



Freedom, Security & Justice:
European Legal Studies

*Rivista quadrimestrale on line
sullo Spazio europeo di libertà, sicurezza e giustizia*

2019, n. 2

EDITORIALE
SCIENTIFICA



DIRETTORE

Angela Di Stasi

Ordinario di Diritto dell'Unione europea, Università di Salerno
Titolare della Cattedra Jean Monnet (Commissione europea)
"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

COMITATO SCIENTIFICO

Sergio Maria Carbone, Professore Emerito, Università di Genova
Roberta Clerici, Ordinario f.r. di Diritto Internazionale privato, Università di Milano
Nigel Lowe, Professor Emeritus, University of Cardiff
Paolo Mengozzi, già Avvocato generale presso la Corte di giustizia dell'UE
Massimo Panebianco, Professore Emerito, Università di Salerno
Guido Raimondi, Consigliere della Corte di Cassazione
Silvana Sciarra, Giudice della Corte Costituzionale
Giuseppe Tesaro, Presidente Emerito della Corte Costituzionale
Antonio Tizzano, Vice Presidente Emerito della Corte di giustizia dell'UE
Ugo Villani, Professore Emerito, Università di Bari

COMITATO EDITORIALE

Maria Caterina Baruffi, Ordinario di Diritto Internazionale, Università di Verona
Giandonato Caggiano, Ordinario di Diritto dell'Unione europea, Università Roma Tre
Pablo Antonio Fernández-Sánchez, Catedrático de Derecho internacional, Universidad de Sevilla
Inge Govaere, Director of the European Legal Studies Department, College of Europe, Bruges
Paola Mori, Ordinario di Diritto dell'Unione europea, Università "Magna Graecia" di Catanzaro
Claudia Morviducci, Ordinario di Diritto dell'Unione europea, Università Roma Tre
Lina Panella, Ordinario di Diritto Internazionale, Università di Messina
Nicoletta Parisi, Ordinario di Diritto Internazionale, Università di Catania-Componente ANAC
Lucia Serena Rossi, Giudice della Corte di giustizia dell'UE
Ennio Triggiani, Professore Emerito, Università di Bari



COMITATO DEI REFERES

Bruno Barel, Associato di Diritto dell'Unione europea, Università di Padova
Marco Benvenuti, Associato di Istituzioni di Diritto pubblico, Università di Roma "La Sapienza"
Raffaele Cadin, Associato di Diritto Internazionale, Università di Roma "La Sapienza"
Ruggiero Cafari Panico, Ordinario di Diritto dell'Unione europea, Università di Milano
Ida Caracciolo, Ordinario di Diritto Internazionale, Università della Campania "Luigi Vanvitelli"
Luisa Casseti, Ordinario di Istituzioni di Diritto Pubblico, Università di Perugia
Giovanni Cellamare, Ordinario di Diritto Internazionale, Università di Bari
Marcello Di Filippo, Ordinario di Diritto Internazionale, Università di Pisa
Rosario Espinosa Calabuig, Profesor de Derecho Internacional Privado, Universidad de Valencia
Giancarlo Guarino, Ordinario f.r. di Diritto Internazionale, Università di Napoli "Federico II"
Elsbeth Guild, Associate Senior Research Fellow, CEPS
Paola Ivaldi, Ordinario di Diritto Internazionale, Università di Genova
Luigi Kalb, Ordinario di Procedura Penale, Università di Salerno
Luisa Marin, Assistant Professor in European Law, University of Twente
Simone Marinai, Associato di Diritto dell'Unione europea, Università di Pisa
Rostane Medhi, Professeur de Droit Public, Université d'Aix-Marseille
Violeta Moreno-Lax, Senior Lecturer in Law, Queen Mary University of London
Stefania Negri, Associato di Diritto Internazionale, Università di Salerno
Piero Pennetta, Ordinario di Diritto Internazionale, Università di Salerno
Emanuela Pistoia, Associato di Diritto dell'Unione europea, Università di Teramo
Concetta Maria Pontecorvo, Associato di Diritto Internazionale, Università di Napoli "Federico II"
Pietro Pustorino, Ordinario di Diritto Internazionale, Università LUISS di Roma
Alessandra A. Souza Silveira, Diretora do Centro de Estudos em Direito da UE, Universidade do Minho
Chiara Enrica Tuo, Associato di Diritto dell'Unione europea, Università di Genova
Talitha Vassalli di Dachenhausen, Ordinario f.r. di Diritto Internazionale, Università di Napoli "Federico II"
Alessandra Zanobetti, Ordinario di Diritto Internazionale, Università di Bologna

COMITATO DI REDAZIONE

Francesco Buonomenna, Ricercatore di Diritto Internazionale, Università di Salerno
Caterina Fratea, Ricercatore di Diritto dell'Unione europea, Università di Verona
Anna Iermano, Assegnista di ricerca di Diritto dell'Unione europea, Università di Salerno
Angela Martone, Dottore di ricerca in Diritto dell'Unione europea, Università di Salerno
Michele Messina, Associato di Diritto dell'Unione europea, Università di Messina
Rossana Palladino (*Coordinatore*), Ricercatore di Diritto dell'Unione europea, Università di Salerno

Revisione abstracts a cura di

Francesco Campofreda, Dottore di ricerca in Diritto Internazionale, Università di Salerno



Rivista giuridica on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu

Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017



Indice-Sommario

2019, n. 2

Editoriale

Spazio europeo di libertà, sicurezza e giustizia, diritti fondamentali e dialogo tra giudici p. 1
Guido Raimondi

Saggi e Articoli

In tema di informazioni sui Paesi di origine nella procedura di riconoscimento della protezione internazionale p. 4
Giovanni Cellamare

Comentarios sobre el reto de una estrategia española de seguridad aeroespacial y ciertas lagunas jurídicas p. 17
Juan Manuel de Faramiñán Gilbert

Rapporti interordinamentali e rapporti interistituzionali in circolo (scenari, disfunzioni, rimedi) p. 35
Antonio Ruggeri

Commenti e Note

To trust or not to trust? Fiducia e diritti fondamentali in tema di mandato d'arresto europeo e sistema comune di asilo p. 64
Valentina Carlino e Giammaria Milani

The challenge of today's Area of Freedom, Security and Justice: a re-appropriation of the balance between claims of national security and fundamental rights p. 90
Roila Mavrouli

The tale of the European sandcastle: on the convergence and divergence of national detention systems across the European Union p. 120
Christos Papachristopoulos

La nécessaire harmonisation du visa humanitaire dans le droit de l'Union Européenne au prisme de l'asile p. 140
Chiara Parisi



Il primo parere consultivo della Corte europea dei diritti dell'uomo tra maternità surrogata e genitorialità "intenzionale": il possibile impatto nell'ordinamento giuridico italiano p. 160
Luigimaria Riccardi

Il difficile cammino verso una "tutela integrata" delle donne vittime di violenza nello spazio di libertà, sicurezza e giustizia: sviluppi normativi e perduranti profili di criticità p. 184
Valeria Tevere



THE TALE OF THE EUROPEAN SANDCASTLE: ON THE CONVERGENCE AND DIVERGENCE OF NATIONAL PRISON SYSTEMS ACROSS THE EUROPEAN UNION

Christos Papachristopoulos*

SUMMARY: 1. Introduction. Background of the research. Objectives and structure of the study. – 2. In a nutshell: Mutual recognition in the Area of Freedom, Security and Justice. – 3. European influence in matters of detention: towards convergence. – 4. Disparities between national detention systems: towards divergence. – 5. Problematic consequences of divergence: building on sand. – 6. Securing the Union’s AFSJ through EU intervention. – 7. Concluding remarks.

1. Introduction. Background of the research. Objectives and structure of the study

A spectre is haunting the European Union (EU), stemming from the prison centres of its own Member States (MS). On October 1999, the European Council held a special meeting in a small Finnish town, named Tampere. This meeting revolved around the primary objective of establishing the EU as an Area of Freedom, Security and Justice (AFSJ)¹, within which European citizens may feel confident that, wherever they move, their freedoms and security are well protected, and in full compliance with the Union's values, including the rule of law and fundamental rights and freedoms. The meeting resulted in the drafting of several elaborate political guidelines, which constitute the Tampere programme.

Section VI of this programme falls under the title of ‘Mutual recognition of judicial decisions’, and includes, *inter alia*, the following provision: 33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual

Double blind peer reviewed article.

* Researcher of EU Criminal Law, Alumnus of the University of Leiden, Lawyer. E-mail: papachristopoulos@yahoo.gr.

I would like to thank the anonymous reviewers for their valuable comments and suggestions. The usual disclaimer applies.

¹ Established under the 1999 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1-144.

recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities².

Thus, the EU officially endorsed the mutual recognition principle, as a cornerstone upon which the AFSJ, as a priority policy objective, is to be built and function.

Fast-forward to the current day, twenty years after Tampere: the smooth functioning of the mutual recognition principle within Europe's AFSJ is under considerable pressure, stemming not from any external threat, but rather by the Union's own MS, and, more specifically, their penitentiaries. The study at hand focuses on this issue; more specifically, it revolves around this interplay and rising tension between the smooth functioning of the European Union's Area of Freedom, Security and Justice, on the one hand, and the protection of fundamental rights of individuals deprived of their liberty³, as affected by detention conditions across national prison centres⁴, on the other. What role do detention conditions and fundamental rights of prisoners play within Europe's AFSJ, and how do they relate to mutual recognition in criminal matters?⁵

To comprehend and provide an answer to these research questions, the paper adopts a dual focus. Firstly, it aims to produce a summary of the attempts carried out at European level to converge national penal orders, detention conditions and prisoner rights, and to illustrate how this convergence relates to the mutual recognition principle and the AFSJ. Secondly, it seeks to address the existing disparities between national detention systems across the Union, as a force of divergence; to shed some light into its causes and problematic consequences for the Union's AFSJ; and, finally, to map out the road ahead. As regards the structure of the study, Paragraph 2 briefly revisits how mutual recognition operates, within the context of Europe's AFSJ. Paragraph 3 summarizes European intervention that has taken place in matters of detention, namely detention conditions and prisoner rights, across national orders. Paragraph 4 demonstrates the disparities that persist between EU penal systems, while Paragraph 5 highlights the negative consequences this *status quo* raises for MS and the EU as a whole, with a focus on mutual recognition. Paragraph 6 consequently deals with the correspondent strategy that the EU

² Council of the European Union, Tampere European Council, 15 and 16 October 1999 - Presidency Conclusions, 2012, p. 6. Emphasis Added.

³ Namely the right to physical liberty as safeguarded under Article 5 ECHR, not encompassing mere restrictions on liberty of movement; see Council of Europe, *Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security*, Strasbourg, updated on 31 December 2018.

⁴ Institutions housing individuals lawfully deprived of their liberty by the criminal justice system, as a result of a suspected or proven criminal offence; therefore, those individuals deprived of their liberty, but not connected with a suspected or proven criminal offence (i.e. immigration detention, mental asylum), or persons under military law, fall outside the scope of the paper. Definitions based on the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules; see also European Court of Human Rights, Court (Plenary), judgment of 6 November 1980, application no. 7367/76, *Guzzardi v. Italy*, para. 95.

⁵ For an extensive analysis on the relevance of the interaction between fundamental freedoms and criminal law see F. TULKENS, *The paradoxical relationship between criminal law and human rights*, in *Journal of International Criminal Justice*, 2011, n. 3, pp. 577-595; V. MITSILEGAS, *EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe*, Bloomsbury Publishing, 2016; and A. KLIP, *European Criminal Law*, 3rd Edition, Intersentia, 2016.

could utilize to mitigate existing disparities, improve on the overall quality of national penal systems, and thus ensure the smooth functioning of its AFSJ through the mutual recognition principle. The final Paragraph (7) offers a brief conclusion.

2. In a nutshell: Mutual recognition in the Area of Freedom, Security and Justice

The interest of the EU in freedom, security, and justice matters manifested itself rather recently, arising from a need to control the criminal by-products that accompanied the construction of the Union as a borderless area⁶.

It was a series of terrorist attacks – most notably the tragic events that occurred in 1972 in Munich⁷ – that set things in motion, as national authorities began to realize that, in order to effectively combat the threat of terrorism, some level of intergovernmental cooperation was in order. Therefore, the creation of an intergovernmental forum that would establish communication networks between MS, thus facilitating counterterrorism efforts, was decided⁸. From there, things quickly spiralled into motion. The Schengen Agreement (1995) led to the abolition of internal border controls in the vast majority of MS; at the same time, cooperation between European MS was formally introduced,⁹ especially with the Maastricht Treaty¹⁰ establishing the so-called ‘third pillar’ of Justice and Home Affairs (JHA).

Nonetheless, the absence of internal border controls, while ensuring the free movement of people, came with a downside, as it also facilitated the movement of criminals, the cooperation of criminal organizations, and the commitment of cross-border crime. Criminals in the EU found this freedom of movement to mean an opportunity to advance their goals, like wolves in sheep’s clothing.

Such concerns were expressed directly with the Treaty of Amsterdam,¹¹ which set the objective to “maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”¹². This AFSJ strives to establish and safeguard fundamental rights, maintain high levels of security, and ensure that internal freedom of movement does not facilitate criminal activity¹³.

⁶ V. MITSILEGAS, J. MONAR, W. REES, *The European Union and internal security: Guardian of the people? (One Europe or several?)*, Basingstoke [etc.], 2003.

⁷ K. TOOHEY, T. TAYLOR, *Mega events, fear, and risk: Terrorism at the Olympic Games*, in *Journal of Sport Management*, 2008, n. 4, pp. 451-469.

⁸ T. BUNYAN, *Towards an authoritarian European state*, *Race & Class*, 32(3), 1991, pp. 19-27.

⁹ An example being the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, Official Journal C 254, 19/08/1997 pp. 01-12.

¹⁰ Treaty on European Union, Official Journal C 191, 29/07/1992, pp. 01-110.

¹¹ Treaty of Amsterdam, *op. cit.*, 1997.

¹² See Article 1 paragraph 5 Treaty of Amsterdam, *op. cit.*, 1997.

¹³ See Article 67 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47-390.

To achieve these goals, the Union relies heavily on establishing and promoting a cooperation regime among national judicial and police authorities of its MS. Within this context, it has adopted a series of cooperation instruments, the Framework Decision on the European Arrest Warrant (FD EAW)¹⁴, which aims to regulate and simplify extradition procedures between States, being the first and most prominent one. Other currently in effect cooperation instruments include the Framework Decision on the transfer of prisoners¹⁵ (which aims to facilitate the social rehabilitation of convicted persons); the Framework Decision on alternative sanctions and probation decisions¹⁶ (which allows the recognition and supervision of probation measures in a MS other than the one that pronounced the sentence); and the Framework Decision on the European supervision order¹⁷. Adhering to the spirit of Tampere, each of these instruments concerns some kind of judicial decision (an arrest warrant, a custodial sentence, a probation measure)¹⁸, and altogether provide a policy framework regulating forced movement and transfer of individuals within the EU¹⁹. Regulating forced movement proves thus as a means to the end of safeguarding freedom of movement within the EU.

This cooperation regime, and, in turn, the whole structure and operation of the AFSJ, is built upon the structural²⁰ principle of mutual trust: the assumption that each EU administration upholds a basic standard of human rights and keeps an equal level of common values²¹. This means that e.g. Italy is expected to believe that Greece, Poland, Germany and the Netherlands all share and respect a common framework of values and fundamental rights, and vice versa: Greece, Poland, Germany and the Netherlands are legally expected to presume the same of Italy. Mutual trust is built upon the fact that EU MS share a common normative and monitoring influence, regarding fundamental rights, as analysed under the following Paragraph.

Consequently, mutual trust allows for mutual recognition. As a principle, mutual recognition originates from EU internal market law²²; in the context of criminal justice,

¹⁴ Council Framework Decision 2002/584/JHA, *on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision*, of 13 June 2002, in OJ L 190, 18 July 2002, pp. 1-20.

¹⁵ Council Framework Decision 2008/909/JHA, *on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union*, of 27 November 2008, in OJ L 327, 5 December 2008, pp. 27-46.

¹⁶ Council Framework Decision 2008/947/JHA, *on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions*, of 27 November 2008, in OJ L 337, 16 December 2008, pp. 102-122.

¹⁷ Council Framework Decision 2009/829/JHA, *on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention*, of 23 October 2009, in OJ L 294, 11 November 2009, pp. 20-40.

¹⁸ L. MANCANO, *Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law*, in *Perspectives on Federalism*, 2016, n. 1, pp. 1-20.

¹⁹ M. WENDEL, *Mutual Trust, Essence and Federalism—Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, in *European Constitutional Law Review*, 2019, n. 1, pp. 17-47.

²⁰ A. PRECHAL, *Mutual trust before the Court of justice of the European Union*, in *European Papers*, 2017, n. 1, pp. 75-92.

²¹ European Court of Justice, *Opinion 2/13* of 18 December 2014, para. 191.

²² Court of Justice of the European Union, judgment of 20 February 1979, *Rewe-Zentral AG v.*

it dictates that a judicial order or judgment issued by the authorities of one MS is to, in principle, be recognized and enforced by the authorities of another MS automatically and without further formalities²³.

A chain is thus formed: a common framework of values, rights and freedoms gives birth to mutual trust – the assumption that, indeed, MS respect and uphold this common minimum threshold. In turn, this allows for mutual recognition of judicial decisions and judgements across the Union, and enables cooperation between national authorities. Ultimately, this leads to increased levels of security, allows for the unconditional freedom of movement and the functioning of Europe's internal market, and enhances the protection of common values and fundamental rights across the EU.

In the following Paragraph, the study examines how this European framework of common values and fundamental rights manifests itself in detention-related matters, namely detention conditions and prisoner rights.

3. European influence in matters of detention: towards convergence

The Council of Europe (CoE) is the oldest and leading organization devoted to the protection of human rights in Europe. Recognising the prominent role the CoE has historically played in detention conditions and inmate-related matters in the Old Continent, it is only fitting that this Paragraph commences with a brief overview of the Council's activities in the area.

The CoE holds both normative and monitoring influence over national detention systems, and has adopted a series of legal instruments and treaties, devoted to establishing and safeguarding the minimum rights and freedoms of individuals, including those deprived of their liberty. These include: the European Convention on Human Rights and Fundamental Freedoms (ECHR)²⁴ and its associated Protocols. Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial) and Article 8 (right to respect for privacy and private life) prove particularly relevant in the current context. Regarding the associated Protocols, Protocol 6 to the Convention requires CoE Members to abstain from the use of the death penalty as a form of punishment – an exception is provided only to times of war or imminent threat of war. For the enforcement, interpretation, and monitoring of the ECHR, the Convention established the European Court of Human Rights (ECtHR), the decisions of which are legally binding on all CoE States.

The 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment²⁵. The Convention provides for the setting up of an international

Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), C-120/78, ECLI:EU:C:1979:42.

²³ Thus establishing a freedom of judicial decisions and judgments as a fifth fundamental freedom within the Union.

²⁴ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR), European Treaty Series (ETS) No. 005, as amended.

²⁵ European Treaty Series (ETS) No. 126.

committee, namely the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT is empowered to visit all places where persons are deprived of their liberty by a public authority, including police cells, jails, prisons, closed psychiatric institutions, immigration detention centres, homes (regarding house arrest), and so on. During each visit, the CPT seeks to identify situations and conditions that may result to torture, or other inhuman or degrading treatment or punishment. After each visit, a Report containing the CPT's findings is drawn up and sent to the respective government; this Report may include recommendations and suggested improvements that national authorities could adopt, in order to enhance detention standards and strengthen the protection of their detainees. The CPT thus assumes the role of a preventive, non-judicial machinery, and complements the system of protection already existing under the ECHR.

The 2006 European Prison Rules²⁶. While advisory in nature, these Rules provide European States with a clearly articulated set of benchmarks and recognised standards on good principles and practices in the treatment of detainees and the management of detention facilities. Drawing from the philosophy of human rights, and recognising the detrimental impact that incarceration holds for individuals, the Rules imply that States ought to abstain from mistreating prisoners, while also taking care to actively reduce the pains of imprisonment; they thus encompass both negative and positive obligations.²⁷ The Rules contain provisions regulating various aspects of prison life: these include nutrition, hygiene, healthcare, access to legal advice, work and education, contact with the outside world, freedom of thought, conscience and religion, and so on.

The following CoE legal instruments are also noteworthy in the context of this study: the 1983 Convention on the Transfer of Sentenced Prisoners (ETS No. 112); the Recommendation Rec(92)16 on the European rules on community sanctions and measures; the Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures; and the Recommendation CM/Rec(2012)12 of the Committee of Ministers to Member States concerning foreign prisoners.

All EU Members have ratified the ECHR and its Sixth Protocol, as well as the 1987 Convention; moreover, every EU State falls under the jurisdiction of the ECtHR, and the monitoring competences of the CPT. The EU itself has followed upon this path, assigning an ever-increasing importance towards creating a Union based on fundamental rights and freedoms. This becomes evident at the very preamble of the TEU,²⁸ which declares that its MS draw inspiration “{...} from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law {...}”, and

²⁶ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.

²⁷ Positive obligations denote that a State has to engage in an activity to secure the effective enjoyment of a fundamental right (active protection), as opposed to the classical negative obligation to simply abstain from violations (passive protection); see J.F. AKANDJI-KOMBE, *Positive obligations under the European convention on human rights*, in *Human rights handbook*, 2007, n. 7.

²⁸ Consolidated version of the Treaty on European Union OJ C 326, 26.10.2012, pp. 13-390.

that MS confirm “{...} their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law{...}”.

Article 6 of the TEU moreover states “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”, and that “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union {...} which shall have the same legal value as the Treaties”. Indeed, several Articles²⁹ of the CFREU³⁰ prove relevant in the current context, the most prominent one being Article 4 (prohibition of torture, inhuman or degrading treatment).

Furthermore, the EU holds a more indirect influence over national penal systems and detention conditions. This is embodied particularly in the three aforementioned cooperation instruments, namely: the FD on the transfer of prisoners; the FD on alternative sanctions and probation decisions; and the FD on the European supervision order. These Framework Decisions, if implemented correctly by the MS, have the potential to promote alternatives to incarceration and to facilitate the social reintegration of inmates.

It thus become evident that both the EU and the CoE have strived, over the years, to provide their Members with a framework, which ensures that a certain minimum fundamental rights framework applies in general as well as regarding incarcerated individuals, and that detention conditions are of sufficient quality to ensure the protection of such rights. There may be 28 distinct legal and penal orders, but there is one common thread, regarding fundamental rights in the EU – at least in theory³¹. Nonetheless, the management, supervision, and maintenance of detention conditions and human rights standards in penitentiaries have traditionally belonged to the sovereign State³², and penal systems have proven to vary greatly across the Old Continent, as examined in the following Paragraph.

4. Disparities between national detention systems: towards divergence

An example of this divergence can be witnessed by examining the national reports for prisons in just three European jurisdictions, as provided by the CPT: England and Wales, Greece, and the Netherlands.

²⁹ Including Article 4 (prohibition of torture, inhuman or degrading treatment), Article 5 (prohibition of slavery and forced labour), Article 6 (right to liberty and security), Article 7 (respect for family and private life), and Article 47 (right to an effective remedy and to a fair trial).

³⁰ Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, pp. 391-407.

³¹ R. SCHÜTZE, *Three ‘Bills of Rights’ for the European Union*, in *Yearbook of European Law*, 2011, n. 1, pp. 131-158.

³² M. WEBER, J. DREIJMANIS, G. WELLS, *Max Weber’s complete writings on academic and political vocations*, New York, 2008.

The CPT, in its latest report³³, noted that there have been several positive developments, as regards the situation in prisons in England and Wales; Yet “a number of chronic issues raised during previous CPT visits, including severe overcrowding, poor living conditions and a lack of purposeful regimes {...} continue to blight the prison system”. Moreover, the CPT’s delegation found that “these long-standing problems were being exacerbated by a significant escalation in levels of violence, rendering them unsafe places for prisoners and staff alike”³⁴.

Concerning Greece, the relevant report³⁵ reveals that the Committee is concerned that problems include “{...} the lack of a strategic plan to manage prisons, which are complex institutions, the absence of an effective system of reporting and supervision, and inadequate management of staff”; moreover, “{...} the main problems of overcrowding and chronic shortage of staff persist in the Greek prison system. These two overarching problems compound the many additional serious shortcomings in the prisons visited, including very poor material conditions, lack of hygiene, the absence of an appropriate regime and high levels of inter-prisoner violence and intimidation. Further, the insufficient provision and inadequate medical care in prisons is particularly worrying. The situation has now deteriorated to the point where over and above the serious ill treatment concerns under Article 3 of the European Convention on Human Rights (ECHR), there are very real right to life issues under Article 2 ECHR, in as much as vulnerable prisoners are not being cared for and, in some cases, are being allowed to die”. The CPT concludes, “The Greek prison system is reaching breaking point”³⁶.

On the correspondent report³⁷, we read: “In the course of the last decade, the prison population has considerably decreased in the Netherlands. At the time of the May 2016 visit, there were 8,519 persons being held in Dutch prisons including in the psychiatric penitentiary centres (PPC) compared to 16,230 in 2006. The CPT wishes to highlight this situation, almost unique in Europe. As a consequence, the Dutch authorities have closed a number of prisons in recent years and most of the individual cells which had been transformed into double-occupancy cells in the early 2000s are now again being used for single accommodation. To prevent the closure of too many establishments, the Netherlands has rented out prison premises, together with custodial staff, to other European states {...}”³⁸. Moreover, “{...} the delegation did not receive a single

³³ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016, Strasbourg, 19 April 2017.

³⁴ See Paragraph 30 of the Report.

³⁵ Council of Europe, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015, Strasbourg, 1 March 2016; see also N.K. KOULOURIS, W. ALOSOFIS, *Prison conditions in Greece*, in *European Prison Observatory: Detention conditions in the European Union*, Rome, 2013.

³⁶ See Paragraph 61 of the Report.

³⁷ Council of Europe, Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016, Strasbourg, 19 January 2017.

³⁸ The Dutch prison population has considerably decreased in the Netherlands during the last decade, to the

allegation of physical ill-treatment by staff in any of the establishments visited. On the contrary, relations between prisoners and staff appeared to be generally good, and staff displayed professionalism and engagement in their interaction with prisoners. {...} Inter-prisoner violence appeared to be limited. {...} the prison buildings were well maintained and necessary investments were made in a timely manner in order to prevent the deterioration of the premises. Further, all the establishments visited operated below their maximum capacity which contributed to maintaining suitable material conditions for inmates³⁹.

The Committee's reports paint a vivid picture, one that finds confirmation and support in other sources. For instance, one has to glance at the ECtHR case law database for the year 2018, and examine the table⁴⁰ relating to violations of Article 3 ECHR – an Article that corresponds with Article 4 of the Charter and lies at the very heart of the issue under examination – in the context of inhuman or degrading treatment. Romania was found guilty of 37 violations, Greece of 11, Italy of 2, the Netherlands of 1, and the UK for none; going all the way back to the Court's establishment, and examining the violations during the period of 1959-2018, Romania holds 263 violations, Greece 115, Italy 32, the Netherlands 10, while the UK 17⁴¹.

The disparity is also illustrated in the most recent SPACE Report⁴², specifically the section regarding prison population rates (number of inmates per 100.000 inhabitants in a country). There it becomes evident that some national prison systems (e.g. those of Germany, Sweden, and the Netherlands)⁴³ are housing increasingly less individuals, while others (e.g. Italy, Hungary or Belgium)⁴⁴ stand at the opposite side of the spectrum.

High incarceration rates, of course, consist solely a single aspect of the issue. The ECtHR has identified recurrent, deep, structural problems that affect various national detention systems, and result in repetitive breaches of the States' obligations under the ECHR. For instance, in the 2015 pilot⁴⁵ judgment of *Varga and Others v. Hungary*⁴⁶ the

point where prison premises have been rented out to other EU MS, such as Norway and Belgium. For more information, see Council of Europe, *op. cit.*, of 25 November 2016; and F. PAKES, K. HOLT, *The Transnational Prisoner: Exploring Themes and Trends Involving a Prison Deal with the Netherlands and Norway*, in *The British Journal of Criminology*, 2017, n. 1, p. 79.

³⁹ See Paragraphs 31 to 35 of the Report.

⁴⁰ Council of Europe, European Court of Human Rights, Violations by Article and by State 2018.

⁴¹ Council of Europe, European Court of Human Rights, Violations by Article and by State 1959-2018.

⁴² Council of Europe, Annual Penal Statistics, Space I – Prison Populations, Strasbourg, Survey 2016, Updated on 7th February 2019 (Statistics as recovered from Report's Executive Summary, p. 3).

⁴³ With a reduction in their prison population rates of 18.4 %, 26.2 % and 38.9 % respectively.

⁴⁴ With an increase in their prison population rates of 37.0 %, 19.5 % and 8.3 % respectively.

⁴⁵ The pilot judgment procedure was developed by the ECtHR as a technique of identifying structural problems underlying repetitive cases against many countries and imposing an obligation on MS to address those problems. Where the Court receives several applications that share a root cause, it can select one or more for priority treatment under the pilot procedure. In a pilot judgment, the Court's task is not only to decide whether a violation of the Convention occurred in the specific case, but also to identify the systemic problem and to give the respective national administration clear indications of the type of remedial measures needed to resolve it.

⁴⁶ European Court of Human Rights, judgment of 10 March 2015, *Varga and others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.

Court observed that it had found violations of Article 3 (prohibition of inhuman or degrading treatment) ECHR in a number of previous and (approximately 450) pending similar cases against Hungary. In all of these cases, it identified recurring issues, including lack of personal space, restrictions on access to shower facilities and outdoor activities, and lack of privacy when using sanitary facilities. These issues did not appear in isolation, but rather originated in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system, which provided for insufficient safeguards against inhuman and degrading treatment. Two years later, in another pilot judgment, *Rezmiveş and Others v. Romania*⁴⁷, the Court identified a general problem originating in a structural dysfunction specific to the Romanian prison system, which resulted in repetitive violations of Article 3 ECHR. Problematic aspects of Romanian penitentiaries included overcrowding, inadequate sanitary facilities, lack of hygiene, poor-quality food, dilapidated equipment, and the presence of rats and insects in the cells⁴⁸.

Finally, several European institutions have acknowledged this situation, among the very first being the European Commission, which has recognized that, while detention conditions and prison management are the responsibility of MS, they hold an effect on the essential principle of mutual recognition of judicial decisions in the context of the AFSJ. The Commission also stated “Despite the fact that the law and criminal procedures of all Member States are subject to ECHR standards and must comply with the EU Charter when applying EU Law, there are still doubts about the way in which standards are upheld across the EU”⁴⁹. The European Parliament has followed upon this path; in its most recent Resolution of relevance, it expresses its concern, since “the situation in the prisons and the at times degrading and inhumane conditions of detention existing in certain Member States are cause for extreme concern, as demonstrated by reports {...}”⁵⁰.

There exist, therefore, and despite the common normative and monitoring European framework, considerable disparities between prison systems and detention conditions, with some jurisdictions serving as global inspirations, while others are considerable lagging behind. The Union is comprised of many different MS, with various legal

⁴⁷ European Court of Human Rights, judgment of 25 April 2017, *Rezmiveş and others v. Romania*, application nos. 61467/12, 39516/13, 8213/13 and 68191/13.

⁴⁸ There has been a long chain of repetitive cases that illustrate structural problems in national prison systems. See indicatively European Court of Human Rights 8 January 2013, *Torreggiani and others v. Italy*, no. 43517/09; judgment of 16 July 2009, *Sulejmanovic v. Italy*, no. 22635/03; judgment of 22 October 2010, *Orchowski v Poland*, no. 17885/04. Furthermore, this reality is mirrored in national and international reports; see e.g. N. K. KOULOURIS, W. ALOSKOFIS, *Prison conditions in Greece*, cit.; V. EECHAUDT, *Complying with international prison law? Prison discipline in Belgium and France*, presented at the 17th Annual Conference of the European Society of Criminology: Challenging “Crime” and “Crime Control” in *Contemporary Europe*, 2017, pp. 357–357); and A. COYLE, C. HEARD, H. FAIR, *Current trends and practices in the use of imprisonment*, in *International Review of the Red Cross*, 2016, pp. 761-781.

⁴⁹ European Commission, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, of 14 June 2011, COM(2011) 327 final.

⁵⁰ European Parliament Resolution, on prisons' systems and conditions, of 5 October 2017 (2015/2062 (INI)).

traditions and orders that need to be respected by the European legislator and each Member of the European Community; in such a context, disparities are as inevitable as they are welcome. Ever since the days of Durkheim⁵¹, it has been common knowledge among theorists and practitioners alike that a prison is an extremely complex machinery. Indeed, scholars such as Snacken⁵² and Lappi-Seppälä⁵³ have demonstrated that the quality of detention conditions and human rights standards in penal systems is a result of a combination of reasons, including legal, financial, political, societal, and historical variables⁵⁴.

It comes therefore as no surprise that national legal and detention systems are not identical. They are not supposed to be identical – they are, however, supposed to offer equivalent protection. When disparities grow too vast, to the point where various MS start falling below the minimum threshold provided by the communal culture of rights, trouble arises.

5. Problematic consequences of divergence: building on sand

At the outset, it should be noted that detention-related matters are in direct correlation with a series of topics of national interest. Indeed, the extent towards which a State respects the fundamental rights of its inmates, and guarantees a certain quality of life behind bars, has been proven to hold a considerable effect on recidivism rates⁵⁵. Moreover, poor detention conditions have the potential to lead to and facilitate radicalization by criminal and terrorist organizations⁵⁶. Matters of detention also translate into palpable financial benefits (or harm) for the national taxpayer – prisons and detention centres are an extremely costly machinery to maintain, while inmates do not actively contribute as productive members of society⁵⁷. Finally, detention conditions overall have

⁵¹ E. DURKHEIM, *Two Laws of Penal Evolution*, in *University of Cincinnati Law Review*, 1969, n. 32.

⁵² S. SNACKEN, K. BEYENS, H. TUBEX, *Changing prison populations in western countries: Fate or policy?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1995, n. 3, pp. 18-53.

⁵³ T. LAPPI-SEPPÄLÄ, *Sources of prison overcrowding*, in paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, 12th United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 2010, pp. 12-19.

⁵⁴ See also L. K. CHELIOTIS, S. XENAKIS (Eds.), *Crime and punishment in contemporary Greece: international comparative perspectives*, Peter Lang AG, 2011.

⁵⁵ P. GENDREAU, C. GOGGIN, F.T. CULLEN, *The Effects of Prison Sentences on Recidivism*, Canada: Solicitor General, 1999; and F. DRAGO, R. GALBIATI, P. VERTOVA, *Prison Conditions and Recidivism*, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 2009.

⁵⁶ P.R. NEUMANN, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*, London: International Centre for the Study of Radicalisation and Political Violence and the National Consortium for the Study of Terrorism and Responses to Terrorism, 2010; and J. ILLARDI, *Prison radicalisation: The devil is in the detail*. Paper presented at the ARC Linkage Project on Radicalisation – Conference, Understanding Terrorism from an Australian Perspective: Radicalisation, De-Radicalisation and Counter Radicalisation, Monash University, Australia, 2010.

⁵⁷ Estimations reveal that it costs 51 Euros per day to keep one inmate behind bars per average; see Council of Europe, *Annual Penal Statistics, Space I – Prison Populations*, Strasbourg, Survey 2016, Updated on 7th February 2019; see also V. W. BALLEGOOIJ, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS, European Added Value Unit), 2017.

an effect on the effectiveness, efficiency, transparency and legitimacy of national penitentiaries, and ultimately of the entire criminal justice system and state apparatus⁵⁸.

Nonetheless, the focus of this study lies on the European level, rather than the national one. What is the interest of the EU in prison-related matters – reversing the question, what consequence do detention conditions and prisoner rights hold for the EU?

The answer proves straightforward: poor detention centres equal poor levels of mutual trust, and trust serves as the very backbone of the AFSJ. Indeed, MS across the EU are supposed to belong to the same community, share equal normative and monitoring European influence, and aspire towards the same values. Yet how can a State, which provides for high-standard detention conditions, and safeguards the rights of its prisoners, trust and cooperate with one, within which notoriously poor detention conditions result in systematic and frequent violations of inmates' rights? The notion that certain values and fundamental rights are uniformly recognised across the Union thus seems to be a reality, and the very existence of the EU as an AFSJ is put under the test; and this is already happening.

In 2014⁵⁹, Hungarian authorities issued two European Arrest Warrants for the surrender of Mr. *Aranyosi*, a Hungarian national. A year later, Romanian authorities issued one EAW for Mr. *Căldăraru*, a Romanian national. These Warrants for both individuals were addressed to German authorities, specifically the Higher Regional Court of Bremen (Hanseatische Oberlandesgericht Bremen).

As mentioned under Paragraph 2, the FD on the European Arrest Warrant (EAW) is the first concrete measure within the context of the Union's AFSJ based on the principle of mutual recognition, as envisioned by Tampere. Once issued, the EAW requires for the executing MS to arrest and transfer a criminal suspect or sentenced person to the issuing MS, so that the person can be put on trial or complete a detention period. As an instrument, the EAW is intended to increase the speed and ease of extradition throughout EU States, by removing cumbersome political and administrative phases of decision-making, which had characterised the previous system of extradition in Europe. The ultimate, overarching goal, is for suspects or convicts to be unable to utilize national borders as a means of escaping justice.

Nonetheless, and despite having ratified the relevant FD, the German Court proved reluctant to extradite. The reason was that the Court held information about the poor conditions of correctional facilities in both Hungary and Romania; this information was provided by relevant CPT Reports and ECtHR case law (such as the aforementioned *Varga* judgment)⁶⁰. Thus, the Court was faced with strong indications that, in case it decided to accept the Warrants and extradite *Aranyosi* and *Căldăraru*, these individuals

⁵⁸ J.R. SPARKS, A.E. BOTTOMS, *Legitimacy and Order in Prisons*, in *The British Journal of Sociology*, 1995, n. 1; and J. JACKSON, T.R. TYLER, B. BRADFORD, D. TAYLOR, M. SHINER, *Legitimacy and procedural justice in prisons*, in *Prison service journal*, 2010, pp. 4-10.

⁵⁹ Facts as described in European Court of Justice of the European Union, Grand Chamber, judgment of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, paragraphs 28 ss., ECLI:EU:C:2016:198.

⁶⁰ European Court of Human Rights, 2015, *ibidem*.

could be exposed to detention conditions so poor, that their detention would violate their fundamental rights and freedoms. The Court was concerned especially whether these individuals would be protected against torture, inhuman or degrading treatment, as safeguarded under Article 3 ECHR and Article 4 of the Charter.

Consequently, the German Court referred the case to the ECJ, seeking guidance on how it ought to proceed. The European Court, at the outset, recognised⁶¹ that Article 3 ECHR, and the correspondent Article 4 of the Charter, does not only consist an absolute⁶² right, but is fundamental for the EU and its community of values. On the other hand, MS have to, in principle, execute a EAW, and based on the structural principles of mutual trust and recognition – in other words, Germany had a legal obligation to extradite.

Faced with this Gordian Knot, the Court decided to put in place a two-phase test. It declared that, should an executing MS hold evidence demonstrating that there is a substantial risk that detention conditions in the issuing MS infringe Article 4 of the Charter and Article 3 ECHR, it should proceed as follows: firstly, it must assess general detention conditions in the issuing MS; secondly, it must assess whether these general conditions will possibly – based on substantial grounds – result in an infringement of the fundamental rights of the specific individual. Therefore, it does not suffice for detention conditions to be generally poor in the issuing MS; there should also be a real risk for the requested individual, once surrendered. Only after this two-stage assessment has been carried out can the executing MS defer from extraditing, at least until it receives the information necessary to discount the existence of such a real risk for the individual concerned. The Court concludes⁶³ that, if this risk cannot be discounted within a reasonable time, then the executing MS must decide whether or not to terminate the procedure.

Thus, the Court sought to restore the balance between safeguarding fundamental rights on the one hand, and ensuring the smooth functioning of the EAW on the other. This landmark decision is important for a few other reasons as well. In *Aranyosi and Căldăraru*, the ECJ itself recognizes that the obligation imposed on MS to presume that other Members provide effective and equivalent fundamental rights protection is not unconditional – mutual trust is not immune, but rather limited, and must be weighed against any acknowledged detention-related deficiencies. While the Court places an obligation on the issuing MS to not rely merely on general deficiencies, but to go further and test each case *in concreto*, at an individual basis, allowing the executing MS to question the fundamental rights record of the issuing MS is clearly at odds with the mutual

⁶¹ Court of Justice of the European Union, Grand Chamber, judgment 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, 2016, paras. 85-87, ECLI:EU:C:2016:198.

⁶² An absolute right consists an inalienable attribute of every human being, and restrictions might be imposed upon its protection – as contrasted with a qualified right, the protection of which may be restricted by the State for e.g. public safety or national security reasons; see Article 15 ECHR; and S. GREER, *Constitutionalizing Adjudication under the European Convention on Human Rights*, in *Oxford Journal of Legal Studies*, 2003, n. 3, pp. 405-433.

⁶³ Court of Justice of the European Union, *op. cit.*, para. 104.

trust principle⁶⁴, which builds on the presumption that other MS provide effective and equivalent fundamental rights protection – full stop.

Moreover, the EAW relies on, and aims to promote, automaticity, simplicity, and speed in extradition procedures. This goal is now hindered with the two-step test; while such a test must only be utilized in cases where there is evidence about poor detention conditions in a MS, the ever-increasing disparities between national detention systems, and the chronic issues faced by many MS in this regard, mean that the two-step test might be used more often than not. While this is good news for the protection of fundamental rights, it is a heavy blow for the mutual trust and mutual recognition principles, and consequently for Europe's AFSJ.

Thus, a current, persisting, and crucial problem exists for the EU. Poor national detention conditions undermine mutual trust and recognition, and cause a standstill in extradition proceedings between MS. Left unanswered, this situation will not only further harm the cooperation regime in criminal matters between MS, but ultimately undermine the European values of security, human rights, and free movement. Prison conditions prove therefore an issue of extreme relevance for the EU, which holds a vital interest to intervene. The following Paragraph examines how such intervention could potentially take place.

6. Securing the Union's AFSJ through EU intervention

The EU stands at a crossroads. Does it fall back and accept fundamental rights concerns as a new limit to mutual trust and recognition, or does it instead seek to 'rescue' these essential principles, and thus ensure the smooth functioning of its AFSJ – and if so, how?

Since its establishment, the ultimate goal of the EU is to benefit its citizens⁶⁵, by, *inter alia*, protecting basic political, social and economic rights, and developing a single area based on the EU's four key freedoms, which enable citizens to live or work in any EU country, move their money, sell goods without restrictions, and provide services on the same basis across the Union. Not taking action, and not looking to positively influence the *status quo* and reverse the currently threat towards its AFSJ would thus mean that the EU accepts defeat, and gives up on its core values and ideals, and ultimately its very purpose.

In this sense, the choice is already made. Indeed, as early as 2009, the European Parliament has called for the construction of the Union as an area "based on respect for fundamental rights, the principle of mutual recognition, and the need to maintain the

⁶⁴ See I. CANOR, *My Brother's Keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe"*, in *Common Market Law Review*, 2013, n. 2, pp. 383-421; and M. WENDEL, *Mutual Trust, Essence and Federalism—Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, in *European Constitutional Law Review*, 2019, n. 1, pp. 17-47.

⁶⁵ See Article 3 of the Consolidated version of the Treaty on European Union OJ C 326, 26.10.2012.

coherence of national systems of criminal law, to be developed through {...} minimum standards for prison and detention conditions and a common set of prisoners' rights in the EU"⁶⁶.

Such a common framework exists, as developed by the CoE, the CPT, the ECtHR and the EU itself – yet disparities persist. As already highlighted under Paragraph 3, several provisions envision a number of rights for prisoners and detainees across the EU, while also setting the minimum standards for detention. However, there may be room for further improvement.

At the outset, on a regulatory level, some of these provisions can be hopelessly broad. Take, for instance, Article 4 CFREU, and Article 3 ECHR, which state that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' While both of these provisions guarantee that individuals deprived of their liberty should not be treated in a degrading or inhuman way, neither of them offers an explanation on what exactly constitutes degrading or inhuman treatment; this is rather left up to national authorities of each MS to define. A similar example would revolve around the ECtHR. In its case law, the Court has explicitly stated that States have a positive obligation to ensure rehabilitation of their inmates, and that the emphasis on rehabilitation consists a mandatory factor that needs to be taken into account when developing national penal policies⁶⁷. Yet again, there is no common definition of what exactly consists rehabilitation, nor a single agreed-upon way to measure it.

Moreover, the protection of inmates' rights, and the establishment of minimum standards that should apply to detention conditions, are often fragmented across various provisions, documents and instruments, and may not be addressed specifically to inmates and detainees, but rather derive from provisions of a more general scope – such as the CFREU. Furthermore, some of these provisions, like the Council's European Prison Rules⁶⁸, are not legally binding, and thus cannot be imposed upon MS.

Finally, while the CPT holds monitoring competence over national detention systems, it does not have the power to impose fines or any form of sanctions to MS that fail to adhere to the desirable standards, but rather relies on a shaming strategy, by exposing the State's failure to the European and international community. Ultimately, the CPT is relying on moral and political influence, and resting on the sanction of (negative) publicity, which assumes that a sovereign State values its reputation in the international community as a State that respects its obligations, as they stem out from relevant documents and treaties it has signed.

⁶⁶ See European Parliament resolution of 25 November 2009, on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, Strasbourg, 2009, paragraph 112.

⁶⁷ See European Court of Human Rights, Grand Chamber, judgment of 26 April 2016, application no. 10511/10, *Murray v. The Netherlands*, par. 104; and European Court of Human Rights, Grand Chamber, judgment of 30 June 2015, application no. 41418/04, *Khoroshenko v. Russia*, par. 121.

⁶⁸ See also the UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Is it perhaps time for the EU to add to and expand the existing normative and monitoring framework? The EU does, in principle, possess the power to enforce a regulatory instrument upon its MS, thus setting legally binding standards, which MS would have to respect⁶⁹. In its most recent Resolution⁷⁰, the Parliament invited the MS to adopt a European Prisons Charter. This is not a novel idea; the CoE has suggested as much, over a decade ago⁷¹. In the words of the Committee on Legal Affairs and Human Rights⁷² of the CoE: Europe must adopt a robust, efficient and ambitious instrument to promote a genuine European prisons policy. This policy would establish fully binding standards and common criteria for the member states, and allow the harmonisation of detention conditions and the monitoring of standards' enforcement, ensuring therefore that the rights and dignity of persons deprived of their liberty are respected.

A European Prison Charter, as a single document, which would firmly establish the rights of persons deprived of their liberty, and set a certain framework that should apply to detention conditions, would perhaps prove suitable to the task. Such a document would have to take into account and expand upon all the relevant rights, ideals and principles found in the case law of the ECJ and the ECtHR, as well as general and common principles resulting from the common constitutional traditions of EU countries and other international instruments or documents, such as the Universal Declaration of Human Rights. The adoption of the Charter would serve to make explicit where the Union stands, as regards to the matter. The importance of prisoner rights and adequate detention conditions would thus be expressly recognised, and made visible to each and every MS and European citizen. It could (and perhaps should) also be assigned the same legal value as the Treaties and the CFREU; it would thus constitute primary law of the EU, and would serve as a yardstick, against which the validity of secondary EU legislation, as well as national provisions, would be measured; in such a case, it could be invoked before the national courts (according to the principle of direct effect of EU law).⁷³ The MS would have to obey, or face the political and, more importantly, legal consequences – which would provide an incentive for MS to comply, and possibly deal with problems stemming from a lack of political will to act.

Another option for the EU would include the undertaking of central (complementary) executive capacities. Perhaps the problem lies not in the 'head', but rather the 'feet': it is not the regulatory framework the needs to improve, but rather MS need to incorporate

⁶⁹The Union operates through a system of supranational independent institutions on the one hand, and intergovernmental negotiated decisions by the Member States (MS) on the other. For more information, see F. SCHIMMELFENNIG, B. RITTBERGER, *Theories off European integration*, in *European Union: Power and policy-making*, 2006, n. 10, p. 73.

⁷⁰ See European Parliament Resolution of 5 October 2017, *op. cit.*

⁷¹ See Council of Europe Recommendation 1656/2004 of 27 April 2004.

⁷² See Doc. 10922, report of the Committee on Legal Affairs and Human Rights, rapporteur: MR MICHEL HUNAULT.

⁷³ The direct effect of European law has been enshrined by the Court of Justice in the judgement of *Van Gend en Loos* of 5 February 1963. In this judgement, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European Courts.

this framework in their own national legal orders, and ensure its full and effective implementation. Even with a coherent, visible, and legally binding detentions and penal policy, some MS may still prove unwilling or unable to comply. In such cases, the Union could, in theory, complement its legislative competence with an executive one, and provide assistance (in the form of funding or personnel), though limited in scope and time, until the problematic situation in detention centres has been dealt with. Recent examples of the Union complementing the executive efforts of MS consist of the allocation of funds in MS faced with an economic crisis, or the recent proposal to dispatch of qualified personnel to assist migration and border control authorities.⁷⁴ Similar options exist, as regards the topic at hand.

On the one hand, already existing national and other agencies, institutes and forums, such as the CPT, the European Penitentiary Training Network, or the European Prison Regime Forum, could be supported and enhanced; on the other, options about establishing new institutions and structures should be examined. For instance, the European Parliament has called on the European institutions to support technically and economically, as far as possible, the improvement of prison systems and conditions, especially in MS facing serious financial difficulties⁷⁵. Following on this proposal, national effort could be supported by a funding effort – using EU Structure and Investment Funds. Furthermore, a European Detention Agency could be established. Such an Agency could exert monitoring powers in national detention systems across the EU, in the same sense that the CPT does across all CoE members; however, it could also possess the competence to bring any identified problems to the attention of the European Institutions, decide on the allocation of resources towards national detention centres, or even propose sanctions. Such an Agency could also employ specialized, qualified personnel, which could be sent to the MS, in order to amount for potential staff shortcomings; this personnel would offer assistance, but limited in scope and time, and would retire from the MS, once the problematic situation was dealt with.

The aforementioned options are only indicative and by no means exhaustive⁷⁶. Of course, for the EU to undertake any legal action, there must first exist a relevant competence and legal basis, which allows the Union to do so⁷⁷. Potential candidates for harmonizing detention conditions may be Article 82(2)(b) TFEU and Article 352 TFEU⁷⁸; moreover, and outside a legal basis found in (and potentially requiring the

⁷⁴ See European Commission Communication, *A strengthened and fully equipped European Border and Coast Guard*, 2018.

⁷⁵ European Parliament Resolution of 5 October 2017, *op. cit.*

⁷⁶ See Report for the LIBE Committee, “Criminal procedural laws across the Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation”, LIBE Committee (2018).

⁷⁷ According to the principle of conferral of EU law, as laid down in Article 5 of the Treaty on European Union (TEU).

⁷⁸ See indicatively T. P. MARGUERY, *Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions*, in *Maastricht Journal of European and Comparative Law*, 2019, pp. 1-14; and L. MANCANO, *Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law*, in *Common Market Law Review*, 2019, n. 1, pp. 61-90.

amendment of) the Treaties, the Union could rely on soft law, e.g. the case law of its ECJ, with the ultimate goal of nudging MS to improve upon detention conditions themselves. In any case, the reaction of national authorities towards any European intervention may prove, at best, dubious. Legal and societal postulates may dictate the need to tread upon one path, yet MS are proving increasingly reluctant to share or give up even part of their sovereignty in favour of advancing European ideas.

7. Concluding remarks

The paper at hand has thus examined the attempts made at European level to harmonize matters of detention across the Union and within the context of its AFSJ, with the purpose of facilitating cooperation between MS, and overall ensuring the free movement of persons and enhancing the protection of the EU citizens. Moreover, it has showcased the opposite side of the spectrum, namely, the (inevitable yet problematic) divergence of national detention systems.

At the outset, both the EU and (especially) the CoE hold normative and monitoring influence over national detention systems. Yet disparities between MS are evident: while in theory MS belong to the same community, reality reveals that conditions in centres of detention greatly differ. Despite various attempts of intervention, it would seem that Europe has been building on sand. National detention systems remain in opposite sides of the spectrum, thus dividing the Union in two ‘speeds’ or ‘gears’: on the one hand, a Union where detention is effective, efficient, legitimate, respectful of fundamental rights, and serves its purpose; on the other, a Union which fails to deliver.

It would be a truism to state that detention-related matters hold consequences at a national level. Furthermore, and perhaps more importantly, the EU is a delicately woven tapestry, and an issue in one of its Members extends and multiplies, to the point of affecting every other MS. The situation in national centres of detention is in direct correlation with the principles of mutual trust and recognition, recognized by Tampere as being of fundamental importance for the efficient operation of Europe’s AFSJ, its common market, and the existence and functioning of the Union in general. This is already happening; the *Aranyosi* and *Căldăraru* joined cases analysed afore serve as a landmark; however, they were not an isolated instance,⁷⁹ and, examining the situation in national penitentiaries, it would seem that the issue is not going to disappear by itself any time soon.

Given the severe nature of these consequences, and the threat they pose for core European values, goals and ideals, it is perhaps high time that the EU adopted a more

⁷⁹ See i.e. Court of Justice of the European Union, First Chamber, judgment 25 July 2018, *ML*, case C-220/18 PPU; Supreme Court of Ireland, *The Minister for Justice Equality and Law Reform v Robert Rettinger*, 23 July 2010. See also S. PEERS, *The European Arrest Warrant: The Dilemmas of Mutual Recognition, Human Rights and EU Citizenship*, in *The Court of justice and the construction of Europe. Analyses and Perspectives on sixty years of case law*, The Hague, The Netherlands, 2013.

interventionist approach. The paper has touched upon a series of potential options, concerning regulation and enforcement both, which could potentially provide MS with the necessary direction, incentive, and time necessary, in order to undertake the onerous task of structural reformation.

Yet the very nature of the EU has been described as a system of negotiation⁸⁰, and it should remain thus, given the plethora of nations, traditions, and legal cultures that comprise the Union. Indeed, the EU is not a federation, and top-down solutions might not prove suitable nor desirable in the long term. Even the envisioned under Paragraph 6 measures might be perceived as too interventionist by the sovereign MS, especially given the fact that matters of detention belong traditionally to the very heart of Westphalian sovereignty, which renders them, as mentioned afore, an extremely sensitive area. Therefore, any form of intervention might be deemed by national authorities and the European people as shifting the balance of scales, by establishing ‘too much Europe’. That is to say, legal and societal postulates may dictate the need to tread upon one path, but MS are proving increasingly reluctant to share or give up even part of their sovereignty in favour of serving European ideas.

Moreover, providing national systems with extra funds and personnel, or imposing legal sanctions of any sort, might serve and positively influence the situation, yet they do not seem to constitute temporary, short-term measures. If the Union holds any aspiration to provide a permanent solution to the issue, this can only be delivered through targeting the issue at its core, and ultimately lead to a structural change from within the MS. This is not a simple nor trivial task; one should not expect to just “throw money” or other resources into the prison machinery and be rewarded with results in return. Instead, the EU should focus on collaborating with its MS and formulating a clear and articulate penal policy, one that revolves around the fundamental rights of the individual inmate, and provides for adequate detention conditions. Nonetheless, detention consists an extremely sensitive issue, a web interwoven most intricately, and any attempt to improve on the situation would have to be thoroughly designed and carried out. Finally, there remains the legal matter of competence, which is all but settled, and would prove a great challenge for any attempt.

Overall, one thing remains certain: more research is necessary, to uncover and explore both the factors that shape national detention systems and perpetuate existing disparities, as well as the potential paths of action that the EU could tread upon to positively influence the *status quo*, improve the lives of prisoners and detainees across the Old Continent, and rescue mutual trust and recognition, its AFSJ, along with its ideals. Only then can we emerge in a better world, a world where, in the words of the Romans, “*transit umbra, lux permanet*” – the shadow passes, the light remains.

⁸⁰ O. ELGSTRÖM, M. SMITH, *Introduction: Negotiation and policy-making in the European Union – processes, system and order*, in *Journal of European Public Policy*, 2011, pp. 673-683.

ABSTRACT: Despite European organizations holding normative and monitoring influence over detention-related matters, the situation in national penitentiaries across the EU exhibits great disparities. The failure of national authorities to ensure detention conditions that safeguard the rights of their prisoners undermines the principles of mutual trust and mutual recognition, which serve as a bedrock for intergovernmental cooperation between European States. It is high time the Union intervened, with a purpose to rescue its essential principles and safeguard its ideals; nonetheless, whichever path the Union chooses to tread upon, it should do so carefully. Detention matters are a sensitive issue, and any prison an extremely complex machinery.

KEYWORDS: Area of Freedom, Security and Justice – Mutual trust and mutual recognition principles – Detention conditions and prisoner rights – EU Penal Policy – Disparities and divergence across national prison systems.