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So close and yet so far: the paradoxes of mutual recognition

Miguel Poiares Maduro

ABSTRACT In these closing remarks I want to highlight three paradoxes of mutual recognition that emerge from this excellent set of contributions on mutual recognition. The first relates to the underlying theme of this volume: although mutual recognition is *prima facie* a conflicts rule, such a rule entails, in fact, a process of social decision-making that is best described as a form of governance. The second paradox is that, albeit presented as an instrument to promote integration while preserving diversity and the states' regulatory autonomy, mutual recognition has an important impact on states' sovereignty. Finally, the last paradox emerging from the different contributions arises from the relationship established between mutual recognition and mutual trust. Such a relationship highlights the extent to which the recognition of diversity entailed in mutual recognition actually depends on a certain degree of common identity, as only the latter can provide the basis for the mutual trust necessary to implement mutual recognition. None of these paradoxes necessarily challenges mutual recognition and its potential for application in different policy areas of integration. They allow us, however, to identify some usually hidden assumptions and processes of decision-making inherent in mutual recognition. This will, in turn, allow us to make a better normative judgement of its potential benefits and shortcomings in different policy areas.

KEY WORDS Governance; mutual recognition; participation; representation.

INTRODUCTION

An immediate conclusion that emerges from this set of contributions is the diversity of mutual recognition. The contributions cover a variety of different policy areas (from taxation to goods, from services to justice and home affairs) and even different multi-level systems or integration regimes. Such a panoramic view provides us with a perception of how different the potential for mutual recognition and its possible consequences may be depending on the policy and actors' dynamics and variables on those different areas. They also present us with different models of mutual recognition. Pelkmans (2007) talks of regulatory and judicial mutual recognition. Trachtman (2007)

distinguishes between equivalence and strict mutual recognition and Nicolaïdis and Schmidt (2007) between pure mutual recognition and managed mutual recognition. Sandra Lavenex (2007) points to the risks of transferring the logic of mutual recognition developed in the area of the internal market into the area of justice and security where the same institutional conditions that supported the former are not met and where the degree of mutual trust is even weaker. In a similar vein, Philipp Genschel (2007), for example, explains how mutual recognition is the preferred instrument to eliminate regulatory barriers but not tax barriers. Adrienne Héritier's conclusion draws on this richness to develop some hypotheses on what environmental/institutional factors explain preferences for mutual recognition and the outputs of mutual recognition policies (Héritier 2007). To some extent, the present conclusion complements her analysis by adopting a more normative approach.

RULES RECOGNITION AND GOVERNANCE

A first issue arising from the diversity of forms taken by mutual recognition is whether it is indeed a form of governance and what consequences ought to follow from such a characterization. Though most contributions appear to argue that mutual recognition is a form of governance, Joel Trachtman (2007) argues in the opposite sense. For Trachtman mutual recognition determines which governance rule is to prevail and therefore cannot be a form of governance in itself. His view is perfectly understandable if one takes mutual recognition, at its face value, simply as a rule allocating regulatory competences among states. In such a light, it is a conflict rule: it determines which set of rules is to prevail in the regulation of a certain good or service, for example. However, mutual recognition is indeed a mode of governance if one looks at the processes which are generated by this rule and the social outcomes they produce. In fact, mutual recognition does not determine the final regulatory outcome but sets in motion a process of regulatory competition that is governed by a particular form of market (composed of both economic and political transactions). It is to this market that mutual recognition entrusts regulatory competition and it is this market that is a mode of governance, in the sense in which Susanne Schmidt (2007: 668) refers to governance: 'forms of social co-ordination'.

It is the particular mechanisms of decision-making inherent in mutual recognition that explain why it generates different assessments for different actors and in different policy areas. Mutual recognition changes the balance among different interests in the representation and participation that shape certain policies. As a consequence, it can be more or less 'democratic' than other forms of governance and will lead to different outcomes. When Schmidt (2007) compares national treatment (host-country control) with harmonization and mutual recognition, she rightly points out that the relationship between politics and trade is reversed from the first to the latter. What that reflects, however, is the different contexts and mechanisms of participation existent in the three modes of governance. Under national treatment, the primate of politics is, in effect, the primate of

national politics. Policies will be the product of the participation of the different interests represented in the national political process and of the balance of power between them. Under harmonization, policies will be the product of participation by different national interests at supranational political process levels and of their respective voting and lobbying power at that level. Under mutual recognition, it is participation in the 'market for regulations' that determines the final policies. Such a market, responsible for policy choices under the regulatory competition generated by mutual recognition, is, however, different from the traditional market. It involves, first of all, the preferences that consumers express for certain goods or services (which favour the regulations according to which those goods and services are produced). It also involves the preferences that capital, companies, labour, taxpayers and other categories express for certain policies by moving to the states that adopt them and relying on the home-country control principle. But it is also a product of other forms of 'voting with one's feet' and the political votes and lobbying of those who remain in the host country and resist changing their domestic policies. The policy outcome of the regulatory competition inherent in mutual recognition is a product of these different variables and instances of participation. The final result of mutual recognition will be a product of how this market of economic and political transactions decides among the mutually recognized norms and policies. It is for this reason that the outcome of regulatory competition depends on the rules of competition and that it varies greatly depending on the issues and the forms of competition. It is also for this reason that Reich (1992: 867–8) has stated that 'competition between legal orders is as such neither efficient nor harmful. It is much more necessary to know the objectives, contents and form of the legal orders among which competition in a (quasi-)federal jurisdiction will take place.'

The different variables of participation and representation in mutual recognition explain the variety of forms of mutual recognition highlighted in the different contributions and its higher or lower success in different policy areas. One example which is addressed in some of the contributions is the different treatment accorded to process rules (which govern the conditions under which a product is produced or a service is prepared and do not accompany it to the importing state: labour rules, environmental rules regulating production, taxes, etc.) with regard to product rules (which govern the characteristics of the good or service and do accompany it: components, packaging, labelling or the nature of the activity involved in the service provided, for example). Process rules are, in general, mutually recognized. In spite of some recent challenges to this distinction in the World Trade Organization (WTO) context, the general rule is that a state cannot impose on the products or services from other states its own process rules. In principle, no state can legally prohibit the importation of a certain good because it is manufactured under different conditions from its domestic products, such as regarding the wages paid or taxes levied on the producing companies. The reason why mutual recognition regarding process rules is generally more accepted than mutual recognition

regarding product rules may have to do with the way the market, as defined above, governs the process of mutual recognition regarding those two different types of rules. Product rules have externality effects in terms of costs that process rules do not necessarily have, and this hinders the capacity of the market to internalize in the decision-making process of the home-country state a large part of the costs generated by its policies.

I would also argue that it is the different participation mechanisms inherent in the forms of governance related to national treatment, harmonization and mutual recognition that often explain the different assessments made by different actors on the virtues and problems of mutual recognition. Again, the current set of contributions present us with a very clear view of these different assessments. Some point to actual instances of the race to the bottom or present its thesis in the abstract (as exemplified by Trachtman's (2007: 784) assertion that the least demanding rule always leads, in principle, to deregulation). Others make a rather positive assessment and either point to opposite examples of a race to the top or challenge the race to the bottom thesis. That is so either because they trust that the competitive process will, more often than not, promote more optimal regulation (Pelkmans 2007) or because they believe that mutual recognition creates, by itself, pressures towards some forms of harmonization (Nicolaidis and Schmidt 2007). What I believe it is important to stress is that whether mutual recognition will actually lead to more or less regulation and to higher or lower regulatory standards (the two are not necessarily the same) depends on the dynamics of participation generated by the process of market decision-making inherent in mutual recognition and that this should be compared with those of the available alternatives.

The different assessments and applications of mutual recognition are a natural consequence of the participatory variables that determine the results of mutual recognition as a form of governance. Whether and how mutual recognition will operate depends on the interaction between the forms of participation and representation inherent in the decision-making process of regulatory competition and the contexts in which its application is suggested. This will also determine how mutual recognition is to be structured and in the context of which institutional alternatives this occurs. Such variables will determine how different interests will have a voice in the mechanisms associated with mutual recognition and this will, in turn, determine its likely social outcome.

One of the main values of this set of contributions lies precisely in the link they establish between these two issues: the regulatory consequences of mutual recognition and its conception as a form of governance. In my view, only a clear assumption of mutual recognition as a form of governance can highlight the institutional dimension associated with it, in terms of the mechanisms of participation and representation that it embodies and their importance in both explaining and modelling its regulatory impact.

This assumption is also the way to move on from the ideological debate that has been intimately linked to mutual recognition (Schmidt 2007) and reconstruct it under a more productive framework. A genuine and correct

assessment of mutual recognition can only be made by addressing it as a form of governance whose forms of participation and representation operate differently in different sets of circumstances.

This discussion highlights three points:

- First, mutual recognition is an instrument of governance: it is a form of decision-making (based in a particular institutional form of the market) that produces social decisions. In this light, it favours certain mechanisms of participation over others with consequences for the way in which different interests are represented.
- Second, in the light of the governance qualities of mutual recognition and the differentiated representation it promotes, its legitimacy is reinforced the more it takes place in the context of alternative modes of decision-making. In other words, mutual recognition, to be fully legitimate, should be an institutional choice among a set of institutional alternatives. That institutional choice should be a function of the variables of participation and representation in all the alternative modes of social decision-making. The existence of these alternatives would guarantee that the risks inherent in the mechanisms of decision-making linked to mutual recognition can be corrected and controlled. These institutional alternatives can be national (to guarantee, for example, a fair domestic redistribution of the trade gains) or supranational (to reinstate at the supranational level the primacy of politics).
- Third, where mutual recognition imposes on states a broadening of the interests that they are to take into account in the definition and pursuit of their goals, it interferes with the redistribution of costs and benefits in those states. In these instances, there is a strong case for mutual recognition also to be supported by instances of redistribution at the supranational level (see also Trachtman 2007: 787). But this raises an additional question: what kind of political link is necessary between states, beyond their cooperative self-interest, when mutual recognition entails redistribution and requires solidarity? This question, which is mainly normative, can be linked with the conditions for mutual trust between states which are necessary to mutual recognition and which will be discussed in more detail below.

MUTUAL RECOGNITION AND DIVERSITY

As Schmidt (2007: 672) notes, harmonization requires a high degree of vertical transfer of sovereignty. It is no surprise, therefore, that a preference for mutual recognition is often expressed in terms of it being the instrument of political and economic integration which is more respectful of diversity and a state's autonomy (Nicolaidis 2007). To a considerable extent this is true but the link between mutual recognition and the preservation of diversity should also not be exaggerated. Is the impact on sovereignty generated by the process of

harmonization so much different from the impact of mutual recognition? Mutual recognition often leads to ex-post harmonization and what changes is not so much the degree of sovereignty transferred but more how it is transferred. What happens is that this ex-post harmonization is promoted in a decentralized manner by regulatory competition and the process of decision-making which I have previously described. It is a product of this decentralized process of decision-making that involves different national authorities and actors at a horizontal level. This is also a form of diversity but it could perhaps be better identified as a form of horizontal deliberation. Susanne Schmidt (2007: 672) talks appropriately, in this context, of a horizontal transfer of sovereignty. A state that has to recognize and give effect, in its jurisdiction, to the rules of another state can be said to transfer, in part, some of the exercise of its sovereign powers to that other state. However, the nature of the changes in a state's sovereignty in the context of mutual recognition is perhaps even more complex and varied than what can simply be deduced from the idea of horizontal transfer of sovereignty.

In this respect, a reconstruction of the nature of the impact of mutual recognition on a state's sovereignty must take into account two dimensions. The first is the extent to which mutual recognition impacts on the policy autonomy of states (the autonomy of a political community to determine its own policy preferences or self-government). The second is the extent to which it affects the autonomy of a political community in defining the participation and representation of different groups and citizens in its policies. Both of these instances can also be linked to different processes through which mutual recognition *de facto* leads to forms of implicit harmonization.

First, though the obvious point is to highlight the horizontal transfer of sovereignty inherent in the process of regulatory competition created by mutual recognition, the latter can also promote a vertical transfer of sovereignty. As several of the authors point out, mutual recognition is often linked to some sort of essential harmonization. At other times it is also implemented with reference to international standards that assume a more or less soft or hard law character. These standards are the product of technocratic bodies and committees that have an inherent rationality dominated by a particular set of normative values and are often not subject to a state's sovereign control.

The acknowledgement of the mixed character of mutual recognition also helps to highlight how mutual recognition changes the exercise of sovereignty within a state. I have already pointed to the circumstance that mutual recognition could, to a large extent, be defined as an alternative model of social decision-making, of a largely decentralized nature and, consequently, with a different representation of interests. There are, however, further dimensions to what it entails in terms of impact on the balance of power in the decision-making powers of a state. Lavenex (2007: 774–5) demonstrates this by claiming that mutual recognition in the area of justice and security is actually an instrument to reinforce the power of national governments over other branches of power within the states. Some resistance to mutual recognition,

which either favours national treatment (primacy of national political control) or harmonization (primacy of European political control), has its origins precisely in this distrust of mutual recognition as affecting the balance of power within the states and not so much between states.

One perspective which aims at presenting mutual recognition as fully respecting policy diversity and national autonomy highlights its role as a kind of destroyer of policy prejudices or a 'substantive translator' of regulations. Pelkmans (2007: 702) presents this vision when he refers to the application of mutual recognition by the Court of Justice in the realm of safety, health, environment and consumer protection (SHEC). In his own words: 'SHEC regulation is in essence "risk regulation". If the risk reduction aimed for is similar, the regulatory objective is essentially the same, and a good can be freely imported.' In other words, since the goal is attained in an equal measure by the different policies of the exporting and the importing state, there is no reason why they should not be mutually recognized. Not to do so will be, as Pelkmans says, a regulatory failure, the consequence of a lack of mutual trust between member states where, at least in these cases, the identity of regulatory objectives will prove to be false. This is certainly true and a welcome outcome of mutual recognition but, again, it involves a shift in the balance of power within a state. Often, that lack of 'mutual trust' and 'equivalence' is the product of a captured or frozen domestic political process. In some instances, the process of deliberation on mutual recognition either empowers sub-represented groups in the national political process or allows dormant majorities (often consumers) to regain control over the political process in areas previously dominated by certain concentrated interests. In other instances, mutual recognition challenges existing legislative path dependencies at the state level. National legislation which may have been largely justified when adopted sometimes becomes outdated and unjustified but, nevertheless, remains in place since it has, in the meantime, created a community of vested interests and a set of social practices resistant to change. When a state is forced by the processes of mutual recognition to justify its own legislation in light of different but 'equivalent' legislations from other states, it is forced to question anew the wisdom of that legislation and a new deliberative moment tends to occur. Mutual recognition might lead again to implicit harmonization (in the form of equivalence or identical legislations) as a consequence of the change in the domestic politics of a state.

The form of mutual recognition to which Pelkmans (2007: 702) refers equates, as stated, mutual recognition with equivalence. This can certainly be conceived as one of the forms of mutual recognition and, as Trachtman (2007: 786) suggests in his contribution, appears to be the prevalent method in the WTO context. In the European Union context, however, it is doubtful if mutual recognition is only applicable where there is equivalence between the different national policies. One example is the largely consensual case law of the Court of Justice which in a series of matters, mainly regarding consumer protection, has struck down national law imposing certain product

requirements (such as those regulating the mandatory composition of beer, vinegar, pasta, etc.) as unjustified in light of an alternative labelling policy. The Court considered that, in many instances, labelling information would be sufficient. However, what was at stake in these cases was not pure equivalence since a policy imposing mandatory product requirements is rather different from a policy based on consumer information. What takes place, in this instance, is that the judgment of the Court of Justice must take into account the interests of market integration that the national legislation simply ignored. In other words, judicially imposed mutual recognition is, often, an instrument for the Court of Justice to introduce EU interests of market integration in the national decision-making process and not simply a mechanism through which the Court assesses whether the different national legislations are identical. Again, the spectrum of interests to be taken into account changes in such decisions.

One relevant question concerns what is required for mutual recognition to legitimately move from a logic of pure equivalence to an instrument to be used in the reform of national regulatory policies. While mutual recognition aimed at simple equivalence will only require national regulators to recognize the rules of other states that achieve the same degree of protection of the goals pursued by their domestic rules, a stricter form of mutual recognition, as usually conceived in the European Union, requires them to take into account new interests beyond those taken into account to determine the goals pursued by the original national policy. In the European Union, that is justified by the political dimension of its economic integration, which can be said to require national political processes to expand, in certain instances, their democratic constituencies to include the interests of nationals of other member states.

Mutual recognition has, therefore, at least two types of functions beyond that linked to the process of regulatory competition. On the one hand, it is a translator of different national regulatory languages: it helps member states to realize that, in some instances, different rules do not mean, in fact, different policy objectives and that they actually share the same regulatory goal (though the regulatory words may vary, their purpose is the same). In these cases, mutual recognition also impacts on the power of a state but mostly at a domestic level. It shifts the balance of power within the state political process. On the other hand, there are instances where mutual recognition goes further: when it requires member states to change their regulatory ideals in order to attend also to the broader goals of economic integration required by a non-fragmented market. In these instances, member states are forced to incorporate in their regulatory analysis the costs arising from their regulations to the interests of nationals of other member states.

Thus, it is important to highlight that mutual recognition cannot be simply presented as not interfering with national sovereignty and policy autonomy. The right question is instead, what kind of transfers of power does mutual recognition entail and when are they justified?

MUTUAL RECOGNITION AND IDENTITY

Finally, all contributions stress the connection of mutual recognition to questions of identity and mutual trust. Two closely linked issues prevail here: first, the extent to which the viability of mutual recognition does depend on a certain degree of policy and systems identity between the participating states; second, the extent to which, while attempting to promote mutual trust among the participants (Nicolaidis 2007), mutual recognition also depends on the pre-existence of such mutual trust.

These two issues are, in my view, also linked to different forms of mutual recognition which emerge from the contributions: norms recognition (functional equivalence); policy recognition (mutual recognition of different goals); and systems recognition (mutual enforcement and systems recognition). These require different degrees of mutual trust and pre-existent identity.

Rules disparities which do not reflect different goals are the easier disparities to overcome by mutual recognition as highlighted in Pelkmans' (2007: 702) discussion on the equivalence of national regulatory objectives which is often hidden behind different rules. Often, in these cases, the process of national regulatory reconstruction forced by mutual recognition leads the national regulators to be confronted with identical policies hidden behind different national rules. In this case, systemic trust is promoted by the identification of policy coincidence. It will be in these instances that mutual recognition will be more easily adopted and legitimated. States are not required to change their policy goals. They are only required to recognize different rules that pursue the same goals. The existent policy identity facilitates the mutual recognition of different rules. It will often be in a context of this type that a pure form of mutual recognition will be adopted. Usually, judicial enforcement of the principle of mutual recognition is sufficient in these cases. In requiring proper justification for divergent national rules it allows an easy identification of the policy consensus underlying those different rules.

Mutual recognition immediately becomes more difficult once it is attempted in a context of differentiated goals and limited policy identity. In such a context, different rules do pursue different goals. What happens is that, in some instances, those different goals may be the product of insulated national political processes which do not take into account the broader goals of the integrated polity. Mutual recognition may still be possible and desirable once a broader set of goals is taken into account by national political processes. However, it will usually take the form of managed mutual recognition highlighted by Nicolaidis and Schmidt (2007). Sometimes also, this form of mutual recognition can be judicially promoted by balancing the application of the principle of mutual recognition with public interest exceptions. This forces states to internalize in their decision-making process a broader set of interests while also authorizing some exceptions to mutual recognition, if states still justify them as necessary and proportional to the pursuit of legitimate goals. At other times, however, judicial enforcement will not be sufficient and it has to be

supported and/or preceded by a certain degree of harmonization. The supranational deliberative process which is put in place by the need to harmonize may provide a better forum to agree on new policies. If that is the case, managed mutual recognition is also conducive to policy identity but through deliberation at a different level than the state.

The more difficult context for mutual recognition is that exemplified by Lavenex (2007). It is the case of mutual recognition that requires a broad systems recognition. In the area of justice and security discussed in her contribution, member states have to do more than simply recognize other norms as equivalent to their own. They have to accept and enforce other systems of law. This requires a higher degree of mutual trust than in the area of economic integration. The mutual recognition of judicial decisions is not based simply on the mutual recognition of each applicable norm but on the assumption that the other's judicial and legislative decisions are legitimate in systemic terms. It is the entire system which must be recognized as a system affording all the appropriate protections, notably in the area of fundamental rights. This involves the recognition of rules, goals and the processes and institutions through which they are adopted and implemented in another system. Other forms of mutual recognition also entail some recognition of the other's system, only the latter is, in reality, deduced from the existence of policy coincidence or overcome if goal differentiation takes place in a non-systemic area (a more limited or less sensitive policy). Instead, where that is not the case it is to be expected that national political processes and national courts may show some resistance to the idea of mutual recognition. The problem is that the same variable that pushes for mutual recognition (the difficulty to achieve a political consensus on common rules) also makes it more difficult to enforce it (because of the lack of sufficient mutual trust).

This paradox of mutual recognition can also be presented from a normative standpoint by stating that, while its broader normative foundation may lie in the promotion of the recognition of the other, it is more likely to be workable and legitimate where the pre-existent identity is stronger. The greater the initial degree of policy or systemic divergence, the greater the likelihood that mutual recognition will face resistance and the greater the justification to impose on a state the recognition of the other's policies. The paradox, as was stated, is that it is also where divergence is greater that mutual recognition is more needed as an instrument for economic and political integration. This is the case for pragmatic reasons but also for normative ones. Such divergence creates regulatory and political obstacles to the pursuit of other legitimate goals linked to integration: it is precisely in these instances that the information and transaction costs arising from national treatment will be higher. Furthermore, national treatment will often be used as an instrument of resistance to the idea of inclusiveness inherent in the process of integration.

A variant on this problem is presented by Genschel (2007: 753) who highlights that, in the tax domain, the fact that mutual recognition is not distributionally neutral exacerbates the problem of mutual trust. In reality, mutual

recognition is likely, as we have seen, to have distributional consequences in all domains, both between states and within states (between different groups of citizens). Where that is the case, the issue of mutual trust becomes a question of solidarity. This requires us to consider what broader goals need to be provided to support mutual recognition, particularly when it moves beyond functional equivalence. To what extent, when mutual recognition has redistributive consequences, does it need to be grounded in some form of political commitment entailing some degree of solidarity between the participants in this form of governance? If so, how should these redistributive consequences be measured and regulated? These raise deep normative questions on what recognition entails, something that Kalypso Nicolaïdis (2007) addresses.

Finally, because, as was said, harmonization will also be more difficult where the conditions for mutual recognition will be less favourable (transactions and information costs in the supranational political process will be very high by virtue of the high degree of policy and systemic divergence), the favourite solution in the European Union has been a form of managed mutual recognition (Nicolaïdis and Schmidt 2007). Often, however, managed mutual recognition, either through the adoption of minimum standards or by references to general clauses and principles, leads to a broad application of a rule of reason subject to judicial adjudication. Such a form of mutual recognition largely delegates, *de facto*, the final responsibility on when and how mutual recognition should be applied to the judicial process.

Instances of political delegation in the judicial processes, where there is unresolved political disagreement, are not new. Moreover, they can be an appropriate form of rationalizing political conflicts, by agreeing on principles and on a process to balance between those principles outside the passion of ordinary politics. However, this places a particularly high burden on courts which the political process should support in legitimacy terms. Instead, the risk is that the very contested nature of the politics of these issues may lead the political process to challenge the judicial outcomes. In the end, the European judiciary can be placed in the difficult situation of being forced to arbitrate between quite divergent political views that, while entrusting to the Court that task, at the same time constantly challenge the legitimacy of its outcomes.

In this respect, a system of managed mutual recognition can only be successful, in the long term, if the delegation it entails in the judicial process is fully assumed by the political process and supported by the legitimacy it accords to the judiciary. Mutual recognition will also be more successful where existing alternative institutions are available to co-manage mutual recognition and guarantee that the political process can always regain control over the policy issues that it, frequently and implicitly, delegates to courts. The legitimacy of mutual recognition requires it to operate in a context where other viable choices are available in terms of institutional alternatives or forms of governance. It is only in this context that the preference for the mechanisms of participation and representation that it entails can be properly legitimated. However, it is precisely where that is not the case that mutual recognition tends to be chosen as a

kind of fall-back solution to the problems of stalled integration. It is this dilemma that makes mutual recognition so appealing but at the same time so contested.

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