

Rule of Law, mutual recognition and mutual trust: comparing the EU and the US experience

Davide Strazzari

Abstract

The so-called Rule of Law crisis in Central and Eastern European countries has affected the EU's Area of Freedom, security and justice of the EU, which is based on the principles of mutual trust and mutual recognition. These principles require a homogeneous level of protection of rights and the judiciary of EU Member States to be independent. Mutual trust and mutual recognition are classic principles of horizontal federalism. The U.S. also has similar clauses in its Constitution such as the Extradition Clause and the Full Faith and Credit Clause. The U.S. experience shows that the presence of these provisions in the Constitution did not immediately lead to the affirmation of the interest of unity and it took time before the States effectively incorporated the rights enshrined at the federal level. Only when this occurred, mutual recognition was effectively implemented.

Keywords

Mutual trust, Mutual recognition, EU area of freedom, EU security and justice, Rule of Law in USA

Introductory Remarks: Rule of law and mutual trust in the area of Freedom, Security and Justice

The “rule of law” is listed among the founding values of art. 2 TEU; it is also mentioned among the principles that should guide the Union’s action on the international scene (art. 21 TEU). However, the EU Treaty does not provide a definition of it. This is regrettable since the “rule of law” is a concept with different meanings according to the legal tradition considered (Salerno 2020). In that regard, as is well known, in the common law countries, the “rule of law” is a principle that refers to the traditional conception of limited government, in which rights precede the state itself and are guaranteed by independent judges. It assumes that the statute is not the sole source of law, but that, alongside it, is the production of law by the courts. In contrast, in the civil law context, the rule of law is a concept that tends to coincide with the principle of legality and thus with the idea that the actions of public authorities and judges are subject to law, produced by Parliaments. The only source of law is thus enacted by political actors. Which conception of “rule of law” has the EU enforced?

The most relevant contribution in the field came from the European Commission. In its 2014 Communication “A New EU Framework to Strengthen the Rule of Law”, while recognising that “the precise content of the principles and standard stemming from the rule of law may vary at national level depending on each Member State’s constitutional system», the Commission also stated that the rule of law “include(s) legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws, legal certainty; prohibition of arbitrariness of the executive power; independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law”. By emphasizing the judges’ independence and the effectiveness of the judicial remedy, it seems that the European Commission has endorsed a conception of the “rule of law” that is more consistent with that of the common law tradition.

The Court of Justice, too, has highlighted this specific component of the rule of law. In *Minister for Justice and Equality v. L.M.*, the Court said: “[...] It must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individual derive from EU law will be protected and that the values common to the Member States set out in art. 2 TEU, in particular the value of the rule of law, will be safeguarded. Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to

them of an EU act”.¹ Why then both EU institutions chose to focus on this aspect of the rule of law?

Of course, an obvious explanation is that both Hungarian and Polish authorities took legislative initiatives aimed to undermine the judiciary independence in their respective legal systems (Di Gregorio 2017). However, there also are more structural reasons. First, the effectiveness of EU law relies on instruments such as the preliminary reference, the primacy, the direct effect, the state liability for breaching EU law whose enforcement require an independent judge. A second explanation, one we would like to focus on in this contribution, is the importance of having independent judges and effective legal remedy within the Freedom, Security and Justice area. In this field, which deals with judicial cooperation in criminal and civil law, the EU had to consider that each of the 27 Member State has its own criminal and civil legal system, which is characterised by deep differences. Thus, rather than focussing on harmonization of the substantial criminal and civil law of all member states, through directives and regulation, the Treaty of EU envisaged a different instrument, namely mutual recognition of judicial decisions. Indeed, mutual recognition is not a new regulatory technique. The CJEU elaborated it in the '70, in the *Cassis de Dijon* case, within the internal market area. According to this principle, a member state must allow goods that are legally sold in an EU state to be sold in their own territory, even if the goods do not respect all the technical requirements that are usually required for that type of goods to be sold in the importing member state.

Within the Freedom, Security and Justice area, however, mutual recognition takes a different and more strategical meaning as it primarily concerns the recognition of judicial decisions rather than administrative ones. Moreover, it generally entails an encroachment upon classical fundamental individual rights (Iglesias Sánchez and González Pascual 2021). The European Arrest Warrant (EAW) is a suitable example of this approach. The EAW is a judicial decision issued by a Member State requiring a judicial authority of another Member State to surrender a person present there for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The decision provides for the mandatory use of a standardised certificate by the issuing authority. If this certificate is correctly filled, it must be recognised by the judge of the executing Member State as if it were issued by a national judicial authority of his own state. The competent authority of the executing Member State cannot refuse the enforcement of the arrest warrant unless it deems that a ground for non-recognition as specifically listed in the EAW decision occurred. The EAW decision, then, does not allow the executing Member State to refuse recognition on the basis of

¹ CJEU, 25th July 2018 PPU, Case C-216/18, *LM*, § 48-49.

an open-ended clause. More precisely, the Framework Decision does not allow the executing authority of a Member State to refuse the enforcement of an EAW on the ground that the requesting state does not comply with fundamental rights, (Mitsilegas 2015: 466; Bargis, 2017: 178, Cappuccio, 2022: 295)

The mutual recognition is the key functioning principle of many EU legislative acts dealing with both criminal and civil matters. The Dublin Regulation can also be added to the list, with a few cautions. As is well known, the Dublin Regulation establishes criteria and mechanisms to determine which Member State is in charge of examining an asylum request. The State that receives an asylum request will apply the criteria set in the Regulation. If it finds that another State is responsible, it may request it to take charge of it. The system is based on the assumption that the responsible state will treat the asylum seeker in line with the relevant international and EU acts in the field of international protection. In this sense, the Dublin Regulation is primarily a mechanism based on mutual trust. However, when the so called “take back” function is involved, one can identify “an informal mutual recognition mechanism for negative decisions” (Majani, Migliorini, 2020: 25). Although there is not a judicial decision, Member State authorities do recognise legal effect to acts issued by another member state, namely the registered request for asylum presented there or the negative decision already issued by a Member State’s authorities. As a consequence, they proceed to transfer the person concerned, irrespective of his/her will. Art. 3of the Regulation set the principle according to which the application for Asylum shall be examined by a single Member State.²

The principle of mutual recognition has been recognised by EU institutions as the cornerstone of judicial cooperation in both civil and criminal matter. It is the European Council in Tampere in 1999 that inaugurated this mechanism. It has been confirmed and further developed by the Hague programme in 2004 and by the Stockholm programme in 2012. The Lisbon Treaty explicitly mentions it at art. 67, 81 and 82 of TFEU. In order to make efficient the mutual recognition system, it is important that States and more precisely the judiciary of each EU Member State trust each other. The link between the two concepts – mutual recognition and mutual trust – is explicitly highlight-

² Majani and Migliorini (2020: 25) observe: “Indeed, the applicant whose claim is rejected by the responsible State, and moves to another State to file anew request, may be transferred back without the second State having to examine their claim. In a way, the second Member State “recognises” the negative decision issued by the first”. However, even when a “take back” situation is involved, the second Member State is never under an obligation to recognise and transfer the person concerned. Both Dublin Regulation II (Council Regulation No 342/2003) and III (Reg. No 604/2013) provide for a clause allowing the Member State which is in charge of determining which Member State is competent to decide to examine the asylum request, even if it were not competent according to the criteria set forth in the Regulation. This decision is fully discretionary and can be based on humanitarian, compassionate or political grounds. The Dublin Regulation III (see art. 17, par. 1) renamed this clause “discretionary clause”, whereas under the Dublin Regulation II it was known as “sovereignty clause”.

ed in the Conclusions of the European Council of Tampere, The Hague and Stockholm and in the recitals of many EU legislative acts taken in the field. But on what elements is this mutual trust based?

Each EU Member State is part of the European Convention of Human Rights (ECHR) and consequently is under the jurisdiction of the European Court of Human Rights (ECtHR). All EU Member States are bound to respect the Charter of Fundamental Rights of the European Union (CFREU). All EU Member States must respect the values enshrined in art. 2 of the TEU, which includes, as already noted, the rule of law principle. Moreover, the Stockholm program mentioned two further measures aimed to strengthen mutual trust. One is the training of judges, the other is developing European judicial networks.

Is this enough? Is the judge of the executing Member State under the legal obligation to assume that always his colleague sitting in another EU Member State is respecting EU fundamental rights? What if the executing Member State grants a more favourable standard in terms of fundamental rights than that applicable in the requesting State?

In order to provide an answer to these questions, this contribution deems important to compare the EU experience with that of federal states, notably the US. As a matter of fact, in classical federal systems when federated units are granted powers in civil and/or criminal matters and have an autonomous judicial organization, separated from the federal one, the federal Constitution usually contains provisions setting the principle of mutual recognition of judicial decisions or such a result is elaborated by the federal Supreme Courts.³

In that sense, mutual recognition is not only an issue of horizontal federalism (Van Den Brink 2016: 921 ss.) – i.e. it does not involve only relations among the authorities of federate units – but to the extent the exceptions must be narrowly constructed and based on the federal Constitution or the federal Supreme Courts case law, it also becomes an issue of vertical federalism. In that regard, mutual recognition requires the federal level to establish minimum rights and minimum harmonizing rules in order to enhance mutual recognition. Mutual recognition is a way to guarantee the unity of the federal legal order rather than to subnational unit's legal system values.

³ This is the case of Canada in relation to civil law. See Supreme Court, *De Savoye v Morguard Investments* [1990] 3 S.C.R. 1077. Criminal and procedure law, divorce and marriage are federal powers. Moreover, the Supreme Court rules as the last instance on controversies regarding both provincial and federal law, thus representing a unifying element. On the tendency of federal systems to guarantee, the uniform interpretation of the law by the national judiciary, following a logic that reflects the same rationale of supremacy and homogeneity of federal law more generally, see Palermo, Kössler 2017: 159 ss.

Although the EU is not a federal state and its components maintain their statehood, mutual recognition technique within the EU presents strong analogies with that implemented in federal systems. As noted in literature (Rizcallah 2019: 3), mutual recognition is ambivalent with regard to the sovereignty of Member States. On the one hand, it excludes the need for a strong vertical harmonization, thus avoiding to strengthen the EU harmonizing powers vis à vis Member States. This is respectful of the State sovereignty. On the other hand, however, in order to allow the system to effectively work, it is necessary that only few exceptions to the recognition of the foreign decisions are admitted. In other words, Member States should not rely on their own level of protection of certain rights or on their domestic legal values to deny mutual recognition. If they did so, the entire system would collapse.

The contribution, therefore, sees a first part devoted to the EU experience. Taking the Dublin Regulation and the European Arrest Warrant as paradigmatic examples, it will show that the Court of Justice of European Union (CJEU) has in fact allowed only limited exceptions to the principle of mutual recognition based on the need to protect fundamental rights and that it did so primarily because pushed by the ECtHR case law. The second part will instead be devoted to the U.S. experience to highlight how, despite explicit constitutionalization of the mutual recognition principle, the system took a significant amount of time before this principle became established and effective homogeneity among federated units, in terms of legal values, reached through the federalization of the fundamental rights protection.

Towards the recognition of a human right exception to mutual trust: the case of Dublin regulation

The importance of mutual trust for the EU construction has been highlighted by the CJEU in its Opinion 2/13. The Court said: “it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.⁴

The Court explicitly considers mutual trust of fundamental importance for the EU, as if it were a principle having a constitutional material value. In striking a balance

⁴ CJEU, 18th December 2014, Opinion 2/13, § 191.

between, on the one hand, the effectiveness of EU law and the reasons of unity, and, on the other hand, the respect for fundamental rights, the Court seems to give precedence to the former. As a matter of fact, only exceptional circumstances may justify derogations to the mutual trust/mutual recognition principles. But what are the exceptional circumstances the CJEU refers to as justifying a derogation to mutual trust and who is in charge of defining them?

In some legislative acts based on mutual recognition and mutual trust there is an explicit link to art. 7 of TEU procedure. For instance, the 10th recital of the framework decision 2002/584 on the EAW holds that the mechanism of the European arrest warrant 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 European Union (now art. 2 TEU), determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

Having regard to asylum, Protocol n. 24 on Asylum for nationals of Member States of the EU says: "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State". Only if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national, this presumption will not apply.

Envisaging art. 7 procedure activation as the only situation justifying derogation to mutual trust would have meant to set a very high threshold. Mutual trust would have become in practical terms a blind trust (see Lenaerts 2017: 805). This view could not stand the ECtHR review. In its famous judgment *M.S.S. v. Belgium and Greece*, the ECtHR called into question the Dublin system's structure. It recognised Belgium's responsibility, for violation of Article 3 ECHR, since Belgium had not prevented the transfer of an asylum seeker to Greece, despite the fact that it was known that there were systemic deficiencies in the examination of applications and the reception of asylum seekers in that country.⁵

According to the ECtHR Court, the circumstance that an EU Member State is called upon to execute requests from other Member States, based on the principle of mutual trust, does not exempt the requested State from verifying that the rights of the ECHR, and specifically art. 3, are effectively respected in the requesting State. The failure to

⁵ ECtHR, *M.S.S. v. Belgium and Greece*, [GC] 21 January 2011.

do so may result in an indirect violation of the Convention. The mechanism which, according to the ECHR, allows the principle of mutual trust to be considered compatible with the obligations imposed on EU States under Article 3 of the ECHR is the so-called sovereignty clause, now re-named discretionary clause. It allows the Member State determining the competence to rule on the application for international protection, even if it would not be competent on the basis of the criteria established in the Dublin Regulation, and this for political, humanitarian or even mere expediency reasons.

The subsequent case-law of the CJEU has partially taken on board the objections of the ECtHR (see Morgese 2012: 146; Moreno-Lax 2021: 92; Ferri 2021; Battjes, Brouwer 2015: 183 ss). In *N.S.*,⁶ the Court imposes the prohibition of transferring the asylum seeker to the country responsible, but only if there are reasonable grounds to believe that there are systemic deficiencies in the asylum procedures or in the reception conditions in that country that entail the risk of inhuman and degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, for the asylum seeker transferred.⁷

More precisely, the Court stated that the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of Dublin regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the so-called sovereignty clause.

The *N.S.* decision was given in pursuance of Council Regulation No 342/2003, so-called Dublin II. The currently in force Dublin III Regulation (No. 604/2013) codified the *NS* decision at art. 3.2. Subsequent CJEU decisions enlarged the scope of the derogation to mutual trust beyond the systemic situation characterized by various deficiencies. In *C.K.*⁸ and then in *Jawo*⁹ the Court held that the transfer of an applicant to

⁶ CJEU, 21st December 2010, case C-410/10 and 493/10, *N.S. and others*.

⁷ This decision was given in pursuance of Council Regulation No 342/2003, so-called Dublin II. The Dublin Regulation currently in force (No. 604/2013) codified the *NS* decision at art. 3.2.

⁸ CJEU, 16th February 2017, C.578/16/PPU, *C.K.*

⁹ CJEU, 19th March 2019, C-163/17; *Jawo*.

a Member State is ruled out in any situation in which there are substantial grounds for believing that the applicant would run a risk during his transfer or thereafter to be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter. Thus, the test can be satisfied even if a concrete risk of breaching art. 4 of CFREU is to be referred in relation to a single person, irrespective of any finding of systemic or structural deficiencies.

The case of the European Arrest Warrant

A similar path was followed by the CJEU in relation to the Framework-Decision on the European Arrest Warrant. In a first stage, the CJEU adopted an approach contrary to admit derogations based on the need to avoid a breach of fundamental rights (Cappuccio 2022: 293 ss; Carlino, Milani 2019; Mitsilegas 2012: 319.; Mitsilegas 2016: 213). In *Radu*,¹⁰ the executing authorities doubted about the legitimacy of an EAW issued for the purposes of conducting a criminal prosecution on the grounds that the requested person was not previously heard in the issuing Member State. While the AG Sharpston suggested that an exceptional refusal to execute EAW should be possible when the fundamental rights of the person are involved, the Court concluded differently, highlighting that the requested person could be heard after the surrender. In *Melloni*,¹¹ the CJEU concluded that the executing judicial authorities may not require that the surrender of a person convicted *in absentia* is made conditional upon the review of the process in his presence. This is so even if the executing State invokes that this procedural safeguard is mandated by its Constitution. According to the CJEU, the primacy of EU law would preclude this possibility: the Framework Decision, which codified ECtHR case law on this issue, admits the possibility to give effect to convictions *in absentia* provided that some procedural safeguards have been respected, which was effectively the case in *Melloni*.

The restrictive approach initially followed by the CJUE has been partially relaxed later on, starting with *Aranyosi*. The *Aranyosi* case originated from a preliminary reference proposed by a German judge who was in charge of giving execution to the surrender of Mr. *Aranyosi* to Romanian authorities in pursuance of an EAW. The German judge relied on previous ECtHR decisions, which have repeatedly condemned Romania for violation of art. 3, since it imposed the applicants in cells, that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking it water

¹⁰ CJEU, 29th January 2013, C-396/11, *Radu*.

¹¹ CJEU, 26th February 2013, C- 399/11, *Melloni*.

for showers. The issue the CJEU was asked to clarify was whether a requested judge could refuse the enforcement – or made it conditional upon specific assurances – of a surrender for the purposes of prosecution whenever there are strong indications, grounded on previous ECtHR decisions, that the detention conditions in the issuing Member State infringe the fundamental rights of the person concerned, namely art. 3 of the ECHR and art. 4 of the CFREU. The CJEU admitted that a possible derogation to the mutual trust principle can be accepted even lacking a textual basis for it in the Framework decision. However, the threshold the Court set is very high.

The requested judge must conduct a two-step analysis. First, there must be objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrate that there are systemic or generalised deficiencies. Second, the executing judge must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by an EAW will be exposed to a real risk of inhuman or degrading treatment in the event of his surrender being executed. In order to satisfy this two-pronged test, the judge can postpone its decision on the surrender until it obtains supplementary information from the issuing judicial authority that allows to exclude such a risk. The *Aranyosi* test was confirmed in the *Dorobantu* decision where the Court highlighted that a real risk of breaching art. 4 CFREU, because of the conditions of detention, cannot be weighed with considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.¹²

A further important development directly linked with the rule of law crisis in Central-Eastern Europe is the *LM* decision. The Court held that a requested judicial authority might in principle deny execution to an EAW, issued by a Polish judge, on the ground that there is a real risk of breach of the fundamental right to a fair trial, guaranteed by the second paragraph of art. 47 of the Charter of Fundamental Right of the EU, on account of systemic or generalised deficiencies so far as concerns the independence of Polish judiciary. In this regard, a reasoned proposal of the European Commission adopted pursuant to art 7(1) TEU, is good ground to make such an assumption.

However, this finding does not entail that the requested judge must automatically deny any EAW requests. As in *Aranyosi*,¹³ a second condition must be fulfilled: the requested judicial authority must determine, specifically and precisely, whether having regard to his personal situation as well as to the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State, there are substan-

¹² CJEU, 15th October 2019, C-128/18, *Dorobantu*.

¹³ CJEU, 5th April 2016, C- 404/15 and C-659/15, *Aranyosi Caldararu*.

tial grounds for believing that the person will run such a risk if he or she is surrendered to that State.

Thus, in both the Dublin Regulation and the EAW Framework Decision case-law, the CJEU finally recognised “a human right exception” (Majani, Migliorini 2020: 41) to the mutual trust principle, despite no explicit textual basis in the relevant EU secondary acts. However, this exception is very limited. All cases were preceded by ECtHR decisions that found in the relevant Member State a systemic failure in the protection of human rights. Second, this “human right exception” seems to apply only when the prohibition of inhuman or degrading treatment is at stake and not when other human rights are involved. This may be consistent with the fact that art. 3 of the ECHR is an absolute right, not subject to any form of balancing. In *LM*,¹⁴ however, the CJEU applied the exception in a case involving a risk of violation of the right to an independent judge, although this finding must be contextualized in a wider context related to the failure of the rule of law principle, which in itself has a structural relevance. Finally, the human right exception seems to apply only when structural deficiencies are at stake.¹⁵ In that case, at least in relation to the EAW, these structural deficiencies must also entail a concrete risk for the specific person involved in the EAW procedure of breach of his human rights. In order to ascertain this aspect, the requested judge may ask collaboration with the issuing judge.

Mutual trust and mutual recognition in the US experience

In US, every federate State has its own criminal and civil law system, although it must be highlighted that all State legal systems have a common ground rooted in the common law tradition. The federal level is not granted powers allowing to harmonise the different sub-national units legal system. Mutual recognition is thus the way the federal constitution provides for guarantee federal unity. The latter contains two mutual recognition clauses, set in art. 4. The so-called “Full Faith and Credit clause” states: “Full faith and credit shall be given in each State to the public acts records and judicial proceeding of every other State. And the congress may by general laws prescribe the manner in which such acts records and proceedings shall be proved and the effect thereof». The second mutual recognition clause is the so-called extradition clause: “A person charged in any State with treason felony or other

¹⁴ CJEU, 25th July 2018 PPU, C-216/18, *LM*.

¹⁵ See, however, the *CK* and *Javo* decisions, mentioned in the text, where the CJEU admitted that even a substantial risk of violation of art 4 CFREU referred to individuals is enough to hinder the transfer of the person concerned.

crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from which he or she fled, be delivered up, to be removed to the State having jurisdiction of the crime". The two provisions have different scopes of application not only because the Full Faith Clause concerns civil and administrative acts, while the extradition clause deals with criminal matters. The former is also a basis for federal legal measures enhancing mutual recognition. Congress has rarely taken legislative steps in that regard. The Supreme Court held that at least regarding definitive judicial decisions a State cannot oppose public policy exceptions to the recognition of a sister State decision. Thus, the interest of the federal unity prevails over State autonomy.

Same sex marriage represented a possible breach in this framework. After the Hawaii Supreme Court recognised the right for same sex couple to marry, the Congress passed the Defence of Marriage Act (DOMA) allowing States not to recognise same sex marriage celebrated in other States. As a matter of fact, a same sex couple could get married in a State allowing same sex marriage and get there a judicial decision declaring the couple married, thus forcing other sister States to recognise the marriage. In order to avoid this, the DOMA stated: "no State shall be required to give effect to any public act, record, or judicial proceeding of any other State [...] respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that other State ... or a right or claim arising from such relationship".

Many legal scholars doubted about the legitimacy of the DOMA. According to their view, the Full Faith clause would authorise the federal congress to intervene in order to enhance the mutual recognition, but not to constrain and limit recognition of acts issued by other sister State (Kramer 1997: 1965 ss.). However, other scholars sustained an opposite view: the Full Faith clause would grant Congress more discretion in defining a balancing between the protection of the State interest and federal homogeneity (Schmitt 2013: 485 ss., Engdahl 2009: 1584 ss.). The *Obergefell v. Hodges* decision, recognising the federal fundamental right to same sex marriage, has solved the dispute, setting aside the issue whether the federal Congress had the power to take measures aimed to defend state autonomy in private law.¹⁶

As for the so-called state-to-state extradition clause is concerned, it applies to any type of crime in relation to which a person has been convicted, remanded for trial or is otherwise under investigation for criminally relevant acts committed in a State from which he or she has subsequently departed. The procedure is particularly complex and unlike the European Arrest Warrant model, it necessarily involves political rather than judicial bodies, a clear legacy of a model focused on the discipline of international extradition.

¹⁶ Corte Suprema, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

It begins with a request made by the governor of the State that the accused person has fled to return the fugitive, a request that must be made to the governor of the State where the fugitive is. Once the request is received, the governor of the executing State generally asks the assistance of his chief prosecutor in order to verify the authenticity of the documents and the identity of the person involved.

Once these verifications have been completed, the governor of the executing State proceeds to issue an arrest warrant against the persons sought. The latter may apply to the judicial authority, through a habeas corpus petition, in order to challenge the legality of the return to the authorities. Currently, the interstate extradition process ensures high rates of effectiveness. On the one hand, in relation to the political phase, the governor has a constitutional obligation to proceed with the execution. This obligation is justiciable in case of non-compliance before a federal judge who can therefore order the governor to proceed with the extradition. On the other hand, in relation to the possible involvement of the courts of the executing State in the habeas corpus adjudication, the Supreme Court has essentially reduced this stage to a very formal adjudication in which the court must satisfy itself that the State's extradition documents are formally correct, that indeed the person is being tried or convicted of a crime in the requesting State, of the person's identity; that the person is a fugitive within the meaning of the constitutional clause.

This is the result of a judicial process that took time before being definitely settled. To retrace the salient stages of this development is the purpose of this section. As is well known, each of the 50 federate States has developed its own criminal law system although the common adherence to common law principles, on the one hand, and the development of federal constitutional rights, on the other, have allowed a legal homogeneity to develop. Nevertheless, partly because of historical events related to slavery and later institutional discrimination against Black people, the constitutional obligation to give near-automatic recognition to extradition requests from other States has been slow to take hold.

After the formal abolition of slavery imposed by the Thirteenth Amendment, the slaveholding States had in fact adopted criminal legislation that was highly discriminatory against Black people, making them often liable for various criminal offenses (so-called Jim Crow legislation). Since the expiation of punishment was often through a sentence of hard labor, to be served even with private parties, the mechanism tended to perpetuate the condition of substantial slavery of the black population. In addition to this, there also were the frequent lynchings which black people, accused of certain crimes, were subject to; the prohibitive conditions of detention in prisons or the violation of defence rights set forth in the constitutional charters of the country of execution.

In this context, there were two situations that could in fact lead to a non-execution of the request by the governor of the requesting state: the failure of the governor of the executing State to act and the cancellation of the warrant of arrest imposed by the judge of the executing State eventually called upon to rule on the writ of *habeas corpus*. The first of these situations is at the heart of a significant jurisprudential evolution of the Supreme Court. In 1861, the governor of Kentucky had appealed directly to the Supreme Court in order to obtain a writ of mandamus requiring the Governor of Ohio - Dennison - to give effect to his request for the surrender of a free black man accused of aiding and abetting the escape of a person into slavery. The governor of Ohio had refused to enforce the request, relying on the legal opinion of his minister of justice, who held that the execution of a request under the extradition clause was a discretionary power that the governor could legitimately oppose when the extradition related to conduct that was not judged to be a criminal offense by the common law or by the laws of civilized nations.

The Supreme Court, while holding that the governor does not exercise any discretion regarding the extradition request, being obliged to give it effect, nevertheless stated that the obligation to execute this obligation was not justiciable. In fact, according to the Court, the absence in the Constitution and in federal acts of any reference to a possible judicial remedy vis-à-vis the governor's makes it impossible to configure a federal judicial remedy that would impose a submission of State administration to federal intervention in areas fully reserved for the former.¹⁷

The practice subsequently followed by the States shows precisely how the governors have also made use of their discretion in order to obtain guarantees in the manner of execution of the sentence and/or reductions of conviction. Indeed, apart from federal intervention in 1793, Congress refrained from further regulating this area, and the extradition between States was and still substantially is governed by harmonizing interventions spontaneously taken by the States. It is particularly noteworthy to mention the Uniform Criminal Extradition Act of '36 drafted by the National Conference of Commissioners on Uniform State Laws which has been substantially implemented by the majority of States (Murphy, 1983: 1063 ss.).

Only in 1983 the Court overturned the Dennison precedent and recognized that the constitutional obligation to comply with an extradition request may be justiciable in the federal courts.¹⁸ According to the majority opinion written by J. Marshall, the Dennison ruling must be contextualized in the peculiar historical moment that shortly before the outbreak of the Civil War saw the powers of the federation seriously challenged and

¹⁷ Corte Suprema, *Kentucky v. Dennison*, 65 U.S. 66, (1861).

¹⁸ Corte Suprema, *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

the premise on which the ruling rests - that the States and the federal government are to be considered co-equal sovereigns - no longer relevant. Recalling, not surprisingly, *Brown v. Board Education* and *Cooper v. Aaron*, the Court affirmed that it was incumbent on federal courts to prevent constitutional violations by State agents or to require them to enforce constitutional obligations. Since the extradition clause imposes a clear obligation, no discretion can be accorded to the governor, who is obliged to implement the requirement, and in this context no weight can be given to the enforcement practice generated between States where it is inconsistent with constitutional precept. Thus, the constitutional obligation meets only two exceptions: that the person charged is not a fugitive, meaning that he or she was not materially present in the territory of the State at the time of the commission of the criminal conduct, and that the fugitive must be subject to criminal proceedings in the State of execution. Similarly, the Court denied that the judges of the executing State - called upon to rule on the writ of habeas corpus by the fugitive - can review the extradition requests based on the violation of federal rights in the proceeding of the requesting State. The executing judge must conduct a deferential review, without entering the merits.

Conclusions

The US experience is interesting to compare with that of the EU. In the former, mutual recognition as a principle is explicitly set in the Constitution and its concrete functioning has been progressively defined by the Supreme Court case-law. It is this institution rather than political federal actors that has progressively struck the balancing between the protection of fundamental rights and the promotion of the federal cohesion. The Supreme Court has finally excluded that exceptions based on fundamental rights can derogate to both the full faith and the extradition clauses. However, at least in relation to the extradition clause, this result took time before being affirmed. Mutual trust among federate units has been enhanced thanks to the progressive definition of common legal standard based on the incorporation doctrine of fundamental rights and on the sharing of the common law tradition. Despite all this, until the 1983 Supreme Court's decision, the experience showed that infringement of fundamental right was a relatively common ground to deny enforcement of an extradition request advanced by a sister State. Moreover, until the 1983 Supreme Court's decision, mutual trust, as a principle, functioned within the limits and the procedures set by horizontal agreements among States.

The EU experience does not rely on a mutual recognition clause enshrined in the Treaty. Rather, each EU secondary act provides for a different level of harmonization

within which the mutual recognition principle must work. Thus, the role played by the political actors in setting the limits and the legal context for the functioning of mutual trust is more significant than the practice in US. Moreover, in Europe, the judiciary is not shaped as a sole federal court, as in US. The CJEU must balance its role with the ECtHR and the national courts, especially constitutional courts. In that regard, the initial CJEU approach, favouring mutual trust over recognition of fundamental rights, has been partially attenuated mainly because of the ECtHR case-law.

However, the threshold the CJEU has set is very high: potentially only systemic violations of Article 3 of ECHR can justify a derogation from mutual recognition.¹⁹ Such a rigid and strict approach may be difficult to implement at the national level. As the U.S. case shows, mutual trust is grounded on homogeneity of legal values shared among territorial units, a process that requires time and constitutive national moments, as effective incorporation of federal rights. In this context, we may evaluate the crisis of rule of law in Central and Eastern European countries and the approach taken by the CJEU.

On the one hand, it is true that the Court of Justice has admitted that a violation of the right to an independent judge can justify an (unwritten) derogation from mutual recognition, thus assuming that a breach of this right is comparable, in terms of seriousness, to that of art. 3 ECHR. This may highlight the strategic importance for the EU to have national independent judiciaries. However, the CJEU did not consider the presence of systemic violations in the judiciary organisation system of a Member State to be sufficient, in order to derogate from mutual trust and mutual recognition. The CJEU required the judge of the requested State to verify that such a situation of abstract risk results in concrete risk to the person concerned of violation of the rights of the defence. This is a requirement very difficult to meet and thus presumably destined not to be practically implemented. While this approach of the Court undeniably favours mutual recognition, it does not help to promote effective mutual trust among judges of EU Member States. The logic of promoting “blind trust”, re-echoing somehow federal-state structure, does not seem to work and must be reconciled with the fact that the protection of human rights within the EU Member State also involves the role of the ECtHR and national constitutional courts. This judicial pluralism, which has not comparable examples in federal-state structures, makes difficult for the CJEU to strictly pursue the goal of unity and imposes it to adopt a more lenient approach with regard mutual trust and mutual recognition mechanisms.

¹⁹ See, however, in Dublin Regulation field, the *CK* and *Jawo* decisions, mentioned in the text, where the CJEU admitted that even a substantial risk of violation of art 4 CFREU referred to individuals is enough to hinder the transfer of the person concerned.

Bibliography

Bargis, M.

2017 'Mandato d'arresto europeo e diritti fondamentali; recenti itinerari "virtuosi" della Corte di giustizia tra compromessi e nodi irrisolti', *Diritto Penale contemporaneo*, 2, pp. 177-215.

Battjes, H. and E. Brouwer

2015 'The Dublin Regulation and mutual trust: Judicial Coherence in EU Asylum Law', *Review of European Administrative Law*, 8, 2, pp. 183-214.

Cappuccio, L.

2022 'Mandato d'arresto europeo e diritti fondamentali. Un percorso giurisprudenziale', *Quaderni Costituzionali*, XLII, 2, pp. 293-321.

Carlino, V. and G. Milani

2019 'To trust or not to trust? Fiducia e diritti fondamentali in tema di mandato d'arresto europeo e sistema comune d'asilo', *Freedom, Security & Justice: European Legal Studies*, 2, pp. 64-89.

Di Gregorio, A.

2017 'Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione', *DPCE-Online*, 28, 4.

Engdahl, D.E.

2009 'The classic rule of Faith and Credit', *Yale Law Journal*, 118, pp.1584-1659.

Ferri, M.

2021 'To Trust or not to Trust in case of indirect refoulement? Una nuova sfida per il principio di fiducia reciproca nel sistema Dublino', *Questione Giustizia*, 11 maggio 2021.

Kramer, L.

1997 'Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception', *Yale Law Journal*, 106, pp. 1965-2008.

Lasch, C.N.

2013 'Rendition resistance', *North Carolina Law Review*, 92, 1, pp. 102-181.

Lenaerts, C.

2017 'La vie après l'avis: Exploring the principle of mutual (yet not blind trust)', *Common Market Law Review*, 54, pp. 805-840.

Maiani, F. and S. Migliorini

2020 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice', *Common Market Law Review*, 57, pp. 7-44.

Mitsilegas, V.

2016 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship between Legal Pluralism and Right-Based Justice in European Union', in E. Brouwer and D. Gerard (eds.), *Mapping Mutual Trust, Understanding and Framing the role of mutual trust in EU Law*, EUI working paper/MWP 2016/13, pp. 23-36.

Mitsilegas, V.

2015 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', *New Journal of European Criminal Law*, 4, pp. 457-481.

Mitsilegas, V.

2012 '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', *Yearbook of European Law 2012*, 31, pp. 319-372.

Moreno-Lax, V.

2021 '(Dis-)Trust in EU migration and Asylum Law: The Exceptionalisation of Fundamental Rights', in P. González and S. Iglesias (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge CUP, pp. 77-99.

Morgese, G.

2012 'Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronuncia della Corte di giustizia nel caso NS e altri', *Studi sull'integrazione europea*, 7, pp. 147-162.

Murphy, J.J.

1983 'Revising Domestic Extradition Law', *University of Pennsylvania Law Review*, 131, 5, pp. 1063-1119.

Palermo, F. and K. Kössler

2017 *Comparative Federalism*, Oxford and Portland, Hart publishing.

Rizcallah, C.

2019 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a driver of EU Integration', *European Law Journal*, 25, n. 1, pp. 37-56.

Salerno, G.M.

2020 'European Rule of Law: un principio in cerca d'autore', *federalismi.it*, n. 19, 17 giugno 2020.

Schmitt, J.M.

2013 'A Historical Reassessment of Full Faith and Credit', *George Mason Law Review*, 20, pp. 485-544.

Van Den Brink, T.

2016 'Horizontal federalism, mutual recognition and the balance between Harmonization, Home state Control, and Host State Autonomy', *European Papers*, 1, n. 3, pp. 921-941.

About the Author

Davide Strazzari is associate professor in comparative public law at the Sociology and Social Science Department of University of Trento, where he lectures Italian Public law and EU public law. His research interests concern legal pluralism, minority rights, immigration and antidiscrimination law. He is author of two monographs (in Italian), he has co-edited two

volumes [with R. Toniatti, C. Piciocchi, *State and religion: agreements, convention and statutes*, 2021, Trento – and with R. Toniatti (eds.), *Legal pluralism in Europe and the “ordre public” exception – normative and judicial perspectives*, June 2016, ISSN: 2284-4503 available at www.julps.eu]; he wrote several articles in international peer reviewed journal. Since 2018, he has been a member of the CURED I research project, Max Planck Institute for Social Anthropology di Halle, coordinated by prof. M-C. Foblets.

DAVIDE STRAZZARI

Department of Sociology and Social Research, University of Trento, via Verdi, 26, 38122, Trento, Italy.

e-mail: davide.strazzari@unitn.it