

# Mutual Recognition: Promise and Denial, from Sapiens to Brexit

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**Abstract:** This contribution argues that the European crisis in general and Brexit in particular, can be seen to reflect the partial loss of the ethos of a principle that has been at the heart of the EU, namely mutual recognition. While familiar to legal scholars as a norm governing the integration of markets and the management of conflicts of law, the essay seeks to show how this principle bears on our current European predicament as a philosophical concept and a form of governance between states before dwelling on the intricacies of mutual recognition in the EU single market. Because recognition is sought, obtained or denied in all social spheres, every discipline has its own complex variation on this simple theme requiring to connect legal theory with anthropology, philosophy, history, sociology and international relations. The essay spans all these fields through eight takes (mutual Recognition shunned, invented, enshrined, constitutionalised, managed, ‘on trial’, lost, and for grabs) which can also be interpreted as different time horizons (from Sapiens to Brexit through Westphalia). Each take provides a variation on what is referred to as “mutual recognition paradox”, eg how to increase mutual engagement and mutual deference at the very same time.

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## Introduction

Let me start with a confession. In the last decade, I have been involved intensely in three national referendum campaigns, in the three countries that I call home, each time on the losing side: the French 2005 NO to a Constitutional Treaty for the European Union (EU), the Greek 2015 NO to EU-mandated reforms, and the 2016 British NO to the EU itself. What lessons should I draw (aside from my unemployability as a campaigner)? If failures are the great engine of our lives, as individuals or as institutions, we do need prisms to process them. Complacency will not do, as expressed by the propensity of European elites to dismiss these serial NOs by hoping to ‘re-elect the people’ as Brecht would quip, mocking their ignorance or asking for their acquiescence in being

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overruled. Nor can we rest content solely with telling the stories of disenfranchisement and resistance that led to these NOs.

Another side of the story rests with those among us who argued for YES from despair, all the while agreeing with parts of our detractors' disenchantment. Something has been lost we feel in the European story. But we can hope that it has not been lost forever and that if we name it we might recover it. This something is not just the commitment to loyal cooperation among EU countries and their leaders, or a sense of solidarity among European peoples, or the basic decency of European economic elites. Rather, I submit, it is an ethos, the ethos of mutual recognition. This, of course, is a very big label that can be attached to many things.

We all think we know what mutual recognition means. Remember the HSBC ad campaign that greeted airport travellers with 'Waterloo' signs alternatively stamped as 'victory' and 'defeat'. Can the British and the French ever recognize each other's standpoints?<sup>1</sup> Hence, we first understand mutual recognition as a state of mind—accepting to live and interact with the differences of others without neither trying to make these others like me nor isolating these differences in a ghetto of their own. But every discipline has its own complex variation on this simple theme, since recognition is sought, obtained, or denied in all social spheres. Hence, for this enquiry, International Relations (IR) scholars like me must turn to legal scholarship while *CLP*'s readership are invited here to turn to philosophy, history, sociology, or international relations.

Mutual recognition, complete with its ambiguities, spans many realities and requires many conceptual lenses. As Ricoeur most masterfully described it, we must follow a trajectory from simple recognition (Kant uses the term *Rekognition* to refer to our capacity to represent objects as phenomena) to the intersubjective concept of mutual recognition.<sup>2</sup> For him, *mutual recognition* is a way of accounting for how an unequal and conflicting relationship between two parties can be transformed or resolved by means of a reciprocal acknowledgement of their identities and values. It has to do with our shared entitlement to human dignity.<sup>3</sup> In his hierarchy of human impulses, Hobbes for his part placed the will for recognition as high as fear in a state of nature.<sup>4</sup> And Axel Honneth's

<sup>1</sup> For an account of another relationship between 'intimate antagonists,' see C Schrag Sternberg, K Gatzou and K Nicolaidis, *The Greco-German Affair in the Euro-Crisis: Mutual Recognition Lost?* (Palgrave-Macmillan 2017).

<sup>2</sup> P Ricoeur, *The Course of Recognition* (Harvard University Press 2005).

<sup>3</sup> *ibid.* See also J Bartelson, 'Three Faces of Recognition' (2013) 5 (1) *International Theory* 14.

<sup>4</sup> S Shapin and S Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life* (Princeton University Press 2011).

masterful social theory of recognition has offered a recent re-articulation of the Hegelian idea that recognition is obtained through struggle.<sup>5</sup> In my own field of international relations, we ask how the animal called 'state' not only comes into being but is sustained through recognition.<sup>6</sup> And of course, much of public and private international law has to do with adjudicating between different and clashing national laws and the question of what is to be done about foreign laws, standards, and judgements. I will not discuss all these dimensions in the following pages. Nevertheless, I will suggest that all of these facets are relevant to Brexit even if they were invisible to the average voter during the referenda debate.

How then does mutual recognition as an ideal translate into a state of the world, a fact of the matter, a diplomatic, regulatory, or legal norm? How does it migrate from a philosophical concept to a foundational norm in international relations, a form of governance between states, a legal principle governing the integration of markets and the management of conflicts of law? How does it help mediate the way we define our normative standards and interests? And how does it bear on our current European predicament?

This is a vast agenda that I invoke in this essay merely as backdrop to discussing the EU crisis, especially Brexit. We ought to view the story of the EU as an exemplar of a much bigger tale about a norm whose breach goes a long way in explaining the aforementioned NOs but whose promise justifies hanging on to the YESs. If the praxis of mutual recognition, its celebration and denial, has accompanied human interactions since the dawn of humanity, perhaps we can learn something by probing its ups-and-downs in the EU context.

I offer here a very abridged version of that bigger story through eight 'takes' which can be interpreted alternatively as different time horizons (from pre-historic times to the present through Westphalia), different disciplinary frames (anthropology, history, political science, law), or different phenomenological angles (eg different bits of the real world). Each take serves a different and complementary function in the story I want to tell, whereby human beings as social animals have always, one way or another, tried to deal with what I call 'the mutual recognition paradox', eg increasing mutual engagement and mutual deference at the same time. In

<sup>5</sup> A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press 1996).

<sup>6</sup> See *inter alia*, E Ringmar and T Lindemann, *The International Politics of Recognition* (Paradigm Publishers 2011); Bartelson (n 3).

each case, we can ask: how? What is at stake? And ultimately: can we recover the spirit of mutual recognition in Europe?

## Brexit or Mutual Recognition Shunned

Clearly, deciding what is the meaning of ‘leaving the EU’ is up for grabs, since only Algeria and Greenland ever accomplished it and neither of them was a Member State. But perhaps the mutual recognition lens helps us say something about what it is not or cannot be.

Before and after the 2016 UK referendum, a group of prominent Brexiteers met several times at Oxford University’s All Souls College to rehearse their argument. Our conversations made it clear to me that their commitment to ‘hard’ Brexit (or whatever label might be chosen) was not grounded above all in a resolve to stop immigration at the cost of access to the EU market. More profoundly, it rests with a single operating principle namely, unilateralism. This is the idea that ‘sovereignty’ can best be operationalized through unilateral action, which, crucially, is not just about unilaterally leaving but about unilaterally staying in. Pick the bits of EU law that we like and just decree that we are EU-equivalent and therefore deserve access. The idea of unilaterally doing the right thing is deeply seared in their collective imagination, harping back to the 1846 repeal of the Corn Laws, ‘one of the most glorious moments in British history’. It would make Brexit oh so easy! We are one postage stamp away from an ‘Article 50 goodbye letter to Brussels’.

But unfortunately for its proponents, the forcefulness of historical memory blinds them to the radically different nature of the challenge at hand. In truth, the limits of unilateralism do not lie with the easy assertion that concessions need to be bargained away to induce reciprocity: we give you access if you give us access. Rather, what our Brexiteers failed to understand, and are only now learning slowly and painfully, is the living and organic nature of European law. Over the last sixty years, EU Member States and their representatives have painstakingly woven a web of shared laws which do not simply sit on national books, there to be unilaterally repealed or retained. These laws and regulations are about the national policies, rules, standards, supervision mechanisms, certification procedures, accreditation processes, and the likes that will, under certain conditions and to different extent, be *recognized* by the other Member States. In effect, EU law works through the complex fabric of recognition that constantly needs to be adapted and interpreted in common either through political bargains or through court rulings.

You cannot just decree that by unilaterally keeping rule X or Y you are part of a system you no longer take part in actively. Without the complex mixture of mutual trust and mutual spying, actual long-term access remains superficial and fragile. This is the meaning of EU membership or lack thereof.

In truth, it is neither easy nor impossible to leave the EU, but unweaving the logic of deep mutual recognition cannot be a unilateral process. Let us first step back, to get a better sense of what is at stake.

### The *longue durée* or Mutual Recognition Invented

It is not far-fetched to suggest that much of the history of humanity has been about the struggle between ‘nomads’ and ‘settlers’, between those on the move across space and those who took root in a place, where place meant town and city before it meant nation state. But struggles also often turned into cooperation, as ultimately nomads and settlers needed each other to survive. Indeed, anthropologists have found ample evidence that federal type covenants simultaneously connecting nomadic and settled tribes on different scales date back tens of thousands of years in the early days of *Homo sapiens*.

What can anthropologists tell us then of the age-old encounters between nomads and settlers? And beyond what they tell us, what can we imagine? For one, we have come to understand that it is because early humans developed the capacity to internalize their mutual goals so well that they were able to coordinate complex activities leading to leaps in evolution unattainable by other species. We have come to label as empathy the ability to put oneself in other people’s shoes while using this ability to make one’s own mind up. Very basic cooperation does not require empathy but complex cooperation does—and the more capacity for empathy, the more early humans were able to take on projects together while anticipating each other’s needs. Without this capacity for empathy scientists tell us, our brain volume would not have grown along with our capacity for cooperation. And without this capacity for empathy, it would have been impossible for nomads and settlers to accommodate their respective goals.<sup>7</sup>

<sup>7</sup> The literature on empathy in neurobiology and psychology is vast. For a recent application to humanities and social science, see Å Assmann and I Detmers, *Empathy and its Limits* (Palgrave MacMillan 2016). See also K Nicolaidis, ‘My Eutopia: Empathy in a Union of Others’ in M Segers and Y Albrecht (eds), *Re:Thinking Europe, Thoughts on Europe: Past, Present and Future* (Amsterdam University Press 2016).

This capacity to empathize becomes all the more important when considering the role of norms in the search for peaceful human coexistence. In a world of only settlers and bounded communities, we could all rest content with a universalized sovereignty principle: to each its mores and laws and when in Rome do as Romans do.

Alternatively, in a world of ubiquitous nomadry it might make more sense to define and apply universal minimal norms of interaction shared by all: the *world* as Rome.

But in a world of both settlers *and* nomads, resorting to either of these approaches becomes problematic, as the bounded rules of settlers are connected and challenged through the movement of nomads who carry with them the imprint of their land of origin. The mutual recognition paradox then is expressed by the tension between the requirement for settlers to engage with each other through nomads and the requirement for nomads to defer at least in part to their hosts' norms.

In truth of course, identities can be fluid and overlapping, nomads can settle *en masse* and become 'minorities'—and settlers can be forced to move. But whoever fills the roles, we must contend with a world where nomads and settlers interact. And in this world, upholding both diversity and interdependence means precisely managing the extent, conditions, and limits of recognition of the other in our midst.

Mutual recognition then is the expression of empathy in action, since from empathy to recognition we move from 'taking in' a uniquely particular viewpoint to acknowledging each other's more abstract social identities—what is universal about them. And it is an ethos or a norm which can be deployed at many levels, through willing engagement or through struggles, between individuals, group, or nations, with interlocking dynamics across these different realms. We need to consider how what happens in each enables or constrains the other (for instance, how the denial of individual rights might be compensated by recognition between nations).

The EU can be seen as a specific instantiation of this universal story, a contingent, fluid, and contested contract between nomads and settlers, between the logic of space and the logic of place. Perhaps, it is unique to the extent that it is designed for nomads even while a huge majority of its inhabitants are sedentary. In this tension lies much of the EU's current predicament and a core source of the Brexit decision.

As a whole the EU has been designed and perfected as a 'space,' lending itself to the exercise of freedom, freedom to move, but freedom to move on a territory fundamentally defined by juxtaposed places, places with

boundaries which are altogether political, jurisdictional, or regulatory, as well as redistributive.

No wonder that it may be difficult to get mutual recognition right in such a space. And indeed, Brexit can be thought of *inter alia*, as the revolt of the settlers in a European space organized above all for the benefit nomads. While constituting 3 per cent of Europe's population (admittedly more if we include those who do not move in order to work like students, tourists, or patients), nomads are still the object of much of the focus of European law bent on making it easier for them to provide the glue between Europe's all too separate peoples.

But of course, mutual recognition did not become the normative core of the EU *ex-nihilo* or from first principles pertaining to the accommodation of nomads and settlers. To trace its pedigree, we need to resort to the power of historical memory and the associated myths that simplify the lessons of the past, which bring us to the realm of historians.

### Modernity or Mutual Recognition Enshrined

It can be argued that the most fundamental distinction between the political forms which prevailed for most of human history—empires, city states, overlapping feudal territories—and the nascent European system of sovereign states that progressively came to encompass the globe over the last century, is precisely the idea of mutual recognition, an idea fine-tuned and formalized over time in various connected spheres of socialization, at various levels of aggregation.

Through the lens of international relations, and even if its actual meaning is much contested nowadays, it is hard to escape the importance of the 1648 'Westphalian peace' in our collective historical imagination. Isn't the most widespread story about the European project today that the EU is a 'post-Westphalian' construct? What are we 'post-ing' exactly, and why, when we say post-Westphalia?

True, after a terribly bloody Thirty Years' War, Westphalia was about organized rivalry rather than institutionalized cooperation. And it took another Thirty Years' War three centuries later to finally bring about a lasting form of cooperation among European states in the guise of the EU. For those attached to the 'post' vein, Westphalia must be shunned in that it consecrated state sovereignty which in turn led to nationalist mayhem over time (actually most historians of political ideas would argue that it was but a small step in this consecration).

Nevertheless, sovereign equality, an idea if not a practice consecrated at Westphalia, remains the core philosophy of the EU. This is the core meaning of mutual recognition in international relations: political recognition leading to the recognition of ‘states’ as legal subjects of international law. Of course, such a political act covers a number of realities depending on what is meant by ‘state’—the construction called ‘state’, the successive governments representing this state, or the construct called ‘people’? But whatever its ultimate object, recognition and the granting of the status of legal entity is both a precondition and a consequence of peaceful relations.<sup>8</sup>

The true legacy of Westphalia however is elsewhere. First, this is where the interlocking dynamics of mutual recognition across different realms—between individuals, groups, or nations—somehow starts to structure political space in Europe. To massively simplify, Westphalia is about the relationship between intra-societal and inter-state recognition. To the extent that the struggles for individual rights, freedom of conscience and the likes of the preceding époque failed to deliver within bigger or more fluid entities like the Holy Roman Empire or feudal France, they came to be transmuted into the struggle for state rights and the reciprocal recognition of such rights.<sup>9</sup> Thus, the sovereign rights of states were driven not only by princes and monarchs as sovereigns but also, from below as it were, by those who sought to be protected from the whims of these sovereigns.

In short, the Westphalian settlement starts to bring together patterns of individual and state recognition in Europe, connecting social recognition between groups and diplomatic recognition between states. The conditions and contours of such (mutual) recognition were to be the object of inter-class and interstate conflicts in Europe for the next three centuries.

Secondly, and as a result, Westphalia offers today’s EU project an intuition far more powerful than the simple sovereignty story of non-interference between political entities seeking to get rid of Europe *imperium*, the will to dominate by individual states. For while it organized formal political and legal mutual recognition between sovereigns, that recognition was conditional on the protection of religious minorities on all sides: a ruler could not force its subject to change religion even if he

<sup>8</sup> R Wolf, ‘Respect and Disrespect in International Politics: The Significance of Status Recognition’ (2011) 3 (1) *International Theory* 105.

<sup>9</sup> C Reus-Smit, ‘The Struggles for Individual Rights and the Expansion of the International System’ (2011) 65 (2) *International Organization* 207. See also C Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton University Press 1999).

himself did, and dissenting tribes within his realm had to be ‘patiently suffered and tolerated’. Westphalia represents the beginning of the idea that conditionalities attached to sovereignty can be a key to peace rather than a pretext for war.

It is precisely the simultaneous enshrinement of sovereign recognition and its conditionality that makes Westphalia so relevant today, reminding us that states’ recognition of each other’s autonomy tends to be predicated on their *droit de regard* inside each other’s realm, and better still on at least some degree of mutual trust: *deference* and *interference* as two sides of the same coin. This is what I referred to earlier as the mutual recognition paradox. The very same speech act which means to say, ‘I will let you be’, also says, ‘by this very utterance I also open a wedge allowing me to peek into your domain, that domain that I have just recognized as autonomous and separate’. Mutual recognition is about enacting and denying trust at one and the same time.

At a systemic level, and if we take in the evolution of the international society of states as a whole, we find the same tension and duality. Mutual recognition serves both as a way *in* and a way *out* of what we think of as the anarchic international system. As a way *in*, we use it to explain how states are constituted in the first place through mutual *deference* as a kind of basic interaction, even if we may disagree as to whether mutual recognition is ‘a response to something that already exists, or [whether] it brings something new into being’.<sup>10</sup> As a way *out*, the concept and praxis of mutual recognition can mitigate anarchy precisely because it speaks to the *engagement* between peoples, groups, or societies and their intermingling as the ultimate result of the very conditions (the interference) that have brought interstate recognition about in the first place. Mutual respect for, combined with engagement with, differences is an inter-cultural and inter-societal idea beyond the diplomatic realm. Crucially it is not only demanded, granted, or withheld bilaterally but these dynamics take place under the implicit auspices of a third observer, be it the public sphere, anarchy, or democracy.<sup>11</sup> In short, mutual recognition is the thread that takes us from the formation to the transformation of the state system, and, who knows, perhaps eventually towards its transcendence, although this last step would also entail the negation of recognition (in its initial

<sup>10</sup> P Markell, ‘The Potential and the Actual. Mead, Honneth, and the “I” in B van den Brink and D Owen (eds), *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (CUP 2007).

<sup>11</sup> O Kessler and B Herborth, ‘Recognition and the Constitution of Social Order’ (2013) 5 (1) *International Theory* 155.

form at least).<sup>12</sup> Some argue that the concept serves to reproduce the current system while others counter that it will gradually propel the international system from a primitive state of war into a morally mature community of all mankind.<sup>13</sup>

To be sure, one may wonder how mutual recognition can be attributed so much power, altogether constitutive, reproductive, and transformative.<sup>14</sup> In my view, it is precisely this enigmatic quality, its apparent versatility that calls for apprehending mutual recognition through many disciplinary lenses and in many different contexts—a kind of cognitive triangulation.

Thankfully for the reader, I will not journey here through the intervening 300 years since Westphalia.<sup>15</sup> But what we can say is that many peace-shapers throughout these centuries, from political and legal philosophers to statesmen, came back over and over again to three broad types of interrogations, that I believe are still with us today, and which I will refer to, for short, as the Hegelian, Kantian, and Grotian questions associated with mutual recognition:

- The (horizontal) Hegelian question, about the ‘mutual’ in mutual recognition, and whether this is about equality or merely about reciprocity.<sup>16</sup> In other words, how do we deal with the asymmetries of power that unavoidably underpin mutual recognition systems? Should mutual recognition be about mitigating asymmetries of power or do mutual recognition regime unavoidably reflect and reproduce hierarchies of status? Should smaller states in the system be considered as dispensable distractions or indispensable balancers, the object of formal or true recognition?
- The (vertical) Kantian question, about who should be doing the recognition, and how mutual recognition between states ought to be anchored in vertical recognition of ‘popular sovereignty’—or some version thereof, and managed through an overarching system of rule and authority.<sup>17</sup> In other words, how do we bring

<sup>12</sup> *ibid.* For a discussion in the EU context, see K Nicolaidis, ‘The Idea of European Democracy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012).

<sup>13</sup> Bartelson (n 3) 107–29

<sup>14</sup> *ibid.*

<sup>15</sup> See *inter alia*, ‘Introduction’ in J Lacroix and K Nicolaidis (eds), *European Stories: Intellectual Debates on Europe in National Contexts* (OUP 2010).

<sup>16</sup> See *inter alia*, RR Williams, *Hegel’s Ethics of Recognition* (University of California Press 1997). For a masterful Hegelian reinterpretation through social theory, see Honneth (n 5).

<sup>17</sup> MC Williams, ‘The Discipline of the Democratic Peace: Kant, Liberalism and the Social Construction of Security Communities’ (2001) 7 (4) *European Journal of International Relations* 525.

the people and democracy in the interstate equation? If Kant is right and democratic peace requires adding a *jus cosmopolitanus* to domestic and international law, how deep is the obligation of hospitality at the core of this cosmopolitan ideal? How do we bring mutual recognition ‘all the way down’ to the level of individuals, if these individuals are not truly party to the dealings between their states? And given asymmetries of power, to what extent does the mutual *droit de regard* implied by recognition need a referee, and how powerful should this referee be?

- The (global) Grotian question, about the scope of recognition and its universal reach.<sup>18</sup> How can we justify—or with time *can* we justify—unilaterally determining any kind of standard of civilization, standards which in turn justify applying different rules of recognition within and outside Europe? If Grotius wrote of a common law among nations implying the mutual recognition of natural law between nations, how did he reconcile this take with what he defended as the privileged status of Christianity? . . . There are those in Beijing who to this day have not forgotten the Duke of Argyle’s pronouncement during the Second Opium War that ‘It is supreme nonsense to talk as if we were bound to the Chinese by the same rules which regulate international relations in Europe’!. . . In other words, how do we resolve the tension in mutual recognition, between the bilateral logic implied by engagement, respect, reciprocity, compatibility and an aspiration to universality?<sup>19</sup> Ultimately, isn’t mutual recognition always also a form of exclusion and therefore a source of potential conflict between the ins and the outs of a given ‘recognition order’?<sup>20</sup>

Perhaps it is useful to ask how the same interrogations can remain relevant in such different times, including under the umbrella of the *sui generis* political entity, the EU, which emerged three centuries after Westphalia in the wake of the most destructive and global war of all. Perhaps citizens tempted to shrug off the weight of the EU system of rules need to be reminded that their ancestors had to confront the same age-old questions. If cooperation is a precious prize, isn’t it normal to pay a price for it? How

<sup>18</sup> E Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (CUP 2002).

<sup>19</sup> K Nicolaidis and others, ‘From Metropolis to Microcosmos: the EU’s New Standards of Civilisation’ (2014) 42 (3) *Millennium* 718.

<sup>20</sup> Kessler and Herborth (n 11); RN Lebow, *Why Nations Fight* (CUP 2010); T Lindemann, *Causes of War: The Struggle for Recognition* (ECPR Press 2010).

intrusive should the conditions for recognition be? How should they be negotiated? Who should be in charge of their peaceful enforcement?

## EUtopia or Mutual Recognition Constitutionalized

The story of humanity's post-wars designs always start with war stories. The one which inhabits me these days, was told by a very old friend who recently died called Stanley Hoffmann. At the age of 15 in 1944, Stanley finds himself hiding with his mother in Provence, in a village occupied by German soldiers most of whom are barely older than him. In the story, Stanley and his mother, originally Austrian Jews and the only ones in the village to understand German, manage to listen to their occupants as they open letters from home, letters full of catastrophic news of bombardments and death. And so, they pass on the message to the villagers, that in truth the boys in Nazi uniforms are *malheureux comme des pierres* (as sad as stones), and the villagers in turn instruct their sons in the *maquis* of the surrounding hills not to shoot. When the village was liberated in 1945, he recalls, not one drop of blood was shed. Ripples of empathy in the mist of Inferno.<sup>21</sup>

Did these pockets of humanity, drops of recognition in an ocean of terror, help make reconciliation possible after the war? Or was the European project on the contrary driven by a desire to escape, escape not only the scourge of dominion by successive would-be European super-power, but escape the pervasive denials of recognition of close others, neighbours as intimate enemies, which led to the appalling crimes committed in the myriads of local battles for supremacy throughout Europe *after* World War II?<sup>22</sup>

Mutual recognition in Europe post-1945 was first embodied by the yearning for reconciliation—the European dream that enemies can become neighbours and neighbours can become friends. And the story of the EU's creation in the 1950s takes us from reconciliation to institutions—the admission that the dream cannot do all the work by itself.

The EU story has many strands including on the dark side a messianic zeal on the part of those who captured the process in the name of *techné* and in contempt of the people. It is this technocratic, centralizing, anti-

<sup>21</sup> See Nicolaidis (n 7).

<sup>22</sup> See *inter alia* K Lowe, *Savage Continent: Europe in the Aftermath of World War II* (Viking 2012) and M Mazower, *Dark Continent: Europe's Twentieth Century* (Vintage 2009).

democratic strand in the EU story which has given many ‘intellectual Brexiters’ their sting and passion. They forget that this is only one strand, and that perhaps just perhaps this strand might have been a *necessary* sin stirring the European project away from something else they should dislike even more—grand designs of pan-European democracy—as if Europeans were one people, one people to be governed by one state. Better to rely on technocracy for cooperation and *only then* unleash our democratic exigencies upon it. We live in a world of second bests.

For if transnational democracy was not in the EU’s DNA, mutual recognition which is its precondition, figures centrally in this story, above all because the EU was constructed as an anti-hegemonic not an anti-national, project. Three hundred years after Westphalia, the idea of Union did prevail over two alternatives: the closure of sovereignty that tends to morph into nationalism and the creation of a new Euro-nationalism. But—and this is crucial to our story—to remain complementary to the idea of European nations while overcoming nationalism, what ‘the nation’ meant had to be transformed too. The EU did not shirk the Hegelian question of power in its attempt to build as it was as a project of deepening mutual recognition among nation states through the mitigation of power asymmetries between smaller and bigger ones.<sup>23</sup> This may have been too ambitious, but it was the promise of recognition. And while it is this promise that has been betrayed by Germany’s ‘reluctant hegemony’ ushered in by the Eurocrisis, that betrayal cannot in itself render the promise void: the EU’s institutional capital remains, even if under capture.

At creation, the EU’s institutional design subscribed to equality between states with a vengeance, from weights of votes, to numbers of representatives and commissioners to the rotating presidency which meant that France = Luxembourg. The recognized status of ‘smaller’, ‘peripheral’ or ‘poorer’ states was supposed to reflect the nature of the EU as an anti-hegemonic state-centric project, as later reflected in the 1993 Maastricht Treaty: ‘The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy (art F.1).’

I have long argued that under this scenario, mutual recognition serves as the normative compass of integration, not only as a diplomatic and legal norm but also as a social transnational norm. In this ideal world, democracy is neither transcendent and above the state as a Euro-wide

<sup>23</sup> K Nicolaidis and P Magnette, ‘Coping with the Lilliput Syndrome: Large vs. Small Member States in the European Convention’ (2005) 11 *European Public Law* 83.

ideal, nor can we leave national democratic spaces intact. Instead, the latter must be radically open to each other precisely in order not to merge as one single continental democratic space. I call this ideal vision, this third way, *European demoicracy*, defined as ‘a Union of peoples governing together but not as one’.<sup>24</sup>

Democracy is not reducible to the assertion of the ‘s’ of peoples. Instead, it is an injunction to those who cherish sovereign autonomy that such autonomy comes at a price when you want to reap the benefit of intense interdependence. The price is openness, but the kind of openness compatible with national autonomy. With time, an enlarged mentality may emerge—as Kant would have it—of thinking and judging from the point of view of everyone else, an enlarged mentality of enough European citizens and their institutions as to transform the way they imagine their own identities and interests. The demoicratic ideal is an injunction to ring-fence the protection of diversity in Europe, not to cross the Rubicon of statehood, not to try to reach the other shore where the degree of institutionalized convergence, harmonization and assimilation renders mutual recognition mute: mutual recognition is about sustained *and* subverted difference between peoples. The demoicratic idea focuses on horizontality and horizontally intertwined polities as opposed to the vertical transfer of sovereignty—pursuing the latter only as a means to the former.

Under this vision, to the extent that European peoples would not merge into one single European people, this would remain a Union of others, not in the essentialist understanding of other ethnic nationals, but in the sense that different political communities forge their own ‘overlapping consensus’ through their own political ways and languages, their own political bargaining mode, their own notions of the role of the state, etc. The challenge for the EU has been to build a supranational overlapping consensus of existing national overlapping consensuses. This is

<sup>24</sup> K Nicolaidis, ‘European Democracy and its Crisis’ (2013) 51 (2) *Journal of Common Market Studies* 351. See also F Cheneval, S Lavenex and F Schimmelfennig, ‘Demoi-Cracy in the European Union: Principles, Institutions, Policies’ (2015) 22 (1) *Journal of European Public Policy* 1; F Cheneval and K Nicolaidis, ‘The Social Construction of Democracy in the European Union’ (2016) 16 (2) *European Journal of Political Theory* 235; K Nicolaidis, ‘The Idea of European Democracy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012); R Bellamy, ‘“An Ever Closer Union Among the Peoples of Europe”: Republican Intergovernmentalism and Demoicratic Representation within the EU’ (2013) 35 (5) *Journal of European Integration* 499; M Ronzoni, ‘The European Union as a Democracy: Really a Third Way?’ (2016) 16 (2) *European Journal of Political Theory* 210.

compromise through confrontation rather than a single overarching political order.

In short, if the EU is to be more than an alliance of states while remaining a community of others, its peoples need to connect through multifaceted and deep forms of political and historical mutual recognition. If it is not to become centralized, the system depends on states taking responsibility for the ways in which they deal internally with their own externalities. It is this dual aspiration and its translation through shared institutions in the EU that we can designate as the *demoicratic deal*: the preservation of national or group autonomy predicated on a commitment to others outside the circle of autonomy.

Here, mutual recognition across borders refers to the entire realm of social interactions: identities and cultures, political traditions, social contracts, historical grievances and memories. It is on this basis that European peoples are supposed to accept, or better wish, to mutually open their democracies to the peoples of other Member States.

What does this demoicratic philosophy imply for EU law? Much ink has been spilled in particular on the compatibility between the revised identity clause of the Lisbon Treaty (the Lisbon Treaty's calls for the respect national constitutional identities in its Article 4.2), and the primacy principle as well as the commitment to loyal cooperation under EU law. While the actual meaning of these three clauses is much debated and has given rise to a growing European Court of Justice (ECJ) jurisprudence on Member States' margin of discretion, it is this very tension that is at the heart of a demoicratic polity.<sup>25</sup> There is little doubt that the highlighting of national constitutional identity helps question the assumption of a hierarchical model for understanding the relationship between EU law and domestic constitutional law, and endorses a pluralistic vision of this relationship.<sup>26</sup> This diagnosis in turn reflects the highly popular take on EU law which has flourished in the last 15 years under the label of Constitutional Pluralism.<sup>27</sup> But what does '*national constitutional*

<sup>25</sup> For a detailed discussion, see, for instance, E Cloots, *National Identity in EU Law* (OUP 2015). See further F-X Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in L Azoulai, (ed), *The Question of Competence in the European Union* (OUP 2014); H Eklund, 'National Margins of Discretion in the Court of Justice of the European Union's Adjudication of Fundamental Rights: Studies of Interconnectedness' (EUI PhD Thesis 2016).

<sup>26</sup> A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 (5) *Common Market Law Review* 417.

<sup>27</sup> See *inter alia*, N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 (3) *Modern Law Review* 317; MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 137.

*identity*' mean? Reduced to an affirmation of national legal sovereignty 'when it matters' it would only offer one half of the democratic ideal. Instead, one would need to ask whether the 'national' itself is understood in a pluralist way or whether it is reified as an essentialist and closed concept which fails to 'take into account' the interests and concerns of others. How does the 'national' extracted from a constitution differ from the 'national' extracted from exclusionary ethnic arguments? Can we hope that 'national constitutional identity' does not turn into a call for closure? And how should European-level 'constitutional patriotism' *a la* Habermas, be reconciled with such a commitment to national constitutional identity?<sup>28</sup> This is a debate which will test the spirit of mutual recognition in the EU at its core.

Now of course, not all has gone according to this recognition plan in the last 60 years since the creation of the EU. We could tell the story of the EU as a series of trial-and-errors on the mutual recognition and democracy road. We would show how sadly and too often, European idealism lost its way by following the messianic injunction for oneness as European wheelers and dealers forgot this foundational ideal. We would argue that this is the deeper cause of euro-scepticism, as people around Europe yearn for 'taking back control', weary of processes they did not connect to.

Most generally, we can more fruitfully read both the original promise of the 20th-century European project and its 21st-century demise through the twin prisms of mutual recognition. But the devil is in the details. Legal theorists will be familiar with the contested micro-application of mutual recognition to kir, banks, plumbers, drugs, criminals, or refugees. Let me pick up these threads below.

## The Single Market or Mutual Recognition Managed

The single market is the birthplace of mutual recognition in its legal and technical guise in the EU context. It is all-the-more significant that over the years, the way it was applied in the EU provided a template for the export of mutual recognition beyond its shore, a point I will come back to shortly.

The mutual recognition angle gives us two perspectives on Brexit that are in tension with one another. On one hand, it speaks to how the

<sup>28</sup> See J Lacroix, 'For a European Constitutional Patriotism' (2002) 50 (5) Political Studies 946.

Brexiters delude themselves in wanting to believe that ‘access’ to the single market can be similar to ‘membership’ of the single market and that they can find refuge in vague talk of equivalence: a mutual recognition regime is a complex organic thing!

On the other hand, the mutual recognition story also speaks to the inflexibility of some EU lawyers who seems to deny that a new species of state is conjured up with Brexit, namely the ‘former EU member-state’.<sup>29</sup> As such, Britain will not simply be a third country which cannot fit under the mutual recognition umbrella. If mutual recognition is about accommodating ‘legitimate differences’ why could it not accommodate the British one?

So what does the tension thus stated mean for Britain’s mutual recognition status in the single market after Brexit?

A rather long detour is necessary to address this question.

If we started with the EC 1957 Treaty of Rome, we would only find one mention *en passant* of the term ‘mutual recognition’ as a legal injunction—about the business of universities, namely professional qualifications. It took a while to make this happen, but, roughly, in Europe today, if you are qualified in one place, you are qualified everywhere. For everything else in the decades that follow, EU lawmakers were busy exploring the main alternative to national treatment (‘when in Rome do as Roman do’) which meant a fragmented not common market across borders: all out harmonization.

We need to wait 20 years and the 1979 *Cassis de Dijon* ruling for the discovery that mutual recognition is not just a better but the *only* alternative to harmonization and national treatment if you want your firms, goods, and people to move in the European space under a single rule and a single regulatory authority, even while avoiding centralization.<sup>30</sup>

Over the following decades, the familiar story unfolds of the unbundling between territoriality and jurisdiction in the EU, with the

<sup>29</sup> See K Nicolaidis, ‘Brexit Arithmetics’ in J Armour and H Eidenmüller (eds), *Negotiating Brexit* (Hart Publishing 2017).

<sup>30</sup> The literature on the *Cassis de Dijon* judgement is vast. For an overview, see, for instance, C Janssens, *Mutual Recognition in the European Union* (OUP 2013); C Barnard, *The Substantive Law of the EU* (OUP 2016); S Weatherill, *The Internal Market as a Legal Concept* (OUP 2017). I have expanded on the legacy of *Cassis* from a political science viewpoint in: K Nicolaidis, ‘The *Cassis* Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees’ in B Davies and F Nicola (eds), *European Law Stories: Critical and Contextual Histories of European Jurisprudence* (CUP 2017); and K Nicolaidis, ‘Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition’ in L Azoulai and M Maduro (eds), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart Publishing 2010).

astonishing expansion of mutual recognition as the EU dominant norm along three dimensions:

First in (*universal*) *reach*: turning this *judicial* principle of ‘recognition of equivalence’ which is about unidirectional recognition by one state of another state’s standards, into a *political* principle of ‘mutual’ recognition. While judicially mandated recognition is an obligation of *process* through which each Member State has to consider the other, mutual recognition turns this process into a *bona fide* multilateral regime.

Secondly in *scope*: generalizing *Cassis* from alcoholic products to all products, from underlying standards to the actual authorities entitled to authorize, certify, or stamp them, and crucially, from goods to services. And later as a blueprint beyond economic integration to criminal justice, starting with the mutual recognition of judgments and arrest warrants.

Thirdly in *depth*: from a constrained assessment of *equivalence* between home and host countries’ rules, to a political judgment, which does not necessarily need to be made on a careful case-by-case basis, but can be predicated on a host of other factors like trust, solidarity, proximity, political mood, linkage politics, and paternalism.

I said ‘the familiar story’ because the true story of mutual recognition and the single market is of course more complicated and interesting. It asks about residual sovereignty retained by the host state, about the stubborn and eternal assertion of the territorial over the functional logic—‘when in Rome’ will not die without a fight!

And indeed, I would argue, the true spirit of mutual recognition remains the same since our earlier mentioned early sapiens: to strike the right balance between tolerance of home rules and control on host soil, the home rules of nomads, the host soil of settlers.

In truth, mutual recognition in action in the EU was not supposed to entail a wholesale horizontal transfer of sovereignty, but rather it was a kind of exercise in legal empathy, if I can put it that way, the ‘taking into account’ of home rules—through principles known in the legal jargon as proportionality, balancing and the rule of reasons which regulate the ways Member States can apply under specified conditions their own regulation to incoming goods and services.<sup>31</sup>

In my own work, I label this more complex version of mutual recognition ‘managed mutual recognition’ and I show how it results from the eternal dance between law and politics, judges and princes, and their respective courts.<sup>32</sup>

<sup>31</sup> On legal empathy, see Nicolaidis (n 7).

<sup>32</sup> For discussions on the concept of ‘managed mutual recognition’, see *inter alia*: K Nicolaidis and G Shaffer, ‘Transnational Mutual Recognition Regimes: Governance

In this story, the magic ingredient that is supposed to make the mutual recognition potion work for us is of course trust.<sup>33</sup> If trusting the other is to seek to bind her to one's expectations, then such trust requires prior and continued knowledge about such other as well as a consensual form of mutual spying to ensure that we will all refrain from cheating in the blind spots of our commonly agreed minimal standards, the standards that make us compatible in the exercise of mutual recognition. In other words, for recognition to work we need binding trust rather than blind trust. With time, changes in the scale and purpose of the interaction may change the balance between the two. And it is these cycles which in turn must determine the evolving ways in which mutual recognition between laws, standards or regulations is managed over time.

Managed mutual recognition, as a result, can be partial in scope (say recognition in insurance for corporate risk but not mass risk) or conditional and therefore offering various degree of automaticity of access (eg, residual host country requirements for lawyers such as entry exams or training period in the host state). A lack of trust between parties can be compensated in various ways through both *ex-ante* and *ex-post* conditions, including safeguards against change through partial or total reversibility of recognition. And the management of mutual recognition can be viewed as a process, involving trade-offs between these dimensions that may change over time.

It is this flexible and dynamic character that has allowed recognition to become such a pervasive principle. But here we find again, as we did when we were considering the duality of mutual recognition as a principle

without Global Government' (2005) 68 Michigan Review of International Law 267; K Nicolaidis, 'Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals' in F Schioppa, *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005) 129; K Nicolaidis and J Trachtman, 'From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS' in P Sauve and RM Stern (eds), *Services 2000: New Directions in Services Trade Liberalization* (Brookings Institution Press 2000); K Nicolaidis, 'Regulatory Cooperation and Managed Mutual Recognition: Developing a Strategic Model' in G Bermann and others (eds), *Transatlantic Regulatory Cooperation* (OUP 2001).

<sup>33</sup> On trust and the single market, see *inter alia*, I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012); K Nicolaidis, 'Trusting the Poles, Mark 2: Towards a Regulatory Peace Theory' in Lianos and Odudu (eds), *ibid*; K Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 (5) *Journal of European Public Policy* 682; A Bogdandy, 'Trustworthiness and the Rule of Law: What the Critics of the EU Do Not Want' (VerfBlog, 25 April 2017) <<http://verfassungsblog.de/vertrauenswuerdigkeit-und-rechtsstaatlichkeit-was-die-kritiker-der-eu-nicht-sehen-wollen/>>; N Luhmann, 1968: *Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität*, Stuttgart: Enke [English translation: *Trust and Power*] (Wiley, 1979).

governing the relation between states, the tension between *interference* and *deference*, with emphasis on one side or the other.

On one hand, mutual recognition goes too far. As ‘legal empathy’ it forces states, their lawmakers and regulators into a constant confrontation between their own system and that of others, ruling out social and regulatory parochialism but also local protection. Take for instance perhaps the most infamous *intrusive* judgments in the free movement case law, *Viking* and *Laval*, to which I will come back.

On the other hand, we have the opposite critique whereby too much *deference* prevails when the kind of conditions that apply for recognizing another state’s standards as equivalent are subject to so much creative interpretation that arguably mutual recognition does not really exist.<sup>34</sup> To be clear, primary EU law does not dictate that if products are good enough for one Member State, then they are good enough for all Member States. Instead it demands only ‘that the more fastidious State shall demonstrate why they are not good enough for it and, as part of that process of justification, it must as a matter of EU law comply with the procedural disciplines which the court has attached to the basic free movement norms’.<sup>35</sup> As a result traders will often face an arduous task when they are confronted by national rules and practices that obstruct their access to a market if they want to challenge them in court. Advocates of free trade can use EU law and the courts to secure the disapplication of unjustified national measures but not to deregulate against the wish of national regulators. There is thus what we can call a space of regulatory freedom within which states are allowed to show that ‘justification for trade-restrictive practices is of crucial importance to ensuring the EU’s internal market is not a process of remorseless deregulation, but rather a site within which diversity in national regulatory choices is managed, checked but, provided it is shown to be sincere, respected’.<sup>36</sup> In this sense, and to the extent that the ECJ ultimately gives the benefit of the doubt to trade restrictive measures truly inspired by the public good, obligations of mutual recognition do not and should not trump domestic objectives.

<sup>34</sup> The argument is made by S Weatherill, ‘The Principle of Mutual Recognition: It Doesn’t Work, Because it Doesn’t Exist’ (forthcoming) *European Law Review*; and S Weatherill, ‘Why There is No “Principle of Mutual Recognition” in EU Law (and Why That Matters to Consumer Lawyers)’ in K Purnhagen and P Rott (eds) *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) 401.

<sup>35</sup> Weatherill, ‘The Principle of Mutual Recognition: It Doesn’t Work, Because It Doesn’t Exist’, *ibid.*

<sup>36</sup> *ibid.*

Is it the case, therefore, that embedded liberalism, liberalism that is firmly embedded in the national context, is safe?<sup>37</sup> Not necessarily. We can note that the ECJ in recent case law (eg *CIA security*), and the Commission in support, in their frustration at national inertia in respecting the single market freedoms, have taken steps that may still dis-apply national regulations altogether, as when the court announces that if a Member State does not notify a new standard under the mutual recognition regulation, that national standard does not apply at all to out-of-state traders.<sup>38</sup> Is this a necessary step or going a step too far? To address this question, we need to turn to a person-centred perspective on mutual recognition.<sup>39</sup>

### Citizen Angst or Mutual Recognition on Trial

The story of mutual recognition and the single market is not just about the confrontation between cross-border traders and ‘intransigent national bureaucrats’ or conversely promoters of private versus public interest. It is also a story about citizens, as consumers and workers, and as the ultimate source of legitimacy for the rules applied on a given territory.<sup>40</sup> We are back to the Kantian question of the relationship between the horizontal relationship between states and their lawmakers and the vertical relationship between states and their citizens. In 21st-century terms, we need to think about the *problem of translation* from the realm of law to that of democratic politics, a translation failure which plagues the Brexit debates to this day.

<sup>37</sup> JG Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 (2) *International Organization* 379–415; See also R Howse and K Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far’ in RBB Porter and others (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institute Press 2001) 227.

<sup>38</sup> Regulation 764/2008, referred to as ‘Mutual Recognition Regulation’ lays down procedures relating to the application of national technical rules to products lawfully marketed in another Member State. For a discussion on how it fails to subject national laws and practices to sufficient scrutiny, see Weatherill, ‘The Principle of Mutual Recognition: It Doesn’t Work, Because It Doesn’t Exist’ (n 34).

<sup>39</sup> See K Nicolaidis, ‘Trusting the Poles, Mark 2’ (n 33). For a systematic discussion on a person-centred perspective on European Law see L Azoulai, SB des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Bloomsbury Publishing 2016).

<sup>40</sup> See D Kochenov, *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

This is the important twist—the story is not only about legal technicalities, it is about mutual recognition all the way down—how citizens who are affected by national and EU standards—and are supposed to contribute in shaping them—perceive and participate in the process of legal mutual recognition. In a truly democratic polity, recognition ought to be ‘managed’ in such a way as to respect self-government in an interdependent world. Kant spoke about democratic peace. This bit of the puzzle is about regulatory and jurisdictional peace as one of the by-products of a transnational polity.<sup>41</sup> If the mutual recognition regime which underpins the single market stems from the laudable goal to perfect horizontal regulatory and administrative cooperation rather than create a whole new vertical supranational umbrella, while avoiding litigation through dialogue whenever possible, it must ultimately confront national publics.

One of the most prominent examples of the politicization of law can be found with the saga around the 1996 posted workers directive, which allows foreign companies to hire (cheap) workers in one EU country and then post them to a richer one while obeying some but not all local employment rules. When the ECJ was asked in the *Laval* and *Viking* cases, it inferred that obligations of recognition included national-level collective bargaining (or lack thereof), a reading which for many opened up free movement to abuse, leading critics to equate mutual recognition with deregulation and social dumping. But the blame in my opinion lies with reading the directive as an imperative for pure recognition as opposed to ‘managed recognition’ thus failing to consider the impact on public interest of dis-applying host state rules.<sup>42</sup>

Many of us will remember how the run up to the 2005 French referendum on the Constitutional treaty happened to coincide with the public consultations around the infamous *Bolkenstein* services directive which sought to enshrine the country of origin principle as the unalloyed way to regulate services across borders—a less host-state friendly version of the *Laval* and *Viking* jurisprudence applied beyond posted workers.<sup>43</sup> At the time, simply to utter support for the principle ‘*du pays d’origine*’ whether

<sup>41</sup> On the application of Kant’s democratic peace theory to ‘regulatory peace’, see K Nicolaidis, ‘Trusting the Poles, Mark 2’ (n 33).

<sup>42</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (2007) ECLI:EU:C:2007:809; Case C-438/05, *International Transport Workers’ Federation v Viking Line ABP* (2007) ECLI:EU:C:2007:772. See also M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014).

<sup>43</sup> See K Nicolaidis and S Schmidt, ‘Mutual Recognition “on trial”: the long road to services liberalization’ (2007) 14 (5) *Journal of European Public Policy* 717.

in Paris' streets or in highbrow intellectual circles was enough to have one excommunicated to the burning hell of heartless neo-liberalism.

Indeed, pollsters reckon that the bogey man of the Polish plumber bent on undercutting his French counterparts on the basis of his home-only standards, bares significant responsibility for the 2005 NO vote by the French electorate and thus the aborted attempt at formally constitutionalizing the EU.

Who are the real culprits?

Let us face it; the French did not trust the Poles—meaning Polish standards. For them the Polish plumber who carried in his bag his home rules alongside his tools was synonymous with the dreaded 'race to the bottom'. In this story, the case law of *Laval* and *Viking* had taken on Constitutional proportion. The Brexit NO a decade later in part partook in this unease—too much of the other and their work ethic brought on to my home soil, even when no formal legal recognition is involved at all. In short, integration between states in the name of interstate peace ends up endangering integration within states in the name of social peace.

They may not be ready to vote for Frexit, but the French still don't trust the Poles. The first announcement coming from French Prime Minister Manuel Valls in the wake of the 2016 Brexit vote was that France would demand that the posted-workers directive tighten the screws on host state control, in other words shun any residue of mutual recognition when workers move temporarily to another state. And immediately after his election in 2017, French President Macron forcefully campaigned to change the posted workers directive and enforce 'the same pay for the same work in the same place'. As with Brexit, albeit in a different way, free movement is testing the limits of mutual recognition.

To be sure, the French are unreasonably sovereignists when it comes to plumbers or anyone else for that matter (the French variant of taking back control is not to stop people at the border but to turn them into Frenchmen). One could explain to them that applying country of origin rules is a way for the Poles to cash in on their comparative advantage, just as liberals argue for international trade in general when labour competes at a safe distance. But they would have grounds to respond that beyond a certain threshold, differences are unfair advantages, especially when a worker moves and therefore works in the same context as his competitors without taking on the kind of *acquis social* they have fought for so long. Simply put, what I call face-to-face social dumping is sociologically less acceptable than long distance competition even if the two are economically equivalent. Should we not accept that the logic of comparative advantage does not operate in the same way when a person

carries it with her to a new host country where nomads and settlers must coexist?

Which side is right depends on a host of factors—the real question is who decides, courts? Parliaments? Public opinion? And who decides in whose name? If we turn back to our initial *longue durée*, the fault lies in part with the intrinsic logic of free movement, the very foundation of the EU single market which privileges the logic of space—the free movements for nomads—over the logic of place—that preferred by settlers attached to local rules and sleeping securely at night in the knowledge that ‘when in Rome . . .’. Too often, lawmakers fail to apply the wise guidelines of ‘managed mutual recognition’, which is about balancing these two logics.

Conceptually, let us think of this challenge in terms of the risk of conflation between recognition and ‘country of origin principle’ on one hand, and recognition and ‘equivalence’ on the other.

### Mutual recognition versus ‘country of origin’

In terms of philosophical legal doctrine, the issue here is one of the ultimate locus of sovereignty where the two principles do belong to different logics: with country of origin, a conflict-of-law rule is simply applied, attributing competences *a priori*, while with mutual recognition, sovereign control stays with the host country albeit constrained by obligations of ‘other-regarding-ness’ when it considers to what extent it should apply its own regulations. This is precisely the point of ‘mutuality’—states are all asked to compare the regulations of the host and home state rather than engage in a positive attribution of competence to the home state, the ‘country of origin’. And yet, the amalgam is understandable in terms of results, since the country of origin principle is simply the equivalent of ‘pure’ mutual recognition whereby regulatory authority is wholly transferred to the home state, either irrespective of that state’s regulations or after due consideration of these regulations.

Crucially, the missionary zeal, which takes the principle of mutual recognition to its extreme as wholesale transfer of sovereignty to the country of origin, *assumes* trust rather than sets out to ensure that everyone has earned it. Looking beyond the single market, this was the fundamental mistake in the design of the single arrest warrant during the post 9/11 frenzy: each Member State was asked to trust the judicial system of all others, and thus entrust them with a responsibility for fair treatment. Sure, the imperative to mutually recognize each other provides an impetus to cooperation between national criminal justice systems, but at

what cost? Should recognition not follow or at least accompany the progressive increase of trust rather than precede it? Crucially, the trust in question is not only on the part of courts but also on the wider public that identifies with victims or offenders. Interestingly, the UK is one of the countries that has most availed itself to the safeguards built-in the single warrant even if the application by analogy of mutual recognition to the area of Justice and Home Affairs in general (in both civil and criminal matters) at the 1999 Tampere Summit was a British initiative—as a way to overcome demands for harmonization of substantive aspects of their criminal laws.<sup>44</sup> There seems to be little reason for the EU27 not to acquiesce to British demands for the status quo after Brexit in this area, except for the hope by some that progressive harmonization may eventually prevail.

Some would argue along the same lines in the case of financial services, where EU Member States, including the UK, have agreed to a ‘single rule-book’ of financial regulations, which since the financial crisis is written through EU-level sectoral agencies.<sup>45</sup> In return, financial services firms that obtain authorization from their ‘national competent authority’ can offer services throughout the EU under what is known as the single ‘financial services passport’—under the sole supervision of their home country. Critically, detractors contend that while this system did allow for financial integration (a good thing), it may have lacked the necessary safeguards in the context of the 2008 financial crisis. It is unsurprising that a public alerted to the dramatic risks of spillover of bad regulatory supervision from one jurisdiction to the next might turn against unmitigated mutual recognition in finance.

When it comes to post-Brexit Britain, some EU Member States are tempted to argue that the single financial passport is a pure form of mutual recognition which is only warranted if states trust each other’s rules and can ensure ongoing trust through oversight of each other’s banks (a task entrusted to the European Central Bank (ECB)). Will the UK remain trustable? To be sure, its future status as a ‘former member state’ warrants a unique approach simply because the UK is already part of the EU’s mutual recognition regime and thus already ‘EU compatible’. To the extent that managed recognition within the EU does include as its

<sup>44</sup> K Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford 2015). See also P Craig and G de Búrca, *The Evolution of EU Law* (2nd edn, OUP 2011).

<sup>45</sup> There is, of course, a vast literature on this topic. For a discussion in the context of Brexit, see J Armour, ‘Brexit and Financial Services’ (2017) 33 (1st supp) *Oxford Review of Economic Policy* 54.

ultimate safeguard the possibility of reversibility, and to the extent that mutual recognition is precisely about allowing some margin of discretion to national regulators, there is a case for keeping the UK under the EU's mutual recognition tent.

But in finance as elsewhere the hard question is what happens overtime? In every realm of mutual recognition, we need to consider mutual compatibility at two levels: the standards and the enforcer, the what and the whom. On the second ground, we need to distinguish between the authority to license, certify, stamp, enforce the standard in question *ex-ante* and the authority hearing your claim *ex-post*. Which country's law applies and which courts has jurisdiction is easier to separate in civil judicial cooperation, for instance—involving families, consumers, businesses, cross-border marriages, commercial contracts, or insolvency cases—than in finance where the regulator's action becomes the standard itself. A mutual recognition regime in short is a network of relationships over time not a snapshot of comparable rulebooks.

### Mutual Recognition vs Equivalence

This brings us to the related relationship between 'mutual recognition' and 'equivalence'. Is the infamous resort to 'equivalence' a possible and useful substitute for mutual recognition for Britain?

Most generally, *Cassis* is grounded on the idea that how liquor 'lawfully produced and marketed in one of the member state' can be assumed to be 'equivalent' to that of the importing state. Can we say then that mutual recognition is simply the logical consequence of the principle of equivalence? This has been a hotly debated question in legal scholarship but is of course also highly political. To be sure, shared membership in the EU and therefore the single market implies a strong presumption of regulatory equivalence. On a case-by-case basis, if it was the case that the judges, and especially ECJ judges, were prone to impose mutual recognition *in spite of lack of equivalence*, they ought to be criticized as ayatollahs of free movement or free trade. If on the other hand, they failed to find in favour of mutual recognition, *in spite of equivalence* between national rules, they could be attacked as betraying the spirit of free movement.

Hence, the issue here is not only whether rules are properly and rightly found equivalent between two or more Member States but also whether the *equivalence test* in and of itself is a necessary part and prerequisite of an assessment pertaining to mutual recognition. It is hard to find any judgement that is not, at least implicitly, grounded on an assessment of equivalence. And when it comes to legislative approaches to mutual recognition,

it can be argued that the Member States engage in an overall assessment of equivalence as a prior to agreeing on the contours of managed mutual recognition. What varies across judgements as well as laws is what we could call the equivalence threshold or mutual recognition threshold. The term 'equivalence' is of course rather ambiguous in common parlance. Whether or not such and such national rules are actually equivalent is itself a matter of controversy. Equivalence is to a large extent in the eyes of the beholder and different national cultures may have more or less tolerance for regulatory differences.

What is clear, however, is that equivalence does not refer to sameness or even similarity. It has instead a functional connotation—'achieving the same function'—which is why the exercise has been referred to as *functional parallelism*.<sup>46</sup> Functional equivalence amounts to arguing that there exists alternative means to fulfilling the same ends—eg less restrictive of trade. A state must recognize regulations that provide equivalent guarantees but the duty stops at recognizing rules enacted to pursue different objectives. When Weiler bemoans that 'the court preaches the rhetoric of mutual recognition but practices functional parallelism'<sup>47</sup> he is ascribing a more ambitious meaning to mutual recognition, akin to some degree of recognition of the validity of these different objectives rather than of their equivalence as means to same ends—something which takes trust *in spite of differences* seriously. And indeed, politicians can get into that mode too, recognizing their respective systems instead of simple tolerating differences in methods. But that is unlikely, wouldn't you say? In fact, the tyranny of small differences is alive and well in the EU and whether we refer to them as ends or means is itself often a matter of convention. The proportionality test is a rational check on the human tendency to invoke differences as warranting exclusion—but has its logic been internalized by the public at large? In the end, some German consumers will be misled by the labelling of Kir which is unfortunate. But is it unfortunate enough to deprive many other consumers of its pleasures? The ECJ decides on a case-by-case basis whether we can live with the difference in question. And lawmakers can do so more boldly if they find that their publics will play along.

Undoubtedly, the Brexit negotiations will expose the complexity of these assessments, the obvious fact that equivalence at one point in time does not guarantee continued equivalence over time and that Britain will lose the possibility of incremental adjustment that is offered by the machinery of

<sup>46</sup> J Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in Craig and De Burca (eds), *The Evolution of EU Law* (OUP 1999) 366.

<sup>47</sup> *ibid.*

constant negotiations over managed mutual recognition. Most fundamentally, simply speaking of ‘equivalence’ does not allow for a deeper conversation about the validity of different means to pursue similar objectives, or the ways in which *caveat emptor* and consumer sophistication may change over time which in turn justifies different ‘degrees’ of recognition. The EU negotiators like to repeat that ‘equivalence’ for third countries is not a blank check, but nor is mutual recognition among EU members.

To be sure, one could say that if Britain’s regulations were to diverge over time from that of the continent then the EU could always pull the plug and reverse access. But how will ‘illegitimate differences’ be ascertained? When does legitimate margin of discretion become ‘unfair competition’? Who will decide? And what is the value of equivalence of standards *per se* if it is not complemented by the equivalence between the authorities that assess them, who are in turn trusted by their national citizenry.

In the area of financial services, one alternative to belonging to the mutual recognition regime is to acquire the current status of third countries where EU law simply prohibits Member States from offering more favourable treatment to third-country firms than is provided for under the EU regime for Member State firms. But it is more likely that under Brexit, UK firms will come under the newly created ‘third-country equivalence’ approach (3CE) whereby the Commission and relevant EU supervisory agencies determine whether the third country’s regulatory regime is *equivalent* to the EU regime—this usually encompasses three components, namely *substantive equivalence* of the effect of the rule, *compliance* on the part of the authorized firms, and in some cases *reciprocal* recognition of EU firms.<sup>48</sup> To be sure, the ‘equivalence’ approach does not cover all the sectors covered by the current single passport (most wholesale financial services, some insurance and very little retail markets and commercial banking). And, paradoxically, it means more direct oversight by Brussels agency that for EU Member States even while the country becomes mostly a rule-taker. The UK can still hope to influence EU ‘from above’ as it were through the G20’s new Financial Stability Board, but that channel is subject in part to the whims of the USA.<sup>49</sup> In the area of euro-clearing, for instance, until now the UK has been able to settle euro-denominated payment transactions although it is outside the Eurozone, a competence granted by the ECJ in spite of ECB opposition. But if the UK exits the Single Market, the trade-off is clear. The equivalence regime will offer less certainty in the future if the UK falls behind in

<sup>48</sup> For a detailed discussion, see Armour (n 45).

<sup>49</sup> *ibid.*

implementing EU financial regulation—after all the equivalence determination is unilateral. Moreover, the UK will have to accept more regulatory oversight from Brussels. But at the same time it will gain the freedom to apply EU rules only to relevant aspects of financial services law, rather than applying the legal framework of the single market wholesale.

The case of public health and so-called health tourism provides a different twist on the meaning of ‘equivalence’. As we know, free movement of patients in the EU (which means movement ‘covered by their national insurance’) is predicated on the recognition by their own Member State that if the patient has a right to receive a treatment at home, they also have a right to receive this treatment abroad, automatically for out-patients and with a prior authorization otherwise. In the latter case, a Member State is obliged to grant such authorization if it is not able to show that the same or equally effective treatment can be provided ‘at home’. And this recognition in turn implies a duty to reimburse patients for public health services accessed abroad. Apparently, free movement lawyers find this counter-intuitive calling it a kind of ‘reverse mutual recognition’: demonstrating equivalence allows to refuse recognition!<sup>50</sup> Thus, for instance, Janssen argues that in the area of public healthcare, the logic of mutual recognition has been reversed since ‘instead of imposing a duty of mutual recognition in cases of equivalence the ECJ appears to draw the opposite conclusion – that is that the duty arises if an equivalent treatment *cannot* be obtained in the patient’s country’.<sup>51</sup>

But is the court really inconsistent? In my view, there seems to be some confusion on the part of legal scholars as to the referent of ‘equivalence’ when it comes to the prerequisite of recognition. According to the ECJ, that a country’s health service agrees to pay another for treatment of its nationals depends both on whether a given treatment is covered in the country of the patient *and* whether that states in unable to offer an equivalent service. I would argue that there is no inconsistency here if we understand ‘equivalence’ to refer *not* to the specific treatment (that needs to be non-equivalent to be recognized) but to the system within which the treatment is embedded and which each Member State seeks to protect according to its own notion of public interest. In this perspective, we need to understand the context in a different way than free movement lawyers do through a kind of Copernician revolution. Think of it this

<sup>50</sup> For a discussion, see, for instance, Janssens (n 30); B Van Leeuwen, ‘The Doctor, the Patient and EU Law: The Impact of Free Movement Law on Quality Standards in the Healthcare Sector’ (2016) 41 (5) European Law Review 638.

<sup>51</sup> Janssens (n 30) 36.

way: in normal trade in services parlance, the state of the consumer/patient/citizen is not the 'home state' as they say, but the 'host state'—and indeed it is always the host state which is asked to do the recognizing in the mutual recognition process. The fact that the patient physically moves to the state of the healthcare service provider does not change the fact that the latter is the home state of this provider. The state asked to pay for the service is in effect the virtual host of the service provider that is subcontracted to provide a specific medical act for a patient from this host state (who happens to have to move to the home state of the provider). The equivalence that needs to be evaluated by the host state (the state of the patient) which is then compelled to pay for the service in question can be understood in this light as an assessment of non-redundancy, whereby subcontracting to the foreign home state creates an equivalence between the two health services. The foreign treatment is 'equivalent' to having been provided in the host state (home state of the patient) precisely because it is covered but happens not to be available. Only if states were forced to reimburse acts that they did not cover could we say that the two sides are not equivalent. In the end, a multilateral system of mutual recognition is only sustainable if it respects the integrity of each state's legal, regulatory, and welfare system. Whether and how this kind of balancing will be sustained in the context of Brexit remains to be seen.

Indeed, mutual recognition for the sake of free movement ultimately raises the question of higher ends, and the need to move beyond exclusively economic perspectives on the internal market. In particular, we need to ask whether recognition respects the ethical diversity in the EU, to the extent that different societies have made different ethical choices through democratic processes when it comes to say drug consumption, abortion, or euthanasia.<sup>52</sup> The ECJ and most observers seem to consider that the distance between the citizens who make ethical choices and the EU is too significant for the EU to legitimately impose ethical views on these citizens.<sup>53</sup> Arguably, free movement should not mean that countries be forced to allow their citizens to operate under another country's rules through the mutual recognition of national ethical choices. The CJEU has shown that it is able to apply the free movement provisions to national ethical positions without exposing these positions to efficiency-based reasoning. In *Grogan*, the Court refrained

<sup>52</sup> For a discussion, see B van Leeuwen, 'Euthanasia and the Ethics of Free Movement Law: the Principle of Recognition in the Single Market' (unpublished manuscript, 2017).

<sup>53</sup> F de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545, 1550–51. See discussion in van Leeuwen (n 52).

from intervening in Ireland's policy of banning the distribution of leaflets advertising free aborting in England for Irish women.<sup>54</sup> In *Josemans*, the court refrained from assessing the policy of the city of Maastricht to prohibit the sale of soft drugs to citizens who were not resident in the Netherlands.<sup>55</sup> In the name of 'human dignity', the German authorities are allowed to prohibit laser-gaming import in which participants are supposed to kill each other. And if in *Conegate*, the ECJ found that British authority could not ban the import of German sex dolls in the name of morality, it is because sex dolls were legally manufactured and sold in the UK!<sup>56</sup> The *Coman* case, still pending, asks whether Member States which are strongly opposed to same-sex marriages ought to be obliged to recognize a same-sex partner as a spouse, effectively leading to mutual recognition of same-sex marriages in the EU.<sup>57</sup> Here again the ECJ is likely to err on the side of caution.

It would be too simplistic to simply oppose the individualistic aim of personal freedom (to move, to access treatment) served by mutual recognition with national choices and solidarity curtailed by it. Put differently, it could be argued that ethical choices made democratically at the national level should not be trumped by free movement but at least be challenged by ethical pluralism—eg 'making different national ethical choices interact and engage with each other – not by insulating them from any external perspectives'.<sup>58</sup> A *praxis* of mutual recognition—for instance, by refraining from prosecuting the family of patients travelling to die abroad—implies that these national ethical choices ought not to be entirely shielded from the kind of debate that free movement gives rise to. Accordingly, there would be no obligation of *outcome* simply an obligation of *process*. Even if the public and the courts both thought that judicially mandated mutual recognition of end-of-life practices were a step too far, a case involving euthanasia in the Netherlands

<sup>54</sup> Case C-159/90 *Society for the Protection of Unborn Children Ltd v Stephen Grogan and others* (1991) ECLI:EU:C:1991:378.

<sup>55</sup> Case C-137/09 *Josemans v Burgemeester van Maastricht* (2010) ECLI:EU:C:2010:774.

<sup>56</sup> Case C-121/85 *Conegate Limited v HM Customs and Excise* (1986) ECLI:EU:C:1986:114. See A Tryfonidou, 'The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights for the Citizen' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 316, 320.

<sup>57</sup> This is about the interpretation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See D Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 *Fordham International Law Journal* 156; van Leeuwen (n 52).

<sup>58</sup> *ibid.*

would surely be a valuable way to engage into a *national* democratic conversation in the Member States where citizens are denied to right to die according to their own choosing.<sup>59</sup> Free movement law can legitimately create a forum where this kind of ethical confrontation can take place while refraining from adjudicating in the debate. In the end, if mutual recognition creates a tension between the ethical choices of individuals and the ethical choices of societies this is a progressive move if we consider that ultimately ethical choices are individual ones. Hence, applying mutual recognition to ethical choices might enhance rather than bypass the national democratic conversation. Increased mutual familiarity between peoples does not necessarily breed increased trust. But it certainly brings home the point that ethical questions cannot be addressed in isolation.

So is mutual recognition soluble in democracy and democracy? What does it take for each national public not to feel despoiled by the process of granting the other side democratic authority over rules that will ultimately affect them?

In sum, let me make three last points:

- (i) Normatively, mutual recognition regimes and transnational governance are best viewed as operating through chains of accountability where the democratic component operates primarily at the national level (through citizens checking on their own lawmakers and regulators). Although supranational actors and institutions play a role, and although publics can organize transnationally, the starting (and most important) point of the accountability chain remains citizens at the national level. This is the challenge of indirect representation.
- (ii) There are of course standards of transparency, reasoned justifications, and judicial review mechanisms that empower publics and public advocates *wherever they are located*, to oversee regulators who engage in various kinds of mutual recognition games among themselves and across borders. The problem is that these democratic procedures vary immensely between Member States. So different publics oversee their law-making differently and this in turn affects how these laws might be acceptable to other publics. The greater the divergence between cultures of citizen oversight the greater the democratic tensions. This is the challenge of accountability gaps.

<sup>59</sup> *ibid.*

- (iii) The question remains whether citizens of polity A trust their own regulators to ensure that regulators of polity B act transparently towards their own citizens who, in turn, can press polity B's regulators to protect their own interests and safety and therefore those of polity A. This is the challenge of transitivity.

Ultimately, it is the dynamic aspect of managed mutual recognition that must ensure that regulators remain responsive both to each other and to their respective publics. The EU is thus hostage to the democratic quality of its Member States, and with little power to affect it. And if this is the case, Brussels institutions need to abide by a kind of democratic do-no-harm principle as well as empowering those who promote democratic accountability in their own country.

Brexit then raises the question of the sustainability of an enlarged mutual recognition regime between peoples who are in the process of loosening the ties that bind and perhaps therefore unavoidably decreasing the mutual trust they may have in their respective democratic control.

Some will counter that after all, the EU has actually replicated the mutual recognition logic in its dealings with the rest of the world through the negotiation of mutual recognition agreements (MRAs) signed with countries like Australia, Canada, Japan, New Zealand, Israel, the USA, or Switzerland. True. But UK citizens will quickly learn that these agreements do not reach nearly as deep as what prevails inside the EU as discussed above in the case of finance.<sup>60</sup> In the external realm, recognition is restricted to products, not services. Moreover, even for products what is recognized is the certification process (through the certification of Conformity Assessment Bodies), not the underlying standards. In other words, under this kind of regime, EU countries would have to recognize British certification of its products to the EU's standards. It should come as no surprise that the negotiations over the EU-US MRAs, signed in 1999, were particularly tough, for instance, having to let the FDA (Federal Drugs Agency) keep its right of residual control over pharmaceuticals even if only at the last stages of the approval process.<sup>61</sup> Mutual recognition is only in its infancy beyond the shores of the EU. 'Global Britain' will find an almost blank slate when it comes to true trade facilitation outside the umbrella of the EU mutual recognition regime.

<sup>60</sup> K Nicolaidis and M Egan, 'Regional Policy Externality and Market Governance: Why Recognize Foreign Standards?' (2001) 8 (3) *Journal of European Public Policy* 454 (reprinted in W Mattli (ed), *The Political Economy of Standardization* (CUP 2001)).

<sup>61</sup> *ibid.*

## The Euro-saga or Mutual Recognition Lost?

Which brings us to the second area where the logic of mutual recognition has been tested in the last few years, namely the Eurozone crisis and the management of sovereign debt. This is a very complex story beyond the scope of this essay, which starts in the realm of political economy and takes us to the deeper socio-cultural foundations. I will simply indicate here three interrelated levels at which we can scrutinize the fate of mutual recognition under EMU.

First, we often overlook the fact that the overall EC legal and political construct is predicated on the *implicit* (and here 'implicit' is crucial) mutual recognition of the respective 'state capacities' of its Member States, including their basic competence in the crucial area of tax and spend. Let us call this *systemic* recognition. Beyond the basic requirement of 'democracy', nowhere in the Treaties do we find a statement of the kind, 'a member state must demonstrate a basic capacity to enforce the rules and standards that have been agreed at EU level, respect the rule of law, stamp out corruption etc.' Nevertheless, the Treaties are predicated on a valid mutual presumption of compliance among Member States which does not rest on the threat of fines. What Bogdandy and Ioannidis call 'systemic deficiency' is not a feature under scrutiny *per se*.<sup>62</sup> In other words, the nation states entering into an integration pact was predicated on mutual trust regarding their capacity (if not always their political willingness) to deliver on their mutual commitments. On this basis, the cooperative endeavour that is the EU could defer to the national level when it came to delivering on, say, taxation or the rule of law. To be sure, Article 49 makes 'respect for European values' a prerequisite for membership eligibility and Article 7 was introduced in the Treaties to ensure that when it came to the new Eastern European entrants, such systemic recognition was no longer implicit but could actually be monitored and sanctioned. But the reluctance of Member States to invoke it to this day testifies in my view to the strong presumption of deference associated with such implicit systemic recognition.

Secondly, in the realm of monetary union, however, externalities are too powerful to rely on implicit recognition. Indeed, the system of governance set up initially by EMU moved beyond implicit systemic recognition, by setting macroeconomic policy benchmarks through the

<sup>62</sup> AV Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 (1) Common Market Law Review 59.

Stability and Growth Pact. Nevertheless, deference still prevailed regarding how and how fast states ought to converge. It is fair to say that this assumed deference has been radically altered with the Euro-crisis. To be sure, the adoption of a common currency is predicated on trust in each other's capacity to avoid generating unsustainable public or private imbalances and thus export inflation and instability across borders. But we are back to the Westphalian question: how much intervention into each other's affairs is warranted by recognition under conditions of interdependence? Have the intrusive mechanisms put in place by the European semester, the fiscal compact and country programmes enforced by the troika gone too far? These questions have been discussed under the headlines of 'risk reduction' (getting other countries to behave) and 'risk sharing' (mutualizing the consequences of their behaviour) in the EU. And so-called EMU reform negotiations revolved around the question: where should the emphasis be between risk reduction and risk sharing and which should come first? But if we accept the premise of mutual recognition and therefore self-government, we need to raise a *preliminary* question: should we not aim to recover the spirit of *systemic* recognition and thus focus on state-level capacity to deliver the goods (eg risk reduction), lest the EU becomes synonymous with the old colonial trope of 'governing at a distance'?<sup>63</sup>

It could be argued that in introducing the logic of financial support based on conditionality in the EU system, the creation in 2011 of the European Stability Mechanism (ESM) was nothing new, a European variant of the IMF. And yet, conditionality had been alien to the EU precisely because it assumes a level and mode of interference and a coercive contractual logic at odds with polity-building through mutual recognition. When the ECJ had to decide in the *Pringle* case whether the ESM was constitutional in spite of the no-bail out clause, it opined on the grounds that this was necessary to safeguard the stability of the euro area as a whole.<sup>64</sup> But the Court's choice to allow for the ESM to be established outside the Union framework was dictated by exceptional circumstances, the requisite of crisis management and dealing with legacy costs. Entrenching this logic as is would certainly subvert the EU spirit of recognition.

<sup>63</sup> K Nicolaidis and M Watson, 'Sharing the Eurocrats' Dream: A Demoi-cratic Approach to EMU Governance in the Post-Crisis Era' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream* (CUP 2016).

<sup>64</sup> Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, 27 November 2012 (Full Court).

Thirdly, this is in part due to how the Eurocrisis has affected the deeper underpinnings of mutual recognition between individuals and societies. The many intertwined patterns of denials of recognition which prevailed since 2010 between Greeks and Germans—or at least between some factions—are exemplary of a wider trend in Europe. Between these two antagonists at least, there are many ways in which each side came to redefine itself through ascription of the other: the Germans saw Greek squanderers when the Greeks bemoaned German misers; the ones were seen as swindlers while the others had hearts of steel; and the Germans felt they were the true heirs of antiquity while the Greeks found excuses to misbehave as . . . the true heirs of antiquity. Denying the other's complexity and ambiguities served as a way to exorcise one's worse fears and insecurities.<sup>65</sup>

In short, if I didn't fear sounding too grand, I would argue that a crisis of the body politics is also a crisis of the soul. If the European project was supposed to be anchored in the mutual recognition of European peoples, recognition of their respective concerns, needs, and suffering, it is safe to say that such recognition has always been partial and timid at best. With the crisis however, we witnessed a reversal, a reversal to the old demons, in the patterns of denial of recognition between the same peoples who had been supposed to engage in togetherness in the previous decades.

Of course, recognition in a democracy is a tall order. It implies that when a country takes its decision democratically, enough people remind everyone else of the obligation to ensure that 'foreign' identities and their interests are taken into account. And in doing so, it implies that it might be desirable to ensure that one's actions (say if you are German) do not aggravate injustices *inside* that other polity. Greek structural reforms or German macro-economic policies should each be the object of such other-regarding democratic debate not the object of coercion or blackmail.

But all hope is not lost. Arguably, the very process of ascription has paradoxically opened up the potential for renewed and perhaps deeper forms of recognition, not only because each polity now knows so much more about the other's democratic pathologies and achievements, but also because this deeper knowledge has indeed forced each side to pry open the black box of the other side, to differentiate between culprits and victims, who suffers and who doesn't, what fairness means not only as a relationship between two countries but within each of them.<sup>66</sup> This is the

<sup>65</sup> See Schrag Sternberg, Gatzou and Nicolaidis (n 1).

<sup>66</sup> *ibid.*

meaning of mutual recognition ‘all the way down’, which connects it with transnational solidarity, that is asking who is on my side on your side, and moreover, why those who aren’t are not, and why they may change their mind. To be sure, it would be naïve to argue that most Greek citizens have internalized the angst of the German taxpayer, or that most Germans truly feel angst at punishing the wrong guys in Greece. But there is still a chance that we may move in this direction.

### Others-within or Mutual Recognition for Grabs

The third and final area where I see mutual recognition tested in Europe was epitomized by the so-called ‘refugee crisis’ of 2015, and concerns how Europeans treat others in their mist. In this bit of the story, we are all settlers in Europe, and the problem is the nomad from outside our walls. We must deal with the disconnection between those two worlds, and how the wheel from sympathy to empathy and from empathy to recognition may or may not turn.

When it comes to the non-European nomad in our mist, there is little doubt that mutual recognition is up for grabs in Europe’s corridors of power as well as in the streets, from the beaches of Lesbos to the tracks of Calais, from Berlin to Budapest. An invisible line seems now to separate Europeans precisely around the old imperial pattern of recognition as gate keeping: is the non-European ‘worthy’ of our recognition? When we fail to invest in speedy recognition of asylum speakers, fail to agree on how they can settle in Europe, even temporarily, we implicitly create a hierarchy of dignity between those who are part of us and those who are the others.<sup>67</sup>

As I have argued at the beginning of this essay, we need to come back to the essential expression of mutual recognition as a feature of human relations, the expression of ‘empathy in action’, which transforms asymmetric relations into fundamentally reciprocal ones.<sup>68</sup> In this sense,

<sup>67</sup> See F Strumia, ‘Walking the Blurry Line in EU Immigration: European Citizenship and Its Democratic Bridge between the Member States’ Power to Exclude and the Third Country Nationals’ Right to Belong’ (2015) Jean Monnet Working Paper 15/15 <<http://www.jeanmonnetprogram.org/paper/walking-the-blurry-line-in-eu-immigration-european-citizenship-and-its-democratic-bridge-between-the-member-states-power-to-exclude-and-the-third-country-nationals-right-to-belong/>>; K Nicolaidis and J Viehoff, ‘Just Boundaries for Democrats’ (2017) 39 (5) *Journal of European Integration* 591.

<sup>68</sup> See Nicolaidis (n 7).

patterns of denials of recognition between Hungarians and Syrian refugees are connected with that between Greeks and Germans.

Of course, we know that there are fundamental differences in attitudes to refugees and ‘others within’ across Europe. But notwithstanding these differences, the logic of ‘right-to-belong’ across border is itself embedded in the norm of democratic belonging based on mutual recognition. We cannot entirely separate the mutual recognition rights stemming from our European citizenship and those we are ready to grant to people from the outside—especially refugees. In this spirit, European citizenship may be derived from nationality in the EU proper, but in fact, it infiltrates a pan-European discourse of rights, a logic of rights where the logic of state power otherwise would prevail.<sup>69</sup> This logic ought to translate into processes of inclusion of third-country nationals contrasting with a competing national one, which rather exalts the power of nation states to manage borders and administer admission. Accordingly, territorial sovereignty is tamed, not superseded by the right to cross borders, exercised in a way conscious of the implications of that right. Kant’s *ius cosmopolitanicum* would be inconsistent if it applied only to one category of people, namely Europeans. Aren’t we all host to each other, as Steiner put it? Does this not mean that in the ethics of hospitality the guest-host relationship takes up the space that Hegel assigned to the master–slave dialectic?<sup>70</sup>

But on the other side of the invisible line, our wretched refugees have unleashed our old demons. While the British had their ‘breaking point’ poster, Schengenland has the likes of Victor Orban. And alas, liberals around Europe cannot wish away the incredibly powerful emotive story which he is peddling. That Germany’s emotional display is an hypocritical liberal sham of wanting to look good but without paying the price, asking others to take their share without consulting them. These Liberals, Orban warns us, will destroy the nation state for the sake of moral comfort. He invites Europeans to see this, not as a humanitarian crisis but as a war for territory. In this view, the non-refoulement principle in the asylum regime is predicated on the absence of security threats. In short, there is no mutual recognition imperative when the Hungarian right to life is at stake!

Part of the problem is that the EU’s Dublin regime enshrines negative recognition for asylum seekers (refused here, refused everywhere) but fails

<sup>69</sup> Strumia (n 67); C Costello, ‘Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law’ (2012) 19 (1) *Indiana Journal of Global Legal Studies* 257.

<sup>70</sup> D Innerarity, *Ethics of Hospitality* (Taylor & Francis 2017).

to enshrine positive mutual recognition of refugee status (accepted in one country, accepted everywhere). In the absence of such recognition, refugees are bereft of the freedom to choose where to go and European governments and their publics are under no obligations of accountability towards each other. Relocation across countries can therefore only come from above. It is the absence of such recognition that led to Angela Merkel's *Willkommenskultur-in-one-country*, a grand collective gesture on the part of the German people—as well as others including the Swedes and in their way Greeks and Italians—which has come to compensate for retrenchment elsewhere.

Therefore, we are left with asking under what conditions the logic of contagious empathy could lead to a pan-European welcome imperative, thus progressively replacing the logic of *ex-post* relocation between states with that of *ex-ante* resettlement from outside. If that was to be the case, the process could be better designed to balance the opening of our external borders with the demands of self-government within and outside the EU, maximizing the likelihood of return for refugees. And it would not strip the Member States of their powers but rather call for the exercise of their power in mutually respectful way.

## Back to Brexit

Perhaps paradoxically, the Brexit narrative continues to draw its strength from two contradictory strands of the story I have just sketched.

On one hand, the referendum campaign drew strength from a popular misunderstanding of the nature of the EU, with mutual recognition at its core. This is still an entity with a relatively weak centre, where the vertical dimension of authority has not truly exercised dominium and is still subject to the horizontal weaving of shared laws of coexistence. On many counts, the default in the EU remains deferential, in the spirit of mutual recognition between Member States and between their publics.

On the other hand, when Brexiteers stress the multi-dimensional dysfunctionality of today's EU, and even if they do not put it this way, they can draw on trends and atmospherics. In small and big ways, mutual recognition is currently threatened in Europe or at least mismanaged, its spirit seemingly betrayed both by sovereignists and by centralizing animus. While Britain may not be part of EMU and Schengen these stories have both direct and symbolic import on the British public imagination.

So let us consider two scenarios. In the first, the Brexit shock accelerates the unravelling of an EU pulled by the opposite forces of sovereignism and federalism, both inimical to the spirit of mutual recognition. In this case, the UK's unilateralist trope will simply add to the unravelling.

Under a second scenario, Europeans would take the high ground, and collectively address with intelligence and humility the Hegelian, Kantian, and Grotian questions that have haunted our continent for much longer than the existence of *this* European Union. In this spirit, they might consider the idea that it ought to be much harder to take away recognition than to initially grant it, especially from an obsessively EU-law abiding country like the UK. They might thus decide imaginatively to explore a new dynamic version of regulatory mutual recognition for Britain taking into consideration the fact that this game has always been about constraining divergence rather than enforcing convergence. This would in turn contribute to a "do-no-harm" Brexit, and to renewed perceptions of the EU as a magnanimous, benign and empathetic actor. And perhaps, just perhaps, we would start to reverse the tide of popular NOs to the European project. If so, Brexit would not have been in vain.

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