



BESHKOV OR THE LONG ROAD TO THE PRINCIPLE OF SOCIAL REHABILITATION OF OFFENDERS

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ABSTRACT: This *Insight* provides an analysis of the first preliminary ruling (Court of Justice, judgment of 21 September 2017, case C-171/16, *Beshkov*) concerning some provisions of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. The Court of Justice was asked: *a)* to interpret the concept of “criminal proceedings” within the meaning of the Framework Decision; *b)* to explain whether or not this expression had to be connected to a finding of guilt; *c)* to make clear whether the procedure for taking into account a previous conviction could be initiated only by the Member State or also by the convicted person; and *d)* to point out the consequences that taking into account previous convictions could have on the manner of execution of a foreign judgment. In this context, AG Bot recalled the notion of social rehabilitation of offenders as a principle inspiring the Framework Decision that should have been considered in order to answer at least one of the questions referred to the Court. As the Court did not take it into consideration, the purpose of this *Insight* is to identify a possible interpretative path the Court might follow to acknowledge the social rehabilitation of offenders as a general principle of EU law.

KEYWORDS: Framework Decision 2008/675/JHA – taking into account of previous convictions in the Member States of the European Union – principle of social rehabilitation of offenders – *Beshkov* – Court of Justice – International Covenants on Civil and Political Rights.

I. INTRODUCTION

In *Beshkov*,¹ the Court of Justice was required for the first time to interpret the provisions of Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the EU in the course of new criminal proceedings (hereinafter FD

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¹ Court of Justice, judgment of 21 September 2017, case C-171/16, *Beshkov*.

2008/675 or FD).² More specifically, the Court was asked by a Bulgarian Court to clarify the concept of “criminal proceedings” within the meaning of the FD in order to understand whether it comprised proceedings for the enforcement of a judgment imposed by a court of a Member State. Furthermore, the Court of Justice tackled the issue of the recognition procedure provided for under national law and its possible relevance with regard to the taking into account of previous convictions handed down by the judicial authorities of other Member States. Finally, the third question referred to the Court of Justice for a preliminary ruling concerned the specific arrangements for the taking into account of a previous conviction handed down by a court of another Member State and their probable effects on the manner of execution of the foreign judgment.

Dealing with these topics, AG Yves Bot had the chance to focus on the principle of social rehabilitation of offenders as a general reference and a viable tool to solve the third question.³ Then, the purpose of this *Insight* is to highlight the relevance that this principle had in the actual case and more importantly the limited relevance it has had so far in the case law of the Court of Justice. In fact, the Court of Justice has never said anything with regard to the function of the judgment, notwithstanding the fact that social rehabilitation of offenders forms part of the constitutional traditions of some Member States and is mentioned in some EU acts,⁴ sometimes even as an objective to be pursued.⁵ In this regard, AG Bot has spurred the Court of Justice over the last ten years, without obtaining much. Thus, after considering the relevant law, the facts, and the questions referred to the Court (section II) and after outlining the legal reasoning of both the AG (section III) and

² Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. The FD replaced the provisions of Art. 56 of the European Convention of 28 May 1970 on the International Validity of Criminal Judgments, concerning the taking into consideration of criminal judgments, as between the Member States parties to that Convention. Pursuant to this Article, “each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment all or some of the effects which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration”.

³ On the topic, see generally D. VAN ZYL SMIT, S. SNACKEN, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press, 2011.

⁴ See Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between the Member States, and Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

⁵ See Art. 3 of 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, and Art. 1 of 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.

the Court of Justice (section IV), the focus is on the principle of social rehabilitation and the efforts AG Bot has made so far to make it possible for it to emerge in the case law of the Court of Justice. The case law of the European Court of Human Rights is considered as well. Finally, some thoughts are devoted to the legal instruments the Court of Justice might exploit to acknowledge this principle in its case law (section V).

II. THE RELEVANT LAW, THE FACTS, AND THE QUESTIONS REFERRED TO THE COURT OF JUSTICE

Recital 1 of FD 2008/675 states that, in light of the objective of maintaining and developing an area of freedom, security, and justice within the EU, information on convictions handed down in the Member States needs to be taken into account outside the convicting Member State. That should be done both to prevent new offences and in the course of new criminal proceedings.

Recital 5 clarifies that, provided that the FD does not aim at harmonising the consequences attached by the different national legislations to the existence of previous convictions, the Member States should attach to a conviction handed down in other Member States effects equivalent to those attached to a conviction handed down by their own courts with regard to matters of fact, procedural law or substantive law. In this regard, recital 7 and Art. 3, para. 2, add that the effects of a conviction handed down in another Member State should be equivalent to the effects of a national decision at the pre-trial stage of criminal proceedings, at the trial stage and at the time of execution of the sentence.

Under Art. 3, para. 1, of the FD, each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions⁶ handed down in other Member States are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law. However, as provided for under the subsequent para. 3, “the taking into account of previous convictions handed down in other Member States [...] shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings”.

For what concerns the relevant national law, Art. 8, para. 2, of the Bulgarian Criminal Code, provides that a final sentence imposed on someone in another Member State of the EU with regard to an act that constitutes an offence under the national code is to be taken into account in any criminal proceedings initiated against that person in Bulgaria. Pursuant to Art. 4, para. 2, of the Bulgarian Code of Criminal Procedure, a conviction

⁶ Pursuant to Art. 2 of the FD, “conviction” means any final decision of a criminal court establishing guilt of a criminal offence.

handed down by a court of another Member State and which is not recognised under the procedure provided for in Bulgarian law is not to be subject to enforcement by the Bulgarian authorities. Nevertheless, Art. 4, para. 3, of the same code, provides that para. 2 is not to apply if an international treaty that has been ratified and published and has entered into force in Bulgaria provides otherwise. Finally, under Art. 466, para. 1, of the Bulgarian Code of Criminal Procedure, a decision recognising a conviction handed down by a foreign court has the same effect as a conviction handed down by a Bulgarian court.

Moving to the facts, in 2010, Mr Trayan Beshkov, a Bulgarian citizen, was sentenced to a term of imprisonment of 18 months – six months being served, and 12 months being suspended, with a probation period of three years – by the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria). In 2013, the Sofiyski Rayonen sad (District Court, Sofia, Bulgaria) sentenced him to a term of imprisonment of one year for acts categorised as minor assault, causing injury, and hooliganism. In 2015, Mr Beshkov requested the Sofia District Court to take into account his previous conviction in Austria in order to impose upon him a single total custodial sentence corresponding to the highest of the penalties imposed by the Austrian and Bulgarian courts.

Being unsure whether it had to previously recognize the decision of the Klagenfurt Regional Court, the Sofia District Court stayed the proceedings and referred three questions to the Court of Justice for a preliminary ruling. First, the Bulgarian Court asked the Court of Justice to clarify the concept of criminal proceedings. More specifically, the Bulgarian Court asked whether this concept should have exclusively been connected with a finding of guilt or it could also be related to execution proceedings. Second, the Sofia District Court asked whether the sentenced person had a right to initiate the proceedings in order for the previous conviction to be taken into account. Finally, the Court of Justice was asked whether the Member State in which the new criminal proceedings were taking place could change the manner of execution of the penalty imposed by the previous, foreign judgment.

III. THE OPINION OF AG BOT

First, AG Bot pointed out an issue that was inherent to the questions referred to the Bulgarian Court: should the decision of the Austrian Court first be recognised as a foreign one pursuant to the process provided for under national law? For what concerns this problem, he gave a negative answer by recalling *Gözütok and Brügge* where the Court of Justice held that “the Member States have mutual trust in their criminal justice systems and [...] each of them recognises the criminal law in force in the other Member States even when the outcome would be different if [their] own national law were applied”.⁷

⁷ Court of Justice, judgment of 11 February 2003, case C-187/01, *Gözütok and Brügge*, para. 33. On the topic, see generally L. KLIMEK, *Mutual Recognition of Judicial Decisions in European Criminal Law*, Berlin: Springer, 2016, C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University

Focusing on the questions referred to the Court of Justice for a preliminary ruling, AG Bot underlined that one cannot simply and exclusively establish a relation between criminal proceedings and new prosecutions. This would have been the case if the FD had employed the expression “prosecution proceedings”, which would have significantly limited the scope of its provisions. However, as the FD refers generically to “criminal proceedings”, one can say that this concept embraces all the types of criminal proceedings, including those concerning the execution of the conviction. In this regard, AG Bot recalled Framework Decision 2009/315/JHA.⁸ Pursuant to Art. 2, let. b), of this Framework Decision, “criminal proceedings” means the pre-trial stage, the trial stage itself and the execution of the conviction.

With regard to the second question, AG Bot recalled the principle of mutual recognition once again. As this principle requires that no formal process is needed to recognise a previous conviction that has been handed down in another Member State, the consequence is that one cannot limit the right to initiate the proceedings in order for the previous conviction to be taken into account to the Member States. This would not make it possible for the principle of mutual recognition to apply and work properly and at the same time, it would hamper the principle of the right of access to a court, which surely belongs to the sentenced individual.

For what concerns the third question, it raised some problems, as taking into account the Austrian conviction for the purposes of the execution of the Bulgarian sentence would have changed the manner of execution of the Austrian sentence: in fact, the Bulgarian court should have converted it into a term of actual imprisonment. Nonetheless, this would have resulted not only in the violation of Art. 3, para. 3, of the FD, but also in the violation of the principle of equivalence as stated in recitals 5 and 7 of the FD. Thus, the Sofia District Court should not have taken into account the conviction handed down by the Klagenfurt Regional Court, but this would have led to the conclusion that Mr Beshkov should serve the 12-month custodial sentence in Bulgaria. This would have resulted in a significantly harsh treatment on Mr Beshkov and at the same time, it would have amounted to a violation of the principle of social rehabilitation of offenders. Thus, AG Bot concluded it was up to the national court to tailor the sentence to the individual by adopting an approach based on the principle of proportionality. This would have made it possible for the Court to impose a more lenient sentence by taking into consideration the circumstances in which the offence was committed.⁹

Press, 2013, V. MITSILEGAS, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, in *Common Market Law Review*, 2006, p. 1277 *et seq.*

⁸ Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States. This Framework Decision is linked to FD 2008/675, as its aim is to facilitate the exchange of information relating to the criminal record of a person convicted in a Member State.

⁹ Opinion of AG Bot delivered on 17 May 2017, case C-171/16, *Beshkov*, paras 59-60, 62-64, and 76-82.

IV. THE JUDGMENT

Providing an answer to the first question, the Court of Justice held that under Art. 3, para. 2, of the FD, the obligation to take into account previous convictions handed down in other Member States was to apply at the pre-trial stage, at the trial stage, and at the time of the execution of the conviction, in particular with regard to the applicable rules of procedure. These include the rules concerning the definition of the offence, the type and level of the sentence, and the rules on the execution of the decision.¹⁰ Thus, “Framework Decision 2008/675 must be interpreted as meaning that it is applicable to a national procedure that is concerned with the imposition, for the purposes of execution, of an overall custodial sentence that takes into account the sentence imposed on that person by a national court and also that imposed following a previous conviction handed down by a court of another Member State against the same person for different facts”.¹¹

For what concerns the second question, the Court of Justice deemed it necessary to reformulate it.¹² In fact, in order to provide a proper answer, it had to be primarily determined whether the FD precluded the implementation of a recognition procedure, as provided for under national law. If it did not preclude it, then the Court of Justice would have considered whether the procedure might have been initiated solely by authorities or by the convicted person, too.¹³ Thus, for what concerns the first issue, the Court of Justice considered that the recognition procedure implied an examination of the foreign conviction, which was at odds with the principle of mutual recognition. In fact, through a recognition procedure, it would not be possible to take into account previous convictions in the terms in which they were handed down.¹⁴ Therefore, the Court of Justice held that there was no need to provide an answer to the second issue and ruled out that a national procedure for prior recognition could be a prerequisite of account being taken, in a Member State, of a previous conviction handed down by a court of another Member State.¹⁵

With regard to the third question, the Court of Justice considered that “taking into account” did not mean to interfere with, or revoke previous convictions. Thus, a national court cannot review and alter the arrangements for execution of previous convictions handed down in another Member State that have been previously executed. More specifically, a national court cannot revoke a suspension attached to the sentence imposed on that conviction and convert that sentence to a period of imprisonment. Therefore, the Court of Justice ruled that FD 2008/675 precluded national legislation providing that

¹⁰ *Beshkov*, cit., para. 27.

¹¹ *Ibid.*, para. 29.

¹² In this regard, the Court recalled Court of Justice, judgment of 21 December 2016, joined cases C-508/15 and C-509/15, *Ucar and Kilic*, para. 41.

¹³ *Beshkov*, cit., paras 32-33.

¹⁴ In this regard, the Court recalled Court of Justice, judgment of 9 June 2016, case C-25/15, *Balogh*, para. 54.

¹⁵ *Beshkov*, cit., paras 36-37 and 39-40.

a national court may alter the arrangements for execution of a foreign judgment for the purposes of execution.¹⁶

V. SOME THOUGHTS ON THE PRINCIPLE OF SOCIAL REHABILITATION OF OFFENDERS IN THE CASE LAW OF THE COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

When setting the scene for his answers and then, when providing an answer to the third question, AG Bot focused his attention on the function of the sentence.

First of all, he recalled that under national laws, isolated offences are treated differently from a series of offences, which might constitute, depending on the case, recidivism, reoffending, or a combination of offences.¹⁷ While recidivism determines an increase in the penalty attached to the subsequent offence, and reoffending occasions an increase in the severity of the punishment, a combination of offences leads to different consequences. In fact, “the warning, designed to promote awareness, constituted by the first conviction has not been given. The multiple offences therefore cannot be ascribed the meaning described above and society’s response cannot, consequently, take the same form”.¹⁸

Consequently, enforcement of the sentence cannot be reduced to a mere calculation of the day of imprisonment, as this would not be consistent with the function of social rehabilitation of offenders. As the sentence must be tailored to the individual, one cannot simply add together all the penalties imposed on someone when no warning or supervision has been given. In fact, this would result in an unfair judgment, which would lead to recidivism, and not to reform.¹⁹

Regarding this, AG Bot stressed that one cannot find any reference to the function of the sentence neither in the Charter of Fundamental Rights of the EU nor in the European Convention on Human Rights. However, the reflection on the topic led to the emergence of this principle.

“Originally conceived as a form of revenge, punishment evolved to become a penalty first experienced as retribution, then as reparation and, finally, as being necessary to allow the social rehabilitation of the convicted person, which is the modern view. Criminal recidivism immediately raised the question of its prevention. It very quickly became apparent that isolating the offender by means of a custodial sentence, whilst unavoidable

¹⁶ *Ibid.*, paras 44-47.

¹⁷ AG Bot defined recidivism as the situation where, “following a criminal conviction that has become final [...] the offender commits another offence which is identical to the previous one or classified as such by law” (Opinion of AG Bot, *Beshkov*, cit., para. 38). For what concerns reoffending, the offence or offences following the first conviction do not exhibit the similarity, which is typical to recidivism (para. 39). Finally, in the event of a combination of offences, “all the offences are committed without the criminal acts committed being separated in time by a final conviction” (para. 40).

¹⁸ Opinion of AG Bot, *Beshkov*, cit., paras 41-43.

¹⁹ *Ibid.*, para. 49.

in a number of cases, could, far from preventing recidivism, on the contrary, encourage it. There developed the rehabilitation function of the sentence, a function which is related, at the enforcement stage, to the fundamental principle that the sentence must be tailored to the individual".²⁰

Looking at the precedents, one can say that the Court of Justice has never said a word on the topic.²¹ At the same time, it is not difficult to note that AG Bot has been advocating for the last ten years for this principle to be acknowledged in the case law of the Court of Justice. In fact, in a case concerning the interpretation of Framework Decision 2008/909/JHA, AG Bot noted that the principal objective of this Framework Decision was to further the social inclusion or social rehabilitation of the sentenced person by making it possible for individuals who had been deprived of their liberty to serve their sentence within their own social environment.²² This is something he had already highlighted in *Ognyanov*, where he stated that the transfer of a prisoner to their Member State of origin or residence could be regarded as a measure of enforcement of a sentence tailored to the individual, whose objective was to further the social rehabilitation of the sentenced person.²³ In a case regarding the concept of "imperative grounds of public security" as a reason justifying an expulsion decision taken against a Union citizen, AG Bot considered that

"the idea, mooted since ancient times by theologians, philosophers and theorists, that a criminal sanction must contribute to the rehabilitation of the convicted person, is nowadays a principle which is shared and confirmed by all modern legal systems, including those of the Member States. Also, in 2006, the Council of Ministers adopted a recommendation on the European Prison Rules which provides that '[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty'. The International Covenant on Civil and Political Rights, adopted by the United

²⁰ *Ibid.*, para. 48.

²¹ A very partial acknowledgement may be found in Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg*, para. 67. According to the Court, "it is necessary to point out [...] that the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires. The Member State of execution is therefore entitled to pursue such an objective only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State".

²² Opinion of AG Bot delivered on 12 October 2016, case C-582/15, *Van Vemde*, para. 48.

²³ Opinion of AG Bot delivered on 3 May 2016, case C-614/14, *Ognyanov*, paras 107-108. For a review, S. MONTALDO, *Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov*, in *European Papers*, 2016, Vol. 2, No 2, www.europeanpapers.eu, p. 708 *et seq.* With regard to the same Framework Decision, AG Mengozzi wrote that the objective of rehabilitation does not merely serve the interests of the sentenced person. Successful social rehabilitation in an environment which is familiar to the person concerned also represents an additional assurance for the society that his unlawful conduct is less likely to recur (Opinion of AG Mengozzi delivered on 20 March 2012, case C-42/11, *Lopes da Silva Jorge*, para. 37).

Nations General Assembly and signed in New York on 16 December 1966, also provides, in Art. 10, para. 3, that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. [...] Observance of the principle that criminal sanctions must have the function of rehabilitation is indissociable from the concept of human dignity and, as such, I am of the opinion that it belongs to the family of general principles of Union law".²⁴

Finally, in *Wolzenburg*²⁵ and in *Kozłowski*,²⁶ he recalled some other legal instruments that are relevant in this regard, such as the Convention on the Transfer of Sentenced Persons²⁷ and the resolution on respect for human rights in the EU the European Parliament passed in 1997.²⁸

In some cases, the European Court of Human Rights stated that one of the essential functions of a prison sentence is to protect society by preventing a criminal from re-offending and causing further harm, while at the same time acknowledging the merit of measures – for instance, temporary release – permitting the social reintegration of prisoners.²⁹ Nevertheless, as of today, the Court of Justice has never taken a stand in favour of the principle of social rehabilitation of offenders, even when they had the opportunity to do so. For instance, the Court could have highlighted the importance of this principle in *Onuekwere* and *M.G.*, where they held that the periods of imprisonment could not have been taken into consideration in the context of the acquisition of the right of permanent residence, adding that these periods interrupted the continuity of residence.³⁰ Truth be told, if the Court had considered social rehabilitation as a typical function of the sentence and integration as an objective pursued by the sentence, the answer might have been different, at least for what concerns the continuity of residence. Thus, the Court's silence on the topic is overpowering, especially if one considers that only in one case the Court underlined that "the social rehabilitation of the Union citizen

²⁴ Opinion of AG Bot delivered on 8 June 2010, case C-145/09, *Tsakouridis*, paras 48 and 50.

²⁵ Opinion of AG Bot delivered on 24 March 2009, case C-123/08, *Wolzenburg*, footnote 20.

²⁶ View of AG Bot delivered on 28 April 2008, case C-66/08, *Kozłowski*, para. 76.

²⁷ Convention of the Council of Europe on the Transfer of Sentenced Persons of 21 March 1983. The principle of social rehabilitation is recalled in the recitals.

²⁸ European Parliament Resolution A4-0112/97 on respect for human rights in the European Union.

²⁹ See for instance European Court of Human Rights: judgment of 15 December 2009, no. 28634/06, *Maiorano et al. v. Italy*, para. 108; judgment 18 October 2005, no. 75833/01, *Schemkamper v. France*, para. 31; judgment of 24 October 2002, no. 37703/97, *Mastromatteo v. Italy*, para. 72. For further reference, see A. GIANELLI, *The Place of rehabilitation of the Offender among the Purposes of Penalties according to International Law*, in P. ACCONCI, D. DONAT CATTIN, A. MARCHESI, G. PALMISANO, V. SARTORI (eds), *International Law and the Protection of Humanity. Essays in Honor of Flavia Lattanzi*, Leiden: Brill, 2017, p. 397 *et seq.*

³⁰ See Court of Justice: judgment of 16 January 2014, case C-378/12, *Onuekwere*, para. 32; judgment of 16 January 2014, case C-400/12, *M.G.*, para. 38. For a review, see U. BELAVUSAU, D. KOCHENOV, *Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in Onuekwere (C-378/12) and MG (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*

in the State in which he has become genuinely integrated [...] is not only in his interest but also in that of the European Union in general".³¹

In light of the above, one may wonder what interpretative path the Court might choose, should they ever decide to acknowledge social rehabilitation as a general principle of EU law as suggested by AG Bot in *Tsakouridis*. As underlined by AG Bot, the Charter of Fundamental Rights of the EU does not contain any reference to the principle of social rehabilitation of offenders. It would be problematic to recall the national constitutional traditions common to the Member States. In fact, while the concept of human dignity is recalled directly or indirectly in all of them, only a few contain a specific reference to social rehabilitation of offenders.³² Therefore, the Court of Justice might want to consider another option. Unquestionably, they could recall the case law of the European Court of Human Rights on the topic, as already done in the past with regard to other issues. However, a cleverer solution would be based on the interpretative exploitation of the International Covenant on Civil and Political Rights (the Covenant).³³

As recalled by AG Bot, pursuant to Art. 10, para. 3, of the Covenant, the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. As it is renowned, all the Member States of the EU are parties to the Covenant. Thus, one can say the Covenant expresses some core values that are shared by these States. Therefore, the Court of Justice might recall the Covenant and conclude that social rehabilitation is a general principle of EU law, in that the Member States have agreed on the role it plays in shaping the treatment of prisoners.

This kind of approach would not be novel. In fact, the Court of Justice has already had the chance to recall the Covenant as an international instrument related to the protection of human rights of which it takes account in applying the general principles of EU law. This happened in some cases concerning the protection of the rights of the child.³⁴ Therefore, it would not be difficult to do the same thing with regard to the principle of social rehabilitation of offenders, at least from a theoretical point of view. However, one must be aware of a change in the approach of the Court to legal instruments that have not been formally incorporated into EU law. For instance, in *Ordre des barreaux francophones et germanophone*, the Court was asked – among other things – to interpret Art. 47 of the Charter of the Fundamental Rights of the EU in conjunction with

³¹ Court of Justice, judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 50.

³² This is the case of the Constitution of Italian Republic (Art. 27, para. 3) and the Constitution of the Kingdom of Spain (Art. 25, para. 2).

³³ International Covenant on Civil and Political Rights of 16 December 1966.

³⁴ Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien Vertriebs*, para. 39, and Court of Justice, judgment of 27 June 2006, case C-540/03, *European Parliament v. Council*, para. 37.

Art. 14 of the Covenant and Art. 6 of the European Convention on Human Rights. However, the Court refused to do so for that reason.³⁵

VI. CONCLUSION

As of today, the Court of Justice has not acknowledged the principle of social rehabilitation of offenders as a general principle of EU law. The reason behind this choice is not easy to find, but it is quite likely it is a normative one. In fact, no specific reference to that principle can be found neither in the Charter of Fundamental Rights of the EU nor in most of the Member States' constitutions. However, there are some alternative paths the Court might choose to follow to get to this result. As it was shown in this *In-sight*, the Court might exploit the relevance that international law has in the Member States' legal systems and the fact that all the Member States have ratified the International Covenant on Civil and Political Rights.

It is quite easy to understand the importance that such an acknowledgement might have in the construction of the area of freedom, security, and justice, as it would be regarded as one of its basic principles. At the same time, that would represent another significant milestone in the case law of the Court of Justice on the protection of fundamental rights³⁶ and an opportunity to restart the dialogue between EU law and international law that some recent judgments seem to have stopped. In this regard, the Court of Justice should not miss the opportunity offered by the *Cour d'appel de Liège* (Belgium) with a request for a preliminary ruling lodged on 23 August 2017.³⁷ The Belgian Court referred a question on the interpretation of Framework Decision 2002/584/JHA and its Art. 4, para. 6.³⁸ Pursuant to this Article, the executing judicial authority may refuse to execute a European arrest warrant if the warrant has been issued for the purposes of execution of a custodial sentence or detention order, 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 *Cour d'appel* requested the Court of Justice to clarify whether Art. 4, para. 6, could be interpreted as being inapplicable to acts for which a custodial sentence has been imposed by a court of an issuing Member State when those same acts are punishable in the territory of the executing Member State only by a fine. This would

³⁵ Court of Justice, judgment of 28 July 2016, case C-543/14, *Ordre des barreaux francophones et germanophone*.

³⁶ On the topic, see generally E. SPAVENTA, *Fundamental Rights in the European Union*, in C. BARNARD, S. PEERS (eds), *European Union Law*, Oxford: Oxford University Press, 2014, p. 226 *et seq.*, and G. DE BÚRCA, *The Evolution of EU Human Rights Law*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 465 *et seq.*

³⁷ Request for a preliminary ruling from the *Cour d'appel de Liège* (Belgium) lodged on 23 August 2017, case C-514/17, *Ministère public v. Marin-Simion Sut*.

³⁸ On the topic, see Court of Justice, judgment of 29 June 2017, case C-579/15, *Popławski*.

mean, in accordance with the domestic law of the executing Member State, that the custodial sentence might not be executed in the executing Member State, which would be to the detriment of the social rehabilitation of the person sentenced and of his family, social and other ties.