was often prioritized and mutual trust was not challenged. In *Radu*, the Court asserted that respect for fundamental rights did not require that the executing authority may refuse to execute a EAW in the event of fundamental rights breaches.[11] Moreover, the Court in *Melloni* again protected the principle of mutual trust and prioritized the efficacy of the measure against the protection of fundamental rights. The Court again, similar to *Radu*, argued that allowing the executing authority to make the surrender of the person convicted *in absentia* conditional upon a subsequent review of the judgment leading to a EAW would undermine the efficacy of the measure.[12]

Fundamental rights were not given sufficient attention in the field of the Dublin system either, and the CJEU was timid, even slow, to recognize exceptions in the presumption of mutual trust here too. Although this first phase regarding the Dublin system is chronologically different from that concerning the FDEAW, and the instruments refer to different areas of law, some careful analogies can be made. The law had failed for a long period to move away even slightly from a border-control narrative and embrace the humanitarian side of the debate.[13] Similar to the area of the FDEAW, the Court generally highlighted the state-centric objectives shaping the Dublin system at the cost of the protection of fundamental rights. The prevalence of the state-centric purpose of the Regulations was noticed both at the legislative and

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[10] FDEAW op. cit. *supra* note 2, Arts 3, 4, 4a and 5; Case C-396/11, *Ciprian Vasile Radu*, EU:C:2013:39, paras 35, 36; Case C-388/08, PPU *Artur Leymann and Aleksei Pustovarov*, EU:C:2008:669, para 51; Case C-261/09, *Gaetano Mantello*, EU:C:2010:683, para 37.

[11] Case C-396/11, *Radu*, para 39. On a commentary see, Xanthopoulou, "The quest for proportionality for the European arrest warrant: Fundamental rights protection in a mutual recognition environment", 6(1) New Journal of European Criminal Law (NJECL), 32-52, at 38-45.

[12] Ibid, para 63.

[13] Moreno-Lax, "Life after Lisbon: EU asylum policy as a factor of migration control', in Acosta Arcarazo and Murphy (Eds.), *EU Security and Justice Law; After Lisbon and Stockholm*, (Hart Publishing, 2013), p. 149.

jurisprudential level.[14] The extreme, but not infrequent, case that asylum seekers were victims of degrading and inhuman treatment breached their absolute right not to be subjected to such treatment, and necessitated to move beyond mutual trust.[15] As a result, numerous challenges were made in front of national and European courts to prevent transfers to Greece in view of worrying reception conditions and inadequate human rights protection.[16]

The Phase of Controlled Derogations from Mutual Trust

The second phase had started earlier in the context of the Dublin system than in the FDEAW, with the judgment of the Court in *N.S.* and *Others*, but remained quite narrowly prescribed. The CJEU adopted the *M.S.S.* v *Belgium and Greece* ruling[17] in its *N.S. and M.E.* judgment and stated that the presumption that asylum seekers will be treated in a way that complies with fundamental rights must be regarded as rebuttable.[18] The judgment in *N.S.* and *Others* was seminal in the evolution of the concept of mutual trust in the form of a non-conclusive presumption.[19] Having opened Pandora's box, the Court then wished to ensure that it remained in control of the limits allowed to be set on mutual trust. *Abdullahi,* therefore, served the purpose of taming the limits to trust, reminding Member States of their *obligation* to trust each other.[20] *Abdullahi* thus set the tone of this phase of case law, where the Court clearly delineates the discretion of authorities regarding the scope of review.

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[14] Mitsilegas, op. cit. *supra* note 7, at 334.

[15] Nanopoulos, "Trust issues and the European common asylum system; Finding the right balance (Case comment)", 72(2) C.L.J. (2013), at 276.

[16] Matera, "The common European asylum system and its shortcomings in protecting human rights: Can the notion of human security (help to) fill the gaps?" in Matera and Taylor (Eds.), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (Asser Institute, CLEER, 2014), at 12, 13; Lenart, "Fortress Europe": Compliance of the Dublin II Regulation with the European convention for the protection of human rights and fundamental freedoms" 28(75) Utrecht Journal of International and European Law (2012), 4-19.

[17] ECtHR, *M.S.S. v Belgium and Greece* Appl. No. 30696/0921, judgment of 21 January 2011, paras 347-350. For a comment see Moreno-Lax. "Dismantling the Dublin System: M.S.S. v Belgium and Greece", 14(1) European Journal of Migration and Law (E.J.M.L.) (2012), 1-31.

[18] Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and Others v Secretary of State for the Home Department* EU:C:2011:865, para 104.

[19] Buckley, "Case Comment: *NS v Secretary of State for the home department*", 2 E.H.L.R. (2012), 205-210; Den Heijer, "Case Comment: Joined Cases C-411 and C-493/10, *NS v Secretary of State for the home department and ME* v *Refugee Applications Commissioner*", 49(5) CML Rev. (2012), 1735-1754.

[20] Case C 394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813. The Court held, that an applicant may only challenge a Member State's decision by claiming systemic deficiencies in the asylum procedure, and in the reception conditions which provide substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment.

The same timid tone of controlled derogations from the obligation to trust dominated *Aranyosi*, where the Court, introduced a ground for *postponement* of the surrender.[21] In this case, the referring court asked whether Article 1(3) of the FDEAW should be read in such a way that the executing authority could or should refuse to execute a EAW in light of fundamental rights violations and particularly violation of Article 3 of the ECHR or Article 4 of the Charter. The Court held that when the judicial authorities have evidence that there is a risk of inhuman or degrading treatment, they are bound to assess the possible existence of that risk, relying on 'objective, reliable, precise and duly updated elements'.[22] The establishment of the fact that such a risk exists is not sufficient to allow the executing authority to refuse the execution of a EAW.[23] The authorities must also establish that the specific person will be exposed to this risk specifically because of the conditions of their detention.[24] If the executing authority is convinced of the existence of this risk for the particular person, it has to postpone, but not abandon, the EAW, and make a decision on detention after informing Eurojust.[25]

The judgment in *Aranyosi* reveals the spirit of this phase of case law, which is still currently pertinent to the FDEAW. On the one hand, the Court introduced an exception, and, on the other hand, it ensured that the exception is firmly tamed and controlled. The judgment makes an attempt to reconcile rights with trust; however, it remains loyal to the idea of blind trust to which this judgment constitutes an exception, only then to confirm the rule. Particularly, the judgment introduced a high threshold for the test to be satisfied. An additional part was specifically added to the test that had been introduced by *N.S.* and *Others*, referring to 'systemic deficiencies' of reception conditions or asylum procedures. That is a generic test and refers to systemic deficiencies in a state which have been well-documented. On the other hand, *Aranyosi* requires a double test to be satisfied. First, a real risk has to be established, similar to *N.S.* and *Others*, that the requested person would be subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter, due to the issuing state's prison conditions which suffer from *systemic* flaws. So far, the test follows the generic test introduced by *N.S.* and *Others*. However, the second layer of the test essentially intensifies the review. Apart from identifying systemic deficiencies to establish the risk, the executing authorities must determine that such a risk exists in the particular case examined. They have to conduct an individual assessment *in concreto* in the case of the requested person.

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[21] Joint Cases C-404/15 and C-659/15, PPU *Pal Aranyosi and Robert Caldararu*, EU:C:2016:198.

[22] Ibid, para 88.

[23] Ibid, para 91.

[24] Ibid, paras 92-94.

[25] Ibid, paras, 98, 100-102.

It remains to be seen what the future of mutual trust will be for the FDEAW, but *Aranyosi* has at least introduced the ruling that an individual assessment is necessary to determine actual compliance with the obligation to respect rights as the basis of trust. It could be argued that although *Aranyosi* still insists on the same understanding of mutual trust as a legal obligation, it paves the way to the third phase of evolution.

Towards a Phase of Individual Assessment?

The third phase that can be identified in case law embraces a more extensive rights review, in the context of asylum law, while departing from the narrow scope of *Abdullahi* and the 'systemic deficiencies' test of *N.S.* and *Others*. Trust, here, is earned on a basis of a case-by-case analysis, when the presumption is challenged. Individual circumstances are carefully considered, and individuals' human dignity is placed at the center of the judicial reasoning. Although the FDEAW has not yet 'entered' this phase – and it is doubtful that it will do soon, given the strictness of the test in *Aranyosi* – the evolution of trust in asylum law is paradigmatic, as the article argues in the next section.

In particular, it appears that the Court in *Ghezelbash* decided *contra Abdullahi.* The Court clarified that Article 4 of the Dublin III Regulation confers a right to the asylum seeker to be informed of the criteria for determining the Member State responsible. The ruling was upheld in the subsequent case of *Karim* that reiterated that Article 27(1) of the Dublin III Regulation grants an asylum seeker an effective remedy against a transfer decision, which may concern the examination of the application of that Regulation.[26] Therefore, the judgment moved away from the narrow interpretation of the Dublin III Regulation in *Abdullahi*, that an asylum seeker could only challenge their transfer where it was feared that they would be subjected to inhuman or degrading treatment.

Furthermore, another seminal judgment in the context of asylum law which informs the interdependent relationship between mutual trust and fundamental rights is *C.K.* and *Others*,[27] where the Court moved away from the systemic deficiencies requirement. The question submitted to the Court was whether the assessment of circumstances under Article 3(2) of the Dublin III Regulation is sufficient to satisfy the requirements of Article 4 and Article 19(2) of the Charter in cases where no systemic flaws exist. The CJEU stated that according to the case law of the ECtHR[28] the suffering which stems from naturally occurring illness may be covered by Article 3 ECHR, wherever it is, or there is a risk that it will be, aggravated by treatment as a

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[26] Case C-155/15, *George Karim* v *Migrationsverket*, EU:C:2016:410.

[27] Case C-578/16 PPU, *C. K., H. F., A. S.* v *Republika Slovenija*, EU:C:2017:127.

[28] ECtHR, *Paposhvili* v. *Belgium*, no. 41738/10, judgment of 12 December 2016.

result of detention conditions, expulsion, or other measures which can be attributed to the authorities. The Court held that even where there are no serious grounds for believing that there are systemic failures in the asylum procedure and the reception conditions of asylum seekers, *a transfer in itself* can entail a real risk of inhuman or degrading treatment within the meaning of Article 4 Charter. This is particularly the case where the transfer of an asylum seeker suffering from a serious mental or physical condition leads to their significantly worsening health.

The authorities of a Member State must consider objective factors, such as medical evidence, which prove the particular seriousness of a person's condition and the serious and irremediable impact that a transfer may entail for that person. These authorities would have to eliminate any serious doubt concerning the impact of the transfer on the status of the person concerned. They can do so by ensuring that the applicant is accompanied, during the transfer, by the appropriate medical staff, to prevent any deterioration in their health.[29] If necessary, a Member State should suspend the transfer for as long as the applicant's health condition does not allow them to be subject to a transfer. The requesting Member State may also choose to examine the request itself by making use of the 'discretionary clause' under Article 17(1) Dublin III. That provision should still be read as offering discretion to the Member State, rather than obliging them to exercise responsibility.[30]

The last judgment is very important, as it allows space for assessing the individual case based on the evidence that the individual submits, beyond a discourse of preserving mutual trust whilst assessing the damning effect of a transfer for an individual. Although the judgment only refers to inhuman or degrading treatment, it points to a way forward where a case-by-case analysis could be developed in line with the case law of the ECtHR. The judgment empowers the authorities to perform an individual assessment, with compassion, beyond a narrative of trust by finally prioritizing the individual situation of a human being in a vulnerable position, and based on medical evidence.

Reasons of the trajectory

One might wonder why the relationship between mutual trust and fundamental rights has gone through these evolutionary changes in the case law of the CJEU in the two different fields of EU asylum and criminal law. A discussion on the reasons why this has taken place should first consider the two fields separately, as the changes have not occurred at the same time. The noticeable shift in the case law on the FDEAW, as well as the place of *Aranyosi* in the wider discourse on EU fundamental rights,[31] has been

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[29] Case C-578/16 *C.K. and Others*, paras 80, 81, 82.

[30] Ibid, paras 87, 88, 89.

[31] Hong, op. cit. *supra* note 8.

analyzed by commentators.[32] Scholars notice that the Court, having established the effectiveness of the FDEAW, decided to attend to the growing concerns over rights. The Court first chose to ensure the functionality of the FDEAW, via ensuring an unimpeded system of mutual recognition, asserting its authority on national judicial authorities, and then moved on responding to the growing concerns about rights. This could also resonate with the Court's deliberate decision to make a statement that fundamental rights are not neglected.[33]

As far as the case law on the Dublin III Regulation is concerned, the shift both in *N.S.* and *Others* and recently in *C.K.* and *Others*, despite being long-overdue, is a positive and welcome change and signifies a process of maturity for the principle of mutual trust in Dublin system. It recognized what had long been obvious with regard to endemic problems of the asylum system for vulnerable individuals, leading to systemic deficiencies and the gross fundamental rights violations of the applicants. The Court was 'forced', in view of the serious circumstances, to re-evaluate the concept of mutual trust resulting in transfers without checks.

A reason that might explain this change of direction in both fields could be the Court's willingness to compromise on the position of exceptionalism that was put forward by the CJEU in its recent Opinion 2/13 on the accession of the EU to the ECHR.[34] In this Opinion, the Court offered a detailed legal analysis of the Draft Accession Agreement of the EU to the ECHR to ascertain the compliance of this agreement with EU law.[35] There, the Court specified that accession cannot impact upon mutual trust in AFSJ matters, and highlighted the need to *protect* the principle of mutual trust. However, in a number of more recent cases in the context of the FDEAW the Court appeared to adopt a rights-oriented approach, demonstrating an extra care for rights.[36] Perhaps, the Court, having now asserted this position of authority and autonomy of EU law, has

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[32] For an analysis of the ruling see, Anagnostaras, op. cit. *supra* note 8; Gáspár-Szilágyi, "Case Report, 'Joined Cases Aranyosi and Căldăraru: Converging human rights standards, mutual trust and a new ground for postponing a European arrest warrant" 24 European Journal of Crime, Criminal law and Criminal Justice (Eur.J.Crime Cr.L.Cr.J.) (2016), 197-219; Ballegooij and Bárd, "Mutual recognition and individual rights: Did the Court get it right?' (2016) 23 (4) New Journal of European Criminal Law (NJECL) 439-464.

[33] Anagnostaras, op. cit. *supra* note 8, 1698

[34] Peers, "Human rights and the European arrest warrant: Has the ECJ turned from poacher to gamekeeper?' (EU Law Analysis, 12 November 2016) < http://eulawanalysis.blogspot.co.uk/2016/11/human-rights-and-european-arrest.html> (last visited 15 Sept. 2017).

[35] Opinion 2/13 of the Court of 18 Dec. 2014, EU:C:2014:2454.

[36] Case C-237/15 PPU, *Minister for Justice and Equality* v. *Francis Lanigan*, EU:C:2015:474; C-294/16 PPU, *JZ* v *Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610; Case C‑241/15, Niculaie Aurel Bob-Dogi, EU:C:2016:385; C-108/16 PPU, *Paweł Dworzecki*, EU:C:2016:346; C-453/16 PPU *Halil Ibrahim Özçelik*, EU:C:2016:860; Case C‑452/16 PPU, *Krzystof Marek Poltorak*, EU:C:2016:858; Case C‑477/16 PPU, *Ruslanas Kovalkovas* EU:C:2016:861.

started developing a rights-sensitive approach, in its own terms, without being instructed by another Court. *Aranyosi* and *C.K.* and *Others* belong perhaps to this conscious effort of *autonomously* developing a rights-narrative in the case law, after having ensured the efficiency as well as the autonomy of EU law. If the above analysis on explaining the Court's changing approach is correct, one wonders whether the law in this area is governed by constitutional values or by circumstantial pressures flowing from its interaction with other courts and the conflicting need to remain autonomous.

The Way Forward through Unchartered Territory

The article claims that the attempt at reconciliation of rights and trust in *Aranyosi* and then *C.K. and Others*, although welcome, is still inadequate and submits a fundamental reconsideration of the concept of mutual trust. This reconsideration is based on a quest for clarity in terminology and conceptual distinctions. Trust cannot be enclosed to a static obligation but should be understood as a dynamic social construct that is not enforceable itself, unlike mutual recognition. In light of this framing argument, the article argues that the last phase of the doctrine's evolution moving towards an individual assessment, when this is necessary, is welcome but should be further developed in relation to other occasions that have not been clarified. The article particularly argues first that respect for all fundamental rights is essential, as disrespect for rights is evidently what has so far caused distrust among authorities of Member States. In this respect, acknowledging shared values and the need for strengthening them via harmonization is also essential. Finally, in order for authorities to trust each other, communication, learning and mutual understanding are necessary.

Reconsidering Trust

Despite the noticeable shift in the judicial attitude, the overarching value of the protection of fundamental rights within the framework of mutual trust is not yet fully recognized. This is because of not having properly conceptualized trust in our legal framework which impacts on fundamental rights. The problematic relationship between mutual trust and fundamental rights has been further anchored to the terminological vagueness stemming from and feeding to the cognitive dissonance in relation to these terms. The two terms, trust and recognition, are often used interchangeably without a clear understanding of their role in the system of cooperation. Therefore, the article argues that the discourse on mutual trust and mutual recognition requires terminological clarity and perceptive change in relation to truly understanding the terms that are central to transfers of individuals in the AFSJ, based on this framework of recognition and trust.

First of all, it is helpful to set out where the misconception lies. We know that mutual recognition requires mutual trust. However, the whole concept of mutual trust is supposedly based on a presumption of compliance. This is problematic as it relies on a pure leap of faith. Instead of Member States *gaining trust and becoming trustworthy* via actual and evidenced compliance with rules, they presume that every cooperating party complies with these rules. A mere presumption is therefore the

premise that such an important relationship relies on, which essentially skips the step of gaining trust and becoming trustworthy. The relationship of cooperation among states is based only on a choice of presuming in almost religious, dogmatic terms. The presumption though could be challenged once a truthful, logical argument appears.

Referring to trust as a static construct and a legal obligation is also wrong, as it prolongs the cognitive dissonance that feeds to its misrecognition as a changing social concept that needs evidence to be established. For example, Advocate General Bot opined in *Aranyosi* that a ground for non-execution because of a risk of violation of fundamental rights in the issuing Member States, *would substantially undermine the relationship of trust between Member State*.[37] This is an example of where our narrative wrongly lies on a premise that trust is a static construct that is well-protected by the law. Here, assuming that the legal interpretation itself would have a damning effect on trust is wrong, as it fails to recognize the real nature of the concept is not enforceable. Trust cannot be enforced unlike mutual recognition that can be the subject of a legal provision. Trust can also be undermined even without changing the interpretation of the FDEAW, if Member States are not trustworthy.

Another example could also be helpful. The Court stated in *Aranyosi* that the FDEAW established a system of arrest and surrender with the purpose 'to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which *should* exist between the Member States'.[38] Again, here, trust is treated as a legal obligation of Member States which *should* trust each other again as if trust can be automatically generated and maintained without a constant effort of being trustworthy. So, the misconception lies on missing the fact that trust, as firm belief, is the result of a continuous effort and that it can actually be undermined and deconstructed not by *allowing* the Member States to second-guess each other but by actually not proving trustworthiness.

Therefore, the way forward for mutual trust should involve a process of reflection, understanding, and terminological clarity, along with a re-evaluation of the relationship between presumptions, trust, trustworthiness, recognition and faith. Trust, as the basis of recognition and as a result of evidence, should be earned and realistically constructed, as Mitsilegas points out.[39] So, the focus of the debate should be on how to earn trust in order to become trustworthy. The answer is definitely not through presumptions which are compelled by an authority. It is naïve to believe that Member States will act in a way in which they will always respect fundamental rights. In this case, an obligation to trust could be even harmful.

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[37] *Aranyosi and Caldararu*, Opinion, paras 106-122.

[38] *Aranyosi and Caldararu*, para 77.

[39] Mitsilegas, 'The symbiotic relationship between mutual trust and fundamental rights in Europe's Area of criminal justice', 6(4) New Journal of European Criminal Law (NJECL) (2015), 457-480.

Trust can be earned through knowledge, evidence, repeated patterns, practices and interaction.[40] This will be achieved through enhanced judicial dialogue: learning from the 'better' but also from the mistakes of the 'weaker', and reflecting on these mistakes. This process of being other-regarding in this relationship of cooperation, thereby enabling mutual learning,[41] also requires the limitation of attitudes of exceptionalism in European judiciaries. Adopting a stance of exceptionalism, and labelling states' justice systems as having systemic faults, as if the identification of scapegoats will save the mechanism from the burden of other infringements, will certainly not help to foster a dialogue and a process of mutual learning based on equal terms.

Moreover, multiple phases of cooperation based on trust among the respective parties could exist. These could range from unconditional acceptance to refusal to cooperate because the level of trust is not adequate in view of specific exceptional circumstances. However, many other options could be formulated in between these two extremes, based on a trans-judicial dialogue. This could entail offering guarantees. A proportionality-based analysis is one step in this direction, as it urges judicial authorities to investigate such parameters. A proportionality-based analysis would determine whether a restriction on a right associated with a transfer is disproportionate enough to prevent the transfer.

This model of trust would also fit into an active model of mutual recognition, in the context of which national authorities would communicate with each other. In the context of AFSJ, we can currently notice a situation of 'pure mutual recognition', as it would be called by Nicolaidis and Schmidt when referring to the context of the internal market.[42] In particular, the application of mutual recognition to the context of the FDEAW is what has been described by Armstrong as passive.[43] Passive mutual recognition accounts for the mere execution of 'symbolic forms', such as judicial decisions, certificates or qualifications, which are not examined in depth in order to ascertain their functional equivalence. However, it was early recognized that generally associating the principle of mutual recognition with an absolute home-state model, where the host state has to accept every decision of the home state, is misleading.[44] In light of this, mutual recognition should should not impose a blind obligation to trust on the host Member State. It should actually bridge host state and home state control

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[40] On trust as a social construct see, Willems, 'Mutual trust as a term of art in EU criminal law: Revealing its hybrid character', 9(1) E.J.L.S (2016), 211-249, at 234-241.

[41] Armstrong, 'Mutual recognition', in Barnard and Scott (Eds.), *The Law of the Single European Market*: *Unpacking the Premises*, (Hart Publishing, 2002), at 233, 241-242.

[42] Nicolaidis and Schmidt, 'Mutual recognition 'on trial': The long road to services liberalisation', 14(5) Journal of European Public Policy (J.E.P.P.) (2007), 717-734.

[43] The application of the principle of mutual recognition is further distinguished with regard to internal market in passive and active senses. See Armstrong, op. cit. *supra* note 41, at 242.

[44] Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution*, (Hart Publishing, 1998) pp. 126-127.

'under conditions of regulatory pluralism',[45] where authorities are encouraged to communicate to ensure equivalences. In light of such an active model of mutual recognition, mutual trust is generated by a thorough search for equivalences between the home-state rule and the host-state one.[46]

In *Aranyosi*, the Court held that the issuing authority must cooperate as a matter of emergency and send any information needed to each other.[47] For authorities to earn trust, they must first need to be trusted, in the sense of allowing them discretion to prove their trustworthiness via judicial dialogue and interactive communication. Horizontal trust – that between national authorities requires vertical trust – that between the Court and the authorities. The latter need to be trusted and empowered to exercise rights-based reviews of cases where there is a substantiated argument. If they are not trusted by the Court, they will not have the chance to prove their trustworthiness to their peer judicial authorities at the horizontal level. If they are enabled to do so, they will become other-regarding, grow their trustworthiness, and finally earn trust.

Negating Trust

Considering this argument in tandem with the shift to a phase where an individual assessment of the individual's situation should be conducted, one wonders whether this defeats the purpose of the doctrine and negates the very meaning of mutual trust. The question here is how far we can go with accepting limitations to mutual trust, in light of fundamental rights violations, as this could eventually destroy the very premise of mutual trust.[48] According to the Court, a strict threshold should be maintained that pertains only to systemic violations with reference to Article 4 of the Charter. President Lenaerts specifically suggests that judicial authorities should not second-guess each other, unless a substantiated argument is presented to them.[49]

However, the article argues that the suggestion of a strict threshold of 'qualified mutual trust' is conceptually flawed. Asking how much mutual trust could be limited to protect fundamental rights without contesting the very premise of mutual trust is a paradox. Aspiring to preserve a faulty premise to the detriment of another fundamental value is meaningless, and attention should be set on how to fix the first. Moreover, any discussion about the limits on mutual trust must take place in light of

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[45] Ibid, at 231.

[46] See Pelkmans, "Mutual recognition in goods. On promises and disillusions", 14(5) Journal of European Public Policy (J.E.P.P) (2007), 699-716; Trachtman, "Embedding mutual recognition at the WTO", 14(5) Journal of European Public Policy (J.E.P.P.) (2007), 780-799; Nicolaidis and Schmidt, op. cit. *supra* note 42, at 717.

[47] Joint Cases C-404/15 and C-659/15, *Aranyosi and Caldararu*, para 95.

[48] Mitsilegas, op. cit. *supra* note 7, at 362; Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", (2012) 12 HRLR, 287-339.

[49] Lenaerts, op. cit. *supra* note 8, at 838.

a clear priority in any hierarchy of implicated constitutional values. Accepting a strict threshold is wrong from a perspective of properly prioritized values. The need to protect the principle of mutual recognition by setting a strict threshold must not render the protection of fundamental rights meaningless. The centrality of the protection of fundamental rights in EU law should not be disregarded, but instead must inform the operation of mutual recognition.

Accepting judicial limitations to an obligation to trust arguably negates the framework of mutual trust itself, as it has been understood so far. This is unavoidable but merely reflects the recognition of a process that is already taking place. Trust is already negated due to evidence that there is a risk of rights violations rather than by the empowering discretion to Member States, which merely recognizes the source of distrust. Moreover, for the sake of clarity, it is not trust that is negated by enabling an individual assessment but the framework of mutual recognition. Therefore, our attention should be channeled to the real source of distrust which is the lack of respect to fundamental rights.

Returning to the framing argument and the quest for terminological clarity, mutual trust is a state of mind that Member States need if they are to cooperate, with reference to a specific situation, rather than a dogmatic principle that should be blindly followed. Mutual recognition is the outcome of mutually trusting each other. Its role in the AFSJ is to promote cooperation among Member States with different rules without having to dispense with legal diversity. As such, it is a method or a means of judicial cooperation in criminal matters or cooperation in asylum matters. Despite its importance, its position in the constitutional mosaic of the AFSJ should not be overestimated, to the detriment of the protection of fundamental rights. Rights have a long-standing footing in the constitutional architecture of Member States and are the *actual* cornerstone of an EU area of justice based on mutual trust. Actual, proven compliance with obligations to respect rights, rather than commanded presumptions of compliance, is what will warrant trust.

Generating Trust

Respect: Extending Rebuttal of Presumption to Infringements of Other Rights

In light of this framework, the article argues that trust will be actually strengthened by enabling respect to all rights, when this is challenged and despite the negating effect to mutual recognition – and in fact not to mutual trust. A derogation from mutual trust based on fundamental rights breaches is though only recognized in relation to Article 4 Charter or Article 3 ECHR. Therefore, in light of these, it does not appear that an individual, either in the context of the FDEAW or the Dublin system, may stop their transfer based on an infringement of other rights. In particular, a strict reading of these judgments does not necessarily allow for other allegations of infringement to be reviewed. It is not at all clear whether rebutting the presumption of mutual trust and blocking the mutual recognition of judgments could be extended to cases where due process rights are infringed.

The article argues that rebutting the presumption of compliance and thus limiting trust, with the result of ceasing the process should, as a matter of principle, be able to extend to other rights. This should apply, as long as it is established that a serious and irremediable violation has taken place, or there is a risk of subjecting the requested person to such a violation. This argument is based on several grounds: a textual ground; a ground based on constitutionalism; and a ground based on the right to justification and individual assessment.

First, the FDEAW refers to fundamental rights both in the Preamble, Recital 10 and in Article 1(3), reminding Member States of their obligations to respect *all* fundamental rights. Furthermore, Article 5 of the FDEAW provides particular guarantees that the executing state may ask from the issuing state. For example, the execution of the EAW may be subject to the condition that the requested person will be given the opportunity to apply for a retrial, when the EAW concerns the execution of a sentence or a detention order issued based on a judgment imposed *in absentia*.[50] What is more, several provisions of the FDEAW provide for specific rights of the requested person.[51] A textual argument would require an executing authority to pay due regard to respecting all the rights of the requested person.

Secondly, a gradual development of European constitutionalism informed by the protection of fundamental rights is undoubtedly taking place in the EU constitutional legal order. Shaping the AFSJ, though, has added additional layers of discussion to the narrative of the EU constitutionalism. For this reason, fundamental rights and constitutional principles should play a central role in the development of a transnational justice system. As fundamental rights now enjoy a central position in EU law,[52] their protection should be treated as such in actual and not merely declaratory terms. Judicial or other authorities should be able to establish whether a real risk of infringement exists, where a well-supported argument is presented to them.

Finally, an individual assessment is dictated by a constitutional right to judicial review[53] and a right to justification when an authority's action restricts a constitutional freedom.[54] Rawls connected justice to the justification of governmental action through public reasoning.[55] This should be taken seriously as a crucial element of

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[50] FDEAW op. cit. *supra* note 2, Art. 5(1).

[51] Ibid, Art. 11 on the rights of the requested person; Art. 12 on detention; Art. 13 on consent; Art. 14 on hearing.

[52] The Charter acquired the status of primary law following the Treaty of Lisbon, as it is enshrined in Art. 6 of the TEU.

[53] On judicial review see for example, Sedley, "Governments, constitutions and judges", in Richardson and Genn (Eds.), *Administrative Law and Government Action*, (Oxford, 1994).

[54] Herlin-Karnell, Ester et al, 'Dimensions of justice & justification in EU and transnational contexts', 8(1) Trans. L. T. (2017), 1–7.

[55] Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

creating a single area of justice with respect to a transnational rule of law, including rights and proportionality.[56]

In this sense, an individual assessment, including a proportionality based analysis, should be ensured, in cases where relative rights are restricted. A proportionality-based analysis here would act as a shield protecting fundamental rights, and not mutual trust, mutual recognition and free movement of decision. National authorities must determine whether the restriction is proportionate. If it is not and the transfer of an individual destroys the core essence of the right, the authorities should carefully consider how to remedy the violation. A proportionality based analysis should apply to such circumstances, on a case-by-case basis, so as to establish the degree of the violation, and the remediability of it, in light of ECtHR case law.[57] For example, an individual assessment could be considered when there is strong evidence of a violation when an executing authority may refuse to execute a EAW in light of fundamental rights breaches, other than degrading and inhuman treatment.

Investing in Shared Values: Further Harmonization as a Tool for Generating Trust?

In this respect, recognizing and strengthening shared values would also be a way to generate genuine mutual trust. It has earlier been questioned whether the degree of mutual trust is adequate to effect mutual recognition.[58] This concern is endemic to the nature of governance of the principle of mutual recognition. Although judgments cross borders without control, fundamental rights remain bound to the legal order of each Member State, and are not harmonized to such an extent that the transfer of mutual recognition could be absolutely unproblematic.[59] The operation of the principle leads to an element of extraterritoriality, a 'journey into the unknown'.[60] Differences in the protection of fundamental rights among different Member States[61] contradict the presumption of compliance which generates mutual trust and supports the operation of mutual recognition. It was early argued that legal approximation is necessitated, either as an alternative or as a complement to mutual recognition, with regard to a

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[56] Huscroft, Miller and Webber (Eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, (Cambridge University Press, 2014).

[57] See for a detailed account on proportionality in this respect, Xanthopoulou, *Proportionality and Mutual Trust in the Area of Freedom, Security and Justice*, (King's College London, Doctoral Thesis, 2017)

[58] Alegre and Leaf, "Mutual recognition in European judicial cooperation: A step too far too soon? Case study—The European arrest warrant", 10(2) ELJ (2004), 200-217.

[59] Guild, "Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice", 10 ELJ (2004), 218.

[60] Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p. 119

[61] Summers, *Fair Trials: The European Criminal Procedural Tradition and The European Court of Human Rights*, (Hart Publishing, 2007), p. 3; Konstadinides, "The perils of 'Europeanisation' of extradition procedures in the EU mutuality, fundamental rights and constitutional guarantees" in Eckes and Konstadinides (Eds.), *Crime Within the Area of Freedom, Security and Justice: A European Public Order*, (CUP, 2011).

common approach to defendants' and due process rights.[62] Mitsilegas also considers the impact that harmonization of national criminal procedural law on individual rights has on the evolution of earned and real mutual trust.[63]

Critiques of the absence of common EU defence rights, especially following the quick adoption of the EAW in the post 9/11 disordered legal environment, led to the adoption of a roadmap on procedural rights in 2009.[64] A number of instruments have now been adopted.[65] However, achieving political consensus on the roadmap and actually adopting these instruments has been a lengthy process, especially when considered *vis-à-vis* how quickly the FDEAW was adopted. Indeed, strengthening common ground via harmony is a method of building trust through actual rather than imposed terms. The article argues that harmonization is welcome as long as it is based on shared values, by strengthening them and not contradicting them, and only to the extent that it does not become intrusive in the sense of destroying the diversity which allows the mutual recognition of the discourse of 'different yet equivalent'. If harmonization permeates the whole justice system of Member States, mutual recognition becomes pointless and redundant. The principle of mutual recognition constitutes a method of governing cooperation, as an alternative to positive integration.[66] This model relies on compliance only with rules of the producing state, while discouraging public intervention by the host state, where the product, worker, service, and now judgments enter. It requires Member States to be tolerant and receptive to various products or qualifications. It represents the concept of 'different

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[62] Art. 82(2) TFEU; Mitsilegas, "Trust-building measures in the European judicial area in criminal matters: Issues of competence, legitimacy and interinstitutional balance", in Carrera and Balzacq (Eds.), *Security Versus Freedom? A Challenge for Europe's Future*, (Ashgate 2006), 279-290; Lavenex and Wagner, "Which European Public Order? Sources of Imbalance in the European area of freedom, security and justice", 16 European Security (2007), 225-243.

[63] Mitsilegas, "Mutual recognition, mutual trust and fundamental rights after Lisbon", in Mitsilegas, Bergström and Konstadinides (Eds.), *Research Handbook on EU Criminal Law*, (Edward Elgar, 2016), pp. 152-154, 162-166.

[64] Council Resolution 2009/C of 4 December 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1.

[65] Directive 2010/64/EU of the European Parliament and of the Council of 20 Oct. 2010 on the right to interpretation and translation in criminal proceedings, O.J. 2010, L 280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, O.J. 2012, L 142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 Oct. 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. 2013, L 294/1, and Directive 2016/343/EU of the European Parliament and of the Council of 9 Mar. 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1; Directive 2012/29/EU of the European Parliament and of the Council of 25 Oct. 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, O.J. 2012, L 315/57.

[66] Armstrong, op. cit. *supra* note 41, at 228.

but equal'.[67] It focuses on, and is actually enabled by, commonalities instead of differences only as long as a sufficient level of trust exists, setting aside unnecessary divisions. Trust can exist as long as the second part of the expression 'different but equal' holds true. Therefore, harmonization should operate as a supporting mechanism, building on already existing shared values, rather than as a mechanism that abolishes meaningful differences.

Conclusion

The article has critically observed the principle of mutual trust through its three phases of evolution, and suggested what the way forward should be. Mutual trust, first as blind trust, initially disregarded calls for rebutting the absolute presumption of states' compliance with their obligations in respect to fundamental rights. Mutual trust then moved on to a phase of controlled derogations from the presumption of compliance, which is still ongoing for the FDEAW. Very recently, in the context of the Dublin system, we have witnessed the shift to the most recent phase, that of a nascent individual assessment. The article analyzed these phases with reference to the most important case law, and critically discussed recent judgments whose impact is still undetermined. Next, the article proposed what is needed for the unchartered territory beyond blind trust, as there are still undetermined issues in relation to fundamental rights. The article argued that the way forward, for cases where trust is challenged, lies on a fundamental reconceptualization of mutual trust that should not be seen as a legal obligation but as a result of an evidence-based individual assessment. For mutual trust to evolve we need terminological and conceptual clarity and clear understanding of the nature of mutual trust. Where trust is negated by fundamental rights violations, the framework of cooperation will unavoidably be affected too but our focus should be on how to re-generate trust. The article has submitted several suggestions on how to restore trust through respect to rights. Respect for fundamental rights will be achieved through extending the *Aranyosi* test to rights other than Article 4 of the Charter. As communication is an essential component between trusting parties, national authorities' communication scope needs to increase. This means that the Court should also allow these authorities space to communicate with each other, as is the case with *Aranyosi*. In this way, they will learn from each other, understand their practices, and effectively show trustworthiness and gain trust. Finally, mutual trust between different parties relies on shared values. For this reason, harmonization should serve to strengthen the visibility and our understanding of these common values, rather than as a mechanism that shatters differences.

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[67] Chalmers, Davies & Monti, *European Union Law*, 3rd ed. (CUP, 2014), p. 764.