Articles

Shaping the Future of Europe – First Part
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Shaping the Future of Europe in Prisons: Challenges and Opportunities

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Abstract: Traditionally, the governance of detention has belonged to the sovereign state. Prisons across Europe present considerable disparities; in some states, penal systems are struggling with structural deficiencies, which result in systemic human rights violations. This reality directly undermines the notion of the EU as a community of values; in turn, the functioning of the Union as an Area of Freedom, Security and Justice, based on mutual trust between peers, is at risk. Departing from the negative consequences of the *status quo* of prisons in Europe, this contribution assesses the potential of Europe in prisons. The overarching premise revolves around the thesis that, to ensure the effective enforcement of Union values and policies, EU intervention in national prison systems proves necessary. Towards this purpose, the *Article* describes potential pathways, upon which EU authorities could potentially tread upon, in order to mitigate existing disparities, and enforce a common standard on detention. Consequently, the *Article* moves on to consider the potential impact and pitfalls that the future of Europe in prisons may hold.

Keywords: mutual trust and recognition – detention conditions – fundamental rights – Area of Freedom, Security and Justice – integration – governance.

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I. Introduction

"If we now consider Europe in its diversity, it is indispensable that we have a keen realisation of the problem which confronts us: where is the point beyond which this diversity ceases to be simply the individual expression of general truths and begins to call into question the very existence of a community?".[1]

Posed by W. Hallstein as early as 1958, this question retains its relevance decades later. The European project has long escaped its internal market constraints; today's Union pursues a number of non-economic policies, at the centre of which lies the goal of establishing an Area of Freedom, Security and Justice (AFSJ) without internal borders.[2] The overwhelming majority of EU Member States (MS), "resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples",[3] has assumed responsibility towards pursuing this common good.

Yet, at the same time, any effort towards convergence has to respect and account for "the different legal systems and traditions of the Member States".[4] Thus, unity at EU level is to be pursued within the limits of national diversity. As analysed here, this diversity manifests itself quintessentially within prisons, institutions traditionally regarded as the *sanctum sanctorum* of the Westphalian state; and divergence between national penal systems has proved considerable enough to hinder the integration progress, calling into question the very functioning of the AFSJ.

Case-law at EU level, alongside a considerable bulk of relevant literature, have acknowledged this age-old clash between pursued unity (in our case, towards an AFSJ) and existent diversity (across prisons), and called for a restructuring of the former, so as to resolve the issue. The argument is straightforward: the development of the AFSJ invoked too much, too soon. While appreciating its merits, the contribution at hand departs from this approach, seeking instead to assess whether the desired balance may be better achieved through mitigating national diversities, by shaping a future of Europe in prisons.

Towards this purpose, the rest of the *Article* is structured as follows. Section II presents the current state of penitentiary facilities in Europe. Utilising findings from the Council of Europe (CoE), the disparity between national prisons is disclosed and analysed. The focus lies on post-trial criminal law deprivation of liberty; pre-trial and administrative detention, while highly relevant to the discussion, retain their own distinctiveness, and fall beyond the scope of the present *Article*. Departing from the *status quo*, Section III places national prisons in the context of EU law. The interplay between diverse detention standards and the

[1] W Hallstein, 'The Unity of European Culture and Policy of Uniting Europe' (13 December 1958) University of Pittsburgh aei.pitt.edu 5.

[2] Art. 3(2) TEU. The importance of this objective is underlined by the fact that its mention precedes that of establishing an internal market.

[3] TEU Preamble.

[4] Art. 67(1) TFEU.

functioning of an integration-oriented AFSJ based on mutual trust is presented. Furthermore, the perceived balance established by the Court of Justice of the European Union (CJEU) through its *Aranyosi/Căldăraru* judgment is scrutinised as untenable. Against this background, Section IV assesses whether EU influence on national prisons could be utilised as a viable alternative of achieving *Unity* in *Diversity*. Potential options, as deriving from relevant *compliance* literature, are considered in view of the principles of conferral, subsidiarity and proportionality, alongside legal and political considerations that arise.

In light of the foregoing, it is maintained that the potential of EU intervention in national prisons should assume an integral role in outlining the future development of the European idea.

II. Prison systems in the EU

At the outset, it should be clarified that no European common policy on prisons exists. Traditionally, and in accordance with the doctrine of Westphalian sovereignty,[5] prison-related matters have fallen under the sole rule of the state. National authorities have the power to decide on relevant goals, set the desired outcomes, regulate, implement and monitor policies, and evaluate the outcomes according to their own needs and interests; no outside interference has been allowed within this domestic jurisdiction. Furthermore, the European project has historically focused on its role as an architect of the internal market, and has thus been largely absent from the prison narrative. To this day, the Treaties make no specific mention to detention matters.[6]

Additionally, penitentiaries are not formed in vitro; they are rather shaped within a specific legal, financial, political, societal, cultural, and historical context.[7] Today's EU is comprised of 27 countries, each with its own unique identity; this translates to an equal number of different contexts.

The absence of a regulatory monophony on the matter, combined with the individuality of each state, have resulted in considerable variations manifesting within national prison systems.

Evidence for this disparity is to be found in the works of the CoE, and, more specifically, its European Court of Human Rights, and Committee for the Prevention of Torture and Inhuman Treatment (CPT). In brief, it may be said that the Court judges on detention standards *reactively*, in specific cases brought before it by individual claimants. On the other hand, the CPT adopts a more preventive role, by *proactively* monitoring detention

[5] For an analysis on the history and meaning of this international law principle, see indicatively G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004); H Kissinger, *World Order* (Penguin Press 2014).

[6] P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press 2011).

[7] EA Tiryakian, 'Durkheim's "Two Laws of Penal Evolution" (1964) Journal for the Scientific Study of Religion 261, 262; S Snacken, K Beyens and H Tubex, 'Changing Prison Populations in Western Countries: Fate or Policy?' (1995) EurJCrimeCrLCrJ 1, 40.

conditions through a series of periodic or *ad hoc* visits in national penitentiaries. By merging the findings of the Council's entities, the divergence between living standards in EU prisons becomes apparent.

Before advancing any further, a clarification proves necessary. As already noted, prison institutions are governed at state level. On the basis of what competence, then, and towards which purpose, does the CoE, an intergovernmental (and certainly not national) entity, monitor national penitentiaries? The answer lies in one key element serving as common denominator among all European prison systems: human rights.

II.1. Human rights in detention

In accordance with international law, every individual has human rights. As suggested by the term itself, such rights are taken to derive from the very actuality of being human, and are inherent to all. This is the so-called universal quality of human rights. Consequently, individual prerogatives are merely expressed through – rather than based on – law. Therefore, no statute, provision, court judgment or judicial sentence may nullify them.[8]

The trait of inherent universality is endorsed by the CoE. Historically serving as a pan-European entity with a human rights mandate, the Council's first task was to produce the European Convention on Human Rights (ECHR).[9] The Convention's scope of application includes everyone, as made clear from the very wording of its provisions. The corresponding European Court, responsible for safeguarding the Convention's guarantees, has repeatedly endorsed this approach in several judgments. In *Khodorkovskiy and Lebedev v Russia*, the Court clarifies that "the Convention cannot stop at the prison gate [...] and there is no question that a prisoner forfeits all of his [...] rights merely because of his status as a person detained following conviction",[10] whereas in *Hirst v the United Kingdom (No. 2)*, it declares:

> "(P)risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention [...], they continue to enjoy the right to respect for family life [...] the right to freedom of expression".[11]

In principle, therefore, all inmates maintain their freedoms, as guaranteed under international human rights law. This is mirrored in the domestic legal order of many European states. Indicatively, art. 2 of the Greek Penitentiary Code proclaims that "no other individual right of prisoners except the right to liberty is restricted. Measures taken to

[8] J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

[9] European Convention on the Protection of Human Rights and Fundamental Freedoms [1950].

[10] ECtHR *Khodorkovskiy and Lebedev v Russia* App n. 11082/06 and 13772/05 [25 October 2013] para. 836.

[11] ECtHR *Hirst v the United Kingdom (no. 2)* App n. 74025/01 [6 October 2005] para. 69.

ensure the secure functioning of detention centres do not hinder the enjoyment of constitutionally individual and political rights of detainees [...] in any case, all necessary measures are taken to ensure negative consequences of loss of liberty are minimised";[12] while the Dutch *Penitentiaire beginselenwet* affirms in art. 3 that "persons subject to the execution of a custodial sentence or detention order shall not be subject to restrictions other than those necessary for the purpose of the detention or for the sake of maintaining order or security in the establishment".[13]

Ultimately, human rights delimit incarceration in two ways. At the outset, any curb on the inmates' freedoms must be justified and proportionate, and abstain from violating the core of the right: restriction does not equal nullification. Furthermore, there are certain prerogatives that may not be interfered with under any circumstances. These are the so-called absolute or formally unqualified rights,[14] and consist of the prohibition of torture, inhuman or degrading treatment or punishment (art. 3 ECHR), the prohibition of slavery or servitude (art. 4(1) ECHR), and the *nulla poena sine lege* principle (art. 7 ECHR).[15]

To keep watch over the prison environment, and ensure no undue violations take place, a counterweight to the authority of the state is necessary. Within Europe, this role is assumed by the CoE; by establishing monitoring mechanisms, the Council has strived towards equivalent protection of human rights for all inmates, and according to the European Convention.

Nonetheless, existing evidence reveals that the goal of equivalent rights protection is not easily achieved.

II.2. Inconsistent and unsatisfactory detention conditions

By merging the findings of the CPT and the European Court, one may identify a considerable divergence between living standards in European prisons, which manifests itself in both material and immaterial conditions of detention.

Material conditions refer to tangible aspects of the detention environment, including, *inter alia*, prison infrastructure; sanitary, ventilation, and healthcare facilities; accommodation provided; access to light, clean water, clothing, bedding, and nutrition; and so on.[16]

[12] Greek Ministry of Justice, Penal code www.opengov.gr.

[13] Dutch Ministry of Justice, Penitentiaire beginselenwet, wetten.overheid.nl.

[14] S Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) HRLRev 1, 9.

[15] See also art. 15 ECHR.

[16] Definitions and categorisation between material and immaterial conditions as drawn by the Committee of Ministers of the Council of Europe, Recommendation Rec(2006)2 to Member States on the European Prison Rules of 11 January 2006.

Within this context, the most common issue proves that of prison overcrowding, which occurs when the number of inmates eclipses official capacity. Latest estimates[17] by the Council's Annual Penal Statistics reveal there are nine EU prison systems over their design capacity, where inmates housed exceed the number of detention places available to them. There are five more that are dangerously close to full capacity.[18] These findings are mirrored in European Court case-law, which has identified overcrowding as a structural problem in a number of pilot judgment procedures.[19]

High prison density leads to a general deterioration of the prison environment. In *Longin v Croatia*, the Court found that, due to extreme prison density, a large number of inmates was forced to live, sleep and dine in an area "only one metre away from the open sanitary facilities", while the CPT, in its latest inspection of the Greek prison system, reported that 30 inmates were crammed in a dormitory measuring 57 square-metres (less than two per person), and had to share three toilets and three showers "in a state of disrepair" between them – while others had to sleep "on mattresses on the floor with their heads next to the toilet area".[20]

In addition, individuals in European prisons are often provided with a single meal per day, or with nutrition that fails to account for personal or religious beliefs; other times, they have to carry out their sentence in filthy, humid, poorly ventilated cells, or share their personal space with fleas, bedbugs, cockroaches and rats, often to be found "*en quantité*".[21]

Issues expand to immaterial detention conditions as well. These revolve around two focal points: i) the relationship of the inmate with the outside world, prison personnel, or fellow inmates; and ii) vocational, education, training, and recreational activities provided.

[17] It is worth noting that official statistics often fail to capture the full picture. This is because the SPACE Report statistics refer to the total number of prisoners against the total number of places. Such a calculation overlooks cases where the overall prison density may fall below the threshold, yet overcrowding remains a real problem within specific penitentiaries.

[18] See figure 7 in MF Aebi and MM Tiago, 'Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report' (15 February 2019) Council of Europe Annual Penal Statistics wp.unil.ch 7.

[19] ECtHR *Orchowski v Poland* App n. 17885/04 [22 October 2009] para. 123; ECtHR *Norbert Sikorski v Poland* App n. 17599/05 [22 October 2009] para. 148; ECtHR *Torreggiani and Others v Italy* App n. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10 [8 January 2013] para. 54; ECtHR *Neshkov and Others v Bulgaria* App n. 6925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 [27 January 2015] para. 231; ECtHR *Varga and Others v Hungary* App n. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 [10 March 2015] para. 92; ECtHR *Rezmiveș and Others v Romania* App n. 61467/12, 39516/13, 48213/13 and 68191/13 [25 April 2017] para. 102 ff.

[20] ECtHR *Longin v Croatia* App n. 49268/10 [6 November 2012] para. 60; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report on the visit to Greece from 14 to 23 April 2015 of 1 March 2016, CPT/Inf (2016) 4, para. 74.

[21] ECtHR *Kadiķis v Latvia (no. 2)* App n. 62393/00 [4 May 2006] para. 55; ECtHR *Jakóbski v Poland* App n. 18429/06 [7 December 2010] paras 48-55; Report on CTP visit to Greece (2016) cit. paras 59-87; CPT, Report on the visit to France from 15 to 26 November 2015 of 7 April 2017, CPT/Inf (2017) 7 para. 43.

Regarding outside communication, inmates in many MS have to buy their own calling card, if they wish to make use of the phone – individuals with reduced economic capacity are thus indirectly excluded. Available phone devices are limited in number, forcing prisoners to a long wait; when they finally use them, calls do not exceed a few minutes. Internet, e-mail, or fax services are often unavailable. Visitors may be subjected to extensive screening procedures, which, in practice, greatly reduces the (already narrow) time frame of the visit. Conjugal visits are often granted not as a right, but as a reward reserved for those deemed as exhibiting good behaviour, while authorities have been reported eavesdropping on conversations held behind closed doors, also in cases when the inmate was consulting with a lawyer.[22]

Corrections personnel in many states display violent and abusive behaviour. The European Court has acknowledged guards have the authority to use force to ensure penitentiaries remain a secure, orderly, crime-free environment; nonetheless, in many cases, the usage of such force has been found to be excessive, without proper justification or provocation. Solitary confinement is regularly utilised as a tool of intimidation and control, instead of a last-resort measure. Internal complaint systems are often lacking or entirely non-existent, leaving inmates without an effective recourse; when official investigations are initiated, they are often conducted only superficially. Consequently, inmates place no trust on prison officials to protect them.[23]

Such behaviour is escalated by the fact that wardens may hold no command over their inmates – therefore, they employ violence and intimidation as tactics of regaining control. Staff-inmate ratios are often considerably low – in some instances, amounting to a single officer per 40 inmates. Simply put, there are not enough watchers on the walls. Staff shortages effectively invite organised groups to take over, establishing their own quasi-fiefdom through coercion and violence. Eventually, inmates have to rely on such groups for protection. As has been infamously remarked by Greek criminologist and former Deputy Minister of Justice, Panousis, "tough guys govern the cells, officers only the corridors".[24]

Finally, inmates often find themselves with little to do, other than wander around aimlessly. When some form of activity is offered, it comes as an isolated incident. Prison authorities provide for no long-term educational, recreational, or training plans, and inmates have to rely on the goodwill of external volunteers. Opportunities to participate

[22] Report on CTP visit to Greece (2016) cit. para. 94; CPT, Report on the visit to Austria from 22 September to 1 October 2014 of 6 November 2015, CPT/Inf (2015) 34, paras 87-89; ECtHR *Kučera v Slovakia* App n. 48666/99 [17 October 2007] paras 127-134.

[23] Report on CTP visit to Greece (2016) cit. para. 68; Report on CTP visit to France (2017) cit. para. 93; ECtHR *Bouyid v Belgium* App n. 23380/09 [28 September 2015] para. 101.

[24] C Papachristopoulos 'Policing Prison' (1 August 2019) Leiden Law Blog leidenlawblog.nl; Report on CTP visit to Greece (2016), para. 92; ECtHR *Gladović v Croatia* App n. 28847/08 [10 May 2011]; *Bouyid v Belgium* cit. para. 101.

are limited, and a high number of prisoners is inevitably excluded. In some cases, wardens have been found to purposefully sabotage such initiatives, so as to punish insubordinates, or avoid additional workload.[25]

Overall, empirical and judicial findings point towards deficiencies, which burden penitentiaries in a number of national prison systems across Europe; furthermore, the issues identified seem to be structural, and manifest themselves repeatedly.

The regime and environment within which inmates carry out their sentence is inextricably intertwined with human rights. Consequently, poor conditions of detention constitute violations of the European Convention. This link has been exemplified by the European Court, which has found harsh prison standards as violating prerogatives safeguarded under art. 2 (right to life), art. 3 (prohibition of inhuman and degrading treatment), art. 8 (right to respect for private life), art. 13 (right to an effective remedy), and art. 14 (prohibition of discrimination) ECHR.[26]

Not all EU Members fit this profile. On the contrary, the same sources that uncover flaws in many national systems, serve to illustrate the fine points of others. Examples include the decreasing trend regarding the total number of incarcerated individuals in Sweden,[27] alongside the low prison density in Latvia, Spain, Bulgaria, Croatia, and Lithuania.[28] Furthermore, in its most recent visit to the Netherlands, the CPT delegation "did not receive a single allegation of physical ill-treatment. On the contrary, relations between prisoners and staff appeared to be generally good, and staff displayed professionalism and engagement in their interaction with prisoners [...] Inter-prisoner violence appeared to be limited. The delegation observed that the prison buildings were well maintained [...] all inmates were held in individual cells of at least 10 m²".[29]

To conclude, detention conditions in EU states differ considerably. In practical terms, such a divergence results on different fates for inmates of different nationalities. For example, should a Dutch citizen be found guilty of crime warranting imprisonment, they will likely carry out their sentence in a well-maintained, clean, and secure setting. Should a Greek national wind up in prison for the same deviant behaviour, they will likely be forced to live in an environment close to "reaching breaking point".[30] Due to different standards across national penitentiaries, the rights of the former shall be respected, while the rights of the latter are likely to be violated.

Yet, the question remains: how does this disparity affect the EU?

[25] ECtHR *Tunis v Estonia* App n. 429/12 [19 March 2014] para. 46.

[26] ECtHR *Clasens v Belgium* App n. 26564/16 [28 May 2019]; *Rezmiveș and Others v Romania*, cit.; *Bouyid v Belgium* cit.; *Jakóbski v Poland*, cit.

[27] CPT, Report on its visit to Sweden from 18 to 28 May 2015 of 17 February 2016, CPT/Inf (2016) 1.

[28] MF Aebi and MM Tiago, 'Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I Report' cit. 7.

[29] CPT, Report on its visit to the Netherlands from 2 to 13 May 2016 of 19 January 2017, CPT/Inf (2017) 1, paras 34-36.

[30] Report on CTP visit to Greece (2016) cit. para. 61.

III. The need for EU action

As already noted, the EU has no competence on prison-related matters. Furthermore, the Union is not a human rights entity; historically, it has been the CoE that serves as the continent's conscience, while the European Communities (forerunner of today's Union) were meant to revolve around the more practical objectives of regulating economic resources, and, later, the establishment of the internal market.[31]

Nonetheless, human rights are not to be ignored. On the contrary, art. 6 TEU provides the Union with its own *bill of rights* in the form of the Charter of Fundamental Rights of the EU (CFREU), which, since the coming into force of the Treaty of Lisbon, has acquired legally binding status, and equal to that of the EU Treaties. The same provision recognises human rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States" as constituting general principles of EU law.[32]

Thus, the Union acknowledges the theoretical existence of a common fundamental[33] rights thread in its MS, as deriving from internal (CFREU) and external (ECtHR and constitutional traditions) influence. The EU community may be comprised of 27 different members, yet they all belong to the CoE, have ratified the Union Treaties, the CFREU, and the European Convention on Human Rights; and they all fall under the jurisdiction of the CJEU, the European Court of Human Rights, and the CPT. Hence, all members share a common normative and monitoring human rights influence, and are therefore supposed to provide for effective and equivalent rights protection.

This assertion serves as the basis on which the AFSJ has been built.

III.1. The centrality of fundamental rights in the AFSJ

Freedom of movement constitutes one of the greatest achievements, and, indeed, one of the defining traits of the Union. A key milestone towards this purpose has been the

[31] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 155-176; A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) CMLRev 1307, 1308; S Smismans, 'The European Union's Fundamental Rights Myth' (2010) JComMarSt 45, 46.

[32] Art. 6(3), TEU; S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLRev 645, 648; R Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131, 132.

[33] For the purposes of the paper, the terms "fundamental rights" and "human rights" are used interchangeably. The EU uses the former term to refer to rights as applied internally, within its own jurisdiction, while the latter refers to rights as regulated externally. The difference is a matter of context, instead of substance.

conclusion of the Schengen agreement, and its incorporation in the *acquis communautaire*. With Schengen, the vast majority of EU Members have agreed on the abolition of systematic identity controls and checks at their common borders.[34]

Notwithstanding its economic and social benefits, this reality comes with a considerable downside, as it simultaneously facilitates the movement of criminals, the cooperation of criminal organisations, and the commitment of cross-border crime. Furthermore, and due to the Union comprising of many different legal orders, wrongdoers may resolve in so-called forum shopping behaviours, manipulating jurisdiction variety so as to escape justice. Overall, criminals in the EU found, within Schengen, an opportune area that allowed them to advance their goals.[35]

European and national authorities realised that, for the functioning of the EU as a borderless area to prove viable, freedom of movement needs to be accompanied with a safety net against criminal activity and impunity; to put it simply, the Area of Freedom must also become an Area of Security and an Area of Justice. This objective was first achieved with the Treaty of Amsterdam, and remains of primary importance within the Lisbon Treaty.[36]

The establishment of a borderless, secure, and just EU, could only become possible on the basis of cooperation between national judicial authorities, to counter criminal cooperation. To this end, MS chose the mutual recognition principle, which became the central pillar for the development of the AFSJ as early as 1999, with the Tampere programme. Section VI of this programme falls under the title of "Mutual recognition of judicial decisions", and includes, inter alia, the following provision:

> "Enhanced mutual recognition of judicial decisions and judgements [...] would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in [...] criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities".[37]

Mutual recognition has been imported to the AFSJ from another branch of EU law, that of internal market. There, the principle requires that a product lawfully produced,

[34] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000.

[35] V Mitsilegas, J Monar and W Rees, *The European Union and Internal Security: Guardian of the People?* (Palgrave Macmillan 2003).

[36] Art. 3(2) TEU; also art. 67 TFEU.

[37] Council of the European Union Presidency Conclusions of 15-16 October 1999, Towards a Union of Freedom, Security and Justice: the Tampere milestones, para. 33.

marketed and sold in one EU state may generally be sold in another MS, even if the product does not fully comply with the technical rules of the second country.[38] In the context of criminal law, mutual recognition dictates that a judicial order or judgment issued by the authorities of one MS is to, in principle, be recognised and enforced by the authorities of another MS. In both instances, mutual recognition serves freedom of movement: in the first case, freedom of movement refers to goods, as products of the market; in the second, to judgments, as products of the judiciary.[39] The underlying justification remains identical: facilitate the creation and maintenance of a Union without internal frontiers.[40]

Mutual recognition does not call for substantive changes in national legislation; it was exactly this non-interfering nature that made its adoption welcome by MS, as an attractive venue towards balancing unity and diversity. Nonetheless, the principle is not entirely innocent of non-interference, since it obliges national authorities to enforce a decision issued by another MS, by granting it the same legal effect, as if it was issued within their own legal order.

To an outside observer, it may seem peculiar, if not outright precarious, that the European legislator calls upon MS to so readily allow foreign judicial products, originating under a different system, with different rules, traditions and philosophies, to hold an effect within the host legal system – and that MS have voluntarily assumed this obligation. This peculiarity may be explained by the second component of the Union's AFSJ: mutual trust.

Mutual trust requires "States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[41] In practice, mutual trust dictates that, when implementing EU law, each State has a series of legal obligations.[42] Firstly, MS have a positive (*must*) obligation to presume that their peers adhere to a common fundamental rights framework. Secondly, MS have two negative (*must not*) obligations: they may "not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law", and, "save in exceptional cases", MS are not allowed to "check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[43]

[38] Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42; M Ortino, 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services' (2007) ICLQ 309, 312.

[39] In this sense, freedom of movement of judicial acts may be regarded as a fifth fundamental freedom within the Union. C Barnard, *The Four Freedoms* (Oxford University Press 2013).

[40] N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) European Papers www.europeanpapers.eu 93, 98.

[41] Opinion 2/13 cit. para. 191.

[42] S Prechal, 'Mutual Trust before the Court of Justice of the European Union' (2017) European Papers www.europeanpapers.eu 75, 77.

[43] Opinion 2/13 cit. para. 192.

Mutual trust reaffirms the common thread deriving from the participation of EU Members in the same community of values.[44] Within this community, any decision taken by the judicial authorities of one MS does, in theory, respect the same values, adhere to the same principles, and offer equivalent rights protection, as a decision taken in any other MS. The foreignness of judicial decisions is largely mitigated, and mutual recognition becomes feasible: in the Union we trust.

Thus, a chain is formed: a common thread of rights gives birth to the mutual trust principle – the assumption that, indeed, MS respect and uphold this framework. In turn, this principle allows for mutual recognition of judicial decisions and judgements across the Union, and facilitates anti-crime cooperation between national authorities. Ultimately, this leads to increased levels of security, allows for unconditional freedom of movement, removes potential safe havens for criminal activity, and enhances the protection of common values and individual prerogatives within the European community.

As the above showcases, fundamental rights have become, indeed, *fundamental*, not only for individuals, but for the functioning of the AFSJ as well.

III.2. *Aranyosi/Caldararu*: balancing between trust and rights?

Yet, as previously analysed, conditions of detention across MS differ considerably, which results in various levels of protection regarding prisoner rights. It itself, some level of disparity is not problematic; nonetheless, when national prison systems are plagued with structural issues, which repeatedly violate the rights of inmates, the common thread shatters, and mutual trust proves a "legal fiction".[45]

In the joined *Aranyosi/Căldăraru* cases, the CJEU was forced to address the disparity between national prisons, and its consequent threat to the integration process.[46] The final judgment has been the subject of extensive analysis, and considered a landmark in the development of the EU legal order. This did not happen by accident; in *Aranyosi*, the CJEU departed from its previous doctrine of primacy and effectiveness of EU law,[47] as expressed,

[44] L Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012).

[45] T Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions' (2018) Maastricht Journal of European and Comparative Law 704, 705.

[46] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[47] A position that has long been criticised as disregarding for fundamental rights, utilising them as mere means to the end of advancing the autonomy, supremacy, and effectiveness of EU law. J Coppell and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' cit. 227.

inter alia, with *Melloni*[48] and Opinion 2/13.[49] Instead, the Court allowed for (some) precedence of fundamental rights.[50] Towards the purpose, it engaged in a balancing exercise, attempting to reconcile the enforcement of AFSJ principles with human rights protection; nonetheless, as this section argues, the ensued balance proves a precarious one.

The case unfolded as follows. Germany received two European Arrest Warrants (henceforth, EAW)[51] from Romania and Hungary. The EAW serves as the flagship of mutual recognition instruments, and its purpose is to make the forced transfer of criminal suspects and convicts a quasi-automated procedure. To this end, the EAW abolished the old extradition framework, and introduced a novel surrender one. The new regulatory framework established the judiciary as the state branch bearing responsibility for surrender, abolished the dual criminality principle,[52] and largely reverted the previous prohibition for a state to extradite its own nationals[53] – the so-called nationality exception, traditionally recognised as a sovereign right.[54] These novelties strived towards making surrender a simple, easy, and speedy process, to be realised through judicial cooperation. By bringing a high level of automaticity to surrender proceedings, the EAW ultimately strives to combat criminality, by prohibiting suspects and convicts from utilising national borders as a means of escaping justice.

Upon reception, the German court was bound by EU law to execute the surrender request. This obligation stemmed from the mutual recognition principle, encompassed in the EAW. Yet, the German judiciary was aware of European Court case-law and CPT reports pointing towards structural deficiencies in the prison systems of both issuing states.[55] This information strongly suggested that, in case of surrender, transferred individuals could wind up in poor detention conditions, and consequently suffer from de-

[48] Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

[49] Opinion 2/13 cit.

[50] A Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) German Law Journal 468, 490.

[51] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[52] *Ibid*. art. 2.

[53] *Ibid*. art. 4.

[54] M Plachta, '(Non-) Extradition of Nationals: A Neverending Story' (1999) EmoryIntlLRev 77, 80 ff.; Z Deen-Racsmány and Judge R Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant' (2005) EurJCrimeCrLCrJ 317, 318.

[55] See, indicatively, ECtHR *Varga and Others v Hungary* App n. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 [10 March 2015]; CPT, Report on its visit to Romania from 5 to 17 June 2014 of 24 September 2015, CPT/Inf (2015) 31.

grading and inhuman treatment, as prohibited under arts 3 ECHR and 4 CFREU. Yet, fundamental rights concerns do not constitute ground for refusal of an EAW, as they are not included in the relevant provisions of arts 3 and 4 of the Framework Decision.[56]

Torn between its obligation to surrender, as deriving from mutual recognition, and its obligation to respect fundamental rights, as deriving (also) from the CFREU, the German court was thus reluctant on how to proceed, and referred to the CJEU.

Faced with this Gordian knot, the CJEU introduced a two-step approach, to be applied under similar circumstances. Thus, when evidence reveals the existence of a real risk of degrading and inhuman treatment of inmates in the prison system of the issuing MS, executing authorities must proceed as follows. First, they must assess whether, in general, detention conditions in the issuing MS constitute a risk of violating art. 4 CFREU. For this assessment, executing authorities may use "objective, reliable, specific and properly updated" information, such as relevant CoE case-law, and CPT reports.[57] The result of this assessment remains, in itself, insufficient. Instead, the executing authority must then proceed to determine whether the risk for violation extends to the specific case, *i.e.* to the particular person whose surrender is requested. To make this decision, the executing court must request additional information by the issuing MS, which must reply promptly.[58]

Subsequently, and in case the executing court identifies both a systemic and a specific risk, it must then postpone – but not abandon – surrender proceedings, until it receives additional information by the issuing MS, which discounts this risk. If this does not occur within a reasonable time, the executing MS may then, ultimately, terminate surrender proceedings.[59]

The judgment proves an attempt to reconcile rights and trust. On the one hand, the principles of mutual trust and recognition retain their centrality within the AFSJ, and fundamental rights concerns do not constitute ground for non-execution. On the other, art.

[56] In light of the assumed equivalent rights protection in all MS, this omission proves of minor importance – at least in theory. It should also be noted that, in line with the Court's spirit, more recent mutual recognition instruments have included a fundamental rights provision; see, for instance, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[57] *Aranyosi and Căldăraru* cit. para. 89.

[58] *Ibid*. para. 95.

[59] It is interesting to identify emerging parallels with preceding ECHR and Court of Justice of the European Union (CJEU) case-law in the sphere of migration law; see ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011]; cases C-411/10 and C-493/10, *N.S. and Others* ECLI:EU:C:2011:865. For an analysis, see indicatively S Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"' (2011) Statewatch Analysis 1; V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) Yearbook of European Law 319, 324.

4 CFREU – and its corresponding art. 3 ECHR – is recognised to "enshrine one of the fundamental values of the Union and its Member States",[60] and is allowed to lead to postponement of the proceedings. The Court's approach ultimately allows for fundamental rights to delimit AFSJ principles. In this regard, the judgment falls in line with the voices raised in favour of revisiting mutual recognition instruments, so as to ensure individual prerogatives are accounted for.[61]

Nonetheless, the two-tier approach holds a series of negative consequences. As observed by AG Bot, allowing for national authorities to assess the prison systems of their peers undermines mutual trust, while potentially promoting national biases.[62] Furthermore, and even accounting for time extensions granted through postponement, an overnight improvement of detention conditions seems unlikely, especially in MS struggling with systemic deficiencies.[63] A postponement decision may thus amount to a de facto refusal to enforce mutual recognition in disguise.[64]

Consequently, this weakens forced transfer mechanisms operating under the EAW; a risk that expands to the operation of similar instruments, especially the Framework Decision on transfer of prisoners.[65] A declined effectiveness of these instruments would have reverse effects on the justifications and aims of mutual recognition, undermine the struggle against criminality and impunity, encourage prison shopping behaviour,[66] weaken the Union as an AFSJ, and ultimately harm the common interests of EU states and citizens – essentially rendering decades of effort null.

At the same time, the judgment offers no redress on the root cause of the issue: poor detention conditions. Inequivalent, ineffective protection of prisoner rights presents a direct challenge for mutual trust and recognition. This proves a current, considerable issue for the EU, threatening its anti-crime policies and common human rights values; and the CJEU two-tier approach does not provide for an answer.

[60] *Aranyosi and Căldăraru* cit. para. 87.

[61] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' cit. 319, 363 ff.

[62] *Aranyosi and Căldăraru* cit. Opinion of AG Bot paras 78-93 and 106-22.

[63] A Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' cit. 491.

[64] S Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) EurJCrimeCrLCrJ 197, 216.

[65] Framework Decision 2008/909/JHA of the Council 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.

[66] Especially since there is no unanimity on how the executing state should conduct its assessment; hence, each MS has developed their own criteria. Thus, convicts may opt to pursue to serve their sentence in what they deem a favourable environment, calling on deficiencies of the issuing State's prisons to justify their preference. See Council of the EU, Outcome Report of the College of 16 May 2017 on the EAW and Prison Conditions, 2.

There exists hence a both functional (rescue mutual recognition and trust) and principled (ensure equivalent rights protection) need for the Union to intervene, so as to ensure the creation and maintenance of detention conditions that actually safeguard prisoner rights in the penal systems of its MS. To ensure its functioning as an AFSJ, the EU needs to first achieve state compliance with fundamental rights; and to do so, it must pursue convergence of detention condition standards.

IV. Improving detention standards at EU level

As already noted, prison systems are not formed in vitro; they are instead the outcome of many variables, which differ among MS. Consequently, this reality calls for the device not of a single generic intervention plan, but rather a series of individualised ones. In other words, different factors result in the same unwanted consequence of poor detention conditions in different contexts; to cultivate change, the EU needs to adopt different actions, adapting for the peculiarities of each State.

Due to practical constraints, the focus on any specific system escapes the scope of this *Article*. Instead, the analysis adopts a holistic approach, seeking to identify policy options that may potentially provide for a positive influence *in abstracto*: how could the EU ensure the creation and maintenance of adequate detention standards in its MS?

Fundamentally, this is a question of governance, and one that EU law in itself may not answer. To this end, this part of the analysis adopts an interdisciplinary approach, seeking to utilise findings from relevant compliance literature.[67]

In brief, compliance theories identify four main clusters of options, which may be used to influence state behaviour: litigation, management, persuasion, and enforcement.[68] This section analyses and expands on each option in turn. Three points are identified, comprising of: i) the competence of the EU to act and utilise each option, so as to cause changes in national prisons; ii) the potential, specific measures that may be adopted, stemming through this competence; and iii) relevant legal, political, and pragmatic limitations that arise.

[67] The terms “governance” and “compliance” have been used in a variety of ways. For the purposes of this analysis, I refer here to compliance as a process, or “the whole of ongoing negotiations, political and legal processes, and institutional change that are involved in the execution of EU law and policies and are functionally orientated to give EU law and policies full effectiveness”; see E Chiti, ‘The Governance of Compliance’ in M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford University Press 2012) 31, 31-32.

[68] This categorisation occurs as follows. First, compliance theorists seek to examine whether non-compliance happens on a voluntary or involuntary basis. Having identified the source of non-compliance, they subsequently distinguish between rationalist (changing actors’ pay-off matrices) and constructivist (changing actors’ preferences) approaches. See TA Börzel, T Hofmann and C Sprungk, ‘Why Do States not Obey the Law? Lessons From the European Union’ (1 April 2003) userpage.fu-berlin.de 15.

IV.1. Litigation

The failure of state actors to respect their obligation towards ensuring equivalent rights protection may amount to an incapability, on their part, to comply. Such incapability, compliance theory suggests, may be caused by an absence of clear, applicable regulation on detention conditions and prisoner rights. In this case, the Union should seek to internalise specific regulatory norms into the domestic legal orders of its MS.[69]

As noted under section II, no common framework exists, regarding post-trial conditions of detention. Instead, the management of prisons is regulated by the state. Furthermore, while European human rights provisions delimit national discretion, such provisions do not include set criteria, as to when detention conditions may end up violating this framework. Thus, it remains for national authorities to interpret and translate the general human rights rule into specific measures.

This diversification holds the potential to prove troublesome for mutual trust. Since no consensus exists on how prisons should look like, standards regarded poor in one MS, may be deemed adequate in another. In addition, what constitutes a violation in one state may not necessarily be interpreted analogously in another. The structural ambiguity of human rights norms becomes the subject of contesting interpretations at national level, and the absence of precise prison standards allows for various levels of internalisation, according to local peculiarities and interests.[70]

To counter this divergence, and in light of previously presented CJEU case-law, the approximation of detention rules appears a necessary precondition for mutual trust, by achieving equivalent levels of internalisation.[71] This has been recognised by the European Parliament (EP), which has formally invited MS to adopt, by means of a Directive, a European Prisons Charter.[72] Such a document could introduce clear, concise, legally-binding standards, thus establishing a common minimum framework to be respected by all MS.

In matters of context, the Parliament's proposal submits the adoption of the Charter to be in accordance with a previous CoE Recommendation calling for the same measure.[73] This Recommendation suggests a broad scope, covering all aspects of life in prison; reference is made to detention conditions both *stricto sensu* (i.e. material aspects of the prison

[69] HH Koh, 'Why Do Nations Obey International Law?' (1997) YaleLJ 2599, 2602.

[70] TA Börzel, T Hofmann and C Sprungk, 'Why Do States not Obey the Law? Lessons From the European Union' cit.

[71] V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) CMLRev 1277, 1304; L Conant, 'Compliance and What EU Member States Make of It' in M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford University Press 2012) 1; D Beach, 'Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance' (2005) Journal of European Public Policy 113, 126. Provision for approximation was also included in the Tampere conclusions themselves, see Council of the European Union, Presidency Conclusions cit.

[72] Resolution P8_TA(2017) 385 of the European Parliament of 5 October 2017 on prison systems and conditions.

[73] Resolution P8_TA(2017) 385 cit. para 59.

environment), as well as to the regulation of detainee rights, activities provided, and prison security regime.[74] Furthermore, it has been suggested that the already existing European Prison Rules could serve as blueprint for the drafting of the European Prisons Charter.[75]

To this end, art. 82(2)(b) TFEU has been proposed as legal basis.[76] This provision allows for the approximation of the rights of individuals in criminal procedure. The process takes place by means of directives adopted in accordance with the ordinary legislative procedure (as defined under art. 294 TFEU), and its purpose is "to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension".[77] Approximation entails "the convergence of the legal practice of the various legal systems based upon a common standard".[78] The objective is to dismiss obstacles to mutual trust, as they arise from regulatory polyphony.

However, art. 82 TFEU is not without limitations. More specifically, and from the wording of the art. itself, approximation concerns "individual rights"; yet, both the Parliament's Resolution, and the Council's Recommendation, make reference to detention conditions in general, thus envisioning a seemingly broader scope than the one provided by the legal basis. Furthermore, these rights shall concern individuals "in criminal procedure". This term poses two problems. Firstly, detention conditions – and penitentiary law in general – may fall under the umbrella of substantive (rather than procedural) criminal law in the legal systems of some MS. Secondly, detention conditions affect individuals in the post-trial phase, hence, arguably, escaping the scope of the Union's competence, since they are not part and parcel of criminal procedure.

It has been argued that these considerations may be overcome as follows. At the outset, the prison environment should not be regarded as comprising of a set of impersonal standards, which may result to violations of prisoner rights only incidentally. Instead, detention conditions should be considered as belonging to the very core of art. 6 CFREU on the right to liberty, as corresponding to art. 5 ECHR. In this sense, inmates have an individual entitlement towards adequate living standards, and poor conditions constitute a violation of prisoner rights *in themselves*.[79] Furthermore, and as regards the latter concern, the concept of criminal procedures differs from that of criminal proceedings. A systematic interpretation of relevant Directives on the rights of individuals in criminal

[74] Committee of Ministers of the Council of Europe, Recommendation Rec(2004)1656 on the situation of European prisons and pre-trial detention centres of 27 April 2004.

[75] Recommendation Rec(2006)2 cit.; L Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) CMLRev 61, 87.

[76] According to the principle of conferral, see art. 5(2) TEU; see also R Schütze, *European Constitutional Law* (Cambridge University Press 2012) 152 ff.

[77] See G Vermeulen and W De Bondt, *Justice, Home Affairs and Security: European and International Institutional and Policy Development* (Maklu 2015).

[78] A Klip, *European Criminal Law: An Integrative Approach* (Intersentia 2016) 25.

[79] For a detailed argument in favour of the proceduralisation of detention conditions, see L Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' cit.

proceedings reveals how their scope "is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal".[80] Therefore, one may identify criminal proceedings as covering legal processes up until the final judgment, while criminal procedure has a broader scope, extending to the post-trial phase and including the execution of the sentence – hence, detention standards as well.[81]

Nonetheless, the application of art. 82 remains, in practice, problematic. Legal considerations aside, it remains doubtful whether MS would welcome the exercise of EU competence on the matter. At a political level, Euroscepticism has been steadily rising across the Union, with national authorities and citizens alike subscribing to a narrative of *too much Europe*,[82] as reaffirmed by the latest judgment of the German Constitutional Court.[83] In times of growing tension, it remains imperative for the EU to avoid allegations of competence creep practices, so as to retain its legitimacy.[84] Overall, current circumstances may force EU authorities to opt for a rather narrow reading of art. 82 TFEU, and refrain from legislating on such a contested and sensitive area.[85]

IV.2. Management

Even with a coherent, clear, consistent, and legally-binding framework, dictating the manner in which MS must regulate detention standards and prisoner rights, States may prove unable to follow through to its enforcement. In this case, non-compliance may amount to a lack of resources. This holds especially true for MS still suffering from the results of the recent European debt crisis; in the aftermath of the pandemic outbreak, the upcoming global economic slowdown is bound to exacerbate matters.

To ensure detention conditions match the required standards, national authorities may have to repair and refurbish old facilities, or construct new ones; hire the personnel

[80] See Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, art. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, art. 2; and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, art. 2.

[81] L Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' cit.

[82] On the aftermath of Brexit, support for membership in the Union has increased; nonetheless, things are not seen as going to the right direction. See European Parliament, 'Closer to the citizens, closer to the ballot' (Eurobarometer Survey – A Public Opinion Monitoring Study 2019).

[83] BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15.

[84] S Weatherill, 'Competence Creep and Competence Control' (2004) Yearbook of European Law 1, 7.

[85] J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 1, 29.

necessary to operate these facilities; ensure the technological equipment is adequately updated; provide for all the required materials and supplies; arrange for training, educational, and vocational activities, and so on. Such initiatives come at a cost, and may have a considerable impact on the public budget – especially if the reforms necessary prove extensive, in order to deal with recurring, structural issues.

This has once more been acknowledged by the EP, which has called for the EU to provide technical and economic support towards this purpose, especially in MS facing financial difficulties.[86] Regarding competence, it is currently impossible to direct funding specifically to national prisons, since no relevant legal basis exists in the Treaties. Nonetheless, the EU Commission (EC) has suggested that the Union budget could still be used towards this purpose in an ancillary manner. Specifically, the Commission has indicated that the European Regional Development Fund, alongside the European Social Fund, could both be directed towards supporting national initiatives in a number of relevant areas.[87] For instance, the former could be utilised to establish training facilities in prisons, while the latter could promote vocational activities for inmates.[88]

Financial assistance of this form could enable and incentivise national authorities to adopt measures towards improving conditions of detention; however, and due to the absence of a general competence of the Union to funnel resources specifically towards penitentiaries, such an approach may fail to provide for a comprehensive response.[89] A more pragmatic consideration revolves around the potential effectiveness of this measure. A considerable number of European countries with poor prison systems tends to demonstrate relatively elevated levels of corruption as well.[90] Within this context, the risk of fund misappropriation is considerable – especially since prisons do not generally constitute a high-priority target in the political agenda.

IV.3. Persuasion

The failure to provide for adequate detention conditions that safeguard fundamental rights may also amount to a conscious choice. Under this scenario, MS prove fully aware of their statutory responsibilities and respective measures to be implemented, while also

[86] Resolution P8 TA(2017) 385 cit. para. 67.

[87] Green Paper COM(2011) 327 final from the Commission on the application of EU criminal justice legislation in the field of detention.

[88] Green Paper COM(2011) 327 final cit. See also GL Gatta and E Dolcini, ‘Final Proposals on Possible Guidelines of the EU-Policy in Order to Implement the Best Practices in the Fields of Detention Conditions and Alternatives to Detention’ in A Benardi (ed.) and A Martufi (coord.), *Prison Overcrowding and Alternatives to Detention – European Sources and National Legal Systems* (Jovene Editore 2016) 515.

[89] E Sellier and A Wyembergh, ‘Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact they Have over the Development of EU Legislation’ (30 August 2018) European Parliament Think Tank www.europarl.europa.eu 120.

[90] ‘Corruption Index 2019: Western Europe and European Union’ (23 January 2020) Transparency International www.transparency.org.

possessing the capability to act. Nonetheless, they remain unwilling, deliberately opting for non-compliance instead.

Non-compliance may seem preferable, if state actors are not persuaded by the regulative goal, and, consequently, do not appreciate the need to allocate resources, pursue enforcement, or implement changes in the domestic legal framework. This holds especially true regarding the management of prisons, which have often been deployed by political authorities as a means to manage their electorate, following a *politics of control* approach; thus, from a domestic political perspective, compliance may actually hold counterproductive effects.[91]

In this case, the EU should commit towards persuading defiant authorities that they should comply, because it is within their best interests to do so. Towards this purpose, the EU needs to demonstrate the risks of non-compliance, alongside (and contrasted to) the benefits of compliance. The overarching goal consists of redefining MS interests and priorities, until the desired behaviour is adequately internalised and accepted as the new standard.[92]

To this end, the Union may rely on soft-law and declaratory measures, such as recommendations. These initiatives are not binding, yet hold political significance, and aim towards the convergence of (implicit) social standards – in the same manner Directives aim towards the convergence of (explicit) legal norms. Regarding competence, both art. 7 TEU and art. 352 TFEU may serve as legal basis. These provisions allow for the issuing of recommendations by the Council, the former towards MS demonstrating a "clear risk of a serious breach [...] of the values referred to in art. 2 [TEU]", while the latter aimed towards the general protection of Treaty objectives – one of which is the establishment of an AFSJ.

Furthermore, the Union should seek to enhance dialogue and the exchange of information, experience, and best practices across national prison systems. This could be achieved by advancing the operative powers and scope of existing networks (such as the European Organisation of Prison and Correctional Services) and online databases (such as the Criminal Detention Database of the EU Agency for Fundamental Rights) that provide consultation to national stakeholders. Other options include the provision of training to prison officers and legal professionals, and the reinforcement of existing judicial cooperation instruments with special mention to the importance of detention conditions.[93]

[91] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001). For a case study on how national authorities utilise poor detention conditions to accommodate domestic socio-economic policies, see S Xenakis and LK Cheliotis, 'Carceral Moderation and the Janus Face of International Pressure: A Long View of Greece's Engagement with the European Convention of Human Rights' (2018) Crime, Law and Social Change 1, 13.

[92] T Risse and K Sikkink, 'The Socialization of International Human Rights Norms Into Domestic Practices: Introduction' in T Risse, SC Ropp and K Sikkink (eds), *The Power of Human Rights – International Norms and Domestic Change* (Cambridge University Press 1999) 1.

[93] E Sellier and A Wyembergh, 'Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact they Have over the Development of EU Legislation' cit.

IV.4. Enforcement

Finally, should national authorities retain a non-compliant behaviour, the EU could adopt a harsher approach, aimed towards increasing the costs of nonconformity. To this end, the Union could monitor prisons, so as to identify deviance; and subsequently impose sanctions on MS failing to provide for adequate standards, thus making non-compliance a less attractive option.[94]

Regarding monitoring, the EP Resolution has called for the Commission to collect information on detention conditions in all MS.[95] While the Commission has no direct competence on prisons, art. 17 TEU has established it as Guardian of the Treaties.[96] The Commission is thus entrusted with overseeing the application of EU law, which includes art. 2 TEU, and the CFREU.[97] It should also be noted that, in case the Union utilises its harmonisation potential, as arising from art. 82 TFEU, detention standards would become part and parcel of the EU legal order, and thus subject to the Commission's overseeing.

Another alternative would revolve around utilising art. 259 TFEU as an enforcement mechanism.[98] This provision allows individual MS to bring fellow MS before the CJEU, to judge on potential Treaty violations. Such an initiative would further establish states as watchers of EU law, thus constituting a step towards the *Aranyosi/Căldăraru* peer-review logic already discussed.

Fundamental rights violations would in turn trigger art. 7 TEU, which provides for a formal legal mechanism that may ultimately lead to the suspension of membership rights for the defiant MS (art. 7(3) TEU). The logic of sanctioning is thus similar to the one applied within the rule of law context.[99] In the same sense, it has been proposed that EU law obligations should be tied to the Union budge. In case MS are found violating the EU fundamental rights framework, monetary allocations would be reduced as a consequence.[100]

[94] A Boyle, 'Saving the World? Implementation and Enforcement of International Law through International Institutions' (1991) JEL 229; PA Weitsmann and G Schneider, 'Risky States: Implications for Theory and Policy Making' in G Schneider and PA Weitsmann (eds), *Enforcing Cooperation – Risky States and Intergovernmental Management of Conflict* (Palgrave Macmillan 1997) 283.

[95] Resolution P8 TA(2017) 385 cit. para. 58.

[96] Communication COM(2014) 158 final from the Commission to the European Parliament and the Council: A New EU Framework to strengthen the Rule of Law.

[97] For the Charter to apply, there must a clear link of MS action with EU law; see art. 51 of the Charter; and Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105. Within the specific context, the link manifests clearly, since it is the EU policy framework regulating forced transfer across MS that demands individuals to be moved to establishments providing for poor detention conditions.

[98] D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) Hague Journal on the Rule of Law 153.

[99] Resolution 2020/2513(RSP) of the European Parliament of 16 January 2020 on ongoing hearings under art. 7(1) of the TEU regarding Poland and Hungary.

[100] 'An EU Internal Strategic Framework for Fundamental Rights: Joining Forces to Achieve Better Results' (06 February 2015) FRA (European Union Agency for Fundamental Rights) fra.europa.eu.

Overall, this fourth option revolves around the EU undertaking responsibilities that have traditionally fallen within the authority of the CoE, and, more specifically, its CPT (regarding monitoring) and European Court (regarding monitoring and sanctions). This has been used by MS as an argument against the exercise of EU competence in the area; essentially, some states have declared the duplication of monitoring and sanctions mechanisms as an unnecessary and potentially counterproductive measure, leading to fragmentation and inconsistencies.[101] Counterarguments to this position simply point at the failure of CoE entities to bring forth substantial change, and the subsequent need for the elevated legal force and enforcement potential that accompanies EU action; indeed, the procedure of art. 7 TEU carries considerable political and symbolic weight.[102] Nonetheless, national authorities may regard EU scrutiny as unduly punitive, exclusionary, and unfair finger-pointing behaviour, leading to MS hardening their stance, ultimately undermining any potential for change.[103]

V. Conclusions

Based on compliance literature, a series of possibilities arise, addressing the incapability (through litigation and management) and unwillingness (through persuasion and enforcement) of national actors to act. Such initiatives remain, as of yet, under discussion, and have yet to be tested in action. On this basis, a few remarks prove useful.

The Union needs to march forward. The logic of Westphalian states holding exclusive authority over a clearly defined geographic territory or policy area may have worked during the early days of the European community. Nonetheless, the Union has long evolved, and so must its mode of governance. With Schengen, internal borders have largely abolished their significance; with the AFSJ, policy areas have become intertwined. The Area of Freedom does not exist without the Areas of Security and Justice, and unrestricted movement has to account for cross-border criminality and criminal impunity. To address these issues, the MS chose, with Tampere, to rely on mutual recognition instruments. These instruments have served their purpose well, and their importance should not be disregarded, nor their functioning delimited. Yet, integration based purely on trust cannot advance any further, as the implications regarding individual prerogatives would prove detrimental. To this end, the EU has to reinforce mutual trust with compliance safeguards, to ensure the equivalent protection of rights becomes reality, not legal fiction.

Traversing from the abstract to the factual will likely prove a challenging process. By building on assumptions and theoretical common threads, the Union has painted itself into

[101] Green Paper COM(2011) 327 final cit. para. 29.

[102] W van Ballegooij, 'Procedural Rights and Detention Conditions' (07 December 2017) European Parliament Think Tank www.europarl.europa.eu 144.

[103] Overall, a "sunshine policy" may prove more promising; see GN Toggenburg and J Grimheden, 'The Rule of Law and the Role of Fundamental Rights' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 147.

the proverbial corner. European authorities should not repeat this mistake, by assuming that intervention of any form would readily resolve the situation. Compliance mechanisms, either through persuasion, monitoring, and enforcement, or through litigation and capacity building, have the potential to prove consequential – yet, they should not be regarded as panacea. Before committing to a course of action, the Union should conduct a thorough *ex-ante* evaluation, to assess the anticipated impact of any action, and plan accordingly. Towards this purpose, initiatives seeking to identify the root causes of the problematic situation, alongside local needs and peculiarities, should be supported and developed further.[104] The criminal justice principle of *one size does not fit all* holds true in this context, and intervention close to the ground demonstrates the greatest promise, while being in line with the principle of subsidiarity and the current political landscape.

In the (recent) past, contemplating the potential of Europe in prisons would likely be dismissed as another rather extreme view of pro-European federalists, incompatible and far detached from the perceivable. Today, such notions prove a necessity. Embarking on a quest to rescue the AFSJ may be in line with the European idea; more importantly, though, it serves the common interests, security, and individual prerogatives of the European citizen. Advocating for a (*lato sensu*) approximation of detention standards at EU level is no pretext for erasing national diversities; instead, it constitutes a call for addressing burning human rights issues that burden a considerable number of penitentiaries across the continent. While cognizant of the legal, political, and pragmatic considerations concerned, this contribution is meant to advance the debate on how best to ensure unity of values in a diverse setting, thus shaping the future of Europe.

[104] In this sense, calls for the establishment of communication links between prison authorities and the local community are to be celebrated; see Resolution P8_TA(2017) 385 final cit. para. 18.