

Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters

Reabilitação e transferência internacional de prisioneiros e pessoas sujeitas a medidas restritivas e penas alternativas: uma questão problemática para a cooperação judiciária na UE em matéria penal

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ABSTRACT: The article analyses the role of the notion of offenders' rehabilitation in EU judicial cooperation mechanisms, with a specific focus on cross-border transfers. Firstly, it provides a general overview of the approach of the EU legal order and of the stance of the European Convention on Human Rights on this concept. It is argued that offenders' rehabilitation is an emerging notion at supranational level, capable of imposing increasingly stringent duties on domestic law enforcement agencies. Secondly, it considers how rehabilitation objectives impact the normative decisions underpinning Framework Decision 2008/909/JHA on transfers of prisoners between Member States and Framework Decision 2008/947/JHA on the mutual recognition of probation measures and alternative sanctions. The article argues that offenders'

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rehabilitation is yet to find a clear role in the EU legal order, as demonstrated by the recent case law of the Court of Justice. In particular, the functioning of judicial cooperation mechanisms and the interpretative guidance provided by the Court confirm that this punishment aim locks swords with the full effectiveness of EU law and with the hidden will of the Member States to use cross-border transfers as a tool for controlling intra-EU mobility.

KEYWORDS: offenders' rehabilitation; mutual trust; cross-border transfers; limits; fundamental rights.

RESUMO: O artigo analisa a função da noção de reabilitação dos condenados nos mecanismos de cooperação judiciária da União Europeia, com especial ênfase nas transferências internacionais. Em primeiro lugar, fornece-se uma visão geral da abordagem da ordem jurídica da UE e do sistema da Convenção Europeia de Direitos Humanos sobre este tema. Argumenta-se que a reabilitação dos condenados é uma noção cada vez mais importante em nível supranacional, capaz de impor deveres progressivamente mais restritivos às autoridades policiais domésticas. Em segundo lugar, analisa-se a forma como os objetivos de reabilitação afetam as escolhas normativas subjacentes à Decisão-Quadro 2008/909/GAI, relativa às transferências de reclusos entre os Estados-Membros e à Decisão-Quadro 2008/947/GAI, relativa ao reconhecimento mútuo de medidas de vigilância e penas alternativas. O artigo sustenta que a reabilitação dos condenados ainda está buscando um papel claro na ordem jurídica da UE, como demonstrado pela recente jurisprudência do Tribunal de Justiça. Em particular, o funcionamento dos mecanismos de cooperação judiciária e as orientações jurisprudenciais fornecidas pelo Tribunal confirmam que este objetivo da punição tem relação com a plena eficácia do direito da UE e com a vontade oculta dos Estados-Membros de utilizarem as transferências transfronteiras como um instrumento de controle de mobilidade interna na UE.

PALAVRAS-CHAVE: reabilitação de condenados; confiança recíproca; transferências internacionais; limites; direitos fundamentais.

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INTRODUCTION: OFFENDERS' REHABILITATION AS AN ELUSIVE CONCEPT IN A MULTI-LAYERED EUROPEAN NORMATIVE SCENARIO

The justification of punishment has always been a contentious issue concerning the nature, structure and objectives of national criminal systems². Accordingly, the State's reaction to crime has evolved over the centuries by questioning the legitimacy and limits of its coercive powers. The "ifs" and "hows" of criminal punishment inevitably reflect the moral roots and political priorities of a society, and develop alongside them.

As is well-known, the 20th century brought about a significant paradigm shift towards a more individualised approach to prison systems, with a view to minimising the negative impact of imprisonment³ on offenders' lives and on crime rates⁴. The punishment of a wrongdoer has remained an essential component of detention, but the idea of tackling

² Reintegration or resocialisation also refers to this notion, sometimes with slight conceptual differences. For the purposes of this paper, these words will be treated as synonyms and used accordingly. See VAN ZYL SMIT, Dirk; SNACKEN, Sonia. *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford: Oxford University Press, 2010, p. 58.

³ This trend has been described as a "*décloisonne*" of prisons and prison systems. COMBESSIE, Philippe *Ouverture des prisons jusqu'à quel point?*. In VEIL, Claude; LHUILIER, Dominique (eds). *La prison en changement*. Toulouse: Erès, 2000, p. 69.

⁴ See the various contributions gathered in VAN KEMPEN, Piet Hein; YOUNG, Warren (eds). *Prevention of reoffending. The Value of Rehabilitation and the Management of High Risk Offenders*. 2014, Cambridge: Intersentia.

the structural and personal drivers of crime through more comprehensive and less coercive penal policies has gained increasing importance.

In this vein, the exercise of national *ius puniendi* does not merely consist of administering punishment but pursues more far-reaching individual and collective objectives. On the one hand, it is intended to contribute to fostering the offenders' individual responsibility for their own development and to restore their participation in social life⁵. On the other hand, the path towards individual redemption has been framed within the wider picture of the State's interest in avoiding recidivism and ensuring the security of its citizens⁶.

Offenders' rehabilitation is, by nature, an elusive concept. Firstly, it is just one component of the more complex scenario of criminal punishment; secondly, it combines several possible definitions and meanings, which are connected to a varied set of individual and collective aims. The blurred contours of this notion have always been reflected by the profound differences in its (legal) conceptualisation and practical implementation. Crucially, this framework has further exacerbated the fragmentation of national substantive and procedural criminal law and the ensuing implications for punitive practices and reintegration policies.

In recent decades, the steady increase in international judicial cooperation and the establishment of the EU Area of Freedom, Security and Justice have added new substance to the debate on the theory and practice of components of criminal punishment. Even in core areas of national sovereignty, States are no longer exclusive proprietors of a secret garden immune from external (legal) influences. In fact, the exercise of public coercive powers and the concept of offenders' rehabilitation now face new challenges, due to the rising supranational dimension of criminal law enforcement. This phenomenon leads to increasing legal complexity,

⁵ MELISSARIS, Emmanuel. *Theories of Crime and Punishment*. In DUBBER, Markus; HÖRNLE, Tatjana (eds). *The Oxford Handbook of Criminal Law*. Oxford University Press, 2014, p. 355.

⁶ After some decades of deep crisis, since the beginning of the new millennium rehabilitation has gained increasing attention. For an overview of the theories criticising rehabilitation goals and the reactions to them, GARLAND, David. *The Culture of Control. Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press, 2001, p. 53.

since multiple normative layers - essentially international, regional and national - contribute to shaping rights and duties in the contentious relationship between the offender and law enforcement agencies.

At international level, for instance, Art. 10(3) of the International Covenant on Civil and Political Rights states that the essential aim of prisoners' treatment should be "their reformation and rehabilitation". The scope of this provision is clarified further by the Human Rights Committee General Comment no. 21, which stresses that no penitentiary system should be retributive only. The States are then required to re-educate those convicted of crimes through adequate domestic policies that are intended to maximise their chances of future reintegration into society.

On the regional stage, the path towards the Europeanisation of criminal justice is an illustrative example of how the regional dimension affects national penal systems. In fact, in Europe, both the Council of Europe and the European Union (EU) are key players in this regard. On the one hand, a prominent contribution to shaping national legal orders to pursue rehabilitation goals is derived from the European Convention on Human Rights (ECHR) and the case law of its Court in Strasbourg⁷. On the other hand, the expanding reach of EU criminal law has led the Union to launch its own criminal policy, whereby it seeks to harmonise the national legal orders with a view to pursuing common security goals and protecting the interests of the Union more effectively.

The idea of punishment modelling the development of the ECHR as a living instrument and the Union's criminal system is essential in this regard, as it ultimately affects the duties incumbent upon the Member States and the rights granted to individuals⁸.

⁷ See also the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, along with its commentary.

⁸ In the domestic realm, the EU Member States generally attach significant importance to offenders' rehabilitation. Some national legal systems enshrine this element of punishment in their constitutions, whereas others have codified it either in their criminal codes or in other pieces of ordinary legislation, further developing it through the case law of the domestic courts. See, for instance, Art. 27(3) of the Italian Constitution and Art. 25(2) of the Spanish Constitution. In Germany, for instance, in 1973 the Federal Constitutional Court acknowledged resocialisation as being inherently connected to the rights guaranteed by the Constitution: BVerfGE, 5.6.1973, 202.

In this framework, the article firstly provides a general overview of the approach of the EU legal order and of the stance of the European Convention on Human Rights on the elusive notion of offenders' rehabilitation. The subsequent stage of the analysis is devoted to a key component of the supranational dimension of this punishment aim, namely the identification of the best place for serving a sentence, through judicial cooperation mechanisms allowing for the cross-border transfer of the sentenced person. The article addresses the normative decisions revealed by some EU acts concerning these procedures and discusses the main concerns stemming from these legal texts, also in light of the recent case law of the European Court of Human Rights and of the European Union Court of Justice.

1. OFFENDERS' REHABILITATION IN EUROPE: (CONVERGING?) VIEWS FROM STRASBOURG AND LUXEMBOURG

1.1. OFFENDERS' REHABILITATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Neither the European Convention on Human Rights nor its additional Protocols specifically refer to the aims of criminal punishment. However, some provisions of the Convention address - in one way or another - the exercise of *ius puniendi* by domestic law enforcement agencies and judicial authorities, essentially with a view to limiting it. In this respect, the European Court of Human Rights deserves the most credit for having used these indirect or implicit references to develop a general conceptual vision of the notion of offenders' rehabilitation for the purposes of protecting the rights enshrined in the Convention.

Generally speaking, the Strasbourg Court exercises self-restraint in matters of proportionate and appropriate sentencing, which it considers to fall outside the scope of the Convention. In principle, only "rare and unique" situations of "grossly disproportionate" punishment may constitute a violation of Art. 3, concerning the prohibition of torture and inhumane or degrading treatment or punishment⁹.

⁹ *Harkins and Edwards v. United Kingdom*, Application no. 9146/07 and 32650/07, Judgment 17 January 2012, para. 133. The Court has derived the

However, this cautious approach has not prevented the European Court of Human Rights from interpreting Art. 3, Art. 5(1) (right to liberty and security), and Art. 8 (right to family life) ECHR as legal bases for imposing limits and obligations on the domestic authorities with a view to fostering the wrongdoers' chances of resocialisation. In particular, two major trends can be distilled from the highly fragmented body of case law developed thus far.

On the one hand, the ECtHR has interpreted the cited provisions as requiring the Contracting Parties to ensure that their prison systems and penal policies provide prisoners with "proper opportunities" for resocialisation¹⁰. In fact, most of the relevant case law deals with custodial measures and accordingly focuses on the duty incumbent upon States to minimise the harmful impact of punishment, ranging from unnecessary limitations of personal freedom to the negative side effects of incarceration. Such a duty is far from absolute, since national authorities are endowed with a wide margin of discretion as to the structural features of their domestic policies and laws. In line with this approach, the European Court of Human Rights has consistently upheld that the obligation at issue "is to be interpreted in such a way as not to impose an excessive burden on national authorities"¹¹. In a nutshell, the Strasbourg Court identifies a broad obligation of means, compelling the Contracting Parties to make every reasonable effort to foster offenders' chances of rehabilitation, but leaving them significant discretion as to the actual choice of such means.

On the other hand, the notion in question involves an individual dimension, urging the offender to take responsibility for his/her own resocialisation process. From this point of view, rehabilitation is described as an ongoing progression from the early days of the sentence to the preparation for release or, in general, to life after punishment¹². The

"unique and rare occasions" criterion from the Canadian Supreme Court, *R. v. Latimer*, case 26980, Judgment of 18 January 2001, para. no. 76.

¹⁰ See, for instance, *Harakchiev and Tomulov v. Bulgaria*, Application no. 15018/11 and 61199/12, Judgment of 8 July 2014, para. 264.

¹¹ *Murray v. The Netherlands*, Application no. 10511/10, Judgment of 26 April 2016, para. 110.

¹² *Dickson v. United Kingdom*, Application no. 44362/04, Judgment of 4 December 2007, para. 28 and 75.

progression principle also applies to life sentences, as any inmate having achieved a significant level of rehabilitation should be offered a genuine and tangible offer of a return to society¹³. More generally, following an assessment of each offender's specific situation and of the actual level of threat to public security, States are required to engage the person concerned in rehabilitative treatment. Under the aegis of both Articles 5 and 8 of the Convention, this entails preserving family ties and allowing social contacts, as well as favouring vocational training, education and occupational activities¹⁴. Therefore, the close connection between the guarantees afforded by the Convention, the enforcement of a sentence and the preparation for release are also matters of individual engagement. As underlined by the Grand Chamber of the ECtHR in *Dickson v. United Kingdom*, rehabilitation is no longer solely deemed a means of preventing recidivism but "more recently and more positively it constitutes rather the idea of resocialisation through the fostering of personal responsibility"¹⁵.

1.2. THE THEORETICAL JUSTIFICATION OF OFFENDERS' REHABILITATION IN THE EU LEGAL ORDER

In terms of the EU, the legal magnitude of the concept in question and its impact on the EU and national criminal systems are far from clear. In *Lopes da Silva*, Advocate General Mengozzi stressed the close link between rehabilitation and human dignity, the latter being the cornerstone of the European system on the protection of fundamental rights and the overriding concern of EU institutions and Member States¹⁶. In his view, rehabilitation is not confined merely to individual interests, as a successful resocialisation process is beneficial to an ascending scale of social groups, namely the offenders' families, local communities and European society

¹³ *Vinter and others v. United Kingdom*, Application no. 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013, para. 115. Conviction without parole.

¹⁴ *Murray v. The Netherlands*, para. 109.

¹⁵ *Dickson v. United Kingdom*, para. 28.

¹⁶ Opinion of Advocate General Mengozzi, delivered on 20 March 2012, case C-42/11, *Lopes da Silva*, para. 28.

as a whole¹⁷. From this point of view, Art. 1 of the Charter may represent a solid theoretical justification for recognising the importance of this concept in the European legal system. This is in line with the broad debate on the nature and objectives of punishment, and appears to be a promising tool through which offenders' rehabilitation could be addressed at EU level. In fact, as confirmed by the Court of Justice in other areas and policies¹⁸, respect for human dignity imposes a general limit on EU powers and national legislations and guides them accordingly.

However, the conceptualisation of the primary roots of social rehabilitation in the European Union legal order is far from settled. On a number of occasions the Advocates General have suggested that the Court of Justice acknowledges the connection of this notion with the Charter. In addition, they have urged the Luxembourg judges to elaborate on the meaning and significance of this concept for EU law, also with a view to identifying an ascending scale of priorities among the interests of the Union, as reflected in criminal law enforcement policies at supranational and domestic levels and in the aims of punishment. These attempts to find a place for offenders' rehabilitation in primary EU law - and first and foremost in the Charter of Fundamental Rights - have been made mainly in cases regarding various tools for EU judicial cooperation and international mutual legal assistance, but they also cover EU citizenship rights and the free movement of persons.

The Court of Justice has usually refrained from endorsing the Advocates General's approach and substantive arguments, thereby contributing to blurring the contours of the notion at issue. At the same time, one concession made by the Court is that offenders' rehabilitation is not just about the individual and his/her relationship with a given societal context. In a line of cases regarding EU citizenship and enhanced protection against deportation from the host Member State¹⁹, the Luxembourg Court has acknowledged that the social rehabilitation of the Union citizen in the

¹⁷ Opinion of Advocate General Mengozzi, *Lopes da Silva*, para. 37.

¹⁸ Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega Spielhallen*, para. 34 and 35.

¹⁹ See Art. 28 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

State in which he has become genuinely integrated is also in the interest of the European Union in general²⁰.

In any event, the individual and general interest in fostering the chances of post-enforcement resocialisation and the prevention of recidivism must be balanced with other competing interests and objectives, such as public order and public security, the management of intra-EU migration of undesired Union citizens, the sound management of national prison systems and social assistance schemes. The fragmentation of domestic priorities and quests for departures from EU law further amplify the obscure supranational dimension of the concept at issue and its relationship with opposing political and legal driving forces. Therefore, a more precise clarification of the scope of this notion and of its link to the primary provisions of EU law could be highly beneficial for establishing a coherent approach to it.

In this respect, offenders' rehabilitation cannot be confined - as it is for the system of the European Convention on Human Rights - to the realm of theoretical corollaries of human dignity. For instance, rehabilitation is inherently linked to the idea of a proportionate *ius puniendi*, which features in Art. 49(3) of the Charter. Pursuant to this provision, "the severity of penalties must not be disproportionate to the criminal offence". This principle is enshrined in common constitutional traditions and reflects consistent case law of the Court of Justice concerning the appropriateness of sentences aimed at enforcing EU law at national level²¹. The Court of Justice has not yet ruled on the interpretation of this provision in the post-Lisbon era²²,

²⁰ Court of Justice, judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 50.

²¹ The Court has issued several judgments mentioning the limits on the severity of penalties in other fields of law. See, for instance, judgment of 9 November 2016, case C-42/15, *Home Credit Slovakia*, para. 61-63, concerning (non-criminal) sanctions imposed at national level for the infringement of domestic legislation implementing a Directive.

²² Only very limited references to the need to respect the practical effects of the principle of proportionality in the application of penalties can be found in Court of Justice, judgment of 28 July 2016, case C-294/16 PPU, *JZ*, para. 42. See also Court of Justice, judgment of 20 March 2018, case C-524/15, *Menci*, where the Court uses Art. 49(3) for the purposes of assessing whether the

so it is still to be determined whether or not it adds anything new to the pre-existing scenario. Nonetheless, Advocate General Bot has highlighted the relationship between proportionate sentencing and the individualisation of punishment, with a view to maximising the chances of social reintegration. If the case concerns a minor offender, he pointed out how detrimental - in effectively tackling recidivism - a disproportionate, and thus unfair, punishment can be. A sentence “is necessary to allow the social rehabilitation”²³, but it entails tailoring the exercise of the State’s coercive powers to the individual.

Further provisions of the Charter demonstrate the cross-sectional significance of resocialising goals. In particular, in line with the case law of the ECtHR, Art. 4, which concerns the prohibition of torture, inhumane and degrading treatment, has been interpreted as precluding unwanted and morally debilitating effects of imprisonment. Excessively harsh prison regimes or detention conditions reinforce the detainees’ detachment from society and exponentially increase the risk of reoffending²⁴. Similar arguments could be reiterated in relation to Art. 6 of the Charter, regarding the right to personal liberty and security. This is another silent provision of the Charter, which the Court of Justice has not yet addressed directly. However, some hints as to its meaning and scope can be extracted from the case law of the Court of Justice itself on custodial measures. In fact, as has been highlighted by some scholars²⁵, the right to liberty covers the whole cycle of a sentence or judicial decision determining a deprivation of this right. This includes, firstly, legal certainty as to the pre-conditions for issuing such decisions and the specific features of the period in custody, for instance in terms

convergence of a criminal and an administrative sanction violates Art. 50 of the Charter, concerning the *ne bis in idem* principle.

²³ Opinion of Advocate General Bot, delivered on 17 May 2017, case C-171/16, *Beshkov*, para. 49. See ROSANÒ, Alessandro. *Beshkov. Or the Long Road to the Principle of Social Rehabilitation of Offenders*. *European Papers*, 2018, p. 433.

²⁴ Opinion of Advocate General Bot, delivered on 3 March 2016, joined cases C-404/15 and C-659/15 PPU, *Caldararu and Aranyosi*, para. 143 and 144.

²⁵ MANCANO, Leandro. *The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters*. *Cambridge Yearbook of European Legal Studies*, 2016, p. 215.

of length and relevant applicable rules. Secondly, it covers the actual enforcement of the custodial measure, again with a view to avoiding disproportionate, inappropriate or arbitrary restrictions of personal liberty while in jail.

Interestingly enough, both Articles 4 and 6 of the Charter entirely correspond to the text of Articles 3 and 5 of the ECHR, as confirmed by the explanations attached to the Charter. In principle, this substantial convergence should have a significant impact on the interpretation of these provisions. In fact, pursuant to the equivalence clause as stated in Art. 52(3) of the Charter, the interpretation of these rights should be aligned to the meaning and scope that the ECtHR attaches to the equivalent provisions of the Convention. In this respect, the Court of Justice has acknowledged that Art. 5 of the Convention itself offers authoritative “interpretative guidance” and that the notions of “detention” and “deprivation of liberty”, for the purposes of EU law, must be construed in a manner consistent with Strasbourg case law²⁶.

Such an interpretative convergence does not provide an answer to the recurring search for additional guidance on the legal value and scope of the notion of offenders’ rehabilitation. However, it is valuable in that it fosters a coherent approach to the duties incumbent upon the States in this domain. The standard set by the European Court of Human Rights - and incorporated by the equivalence clause - requires the Member States, when acting in the realm of EU law, to establish appropriate legislation, institutional arrangements and practices capable of taking resocialising goals into due account.

At the same time Art. 52(3) of the Charter is not coherent as regards the ultimate rationale underpinning offenders’ rehabilitation. As we have seen, also due to the inherent features of the system of the Convention and of the judicial scrutiny regarding its respect, Strasbourg case law prioritises the individual dimension and depicts this notion as a progression on a thin line between the State’s obligations, fundamental rights and individual responsibility. Conversely, as some authors have

²⁶ Court of Justice, *JZ*, para. 58-64.

already pointed out²⁷, the Court of Justice - and the EU legal system as a whole - seems to be inspired by a State-centred utilitarian perception, where an individual's progression is mainly functional to preventing recidivism and securing public order and public security.

The next paragraph addresses and discusses this concern, in a specific area of EU judicial cooperation in criminal matters. Firstly, the analysis considers the cross-border and inter-State dimension of offenders' rehabilitation, which is basically the primary challenge raised by this notion from a purely EU law perspective. Secondly, the article focuses on two acts of the Union regarding cross-border transfers of sentenced persons, namely Framework Decision 2008/909/JHA on the transfer of prisoners²⁸ and Framework Decision 20089/947/JHA on the supervision of probation measures and alternative sanctions²⁹. These judicial cooperation mechanisms are of particular relevance for our purposes, since they manifestly pursue the goal of maximising the sentenced person's chances of social rehabilitation, by identifying the best Member State in which to serve a custodial or non-custodial sentence³⁰.

In this context, the analysis aims to verify whether or not the outlined conceptualisation of offenders' rehabilitation and the concerns stemming from it are actually reflected in the design of these cross-border transfer procedures by the EU legislature and the case law of the Court of Justice.

²⁷ MARTUFI, Adriano. Assessing the Resilience of Social Rehabilitation as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA. *New Journal of European Criminal Law*, 2018, pages 49-51; MITSILEGAS, Valsamis. *EU Criminal Law after Lisbon. Rights, Trust and Transformation*. Oxford: Hart Publishing, 2016, p. 222.

²⁸ Council Framework Decision 2008/909/JHA of 27 November 2008 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.

²⁹ Council Framework Decision 2008/947/JHA of 27 November 2008 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.

³⁰ DE WREE, Eveline; VERMEULEN, Gert; VANDER BEKEN, Tom. The Transfer of Sentenced Persons in Europe. Much Ado About Reintegration. *Punishment and Society*, 2009, p. 111.

2. OFFENDERS' REHABILITATION AND CROSS-BORDER TRANSFERS IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE

2.1 OFFENDERS' REHABILITATION IN A CROSS-BORDER SCENARIO: WHAT ROLE FOR JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE EU?

The supranational dimension of sentencing and criminal law enforcement replicates the search for a balance among the diversified aims of punishment. Two main dimensions come to the fore. On the one hand, the establishment of international cooperation mechanisms attempts to tackle the risk of impunity and to secure the actual enforcement of a judicial decision, regardless of where the enforcement takes place. On the other hand, the cross-border dimension of crime and punishment urges the judicial authorities involved to find the best place for serving a detention period or a measure alternative to detention. In fact, as already outlined, this decision has a huge impact on the offender's chances of social rehabilitation and the future possibility of preventing recidivism and preserving public order accordingly.

In this context, in terms of the cross-border enforcement of custodial measures and alternative sanctions, it is of no surprise that several hard and soft international law instruments in this regard attach prominent importance to the latter perspective.

In fact, even though no absolute assumptions can be drawn, the importance of the family and social environment in facilitating offenders' social rehabilitation has been repeatedly demonstrated in legal and sociological literature³¹. This leads to a (rebuttable) presumption that serving a sentence in the country where a prisoner has his/her centre of gravity and main connections is in his/her interest and would reduce the harm deriving from the deprivation of liberty. Consistent research shows that factors such as language divide, lack of information about the legal system of the host country, alienation from local culture and customs, and poor contacts with relatives exacerbate the problems experienced

³¹ MCNEILL, Fergus. A desistance paradigm for offender management. *Criminology and Criminal Justice*, 2006, p. 39.

by offenders in prison³². Moreover, these elements may discourage the competent authorities from involving foreign inmates in initiatives and services that are an integral part of imprisonment and are aimed at preparing the prisoner for his/her return to society³³.

Similar discriminatory treatments have been observed with regard to non-custodial sentences. It has been shown that national courts are reluctant to issue probation measures and other forms of alternative sanctions, if they have no clue as to if and how they will be effectively enforced abroad³⁴. It follows that “foreign offenders are not considered for the same range of alternative sanctions and measures as national offenders”³⁵.

In a cross-border scenario, therefore, judicial cooperation mechanisms may prevent the loopholes stemming from territoriality of criminal law and its enforcement, by providing wider opportunities for choosing the best place for serving a deprivation of liberty or an alternative measure.

From the opposite perspective, while contributing to avoiding the plain frustration of the resocialising goals of punishment, horizontal judicial cooperation across the EU is also highly significant for determining the scope of the citizenship and free movement rights granted by EU primary and secondary law in an ever closer legal and social space. From a free movement perspective, the assessment of the situation of the person concerned and his/her engagement in a progression towards social reintegration have

³² UGELVIK, Thomas. The Incarceration of Foreigners in European Prisons. In: PICKERING Sharon; HAM, Julie (eds). *The Routledge Handbook on Crime and International Migration*. London and New York: Routledge, 2014, p. 107.

³³ UGELVIK, Thomas. Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double Vision. In AAS, Katja Franco; BOSWORTH, Mary (eds). *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press, 2013, p. 183.

³⁴ Overestimation of the risk of absconding?

³⁵ FARALDO CABANA, Patricia. One step forward, two steps back? Social rehabilitation of foreign offenders under Framework Decisions 2008/909/JHA and 2008/947/JHA. *New Journal of European Criminal Law*, forthcoming: “Those who would normally have qualified for a suspended sentence or probation are given a term of confinement, kept in prison until their sentence expires, or released only in order to be expelled from the country. Because they are regarded as absconding risks, they are not considered for transfer to more open regimes”.

a remarkable impact on his/her legal regime and future social centre of gravity. In fact, such an assessment may justify the denial of the right to stay in a given Member State and the ensuing obligation to return to the State of origin. In fact, while the commission of a crime may provide evidence of a certain degree of disconnection from the society of the host Member State, the attitude during detention may, in turn, “reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host Member State with a view to his future social reintegration in that State”³⁶. As such, the EU’s approach to offenders’ rehabilitation is also intended to secure public order and to allocate the law enforcement and judicial authorities’ responsibility over those individuals who threaten it. The normative design underpinning Framework Decision 2008/909/JHA is an illustrative example of this approach.

2.2 FRAMEWORK DECISION 2008/909/JHA ON THE TRANSFER OF PRISONERS

Framework Decision 2008/909/JHA applies the principles of mutual trust and mutual recognition to cross-border transfers of prisoners among the EU Member States. As for many other EU acts concerning judicial cooperation in criminal matters, this instrument replaced the pre-existing Convention of the Council of Europe on the Transfer of Sentenced Persons of 1983³⁷, which had received limited application across the EU³⁸.

³⁶ Court of Justice, judgment of 17 April 2018, joined cases C-316/16 and C-424/16, *B and Vomero*, para. 74.

³⁷ See also its Additional Protocol of December 1997, which entered into force in 2000. A new Additional Protocol amending the previous one was open to signatures in November 2017 and has not yet entered into force. More precisely, within its scope of application, Framework Decision 2008/909/JHA also replaces the European Convention on the transfer of sentenced persons of 1983 and the Convention on the International Validity of Repressive Judgments of 1970, the relevant provisions of the Convention implementing the Schengen Agreement, and the Convention between the Member States of the Communities States on the Enforcement of Foreign Criminal Sentences of 1991.

³⁸ FROMENT, Jean-Charles. Les avatars de la Convention sur le transfèrement de détenus en Europe. In CERÉ, Jean (ed.), *Panorama européen de la prison*. Paris: L’Harmattan, 2002, p. 33.

The advanced mechanism established by the Framework Decision obliterates the intergovernmental footprint of the previous regime³⁹, as it is designed as a primarily technical and judicial system. As such, the Framework Decision minimises unnecessary formalities and is centred on the duty on the part of the receiving judicial authority to recognise the foreign judgment and to execute the transfer request. Moreover, it reiterates two major recurring features of EU legislation in this domain: the abolition of the double criminality check in relation to a list of serious offences⁴⁰ and the provision of an exhaustive list of optional grounds for denying recognition⁴¹.

As clearly stated in Art. 3(1) of the Framework Decision, transfer procedures, as a matter of principle, should be aimed at encouraging the sentenced person's social rehabilitation. Accordingly, Art. 4(2) clarifies that the issuing authority is entitled to forward a certificate and the related judgment only insofar as it "is satisfied that the enforcement of the sentence by the executing Member State would serve the purpose of facilitating the social rehabilitation of the sentenced person". Appropriate preliminary consultations between the competent domestic authorities should take place for this purpose. Furthermore, from the other side of the horizontal cooperation mechanisms, Art. 4(4) allows the executing judicial authority to provide the issuing one with a "reasoned opinion" confirming that enforcement in the Member State of destination would not facilitate the successful reintegration of the sentenced person into society. Therefore, the Framework Decision urges the Member States

³⁹ The text of this act represents the result of 3 years of heated negotiations within the Council. The imminent entry into force of the Lisbon Treaty was actually the most effective boost to reaching an agreement, under pressure of the foreseen eradication of the third pillar, along with the intergovernmental nature of its legal sources. MITSILEGAS, Valsamis. The Third Wave of Third Pillar Law. *European Law Review*, 2009, p. 523.

⁴⁰ See Art. 7(1)(2) of Framework Decision 2008/909/JHA, which reflects corresponding provisions included in most of EU secondary acts in this domain.

⁴¹ See Art. 9 of Framework Decision 2008/909/JHA. Art. 10 also allows for partial recognition and execution. In addition, Art. 11 provides for postponement of execution if the certificate is incomplete or non-correspondent to the judgment. Another key departure from the previous intergovernmental regime is the provision of strict deadlines for handling the procedure and issuing a final decision: see Articles 12(1)(2) and 15(1).

to adopt appropriate measures to form the basis on which their national judicial authorities will decide on the forwarding of a transfer request⁴². However, it does not provide any additional guidance on the precise scope and meaning of the rationale underpinning the judicial cooperation mechanism at stake, thereby leaving leeway for transposition at national level. Some useful hints can be extracted from Recital 9, which provides a list of possible criteria to be considered by the competent authorities, namely “the person’s attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State”.

This vague approach to the elusive notion of offenders’ rehabilitation and its assessment blurs the scope and content of the duties of cooperation incumbent upon the issuing and executing Member States.

In fact, despite and beyond the wording of this act, the formal link it establishes between offenders’ rehabilitation and prisoners’ transfer has been labelled as a façade veiling the managerial ambitions of the Member State over intra-EU mobility. The national governments’ will to add prisoners’ transfers to the list of EU instruments, imposing on other Member States – and in particular on those of origin – the responsibility for undesired Union citizens repeatedly arose during negotiations of the act⁴³. Recent statements by national political leaders⁴⁴ and existing pieces of research demonstrate that this underlying purpose represents a powerful engine for transfer procedures⁴⁵.

⁴² See Art. 4(6) of the Framework Decision.

⁴³ NEVEU, Suliane. *Le transfert de l’exécution des peines alternatives et restrictives de liberté en droit européen. A la recherche d’un équilibre entre intérêts individuels et collectifs*. Limal: Anthemis, 2016, p. 440.

⁴⁴ The most recent is the Italian Minister of the Interior Matteo Salvini, who has announced the transfer of 13 Romanian prisoners to their Member State of origin, proudly adding that “this is just the beginning”, as foreign offenders should always serve their sentence in their home country: <http://www.ilgiornale.it/news/cronache/rimpatriati-13-detenuti-romeni-salvini-questo-solo-linizio-1672721.html?fbclid=IwAR1R3sLlgOXQ-1c0th7GsX-zeTTf2xWozqY8CiAAc4Po5H0PtBVwwCni65nk>.

⁴⁵ See, in particular, the outcomes of the research project STEPS2 Resettlement: CANTON, Rob; FLYNN, Nick; WOODS, Joe. *Social Rehabilitation Through the Prison Gate*, available at <http://steps2.euopris.org/wp-content/uploads/2016/07/>

It has been highlighted accordingly that Member States are interested in reducing prison populations, along with the costs connected to detaining foreigners and their involvement in social rehabilitation programmes.⁴⁶ This cost-saving choice is reflected to some extent by the Framework Decision, which prioritises the effectiveness, rapidity and trend towards automaticity of the judicial cooperation mechanism, even to the detriment of a truly individualised assessment of the inmate's situation.

Firstly, Art. 6 lifts the traditionally compulsory criterion of the prisoner's consent to a transfer to the Member State of nationality in which the inmate habitually lives or to which he/she will be deported after serving the sentence or has fled or returned before the conclusion of the proceedings pending against them or following the conviction in the issuing State. Even though it is in line with the additional Protocol to the noted Convention of the Council of Europe on the transfer of prisoners, this normative choice marks a departure from the principle of individualisation of punishment. It offers leeway to judicial and ministerial authorities to presume that the transfer will be beneficial to the inmate, even if it is contrary to his/her will. As has been widely discussed in legal and criminological studies, tailoring the punishment to the individual is a key trigger for social rehabilitation. In other words, social rehabilitation inherently requires the engagement of the person involved. This entails the difficult assessment of several multi-faceted personal, institutional, social and legal converging factors, the importance of which is further exacerbated by the cross-border dimension of transfers outlined above⁴⁷.

Annex-4.12.-Workstream-3-Social-Rehabilitation-Through-the-Prison-Gate.pdf (accessed 7 April 2019).

⁴⁶ PLEIĆ, Marija. Challenges in Cross-Border Transfer of Prisoners: EU Framework and Croatian Perspective. In DUIĆ, Dunja; PETRAŠEVIĆ, Tunjica (ed.). *EU Law in Context. Adjustment to Membership and Challenges of the Enlargement*. Osijek: University Josip Juraj Strossmayer, 2018, p. 380.

⁴⁷ DURNESCU, Ioan; MONTERO, Ester; RAVAGNANI, Luisa. Prisoner transfer and the importance of the release effect. *Criminology and Criminal Justice*, 2017, p. 450. It has been pointed out that serving a sentence in the prisoner's State of origin does not amount to an automatic and non-rebuttable presumption of increased chances of rehabilitation: VERMEULEN, Gert et al., *Cross-Border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*. Anvers: Maklu, 2011, p. 55.

Secondly, the sentenced person has the right to express his/her opinion on the transfer and the authority of the issuing State must take this into account when deciding whether or not to complete the transfer. However, a negative opinion does not constitute grounds for rejecting recognition, and the Framework Decision does not attach clear consequences to it. Bearing in mind the hidden purposes of transfer procedures, this soft version of the right to be heard does not impose any substantial limit on the issuing authority's discretion.

Thirdly, from a complementary perspective, the prisoner's opinion is in any event deprived of substance, since the Framework Decision does not establish any obligation on the part of the domestic authorities to inform the person concerned⁴⁸. As confirmed by some studies,⁴⁹ the transfer - or even just an opinion about the possibility of being transferred - is a leap in the dark as to the detention conditions in the State in which the inmate will serve the sentence, the details concerning the specific detention facility of destination and the situation thereof. The same applies to the rules governing the execution phase abroad, particularly in relation to the precise scope of reductions and remissions in sentences and other measures intended to favour offenders' rehabilitation. It is no coincidence that, in its report of 2014, the Commission pointed out a generalised lack of information to the sentenced person, affecting the possibility of providing a reliable personal opinion⁵⁰.

Fourthly, the Framework Decision itself excludes that a failure to gather the prisoner's opinion or to obtain the submission of a reasoned opinion by the executing authority stating that the chances of

⁴⁸ At the same time, it must be underlined that some Member States have developed good practices in this regard. For instance, Italy, Romania and Spain provide EU prisoners with a booklet on the main features of transfer procedures and on the basics of a selected set of foreign criminal execution regimes.

⁴⁹ See DURNESCU, Ioan, *Obstacles and Solutions in the implementation of the FD 2008/909/JHA*, report of the STEPS2 Resettlement project, 2016, available at <http://steps2.euopris.org/wp-content/uploads/2016/07/Annex-4.6.-Workstream-1-Obstacles-and-Solutions-in-the-implementation-of-the-FD-2008909JHA.pdf> (accessed 27 March 2019).

⁵⁰ European Commission, Report on the implementation by the Member States of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, COM(2014) 57 final, cit., p. 7.

resocialisation in that Member State would be poor “constitute a ground for refusal on social rehabilitation”⁵¹.

Lastly, the mechanism set by the Framework Decision does not attach any importance to possible gaps between the conditions of detention in the issuing and executing Member States⁵². Even though the authorities involved are expected to exchange information and to perform consultations, nothing in the Framework Decision suggests that this preliminary phase be focused on assessing this specific aspect, which might impact heavily on the prisoner’s situation.

2.3 FRAMEWORK DECISION 2008/947/JHA ON THE MUTUAL RECOGNITION OF PROBATION MEASURES AND ALTERNATIVE SANCTIONS

Framework Decision 2008/947/JHA applies to a varied panorama of judicial decisions imposing probation measures and alternatives to detention, with a view to their supervision in another Member State. This instrument is complementary to the transfer of prisoners and attempts to cover the cross-border dimension of non-custodial measures. By doing so, it fulfils two major tasks. On the one hand, it addresses the above noted reluctances in applying this kind of measure to foreigners; on the other hand, as is the case for Framework Decision 2008/909/JHA, it provides the opportunity to identify the best place for enforcing non-custodial or probation sentences in the EU Area of Freedom, Security and Justice.

At first sight, *mutatis mutandis*, this Framework Decision follows in the footsteps of the transfers of prisoners, since it overcomes the principle of territoriality of criminal law to facilitate the recognition of judicial decisions across the Union and the resulting movement of sentenced persons. In addition, it reiterates some key features of EU sources on the implementation of the principle of mutual recognition in criminal

⁵¹ See recital no. 10.

⁵² On this point see MARGUERY, Tony. Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners. *Maastricht Journal of European and Comparative Law*, 2018, p. 704.

matters, namely the abolition of the double criminality test for a series of offences, the pre-determination of the grounds for non-recognition and the minimisation of formalities⁵³. Framework Decision 2008/947/JHA also pursues the same objective, namely the maximisation of the chances of the sentenced person's social reintegration, by preserving "family, linguistic, cultural and other ties"⁵⁴. By enhancing intra-European supervision, the Framework Decision reduces the aforementioned risk of discriminatory treatment of foreign prisoners and engenders confidence in the implementation of alternatives to imprisonment across the Union, thereby also contributing to decreasing the use of incarceration and the prison population.

In addition, compared to the wording of Framework Decision 2008/909/JHA, the rationale underpinning this act is wider. As is clearly set out in Art. 1(1) and recital 8, mutual recognition of foreign probation and alternative measures is also aimed at safeguarding the victims and the general public as a whole. The basic assumption is that effective supervision and monitoring of compliance with probation measures and alternative sanctions are essential pre-conditions for mutual recognition itself to take place, since they secure the enforcement of the sentence and ultimately contribute to protecting public order. Again, the two intertwined drivers of judicial cooperation emerge: on the one hand, the individual dimension; on the other hand, the general interests of the Member States and of the EU Area of Freedom, Security and Justice as such.

The convergence of these two perspectives has modelled the Framework Decision accordingly. Firstly, in contrast to the system of transfers of prisoners, preliminary consultations between the issuing and executing judicial authorities are not intended to assess whether enforcement of the sentence abroad would facilitate the concerned person's social reintegration. Rather, Art. 15 encourages the competent authorities to engage in prior exchanges of information only with a view to simplifying "the smooth and efficient application of the

⁵³ NEVEU, Suliane. Probation Measures and Alternative Sanctions in Europe: From the 1964 Convention to the 2008 Framework Decision. *New Journal of European Criminal Law*, 2013, p. 134.

⁵⁴ Recital 8.

Framework Decision”. Of course, in practice, the judicial authorities involved can expand the scope of this dialogue to a prior check on whether the transfer is actually beneficial to the sentenced person. However, this is left to their discretion and the wording of the relevant provision is illustrative of how social rehabilitation concerns have been modulated in accordance with the concurring objectives in the general interest.

This is also reflected in the absence of a provision such as Art. 4(2) Framework Decision 2008/909/JHA, according to which the issuing authority forwards the certificate and the judgment only insofar as it is satisfied that the enforcement of the sentence by the executing State would appropriately serve the purposes of that mechanism. It follows that both the issuing and executing authorities enjoy a wider margin of manoeuvre as to the commencement and conduct of the procedure, as well as to the significance of the interests at stake. In accordance with this approach, Framework Decision 2008/947/JHA neither considers an unsatisfactory prospect of social rehabilitation as a formal ground for non-recognition, nor includes any grounds for non-execution on the basis of fundamental rights violations.

Interestingly enough, when it comes to the role of the sentenced person, the Framework Decision marks a clear departure from the transfers of prisoners. Art. 5(1) provides that, as a rule, the certificate can be forwarded to the State in which he/she “is ordinarily and lawfully residing, in cases where the sentenced person has returned or wants to return to that State”. Even though the Framework Decision does not include any specific provision on obtaining the person’s consent and on his/her right to be heard, Art. 5(1) implies that, in practice, such an opinion should be properly verified. Of course, having returned to the Member State of residence does not amount to an absolute presumption of the will to serve the probation or alternative measure there, but it is still undoubtedly an important factor in the decision-making process. Any gap between this factual circumstance and the sentenced person’s actual will should in any event be carefully assessed by the judicial authorities involved, and in particular by the issuing one. In this respect, the absence of clear provisions on the right to be heard and on how and when during the procedure the opinion should be obtained could be detrimental

for the sentenced person⁵⁵. The normative decision might prove to be problematic also in light of the case law of the Court of Justice regarding the meaning of residence. In fact, in its case law concerning the European Arrest Warrant, the Court has acknowledged that this notion must be interpreted as an autonomous concept of EU law and that its reading must not be formalistic⁵⁶. According to the Court, the formal acquisition of residence rights pursuant to domestic law does not exhaust the scope of the notion of residence, which also includes those situations where a substantial and stable *de facto* connection with the host State has been established and can be demonstrated. Even though this stance refers to a specific provision of the Framework Decision on the European Arrest Warrant⁵⁷, the Court has rooted it on the solid basis of the principle of non-discrimination⁵⁸, an overarching general principle of the EU legal system according to which no differential treatment is, in principle, allowed in comparable circumstances. It follows that the same substantial approach should be followed in relation to other judicial cooperation mechanisms, also with a view to striking a proper balance between individual rights and the full effectiveness of relevant EU legislation.

This criticism is further exacerbated by the lack of guidance concerning the right to information. As occurs for the transfers of prisoners, enforcement abroad can amount to a leap in the dark with regard to the legal regime of probation and alternative measures in the State of enforcement and its implications for the person concerned. The studies carried out so far have highlighted the significant degree of

⁵⁵ The lack of appropriate safeguards has been pointed out by DURNESCU, Ioan. Framework Decisions 2008/947 and 2009/829: State of Play and Challenges. In *ERA Forum*, 2017, p. 355.

⁵⁶ Court of Justice, judgment of 17 July 2008, case C-66/08, *Kozłowski*; judgment of 6 October 2009, case C-123/08, *Wolzenburg*.

⁵⁷ In particular, Art. 4(6) of Framework Decision 2002/584/JHA, on which see *infra*, para. 3. This provision differs from the wording of Framework Decision 2008/947/JHA in that it expressly refers to persons residing or staying in the Member State that is called upon to execute a request for surrender. However, it is contended that this divergence does not affect the need to avoid a formalistic interpretation of the notion of residence.

⁵⁸ MARGUERY, Tony. EU Citizenship and European Arrest Warrant: The Same Rights for All?. *Utrecht Journal of International and European Law*, 2009, p. 84.

fragmentation of domestic legal orders in this domain, which amplifies the risk (perhaps *prima facie* consensual but even so) of uniformed transfers⁵⁹. This argument raises structural concerns on the coherence of this judicial cooperation mechanism, as being unfamiliar with the probation and supervision system of the State of transfer could have major consequences on the compliance with the relevant judicial measures and affect their inherent rationale.

These elements have led some commentators to consider that this Framework Decision is not immune from the shadow purpose of allowing the issuing State to use transfers as an instrument for controlling migration, with a view to disposing of undesired Union citizens⁶⁰. Such concerns appear to be well-founded, also in light of the practice of the Member States. However, it might not entirely be the case, or at least the normative choices are not as critical as those made for transfers of prisoners, especially when one compares the features of this act with Framework Decision 2008/909/JHA and considers the structural differences between custodial and non-custodial measures. Still, mutual recognition of probation and alternative measures reiterates the EU's approach to the notion of social rehabilitation, where a balance has to be struck between the positive outcomes of a fruitful path towards resocialisation and the Union and State-centred ambitions of establishing an effective and quasi-automatic system of judicial cooperation⁶¹.

Bearing in mind this twofold approach, the analysis now moves on to consider whether it is also reflected in the case law of the Court of Justice interpreting judicial cooperation mechanisms governing various forms of cross-border surrender or transfer. Therefore, the following paragraph provides an overview of the stance taken by the Luxembourg

⁵⁹ See, for instance, the information provided by the European Prison Observatory, accessible at www.prisonobservatory.org.

⁶⁰ KNAPEN, Marije. Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved?. In GROENHUIJSEN, Mark; KOOIJMANS, Tijs; DE ROOS, Theo (ed.). *Fervet Opus. Liber Amicorum Anton van Kalmthout*. Anvers: Maklu, 2010, p. 113.

⁶¹ MARTUFI, Adriano. The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?. *Maastricht Journal of European and Comparative Law*, 2018, p. 1.

Court in this domain so far, with some references to a line of cases adjudicated by the European Court of Human Rights.

3. CROSS-BORDER TRANSFER PROCEDURES AND SOCIAL REHABILITATION: THE CASE LAW OF THE ECtHR AND OF THE COURT OF JUSTICE

As we have seen, the ECHR and the EU legal system uphold different approaches to the notion of offenders' rehabilitation. On the one hand, within the system of the Convention, this concept imposes on the Contracting Parties a broad obligation of means with a view to facilitating the offenders' progression on a path towards resocialisation. Under this umbrella, the national authorities are also expected to avoid too harsh detention regimes and to adopt any proportionate measure to preserve the sentenced person's family and societal connections.

Whereas the body of cases concerning cross-border transfers pursuant to the 1983 Convention of the Council of Europe is very limited, a parallel set of judgments may provide indirect guidance on the possible duties incumbent upon the Contracting States in such situations. Over the years, the ECtHR has clarified that the choice of location of the detention facility is not a neutral one. In fact, besides stringent public order and public security considerations and specific needs regarding the detention conditions therein, the law enforcement authorities should not underestimate the distance placed between the prisoner and his/her family and societal environment. In fact, even though the exercise of *ius puniendi* is a monopoly of the public authorities and a key sovereign power, an appropriate and proportionate balance between the material features and effects of the coercive measure and the objective and subjective circumstances of the case must be struck. In this context, the decision to cast the prisoner away from his/her family must be carefully considered and scrutinised, as it may add manifestly disproportionate and unnecessary burdens amounting to a violation of the right to private and family life under Art. 8 of the Convention.

So far, these arguments have been used in relation to purely domestic cases and the ECtHR has not yet transposed them in the area

of cross-border transfers. However, this case law could trigger more stringent constraints in cases of cross-border transfers, particularly in those cases where they are carried out despite the sentenced person's dissent (or, at least, without his/her manifest consent).

In terms of the European Union, the jurisprudential interpretation of the notion of offenders' rehabilitation overcomes the dimension of individual rights and addresses the competing interests of the Member States and the Union, in terms of smooth and effective judicial cooperation. An insightful illustration of this complex scenario derives from two related and parallel lines of cases concerning the European Arrest Warrant and transfers of prisoners, respectively.

In relation to the former, the Court of Justice has been repeatedly called upon to provide the correct interpretation of Art. 4(6) of Framework Decision 2002/584/JHA. This provision applies to EAWs issued for the purposes of execution of a custodial sentence or a detention order and enshrines an optional ground for refusal of surrender "where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law". The Court has acknowledged that this provision is intended to preserve the prisoner's societal links, with a view to facilitating his/her resettlement after imprisonment⁶². Therefore, the issuing of a European Arrest Warrant does not imply blind execution, as surrender can be refused upon demonstrating the person's close formal and substantial connections with the host Member State of which he/she is not a national. At the same time, however, the Court has always paid due respect to the full effectiveness of the EAW system, thereby scaling down the scope of Art. 4(6) of Framework Decision 2002/584/JHA.

Firstly, it has clarified that the connection with the executing State must be significant, to such an extent that the national authorities are, in principle, allowed to limit the scope of application of this provision to periods of residence or stay of at least 5 years⁶³. In fact, the insertion of this criterion in a national law of implementation has been considered a proportionate means to strike a balance between individual claims and

⁶² Court of Justice, judgment of 5 September 2012, case C-42/11, *Lopes da Silva*.

⁶³ Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg*.

systemic concerns on the actual grip of mutual recognition mechanisms. This stance has been harshly criticised, as it departs from the idea of a case-by-case assessment of each individual situation and injects into the system the serious risk of differential treatments based on mere - and only apparently neutral - quantitative factors⁶⁴.

Secondly, in a more recent case concerning the responsibilities of the executing State when triggering Art. 4(6) and refusing surrender, the Court has stressed the importance of the final part of this provision, according to which the competent authority in that State must undertake “to execute the sentence or detention order in accordance with its domestic law”⁶⁵. In this context, the Court of Justice has maximised the duty incumbent upon the executing authority to secure the enforcement of the sentence or detention order. First of all, the mere notification to the issuing State of the will to take over enforcement is not conclusive, insofar as such commitment has not been put into practice at the time the surrender is refused. In addition, the competent authority in the executing State must take all measures to secure the enforcement of the sentence. Before deciding on the application of Art. 4(6), the executing judicial authority must examine whether it is actually possible to execute the sentence in accordance with its domestic law. If the latter proves to be materially or legally impossible, the sole alternative available is the surrender of the person concerned.

The stance taken by the Court is understandable from a structural and EU-wide point of view, as it is aimed at avoiding the establishment of impunity loopholes in the European judicial space. From a teleological perspective, *Poplawski* is a clear illustration of the opposing driving forces underlying Art. 4(6), its rationale and the EAW system as a whole.

⁶⁴ *Inter alia*, MONTALDO, Stefano. *I limiti della cooperazione in materia penale nell’Unione europea*. Naples: Editoriale Scientifica, 2015. See also MANCANO, Leandro. The Place of Prisoners in European Union Law?. *European Public Law*, 2016, p. 717.

⁶⁵ Court of Justice, judgment of 29 June 2017, case C-579/15, *Poplawski*. A second reference for a preliminary ruling was later issued by the same referring court with a view to submitting additional requests for clarifications to the Court of Justice. At the time of writing of this article, this *Poplawski II* case (C-573/17) is still pending, Advocate General Campos Sanchez-Bordona delivered his opinion on 27 November 2018.

By analogy, the same trajectory can be identified in the (admittedly very limited, so far) EU case law on cross-border transfers. In this context, the leading case is *Ognyanov II*⁶⁶, where the Court was asked to provide the correct interpretation of Art. 17 of Framework Decision 2008/909/JHA, concerning the coordination of the criminal execution regimes of the issuing and executing Member States. Art. 17(1) endows the executing authority with the primary and sole responsibility for governing the enforcement of the sentence issued abroad. This provision is clear-cut in describing the execution phases in the issuing and executing States as separate and complementary stages. In this vein, Art. 17(2) urges the executing authority to deduct the deprivation of liberty already served in another Member State from the total duration of the sentence. In fact, it is more than likely that enforcement has already commenced in the issuing Member State before the judicial cooperation mechanism is completed, or even prior to the very first steps of the procedure in the issuing State itself.

In this context, the key question raised to the Court was whether the deduction required in order to quantify the remaining post-transfer period of detention should include the (inevitably substantive) assessment of both the enforcement regime of the issuing Member State and the facts occurring during the first phase of enforcement, such as good conduct or the involvement in volunteering or work activities. The Court of Justice considered that the Framework Decision negates any overlap of competences: the cross-border enforcement of a sentence is based on a legal dividing line between the respective tasks and responsibilities of the authorities involved⁶⁷. As a consequence,

⁶⁶ Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov II*. I purposefully refer to *Ognyanov II*, although this specification is not included in the formal information on the case, since another preliminary reference had already been adjudicated by the Court of Justice on the very same proceedings *a quo*: Court of Justice, judgment of 5 July 2016, case C-614/14, *Ognyanov*.

⁶⁷ From this perspective, the AG Bot underlines the need to preserve the principle of territoriality in criminal law, which he considers an inherent expression of core aspects of national sovereignty, widely recognised by all Member States. Opinion of AG Bot, *Ognyanov*, cit., paras 79-81. The Court does not rest on this argument, at least *expressis verbis*, and prefers to lay out its

in the event of a more lenient regime in the executing State, any more favourable provision cannot operate retroactively. Rather, the scope of application of the said more beneficial measure is strictly limited to enforcement within the territory of the State of destination, as all remissions in sentence connected to the pre-transfer enforcement are to be considered solely by the issuing authority⁶⁸. Territoriality and the automaticity of mutual recognition are, in principle, preserved, but the vast separation drawn between the complementary sides of the cross-border enforcement of the same sentence have raised criticism on the actual capability of the mechanism established by Framework Decision 2008/909/JHA to achieve its own goals⁶⁹, in terms of the individualisation of punishment and the truly European and cooperative approach to the rehabilitation of sentenced persons. The Court of Justice seems to be best placed to address this concern, as long as the national judicial authorities resort to its interpretative guidance under Art. 267 TFEU. In particular, as outlined in the first part of the analysis, the equivalence clause of Art. 52(3) of the Charter could facilitate the development of a common understanding and an ECHR-like approach to enhancing offenders' rehabilitation through judicial cooperation mechanisms as a means for protecting human dignity, personal freedom and the right to family life,

Interestingly enough, the same normative approach characterises Framework Decision 2008/947/JHA, where the neat separation of tasks between the competent authorities in the issuing and executing Member States clearly derives from the combined interpretation of Articles 7, 13 and 14. Even though the Court has never been asked to deliver preliminary

line of reasoning based upon the wording of the Framework Decision. There again, the general scheme of the act at issue *de facto* identifies and protects the territorial competence of the issuing State and is intended to prevent territorial conflicts of law.

⁶⁸ Having said that, the issuing authority strikes back through Art. 17(3) of the Framework Decision, which endows it with the discretionary power to withdraw the certificate when it does not agree with the executing State's rules on early or conditional release.

⁶⁹ DDALMULIRA MUJUZI, Jamil. The Transfer of Offenders Between European Countries and Remission of Sentence. *European Criminal Law Review*, 2017, p. 289.

rulings concerning this act, it is more than likely that the stance taken in *Ognyanov II* can be reiterated, *mutatis mutandis*, for the cross-border enforcement of probation measures and alternative sanctions.

CONCLUSION

The notion of offenders' rehabilitation is inherently elusive and triggers multifaceted political priorities and normative choices. It was once confined to the realm of national sovereignty and the exercise of coercive powers by the domestic public authorities but this concept is now acquiring a supranational dimension, thanks to key international law sources on the protection of fundamental rights and on mutual legal assistance and advanced judicial cooperation in criminal matters.

Europe is a paramount example of this ascending scale of complexity of the components of punishment, since both the ECHR and the EU legal system are contributing to opening up the national secret garden of *ius puniendi*. In this respect, the ECHR does not provide a specific reference to offenders' rehabilitation, but the latter notion is deemed to be a corollary of several of its provisions, such as Articles 3, 5(1) and 8. The same situation characterises the Charter of Fundamental Rights of the European Union, which does not include specific provisions on the aims of punishment. At the same time, the provisions of the ECHR noted above are precisely reflected in the Charter, which should then be interpreted in accordance with the Convention itself, in light of the convergence clause of Art. 52(3) of the Charter.

In such a supranational scenario, the overarching concern is to identify the obligations stemming from relevant sources of law and incumbent upon the States towards the individuals and the other States. In this regard, the European Court of Human Rights is gradually developing a line of cases in this domain and has acknowledged that the Contracting Parties are under an obligation of means to enact all measures which are adequate to and necessary for the engagement of an offender in a progression towards post-punishment resocialisation. Compared to this broad and blurred obligation of means, some provisions of EU secondary law - especially in areas of judicial cooperation in

criminal matters and Union citizenship - provide strict obligations of cooperation, which heavily impact the scope of the notion of offenders' rehabilitation. As the case of cross-border transfers demonstrates, the EU legislature has expressed a prevailing interest in the conduct of effective and quasi-automatic judicial cooperation procedures. From a systemic point of view, this normative stance is understandable and provides clear evidence of the progress made by the EU legal system. At the same time, the smooth functioning of cooperation mechanisms cannot obliterate individual safeguards. Cross-border transfers call into question several fundamental rights, ranging from the right to be heard and the right to be informed to the right to liberty and the right to family life. Nonetheless, transfer procedures have been designed to offer leeway to the competent authorities for prioritising their managerial ambitions concerning the allocation of responsibility for an undesired Union citizen to other Member States. This broad margin of manoeuvre is further exacerbated by the blurred essence and legal value of offenders' rehabilitation in the Union. The proposed convergence of interpretations between the ECHR and the EU legal order could contribute to adding substance to this notion in the framework of judicial cooperation mechanisms, in terms of a closer link to key provisions of the Charter.

REFERENCES

CANTON, Rob; FLYNN, Nick; WOODS, Joe. *Social Rehabilitation Through the Prison Gate*, available at <http://steps2.europpris.org/wp-content/uploads/2016/07/Annex-4.12.-Workstream-3-Social-Rehabilitation-Through-the-Prison-Gate.pdf>. Accessed 7 April 2019.

COMBESSIE, Philippe *Ouverture des prisons jusqu'à quel point?*. In VEIL, Claude; LHUILIER, Dominique (eds). *La prison en changement*. Toulouse: Erès, 2000, p. 69.

DDALMULIRA MUJUZI, Jamil. The Transfer of Offenders Between European Countries and Remission of Sentence. *European Criminal Law Review*, 2017, p. 289.

DE WREE, Eveline; VERMEULEN, Gert; VANDER BEKEN, Tom. The Transfer of Sentenced Persons in Europe. Much Ado About Reintegration. *Punishment and Society*, 2009, p. 111.

DURNESCU, Ioan, *Obstacles and Solutions in the implementation of the FD 2008/909/JHA*, report of the STEPS2 Resettlement project, 2016, available at <http://steps2.euopris.org/wp-content/uploads/2016/07/Annex-4.6.-Workstream-1-Obstacles-and-Solutions-in-the-implementation-of-the-FD-2008909JHA.pdf>. Accessed 27 March 2019.

DURNESCU, Ioan. Framework Decisions 2008/947 and 2009/829: State of Play and Challenges. In *ERA Forum*, 2017, p. 355.

DURNESCU, Ioan; MONTERO, Ester; RAVAGNANI, Luisa. Prisoner transfer and the importance of the release effect. *Criminology and Criminal Justice*, 2017, p. 450.

FARALDO CABANA, Patricia. One step forward, two steps back? Social rehabilitation of foreign offenders under Framework Decisions 2008/909/JHA and 2008/947/JHA. *New Journal of European Criminal Law*, forthcoming.

FROMENT, Jean-Charles. Les avatars de la Convention sur le transfèrement de détenus en Europe. In CERÉ, Jean (ed.), *Panorama européen de la prison*. Paris: L'Harmattan, 2002, p. 33.

GARLAND, David. *The Culture of Control. Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press, 2001.

KNAPEN, Marije. Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved?. In GROENHUIJSEN, Mark; KOIJMANS, Tijs; DE ROOS, Theo (eds). *Fervet Opus. Liber Amicorum Anton van Kalmthout*. Anvers: Maklu, 2010, p. 113.

MANCANO, Leandro. The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters. *Cambridge Yearbook of European Legal Studies*, 2016, p. 215.

MANCANO, Leandro. The Place of Prisoners in European Union Law?. *European Public Law*, 2016, p. 717.

MARGUERY, Tony. EU Citizenship and European Arrest Warrant: The Same Rights for All?. *Utrecht Journal of International and European Law*, 2009, p. 84.

MARGUERY, Tony. Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners. *Maastricht Journal of European and Comparative Law*, 2018, p. 704.

MARTUFI, Adriano. Assessing the Resilience of Social Rehabilitation as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA. *New Journal of European Criminal Law*, 2018, p. 43.

MARTUFI, Adriano. The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?. *Maastricht Journal of European and Comparative Law*, 2018, p. 1.

MCNEILL, Fergus. A desistance paradigm for offender management. *Criminology and Criminal Justice*, 2006, p. 39.

MELISSARIS, Emmanuel. *Theories of Crime and Punishment*. In DUBBER, Markus; HÖRNLE, Tatjana (eds). *The Oxford Handbook of Criminal Law*. Oxford University Press, 2014, p. 355.

MITSILEGAS, Valsamis. *EU Criminal Law after Lisbon. Rights, Trust and Transformation*. Oxford: Hart Publishing, 2016, p. 222.

MONTALDO, Stefano. *I limiti della cooperazione in materia penale nell'Unione europea*. Naples: Editoriale Scientifica, 2015.

NEVEU, Suliane. Probation Measures and Alternative Sanctions in Europe: From the 1964 Convention to the 2008 Framework Decision. *New Journal of European Criminal Law*, 2013, p. 134.

NEVEU, Suliane. *Le transfert de l'exécution des peines alternatives et restrictives de liberté en droit européen. A la recherche d'un équilibre entre intérêts individuels et collectifs*. Limal: Anthemis, 2016.

PLEIĆ, Marija. Challenges in Cross-border Transfer of Prisoners: EU Framework and Croatian Perspective. In DUIĆ, Dunja; PETRAŠEVIĆ, Tunjica (eds). *EU Law in Context. Adjustment to Membership and Challenges of the Enlargement*. Osijek: University Josip Juraj Strossmayer, 2018, p. 380.

ROSANÒ, Alessandro. Beshkov. Or the Long Road to the Principle of Social Rehabilitation of Offenders. *European Papers*, 2018, p. 433.

UGELVIK, Thomas. Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double Vision. In AAS, Katja Franco; BOSWORTH, Mary (eds). *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press, 2013, p. 183.

UGELVIK, Thomas. The Incarceration of Foreigners in European Prisons. In: PICKERING Sharon; HAM, Julie (eds). *The Routledge Handbook on Crime and International Migration*. London and New York: Routledge, 2014, p. 107.

VAN KEMPEN, Piet Hein; YOUNG, Warren (eds). *Prevention of reoffending. The Value of Rehabilitation and the Management of High Risk Offenders*. 2014, Cambridge: Intersentia.

VAN ZYL SMIT, Dirk; SNACKEN, Sonia. *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford: Oxford University Press, 2010.

VERMEULEN, Gert et al., *Cross-border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*. Anvers: Maklu, 2011.

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