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The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?

Ermioni Xanthopoulou*

Abstract

During a time of distrust towards some Member States, the position of fundamental rights when executing a European Arrest Warrant (EAW) has been strengthened. The article considers whether the European Court of Justice (ECJ) is now 'taking rights seriously' as regards the EAW. To this end, it employs a theoretical and contextual approach that supports a comprehensive analysis of case-law. First, the article borrows from a theory of rights as trumps and observes that rights are no longer treated as norms with no special force that are in the way of cooperation interests. Second, the article offers a contextual exegesis of this trajectory, by mapping drivers of distrust and evaluating their impact on the position of rights. Through contextualisation, it is argued that distrust, although limited by its circumstances, has offered a compelling opportunity for the ECJ to take rights seriously, paving the way forward for future case-law.

1 | INTRODUCTION

The Framework Decision on the European Arrest Warrant (FDEAW) is a flagship instrument of EU criminal law.[1] Its adoption in 2002 was groundbreaking, as it replaced the previous system of extradition with a simplified judicial system of arrest and surrender.[2] This system operates by means of mutual recognition, the so-called cornerstone of judicial cooperation in criminal matters, that allows Member States to recognise each other's judicial decisions and rules.[3] The principle of mutual recognition relies on and is enabled by a considerable degree of mutual trust among Member States.[4] EU and international fundamental rights laws commonly accepted by Member States offer a

* Senior Lecturer in Law at Brunel University London. I would like to acknowledge and thank the reviewers for the comments and especially Karine Caunes. I am also grateful to Adrienne Yong for reading an early version of this article. Any errors and omissions are my own.

[1]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 (as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009,] OJ L81/24).

[2]J. Sievers, 'Too Different to Trust? First Experiences with the Application of the European Arrest Warrant', in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), 109.

[3]Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para. 33.

[4]For an account of mutual trust, see A.Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart, 2022); E. Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust', (2018) 55(2) *Common Market Law Review*, 489.

common denominator that renders different approaches equivalent and thus trustworthy. Mutual trust constitutes the basis for several mutual recognition instruments in the Area of Freedom, Security and Justice (AFSJ).[5]

It is in this spirit of mutual trust that the FDEAW does not contain a generic, express ground for refusing execution of an EAW on the basis of feared violations of fundamental rights taking place at the issuing EAW Member State.[6] Indeed, the FDEAW mandates, in Article 3, or allows, in Article 4, executing judicial authorities to refuse to execute an EAW, but not because of fundamental rights violations. Most of the exceptions, laid down in the law, do relate to fundamental rights. Yet they essentially constitute possible issues of a lack of equivalence that is needed between different states' laws for the purpose of mutual recognition, rather than issues with the protection of fundamental rights as such. However, an inherent tension between the obligation to presume compliance and recognise an EAW,[7] on the one hand, and the overarching constitutional obligation to respect fundamental rights,[8] on the other hand, is endemic in the law and the case-law of the European Court of Justice (ECJ or the Court). Initially, the ECJ has not been so generous as to allow a generic ground for refusal linked to violations of rights. The Court instructed judicial authorities to unequivocally trust each other,[9] presuming each other's compliance with EU law on fundamental rights. Yet, the Court's case-law has shifted towards a more rights-informed reading and allowed judicial authorities to assess the circumstances of actual compliance not expressly listed in the FDEAW.[10]

This shift in the attitude to case-law, although still having judicial cooperation very high on the agenda, has arguably come with a different positioning of rights that is worth observing closely. So, the article asks (i) whether the Court is taking rights seriously by recognising their special normative force when they compete with other values and (ii) whether drivers of distrust as societal factors have influenced a new case-law approach on rights. It is important to ascertain whether and/or how the Court is bestowing a special normative force on fundamental rights, and it is also necessary to understand the context within which such a shift has taken place. This is because a repositioning of rights in the hierarchy of legal norms could form the basis of an emerging theory of rights to guide and underpin judicial reasoning in EU criminal law that might be useful to judicial cooperating authorities as well as to the ECJ when making decisions on the FDEAW. Reinforcing the place of fundamental rights in judicial reasoning, which is admittedly a desirable outcome, cannot take place if we do not agree at a fundamental level on what rights mean and how we value them in relation to other principles. Understanding the factors that influence the shift can also be telling for European constitutional values.

The current article sits among existing literature on broad constitutional questions in relation to the Area of Freedom, Security and Justice and the European Arrest Warrant. The original value of its contribution, though, lies in addressing a literature gap in relation to an under-considered issue, i.e. the normative position of fundamental rights when compared with competing considerations. Others have worked on the place of rights in EU criminal law and the EAW vis-à-vis mutual trust,[11] but assessing, in light of theory and context, the strength of rights as norms as

[5]Examples include the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ L338/2. For an assessment of mutual recognition and its role in EU criminal law, see J. Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure', (2020) 13 *European Constitutional Law Review*, 33.

[6]For a systemic review of the FDEAW, see L. Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence', (2021) 58 *Common Market Law Review*, 683.

[7]Art 1(1), FDEAW states that 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'.

[8]Art 1(3), FDEAW states that the instrument 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6' of the Treaty on the European Union (TEU). That obligation is further emphasised in the Preamble to FDEAW and particularly in Recitals 12 and 13.

[9]Case 396/11, *Ciprian Vasile Radu*, ECLI:EU:C:2013:39; Case 399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107.

[10]Joined Cases 404/15 and 659/15 PPU, *Pal Aranyosi and Robert Caldararu*, ECLI:EU:C:2016:198.

[11]L. Mancano, 'A Theory of Justice? Securing the Normative Foundations of EU Criminal Law through an Integrated Approach to Independence', (2022) 27 *European Law Journal*, 477; G. Anagnostaras, 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Caldararu*', (2016) 53 *Common Market Law Review*, 1675; V. Mitsilegas, 'Trust' (2020) *German Law Journal*, 69; A. Łazowski, 'The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après *Aranyosi* and *Caldararu*', (2018) 14 *Croatian Yearbook of European Law and Policy*, 1; A. Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal', (2019) 20 *German Law Journal*, 468.

recognised by the Court is a discussion that is missing. Although the question on whether the Court is taking rights seriously has been posed before in the broader context of EU law,[12] the question has not been discussed in relation to an EU criminal law matter and is worth posing, given that rights discourse is on the rise in this field of law. Originality also lies in the article's methodology, i.e. doctrinal, theoretical and contextual, as it aims to shed light on this question not just from a purely doctrinal point of view, as the law is not insulated from society. EU law should be treated as a living instrument and should be assessed and observed against societal developments as well as understood with the aid of jurisprudence.[13] Recent work by Popelier and Gentile, which focuses on unfolding the psychosocial concept of mutual trust, helpfully informs our perspective on mutual trust in the EU and paves the way for further interdisciplinary work on EU criminal law.[14] My current theoretical and contextual contribution, for its part, specifically observes and focuses on the theorisation and contextualisation of rights' normative force, hoping to put forward useful suggestions for cooperating judicial authorities.

The article discerns and welcomes an emerging case-law discourse that started recognising fundamental rights' special force. It also notices that this shift coincides with persisting issues of distrust, as manifested in several cases. Distrust might not be endemic to the whole EAW system, but it is crucial in bringing certain questions to the forefront. We might not be able to go far enough to argue that mutual distrust has led the Court to take rights seriously, but we can notice and reflect on a potential correlation between the two reverse trends, namely the decline of mutual trust and the rise of fundamental rights. Indeed, whether related or not, it is in light of these distrust occasions that the Court recognised that some executing judicial authorities are not always in the position to safely presume compliance with rights. This is very important and has far-reaching connotations for the future of the EU and its developing constitutionalism. So, the article first offers a theoretical analysis of the Court's case-law on the interpretation of the FDEAW, demonstrating how rights are increasingly seen as trumps as compared with interests, and then steps back and analyses this new trend through a law in context approach and especially by mapping the drivers of distrust as potential influential factors.

2 | MAKING SENSE OF THE EAW CASE-LAW THROUGH A THEORETICAL LENS: FROM RIGHTS AS INTERESTS TO RIGHTS AS TRUMPS

2.1 | Theoretical grounds

The article borrows from rights theory, accepting and advocating rights' 'special force' vis-à-vis competing considerations.[15] The 'interest' and the 'trump' model are the most usual models of fundamental rights as far as their strength is concerned in relation to other norms and public interests that are in conflict with them.[16] According to the 'interest' model, fundamental rights have no priority over competing considerations.[17] Therefore, public interests can outweigh fundamental rights. According to the 'trump' model, rights are regarded as 'trumps' and, contrary to the 'interest' model, they have priority over other conflicting considerations.[18] In view of the latter, rights as

[12]J.H.H Weiler & N.J.S. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence—Part II', (1995) 32 *Common Market Law Review*, 579.

[13]K. Caunes, 'What the European Law Journal Stands For', (2020) 26 *European Law Journal*, 2.

[14]P. Popelier, G. Gentile and E. van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context', (2022) *European Law Journal* <https://doi.org/10.1111/eulj.12436>.

[15]D. Kyritsis, 'The Transcendental, the Existential and the Ethical: Alexy and Dworkin on the Foundation of Rights', (2008) 59(1) *Northern Ireland Legal Quarterly*, 91, 92.

[16]M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2013), 16; A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', (2003) 62(5) *Modern Law Review*, 673.

[17]M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', (2004) 2 *International Journal of Constitutional Law*, 574.

[18]R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 193.

fundamental norms cannot be overridden by other competing considerations or collective interests, except in extraordinary circumstances. Therefore, as trumps, they have a special force: fundamental rights must take precedence over other interests dictated by government policy goals. Promoting the greater good for the greatest number of people is not enough justification to override an individual right.[19] If fundamental rights are seen as inconvenient nuisances in the way of achieving public goals, and if society is not willing to allow the protection of rights, then any constitutional proclamation about respect for fundamental rights is indeed hollow.[20]

Respect for fundamental rights is found as a core principle of constitutional law that is at the heart of EU constitutionalism.[21] Yet, a theorisation of EU fundamental rights and their status in relation to other, competing values is still uncertain in relatively new areas such as EU criminal law, which has been highly security-driven.[22] Observing this, and calling for a recognition of rights' special force in judicial reasoning, is especially important considering that the results of adjudication are subject to the theories,[23] politics and hierarchy of values of the adjudicator.[24] In addition, a commitment to an overarching theory in EU criminal law is important because, in its absence, it has been observed that fundamental rights have long been sidelined and their special force has not been recognised when security interests dressed in the principle of effectiveness have sidelined them. Nevertheless, fundamental rights 'trumping' all competing considerations under all circumstances would in fact be impractical and could lead to an extremely individualistic dystopia lacking any sense of community. So, this article supports the idea that absolute rights[25] are indeed strong trumps which must never be breached and cannot be limited. However, relative rights[26] are amenable to limitations as long as these are proportionate[27] and respect the essence of the rights, thus forming weaker trumps.

In the context of the FDEAW, the protection of the fundamental rights of defendants or suspects[28] usually clashes with the law's interest in surrendering persons quickly, requiring Member States to trust each other. Although respect for fundamental rights is a core principle of EU law, its priority in relation to other competing considerations, such as effectiveness and security, has not always been ensured.[29] Applying the theory to the FDEAW, one must agree that the rights of persons requested under the EAW procedure should enjoy some priority over other considerations and not be automatically overridden for the purpose of ensuring efficient judicial cooperation. Absolute rights must always be protected without compromise, whereas a proportionality test may be conducted for other rights when a limitation is present, such as the right to liberty when limited by a custodial term.[30]

Having the theory on rights, as laid down above, in mind, we will navigate the Court's reasoning to evaluate whether and how the Court is taking rights seriously by exploring how much strength rights enjoy in the case-law of the ECJ. In the following section, I will demonstrate how the early phase of case-law on the EAW did not take rights

[19] J. Waldron, 'A Right-Based Critique of Constitutional Rights', (1993) 13 *Oxford Journal of Legal Studies*, 18, 30.

[20] R. Dworkin, see n. 18, 193.

[21] F. Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press, 2014); K. Tuori, *European Constitutionalism* (Cambridge University Press, 2015).

[22] E. Herlin-Karnell, 'The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe's 'Area of Freedom, Security and Justice', (2017) 8(1) *Transnational Legal Theory*, 79.

[23] Or at least their conception and respective use in judicial practice. See A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', (1999) 62(5) *Modern Law Review*, 671, 672.

[24] J. Habermas, *Between Facts and Norms* (Harvard University Press, 1996), 255–259.

[25] Such as the right to freedom from torture and inhuman or degrading treatment enshrined in Art 4 of the Charter.

[26] Such as the right to respect for private and family life enshrined in Art 7 of the Charter.

[27] According to the principle of proportionality as enshrined in Art 52(1) of the Charter. See E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Hart, 2020), Chapter 5.

[28] Such as the protection of the principle of legality (Case 303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECLI:EU:C:2007:261), the principle of non-retroactivity (Case 296/08, *Ignacio Pedro Santesteban Goicoechea*, ECLI:EU:C:2008:457), the principle of specialty (Case 388/08 PPU, *Artur Leymann and Aleksei Pustovarov*, ECLI:EU:C:2008:669), the principle of ne bis in idem (Case 261/09, *Gaetano Mantello*, ECLI:EU:C:2010:683) and the right to be heard (*Radu*, see n. 9) but also the right to humane prisons (*Aranyosi*, see n. 10) and the right to judicial independence (Case 216/18 PPU, *Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586).

[29] E. Xanthopoulou, see n. 27, Chapters 1, 2.

[30] On this see L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', (2016) 18 *Cambridge Yearbook of European Legal Studies*, 215, 227.

seriously, as the EU objective of efficient cooperation prevailed. The ECJ gave priority to the public interest or to the collective objective of security, whose achievement necessitated a quick 'extradition' process, trumping the rights in question. Such a speedy cooperation system would be realised by an unhindered regime of mutual recognition among cooperating judicial authorities. In this respect, the Court has allowed policy-specific interests to override fundamental individual rights. However, we will later witness an evident shift in the Court's treatment of rights as fundamental norms, which have taken priority status as trumps.

2.2 | Rights as interests in the ECJ's case-law

An understanding of rights as interests has been manifested in several early judgments in the Court's early reasoning. For example, in *Radu*[31] we may notice that the Court treats rights as interests that do not hold special normative force when they compete with the interest to cooperate. The case of *Radu* concerns the right to a fair trial and defence rights in general. The Court here decided that 'the executing judicial authorities cannot refuse to execute a European arrest warrant [...] on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued'.[32] Although the rights in question were not absolute and could, in principle, be limited if this was carried out proportionately and with respect to the essence of the rights, the Court did not engage with such reasoning at all. The Court merely emphasised the law's objectives, i.e. the 'establishment of a new simplified and more effective system for the surrender of persons [...] to facilitate and accelerate judicial cooperation' which should be based on the principle of mutual recognition.[33] The judgment also reflected on the broader goal of creating a European space of freedom, security and justice.[34] In brief and absolute terms, the Court held that executing authorities were not permitted to refuse to execute an EAW in the event of fundamental rights breaches. The latter absolute conclusion, in tandem with an emphasis on the law's objectives, is indicative of this early puzzling understanding of rights as norms that do not hold any special force.

In the same vein, the Court in *Melloni*[35] again relied on placing due process rights on an equal footing with a policy goal: the efficacy of judicial cooperation. The case concerns the right to review a judgment issued *in absentia*.[36] The Court was faced with a question of primacy of EU law, as the protection afforded by the Spanish law was not only higher than the one provided for in Italian law but also higher than what was prescribed by EU law. And so the clash here was not only between rights and a specific policy goal but also between rights and the principle of primacy of EU law. Again, the Court seemed to put an emphasis on the importance of policy goals, which was maximised by the additional lens of primacy that existed in this case. The Court decided that 'allowing an executing authority to make the surrender of the person convicted *in absentia* conditional upon a subsequent review of the judgment leading to an EAW would undermine the efficacy of the judicial cooperation'.[37] The reasoning initially relied on the specific secondary measure objective,[38] only to intensify by reference to a broader policy objective to create an AFSJ[39] and finally by resorting to EU law principles of effectiveness and mutual recognition.[40]

[31]Mr Radu, a Romanian national, was subject to four arrest warrants, issued by a German judicial authority for the purpose of conducting criminal prosecutions in respect of acts of robbery. As he did not consent to his surrender, he claimed that the contested warrants were issued without him having been summoned or having had a possibility of hiring a lawyer or presenting his defence, in breach of Arts 47 and 48 of the Charter and Art 6 of the ECHR. The referring court asked whether the executing judicial authority may refuse to execute the EAW.

[32]*Radu*, see n. 9, para. 43.

[33]*Radu*, see n. 9, para. 33.

[34]*Radu*, see n. 9, para. 34.

[35]*Melloni*, see n. 9.

[36]Mr Melloni was sought by the Italian authorities that issued an EAW. Spanish authorities, as executing authorities, were not sure whether they should surrender him because of a higher constitutional level offered in Spain for persons convicted *in absentia*. The Court in *Melloni* was asked whether it is permissible for the executing state to make the surrender of the requested person, convicted in absentia, conditional upon subsequent retrial in the issuing state.

[37]*Melloni*, see n. 9, para. 63.

[38]Ibid., para. 43.

[39]Ibid., paras. 107, 112, 113, 115.

[40]Ibid., para. 62.

Arguably, the Court made more effort than in the earlier judgment of *Radu* to justify the priority of the policy objective against the right, but still it did not recognise the right's special force by scoping out instances where rights might prevail.[41]

2.3 | The emergence of an alternative conception in the ECJ's case-law: Rights as trumps

Having considered case-law where rights were mostly seen as interests, this section considers a shift in the case-law of the ECJ. By studying the case-law on the FDEAW, this section demonstrates the emergence of an alternative conception of rights in the ECJ's case-law, that of rights as trumps. The section is based on thematic fields identified within case-law, rather than on chronological order, as it is important to discern the different legal tests in each category that give rise to different rules regarding the execution of an EAW. Every field also pertains to different rights on which varying degrees of force are bestowed.

2.3.1 | Case-law on prison conditions

Aranyosi,[42] albeit indicative of a turn in case-law that recognises rights' special force, still comes with reservations that undermine rights' position. Indeed, the Court held that when judicial authorities have evidence that there is a real risk of inhuman or degrading treatment, they must assess the possible existence of that risk, relying on 'objective, reliable, precise and duly updated elements'.[43] However, even ascertaining such a risk of violation is not enough.[44] A second leg accompanies the test, i.e. establishing that the specific person will be exposed to a risk specifically because of the conditions of their detention.[45] Still, even if both stages of the test are satisfied, it is not enough for the executing authority to refuse to execute the EAW in question. It may simply postpone the surrender.[46] The language used reveals a reservation, to say the least, and is a clear remnant of prioritising the law's objectives vis-à-vis fundamental rights.

Still, the addition of an individualised review could be seen as placing emphasis on individual cases and on the importance of respecting the rights involved, which arguably stems from recognising their special force. Indeed, having judicial authorities perform some type of assessment to determine the possible existence of a risk of human rights violations demonstrates progress. Hong notes that by adding an individualised review, *Aranyosi* secures fundamental rights in each case and therefore 'takes Article 1(3) of the Framework Decision seriously'.[47] Compared with previous case-law, which insisted on excluding an individualised review, it may indeed be well-argued that *Aranyosi* comes a step closer to taking rights seriously as long as there is a real risk of deficiencies. It also does so by shifting from presumed compliance to actual compliance with fundamental rights. This shift was approved by the Strasbourg Court,[48] marking a massive development when compared with the era of Opinion

[41]There are, however, some nuanced and subtle important references to the protection of human rights at the EU level in relation either to the Charter or to the FDEAW. See, ibid., paras. 58 and 63.

[42]Prison conditions in Hungary and Romania posed concerns about potential violations of Art 4 of the Charter. Overcrowding in correctional facilities resulted in inhuman living standards. The referring German court asked whether Art 1(3) FDEAW should be read in such a way that the executing authority could or should refuse to execute an EAW in light of fundamental rights violations and, particularly, violation of Art 3 ECHR or Art 4 of the Charter.

[43]*Aranyosi*, see n. 10, para. 88.

[44]Ibid., para. 91.

[45]Ibid., paras. 92–94.

[46]Ibid., paras. 98, 100–102.

[47]M. Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: *Solange-III* and *Aranyosi*', (2016) 12 *European Constitutional Law Review*, 549.

[48]*Romeo Castaño v. Belgium*, App no. 8351/17 (ECHR, 9 July 2019).

2/13,[49] which had supported a model of blind trust that was not welcome by the European Court of Human Rights (Court of Human Rights).[50]

In the same spirit, *ML*,[51] which again focuses on prison conditions similar to *Aranyosi*, can be read in two different ways. First of all, the judgment succeeds in taking rights seriously by specifying that just because that person has a legal remedy in the issuing Member State which permits them to challenge the conditions of their detention, the executing judicial authority cannot rule out a real risk of violation. On the other hand, *ML* constitutes a blow to the position of rights with a restrictive approach regarding the second test of *Aranyosi*. *ML* specifies that the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, the person will be detained. This is somewhat ironic, as the executing authority is instructed to 'turn a blind eye' to other facilities' shortcomings and take a leap of faith to specific correctional facilities despite strong cautions that advocate generic caution. This is like accepting that different standards are employed as seen through the 'eyes' of cross-border cooperation. However, it is appreciated that the Court may not wish to block a Member State from both judicial cooperation and judicial dialogue that might actually be instrumental in advancing the implementation of EU law on that basis.

Dorobantu[52] is also significant in firmly establishing rights' priority status. Here, a German court referred a question to the ECJ for clarification on the second test, on account of technical criteria for the assessment of prisons. The Court, *inter alia*, asserted that 'a finding [… of such risk] cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition'.[53] The tone is unambiguous compared with previous judgments and truly treats rights in a serious manner, squarely addressing the conflict and the need to clarify which of the two takes precedence in the overall balancing and hierarchy of values. In this respect, it was held that a judicial executing authority must take into account all relevant physical aspects of the conditions of detention in the prison in which the person was intended to be detained. In particular, the personal space available to each detainee in a cell, the sanitary conditions and the extent of the detainee's freedom of movement within the prison needed to be considered.[54] The Court, taking a detailed approach in listing various factors that need to be considered when assessing prison conditions, makes reference to the European Court of Human Rights' standards, thus linking international law to the developing field of EU law.[55]

Since 18 April 2023 and the significant ruling in *E.D.L.*,[56] the execution of an EAW can also be suspended and even set aside due to serious risks to the health of the individual concerned, when these risks reach a certain level of severity that falls within the scope of Article 4 of the Charter, i.e. prohibition of inhuman and degrading treatment. This is a groundbreaking development as it establishes a purely individualised review without the need to conduct a two-stage test, as long as the health of the requested person is engaged. Questions arise about whether such an approach, discarding the two-stage test, applies elsewhere. For example, could it also apply when there are risks arising from detention conditions, without a severe effect on the health of the requested person at the level of severity specified in the judgment, or concerning the independence of the judiciary in the issuing state? It would be safe to assume that the established case-law will still apply where the health of the requested person is not engaged in the assessment of the legality of the execution of an EAW. Still, this is evidence of case-law recognising the special force of Article 4 fencing off the autonomy of the individual concerned as long as their health is engaged, aligning the EAW case-law with previous case-law on asylum.[57]

[49]Opinion 2/13 of the Court of 14 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:245.
[50]V. Mitsilegas, see n. 11, 69.
[51]Case 220/18 PPU, *Generalstaatsanwaltschaft v. ML*, ECLI:EU:C:2018:589.
[52]Case 128/18, *Dumitru-Tudor Dorobantu*, ECLI:EU:C:2019:857.
[53]Ibid., para. 44.
[54]Ibid., para. 75.
[55]*Muršić v. Croatia*, App no. 7334/13 (ECHR, 20 October 2016) para. 139.
[56]Case 699/21, *E.D.L.*, ECLI:EU:C:2023:295.
[57]Case 578/16, *C. K. and Others v. Republika Slovenija*, ECLI:EU:C:2017:127.

2.3.2 | Case-law on judicial independence

Indeed, it may be argued that the Court started treating rights as trumps in its case-law post *Aranyosi*. For example, in *LM* the ECJ ruled that the executing authority must refrain from giving effect to an EAW if the authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial.[58] The essence of rights, usually called a 'limit on limitations',[59] is not entirely new in the case-law of the ECJ and stems from national constitutional traditions[60] and early case-law of the ECJ on the protection of fundamental rights,[61] both then recognised as general principles of EU law.[62] The breach of the essence of the fundamental right to a fair trial is considered on account of systemic or generalised deficiencies concerning the judiciary of that Member State which could affect judicial independence. The executing judicial authority must also determine that there are substantial grounds for believing that the requested person, *in concreto*, will specifically encounter that risk.[63]

Establishing the essence of the right as a threshold for assessing the legality of a surrender to a Member State effectively creates a trump. This indicates that rights are progressively seen as more forceful norms. It is also welcome that the justification is framed around Article 52(1) of the Charter, with regard to limitations on the exercise of rights and freedoms recognised by the Charter. Unlike their positioning in the internal market, fundamental rights in Article 52(1) are not framed as mandatory requirements that call for a derogation from a master principle, i.e. free movement. On the contrary, under Article 52(1) of the Charter, fundamental rights constitute the central principle which is protected as a trump.[64] This formulation of rights recognising their centrality is essential for their function as norms of special force. From a textual point of view, this is not such a radical argument, as might be seen by traditional EU scholarship concerned with the effectiveness of EU law. The protection of fundamental rights is a central value of the European Union with the Charter having an equal constitutional status with that of the Treaties.[65] In other words, the concept of the essence of rights is a reminder that the core of our rights is absolute and that any limitation which attempts to compromise this core is incompatible with the Charter.[66] Furthermore, it is worth observing that the Court accepted that mutual trust may be limited and in fact *trumped* by rights even where non-absolute rights are challenged, which adds on *Aranyosi* where an absolute right was at stake.

In contrast to the well-noted case-law shift, the ruling in the joined cases of *X and Y*[67] represents the ECJ's reluctance to further forge rights' special force. This case again concerns a risk of a breach of the right to a fair trial in Poland. Here, the ECJ ruled that an executing judicial authority having evidence of generalised or systemic deficiencies concerning judicial independence in the issuing Member State may refuse the surrender of a requested person only if there are substantial grounds for believing that there has been a breach of that person's fundamental right to a fair trial. The second individualised assessment must be conducted having 'regard inter alia to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel'.[68]

On the one hand, it is welcome that the ECJ highlighted the overlap and compatibility of its case-law on the right to an independent tribunal with that of the European Court of Human Rights.[69] In the same spirit, it is commendable that the ECJ recognised that a breach of the right to a tribunal found by the European Court of Human Rights and

[58]Art 52(1) Charter.
[59]K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU', (2019) 20 *German Law Journal*, 779.
[60]T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?', (2019) 20(6) *German Law Journal*, 794.
[61]The concept of 'essence' had not been used much before this judgment. Case 426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, para. 34; Case 362/14, *Maximillian Schrems v. Data Protection Commissioner, ECLI:EU:C:2015:650*, para. 94.
[62]Early judgments refer to 'substance of the rights', Case 292/97, *Karlsson and Others*, ECLI:EU:C:2000:202; Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321.
[63]*LM*, see n. 28, para. 60.
[64]E. Xanthopoulou, see n. 27, 89.
[65]Art 6 TEU.
[66]K. Lenaerts, n. 59.
[67]Joined Cases 562/21 PPU and 563/21 PPU, *X and Y v. Openbaar Ministerie*, ECLI:EU:C:2022:100.
[68]Ibid., para. 103.
[69]Ibid., paras. 56–57.

caused by the procedure for the appointment of judges could be considered by the executing judicial authority when establishing the existence of systemic or generalised deficiencies in the issuing Member State.[70] On the other hand, the ECJ stressed the need for systemic or generalised deficiencies to be duly demonstrated at the individual level, and in support of this approach, it seems that the good old cooperation considerations are again recalled. The ECJ referred to the effectiveness of the EAW system,[71] the fundamental rights of the victims as well as the fight against impunity.[72] This line of arguments was reiterated in the recent order of 12 July 2022 in case C-480/21, again concerning judicial independence in Poland and the question on whether the systemic deficiencies could amount, on their own, to a breach of the essence of the right to a fair trial, requiring an executing authority to refuse a surrender. The Court re-asserted that the executing authority must find that systemic deficiencies have either already caused a breach in the particular case where the EAW is issued for the execution of a sentence or that it will lead to a breach again in the particular case in question, where the EAW is issued for prosecution purposes.[73] Mancano comments that the 'test that feels out of touch' with the situation on the ground has only worsened.[74]

While we notice the ECJ's insistence to maintain the strict, individualised stage of the *LM*/*Aranyosi* test and its impact on rights protection, we may also notice the difficulties that arise from preconditioning the individualised assessment to first finding systemic deficiencies. The requirement of first establishing systemic deficiencies before finding an individualised risk further raises the bar of assessment. In practice, the need for establishing the existence of systemic deficiencies undermines the position of rights and even poses issues of incompatibility with the standards of protection as set by the Court of Human Rights which does not consider these as a precondition for a real and individual risk of a breach of the right to a fair trial.[75] While an individualised risk might indeed be linked to systemic deficiencies, such a risk might simply exist by reason of mis-implementation of the law under specific circumstances, and judicial authorities must be able to scrutinise these.

2.3.3 | Case-law on custody duration

Lanigan[76] is another case which demonstrates that the Court has started taking rights seriously when it comes to the duration of custody. In this case, the judicial authorities of a former Member State, the United Kingdom, issued an EAW to the Irish Republic, requesting the surrender of Mr Lanigan, who was detained in Ireland while he opposed the execution of his EAW. His lengthy pre-trial detention resulted in a breach of time limits for surrender under the FDEAW.[77] Mr Lanigan claimed that he should not be surrendered, as a result of this breach. The Irish courts asked the ECJ, under 267 TFEU, what the effect of such breach should be in relation to the surrender. Effectively, strict adherence to time limits as set out in the law, protecting the right to liberty from disproportionate limitations, competed with the overarching obligation to surrender.[78]

The Court ruled that the time limits set out in law had to be strictly respected. However, the Court then ruled that the lengthy detention pending surrender breaching the legal limits as set out in the FDEAW did not overturn the EAW, which remained valid. So, the Court appeared to give preference to the predominant obligation of the national authorities to execute an EAW despite the glaring issue of the expiration of the deadline. Besides, the Court held that the expiration of the time limit under the FDEAW essentially meant nothing about the 'fate' of detention

[70]Ibid., para. 79.
[71]Ibid., paras. 47 and 63.
[72]Ibid., paras. 60 and 62.
[73]Case 480/21, *W O, J L v. Minister for Justice and Equality*, ECLI:EU:C:2022:592.
[74]L Mancano, 'Everything Must Remain the Same for Everything Can Change: Judicial Subsidiarity as a Way to Address Rule of Law Deficiencies in the European Arrest Warrant Mechanism', VerfBlog, 2022/8/02, https://verfassungsblog.de/everything-must-remain-the-same-for-everything-can-change/, DOI: 10.17176/20220802-181,915-0.
[75]*Bivolaru and Moldovan v. France*, App no. 40324/16 and 12,623/17 (ECHR, 25 March 2021).
[76]Case 237/15 PPU, *Minister for Justice and Equality v. Francis Lanigan*, ECLI:EU:C:2015:474.
[77]The law refers to 60 days to execute an EAW, with a possible 30-day extension, Arts 12, 26, FDEAW.
[78]L. Mancano, see n. 30, 227.

as it did not create an obligation on the state to release the requested person. However, as the above would entail that due process rights had no effect in safeguarding detention decisions under the FDEAW, the Court emphasised that rules on detention were subject to Article 6 of the EU Charter on Fundamental Rights. It also highlighted that EU law had to align with the rules on detention as set out in Article 5 ECHR.[79] In light of this and having carefully balanced all competing considerations and their varying weight, the Court finally held that the executing judicial authority may decide to hold that person in custody 'only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive'.[80] The Court in this case seems to have realised the contradiction within the FDEAW. It dedicated a lengthy analysis to assessing the competing values and the consequences of accepting the prevalence of cooperation interests. In the end, by making the right choice, it acknowledged the binding special force of fundamental rights.

2.3.4 | Case-law on the definition of "judicial authorities"

The Court's extensive and growing case-law on the *definition of judicial authorities* and judicial decisions is another example of the Court's commitment to taking judicial independence and fair trial seriously. Judicial independence was again at the forefront of another segment of case-law regarding the meaning of the term 'judicial authority' that can issue as well as supervise the execution of an EAW. Defining what constitutes a judicial authority is crucial for the purposes of ensuring effective judicial protection throughout the procedures of an EAW. Regarding the issuance, there are some requirements that the issuing authority must satisfy to ensure that judicial independence is not jeopardised.[81] So, the Court specified numerous occasions[82] when an authority may amount to a judicial authority within the meaning of the law with the purpose of forging judicial independence and eventually judicial protection. In particular, the Court held that where an EAW is issued by an authority that is not a court, the warrant must be capable of being subject to judicial review by a court.[83] Moreover, the Court held that a public prosecutor can also be considered a judicial authority, provided that their independence is guaranteed in the presence of effective judicial supervision, where needed.[84] The Court has placed significant weight on this matter, and this is indicative of a recognition that respect to due process rights is paramount for judicial cooperation. The case-law of the Court on clarifying the contours of the concept of judicial authority is certainly characterised by a strong commitment to ensuring judicial independence as a cornerstone of the right to a fair trial, which seems to have taken a trump place.

2.3.5 | Concluding thoughts

One can certainly notice a shift taking hold in the case-law of the ECJ with the emergence of rights as trumps as compared with rights as interest being pushed away whenever in the way of security cooperation collective interests. Such a shift is noticed in all studied areas, i.e. prison conditions and humane treatment, judicial independence, custody duration and the definition of judicial authorities. The ECJ appears more ready to defend and demarcate the space of the absolute right enshrined in Article 4 of the Charter, as the exceptions to mutual recognition were

[79] In the same spirit, the Court aligned the definition of 'detention' in the EAW with that of the Court of Human Rights case-law in some other cases. See Case 806/18, *Criminal proceedings against JZ*, ECLI:EU:C:2016:610.
[80] *Lanigan*, see n. 76.
[81] Art 8(1)(c), FDEAW.
[82] Case 477/16, *Openbaar Ministerie v. Ruslanas Kovalkovas*, ECLI:EU:C:2016:861; Case 452/16 PPU, *Openbaar Ministerie v. Krzysztof Marek Poltorak*, ECLI:EU:C:2016:858; Case 453/16 PPU, *Openbaar Ministerie v. Halil Ibrahim Özçelik, ECLI:EU:C:2016:860*; Joined Cases 508/18 and 82/19 PPU, *OG and PI (Public Prosecutors of Lübeck and of Zwickau*, ECLI:EU:C:2019:456; Case 509/18, *Minister for Justice and Equality v. PF*, ECLI:EU:C:2019:457.
[83] *OG & PI*, see ibid.
[84] Case 489/19 PPU, *NJ in the presence of Generalstaatsanwaltschaft Berlin*, ECLI:EU:C:2019:849.

recognised earlier than in relation to other relative rights. Moreover, the problematic two-stage test is already reconsidered when the health of the requested person is severely affected, within the meaning of Article 4. This discrepancy between Article 4 and other provisions protecting relative rights is not arbitrary, as an absolute right carries a strong trump whose special normative force cannot be compromised or be subject to a proportionality review. Still, the ECJ, by devising the concept of the essence of rights for relative rights, sends a strong message that the core of our rights is absolute and that any limitation which attempts to compromise this core is incompatible with the Charter. The Court rightly does not adopt the same approach towards all rights, but this does not compromise coherence as different types of rights demand different treatment. Still, an uncompromising approach, despite being carefully balanced against cooperation interests, has emerged in relation to what demands an absolute protection, i.e. absolute rights and the core essence of relative rights. This is a remarkable development when reflecting back to the early years of the case-law. On 5 June 2023, the Court, in *Commission v. Poland*,[85] emphasised the foundational character of Article 2 TEU, which explicitly includes 'respect for human rights' and does not refer to other interests such as security cooperation, placing rights at the top of a constitutional hierarchy. The Court also highlighted that mutual trust is grounded on the fundamental premise that Member States share these common values enshrined in Article 2 TEU.[86]

3 | A CONTEXTUAL EXEGESIS THROUGH MAPPING DISTRUST DRIVERS

The early approach of the Court towards a compromise on fundamental rights manifests an understanding that does not acknowledge their special force as norms of fundamental status. This is because when rights are being frequently overridden by public interests, their special force is not being acknowledged. That way, rights are seen only as any other norms and therefore not deserving a special place in the hierarchy of legal norms. However, as correctly noted, judicial cooperation and mutual trust no longer rely on blind presumptions but are based on 'fundamental rights benchmarks based on extensive scrutiny on the ground'.[87] Consequently, it is reasonable to argue that rights are now being taken more seriously as the Court has laid the groundwork to ensure a fair trial for people involved in the EAW procedure.

Due process has been key for the work of Dworkin, who was preoccupied with it as a way to achieve equality before the law, a basic requirement of a legitimate legal system.[88] Indeed, due process enables a fair trial, which is evidently a value that the ECJ has been earnestly concerned with, as demonstrated in the previous discussion about the importance of safeguarding judicial independence. After having observed the case-law trajectory, in the previous section, we will next reflect on the context within which the law developed in order to understand whether and how this has influenced case-law maturity.

In order to comprehend the evident shift in the case-law of the ECJ in relation to the position of rights vis-à-vis competing interests, it is important to look at the context within which the Court deliberated on this issue. The methodological approach of this section, "law in context", is used to deepen our understanding of law and the way in which its implementation is conditioned and disciplined by reference to culture and social institutions, intellectual history, the realities of class and power, custom and morality.[89] In this respect, law is seen as 'in and of society, adapting to its contours'.[90] This approach helps us realise that law is not completely autonomous but dependent on social factors. It will help us appreciate why and how the Court is now taking rights seriously by studying the context

[85]Case 204/21, *Commission v. Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2023:442.
[86]Ibid., para. 66.
[87]V. Mitsilegas, see n. 11, 70.
[88]R. Dworkin, see n. 18, 199, 272–273.
[89]P. Selznick, '"Law in Context" Revisited', (2003) 30(2) *Journal of Law and Society*, 177.
[90]Ibid., 177.

that conditioned the Court's deliberations. The multi-layered legal context of EU law, as noted by Herlin-Karnell et al.,[91] renders this approach even more interesting.

Considering that judicial cooperation forms the context within which the debate on fundamental rights is taking place, looking at the conditions of its operation to evaluate their possible effect on case-law forms an appealing hypothesis. The context within which the law is developed is characterised by a growing environment of distrust. Distrust, although not generalised but linked to specific circumstances in certain Member States, gradually led to an increase in exceptions to mutual recognition and a qualified concept of mutual trust. An unfolding rule of law backsliding in Poland affecting judicial independence, and a crisis in prison conditions in Romania and Hungary, raised serious questions about the inhuman treatment of prisoners, constituting the broader contextual background against which the Court delivered recent judgments. In this section, I examine the drivers of distrust, namely concerns about judicial independence in Poland and inhuman prison conditions in Hungary and Romania. Furthermore, I draw some parallels between drivers of distrust as manifested in the area of judicial cooperation in EAW matters, on the one hand, and asylum cooperation, on the other hand.

I argue that that these specific contextual "crises" gave the Court an excellent opportunity to take rights seriously by looking at the compelling reality of implementation gaps on the ground. Adopting a law in context approach is necessary, as it appears that the development of EU law is responsive and reactive to crises rather than insulated from external events.[92] Although any parallels to other policy areas need to be carefully drawn, we may notice that crises affecting the field of the AFSJ law have been instrumental in shaping the law. A correlation, to say the least, must be acknowledged between the context of distrust, the process of the maturing of mutual trust and the rise of fundamental rights in the ECJ's case-law. Such a correlation is supported by the fact that instances of distrust and the extensive criticism that they received urged the Court to take a strong stance on the constitutional place of rights, which had been previously overlooked.

3.1 | Prison conditions as drivers of distrust

The first driver of distrust that called for the Court to consider the reality of fundamental rights, and eventually to take their special normative force into account, is linked to prison conditions in Hungary and Romania. The actual (as compared with presumed) conditions posed serious concerns about alleged violations of Article 4 of the Charter, giving effect to the right to freedom from torture or inhuman or humiliating treatment. Overcrowding in prisons was reported by the European Committee for the Prevention of Torture and resulted in inhumane living standards that were undeniable and which could no longer support mutual trust in the form of blind trust relying on conclusive presumptions.[93] Therefore, the surrender of a person requested under an EAW that was issued by Hungary or Romania would be illegal as it would expose the requested person to a real risk of violation of Article 4 of the Charter.

It was against this background of pressing human rights concerns that the Court emphasised the obligation of judicial authorities to assess the possible existence of a risk of inhuman or degrading treatment relying on 'objective, reliable, precise and duly updated elements'.[94] All judgments that are relevant to this driver of distrust[95] denote a significant shift from *Radu* and *Melloni*, which both had defended blind trust. The Court made it clear that trust is not blind trust and that rights violations are real, referring to the report findings of the European Committee for the Prevention of Torture.

Simultaneously, one should observe EU law in context while noticing institutional dynamics and judicial tendencies. The spirit of this context is equally characterised by the Court's effort not to completely block a Member State

[91] E. Herlin-Karnell, G. Conway and A. Ganesh, *European Union Law in Context* (Hart, 2022), 4.
[92] Crisis-driven EU law is a term also used by Herlin-Karnell and Conway when referring to the EU law response to the Covid-19 crisis, ibid., 11.
[93] See European Committee for the Prevention of Torture, 'CPT Visits' Available at <http://www.cpt.coe.int/en/visits.htm>.
[94] *Aranyosi*, see n. 10, para. 89.
[95] *Aranyosi*, see n. 10; *ML*, see n. 49; *Dorobantu*, see n. 52.

from the system of judicial cooperation. At the same time, the Court seems protective of the system of mutual trust supporting judicial cooperation as this has been consistently labelled as a 'success story' by its stakeholders.[96] This is why, according to *ML*, an assessment of detention conditions in the issuing Member State must be limited to the prisons in which it is actually intended that the person concerned will be held.[97] For this reason, the Court emphasised the need to rely on duly updated information, thereby encouraging the judicial authorities to conduct a regular check-in with law on the ground. Therefore, with consideration of the full context, the Court seems compelled by reality to recognise the rights' trump quality, but still it is cautious.

3.2 | Rule of law backsliding as a driver of distrust

A second driver of distrust that has also shaped the context of law concerns breaches of judicial independence and the right to a fair trial. These concerns were generated by government-led judicial reforms in Poland that granted the executive greater powers over the judiciary.[98] In its letter of formal notice, sent to Poland on 3 April 2019, the Commission expressed its opinion that the new disciplinary regime implemented for judges in relation to the content of their judgments led to Poland failing to fulfil its obligations under Article 19(1) TEU.[99] It was also acknowledged by the Meijers Committee, an independent group of legal experts, that these reforms led to an erosion of the rule of law and of mutual trust among Member States and had a direct impact on cross-border judicial cooperation.[100] On 15 July 2021, the Court of Justice ruled that the disciplinary regime for judges in Poland is indeed not compatible with EU law.[101] The conflict escalated with the Polish Supreme Court challenging the primacy and applicability of the rulings in Poland with the ECJ responding by imposing astronomic financial penalties, while Poland was blocked from receiving the Covid-19 recovery fund. In addition, the Court of Human Rights also found, in early 2022, that the Polish Supreme Court does not meet the standards of the right to a fair trial enshrined in Article 6 ECHR.[102] The rule of law crisis is present not only in Poland. Misuse of EU public funds in Hungary[103] and reports on suppression of press freedom in Greece are several other drivers of distrust among Member States. These have set a tone of decline and erosion of some of our most foundational values in Europe, and they invite reflection on the importance of these values on the one hand and their fragility on the other.

It is within this context and against this background that the Court was asked, in *LM* and then again in *X and Y* and in *W O and J L*, whether a judicial authority may refuse a surrender under an EAW due to reports concerning systemic breaches of the rule of law that might lead to a violation of the right to a fair trial upon executing that EAW. The Court, adapting *Aranyosi*, established that a surrender may not take place when there is a real risk of a breach of the essence of the right to a fair trial. The Court accepted for the first time that mutual trust may be challenged where non-absolute rights are feared to be breached—a significant expansion of the recognised exceptions to mutual recognition. The judgment, in a balancing exercise, establishes the minimum content of mutual trust vis-à-vis the essence of the right, further informing in a substantial way the legal principle of mutual trust as well as our

[96]E. Marks, *Policing the European Arrest Warrant* (King's College London, Thesis, 2020); C. C. Murphy, A. Z. Borat and L. Hoyte, *Prosecutor and Government Officials Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant* (SECILE: Securing Europe Through Counter-terrorism: Impact Legitimacy & Effectiveness 2014); A. Weyembergh, I. Armada and C. Brière, *Critical Assessment of the Existing European Arrest Warrant Framework Decision. European Added Value Assessment The EU Arrest Warrant* (Brussels, European Union, 2014), I-3.

[97]*ML*, see n. 49, para. 84.

[98]P. Bárd and A. Sledzinska-Simon, 'On the Principle of Irremovability of Judges beyond Age Discrimination: Commission v. Poland', (2020) 57(5) *Common Market Law Review*, 1555.

[99]Read in connection with Art 47 of the Charter, which enshrines a right to an effective remedy before an independent and impartial court.

[100]Meijers Committee, 'Surrender to Poland Suspended. Call for Political Intervention to Protect the Rule of Law in EU Member States' (CM2007), 3 November 2020, https://www.statewatch.org/media/1446/eu-meijers-committee-eaw-poland-problems-3-11-20.pdf.

[101]Case 791/19, *Commission v. Poland (Régime disciplinaire des juges)*, ECLI:EU:C:2021:596.

[102]See, for example, *Advance Pharma SP.Z O.O v. Poland*, App no. 1469/29 (ECHR, 3 February 2022); *Wróbel v. Poland*, App no. 6904/22 (ECHR, 8 February 2022). For analysis, see <https://eucrim.eu/news/ecthr-rules-on-systemic-dysfunctions-in-polish-judiciary/>.

[103]'Hungary: Commission Officially Launches Procedure Linking Bloc Funds to Rule of Law' (EURACTIC), 27 April 2022, https://www.euractiv.com/section/politics/news/hungary-commission-officially-launches-procedure-linking-bloc-funds-to-rule-of-law/.

understanding of the right to a fair trial in real context rather than isolated from it. The bar for halting a surrender is still high under the a two-step test,[104] including both a generic and a concrete stage which might be attributed to cooperation considerations and the long-standing loyalty 'toward the application of the principle of mutual recognition in EU law'.[105] The test, that was recently confirmed in *X and Y* and in *W O and J L*, remains strict, with the Court emphasising the need of establishing both the precondition of systemic or generalised deficiencies and an individualised risk of breach or past breach duly demonstrated by the requested person.

Maintaining a strict test could be a direct result of the constitutional conundrum the Court has found itself in. As Bard rightly notices,[106] against a lack of an effective EU institutional action to respond to the decline of the rule of law, judicial cooperating authorities attempt protecting judicial independence via preliminary references while the Court is mindful of controlling the damage to judicial cooperation. However, it could be argued that the pressure from the rule of law crisis in Poland has effectively demarcated the right to a fair trial recognising in principle the trump quality of its essence, i.e. judicial independence. It is also against this background, but not necessarily relating to such concerns about respect for the rule of law, that the Court has been concerned about the definition of the concept of judicial authority. A clear demarcation of this concept is also fundamental for the protection of the right to a fair trial, as without such clarity, authorities that are not independent, or whose decisions are not subject to scrutiny, might be able to issue quick warrants at the expense of judicial independence. This line of case-law was perhaps benefited from the Court and the public discourse being sensitised to the creeping rule of law crisis and the importance of judicial independence.

3.3 | Drawing Parallels

To fully comprehend the context of judicial cooperation and the effects of distrust drivers on the law's development, we need to also consider other areas where distrust has prominently manifested itself. A shocking source of distrust in the different yet adjacent field of the AFSJ was linked to reports of inhuman and degrading treatment of asylum seekers in Greece. These reports, together with pressure from civil society and the European Court of Human Rights,[107] eventually led to the seminal judgment of *N.S. and M.E.*[108] This judgment was the first ECJ decision that recognised that mutual trust is not blind trust as national authorities operating in the field of asylum law cannot be presumed as always respecting the law.[109] Therefore, a transfer of an asylum seeker to the responsible Member State[110] may be blocked where systemic violations of rights present a well-founded risk of breach of Article 4 of the Charter.[111] Here, both context and the way the law was mis-implemented on the ground formed the development of the case-law, and this was frequently referred to as a paradigm that should have shifted much earlier than it actually did in the field of judicial cooperation in EAW matters.[112]

Distrust might manifest towards a Member State because of a growing uncertainty in relation to the applicable law, especially by reference to human rights law.[113] Legal certainty translated to knowledge of the applicable law

[104]See section 2.3.2.

[105]J. Öberg, see n. 5, 33, 58.

[106]P. Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', (2022) *European Law Journal*, 1–26.

[107]*M.S.S. v. Belgium and Greece*, App no. 30696/09 (ECHR, 21 January 2011).

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

[109]Ibid., para. 105.

[110]The Dublin system operates in a similar fashion to the FDEAW, relying on the principle of mutual trust. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L180/31.

[111]*N.S. and M.E.*, see n. 90, para. 106.

[112]Opinion in Case 396/11, *Ciprian Vasile Radu*, ECLI:EU:C:2013:648, para. 73.

[113]Case 327/18 PPU, *RO*, ECLI:EU:C:2018:733. See E. Xanthopoulou, 'Legal Uncertainty, Distrust and Injustice in Brexit Asylum Cooperation', in T. Ahmed and E. Fahey (eds.), *On Brexit: Law, Justice and Injustices* (Edgar, 2020).

and manifested in the principle of legality in criminal law is a prerequisite for developing trust in states with which cooperation is sought. If the shared foundations of the law are in jeopardy, then the foundations of mutual trust might also dissolve. This is the case either where a rule of law backsliding is taking place or where a government regularly announces its unwillingness to have the country's national sovereignty moderated for the sake of international human rights law. In various cases of rule of law backsliding in Europe, we can observe a disregard for or intention to disregard common foundational values which directly affect trust. This emphasises the value but also the fragility of fundamental rights, which will be properly protected only if we first agree on their quality as foundational norms of special force.

4 | CONCLUSION

It would be inaccurate to claim that the legal principle of mutual trust has collapsed as it continues to support judicial cooperation to a considerably functional degree.[114] Distrust is not endemic to the whole system of judicial cooperation in criminal matters. Distrust is not the norm but the exception, at least at the time of writing. To be precise, distrust is rather specific and limited in its circumstances to certain domestic environments. So, instead of framing distrust in purely negative terms, we need to recognise its silver lining as a driver of upgrading mutual trust and a reminder that all actors of judicial cooperation need to take rights seriously. Recognising limits to the principle of mutual trust, where demanded by context, is necessary for building actual trust, given that this signifies the Court's long overdue syncing with reality as well as a process of growing maturity in EU criminal law. As Wischmeyer very rightly ponders, 'isn't it deeply rooted in our ideas about constitutional government that democratic law must institutionalise mutual distrust rather than govern by trust?'[115] Of course, it would have been preferable if the Court had not resisted for a considerable time syncing the law with the practice of cooperation.

However, there is an undeniable link between distrust and the emergence of rights as norms with special force. It is in this spirit that the Court's understanding of fundamental rights has also evolved. The rule of law crisis encompassing systemic deficiencies in prison conditions and an erosion of judicial independence has perhaps urged the Court to consider the centrality of the rule of law and fundamental rights for the EU's identity. Of course, this is not a new idea. Fundamental rights have always been central to the development of EU constitutional law, but such a recognition, with a clear demarcation of values, was long needed in the AFSJ. It is, of course, not possible to find a certain causal link between mutual distrust and the strengthening of the position of fundamental rights. However, one must notice the correlation and contemplate the extent to which instances of distrust have been conducive to the construction of this new trajectory. The Court seems impelled to take a standard-setting position in contrast to domestic practices that threaten the constitutional value of fundamental rights, such as the right to judicial independence, which form the cornerstone of the rule of law. Exceptions to mutual recognition due to distrust, while strengthening fundamental rights, represent syncing law with reality. This is because of a previous dissonance between law axioms and law in context. However, sociopolitical realities could no longer be ignored.

EU law is a living instrument influenced by its crises. Rule of law crises in their various dimensions paved the way for the rule of law and fundamental rights to be properly recognised and reinforced. This is very important for the future of Europe, as fundamental rights form, and should form, a cornerstone for any discussion on integration. To this end, forging a clear understanding of rights is pivotal for the development of real trust among Member States, trust from EU institutions towards Member States and eventually trust in the EU project itself. Although the protection of fundamental rights has always been acknowledged as an important element of European law, it was 'law in context' shaped through crises that has compelled us to take rights seriously. We all agreed that rights are important

[114]Although others might disagree. See, for example, T.P. Margeury, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions', (2018) 25(6) *Maastricht Journal of European and Comparative Law*, 704.

[115]T. Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the Principle of Mutual Trust', (2016) 17(3) *German Law Journal*, 339, 341.

tenets in EU law, but until we faced the reality of implementing (EU) law conditioned by several events, attitudes and cultural tendencies, this was simply a motto easily forgotten when having to give effect to important policy objectives, such as security or migration control. It was not until we saw that prisons are overcrowded, migrants are being routinely treated in an inhuman way and judicial systems are threatened by illiberal forces dominating EU Member States that the need to actually take rights seriously became an imperative that shaped the law. From a law in context perspective, It has become vital to reflect on the normative foundations of EU law and the context of European integration to fully appreciate them and their trajectory.

ORCID


Ermioni Xanthopoulou https://orcid.org/0000-0001-9697-3947

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