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Proportionality and Mutual Trust in the Area of Freedom Security and Justice

Doctoral dissertation submitted for the degree of Philosophy in Law (PhD)

King's College London

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August 2016

# Abstract

It is observed that proportionality is not specifically developed in the context of mutual recognition and mutual trust in the Area of Freedom, Security and Justice (AFSJ). A rigid approach has been formulated, in light of a ‘blind’ mutual trust and absolute mutual recognition only with extreme exceptions. The thesis examines the application and the impact of the principle of proportionality when fundamental rights are infringed in the context of mutual recognition in the AFSJ. The Framework Decision on the European Arrest Warrant (FDEAW) and the Dublin III Regulation of the Common European Asylum System (CEAS) constitute the two case studies of the study. So, the thesis explores and applies a proportionality-based analysis to the decision of a national authority to transfer individuals when their fundamental rights are infringed or when there is a risk that they will be infringed. Proportionality here would determine whether the interference with the right in question is disproportionate to prevent the transfers based on mutual trust and mutual recognition. The thesis argues that, proportionality, when its application is appropriate, could contribute to an effective protection of fundamental rights shielding them from disproportionate restrictions in light of the procedures of mutual recognition instruments. However, it is also argued that proportionality is not always appropriate and considerably helpful. Its impact to the effective protection of fundamental rights is not uniform in both case studies. Fundamental flaws in the Dublin system profoundly affect the position of the individual and the premise of mutual trust to such a serious extent that an insertion of proportionality would not necessarily impact on the protection of rights. The need to develop a consistent theory of rights in the AFSJ recognising their special force is ultimately highlighted.

# Introduction

The goal of the European Union (EU) with respect to the Area of Freedom, Security and Justice (AFSJ) is the creation of an open and secure space in Europe without internal borders.[[1]](#footnote-1) The AFSJ aims to secure the enjoyment of freedom – a fundamental value of the EU edifice – within the European space both by Europeans and by ‘those whose circumstances lead them justifiably to seek access to our territory’.[[2]](#footnote-2) For this reason, various policy areas were initially encompassed by this title, such as judicial cooperation in criminal and civil matters, border and migration controls, and common asylum policies.

As expected, the coherence of the AFSJ was questioned,[[3]](#footnote-3) as different interests shape each specific policy area that is contained in the AFSJ. Speedy (judicial) cooperation among Member States, while abolishing any additional checks and guarantees, is the common ground for formulating all policy areas.[[4]](#footnote-4) Moreover, transnational cooperation in these areas is based on Member States trusting each other to offer a sufficient level of fundamental rights protection, which allows the mutual recognition of decisions made by national authorities (judicial or not). The existence of mutual trust is therefore the cornerstone of this area, without which its operation becomes dysfunctional. The research conducted by the thesis was triggered by a crisis in this cornerstone of the AFSJ, as evidenced by the problematic operation of instruments based on the mutual recognition of decisions issued by the judicial authorities of various Member States. Mutual trust among Member States regarding the protection of fundamental rights is more often presumed or demanded by the Court rather than properly constructed or even thoroughly checked. This crisis in the premise of mutual trust stemming from a compelled presumption has acted to the detriment of the protection of fundamental rights.

**Contribution**

It is here that this thesis contributes, by examining the impact of the principle of proportionality to this crisis of mutual trust and to the protection of fundamental rights. Proportionality is a principle of constitutionalism 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 the mutual recognition of the instruments of the AFSJ, 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).[[5]](#footnote-5) So, the thesis explores the principle’s impact on the operation of mutual recognition instruments in this fast-evolving area of EU law. The problematic imbalance between security interests and the protection of fundamental rights in the context of mutual recognition instruments renders the exploration of the potential of a proportionality-based essential and topical. The idea of observing proportionality was already explored at a preliminary level.[[6]](#footnote-6) However, the study of this principle in the AFSJ has not attracted the attention it deserves, creating a gap which calls for further research.

The thesis considers the impact of a proportionality-based analysis on the protection of fundamental rights in the context of mutual recognition instruments. To formulate a normative framework of analysis, the thesis first considers the application of the principle by the CJEU. The framework for a proportionality-based analysis is then informed by a normative discussion of how the principle should be used by the Court in the special context of the thesis. The proportionality-based analysis in relation to restrictions on rights caused by public interests employed by the thesis determines whether interference with a *prima facie* right is justified. 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. Correspondingly, in the context of the Dublin III Regulation a proportionality-based analysis would also determine whether an interference with fundamental rights of asylum seekers is justified. The result of this analysis would inform any decision of a national authority on whether a Member State is allowed to transfer the individuals concerned to the country specifies by the law.

The thesis hence offers a contribution to the scholarship on the AFSJ from the angle of the presumption of mutual trust and fundamental rights, and from the perspective of an evolving EU constitutionalism. The thesis does not produce a new theory on the principle of proportionality, but offers a clear framework of analysis for the two case studies of instruments which are based on a presumption of mutual trust.

**Research Questions**

Therefore, concerned about the imbalanced equilibrium shaped by a presumed mutual trust, the thesis asks whether and how the principle of proportionality could impact the efforts to bring the interests involved in the context of mutual trust into proportion. Transfers of individuals, which operates based on a presumption of mutual trust, who suffer from violations of fundamental rights, is exactly where the thesis contributes, by formulating, applying and questioning a proportionality-based analysis. The first question I pose is whether any proportionality-based analysis is generally employed in this context by the Court or by the judicial authorities. This question is addressed in the first chapter. The second question I pose is how exactly a proportionality-based analysis should be understood in this context, and how it should be employed, where necessary. This question is addressed at a theoretical level in the second chapter, and then discussed from the perspective of the two case studies in the third and fourth chapters respectively. The third and final question I pose regards 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, which is discussed in the fifth chapter. Therefore, the thesis is organised based on these three core questions.

**Core Arguments**

Based on the structure offered by the three core questions of the thesis, as submitted above, I offer my findings. Firstly, I argue that a proportionality-based analysis is not generally used by the CJEU in the examined context of the thesis; but I also argue that there is a slow dynamic of emergence of a proportionality-based analysis. Secondly, I argue that a proportionality-based analysis would establish whether fundamental rights breaches associated with a transfer of an individual in the framework of a mutual recognition instrument are disproportionate enough to suspend a transfer. The framework of the principle of proportionality is constructed based on constitutional and EU law, and with reference to the limits of the principle of proportionality as a neutral principle. The principle of proportionality needs to be fed with a consistent theory of rights, placing them high in the EU constitutional legal order. It is only then that the principle will be an effective guardian of rights, protecting them from excessive interferences. It also has to be noted that a proportionality-based analysis is only relevant to rights which are amenable to limitations. Therefore, the test is not applicable to absolute rights, such as the right to freedom from torture and the principle of legality in criminal matters, whereas it is applicable in cases where the right to a fair trial, including defence rights, is restricted by competing public interests, such as a public interest to prosecute.

As mentioned above, the principle of proportionality does not incorporate a certain theory on its own, but is open to various substantive theories of rights which ‘can be fed’ into its neutral structure. An understanding of what rights we have should thus underpin the technical, neutral structure of the proportionality test, which balances rights against public goods. Briefly, the thesis supports theories accepting the special footing of rights, and the fact that some rights are absolute. Not many rights, though, are absolute, and most could be subject to limits. In particular, a weak-trump theory of rights, where rights are generally considered to be overriding considerations, enjoying a priority status in the constitutional legal order, but also amenable to balancing, is here suggested. However, it should be clear that this thesis does not intend to offer a theory of rights *per se*. As the argument would otherwise be incomplete, it is felt necessary to give a preliminary understanding of how rights should be defined.

Another significant feature of the framework of a proportionality-based analysis adopted by the thesis is that rights can only be balanced against the legitimate aims of constitutional importance that have the same significant status as rights. Applying this theoretical framework of a proportionality-based analysis to the two case studies informs the answer to the second core research question. The account of a proportionality test should also consider the rights in question, the case law of the European Court of Human Rights (ECtHR) on these rights, and various criteria developed by the two case studies of the thesis.

Thirdly, in relation to the third core research question, the thesis argues that the principle of proportionality, in light of a proper and consistent definition, could have a significant impact on the protection of fundamental rights in the context of mutual trust instruments. However, the thesis also argues that 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. This is evident through the application of a proportionality-based analysis to the two case studies of the thesis. The impact of a proportionality-based analysis is also significantly affected by the general constitutional limits regarding the structure of the principle of proportionality.

At a general constitutional level, the impact of a proportionality-based analysis is found to be limited for both case studies, because of the constitutional limitations 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. Therefore, the principle is not a reliable method, as long as there no theory of rights is consistently applied. This general limit on how the principle of proportionality could 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. This is why the normative framework of analysis should be accompanied with an embryonic basic theory of rights.

Moreover, at one particular level, the impact of a proportionality-based analysis is especially highlighted: in the case of the FDEAW. This instrument is generally considered successful, but still remains problematic in relation to when violations of fundamental rights have taken place at the issuing country, and in light of a requested surrender. A proportionality-based analysis would protect transfers of suspects and convicted persons from disproportionate restrictions of their fundamental rights, while maintaining an efficient level of performance. 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. The thesis here argues that a proportionality-based analysis could be very useful, regardless of whether an express ground for refusal based on fundamental rights breaches is inserted into the FDEAW or not.

On the other hand, the same cannot be argued for the Dublin III Regulation of the CEAS. This instrument suffers from many foundational problems pertaining to the keystone premises of its function, and beyond a merely misconceived or wrongly presumed mutual trust. As a result, the impact of the principle of proportionality on qualifying mutual recognition would not be sufficient to make a difference to the protection of fundamental rights. However, the thesis still attempts to apply a proportionality-based analysis, which could be helpful if the major problems of a foundational character are addressed to an adequate extent.

**Scope**

In relation to the scope of the thesis, the analysis is limited only to the effect of a proportionality-based analysis on the operation of mutual recognition in the AFSJ. The thesis wishes to discuss the impact of this principle, particularly on the application of mutual recognition in this area, and when fundamental rights are violated, or there is a risk that they might be violated, by the authorities of a Member State to where an individual should be transferred. Therefore, it is only the function of the principle of proportionality relevant to fundamental rights limitations that is studied. In particular, the thesis uses the principle of proportionality as a guardian of fundamental human rights protecting them from excessive interferences from security and management of migration interests. 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 rules, having a restrictive effect on national public interests, including sometimes the protection of fundamental rights. Moreover, 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 thesis 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 of the thesis 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 recognition instruments. These two measures were chosen for a number of factors, enabling to the maximum extent a commentary on the application of the theoretical argument. Firstly, I chose this specific set of instruments because 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. Thus, the FDEAW is an example of positive mutual recognition, where Member States recognise 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 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 thesis. 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.[[7]](#footnote-7) 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 thesis 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 to boost the protection of fundamental rights. The chapter also demonstrates the lack of a proportionality-based analysis in the case law of the CJEU, whilst identifying an emergent potential of balancing, which is currently at an embryonic and certainly insufficient stage. The second chapter explores the principle of 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 thesis 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 fifth chapter offers some reflections on the interdependent relationship between mutual trust, fundamental rights and proportionality by revisiting these three pillars of the thesis in light of the findings relating to the research questions.

1. Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47, title V. [↑](#footnote-ref-1)
2. European Council, ‘Presidency Conclusions’ (Tampere Presidency Conclusions) (1999) Tampere 15 and 16 October 1999 OJ C332 E, pt. 1-9. [↑](#footnote-ref-2)
3. Neil Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’ in Walker (ed) *Europe’s Area of Freedom, Security and Justice* (OUP 2004) ch 1. [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)
5. Charter of Fundamental Rights of the European Union (the Charter) [2012] OJ C326/391. [↑](#footnote-ref-5)
6. 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. [↑](#footnote-ref-6)
7. 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 [↑](#footnote-ref-7)