The Clash between Fundamental Rights, Mutual Recognition & Public Security

Recent developments in the CJEU's case law in the field of AFSJ

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Abbreviations

AFSJ- Area of Freedom, Security and Justices EAW- European arrest warrant

CFR-Charter of Fundamental Rights

CJEU- Court of Justice of the European Union

EAW-European arrest warrant FD- Framework Decision

ECHR-European Convention on Human Rights

ECtHR- European Court of Human Rights

EU-European Union

TEU-Treaty on European Union

TFEU-Treaty on the Functioning of European Union

INTRODUCTION

The aim of this paper is to offer the reader an assessment of the *Pál Aranyosi and Robert Căldăraru*[1] judgment by analysing its impact on public order and public security in Europe on the one hand and on the individual's fundamental rights, on the other hand. In this case, the Court of Justice of the European Union(CJEU) looked at how to reconcile the reality, that in some Member States prison conditions fall short of the required standards, with the requirement, that states shall execute requests on the basis of the principle of mutual recognition as laid down in the Council Framework Decision on the European Arrest Warrant(FD EAW).[2]

In essence, the Court allowed the executing authority to assess the standards of fundamental rights protection in the issuing Member State according to a two-tier test and, under certain circumstances, refuse to surrender the requested person. Moreover, CJEU's conclusion that the presumption of mutual trust is not inviolable is a significant shift in approach since the Court has been strongly committed in its previous case-law to an effective surrender regime based on mutual recognition and mutual trust.[3]

The first chapter will offer the reader an insight into the legal implications of the two notions, mutual recognition and mutual trust, which constitute the basis for the efficient functioning of the Area of Freedom, Security and Justice(AFSJ). This chapter will examine these concepts in light of the Court's new decision in *Pál Aranyosi and Robert Căldăraru* case. Particularly, the analysis will illustrate that the CJEU, drawing on its previous case-law, tried to answer the uncertainties concerning fundamental rights in the European area. It has done so by giving more weight to the fundamental rights and limiting the automaticity of the EAW mechanism. However, as it is going to be illustrated, this approach might give the relevant competent authorities a reason to doubt the system of its neighbour Member State.

The second chapter focuses on the issue of fundamental rights in the context of European prison conditions. It is going to be noted that the reasoning of the Court leads to

[1] Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru, EU:C:2016:198
[2] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (FDEAW)
[3] Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad, EU:C:2007:261; Case C-123/08 Dominic Wolzenburg, EU:C:2009:616; Opinion 2/13.

a ‘balancing ‘approach whereby one value is necessarily given priority at the expense of the other. For this reason, I am going to argue for a reconciliation of the two interests at stake, namely mutual recognition and human rights. Furthermore, the newly established ground for non-execution based on unsatisfactory detention conditions leads to a difficult assessment of what constitutes inhuman or degrading treatment. In fact, the effective challenge to and monitoring of inhuman or degrading treatment in European prisons is limited and it appears that prison condition have not improved to a level that would satisfy the relevant standards which are laid down in the European Convention on Human Rights(ECHR) and Charter of Fundamental Rights(CFR). Lastly, I am going to touch upon the consequence of having a non-execution ground by using the *N.S.* case, as a starting point.

The third chapter will return to the discussion of the two cornerstone principles of the AFSJ, namely mutual recognition and mutual trust. However, this discussion differs from the one in the first chapter because these two concepts will be analysed from a security perspective. In light of the recent judgment, I am going to touch upon the practical effects of having a non-execution ground. For this reason, I will emphasize that the unevenness of the EAW system is accentuated (especially in relation to the issue of prison conditions) with the introduction of a refusal ground based on fundamental rights. Lastly, in order to offer the reader a better understanding of the security concerns at stake I am going to describe the three interlinked notions of ‘Freedom’, ‘Security’ and ‘Justice’ and how they relate to the aforementioned issues.

CHAPTER 1: A shift in approach in the AFSJ

From Mutual Recognition based on Trust to the Centrality of Fundamental rights

1. Introduction

The following paragraphs aim at introducing the reader to two notions: mutual recognition and mutual trust, before partaking the discussion about the recent developments of the Court of Justice. This case example will be offered in order for the reader to understand why I believe that the decision of the CJEU might lead to threats to the security of Union citizens. Additionally, it is significant to understand these two concepts so as to comprehend how to situate them in the context of fundamental rights.

Mutual recognition principle has been considered the 'cornerstone' of European integration in criminal matters for 15 years. The applicability of this principle depends upon the presumed mutual trust between the legal systems of the Member States of the Union.[4] These notions have brought about the proper functioning of the Area of Freedom, Security and Justice, which was based on judicial cooperation in criminal affairs.

The principle of mutual recognition applies since the 1999 when it was introduced as a core value in this area of EU competence. The 2000 programme of measures required the EU Member States to adhere to the aforementioned principles, which were enshrined in article 6(1) of the former EU Treaty: "*That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law*."[5]

It is now important to draw the reader's attention to the period before and after the Lisbon Treaty. For the sake of brevity, I am only going to mention the relevant features of this Treaty. Thus, it has to be pointed out that pre-Lisbon, the 'pillar structure' allowed the use of

[4] Valsamis Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*', published by Hart Studies in European Criminal Law, Volume 1, Oxford and Portland, Oregon [2016], pp.124-125

[5] Its equivalent in the current EU Treaty can be found in Article 2; Hemme Battj, Evelien Brouwer, Paulien de Morree and Jannemieke Ouwerkerk, '*The principle of Mutual Trust in European Asylum, Migration and Criminal Law Reconciling Trust and Fundamental Rights*', Meijers Committee (standing committee of experts on international immigration, refugee and criminal law), published by FORUM, Institute for Multicultural affairs, December 2011, Utrecht, the Netherlands, pp.40-41

the 'framework decisions' which were very similar to the directives in the sense that they required implementation but were excluded from having direct effect.[6] After the entry into force of Lisbon Treaty, the 'pillar structure' was dismantled and the mutual recognition principle was valued as a policy principle in the AFSJ.[7] Its current legal basis is found in article 67(3) Treaty on the Functioning of the European Union(TFEU) and it reads as follows:

"*The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws*."

Furthermore, the Framework Decision allows for the surrender of suspects and sentenced persons based on a European Arrest Warrant issued for the acts punishable by the law of the issuing State and particularly, for the offences enshrined in this Decision.[8] In accordance with article 1(2) of the FD EAW, judicial authorities need to '*execute any European arrest warrant on the basis of the principle of mutual recognition'* and *'in accordance with the provisions*' of the Framework Decision.[9]

In principle, EU law does not allow for double checks, this being expressed in the Framework Decisions on mutual recognition[10], which clearly provides that '*the competent authorities in the executing State shall without further formality recognise* […]'.[11] However, when it comes to the FD EAW, the drafters had emphasized that mutual recognition will not be absolute and EU Member States may invoke one of the grounds (mandatory or optional) listed in article 3 and 4 of the FD EAW in order to refuse a European arrest warrant. The problematic nature does not concern these explicit grounds for non-execution, but those

[6] Although, the Court accorded indirect effect to these 'framework decisions' in its case-law, i.e. Case C-105/03 *Pupino* [2005]

[7] Wouter van Ballegooij, '*The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*', 2015 Intersentia, pp.148-149

[8] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18/07/2002 P. 0001 – 0020, art.2

[9] Ibid., art. 1

[10] See Article 7 *Framework Decision 2006/783 on Confiscation Orders* and Article 5 *Framework Decision 2003/577 on Freezing Orders* and *Framework Decision 2005/214 on Financial Penalties*. A notable exception is the *Framework Decision 2002/584 on the European Arrest Warrant*, which allows some formalities.

[11] Andre Klip, 'European Criminal Law' An Integrative Approach, Ius Communitatis II, 2nd edition, Intersentia 2011, pp.371.

grounds that have not been enshrined in the Framework Decision such as fundamental rights-based refusal ground.

Ultimately, the interplay between these two notions and the issue of fundamental rights will be at the centre of the discussion and I am going to show that, after the Court's latest verdict, the goal of mutual recognition based on mutual trust may be undermined. This will be done by contrasting the Court's previous judgments and its current approach towards the limitations on mutual recognition when fundamental rights are at stake. This will show that its reasoning has changed over time and the new developments may actually have a bigger impact on security than it had in the past since the recent decision brings about a new procedure for the execution of a European Arrest Warrant.

2. The Previous Approach: The Limits to Automatic Recognition

In the context of inter-state cooperation based on trust, a crucial question arises: *to what extent can the executing authorities refuse recognition on grounds of fundamental rights concerns*? The limits have been tested by the CJEU itself. The following paragraphs will envisage the Court's previous case-law in order to emphasise that the Court's approach in the EAW cases was to give priority to the mutual recognition principle instead of fundamental rights. This was mainly because there was (and still is) no inclusion in the FD EAW text of an express ground for refusal based on non-compliance with fundamental rights. As Rebecca Niblock argues:

"*The need to strengthen mutual trust in order to facilitate judicial cooperation is an important corollary of this: if we cannot trust the judicial systems of our neighbours, why should we recognize their decisions?*"[12]

The establishment of an AFSJ requires the abolition of internal border controls so that the individuals can move freely and securely within the Union. However, this might lead to threats to the effectiveness of the national criminal laws whose application remains territorial,

[12] Rebecca Niblock, 'Mutual Recognition, Mutual Trust? Detention conditions and deferring an EAW', 13 April 2016; you can access this paper here: https://www.kingsleynapley.co.uk/comment/blogs/criminal-law-blog/mutual-recognition-mutual-trust-detention-conditions-and-deferring-an-eaw (last accessed 23 November 2016).

the authors of the Treaties entrusted the EU legislator with the task of developing a system of judicial cooperation (based on the principles of mutual recognition and mutual trust).[13]

Valsamis Mitsilegas notes that the simplification of free movement must go hand in hand with the simplification of inter-state cooperation. Essentially, the automatic recognition and enforcement of national judicial decisions has to be facilitated by EU legislation that gives concrete expression to the principle of mutual recognition.[14] In criminal matters, the FD EAW constitutes the '*paradigmatic example*'(emphasis added).[15] The following sections will discuss the Court's approach to the limits to automatic recognition.

a. Case C-303/05 *Advocaten voor de Wereld* [2007]

This case was the first of a series of judgments where the CJEU adopted a rather broad approach to mutual recognition. It did so by embracing a teleological interpretation.[16] Particularly, it stressed the importance of achieving effectiveness of the FD EAW by ensuring that 'in principle' mutual recognition takes place in a speedy and simplified manner.[17] The essential feature of this case is that the Court tested the limits of mutual recognition. Even though the decision is mainly concerned with the abolition of the dual criminality requirement and whether such requirement is compatible with the principle of legality,[18] the Court also analysed Article 1(3) of the FD EAW.

It is here where the CJEU stressed that on the basis of the aforementioned Article, the issuing state '*must respect fundamental rights and fundamental legal principles as enshrined*

[13] Koen Lenaerts and Jose A. Gutierrez-Fons, 'The European Court of Justice and fundamental rights in the field of criminal law', Research handbook on EU criminal law, pp.14
[14] 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 YEL 319, pp.321
[15] *Supra* note 13.
[16] Valsamis Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*', published by Hart Studies in European Criminal Law, Volume 1, Oxford and Portland, Oregon [2016], pp. 132-133
[17] Case C-303/05 Advocaten voor de Wereld VZW v. Leden van de Ministerraad [2007] ECR I-3633, para.28; See *inter alia*: Case C-388/08 PPU, Leymann and Pustovarov, para.42; Case C-192/12 PPU, Melvin West, para. 56; Case C-168/13 PPU, Jeremy F, para. 35; Case C-237/15 PPU, Lanigan, para. 36-37.
[18] Ibid., para. 52-53

in Article 6 EU […]'.[19] It also reaffirmed the importance of mutual trust by pointing out that it is for the issuing state to check on the compatibility of a request with fundamental rights. As Valsamis Mitsilegas argues: "[…] *the Court of Justice has moved from a narrow concept of the social contract covering the relationship between citizens and the state to a broader concept of social contract between citizen and the European Union* […]".[20]

b. Case C-396/11 *Radu* [2013]

The above judgement has been used by the Court to set the stage for a further interpretation concerning the compatibility of the system of mutual recognition with the Charter. This case was the first one in which the CJEU was asked directly whether mutual recognition can be refused on fundamental rights grounds.[21] The Court's reasoning started in the same manner as in the *Pal Aranyosi* and *Robert Caldararu* decision by reaffirming the significance of a mutual recognition system based on mutual trust.[22] On the basis of this presumption of trust, the Court found that Articles 47 and 48 of the Charter do not require that a judicial authority of a Member State should be able to refuse to execute a EAW issued for the purposes of conducting a criminal prosecution.[23]

Once again it can be seen that the CJEU places effectiveness considerations at the top of its reasoning. Particularly, the Court stressed that such an obligation would inevitably lead to the failure of the surrender system[24] and added that '[the right to be heard] *will be observed in the executing Member State* ***in such a way as not to compromise the effectiveness of the European arrest warrant system***'.[25] From *Radu* there are two final aspects that have to be addressed.

First, the CJEU confirms that it is satisfied with the current protection of fundamental rights in one of the two states which take part in the cooperative mutual recognition system. Second, it is the executing state which is under the duty to uphold fundamental rights (in this case, the

[19] Ibid., para. 53
[20] *Supra* note 16, pp.132
[21] Case C-396/11 Radu, judgment of 29 January 2013, para.33
[22] Ibid., para.33-34
[23] Ibid., para.39
[24] Ibid., para 44.
[25] Ibid., para.41

right to be heard) and it places the protection of fundamental rights within a clear framework of effectiveness of the enforcement cooperation system established by the FD EAW.[26] In other words, too extensive protection of fundamental rights would undermine the effectiveness of law enforcement cooperation in this context.

c. Case C-399/11 *Melloni* [2013]

In this case, the focus was on the effective operation of mutual recognition. The Court confirmed the primacy of the third pillar law (i.e. the FD EAW as amended by the Framework Decision on judgments in absentia, interpreted in light of the Charter). In other words, the Court conclusion was that the third pillar has primacy over national constitutional law providing a higher level of fundamental rights protection. In order to reach this conclusion, the Court followed a three-step approach.[27]

Firstly, the Court discussed the scope of the FD EAW in order to establish the extent of the limits of mutual recognition. It reiterated its approach in *Radu* and stressed that in principle Member States are obliged to act upon a EAW.[28]Furthermore, the Court adopted a literal interpretation of Article 4 FD EAW, confirming that the provision restricts opportunities for refusing a EAW.[29]This is confirmed by the mutual recognition objectives of EU law.[30]

Secondly, the Court analysed the compatibility of mutual recognition system with fundamental rights. It did so by reference to the case-law of the European Court of Human Rights[31] and it argued that the right of an accused person to appear in person at his trial is not absolute and can be waived.[32] In the end, the Court found that Article 4 was compatible with the Charter.

Thirdly, the Court had to rule on the relationship between secondary EU law with national constitutional law which provided a higher level of protection. It started by rejecting the

[26] *Supra* note 16, pp.133
[27] Case C-399/11 *Melloni v. Ministerio Fiscal*, judgment of 26 February 2013.
[28] Ibid., para.36-38.
[29] Ibid., para.41.
[30] Ibid., para.43.
[31] Ibid.; See *inter alia*: *Medenica v. Switzerland*, Application no. 20491/92 (ECtHR); *Sejdovic v. Italy*, Application no. 56581/00 (ECtHR).
[32] Ibid., para.49.

interpretation of Article 53 of the Charter as giving general authorisation to a EU Member State to apply the standard of protection of fundamental rights guaranteed by its own constitution when that particular standard is higher than the one provided by the Charter and where necessary, to give priority over the application of provisions of EU law.[33]

The aforementioned provision of the Charter affords freedom to national authorities to apply national human rights standards as long as '[…] ***the level of protection*** *provided for by the Charter*,[…] *and* ***the primacy, unity and effectiveness*** *of EU law are not thereby compromised'*(emphasis added).[34]

Furthermore, the Framework Decision on judgments in absentia '*is intended to remedy the difficulties associated with the mutual recognition decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights*' and '*reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed* […]'.[35]

Overall, it can be noted that the Court has given priority to the effectiveness of mutual recognition based on presumed trust. It has adopted a restrictive approach when interpreting fundamental rights which reveals the strong focus of the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

3. The Current Approach: *Pal Aranyosi* and *Robert Caldararu* case.

3.1. Preliminary Matters

It is important to emphasize that the focus of this section is on the effects of the two-tier test since its application might lead to the non-execution of a EAW on grounds of fundamental rights violations. I am going to argue that this test does not establish clear boundaries, especially in regard to detention conditions since differences in the domestic law and procedure across the EU persist.

[33] Ibid., para.56-57
[34] Ibid., para.60.
[35] Ibid., para.62.

As I already mentioned, these differences are mitigated by the policy principle of mutual recognition which implies a real effort towards as much automaticity as possible, simplification and acceleration of judicial cooperation and the creation of a AFSJ. However, the goal of mutual recognition and mutual trust might be undermined since the use of this two-tier test accentuates these significant differences. Accordingly, it gives rise to diverging interpretations at the national level. This is mostly because the executing authorities have to make their own assessment of the evidence, which they will do in conformity with their domestic rules and of course they will vary from one national legal order to another.

3.2. The Recent Judgment

On the 5th of April, the CJEU delivered the *Aranyosi and Caldararu* judgment. [36] The central development concerned the interplay between the principles of mutual recognition and mutual trust, on the one hand, and the protection of fundamental rights, on the other hand. The Court was confronted with two (nearly identical) preliminary references in two cases concerning a Hungarian and Romanian national. The main issue in this case was whether Article 1(3) of the Framework Decision on the European Arrest Warrant must be interpreted as meaning that a surrender is inadmissible if there is a '*real risk*'[37] that the requested individual's fundamental rights will be infringed due to the issuing State's poor detention conditions.

According to the two European arrest warrants, Mr. Aranyosi forced entry into a dwelling house in Hungary and he was also accused of entering a school.[38] Mr. Caldararu was convicted and sentenced to an overall period of one year and eight months' imprisonment for driving without a driving licence.[39] Both individuals were eventually arrested in Bremen, but they did not consent to a simplified surrender procedure. In these circumstances, the Bremen Court observed that in a number of ECtHR's judgments, both Romania and Hungary were found in violation of their ECHR obligations due to the overcrowding in their prisons.[40] As a result, the

[36] Joined Cases C-404/15 and C-659/15 PPU *Pal Aranyosi* and *Robert Caldararu*, ECLI:EU:C:2016:198, judgment of 5 April 2016.
[37] Ibid., para. 104
[38] Ibid., para. 30-38
[39] Ibid, para. 47-48
[40] Ibid., para.43 and para. 60

Court had no other choice (in the absence of an explicit fundamental rights-based refusal ground in the FD EAW) than to refer to the CJEU for a preliminary ruling.[41]

First, the Court begins its analysis by pointing out the importance of the mutual recognition principle in the '*new simplified and more effective system for surrender of persons […]*' which has the aim '*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*'.[42] The central role of mutual recognition principle was that its application should be possible at all stages of the proceedings: pre-trial, at trial and when enforcing the sentence. This has been realised by adopting the so-called framework decisions.

However, it has to be pointed out that its application provides fragmentation of the Member States' national legal systems. Mutual recognition allows not only for enhanced cooperation, but it also allows the EU Member States to keep their own national criminal law systems. That is why this principle has gained the 'cornerstone' title since it enables different legal systems to coexist.[43] Now it is important to see how the CJEU changes its approach by moving from mutual recognition and mutual trust to the centrality of fundamental rights.

Secondly, after reiterating the essential character of mutual recognition and mutual trust, the Court proceeds by referring to the 'exhaustively listed' grounds for non-execution of an EAW.[44] It argues that, 'in principle', mutual recognition obliges Member States to act on an EAW and they must only refuse to execute it under the circumstance laid down in Article 3 and Article 4 of the FD EAW.[45]

The Court further notes that the EAW mechanism can be suspended only in the event of '*serious and persistent breach*' by one of the EU Member States of the principles enshrined in Article 2 Treaty on the European Union(TEU) and in accordance with the procedure laid down in Article 7 TEU.[46] In this context, it is important to observe that the Court, by pointing out that the mechanism of the EAW can be refused if there is a breach of the principles provided

[41] Ibid., para. 63
[42] Ibid., para.76-77
[43] Rebecka Kronmark, '*Limits of Mutual Recognition in Criminal Matter*s', Faculty of Law Lund University, Christoffer Wong, European Criminal Law, Autumn 2010, pp.45
[44] *Supra* note 36, para. 80
[45] Ibid., para. 79
[46] Ibid., para.81

for in the TEU, sets the stage for a new addition to the non-execution grounds stated in the FD EAW.

The Framework Decision does not have an explicit fundamental rights clause that enables the executing state to refuse a person's surrender in case there are serious doubts regarding the conformity with fundamental rights. This can be clearly deduced from the FD's text since in Article 1(3) there is only a vague statement which reads as follows: "[FD EAW] *shall not have the effect of modifying the obligation to respect fundamental rights* […]".[47] Hence, the Court tried to introduce this obligation(i.e. compliance with fundamental rights) by drawing on the recitals[48] of the FD EAW, even though the preamble itself does not directly refer to a specific fundamental rights duty on the part of the executing state when it enforces an EAW.

Thirdly, the Court further addresses the issue of fundamental rights, when it brings its two-tier 'systematic deficiencies' test closer to the standards used by the ECtHR.[49] This part, which may well be the most significant section in the Court's reasoning, starts by reiterating the importance of Article 1(3)[50] and the EU Member States' obligation to comply with the EU Charter when implementing EU law. It is here where the Grand Chamber stresses the need for its Member States to respect Article 4 of the Charter on the prohibition of torture and inhuman or degrading treatment (which is closely linked to the right to human dignity).[51] The absolute character of this provision is also confirmed by Article 3 ECHR.[52]

From this, the Court stressed that whenever there is a 'real risk' of inhuman or degrading treatment for the individual in the issuing Member State, the executing authority is required to assess the existence of this risk before deciding whether to surrender the requested person.[53]

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[47] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, Article 1(3).

[48] Recitals act as interpretative tools and they can help explain the purpose and intent behind a normative instrument. They can be also used to solve ambiguities in the legislative provisions to which they relate, but they do not have any autonomous legal effect: '*the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question*' (Case C-162/97, Nilsson, [1998] ECR I-7477, para. 54); See 19th Quality of Legislation Seminar, "*EU Legislative Drafting: Views from those applying EU law in the Member States*", European Commission Service Juridique-Quality of Legislation Team, Brussels, 3 July 2014, pp.9.

[49] Szilard Gaspar-Szilagyi, 'Joined Cases Aranyosi and Caldararu: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant', European Journal of Crime, Criminal Law and Criminal Justice, Volume 24, Issue 2-3, [2016], pp.206-207

[50] *Supra* note 36, para. 83

[51] Ibid., para. 85.

[52] Ibid., para. 86.

[53] Ibid., para. 88-89.

Now I am going to discuss the steps that need to be followed by the national executing authorities if they are in possession of evidence of a 'real risk' of inhuman or degrading treatment. This test is important because it leads to a final decision on whether the surrender procedure should be brought to an end. In other words, the application of this test may lead to the refusal of a EAW and ultimately to the creation of a new non-execution ground.

3.3. The Two-Tier Test

It must be noted that the CJEU starts its analysis by pointing out that the prohibition of inhuman or degrading treatment enshrined in both Article 3 ECHR and Article 4 Charter of Fundamental Rights(CFR) is absolute. The Court deduces thereof that if the executing judicial authority is in possession of evidence of a 'real risk', the executing authority has a duty to assess the existence of that risk before taking its decision on the execution of the EAW.[54] The Court's two-tier test distinguishes between the assessment of (1) a real risk of ***general detention*** conditions in the issuing Member State; and (2) a real risk in the ***concrete case*** for the requested person.

Under the first step, the executing authority must verify whether there is a real risk of inhuman or degrading treatment of the requested person because of the general detention conditions. This assessment must be done according to objective, reliable, specific and properly updated information that may be obtained from, *inter alia*, judgments of international courts of the issuing Member States and also decisions, reports and other documents by bodies of the Council of Europe or by the UN.[55]

Moreover, the Court refers to the case-law of the ECtHR, which provides for the positive obligations of Member States to ensure detention standards that guarantee the respect for human dignity.[56]As a result, a crucial question arises as to whether the executing authority has an obligation to look into the general detention of the issuing Member State on its own motion. If that is the case, such a *propriu motu* obligation would lead to an increase of the executing

[54] Ibid., para. 88: '*the judicial authority is bound to assess the existence of that risk* […]'
[55] Ibid., para. 89.
[56] Ibid., para. 90.

authority's workload and ultimately to serious national biases.[57] This, in turn, would also lead to an incompatibility with mutual recognition and mutual trust principles.

The second step entails that it is not enough to prove a general and systemic failure of the detention system in the issuing Member State, but it has to be also proven that in the specific circumstance of the case, there are substantial grounds to believe that the requested person's rights might be breached.[58] Thus, the executing authority must request additional information from the issuing authority and this authority must deliver the requested information within the fixed time.[59]

In this context, it is significant to note that these assurances that are being sought by the executing authorities generally concern the minimum individual space, access to day light, possibility of natural ventilation, etc.[60] There are differing opinions concerning the assessment of these assurances. For instance, as regards the minimum individual space, some executing authorities might lean towards accepting four square meters of personal space, whereas others may opt for three square meters.[61]

Furthermore, there are no internationally agreed definitions of what constitutes prison overcrowding or when prison overcrowding might lead to a violation of fundamental rights. It usually occurs when the demand for space in prisons exceeds the overall capacity of detention places in a given Member State or in a particular prison of that State. However, contrary to Section 18.3 of the European Prison Rules[62], there are still a number of Member States who have not provided a definition of 'minimum space'. As a result, it is difficult to secure an agreement as to the capacity of prison systems.[63]

Overall, this new CJEU approach might even run counter to its previous reasoning(Section 2, Chapter 1) where it argued that too extensive protection of fundamental rights (in both the issuing and executing state) would undermine the effectiveness of law

[57] *Supra* note 49, pp.208-209
[58] Ibid., pp. 207-208
[59] Ibid.
[60] Council of Europe, 'European prison rules' (2006), Council of Europe Publishing, pp.39-36
[61] European Committee on Crime Problems(CDPC), White Paper on Prison Overcrowding, prepared by DG Human Rights and the Rule of Law, Council of Europe [2016]- drafted as a reaction to the joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu* [2016], pp.1-2
[62] European Prison Rules, 18.3: Specific minimum requirements in respect of the matters referred to in paragraph 1 and 2 shall be set in national law.
[63] *Supra* note 61, pp.4-5

enforcement cooperation.[64] The emphasis of the Court on the centrality of mutual trust, as a factor privileging the achievement of law enforcement objectives(via the mutual recognition principle), instead of the protection of fundamental rights has been reiterated in the Court's *Opinion 2/13*.[65] In essence, the Court argued that:

"[…] *when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, **in a specific case**, observed the fundamental rights guaranteed by the EU*(emphasis added)."[66]

4. Concluding Remarks

The application of mutual recognition based on presumed mutual trust in the field of European criminal law was designed to achieve quasi-automaticity in law enforcement cooperation across EU. However, due to a number of questions related to the 'moral' side of the mutual recognition system (i.e. the lack of attention to fundamental rights during this process), the Court of Justice has changed its approach when dealing with European Arrest Warrant cases.

One way in which the Court tried to cope with the issue of fundamental rights during a surrender procedure was to set limits to the automaticity of recognition. This was done according to a two-tier test which allowed the executing authorities to proceed with a substantive examination (on a case-by-case basis) of fundamental rights impact. Given the limited space that I am given here it is not possible to go too much into details on this issue. Suffice it to say that the application of the two-tier test by national courts is likely to give rise to diverging interpretations due to various discrepancies in the national laws of the Member States.

[64] *Supra* note 4, pp.132-133; the author makes reference to the Case C-396/11 *Radu*, judgment of 29 January 2013.
[65] Ibid., pp.140; See also *Opinion 2/13*, delivered on 18 December 2014.
[66] Ibid., *Opinion 2/13*, para.191-192

For instance, there is the issue of assurances provided by the issuing Member State. This newly established test gives rise to multiple questions on whether the information delivered is precise enough or whether it is in accordance with the executing authority's national standards. As a consequence, these diverging interpretations might reinforce and perpetuate distrust among Member States since the assurances provided by the issuing authorities are not legally binding, thus the executing authorities might be sceptical in accepting them.

It would therefore go against not only the Union legislature's intention of stipulating (exhaustively and for reasons of legal certainty) the cases in which the EAW may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the FD and particularly of the grounds for refusal provided for in Article 3 and Article 4 thereof.[67] I am going to further discuss the implications of this new decision in the context of fundamental rights. The focus will be on the prohibition of inhuman or degrading treatment and I will offer an in-depth analysis of the impact of creating a new ground for non-execution.

[67] *Supra* note 36, para. 81.

CHAPTER 2: Fundamental rights in the context of EU Prison Conditions

1. Introduction

In this chapter, two important aspects with respect to the FD will be explored. I will firstly examine the Court's perspective which changed from mutual recognition based on mutual trust (Section 1, Chapter 1) to the centrality of fundamental rights. The aim is to provide the practical applicability of employing a fundamental rights driven approach. I am going to argue in the following paragraphs that the 'balancing approach' used by the CJEU (i.e. favouring one interest/value over the other) might give rise to various risks which in turn might have consequences on the public order and public security of the Union and its citizens (Chapter 3).

Secondly, I will be considering whether and under what circumstances, the judicial authorities of a Member State can refuse to execute a warrant on the basis of detention conditions in the issuing State. Finally, drawing on the Court's latest judgment, I will stress the inherent risks of giving more weight to fundamental rights and undermining mutual recognition and mutual trust. The goal is to outline the effects of having an extra ground for refusal (particularly, when there is a real risk that the requested person might be subject to inhumane or degrading treatment).

It is important to note that the State (confronting with ECHR violations) has the chance to prevent or to compensate for any infringements and should not be required to take action by other States. However, there is of course the discussion concerning certain rights, such as the right to life (Article 2 ECHR) and the prohibition of torture (Article 3 ECHR) which clearly prescribe that the States have their own responsibilities and may not contribute to the violations of other Member States.[68]

It is important at this stage to draw a distinction between the two fundamental rights instruments, i.e. the Charter and the ECHR. The perspective of the Charter is somehow different from the one of the ECHR. This is because the Charter guarantees fundamental rights of the Union's citizens *vis-à-vis* the Union, while the ECHR ensures rights to an individual *vis-à-vis* a particular State.

[68] Ibid.

The above issues will serve in the analysis of the recent CJEU's judgement because the present verdict may be one which will either lead to the '*reconciliation*' between various competing interests (and maybe a step forward in the relationship between the CJEU and the ECtHR following *Opinion 2/13*[69]) or it will raise significant security concerns for EU citizens. This chapter will conclude by emphasizing the need to avoid making a choice between two competing values and turn to a new approach that of reconciling the 'high level of safety' and the safeguarding of fundamental rights.[70]

2. Fundamental Rights, Prison Conditions and CJEU's Recent Judgment

Before proceeding with the analysis, it is important to offer the reader some preliminary remarks concerning the FD EAW in order to better comprehend the effects that this recent decision might have in practice. The EAW initiative, as we already know, is based on the principle of mutual recognition of judicial decisions and on mutual trust between the judicial authorities of EU Member States.[71]

Moreover, mutual recognition follows the assumption that the criminal justice systems in all EU Member States conform to the human rights standards as set out in the European Convention on Human Rights(ECHR) and the Charter of Fundamental Rights(CFR). The importance of this principle in the AFSJ was acknowledge by Lord Bingham, he noted that:

"*The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each other's judicial institutions."*[72]

However, 'blind trust' becomes rather difficult in practice due to the specificity of the AFSJ, on the one hand and the limited harmonisation of domestic laws, on the other hand.[73] For instance, the lack of trust of domestic legislators in the soundness of other judicial systems

[69] This aspect will not be discussed in this paper; *Opinion 2/13*, EU:C:2014:2454, para. 191-192
[70] Wouter van Ballegooij, '*The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*', 2015 Intersentia, pp.141
[71] Ibid., pp.34
[72] *Dabas v. High Court of Justice in Madrid*, Spain [2007], UKHL 6, para.4
[73] For more information, see A. Weyembergh, 'Approximation of Criminal Law, the Constitutional Treaty and The Hague Programme', 42 CMLRev. (2005), pp.1567

is indicated by the transposition effort conducted by all EU Member States in respect of the Framework Decision. The evaluation report on the implementation of the FD EAW prepared by the Commission shows that the mandatory grounds for refusal listed in Article 3 and 4 FD EAW differ substantially from State to State.[74]

At this point, it is important to note that the FD does not provide for the harmonisation of national law in respect of detention but rather guarantees the application of existing domestic procedural protections.[75] Nonetheless, preserving these differences has pivotal consequences for the functioning of the EAW machinery and can result in some unevenness in application.[76]When it comes to the extradition process, confidence and trust in the judicial systems in the other Member States leads to the presumption in favour of surrender.

While human rights issues are not specifically mentioned in Article 3 and 4 FD EAW, these matters can still count as a basis for non-execution(Section 3, Chapter 1) or it can provide the grounds for an appeal against a decision to surrender.[77] Recital (10) of the Preamble to the FD EAW states that:

"*The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on the European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.*"

Thus, a decision of the Council based on Article 7 TEU might lead to the deferral of the EAW mechanism. Serious and persistent breach of fundamental rights could result in the suspension of the rights of Member States, including voting rights and may eventually lead to

[74] For an overall evaluation see Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2007) 407 final as supplemented by Commission Staff Working Paper. Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC (2007) 979.
[75] *Supra* note 70, pp.36.
[76] Ibid.
[77] Ibid., pp.40; Some of the EU Member States have introduced human rights grounds for refusal in their implementing laws. For example, see Section 4(2) of Chapter 2 of the Swedish Act(2003:1156) which provides that surrender under a EAW can be refused if it contravenes the ECHR(available at: http://www.sweden.gov.se). The Irish legislation is even stricter, making human rights a mandatory ground for refusal. (available at: http://www.oireachtas.ie/documents/bills28/acts/2003/a4503.pdf).

the suspension of the application of the FD.[78] As a consequence, it can be observed that States have an obligation to protect fundamental rights of the requested persons. Similarly, drawing on the text of Article 3 ECHR, Recital (13) of the Preamble provides that:

"*No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*."

It is clear from the Court's recent decision that a presumption in favour of executing the warrant can be rebutted in case the requested person might be subject to unsatisfactory prison conditions. However, to attempt to establish that detention conditions are a reason for non-surrender is to impeach the judicial processes of Member States and indicates lack of trust.[79]

2.1. Fundamental Rights vs. Surrender Procedure

A decision to execute a EAW may give rise to an issue under Article 3 ECHR or Article 4 CFR. Having regard to the absolute nature of these provisions and despite the assumption of trust, States must conduct a rigorous scrutiny of a claim that the execution of a warrant will expose an individual to ill-treatment.[80] The case-law on this matter sets up a very high threshold for establishing a claim under one of these provisions.[81] The applicant will bear the burden of producing evidence that shows there is a real risk that he/she would be subjected to a flagrant breach of Article 3. If such evidence is provided, then the respondent government is required to 'dispel any doubts about it'.[82]

To this end, the executing authority must request additional information from the issuing authority. This means that the executing authority must rely on "*objective, reliable, specific and properly updated*" information on prison conditions that demonstrates the existence of deficiencies "*which may be systemic or generalised or which may affect certain groups of*

[78] See Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of values in which the Union is based, COM (2003) 606 final.
[79] *Supra* note 70, pp.41
[80] Ibid.
[81] See *Chahal v. United Kingdom* [1990] 23 EHRR 413, para.80.
[82] *Saadi v. Italy* [2008] 24 BHRC 123, para.129

people or which may affect certain place of detention."[83] Therefore, in the absence of an express human rights provision within the FD EAW, is the case-law of the Court of Justice/ European Court sufficient in order to safeguard the rights of the fugitive?

Before seeking an answer to the above question, it is important to mention that it is well established that human rights may act as a non-execution ground. Prior to the FD EAW, the well-known decision of the European Court in the *Soering* case[84] set down the principle that where the returned fugitive would or foreseeably could suffer a violation of his/her human rights, then the executing authorities should not extradite him/her. However, the European Court explained that such principle has limits. I agree with the European Court's approach whereby it sought to achieve a balance in protecting the right of the fugitive:

"*As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition.*"[85]

Shortly after the *Soering* case, other judgments showed that national courts were willing to extend the above mentioned principle to other Convention rights (e.g. the right not to face death penalty, the right to fair trial etc.).[86] However, these and other judgments tended to illustrate that where a conflict arose between human rights obligations and extradition arrangements under national law or international treaties, human rights would prevail. Dugard and Van den Wyngaert stated that the case-law on this matter:

"[…] *recognizes the higher status of human rights norms arising from the notions of jus cogens and the superiority of multilateral human rights conventions that form part of the ordre public of the international community or of a particular region.*"[87]

On the other hand, I believe that such an approach might be rather problematic because in these circumstances, one value is favoured over the other. This method takes into account

[83] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198, para. 89-93
[84] *Soering v. United Kingdom* [1989] 161 Eur. Ct. H.R.(ser.A)
[85] Ibid., para.89
[86] See *Netherlands v. Short*, Dutch Supreme Court 30 March 1990, NJ 1991, 249; *Finucane v. McMahon* [1990], 1 I.R. 165 (H.Ct. & S.C.).
[87] J. Dugard and C. Van den Wyngaert, '*Reconciling Extradition with Human Rights*', 92 AJIL (1998), pp.187-212.

only the importance of fundamental rights of the accused while neglecting the EAW surrender mechanism. For this reason, I argue for a more tempered approach like the one advance by Keijzer:

"*[t]here is no general rule of international law, however, that, in case of conflict between the obligation to extradite under an extradition treaty and the obligation to respect human rights of the requested person, the human rights treaty must always prevail. Such a rule would indeed be very impractical because human rights violations, actual or anticipated, can be of varying severity*."[88]

2.2. Prison Conditions: Inhuman or Degrading Treatment

Article 3 ECHR/Article 4 of the Charter may have enormous potential in challenging all aspects of detention.[89] The State must ensure that prisoners are detained '*in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured*'.[90]

Traditionally, the European Court and the Commission of Human Rights took a rather pragmatic approach in determining challenges to general detention conditions and they were reluctant to find states infringing on Article 3.[91] One relevant example would be the *B v. United Kingdom* case,[92] where the European Commission found that there were 'unsatisfactory' conditions at the institution(where the applicant was detained for three and a half years).

[88] N. Keijzer, '*Extradition and Human Rights: A Dutch Perspective*', in R. Blekxtoon and W. van Ballegooij (eds.), Handbook on the European Arrest Warrant, The Hague, T.M.C Asser Press 2005, pp.183-194.
[89] For a full analysis of Article 3 ECHR see: William A. Schabas, '*The European Convention on Human Rights: A Commentary*' [2015], Oxford Public International Law
[90] Ibid.
[91] B. Dickson, '*Human Rights and the European Convention*' (London, Sweet and Maxwell, 1997), Chapter 3. See also: *Reed v. United Kingdom* 19 DR 113.
[92] *B v. United Kingdom* [1983] 5 EHRR 114.

Even though there was serious evidence of overcrowding and poor facilities, it was decided that such conditions did not constitute a violation of Article 3.[93] It has to be noted that the reasons behind this approach were both pragmatic and diplomatic. This was because judicial bodies were hesitant to interfere with prison managerial decisions, particularly where any decision might have an impact on the allocation of resources. Additionally, this reluctance was caused mostly due to the desire of the European Court and Commission to respect Member State's autonomy regarding their own penal policy.[94]

At the time there was a lack of strict legal guidelines and standards with respect to prison conditions. The European Court and Commission were again reluctant to set standards in this field, thus they preferred to leave this task to the domestic authorities or other international/regional regulations, such as the European Prison Rules.[95] The lack or limitation of judicial regulation in this area has raised a number of difficulties. Nevertheless, the European Court tried to mitigate these difficulties by identifying the relevant factors which allow to regard a certain treatment as inhuman or degrading due to the poor detention conditions.

Firstly, it will have to distinguish between treatment/conditions that are part of the harshness of incarceration and treatment/conditions which impose an unacceptable detriment on the detainee so as to constitute a violation.[96] Thus, the assessment will focus more on the degree/intensity and the Court will need to examine various factors in order to conclude that a certain treatment is to be regarded as inhuman or degrading. In deciding whether the effects of certain actions amount to a violation of Article 3, the Court can take into account other factors such as the victim's age and dangerousness.[97] This approach allows the Court to impose a margin of appreciation and even though such a mechanism is irrelevant once an infringement

[93] See also *Hilton v. United Kingdom* [1981] 3 EHRR 104; *T v. United Kingdom* 28 DR 5; *McFeeley v. United Kingdom* [1981] 3 EHRR 161.
[94] Francesca Ippolito and Sara Iglesias Sanchez *'Protecting Vulnerable Groups: The European Human Rights Framework*', Volume 51 in the series Modern Studies in European Law, Hart Publishing, Oxford and Portland, Oregon [2015], Steve Foster, Chapter V: Circumstantial Vulnerability, 'The Effective Supervision of European Prison Conditions', pp. 385
[95] Ibid.
[96] Ibid; See also: *Valasinas v. Lithuania* App no. 44558/98 ECtHR, 24 July 2001, 12 BHRC 266; It is important to also emphasize that the terms employed in Article 3 were defined in *Ireland v. United Kingdom* (1978) 2 EHRR 25 where ***inhuman treatment*** was that which was capable of causing if not bodily injury, at least intense physical and mental suffering and acute psychiatric disturbances, whilst ***degrading treatment*** was such as to arouse in their victims feeling of fear, anguish and inferiority capable of humiliating them and possibly taking away their physical or moral resistance(para. 167-168)
[97] William A. Schabas, '*The European Convention on Human Rights: A Commentary*' [2015], Oxford Public International Law

of Article 3 has been found, this discretion is important in shaping the boundaries of acceptable treatment and, in this context, lawful and unlawful prison conditions.[98]

Overall, the effective challenge to and monitoring of inhuman or degrading treatment in European prisons is limited and it appears that prison condition have not improved to a level that would satisfy the standards laid down by the ECHR and the CFR. This is evident not only from the direct legal challenges via Article 3, but also from recent EU initiatives in this area- the White Paper on Prison Overcrowding 2016 drafted by the European Committee on Crime Problems[99]- which assessed the issue of overcrowding in European prison. From this document it is clear that there is a need to revise national strategies and develop action plans regarding crime policy, but it is also obvious that these issues are not new.

The European Court has found in many cases that there is a 'systemic' problem related to poor prison conditions or prison overcrowding.[100] Nonetheless, even after this recent report, there is evidence that the problem persists.[101] For example, the Greek Ministry of Justice has informed the Greek Parliament that on 1 November 2014, there were 11 988 prisoners, while the capacity of the prison stood at 9 886 places. Finally, the newly established principle[102] whereby unsatisfactory prison conditions may lead to non-execution of a EAW due to the possibility of subjecting the requested person to inhuman or degrading treatment may not be the long awaited 'reconciling' approach. That is why I support Advocate General Bot's view [103] that "*to reduce prison overcrowding in one Member State only to increase it in another is not a solution*".[104]

[98] Steve Foster, 'Prison Conditions and Human Rights' [2008], Web Journal of Legal Studies, pp.386
[99] European Committee on Crime Problems(CDPC), White Paper on Prison Overcrowding, prepared by DG Human Rights and the Rule of Law, Council of Europe [2016]- drafted as a reaction to the joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu* [2016].
[100] Ibid., pp.23; The first specific reference to the term 'systemic problem' is made by the Committee of Ministers in its Resolution adopted on 12 May 2004(Resolution (Res (2004)3) on judgments revealing an underlying systemic problem.
[101] Ibid., pp. 24, para.145-150
[102] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198, para. 89-96
[103] Opinion of Advocate General Bot, delivered on 3 March 2016, Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu*, para.126
[104] Ibid.

2.3. The New Judgment: The Impact

This section will focus on analysing the CJEU's recent decision, particularly the new two-tier test, and its impact. I am going to do this by offering the reader a similar example from the Court's previous case law, namely the *N.S.* judgment.[105] This will be done in order to emphasize that the solution advanced by the Court of Justice might question the primacy of EU secondary legislation (i.e. the Framework Decision on the European arrest warrant), while underscoring the primacy of EU fundamental rights law.[106]

By employing this test, the Court encouraged the Member States to act as "*delegates for the application of European fundamental rights law*" by relying on ECtHR case law and UNHCR reports.[107] Conversely, this may become rather problematic since attributing judicial review powers to EU Member States in cases of potential violations of fundamental rights might allow national courts to transgress too much into their counterparts' legal system. This is quite a sensitive issue, which might even touch upon core aspects of Member States' sovereignty and might even turn out to be a source for great tension among the states which until recently were used to adhere to a mutual recognition system based on mutual confidence.[108]

In the *N.S.* case,[109] the Court rejected the Union's guiding rule which advocates for automatic reliance on the principle of mutual trust. It ruled that a Member State is precluded from transferring an asylum seeker to another Member State pursuant to European policy (i.e. Dublin II Regulation) if there are systemic deficiencies in the asylum procedure and reception conditions in the issuing state, which might give rise to a 'real risk' of the asylum seeker to be the subject of inhuman or degrading treatment.[110] The assessment of the Court is based, as in *Aranyosi and Caldararu* case, on a two-tier test.

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[105] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011] EU:C:2011:865.
[106] Iris Canor, '*My Brother's Keeper? Horizontal Solange: "An ever closer Distrust among the People of Europe*"' [2013], Common Market Law Review 50, Kluwer Law International, pp. 413
[107] Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu*, para. 89
[108] *Supra* note 107, pp. 415
[109] Kenner, '*The Court of Justice of the European Union and human rights in 2010: Entering a post-Lisbon age of maturity*' [2011], European Yearbook on Human Rights, pp.173
[110] *Supra* note 106, pp.385

As Iris Canor argues, the first tier creates an '*overarching legal construction'*[111] which allows for cooperation between Member States as long as they systematically adhere to European fundamental rights. However, if there is sufficient evidence to prove a systemic violation of core fundamental rights in one Member State, then the other state has to suspend cooperation and the binding European legislation should be deferred.[112]

The second tier gives the national courts the power to review whether the other Member State respects the European standards concerning the protection of fundamental rights. In other words, the Court of Justice empowers national courts with new supervisory competences.[113] The *N.S.* test is very similar to the one used by the CJEU in *Aranyosi and Caldararu* case. Even though the former is concerned with the Common European Asylum System, while the latter relates to the European Arrest Warrant system, both cases might give rise to inconsistencies *vis-à-vis* the European policy at stake and it might also impact the division of competence among Member States.

In order to get a better understanding of the Court's rationale in both cases it is important to explore the scholars' views on the matter. The Court of Justice faced harsh criticism from numerous scholars[114] because in the past, it did not pay too much attention to the protection of fundamental rights and it only introduced 'merely rhetorical general principle of law' into the Union legal system while favouring the completion of the common market and the facilitation of its four freedoms.[115]

The above mentioned criticism has remained pertinent in relation to two aspects. First, it can still be argued that the Court hardly ever found instances of secondary legislation violating fundamental rights and it almost never advocated for the annulment of Union acts.[116] As a result, it can be said that the Court is inclined to leave European policies intact since that is what was agreed by the European legislature. Secondly, it was argued that that serious breaches of fundamental rights by Member States in matters that fall within the scope of their own autonomous competences[117] were beyond the Court's review competence.

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[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Coppel and O'Neil, "*The European Court of Justice: Taking rights seriously*?" [1992] 29 CML Rev., pp.669
[115] Ibid.
[116] *Supra* note 106, pp. 387
[117] Ibid.; For example, prison conditions cannot be said to evidently fall within the EU's internal competence. For more details, relating to EU's competence concerning detention conditions, see: Steve

In terms of competences, it has to be noted that the Court in *N.S.* and similarly in *Caldararu* case tries to make a bridge between European law and the manner in which Member States are executing their own independent competences.[118] Hence, the Court of Justice seems to be willing to expand the constellations in which EU fundamental rights affect Member States' sovereign competences, while "indirectly and elegantly" bypassing Article 51 of the Charter.[119]

Overall, according to the *N.S.* judgement, the Common European Asylum System and similarly, the European Arrest Warrant System, can only be successful if the participating states exercise their obligations (falling within their own competences) in a 'flawless manner'.[120] Thus, even if the *N.S.* reasoning did not go as far as to dismantle the system established by the Regulation, it nonetheless redefined it by placing a new obligation- a mandatory ground for non-execution- upon the Member States.[121]

Accordingly, the Court reduced the scope of application of the Regulation considerably, as it similarly did with the Framework Decision in *Aranyosi and Caldararu* case. Of course, these decisions do not *eo ipso* make regulations or framework decisions void, but it might strip both the secondary legislation at stake and the obligations stemming from it of any substance or impact.[122]

3. Concluding Remarks

As it has been argued, the recent cases of the CJEU brought about a potential conflict between the recognition of judicial decisions (based on trust) on the one hand and the use of fundamental rights considerations as a ground for non-execution of an EAW, on the other hand.

Peers, Angela Ward, "*The EU Charter of Fundamental Rights: Politics, Law and Policy*" [2004] Essays in European Law, Oxford and Portland Oregon, pp. 69-70

[118] *Supra* note 106, pp. 395

[119] Joined Cases C-411/10 & C-493/10, *N.S. v. Secretary of State for Home Department and M.E. v. Refugee Applications Commissioner*, judgment of 21 December 2011, para. 68-69. For more information regarding the analysis of the possible effects of the ECHR on the national legal orders, see: Weiß, W., 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011), pp.64-88

[120] Supra note 106, pp. 392

[121] Ibid.

[122] As Thomas Hammarberg (The Council of Europe Commissioner for Human Rights) observed, "*The gravely dysfunctional asylum procedures in Greece have brought Dublin system to a genuine collapse*", Hammarberg, '*The Dublin Regulation undermines refugee rights, Council of Europe Commissioner for Human Rights*', 22 September 2010.

Nevertheless, I supported the views of several scholars who advocated for a 'reconciliation' between these two competing values, rather than employing a 'balancing' approach whereby one interest is given priority at the expense of the other.

Furthermore, it has been shown that the problem of prison overcrowding is not a new one, in fact the same issue was approached by the Court in its previous case-law. The CJEU did not give priority to fundamental rights (particularly article 4 of the Charter) until recently. Moreover, the Court's desire to offer more value to human rights was recognized in the *N.S.* case and later on in *Aranyosi and Caldararu* case. Hence, by trying to expand the non-execution grounds to fundamental rights (via the use of a two-tier test), the CJEU risked affecting the EU secondary legislation at stake. Another consequence was that it also touched upon core aspects of Member States' sovereignty.

CHAPTER 3: Non-execution of a EAW as a threat to Public Order & Security in the EU

1. Introduction

This final chapter aims at reinforcing the idea that the recent decision of the Court of Justice, where a new non-execution ground was established, might potentially affect the guiding principles of judicial cooperation in the AFSJ, on the one hand, but it might also constitute a threat to the public order and security of the Union and its citizens, on the other hand. Moreover, it is important to note that the issues previously identified (Chapter 1 and 2) will be discussed from a security perspective. Before I proceed, an overview of the chapter's structure has to be offered.

Firstly, I am going to provide a description of the two notions, mutual recognition and mutual trust, in order to familiarize the reader with their meaning within the AFSJ. The discussion will now proceed with an extensive analysis so as to emphasize the security issues that the Court's reasoning might give rise.

I will start by pointing out that the functioning of the EAW mechanism is based on these two notions mostly because the Member States, especially before the Lisbon Treaty, have called resistance against the harmonisation of laws in a sensitive area such as criminal law (which is so closely linked to the sovereignty of the states). By taking the recent decision of the Court of Justice as a starting point, I am going to argue that the unevenness of the EAW system is accentuated (especially in relation to the issue of detention conditions) due to the creation of a new fundamental rights based ground for refusal.[123]

Secondly, I am going to discuss the three interlinked notions of 'Freedom', 'Security' and 'Justice' and how they relate to the aforementioned issues. Particularly, I will mention that while security concerns have been given priority before the Lisbon Treaty, this approach has changed in favour of fundamental rights (i.e. the 'Justice' aspect of the European area) after its entry into force.

[123] Nico Keijzer and Elies van Sliedregt, '*The European Arrest Warrant in Practice*' (2009) T.M.C. Asser Press, pp.35-36

It is here where it must be emphasized that the Charter was adopted and proclaimed on 7 December 2000 in Nice by the European Parliament, the Commission and the Council of the European Union.[124] At the time, the Charter was not legally binding for the Member States or EU citizens, but had the status of an inter-institutional agreement.[125] After the entry into force of the Lisbon Treaty on 1 December 2009, the CFR became a legally binding catalogue of fundamental rights and has the same legal significance as the Treaties.[126]

This section will help the reader get a better understanding of the security concerns at stake and its implications for Union citizens. It is important to note that this analysis will be carried out by placing the individual at the heart of the security debate, while also emphasizing the need for preserving the constitutional principles (i.e. mutual recognition and trust) of the AFSJ.[127]

2. Undermining Mutual Recognition & Mutual Trust

Before I proceed with the analysis of the two notions in the context of the CJEU's recent decision, their role within the AFSJ must be firstly examined. It is important to note that, while the key feature of the development of an AFSJ presupposes the abolition of internal frontiers between the EU Member States, this new single area of movement is not accompanied by a single area of law. The law is territorial, in the sense that the Member States still retain a great extent of sovereignty, especially in the field of law enforcement.[128] As a result, the main question that arises is: *how can the national legal systems interact in a borderless AFSJ?*

It is here where it has to be emphasized that due to the resistance on the part of the Member States concerning the unification of laws, a system of inter-state cooperation via automaticity

[124] European Parliamentary Research Service, Francesca Ferraro and Jesús Carmona, '*Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*' , March 2015(available at: < http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf>) pp.9; See also Conclusions of the Presidency, Nice European Council, 7-10 December 2000.
[125] Ibid., pp.9; On the legal status of the Charter before the Lisbon Treaty see e.g. Bruno de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue', *Maastricht Journal of European and Comparative Law 8* (2001), pp. 81.
[126] Ibid., pp.10
[127] Barbara Hudson, Synnove Ugelvik, '*Justice and Security in the 21st Century: Risks, rights and the rule of law*' (2012), Routledge Studies in Liberty and Security, pp.185-186
[128] Valsamis Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*' (2016), Hart Studies in European Criminal Law, pp. 125.

and speed has been developed. This automaticity means that a national decision may be enforced beyond the territory of the issuing Member State by authorities in other Member States. The method used in order to secure such automaticity has been the use of the mutual recognition principle in the fields of judicial cooperation in criminal matters.[129]

This concept has been well received by the EU Member States resisting further harmonisation in European criminal law since mutual recognition is thought to enhance inter-state cooperation without having the states change their national laws to comply with EU law requirements.[130] Additionally, mutual recognition creates extraterritoriality[131] meaning that the will of the a Member State's authority can be enforced beyond its territorial legal borders and across the AFSJ.

It is important to underline that in order to benefit from this extraterritoriality, there needs to be a high level of mutual trust between the authorities. The acceptance of a high level of integration among EU states has justified the automaticity of judicial cooperation and has led to the adoption of various EU instruments which go beyond traditional forms of cooperation set out in public international law instruments.

Moreover, the membership of the EU presumes respect for fundamental rights by the Member States. This creates mutual trust, which in turn forms the basis of automaticity of inter-state cooperation in the EU.[132]As it has been previously observed, the negative views on the role of mutual recognition principle are mostly caused by the idea that this notion is incompatible with national sovereignty and/or fundamental rights.

Most of the criticism relating to the application of this concept is directed against the European arrest warrant. Particularly, the lack of uniformity, which was repeatedly observed not only by scholars but also by the European Commission[133], is a predictable consequence

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[129] Ibid., pp.126

[130] Valsamis Mitsilegas, '*The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*' (2006) 43 Common Market Law Review, pp.1277-1311

[131] K. Nicolaidis, G. Shaffer, '*Transnational Mutual Recognition Regimes: Governance without Global Government'* (2005) 68 Law and Contemporary Problems, pp. 263-317; See also K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy, pp.682-698.

[132] Valsamis Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*' (2016), Hart Studies in European Criminal Law, pp. 126.

[133] This information is taken from the reports posted by commentators on national EAW legislation, practice and case law, see: http://www.eurowarrant.net ; http://www.law.uj.edu.pl/~kpk/eaw/data/map.html ; http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33167&from=EN (last accessed on December 20, 2016)

caused by the lack of harmonisation in procedural criminal law and the absence of an effective EU enforcement mechanism.

Even though the Court has previously reiterated the need to avoid Article 3 ECHR (and Article 4 Charter) violations maybe in the hope of persuading the EU legislator to include a fundamental rights ground for refusal, that intention was not (textually) shown. This can be clearly observed in the wording of the FD EAW (even after its amendments) and other EU institutions' instruments.

Furthermore, in times like those of today, security is more important than ever. Terrorism is a threat that does not recognize borders and may affect the states and people irrespective of where they come from. Acts of terrorism are criminal and unjustifiable and that is why EU security must be preserved now more than ever.[134]

Nevertheless, it is essential to emphasize that I am not trying to argue that security should prevail over fundamental rights since I believe that the reasoning offered by the CJEU clarified the procedure applicable to circumstances where ill-treatment may occur as a result of detention conditions. In its judgement, the CJEU offers the executing authorities specific steps to be followed, but then again the two-tier test does not establish clear boundaries especially in regard to detention conditions.

Firstly, it recommended that executing judicial authorities should assess, on the basis of "*objective, reliable and properly updated*"[135] information, where there are "*systemic or generalised*" deficiencies in the detention conditions of the issuing Member State. It then reiterated the need for Member States to respect their positive obligation to ensure detentions standards which guarantee the respect for human dignity.[136]

Secondly, the authority must ascertain whether the requested person would indeed face a real risk of inhuman or degrading treatment. Hence, the Court made sure that the executing authority would not refuse a EAW only where there is a general and systematic failure of the detention system.

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[134] For more information concerning the recent terrorist threats that the EU faces, see: https://ec.europa.eu/home-affairs/what-we-do/policies/crisis-and-terrorism_en (last accessed on December 20, 2016).

[135] Joined Cases C-404/15 and C-659/15 PPU *Pal Aranyosi* and *Robert Caldararu*, ECLI:EU:C:2016:198, judgment of 5 April 2016, para. 89

[136] *Ibid*., paras 89–90, with reference to ECtHR, *Torreggiani and Others v Italy* (Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10) 8 January 2013.

On the other hand, even though this judgment has been seen as a clarification to the *N.S and Others*[137] line of reasoning, it has nonetheless led to a situation where mutual recognition and mutual trust are undermined. I believe that the two-tier test is not an adequate instrument for weighting two competing interests since it gives rise to much doubts concerning legal certainty and efficiency in the AFSJ and ultimately EU security in general.

Arguing for non-surrender on the basis of conditions in detention is seen, by many, as an attempt to impeach the judicial processes of Member States and eventually indicates lack of trust in the integrity and fairness of judicial institutions.[138] Although the court has an obligation to decide whether the surrender in question was oppressive or unjust, seeking proof regarding safeguards available in the requesting state would lead to a situation where the states would not be giving "*full faith and credence*" to each other's legal and judicial systems.[139]

Furthermore, I agree with Valsamis Mitsilegas who argues that the principle of mutual recognition can be seen as a "*journey into the unknown*"[140], however in the absence of any harmonising measures, the only instrument which facilitates judicial cooperation in the AFSJ is mutual recognition of decisions on the basis of mutual trust.

Even though these two notions have received much criticism(especially in relation to FD EAW), the Council/Member States, Commission and European Parliament have issued reports, guidelines and resolutions as regards the correct implementation and interpretation of the (problematic) FD EAW on fundamental rights matters.[141]

These instruments clearly hint at EU legislator's intention. Particularly, the Council, after conducting mutual evaluations concerning the practical applicability of the EAW[142], noted the different approaches to incorporating Article 1(3) and the related recitals 12 and 13(Chapter 1), to the implementing law and the creation of a specific mandatory ground for non-execution.

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[137] Joined Cases C-411/10 & C-493/10, *N.S. v. Secretary of State for Home Department and M.E. v. Refugee Applications Commissioner*, judgment of 21 December 2011, nyr(hereinafter *N.S.*)
[138] Nico Keijzer and Elies van Sliedregt, '*The European Arrest Warrant in Practice*' (2009) T.M.C. Asser Press, pp.48-49
[139] Ibid., see also *The Governor of HMP Wandsworth v. Antanas Kinderis* [2007] EWHC 998 (Admin), para.25.
[140] Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) *43 Common Market Law Review*, pp.1281
[141] Final report on the fourth round of mutual evaluation. The practical application of the European arrest warrant and corresponding surrender procedures between Member States, Council Document 8302/2/09 REV 2, 18 May 2009; COM(2005) 63; COM(2007) 407 and COM(2011) 175.
[142] Ibid., Council document 8302/2/09 REV 2, 18 May 2009.

As a result, the Council advised the Member States to scrap their explicit implementation of Article 1(3) FD EAW. For instance, when it comes to the fundamental rights ground for refusal in the Netherlands, it argued that:

"*This ground for non-execution goes, strictly speaking, beyond the provisions of the Framework Decision since it is not included in Article 3 and 4 […] The experts team is familiar with recital 12 […] but considers that this recital should not have been elevated to a ground for non-execution, in view also of the fact that all Member States are signatories to and hence are bound by the Convention on Human Rights and Fundamental Freedoms[…] this ground […] is the expression of a lack of confidence in the criminal law systems of the other Member States*."[143]

3. The notions of a European Area

In this section, the effects of potentially undermining the principles of mutual recognition and mutual trust will be discussed. This will be done by carefully looking at the three interlinked notions of freedom, justice and security and how these 'aims' might be limited due to the recent CJEU judgment.[144] The basic idea behind the use of mutual recognition is the establishment of a *single* area, i.e. the Area of Freedom, Security and Justice, where free movement of people/citizens exceptions based on national sovereignty have no place.

As it has been mentioned by several scholars, the ideal or the end goal of having a single area is that any barriers have to be eliminated. Of course, in practice this is difficult to accomplish since free movement might imply, as it is the case at stake, an infringement of individual rights (e.g. the right to liberty and security, the right to family life, the right to an effective remedy and to a fair trial etc.). Thus, in accordance with Article 52 of the EU Charter, any limitations on the exercise of the rights and freedoms must be provided by law and must respect the essence of those rights and freedoms.

This section highlights and discusses the changes brought about by the Lisbon Treaty and whether these changes (which I believe ultimately influenced the CJEU in its decision-making

[143] Wouter van Ballegooij, '*The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*', 2015 Intersentia, pp.244
[144] Ibid., pp. 148

process) strengthen or weaken the fundamental rights of the Union citizens. The point of departure, as I mentioned above, is EU's aim of creating an area of freedom, security and justice. Accordingly, the concept of *freedom* is multi-faceted, but in this context it is going to be linked to the idea of free movement of citizens within the EU. Moreover, I am going to focus on its definition *vis-à-vis* the development of *security* and *justice*.

The question that this section seeks to answer is whether the development of a European area implicitly promotes one value/fundamental right over another and if that is the case, who will suffer the consequences, the EU or its Member States(citizens). I am going to argue that the Union should find a way of reconciling these three concepts rather than favouring one over the other, thus supporting a more coherent approach to the issues that arise in the AFSJ.

According to ex Article 2 EU (within AFSJ), free movement of persons had to be ensured and appropriate rules with respect to asylum, external border control, migration and the prevention and combating crime had to be taken. After the entry into force of the Lisbon Treaty, the '*area*' has been clarified as being that within it can be no internal frontiers. Hence, common policies needed to be framed, as well as the development of a common approach at the EU level.[145] Article 3(2) TEU now reads as follows:

"*The Union **shall offer its citizens** an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*." (emphasis added)

I outlined the dictum "*shall offer its citizens*" in order to emphasize, what Valsamis Mitsilegas calls, the "*individualisation of security*",[146]which reflects the growing trend by governments and policy makers towards placing the individuals, at the heart of security considerations. In the following paragraphs I am going to argue that security responses are justified in order to address not only the perceived security needs of the state or of society as a whole, but also the perceived feeling of insecurity of the individuals.[147]

Additionally, I am going to discuss these issues in light of the Lisbon Treaty. Particularly, after the Lisbon Treaty, this *area* has an institutional structure which better reflects the Union's

[145] Ibid., see also Duff (2009), pp.96
[146] Barbara Hudson, Synnove Ugelvik, '*Justice and Security in the 21st Century: Risks, rights and the rule of law*' (2012), Routledge Studies in Liberty and Security, pp.199
[147] Ibid.

method. However, it remains clear that Member States are not yet ready to pool their sovereignty completely since they built in possibilities for opting in, staying out and use enhanced cooperation. This might give rise to various concerns regarding the freedom, security and justice within this European area.

A. Freedom

This notion implies both a negative and positive liberty, in the sense that citizens' rights should be shielded against unnecessary interference from the authorities or from crime, while also preserving their freedom to act, the capacity to make individual choices.[148] To some extent, in order to achieve security in the Union, the citizens' freedom needs to be curtailed. However, the security of a person can also be interpreted as safety from wrong or flawed judicial processes, or illegitimate interference by authorities etc.

In some instances, the notion of freedom may be even interpreted as meaning an individual's right to be "free from fear".[149] For the sake of this analysis, I am going to associate the notion of "*freedom*" with the that of Union citizenship in order to reflect the shift from an overbearing focus on security and state interests(pre-Lisbon) to the gradual strengthening of fundamental rights and the position of the individual(post-Lisbon).[150]

In the earlier years of EU citizenship development, documents stressed the need to provide citizens with 'security' and to construct the AFSJ as a secure space.[151] *Freedom* and *justice* were indeed described in terms of *security*. This has led to a 'discursive chain of freedom, security and justice',[152] with security constituting the central link. The Hague Programme thus declared that:

[148] Ibid., pp.225
[149] Ibid., pp. 221
[150] 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 *Yearbook of European Law* pp.319; In this regard, Didier Bigo argued that: "*Freedom is so centrally associated with movement that is often confused with movement itself* […]"
[151] P. Twomey, "Constructing a Secure Space: The Area of Freedom, Security and Justice" in D O'Keefe and P. Twomey (eds*), Legal Issues of the Amsterdam Treaty* (Oxford, Hart Publishing,1999).
[152] D.Kostakopoulou, "The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue" in C.Barnard (ed), *The Fundamentals of EU Law Revisited* (Oxford, Oxford University Press, 2007), pp.174

"*The security of the European Union and its Member States has acquired a new urgency* […] The *citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime as well as the prevention thereof*."[153]

This approach has later changed with the entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme.[154] It is noticeable that the overall change in direction led to the rebalancing in both the discourse and the practice of the AFSJ by putting a greater emphasis on '*freedom*' and '*justice*' rather than '*security*'. This has been reflected in concrete terms in the Council Roadmap on procedural rights for suspects and accused persons[155] and increased prominence of fundamental rights. These changes have been also noted in the case-law of the Court of Justice, as well. A relevant example would be its recent decision in *Aranyosi and Caldararu* case.

On the other hand, this shift in direction has been also emphasised in the Stockholm Programme, however, this perspective is a bit different from the ones described above. Thus, I agree with the following viewpoint since it advocates for a more balanced approach, rather than favouring one value over the other:

"*The European Council considers that the priority for the coming years will be to focus on the interests and needs of citizens. The challenge will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe. It is of paramount importance that law enforcement measure on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced*."[156]

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[153] Acosta Arcarazo and Murphy, "*EU Security and Justice Law*" [2013], Stephan Coutts, Chapter 6: Citizenship of the European Union, pp.100-101

[154] The Stockholm Program provides a new framework for the EU on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period between 2010-2014. It calls for coherent policy responses which go beyond the Area of Freedom, Security and Justice. The Programme accords a central, indeed thematic place to citizenship. In the words of the Commission: "*to put the citizen at the heart of this project*". (Commission, 'An Area of Freedom, Security and Justice serving the citizen', Communication, (COM)) 20090 262 final, pp.2. For more information, see Council of the European Union, '*The Stockholm Programme – An open and secure Europe serving and protecting the citizens*', Brussels, 2 December 2009, pp.2

[155] Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C295/1.

[156] *Supra* note 154, The Stockholm Programme, pp.4.

Lastly, there is a close relationship between the exercise and the legitimacy of public power and citizenship on the one hand and on the other, the functional links between citizenship and the AFSJ through their common origins in free movement. At this point, I want to clarify my stance regarding the role that the notion of '*freedom*' plays in the European area. For this I must turn to the Commission's thoughts which were expressed in one of its Communications:

"*Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator- people- one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action.*"[157]

B. Security

In this section I am going to focus on the key component of "*individualisation of security*", which is closely linked with the notion of a "*right to security*". This part will examine the validity of claims put forward in favour and against such a right. A clear advantage, as observed by Fredman (2007) is that "*the right to security is not simply a right to non-interference but a right to positive state action*". He believed that this notion entails "the right to be free from threats" and that security is an essential prerequisite for the exercise of freedom. [158]

In contrast, others thought that this view can undermine the fundamental rights approach as means of protecting the individual from the state. This view has been supported by Lazarus which advocated for a narrow interpretation of security. He believed that the notion of security should be based on the fundamental rights enshrined in the ECHR.[159]

At this point, it is important to emphasize the shared feature of both views presented above, i.e. 'the right to security' should attempt to place the individual at the heart of the security debate. This entails a process of 'reverse securitisation', meaning that the individual is placed as the reference object in the security discourse. Of course, this is largely subjective because

[157] Commission, 'Towards an Area of Freedom, Security and Justice' (Communication) COM (1998) 459 final pp.1
[158] Barbara Hudson, Synnove Ugelvik, '*Justice and Security in the 21st Century: Risks, rights and the rule of law*' (2012), Routledge Studies in Liberty and Security, pp.200-202
[159] Ibid.

of the need to achieve a 'feeling' of security for the individuals concerned. However, as I already mentioned, this may entail a positive duty for the state to achieve security, which is largely translated into demands for the state to prevent security threats from materialising.

Here, it is essential to outline that the nexus between the positive duty and the prevention of perceived security threats has been central in the development of EU measures in the AFSJ. The concept of *securit*y is, at least to some extent, more tangible than *justice* and *freedom* and is understood (in the EU) as being secured from (criminal) harm. Being one of the three concepts of the EU territory, this notion is highly valued.

TEU suggests that by *security* the Union legislator means the prevention and combating of crime in the area, so that the citizens can move freely and fearlessly across the borderless territory.[160] However, I believe there is a risk of neglecting these security concerns which might ultimately lead to a situation where the idea of citizens that move '*freely and fearlessly*' is undermined. This is because, by looking at the Court's reasoning in the recent judgment *Aranyosi and Caldararu*, it can be observed that the CJEU gave more weight to the fundamental rights.

As AG Bot argued, the issue in this decision is rather different from the Court's previous case-law(Section 2, Chapter 1) since it concerns a question of ensuring public order and public security by enabling a criminal prosecution to be brought against Mr. Aranyosi and ensuring the execution of a custodial sentence against Mr. Caldararu.[161] This is rather problematic from a security perspective because it leads to a situation in which the executing judicial authority can no longer surrender the requested individual for prosecution purposes and also it can no longer have jurisdiction to prosecute him/her in place of the issuing authority.

It is important to reiterate that establishing the offence and choosing the penalties to be applied fall within the exclusive competence of the Hungarian judicial authorities. As a result, these circumstances give rise to, as AG Bot emphasizes, '*a clear and obvious risk'* that the offence would remain unpunished and as a consequence, its perpetrator would reoffend, thus infringing the rights and freedoms of the other citizens of the Union.[162]

[160] Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01, art.3
[161] Opinion of Advocate General Bot, delivered on 3 March 2016, Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu*, para.56.
[162] Ibid., para.59-60

On the other hand, this issue will appear less sensitive if the executing Member State will have the possibility of executing the sentence on the basis of the Article 4(6) of the FD EAW.[163] Moreover, the issuing authorities might also have the possibility of invoking the provisions of the Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentence or measures involving depravation of liberty for the purposes of their enforcement in the EU. [164] This will be done in order to make it possible for the requested person to serve his/her sentence on the territory of the executing Member State.[165]

Overall, when it comes to the case at hand I believe that neither Fredman's nor Lazarus's (aforementioned) claims can fit into this scenario due to the problematic nature of the 'balancing' approach whereby one value is given more weight over the other. However, I agree with Lazarus and Goold (2007) who prefer to talk of 'reconciling' freedom, security and justice.

Unlike the concept of 'balancing', this notion does not concede that enhancement of one will inevitably be at the expense of the other. They make reference to Loader's (2007) sociological analysis concerning the culture of rights, arguing that both security and justice/freedom[166] are values of the good society and they can be reconciled in the establishment of a 'right to security'.[167]

[163] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, art. 4(6)
[164] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, art. 8
[165] Opinion of Advocate General Bot, delivered on 3 March 2016, Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu*, para.61
[166] They discuss the concept of *justice* with the meanings of freedoms and justice. For more information concerning the meaning of these notions, see: Acosta Arcarazo and Murphy, "*EU Security and Justice Law*" [2013], Chapter 13: Synnøve Ugelvik, '*How the Lisbon Treaty changes area of freedom, security and justice*', pp.217
[167] Ibid., Chapter 2: Barbara Hudson, '*Who needs justice? Who needs security?*', pp. 18-19

C. Justice

There has been a lot of confusion surrounding these notions and in many instances they have been even interpreted incorrectly.[168] When this notion is read in combination with the Court's interpretation based on Article 19 TEU,[169] one could assume that this concept might mean compliance with the 'rule of law' as laid down in Article 2 and 6 TEU:

"*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*" (Article 2)

"*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*." (Article 6(3))

A joint reading of the two above mentioned provisions might lead to the assumption that the 'rule of law' covers at least respect for fundamental rights. This is confirmed by Article 67(1) TFEU which stipulates: "[…] *the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States*."

This discussion surrounding the notion of 'justice' might not have been clarifying since it only associates the concept with the idea of the rule of law (which is closely interrelated to

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[168] Wouter van Ballegooij, '*The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*', 2015 Intersentia; For more information concerning the definition of '*justice*' in the Member State's legal system, e.g. the Dutch version of *rechtvaardigheid*.

[169] Ibid.; Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986], para.23: "[…] *The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty*."; see also Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation*, ECR [2008], para.281: "[…] *The Community is based on the rule of law* […]".

the notion of fundamental rights). For these reasons, I am going to attempt at conceptualizing the rule of law as it has been made by the European Commission.[170] Accordingly, its definition was based on a non-exhaustive list of principles, including: legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law.[171]

At this point it is important to discuss the status that was given to the rule of law before the entry into force of the Lisbon Treaty. Particularly, the evolution of EU criminal law was characterised by the emphasis on promoting the security interests of the state at the expense of the protection of the citizen.

I agree with Valsamis Mitsilegas who argues that, before the Lisbon Treaty, "*EU criminal law focuses predominantly on enforcement, with limited space for the protection of fundamental rights; and that a great part of EU criminal law is 'emergency law', its adoption speeded up and justified as a response to terrorism*."[172] However, even in the post-Lisbon period, there have been many issues that arose in the context of fundamental rights.

In terms of the rule of law in the post-Lisbon period, there have been many key changes which had the aim of providing a high degree of legal certainty, especially in regard to EU competences in criminal matters.[173] Even after these improvements, a number of challenges related to the rule of law remain. A prioritisation of security considerations can be discerned even after the Treaty. The case-law of the Court shows that it repeatedly upheld the enforcement objectives of the European Arrest Warrant system leaving very limited scope for the consideration of fundamental rights claims by national judiciary.

A relevant example would be the *Opinion 2/13*, where the CJEU effectively subordinated the protection of fundamental rights to a concept of mutual trust which was elevated by the Court (notwithstanding its inherent subjective nature) into a fundamental rights principle of EU

[170] European Commission, *Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law,* COM (2014) 158 final, Brussels.
[171] Ibid., pp.4
[172] Valsamis Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*' (2016), Hart Studies in European Criminal Law, pp. 266-267
[173]Ibid., pp. 268; For example, some of the key developments have been the normalisation of the powers of the European Parliament (which is now, with some exception, co-legislator in EU criminal law) and the application of the full jurisdiction of the CJEU in the field of criminal law.

law.[174] Another example would that of *P.I.* case,[175] where the Court demonstrated considerable deference to national concepts of justice and security. Here it argued for a limited protection under EU citizenship rights in order to accommodate national perceptions of severity of criminal conduct via the use of Article 83(1) TFEU.

3. Concluding Remarks

As it has been seen, the introduction of mutual recognition as a principle for international cooperation has met severe opposition. This is mostly because mutual recognition by definition takes away some discretion to refuse to cooperate. Beside this obvious challenge, there are also concerns as to whether the other Member State with whom one should cooperate can be trusted. According to Andre Klip, mutual trust as a broad notion, and as a consequence of mutual recognition, can be seriously handicapped by disparities among the Member States. I agree with his view since this issue can only be resolved by raising the standards of those Member States that do not perform so well on certain matters.[176]

As I pointed out in the beginning of this chapter, there must be trust in the judicial decisions of the other Member State in order for cooperation in criminal matters to work properly. This should be done instead of relying on the reciprocity principle. However, this trust is undermined not only due to the recent decision of the CJEU but because of the recent changes observed in the post-Lisbon period.

Some of the issues after the Lisbon Treaty were the transitional period as regards the enforcement powers of the European Commission, the jurisdiction of the Court and the more permanent possibilities to opt in or engage in enhanced cooperation. This has led to uneven development of the AFSJ for citizens and judicial cooperation measures and parts of the *acquis* which were not applicable in certain Member States'(due to their choice not to opt in).[177]

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[174] Ibid., pp. 269

[175] Case C-348/09 *PI against Oberbürgermeisterin der Stadt Remscheid*, [2012] ECLI: EU: C: 2012: 300.

[176] Andre Klip, '*European Criminal Law: An Integrative Approach'*, Ius Communitatis II, 2nd edition, Intersentia 2011, pp.483

[177] Wouter van Ballegooij, '*The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*', 2015 Intersentia, pp.160-161

Moreover, as it has been seen, there might be a risk of conflict between the three interlinked notions of freedom, security and justice due to the recent judgment, however I do not believe that the idea of balancing these three concepts is the proper way to proceed. This is because this approach is problematic in the criminal justice area as it fails to appreciate that security interests need to present necessary and proportionate deviation from a fundamental rights, as it becomes clear from Article 52(1) of the EU Charter.[178]

Hence, I strongly believe that in these circumstances the Union needs to find a way of reconciling these three notions rather than favouring one over the other, thus taking a more coherent approach to these issues. Accordingly, mutual recognition can only make sure that the extra national security interest is indeed recognised, but without additional harmonisation, that is as far as it can go.[179]

[178] Ibid., pp.308; See also Case C-129/14 PPU *Spasic*, [2014] ECLI:EU:C:2014:586, para. 54-57
[179] Ibid., pp.309

CONCLUSION

The implications of a 'genuine system of mutual recognition' would mean an abolition of all grounds for refusal in judicial cooperation and 'full faith and credit' would constitutes the basis for the functioning of the European arrest warrant mechanism.[180] If these statements were true then mutual recognition would have similar significance in criminal law as it had already achieved in the internal market. However, this is not the case. As it has been argued, the mutual recognition principle is rather difficult to apply in the AFSJ since its achievement is based on 'blind trust'. Some scholars have even gone as far as arguing that this principle is incompatible with national sovereignty and fundamental rights.[181]

In contrast, the application of mutual recognition based on presumed mutual trust in the field of European criminal law was designed to achieve quasi-automaticity in law enforcement cooperation across EU. It is also true that mutual recognition based on trust is grounded in particular on Member States shard commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[182] Nevertheless, several scholars have noted that an AFSJ based on this notion fails to take into account that such a European area requires that a citizen and his/her legal interests should not only be protected by the criminal justice system but also 'from dangers of a criminal justice system operated in a reckless manner'.[183]

One way in which the Court tried to cope with the issue of fundamental rights, as a ground for non-execution of EAW during a surrender procedure, was to set limits to the automaticity of recognition. This was done by allowing the executing authorities to proceed with an extensive examination of fundamental rights impact (via the use of a two-tier test). Such assessment does not only increase the workload of the relevant competent authorities but it gives them a reason to doubt the system of its neighbour Member State. As it has been see, this runs counter to the aim which mutual recognition and mutual trust pursue.

Furthermore, the change in the Court's approach in *Pál Aranyosi and Robert Căldăraru*, which was discuss in the first two Chapters, does not only impact the relevant

[180] *Supra* note 177, pp.14-15
[181] Ibid.
[182] Ibid., Weyembergh, pp.319
[183] Ibid., Shunnemann (2006), pp.351

competent authorities, but also the citizens' security since there is a clear and obvious risk that the offence would remain unpunished and that its perpetrator would reoffend (hence infringing the rights and freedoms of other EU citizens).[184] It would therefore go against not only the Union legislature's intention of stipulating, exhaustively and for reasons of legal certainty, the cases in which the EAW may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the FD and particularly of the grounds for refusal provided for in Article 3 and Article 4 thereof.[185]

As it has been illustrated, the recent cases of the CJEU brought about a potential conflict between the recognition of judicial decisions (based on trust) on the one hand and the use of fundamental rights considerations (such as unsatisfactory prison conditions) as a ground for non-execution of an EAW, on the other hand. The Court's idea of balancing competing interests like mutual recognition and fundamental rights is, in general, problematic in the criminal justice area since it fails to appreciate that security interests need to present a necessary and proportionate deviation from a fundamental right, as it becomes clear from Article 52(1) of the Charter.[186] For this reason, I supported the views of several scholars who advocated for a 'reconciliation' of these two values, rather than employing a 'balancing' approach whereby one interest is given priority at the expense of the other.

Lastly, I discussed the three interlinked notions of freedom, security and justice in order to emphasize that the 'balancing' approach is rather problematic. In these circumstances the Union needs to find a way of reconciling these three notions rather than favouring one over the other, thus taking a more coherent approach to these issues. Accordingly, mutual recognition can only make sure that the extra national security interest is indeed recognised, but without additional harmonisation, that is as far as it can go.[187]

Moreover, it has been observed that current policies seek to achieve a high level of security by relying on mutual trust instead of common norms. This leads to individuals no longer feeling safe in their relationship with the State. Hence, I advocate for a 'more European approach' which would establish criteria under which it would be irrelevant in which Member State a certain offence was dealt with, the prevailing notion being that the interest of everyone

[184] Opinion of Advocate General Bot, delivered on 3 March 2016, Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu,* para.60.
[185] Ibid., para. 81.
[186] *Supra* note 177, pp.308-309
[187] Ibid., pp.309

involved should be taken into account. Under this approach, ‘a high level of safety’ would be offered to citizens of the Union and would not serve the interests of a particular Member State alone.[188]

[188] Ibid., pp.141; See also Klip 2009, pp.420.

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